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The Watergate Trial: Decision on Fairness

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Hinges on Dozens of Questions

By LESLEY OELSNER
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WASHINGTON, Jan. 2—The Watergate cover-up trial is over at last; the question now is whether the trial was fair.

The question can be answered on several levels, in several ways—and some of those ways, in the end, may be contradictory. Four men who were once among the highest officials in government were convicted of conspiracy to obstruct justice by 12 residents of Washington—12 men and women who included a retired maid, a retired doorman and a countergirl. Were the defendants convicted by a jury of their peers?

News Analysis

They were convicted—and a co-defendant acquitted—after 46 days of testimony in which the Government put on 30 witnesses and so many tape recordings, building a monumental case against the three best-known defendants — John N. Mitchell, H. R. Haldeman, and John D. Ehrlichman—and a less massive but still seemingly substantial case against the two others—Robert C. Mardian, who Wells Parkinson, who was acquitted.

Did the verdict reflect the evidence?

Sirical and Nixon

Did it matter that the presiding judge at the trial, judge John J. Sirica, was one of the persons responsible for breaking open the cover-up case in the first place? Did it matter that Richard M. Nixon never came to the trial?

Each of these questions and dozens more go into the question of whether the Watergate trial was fair.

But each can be answered differently, depending upon one's perspective.

The law provides one answer—or will, when the appeals are over, and it is not necessarily always the same as the answer based on emotion, or common sense, or historical comparisons.

There was much that occurred in Judge Sirica's courtroom over the last 14 weeks that might appear, on its face, as unfair to many people—for instance, according to public opinion polls, it seemed unfair to prosecute the aides of Mr. Nixon when Mr. Nixon himself went free, because of his pardon last August.

But there was also much that appeared fair—the jurors were sequestered, for instance, so that they could not read or hear news accounts of the trial, accounts that mighe color their opinion.

And, legally, the fact that mistakes were made at a trial—even if they were mistakes by the judge on legal issues—does not mean that a trial was not fair.

Steps Toward Appeal

On appeal, the question is, instead, whether there was "reversible" error. And, under a legal trend that started in the early part of the 20th century, and took on new dimensions in the last decads as the composition and teor of the Supreme Court turned less liberal, a great many errors can be made at a trial without the trial verdict being overturned.

The defense attorneys in the cover-up case spent much of their time at the trial trying to "build a record," as they call it, of erro by Judge Sirica. Time after time they would object to noe of his ruling, for instance, knowing that their objections would be denied but wanting the issue on the record in the event of appeal.

Now, lawyers for each of the four defendants who were convicted, are preparing appeals. None would comment today on their cases; the trial record, though, gives a clear indication of the major arguments they will raise.

They will argue that Judge Sirica should not have presided over the trial—that he was biased in favor of the prosecution because of his role in the trial in 1973 of the Watergate burglars.

They will contend that the massive press coverage of the case made it impossible to select an impartial jury. They will say that Judge Sirica allowed too much "hearsay" testimony, that the White House tapes were not properly authenticated before they were introduced, that the defendants should each have been tried separately due to the "antagonistic" defenses of the various defendants.

Three of the defendants—Mr. Mitchell, Mr. Haldeman and Mr. Ehrlichman—will probably contend too that they were denied their Sixth Amendment right to have the court produce witnesses needed for their defense. For all three asked to take Mr. Nixon's deposition, and Judge Sirica refused, citing both Mr. Nixon's poor health and the limited value of the testimony that he could be expected to give.

There will be other points as well—Mr. Ehrlichman, for instance, will probably argue that Judge Sirica should not have permitted as much prosecution testimony as he did about the activities in 1971 of the White House "plumbers" unit, which Mr. Ehrlichman supervised.

Mr. Mardian is expected to contend that the judge should have allowed him to present to the jury the canons of legal ethics, evidence that Mr. Mardian wanted to back up his contention that his activities in the Watergate affair were within the bounds of actions permitted by lawyers.

To a number of legal observers, the various defense points include at least a few that pose substantial legal questions — the pre-trial publicity issue, in particular. Yet at the same time, many lawyers—including some involved in the case — consider the prospects on appeal somewhat dim.

The pessimism stems in part from the decision this fall by the United States Court of Appeals for the District of Columbia Circuit upholding Judge Sirica's conduct of the first Watergate trial, that of the burglars.

The appeals court agreed in its decision that Judge Sirica had made various errors, but called them harmless — and in its decision praised his efforts to get to the truth.

The pessimism comes also because of the legal trend that the appeals court's decision reflected—the trend toward considering more and more errors "harmless."

Once, according to Yale Kamisar, a professor at the University of Michigan Law School and an expert on constitutional law, trial verdicts were reversed almost automatically—and in great numbers—because of so-called "technical errors."

In reaction, the rule of "harmless error" was developed.

Beginning in 1919, statutes were passed that stated, in effect, that certain technical defects in a trial did not necessarily matter.

The latest codification of this rule is in the Federal Rules of Criminal Procedure, and it reads thus: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

Fairness, Not Perfection

The theory, as the Supreme Court stated at this point—and as Judge Sirica remarked from time to time during the trial—is that a defendant is entitled to a fair trial, not a "perfect" one.

When the harmless error rule was first developed, and for decards afterward, courts continued to think that certain errors at least were grounds for automatic reversal. Essentially, these were errors relating to constitutional rights—the Fifth Amendment protection against self-incrimination, for instance, and the right to counsel.

But, beginning in 1967, the Supreme Court began to say that even certain constitutional errors could, in certain situations, be harmless.

The test, the Court indicated then, was whether the mistake had contributed to the verdict—for example, did improperly admitted evidence help lead the jury to convict a defendant?

But now, according to Mr. Kamisar, the test is somewhat looser—the question, in effect, is whether "untainted," or permissible evidence, provided "overwhelming support" for the verdict.

That was the test the appeals court appeared to use in its decision last fall on the first Watergate trial.

The appeals in the cover-up case may take several years to decide. However, it is considered likely that the appeals court, at least, will follow substantially the same legal test ir the cover-up case that it did ir the original Watergate case.