Earl J. Silbert, Soon to Be Sworn In as U.S. Attorney,

THURSDAY, OCTOBE

Reflects on

R 16, 1975

His Days as Prosecutor in Watergate Case

By JOSEPH LELYVELD
Special to The New York Times

WASHINGTON, Oct. 15—A milestone on the road away from the unnatural disaster known as Watergate will be passed quietly this month when Earl J. Silbert puts his hand on a bible and solemnly swears, for the second time, to uphold the Constitution as United States Attorney for the District of Columbia.

The first time was on Jan. 2, 1974, when the judges of the Federal District Court named him an acting United States Attorney to fill a vacancy. Later that month, President Nixon sent a formal nomination to the Senate, which rarely looks twice at prospective United States attorneys.

Some think it looked longer at Mr. Silbert than it has ever looked at any nominee for any office. It was only on Oct. 8—after nearly 21 months, two renominations by President Ford and hearings in the Senate Judiciary Committee that yielded three volumes of testimony amounting to 834 pages—that the nomination was finally confirmed by a vote of 84 to 12.

The hearings concerned themselves solely with Mr. Silbert's handling, as an Assistant United States Attorney, of the biggest case he is every likely to have in his career as a prosecutor: United States v. George Gordon Liddy et al, the case of the Watergate burglary of June 17, 1972.

The New York Times
Earl J. Silbert

It was his idea of the "et al" that the retrospective questions fastened on. His critics asserted, or sometimes just implied, that he might have been able to include such names as John N. Mitchell, Jeb Stuart Magruder and John D. Ehrlichman under the "et al" had he been more suspicious and aggressive, less careful of reputation and careers, including perhaps his own.

After John W. Dean 3's admissions and the discovery of the White House tapes, it took a disciplined mind to cast itself back to 1972 and arrive at a balanced judgment of what Mr. Silbert might reasonably have been expected to know then or suspect.

In his own defense, he could point out that restraint in a prosecutor is not always considered a failing, that prosecutors are supposed to proceed on the basis of evidence, not suspicion.

'Facts! Facts!'

"My wife kept saying, 'He's guilty! He's guilty!' Mr. Silbert recalled the other day, after his long wait for confirmation had ended. "I kept saying, "Facts! Facts!"

Now, 39 years old and no longer in danger of going down as a Watergate casualty, he talks about the case freely, even avidly, reliving every turn in order to show that his judgments of three years ago were professionally sound and honest. He was willing to follow the facts where they led, he insists, but did not share his wife's intuition that they would lead to the White House.

He did not share it, he says, because, like the rest of official Washington, he tended to equate power with competence and prudence. He says that the 12 years he spent in the Department of Justice after leaving Harvard Law School had conditioned his expectations: the Watergate break-in was manifestly incompetent and imprudent; therefore, he reasoned, it was probably a low-level caper.

Question of Motive

"You'd expect it to be a more sophisticated operation the higher up it went," he said. "You'd think they'd have a good motive. If the White House was going to be into it, they wouldn't run an enormous risk for something with so little gain. You always assume—and maybe that was a mistake—an underlying rationality."

G. Gordon Liddy and E. Howard Hunt Jr. struck him as bizarre characters, small-time imitations of James Bond. It didn't make sense to him that the Committee for the Re-election of the President had given Mr. Liddy large sums of money. It made even less sense that Mr. Mitchell—whose name appeared in bold, gothic letters on the diploma proclaiming Mr. Silbert an Assistant United States Attorney —could have authorized a burglary.

Rendering his play-by-play version of the case, he often lapses into present tense. "I'm going to need fairly strong proof on Mitchell to convince me that he'd have anything to do with something like this'" he says. "It's not because I know him well because I don't. But, you know, a former Attorney General, a big man in municipal bonds. Why would he do it? Does it make sense?"

'Maybe Like a Flash'

iM1 The idea that the White House could be involved if Mr. Mitchell was passed through his mind—"maybe like a flash," he continues—but never lodged tiere.

His suspicions were not aroused, he says, when he was asked to take sworn depositions from Nixon campaign officials in private rather than before the grand jury, or cautioned that the name Herbert W. Kalmbach, the President's attorney, might figure in testimony. The white House, he assumed, was anxious about public opinion in the middle of a political campaign, not criminal liability.

And so, he assured the jury that Mr. Liddy was "the boss . . . the man in charge" of the Watergate break-in and that he and his colleagues "were off on an enterprise of their own." It was only when Mr. Dean appeared in his office with a lawyer and started to respond to questions, Mr. Silbert says, that he saw the case in a new light.

Methods Defended

He acknowledges that his intuitions were wrong but he argues that iis methods were right. It was inevitable, he believes, that one of the convicted burglars would break the silence as James W. McCord Jr. eventually did two days before he was to be sentenced. As the cover-up unraveled, the testimony Mr. Silbert had taken from Mr. Mitchell and others became the basis for perjury convictions.

The Silbert nomination languished in the Senate as long as Watergate remained a dominant issue but—mainly because of strong backing by the Justice Department and the organized bar in Washington—it was not allowed to die.

On one level, this was a measure of Mr. Silbert's reputation locally and the associations he had built here. His most persistent opponent, Charles Morgan Jr. of the American Civil Liberties Union, was a Washington outsider, a new arrival here when he become involved in the case.

"I've always felt that Mr. Silbert met Washington's standards," Mr. Morgan remarked sarcastically after the confirmation vote.

On another level, his confirmation showed that the Watergate tide had receded and it was not safe for official Washington to assume its own rectitude again. Mr. Silbert still argues that high officials are entitled to a presumption of innocence, like anyone else. When his wife and others say, "I told you so," he says: Richard Nixon's responsibility for the Watergate break-in, as distinct from the cover-up, is as unproved today as it was three years ago.

* See 10-17-75 NYT correction