

## Defense Hits Bending of Rules

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The message was a bit redundant, but it was all the more emphatic for that.

"I'm not trying to try this case strictly according to

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the strict rules of evidence," said U.S. District Court Judge John J. Sirica. "What we're trying to get in this case is the truth of what happened."

Just in case anyone at the Watergate cover-up trial might not have been listening, the judge spelled it out. "T-R-U-T-H, truth, remember that word," he said, looking at the jurors now.

It is a single-minded objective that is still months away. Meanwhile, to hear defense lawyers tell it, the judge has thrown the rules

of evidence out the window on more than one occasion.

The protests, began with former White House counsel John W. Dean III's first day on the witness stand. He stayed nearly two weeks, but his seat was barely warm when he began testifying about a meeting he had with acting FBI Director L. Patrick Gray on June 22, 1972—just five days after discovery of the Watergate bugging and break-in.

Chief trial prosecutor James F. Neal wanted Dean to tell the jurors not only what Dean told Gray, but what Gray told him.

That might seem like a small point, but the ensuing hubbub went to the heart of the difficulties inherent in any conspiracy trial, especially one where "T-R-U-T-

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H" has been elevated above "the strict rules of evidence."

Judge Sirica's preferences along those lines are well known. But what is surprising is the avidity with which Watergate prosecutors have been encouraging them. The special prosecution force has always pretended to a punctilio that was supposed to distinguish it from its congressional counterparts. But now that the trial had started, the fastidiousness was fast disappearing.

Dean was about to answer, but the lawyer for former White House chief of staff H. R. Haldeman, John J. Wilson, got Sirica's attention first.

"Isn't this hearsay, your honor?" Wilson asked.

It was indeed. Simply put, the hearsay rule prohibits a witness from putting words in someone else's mouth. He can testify to what he, the witness, said, but not to what someone else told him. If what that "someone else" said is important, then that "someone else" should be called to the witness stand.

That rule, however, barely holds water at a conspiracy trial. In one of his final interviews as Watergate special prosecutor a few days ago—but well after the trial had started—Leon Jaworski was quoted as saying that unlike the Senate Watergate hearings, the record in Sirica's courtroom was being compiled under rules that largely exclude hearsay testimony.

That simply isn't so. As a practical matter, a witness can testify to what alleged conspirators allegedly said or did in furtherance of an alleged conspiracy even before it has been established that a conspiracy existed. Strictly speaking, independent evidence that there was a conspiracy is supposed to come first, but that isn't the way it works.

"In other words, the late Supreme Court Justice Robert M. Jackson wrote 25 years ago in a classic opinion, "a conspiracy is often proved by evidence that is admissible only upon the assumption that conspiracy existed.

The lawyers for the five defendants at the cover-up trial know all that. They also realized that they were

in for a lot of hearsay, especially since the Watergate grand jury had named 19 unindicted co-conspirators, from former President Nixon on down.

But even at a conspiracy trial, the hearsay rule is not supposed to be a completely dead letter. What bothered the defense attorneys was the fact that Gray is not an alleged co-conspirator.

As a result, they argued, Dean, who has already confessed his guilt in the cover-up, could tell the jurors what he told Gray—but not what Gray told him.

Judge Sirica apparently agreed at a bench conference, but prosecutor Neal is a resourceful man.

"Did you impart to one of the defendants what Gray told you?" he asked Dean.

Dean said he had done just that, relaying the information to former Attorney General John N. Mitchell, then still head of the Nixon re-election effort, about half an hour later on the evening of June 22. Here were two alleged co-conspirators talking to one another.

"All right, sir, Neal said in a Tennessee drawl tinged with satisfaction, "tell us what you told Mr. Mitchell as related to you by Mr. Gray.

Dean said he reported that the FBI was hot on the trail of the so-called "Dahlberg-Ogarrio checks," which had been contributed to the Nixon campaign and cashed by one of the Watergate burglars. Dean said he also told Mitchell—and later Haldeman—that Gray was inclined to believe the June 17, 1972 Watergate bugging and break-in had been "a CIA operation."

Score one for the prosecution. But it was only the beginning. Now Dean began testifying about subsequent conversations he had with Gray and CIA deputy director Vernon W. Walters, all hinging on efforts to get the CIA to block the Watergate investigation and to put up covert funds for the five burglars who had been arrested.

Walters has not been named an unindicted coconspirator either. But this time the prosecution didn't even bother with a preliminary showing that what he and Gray had told Dean had been "imported" to anyone.

Defense lawyers protested that this surely was imper-