

# Sirica Suggests He Will Throw Out 2 of 11 Counts Against Mitchell and Ehrlichman in Cover-Up Trial

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WASHINGTON, Nov. 22—Federal District Judge John J. Sirica strongly suggested today that he would throw out two of the total of 11 counts against two defendants in the Watergate cover-up trial.

The counts charge John N. Mitchell and John D. Ehrlichman with making false statements when they told agents of the Federal Bureau of Investigation in July 1972, that all they knew about the Watergate case was what they had read in the newspapers.

Judge Sirica said that the evidence the prosecution had presented to support these charges was "very weak." The evidence involved what was and what was not in the newspapers at the time.

The judge said that next Monday, when the prosecution is expected to rest its case, he would hear defense motions requesting directed verdicts of acquittal on the two counts.

Mr. Mitchell, the former Attorney General and former head of President Nixon's re-election campaign, and Mr. Ehrlichman, Mr. Nixon's former chief adviser on domestic matters, are among five defendants at the trial.

## Doubtful on One Defense

Judge Sirica also made clear today, however, that he did not think much of the defense Mr. Ehrlichman's chief attorney tried to raise this afternoon against the basic conspiracy charge in the case.

This defense is based on the contention that the 1971 break-in at the office of Dr. Daniel Ellsberg's former psychiatrist by the White House "plumbers unit" was a national security operation. Mr. Ehrlichman supervised the "plumbers," a secret White House group set up to stop leaks of information.

The prosecution contends that one motivation for the Watergate cover-up conspiracy was to keep the Watergate burglars, some of whom had been in the "plumbers," from disclosing such things as the Ellsberg break-in.

Mr. Ehrlichman's attorney, William S. Frates, argued today that this could not have been a motivation because the men involved in the Ellsberg break-in did not consider the burglary a crime. Mr. Frates said they considered a legitimate effort to get information about the man who says he disclosed to the press the secret Pentagon papers on the Vietnam war.

Lawyers Are WarnedC "I'm not in sympathy with Dr. Ellsberg or whatever his name is, I'm not a bit in sympathy with him," Judge Sirica said.

But he added, "What's wrong is wrong."

Judge Sirica also put the attorneys in the case on notice that their continued bickering in court could lead to disciplinary action after the trial.

This morning, Richard Ben-Veniste, an assistant special prosecutor, questioning E. Howard Hunt Jr., one of the seven original defendants in burglary June 17, 1972, at the Democratic headquarters in the Watergate complex here. Mr. Frates objected to one question and the two lawyers began to argue the point in the presence of the jury.

Judge Sirica interrupted, saying he had told the lawyers be-

fore that they were to address their remarks to him. "That is not the proper way to conduct the trial," he said, and his voice stern, he added.

"It if happens too often someone will have to accept the consequence after the trial is over, and I don't have to spell out what I mean."

## 39th Day for the Trial

Besides Mr. Mitchell and Mr. Ehrlichman, the defendants on trial on charges of conspiring to obstruct the investigation of the Watergate burglary and other offenses are H. R. Halde- man, th' former White House chief of staff; Robert C. Mar- dian, a former Assistant Attorney General, and Kenneth Wells Parkinson, a former lawyer for the Nixon re-election campaign.

The proceedings today, on the 39th day of the trial, involved mostly testimony and arguments about the alleged connection between the Watergate cover-up and the earlier operations of the "plumbers." Judge Sirica's remarks about the weakness of the "false statements" counts against Mr. Mitchell and Mr. Ehrlichman came in an argument out of the presence of the jury.

The two counts have appeared troublesome for some time. They are based on a Federal law making it a crime to give false statements to Government agencies; the law carries a possible five-year prison term and does not require the statements to have been made under oath.

## Law Called Unpopular

When used in the context of statements made in interviews with F.B.I. agents, the law theoretically allows prosecution for offhand remarks made in casual conversation.

Judge Sirica remarked a few weeks ago that the statute was "not very popular." He also noted then that one of the counts on which Mr. Ehrlichman was convicted in the plumbers trial last summer was based on this statute and that after that trial ended the trial judge, Germard A. Gesell, set aside the verdict on that particular count.

The indictment in the cover-up poses an additional problem because the two counts against Mr. Ehrlichman and Mr. Mitchell are based on their statements that they knew no more than what they had read in the newspapers. It is arguable that, to prove these charges, the prosecution has to prove that no newspaper anywhere printed articles containing the information about Watergate that Mr. Ehrlichman and Mr. Mitchell had.

## Evidence Termed 'Weak'

Today, Judge Sirica asked James F. Neal, the chief prosecutor, whether he had finished presenting his evidence on those two counts.

Mr. Neal replied that he had. He added that he realized the evidence was "not that strong."

"I think it's very weak," Judge Sirica replied.

The prosecutor agreed that, "as to what was and what wasn't in the newspapers, yet, it's not all that strong." He contended, though, that the evidence he had submitted was at least enough for a prima-facie case.

Judge Sirica indicated he did not agree. However, he said

that, if he threw out the two counts, the jury could still consider the prosecution's evidence in connection with counts alleging conspiracy and obstruction of justice.

Mr. Neal said, "That's all we care about."

Mr. Ehrlichman faces four other counts besides the F.B.I. count and Mr. Mitchell faces five.

Both are charged with the basic conspiracy account along with the three other defendants. In addition, both are charged with an obstruction of justice count, along with Mr. Halde- man and Mr. Parkinson. Mr. Mitchell also faces three separate perjury counts and Mr. Ehrlichman, two.

Today, the evidence and argument mostly concerned the conspiracy and obstruction of justice charges. While some of the testimony implicated Mr. Parkinson, the bulk of it was directed toward Mr. Ehrlichman.

Mr. Hunt testified first, glaring at Mr. Ehrlichman from time to time.

The jury had heard a memorandum that Mr. Hunt drafted in November, 1972, in which he, in effect, threatened to disclose certain illegal activities if "commitments" of money and pardons to the seven original Watergate defendants were not kept.

Today, both under questioning by Mr. Ben-Veniste and under cross-examination by Mr. Frates, Mr. Hunt testified that at the time he wrote the memorandum he considered the Ells-

berg operation to be one of those illegal activities.

Then Egil Krogh Jr., who helped set up the "plumbers" unit in 1971 at Mr. Ehrlichman's request, took the witness stand. Mr. Krogh, who has already served a four-and-a-half-month prison term as a result of his guilty plea in the "plumbers" case, generally repeated his earlier testimony about the matter.

Despite its repetitiveness, it would be damaging to Mr. Ehrlichman if believed by the jury.

## Origin of 'Plumbers'

Mr. Krogh told how the "plumbers" unit was set up, as a result of Mr. Nixon's concern about leaks of information to the news media. He said that he had sent a memorandum to Mr. Ehrlichman suggesting a "covert" operation to get Dr. Ellsberg's medical records and that Mr. Ehrlichman's mark of approval had been placed on the memorandum, followed by the notation "approved if done under assurance that it is not traceable."

Mr. Krogh testified that Mr. Ehrlichman seemed "surprised" and disapproving when he reported later that the doctor's office had been broken into.

The possibly helpful effect of this testimony to Mr. Ehrlichman's case seemed, however, to evaporate a few minutes later when Mr. Krogh testified that in March, 1973, Mr. Ehrlichman told him that Mr. Hunt was threatening to "blow the lid off" unless he was paid off.