~~Cr. 1827-72~~

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Pretrial Conference

December 4, 1972

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# United States District Court

## For The District of Columbia



UNITED STATES OF AMERICA )
)
vs ) Criminal No. 1827-72
)
GEORGE GORDON LIDDY, et al )
)

# TRANSCRIPT OF PROCEEDINGS

Monday, December 4, 1972

PRETRIAL CONFERENCE

COPY FOR: Court File

PAGES: 1-119

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Page 116 of this transcript reflects that a bench conference at the bench was ordered sealed.

Docket does not reflect that the sealed proceedings ~~xxxxxxx~~ were ever transcribed & filed.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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| vs | ) | Criminal No. 1827-72 |
| | ) | |
| GEORGE GORDON LIDDY, et al | ) | |
| | ) | |

Monday, December 4, 1972

The above-entitled cause came on for a pretrial conference at 10:00 o'clock a.m., before THE HONORABLE CHIEF JUDGE JOHN J. SIRICA.

APPEARANCES:

On Behalf of the United States:

EARL SILBERT, Asst. U.S. Attorney
SEYMOUR GLANZER, Ass't. U.S. Attorney
DONALD CAMPBELL, Ass't. U.S. Attorney

On Behalf of Defendant Liddy:

PETER L. MAROULIS, Esq.
THOMAS A. KENNELLY, Esq.

On Behalf of Defendant Howard Hunt:

WILLIAM O. BITTMAN, Esq.
AUSTIN S. MITTLER, Esq.

On Behalf of Defendant James McCord:

JOHN ALBERT JOHNSON, Esq.
BERNARD SHANKMAN, Esq.

On Behalf of Defendants Bernard Barker, Eugenio Martinez, Frank Sturgis, and Virgilio Gonzalez:

HENRY B. ROTHBLATT, Esq.

P R O C E E D I N G S

THE COURT: Good morning.

MR. BITTMAN: Your Honor, on behalf of all defense counsel I would like to respectfully request that this pretrial conference be held in chambers. I believe if it is held in open court the frank discussions and some of the comments the defense counsel might have will be curtailed because obviously one thing we don't want to do is in any way generate any publicity on the eve of trial. The pretrial conference is being held because of the request of the government, and anyway, I think I have made my point and would so move we have it in chambers.

THE COURT: Anyone else want to speak to the motion? Counsel for the government?

MR. SILBERT: No, Your Honor.

THE COURT: I will deny the motion.

Gentlemen, I think all of you have received a copy of the agenda for today. The first item on the agenda which was a proposal and suggestion made by counsel for all parties, regards stipulations. Now, I will hear from the government or defense counsel, either one, it doesn't make any difference.

MR. SILBERT: If the Court please, Earl Silbert, representing the United States, Assistant U.S. Attorney.

The request for a stipulation is a request that we have put forward and as Your Honor noted, it is also something I believe defense counsel has suggested as well. We have prepared

for today and obviously defense counsel can't respond to it because they haven't seen it yet, prepared to distribute at this time a proposed stipulation which has 28 proposed paragraphs. All of them deal with documents, papers, records. They deal only with the question of authenticity and competency and the stipulation specifically says there is no concession as to materiality or relevancy. The only purpose of the proposed stipulation is to avoid the necessity of calling a great number of witnesses from all over the country whose sole function would be to authenticate and establish the competency of certain records.

I would also say this: that there are a number of other stipulations we will propose and try to prepare. They relate primarily to toll calls between various telephone numbers, showing long distance phone calls from certain listings of some of the parties involved in this case.

In conclusion, with the stipulation I might say if the Court please, it would be our position that we would like Your Honor to consider the possibility say in about two weeks of having another pretrial conference so that once the defense counsel have had an opportunity to look over the stipulation and make an assessment as to those portions they will agree to if any, those portions they will not, we will then have ample time, a period of about three weeks to prepare and subpoena those witnesses who would be necessary to establish or testify as to those documents defense counsel have indicated they will not stipulate to.

That is all we have to say to the Court at this time. The proposed stipulation covers about 41 or about --

THE COURT: --do you have a copy for the Court?

MR. SILBERT: Yes, I do, Your Honor. (Handed to the Court).

May I at this time and may the record reflect I am going to give defense counsel a copy of this proposed stipulation?

THE COURT: Very well.

(Copies handed to defense counsel.)

THE COURT: I take it you are going to file the original today?

MR. SILBERT: That is the original, Your Honor. If the Court please, since it is only a proposed stipulation and defense counsel haven't seen it, we haven't signed it yet as a formal document and will wait to hear from defense counsel on it.

I have also indicated to Mr. Bittman in a telephone conversation and I am perfectly prepared to put it on the record for all defense counsel that if as to any stipulation counsel for defendants have some question we would be prepared to show them whatever FBI statements we have from any of the witnesses, the socalled 302, if there is any question they have in mind and want to look at the 302 of the witness referred to in paragraph 10, and want to come to our office we would be very happy to show it to them.

THE COURT: Very well. Now, Mr. Bittman, do you have anything to say about the suggestion made by Mr. Silbert?

MR. BITTMAN: I was the one suggested to Mr. Silbert last Friday, Your Honor, the turning over of the 302's with respect to these witnesses.

I do understand, however, this is one thing I would like to address to Mr. Silbert so that perhaps an intelligent decision can be made with respect to the exhibit that Your Honor sent to all defense counsel regarding Michael J. Brennan. Even though that is not on the agenda at the present time I understand the government would want him to testify, would not stipulate to his testimony.

THE COURT: We haven't gotten to that point yet.

MR. BITTMAN: The point I am trying to make, Your Honor, I think it is essential for defense counsel to know how many witnesses the government is going to call with respect to this type of documentary evidence and let me give Your Honor an example.

If the government has 30 witnesses to testify to various hotel registrations, telephone toll records, airplane tickets, things of that nature, and if they want to call three of those 30 witnesses to testify because they may be able to identify one or more of the defendants, then I think we should know that because I would view that the same as a bank robbery case. Certainly if three employees of the bank can identify the alleged robbers

and 15 people cannot, in some situations it is very essential and helpful to the defense to call the bank employees who were present who cannot identify the bank robbers. So I don't know if this stipulation by the government would include all of the witnesses who may testify to this documentary evidence or part, and I think that would be very helpful in order for us to make that announcement.

THE COURT: Suppose we pass the first item till we get into some of the other questions and that might solve the problem.

MR. BITTMAN: It may, and of course the argument has to be curtailed anyway, as Your Honor knows it is the first time we have seen this stipulation.

THE COURT: I know. I was going to set another date for another pretrial conference and will set it for two weeks from today.

MR. ROTHBLATT: Excuse me, Your Honor. If that is the 18th of December, as I look at my calendar I am scheduled for a hearing in U.S. District Court in Detroit, Michigan before two judges. That hearing had been set about a month or two ago and if you can set it for the 19th instead of the 18th.

THE COURT: Any objection? Will that give you enough time, Mr. Silbert, to get out your subpoenas?

MR. SILBERT: Yes, Your Honor, that is all right.

THE COURT: We will set it for 10:00 o'clock, Tuesday, the 19th.

MR. BITTMAN: Perhaps the government already had their subpoenas out, Your Honor. If they do then I think that will be moot. It certainly indicates from the agenda that at least Mr. Brennan has been subpoenaed, so I would gather the government has their subpoenas outstanding.

THE COURT: All right.

Item No. 2. Both defendants have requested this be put on the agenda today: Designation and pre-marking of exhibits to be offered at trial. The defendant requested that and I think the government too, didn't you?

MR. SILBERT: Yes.

THE COURT: I'll hear you, Mr. Silbert.

MR. SILBERT: If the Court please, at this time we haven't pre-marked all the exhibits to be offered at trial. Again, as I advised Mr. Bittman over the telephone on Friday we have pre-marked about a hundred exhibits.

THE COURT: What is the nature of the exhibits?

MR. SILBERT: The approximately 100 exhibits that we have marked consist of two general kinds, if the Court please. A few relating to photographs, aerial photographs and FBI visual aids as to location and scene of the alleged offense at the Watergate. There are about 7 of those. The rest of them consist of the material that was recovered from the defendants at the time of the arrest, that is, of the five defendants who were arrested inside the Watergate.

THE COURT: What is the nature of the material that was recovered from the defendants?

MR. SILBERT: That is a variety of items, if the Court please, including money, tools, different kinds of tools, flashlights, mace, camera equipment, film, flashlight bulbs.

THE COURT: Is there going to be any effort on the part of the government to trace this money allegedly found?

MR. SILBERT: Yes, there will be, if the Court please.

THE COURT: Are you going to offer any evidence in this case, and I take it that everybody has read all of the newspaper items that are a matter of record in this case? I have read them in connection with the motion for change of venue. Are you going to offer any evidence on the question of how the $25,000 check got into the possession of Mr. Barker?

MR. SILBERT: Yes, Your Honor.

THE COURT: You are going to trace that?

MR. SILBERT: Yes.

THE COURT: That is all in these exhibits, correct?

MR. SILBERT: Not the $25,000 check as part of the 100 that have been pre-marked. We still have about 50 to 100 further exhibits to mark and that will be part of those exhibits, if Your Honor please.

THE COURT: Are you going to try and trace, I think there is an item of $89,000?

MR. SILBERT: Not necessarily from the source but we will trace it part of the way through the system.

THE COURT: Why don't you trace it from the source? Isn't that part of the case?

MR. SILBERT: If the court please, first of all part of it, the $89,000 check would involve testimony of a person out of the country over whom we don't have subpoena power. So far as we are concerned, so far as materiality and relevancy we can rely on the bank records of defendant Barker to show checks were deposited in his account and we will produce other evidence to establish the link in its relevancy and materiality.

THE COURT: Now, on the question of motive and intent in this case, as youknow there has been a lot of talk about who hired whom to go into this place. Is the government going to offer any evidence on the question of motive and intent for entering the Democratic National Committee's Headquarters?

MR. SILBERT: There will be some evidence if the Court please.

THE COURT: What do you mean by some evidence?

MR. SILBERT: Well, there will be some evidence introduced. It is a question which the jury will make the proper inference, it is up to the jury to accept or reject the evidence that we propose to offer, butthere will be evidence we will offer that will go from which a jury may draw, we think, an appropriate inference as to perhaps a variety of interests.

THE COURT: I just want to know that because it may become important in settling or marking these exhibits.

MR. SILBERT: Yes, Your Honor. The stipulation makes clear to show from prior association a good deal of our circumstantial evidence will relate to that prior association between the parties alleged to form part of the conspiracy. A good number of the exhibits that are included in the proposed stipulations we have given to the Court and distributed to counsel today go to that and further to that, 50 or 100 additional exhibits we propose to mark will also relate to that particular issue.

THE COURT: Are you prepared to go ahead with marking of exhibits?

MR. SILBERT: We have approximately 100; however Your Honor chooses to proceed on that we have the exhibit list here that we have prepared. We also have, if the Court wants, to bring up exhibits to the courtroom.

THE COURT: Do you have copies now for the counsel?

Mr. SILBERT: I think we can have them made if the Court please, if we pass that.

THE COURT: Well, it is a question how to handle these exhibits. Have you any suggestion, Mr. Bittman?

MR. BITTMAN: Your Honor, customarily in a documentary case the government pre-marks their exhibits well in advance so we can correlate copies that we have received with those numbers and of course if that is not done I might also add this is the first time I know the government as part of its case is

going to include a $25,000 check or $89,000. There is not even a scintilla of a suggestion in the indictment the government expected to rely on any of that evidence and I suggest it would be a variance from the indictment. The government contended in their responses to the pretrial motions when they denied the many bills of particular that we requested that the indictment completely set out their entire case and now for the first time they say this money is very crucial aspect of their case and necessary and I would respectfully object to that. Up until this moment there has been no suggestion the government was going to rely on this evidence and I would renew our motion for bill of particulars so that we can find out what their case is all about.

THE COURT: That is what I am trying to do now, is find out the theory.

Mr. Bittman, as you know, as an experienced lawyer and former prosecutor you know the government doesn't have to set out what all the evidence is so far as the count is concerned.

MR. BITTMAN: I agree, Your Honor, but when they state in opposition to our discovery motion that everything is set out and then now they say it is not, I think raises a brand new problem.

THE COURT: I'll hear you now.

MR. SILBERT: If the Court please, I don't see how Mr. Bittman can make that argument. We did say and say again to the

Court that indictment sets out the theory and the nature of the prosecution's case. It does not have to set forth the evidence and the proof. We have made representations to Your Honor and representations to counsel for the defendants, if the Court please, that all the evidence, that is the documentary evidence that the government intends to prove will be available for defense counsel to observe and in fact as the record will show, and I would like to enter at this time on November 9th I sent a letter to all defense counsel in this case advising them pursuant to Your Honor's ruling, particularly with respect to discovery and reciprocal discovery, all evidence was available for them to look at in our office; that is, the documents that we intended to prove or produce into evidence and all tangible evidence that we also intended to introduce in evidence. Since that time we have sent copies of the documentary evidence upon request to Mr. Bittman and to counsel for the defendant Mr. Liddy, that is to Mr. Maroulis and Mr. Kennelly. There has been no such request from counsel for the other defendants.

Further, Mr. Bittman has had the opportunity with his client to come in and examine all the evidence that was seized from the White House from the office allegedly belonging to Mr. Hunt. He also had a brief opportunity, I believe, to look at the other evidence. And any time they ask for it we will arrange for it to be done. Mr. Liddy's counsel have been in on three separate occasions to avail themselves of the opportunity to

look at the evidence the government intends to introduce. Mr. Bittman says somehow the indictment is faulty or is at variance because a particular check wasn't named in the indictment. That is an absurd statement. A check or any check is part of the evidence.

THE COURT: I think in a case like this where the government must necessarily rely upon a great deal of circumstantial evidence besides direct evidence, the government should be allowed a certain amount of latitude, as the defendants will be too. When you have a question of intent and motive involved which I believe you have in this case, because this jury is going to want to know somewhere along the line what did these men go into the Headquarters for? What was the purpose? Was it their sole purpose to go in there for so-called political espionage or were they paid to go inthere? Did they go in there for the purpose of financial gain? Who hired them to go in there? Who started this thing? There are a myriad of problems in this case that I can see coming up and so can you. They are going to want to know these things. And on the question of motive and intent, I submit and I believe I am right on this, case law backs me up on this, the government should be allowed considerable latitude. This is going to be one of the crucial issues in this case --why did they go in there? Who hired them, if somebody did hire them? And a whole lot of things are going to come out in this case in order to enlighten the jury --at least should come out as to

the purpose for entry into the Democratic National Headquarters. It is that simple. And I think you can gather this from reading all the exhibits in this case.

All right, let's go on.

MR. BITTMAN: Your Honor, can I be heard briefly?

Your Honor, I did go to Mr. Silbert's office and I did review the items that were seized from Mr. Hunt's safe in the White House. I also asked Mr. Silbert with respect to the discussions we had to send me copies of all the documents that they intended to introduce into evidence. A number of documents were sent to me. To this date I don't know if this constitutes all the documents or part. I just don't know, and I say this in all fairness to Mr. Silbert; however, I went over those documents and certainly from reviewing those documents there is no way that I can interpret that the government now believes the $25,000 check and the $89,000 tracing are relevant, at least from my analysis. But more important, and I will ask Your Honor to file a memorandum on this, the government in their response to our discovery motion stated specifically as grounds to Your Honor which Your Honor relied on because you denied almost all of our discovery motions, said the indictment was self-explanatory and they really in effect went overboard in telling us all about their case in the indictment which they didn't have to do. Now all of a sudden for the first time we learn that there is a lot of other

evidence that they want to put in this case that is not charged. There is nothing in the indictment, Your Honor, that relates to any money whatsoever. And there is a number of overt acts in this conspiracy charge so obviously it is not newly discovered evidence because presumably the government had this information before and I would like to respectfully ask Your Honor to file a memorandum setting forth the position the government has taken to this date and renew certain of our requests for discovery so that we can adequately prepare for trial and not be surprised by a new government theory at this late date.

THE COURT: I don't agree with you, Mr. Bittman.

MR. BITTMAN: Would Your Honor permit me to file such a memorandum?

THE COURT: No, I don't think it is necessary.

MR. BITTMAN: I would like to ask the government at this time whether or not they have turned over all of the documentary exhibits? I just don't know. They have turned over a number of them, Your Honor.

THE COURT: Let's stay on Item No. 2a --Designation and pre-marking of exhibits to be offered at trial, that is what we are talking about.

MR. BITTMAN: Yes, Your Honor. I would respectfully ask that the government turn over to us a document list setting forth the number of the exhibit and a brief description of the exhibit. Again, I am not faulting Mr. Silbert in any way, but

a number of the exhibits I received are not legible and he indicated to me that some of them would be in that category, but it would be necessary for us to examine the exhibits to find out how they relate to their exhibit numbers so exhibits that are not legible we can get new copies or compare the originals and make whatever changes we want to so we can follow their evidence. And I think this is customary, at least I used to do it as a prosecutor and turned over complete exhibits well before trial.

MR. SILBERT: I have no objection to that, your Honor. As I said, we have 100 exhibits pre-marked now. After the hearing we will make copies of them and defense counsel can come to our office.

THE COURT: We are going to have at least one more meeting --maybe another after that. I would suggest you do this as quickly as possible, give counsel for each party a copy of your pre-marked exhibits, etc., then get together sometime during the week. Let's not wait until a week or two weeks from tomorrow. These things ought to be all settled by two weeks from tomorrow.

MR. BITTMAN: I asked Mr. Silbert on Friday when I talke to him about the list of stipulations because we'd focus on that soon as we received them. Now Mr. Silbert mentions certain photographs. I haven't seen the photographs. does the FBI intend to put the prototype in or what?

THE COURT: Address your remarks to the Court.

MR. BITTMAN: Excuse me, Your Honor.

I don't know if the government is going to use photographs, if they are, it has not been indicated to me, I don't believe I have copies of them. I went over all exhibits. I would also be interested in knowing whether the government is going to admit some kind of prototype of the Democratic offices. If they do use that kind of exhibit I think all defense counsel should be informed in advance, give us an opportunity to examine, then we would also like to examine the facilities themselves against the prototype to make sure it is accurate. So there is a lot of work, Your Honor, that has to be done. And since the government has not suggested that type of evidence until now perhaps we will need a continuance.

THE COURT: There will not be any more continuance of this case if I can help it. I couldn't help it the last time.

MR. SILBERT: May I say this, if the Court please: as Mr. Bittman will see from the exhibit lists those photographs are set forth, the ones I referred to, in the exhibit list. They are in our offices. They are welcome to come up and look at them at any time. They are certainly part of discovery to which they are entitled and we are prepared to meet with that request.

THE COURT: I would think by the end of this week we can resolve all this.

MR. BITTMAN: I will go to Mr. Silbert's office this afternoon. But I don't want to go and review 10, 25 or 100

exhibits and then just make notes. Certainly the FBI with their great facilities can make extra copies of these photographs or what have you for use of defense counsel.

THE COURT: Do you have extra copies?

MR. SILBERT: Your Honor, some of these are aerial photographs. Some of them are larger than that board (indicating blackboard in courtroom). I am not prepared to make them.

MR. BITTMAN: Your Honor, when I tried cases with the FBI, evertime they would prepare a chart they would also prepare a smaller chart for use of defense counsel and the jury and I don't know why they can't do it in this case when they do it in other cases.

THE COURT: I think if they show you a chart, a large picture of an aerial view, you either object to it or don't object to it --

MR. BITTMAN: --Your Honor, I am serious. In many cases where the FBI has put in prepared charts at the request of the Department of Justice they also prepared small charts for use of defense counsel and the jury, I don't see any reason why they can't do it in this case.

MR. SILBERT: If he wants the smaller chart I will make it available.

MR. BITTMAN: Yes, I don't want a copy of the big one. If you can give me a small one that is all I would like.

Your Honor, could Mr. Silbert answer the question

about whether or not they are going to use some kind of a prototype of the interior --

MR. SILBERT: --the answer to that is yes. It is marked here on our exhibit list as Mr. Bittman will see set forth as Government Exhibit No. 4, Plot plan of the Watergate Office Building, 6th Floor.

MR. BITTMAN: I would like to examine that and also to have the opportunity to examine the interior of the Democratic Headquarters which I never had an opportunity to do.

MR. SILBERT: All he has to do is go up there.

THE COURT: You would be welcome.

MR. BITTMAN: I am not sure if I would or not, Your Honor. If the government would assist me in my effort to review the headquarters I would appreciate it. Otherwise I would have to get some kind of a subpoena. In civil discovery rules there are means of asking for that kind of discovery. It is unique in a criminal case and I would ask the government cooperate with me to that end.

THE COURT: I think he can arrange it.

MR. SILBERT: Certainly. We make a phone call I assume Mr. Bittman can make a phone call.

MR. BITTMAN: Your Honor, I think they have much better contacts than I do.

THE COURT: I don't know aboutthat. That remains to be seen. All right, Mr. Glanzer you want to say something?

MR. GLANZER: No, Your Honor.

THE COURT: Let's proceed to Item 2b. That will be taken care of between now and two weeks from tomorrow.

Do you have any objections to Government exhibits?

MR. BITTMAN: Your Honor, it is going to be virtually impossible to anticipate what objections we will make unless the government does two things: No. 1, make these documents available for our inspection --

THE COURT: --didn't they say they would do that?

MR. BITTMAN: Yes, Your Honor, but point 2 is important. Unless we know the purpose the government is going to put a particular document in evidence how can we make any meaningful objection to it?

THE COURT: When they show you an exhibit all they ask you do as I understand it, is do you have any objection to materiality or relevancy youmake it at the trial. This is the exhibit we will offer. We don't want to go to the trouble of calling the photographer who took the picture, etc. So we will save a lot of time. You may think the exhibit is objectionable, they don't have to tell you why it is admissible, that is up to the judge in trial, subject to materiality and relevancy. And we do that all the time as you know.

All right. Mr. Glanzer?

MR. GLANZER: Your Honor, I wanted to say one thing: we have a proposed exhibit list drawn up which exhibits are numbered in the order which we expect to introduce them. It

may vary,and there is a description of the exhibits, and we have proposed, if Mr. Bittman had been patient, to distribute copies to defense counsel and make the exhibits available so they can correlate them and see what we have marked as exhibits and what appears in the exhibit list are the exhibits. And we are also going to prepare an exhibit list for the Court so everyone will have the same exhibit list. We have so far over 140 exhibits marked. Those include exhibits that appear on the stipulation and would bear a unique designation of "ST" indicating they are derived from or can be found in the stipulation. Depending on whether the stipulation is accepted or not will determine whether it bears that designation. The stipulation, as Your Honor pointed out, only goes to the question of authenticity and competency and the question of whether they yave objections or not, that is, novel objections other than relevancy and materiality will be ones we want to hear about as early as possible instead of waiting to trial and have breakdowns. That is all we are talking about here.

THE COURT: I think that can be worked out.

Let's go to Item No. 3: defendants have requested this be put on the agenda --the jury selection procedure. What did you have in mind, Mr. Bittman, on that?

MR. BITTMAN: Your Honor, the defendants would respectfully ask to conduct the voir dire rather than the Court.

I know under the Federal Rules it is discretionary, Your Honor, to conduct the voir dire and in this court some judges conduct the voir dire themselves and some permit defense attornies to conduct the voir dire.

Recently, as Your Honor is aware, the Chicago 7 case was reversed because of the restriction of the questioning of the jurors. That was only one point that was mentioned, and that related to the publicity in the case principally and the jurors' general attitude, and certainly that is one area, Your Honor, that I think a number of questions have to be directed to the prospective veniremen when they are selected, so all counsel will ask Your Honor for permission to conduct the voir dire or in the event Your Honor wishes to conduct a preliminary voir dire then give us an opportunity to ask other questions which we believe would be relevant or germane.

THE COURT: I find, Mr. Bittman, from experience in long protracted cases of this type, murder cases, etc., this is my personal opinion and not speaking for any other judge, I think we save time when the judge conducts the voir dire examination. So that is what I will do in this case and I will ask counsel on both sides to have the suggested questions to be propounded on the voir dire submitted to me no later than Tuesday morning, January 2nd, day after New Years.

MR. ROTHBLATT: Your Honor, may I be heard on that?

THE COURT: Yes, sir.

MR. ROTHBLATT: I want to respectfully suggest that on my reading of Shepard vs Maxwell in dealing with pretrial publicity the United States Supreme Court suggested that the error or damage done by pretrial publicity could be cured by an extensive voir dire of the jury to determine whether or not they are prejudiced. With all due respect to Your Honor, I think it is only defense counsel who have been voir diring juries in state courts where extensive voir dires are permitted. Can we accomplish that objective suggested in Shepard vs Maxwell? And I think we would be derelict in our duty in this case with all the publicity and since we sought a change of venue if we were not permitted or didn't request permission to personally conduct the voir dire so that we could then again request a change of venue if the responses of the jurors indicated that a fair and impartial trial was not possible.

So I suggest to Your Honor with all due respect for the voir dire you have in mind for the purpose of expediting the case, it is completely contrary to our objective to determine whether or not we can get a fair and impartial jury.

THE COURT: I will deny your request.

The next item is 3a --rather 3b --Number of Jury Challenges. Both sides have requested this be considered today.

MR. BITTMAN: Your Honor, under the Federal Rules in a routine case the government is entitled to six challenges and defendants ten. In view of the fact we are going to have a

sequestered jury in this case and in view of the possible length of this trial, the fact there are seven defendants, on behalf of all defense counsel we respectfully ask for ten preemptory challenges apiece, a total of 70.

THE COURT: Mr. Silbert.

MR. SILBERT: If the Court please, on that issue our position is that number is excessive. Case law is perfectly clear and first of all the rule makes it perfectly clear that even a case involving multiple defendants the defense can be limited within the discretion of the judge to the number of ten. There have been cases allowed more. Those case that have denied more have always upheld it as being the discretion of the trial judge.

I might say here if the Court please, that at the very most we have one lawyer representing four defendants. He has represented to the Court,all of his clients have represented to the Court there was no possible conflict of interest betweee them so what we are dealing with is not seven defendants for purposes of challgnes but four. So that request of multiplying 10 by 7 is simply out of the question.

Whatever the Court decides inits discretion to do our position would simply be that the government has as much right to the selection of a fair and impartial jury panel as the defense. We would specifically request whatever additional number of jurors the Court decides in its discretion to grant to counsel for the defendants that the United States have an equal right to an

additional number. And I might make specific reference to this fact, if the Court please, as Your Honor knows and I am sure defense counsel are aware, in this case we are trying not only U.S. Code offenses but D.C. Code offenses. In the Court Reform and Criminal Procedure Act of 1970, Section 23, Section 105 there is specific provision that in cases that are non capital felonies the procedure is for the government to receive ten peremptory and the defense ten, though it remains within the discretion of the Court to grant additional challenges but there is a specific provision if the Court please, that whatever additional challenges are granted to the defendant the government is to be granted the equal number.

THE COURT: What is the citation again?

MR. SILBERT: If the Court please, it is Title 23, Section 105. And specifically, if the Court please, it is 105a, and the sentence in point says:

> "If there is more than one defendant or if the case is prosecuted by both the United States and the District of Columbia, the Court may allow additional peremptory challenges and permit them to be exercised separately or jointly, but in no event shall one side be entitled to more peremptory challenges than the other."

And that language is bolstered by the House Committee Report accompanying the legislation which reitterates the fact there are to be equal number of challenges on each side. And

we would simply make that request here, that whatever Your Honor decides in his discretion as to allow additional challenges to the defense we be accorded the equal number.

THE COURT: I don't think it is necessary to settle this question this morning. I will wait to find out how many qualified jurors we can get and that cannot be determined until a day or so after we get started on January 8th, and I will decide at that time if I am going to allow any additional challenges other than those authorized by law.

MR. ROTHBLATT: Your Honor, since Mr. Silbert raised the question of the four defendants that I represent, I would like to deal with that first. It is true I represent four defendants and I would be selecting or at least exercising my preemptory challenges on behalf of four defendants, but I submit that individual defendants have the right to decide which jurors they like and I don't have to make the decision for them.

THE COURT: Counsel, I have already ruled on the matter. Let's proceed to something else.

MR. ROTHBLATT: I was going to suggest this, Your Honor: will Your Honor consider additional jurors, that we are dealing with a political case obviously --

THE COURT: --obviously.

MR. ROTHBLATT: And the District of Columbia ,better off or worse was one of the few voted for McGovern and I assume the same jurors which we will have in this case might have their feelings

so inclined and I would think that the prejudice certainly would not be for the benefit of the accused. Bearing that in mind would seem to me the most liberal exercise of discretion that the peremptory challenges should be granted.

THE COURT: Thank you for your comments.

All right, now the next question, or next item is 3a, requested by all parties --Sequestration of the jury. I'll hear anybody wants to speak to that item.

MR. BITTMAN: Your Honor, again on behalf of all defense counsel we would very vigorously oppose sequestration of this jury for a number of reasons.

No. 1, some of the reasons given for sequestration, possibility of fixing the jury, things of that nature, certainly do not exist in this case. It hasn't been suggested by anyone nor can it be suggested. So one of the traditional reasons does not exist. Hopefully the press would exercise some restraint during the trial of this case since the political campaign is over with and therefore the defendants would not be prejudiced.

More importantly, Your Honor, I think experience indicates that a sequestered jury is an unhappy jury particularly in a protracted trial and the normal way they express their unhappiness is a jury verdict against the defendants because they hold the defendants responsible for being sequestered.

In my experience I cannot recall of a federal case where there has ever been acquittal of all defendants where there

has been a sequestered jury and I think Your Honor that this is very significant.

If the press would exercise some restraint in this case we wouldn't have to have a sequestered jury, there would be no other compelling reason to lock up the jury in my opinion.

Another reason why we would ask for the jury not be sequestered is because we would respectfully ask Your Honor to only hold trial for four days a week rather than five days and certainly if you have a sequestered jury it makes it virtually impossible to take a day off now and then either to analyze certain Jencks material etc., etc. All defense counsel would like to try this case four days a week rather than five and with a sequestered jury it is impossible to do so.

The government has had a tremendous edge in this case with respect to the incredible investigation they conducted in this case with respect to witnesses, hours, etc., etc., grand jury, the FBI, and therefore we believe the only way we can adequately defend our clients would be a four day a week trial so we don't get overwhelmed by the government in a kind of race horse atmosphere. Therefore, we respectfully and vigorously as we can oppose the sequestered jury in this case.

THE COURT: What is your position in this?

MR. SILBERT: May it please the Court: first of all, again we believe this is a question for the Court to exercise its discretion. Were the Court to accede to the request of the

defense counsel, I think they are putting the Court possibly in a box because presently outstanding before the Court are motions for change of venue on the grounds of pretrial prejudicial publicity. One of the methods that the cases have traditionally mentioned is a basis for dealing with that problem not only the pretrial publicity --allegedly pretrial publicity but publicity arising during the course of the trial is to sequester a jury. If the Court were to honor the defense request and not sequester the jury you would still be left in the position, that is both government and defense, but also the Court, of having the defendants be in the position to have their cake and eat it too. In other words, claiming prejudicial publicity the motion for change of venue should have been granted, but also then referring to the extensive publicity during the course of the trial.

Mr. Bittman has said if the press can exercise restraint during the course of the trial and not print material would be much better off, sequestration would not be necessary. If the Court please, the First Amendment and the right of free press there is no way that the government, defense counsel and the Court can restrict what the press is going to say about this trial. It is going to be a public trial, they have a right to print whatever they see fit within very, very wide expanse of authority. So you can't ask the press not to print certain material.

Mr. Bittman says that jurors hold sequestration

against the defendants. He makes the statement. He hasn't cited any authority in support of that and I would be very much interested if there were any such authority.

Basically again to sum up our position, it is within your discretion, but we are concerned by opposing sequestration defense counsel are putting the court in a box of having obmected to extensive pretrial publicity and yet presumably reserving that issue, preserving that issue for future litigation if there be some, at the same time wanting the press to voluntarily to restrict itself is an impossible request.

THE COURT: I usually tell the jury at the beginning of the trial when I give them a preliminary charge, especially in a case that is going to be long and protracted, that the Court of its own motion is sequestering this jury. I will not go into detail at this time what I will tell them but that is the substance of it and I don't think they will blame the goveernment or the defense.

MR. BITTMAN: Your Honor, I respectfully disagree with Mr. Silbert with respect the Court is powerless to control the press. In a number of significant highly sensational cases courts do enter orders with respect to the conduct of the press at a trial and I believe Your Honor certainly has that authority, it is not an abridgement or infringement of the First Amendment as to the press, and certainly we are, at least I am at the present time more concerned about the rights of my client and clients

of the other defense attorneys than I am the press writing articles that may be prejudicial to the defendants. They have had a field day now for six months writing prejudicial articles and I think it should come to a halt and I think Your Honor has the power to stop it.

MR. ROTHBLATT: Your Honor, I would like to be heard.

The argument Mr. Silbert advances distresses me. I don't understand if locking up jurors --I am not too worried about what the press does during the course of the trial because we will be able to handle the jury by the evidence they hear in the courtroom and make the argument. What the press writes the jury can form a different impression, they will know whether or not what is recorded in the press is totally accurate, but what I am concerned about is the feeling, the emotional feeling of those jurors that are locked up because these defendants are on trial. Now to say we are putting you in a box, we are saying we will take that responsibility, we don't want them sequestered. We are not concerned about the publicity. The publicity has already been done. We are concerned about the sequestration so you don't sequester them to protect us from a situation that we don't want to be protected from. If you give us our choice, we don't want sequestration.

THE COURT: All right. Now, many things can happen during the course of what might be a hotly contested trial. You

have everyone of the lawyers on this case on both sides experienced lawyers, something might happen during the trial and as Mr. Silbert said, the press have a right to write about the evidence the way they see it. Now, suppose something happens of a prejudicial nature, gets on the front pages of our local paper or out of town and the jury is not sequestered. Then you would be in my office the next morning with a motion for a mistrial.

MR. ROTHBLATT: Your Honor, I say if we have the choice between the two, we will take our chances. We have weighed it and weigh it against the sequestration.

THE COURT: You have now a motion for change of venue which I denied because of the socalled massiv publicity throughout the country. I have denied that motion. So that is all I have to say about it, so I am going to deny the request. If I am able to get a jury they will be sequestered.

MR. MAROULIS: Your Honor, may I be heard?

THE COURT: Mr. Maroulis, yes, sir.

MR. MAROULIS: Your Honor, fundamentally we have two separate issues. One is the question of whether there should be a change of venue because of pretrial prejudicial publicity as the defense has alleged and the second is what should occur during the time of trial itself.

As to the former, the pretrial prejudicial publicity which we allege will prevent us from getting a fair and impartial jury, that item will be out of the question once a jury is

selected if in fact a jury is selected. At that point if a jury can be selected the members of the jury can be instructed by the Court as to what their duties and responsibilities are and the risk then of having prejudicial publicity which would inure to the detriment of the defendants would be minimized. I think that the Court should separate the two issues. Our claim is that we can't get a fair and impartial jury, that is the basis for our motion for a change of venue. The Court has denied that. The time will come during the selection of the jury when the Court will again have to face that very same problem, but if in fact a jury is found then I see no reason why that jury should be locked up when the Court itself could instruct the members of that jury just exactly what their responsibilities are, that they are not to read the newspapers or to listen to the news, etc., they are to be guided by what they hear in the courtroom. I feel the Court certainly could give adequate instructions and that the people who give their oaths to sit as jurymen in this case would do their best to abide by them.

THE COURT: All right, is that all?

MR. MAROULIS: Yes, sir.

THE COURT: I will deny the motion.

The next item on the agenda is with regards to the trial, 4a, requested by all parties --the anticipated length of the trial.

I will ask the government to speak first. It has some

idea I am sure of the number of witnesses at least you have to call --estimate of the length of trial, keeping in mind one of the first things we will have to do after the jury is selected but before the oath is administered to the jury, we will have to go into this motion to suppress evidence filed on behalf of Mr. Bittman's client, Mr. Hunt, and then maybe we will have to go into the Caddy situation --the witness by the name of Douglas Caddy. But the jury will be sequestered and will not hear any of this evidence.

MR. SILBERT: Your Honor, there also may be some identification questions that the defense may raise. Whatever comes up we will make an appropriate proffer to the Court at the appropriate time and I assume Your Honor would want to handle them the same way you have decided to handle the motion to suppress tangible evidence filed by counsel for the defendant Hunt.

As I have indicated before, Your Honor, it is very, very difficult to estimate the trial time. At the present time we have approximately between 50 and 60 witnesses that we intend to call.

Now, in addition to that, if the Court please, in the stipulation there are references to approximately 30 additional witnesses. That would bring it up to about 80. I suppose between 80 and 90. If the stipulation can be arranged as to those witnesses I would believe that would eliminate one week from the trial with respect to the rest of our evidence given

the number of defendants and their skill and experience and all I would say probably three weeks for the government's case to go in starting from the time we make our opening statement.

Now, if the Court please, I trust Your Honor will see that as being just an educated guess because it is so difficult to estimate something like that.

THE COURT: I understand. Well, we have an estimate anyway --about three weeks from the time you make your opening statement. It may take two or three days to get a jury in this case, may take longer, I don't know. As I indicated, I am going to start the case in the Ceremonial Courtroom as you know, which is larger than this and if we get through the preliminaries it may take most of that week and then you may not be starting your opening statement before the following week. It may wind up that way, I don't know.

Now, I don't know whether counsel for the defendants have any estimate of how long the case on behalf of the defendants might take?

MR. BITTMAN: Your Honor, it would be difficult to estimate. I do say this most respectfully, the government might disagree with with, but they have not given us any real discovery in this case so we can analyze what their case is, what witnesses will testify, the significance of their tracings, et cetera, et cetera, so it will be difficult.

I think Mr. Silbert is certainly optimistic to think

we could automatically stipulate to 30 witnesses. Maybe it can be achieved, I hope it can be, but certainly we cannot get into the bind where we are forced to stipulate to evidence which we do not appreciate the significance of that evidence until it is too late and I would certainly think in my own behalf and other defense counsel can address themselves to this issue individually, that this case has to last at least a month and a half.

If I could guess what the government's case is going to be and only a guess, I would believe the defense would be at least one to two weeks and we are looking at least to a month and a half trial or maybe longer.

MR. ROTHBLATT: Judge, may I indulge in a little guessing too?

I don't qualify as an expert but I was involved last year perhaps in the longest military trial in the history of military justice --the trial of Colonel Oren Henderson. We estimated that trial would probably run about two or three months. We started the trial in April and concluded it sometime before Christmas in the month of December. It ran 8 months with varying adjournments so I concluded with the best of plans and all we are doing is guessing, I would say if the government has 50 to 60 witnesses and 30 more on stipulation, realistically I say we might be going two to three months and possibly a little more, and I want to be very frank with Your Honor why I say that. I will

not be inclined and my clients have so instructed me, to enter into any stipulation, And I haven't had a chance to read the government's proposed stipulation, unless the cooperation cuts both ways.

Very simply it is this, Your Honor: I don't know what I am prepared to stipulate to or where the evidence may lead unless the government is prepared to lay its cards on the table. Perhaps I have been a little spoiled by my trial of some military cases where the prosecution lays all of the evidence --

THE COURT: --isn't there a great deal of difference between trying a case before military authorities and a federal court?

MR. ROTHBLATT: No, I think it is precisely the same. We are trying it before a jury. The government says we are not ashamed of your evidence, you are entitled to have it, here is our proof, go and investigate your witnesses and develop your theory.

THE COURT: Let me interrupt you. You made a rather lengthy argument on the point you are doing now --I think it is attached to one of the statements filed here, so I remember your argument very well, but you didn't convince me.

MR. ROTHBLATT: But I am trying to suggest to you is that this case will be lengthy because of that. It can only be shortened, and I am suggesting this to the government and I am suggesting it to Your Honor, if you want to speed up this trial,

then tell us what your proof is going to be, let us have those FBI statements, let us have that Jencks material as early as possible, don't hand us the Jencks material the night before and expect us to cooperate and stipulate away our clients' rights. I will not be inclined to do it, my clients have instructed me not to do it, they say if they cooperate with us and tell us what their proof is we will be prepared to play the game too.

THE COURT: When I was trying cases and I tried hundreds of criminal and civil cases, I told my clients I will conduct the trial my way not the way you want it; if you want it conducted a certain way you get yourself another lawyer.

MR. ROTHBLATT: Well, may I suggest this? I happen to agree with my client. I believe the trial of a criminal case is a search for truth. We are not playing cards. If the government has its proof, lay it out, make it available to us. There is no reason for them to hold it back until the day before. I just can't see the logic of it.

THE COURT: Mr. Rothblatt, you have been in this case three or four months now. I doubt you are going to get surprised on any evidence offered in this case, I mean if it is admissible.

MR. ROTHBLATT: If there are no surprises why don't they give it to us now?

THE COURT: That is up to the government.

MR. ROTHBLATT: I am suggesting to Your Honor if they want to speed this case up and we are all anxious to speed it

up, make that available to us as quickly as possible, now, not wait till the day of trial. That's how we can speed up the case. If they don't want to do it I say we are good for two to four months.

THE COURT: All right.

MR. GLANZER: Your Honor, may I comment upon that?

We said at the outset that we are marking exhibits that we intend to introduce on the government's side of the case. We have already marked 140 exhibits. We invited defense counsel to look at those exhibits which we are going to introduce in our case. Mr. Rothblatt talks about "lay the cards on the table." They are laid out downstairs. He hasn't come down to look at it. That is the evidence we are going to put in our case, we are not hiding anything.

As far as the stipulation is concerned, if Your Honor looks at it and if defense counsel study it they will see they deal with custodians of records. There are 20-minute witnesses at best, they testify to the regular course of business of maintaining and keeping records. In other words, they lay the foundation, that is all they do, not critical at all, except the evidence is circumstantial as Your Honor pointed out and will be probative and relevant to this case.

Now, if that is not cooperation on the part of the government and in terms of cutting down the length of time we will have to be in the courtroom and tailoring the case as much

as possible, so be it. If that is the way defense counsel feel about it that is their view and they are stuck with it.

THE COURT: What about the exhibits downstairs, you heard the statement, Mr. Rothblatt?

MR. ROTHBLATT: I would answer simply, I can't look at an exhibit unless I know what it means. If the government says along with the exhibits they have got the FBI statements and Jencks Act material, great! We are ready to do business, I will rush down there immediately. But if they hand me an exhibit without Jencks Act material, without the FBI statement, it is worthless to me, I am not in the mind-reading business; I can evaluate evidence when I see it in relation to testimony. If they say that is laying the cards out on the table that is not my way of playing.

The Army does it differently. That is the way I play. They give us Jencks Act material and FBI statements along with exhibits.

THE COURT: What you would like is for them to turn over the whole file to you.

MR. ROTHBLATT: If you want to speed up a trial that is what should be done. That is what is done in many states -- the state of California, the state of Vermont-- and the Court has the inherent power to do it if we are interested in speeding up the trial, but you can't have it both ways, they are not going

to rush us on our rights and hold back. If they want to speed up a trial let them lay it out not just with exhibits but with testimony and Jencks Act material.

THE COURT: The law doesn't give you that right, the Jencks Act is very clear.

MR. ROTHBLATT: Your Honor has the power to do it.

THE COURT: I ordered the testimony at least of two witnesses to be furnished to you and all counsel on, I think, Friday before the trial starts. And youwon't even get to it I don't believe for several days.

MR. ROTHBLATT: But Your Honor, with all the months and the manpower they have you expect counsel to work throughout the night to digest this material and be ready for proper cross examination? I don't think that is proper preparation and I don't intend to cooperate on those kinds of terms.

THE COURT: All right, we shall see. Let's go to the next item.

There was some comment made about the proposed schedule of the trial. I believe this trial should be held five days a week, 10:00 to 4:00 o'clock, and possibly if we are moving too slowly we might sit on Saturday morning from 9:00 till 12:00. All right, that is the ruling of the court.

The Order of Cross-examination -- 4c.

You take the indictment, the first defendant named is Mr. Liddy. When it comes time to cross examine the government

witness, Mr. Bittman will be the first lawyer called upon -- no, Mr. Liddy's counsel, I'm sorry. And down the list, Mr. Hunt, Mr. McCord, Mr. Barker's counsel --he is represented by Mr. Rothblatt. So you will have four lawyers, I take it, cross examining witnesses. That is the order of cross examination.

MR. BITTMAN: Your Honor, can't we make a submission to you with our suggested order of cross examination? The government drafted this indictment, the government put these defendants in this order. We might feel that there are very compelling reasons why this order should not be the way Your Honor has stated, or there should be some deviations or variations. Why should we be forced to follow that order when the government set forth that order in the indictment and I don't think that is right. I think at least we should have the opportunity to suggest to Your Honor an order of cross examination.

THE COURT: I thought that is what one of the reasons for meeting here today. I am willing to listen to your suggestions now.

MR. BITTMAN: I thought from what Your Honor just stated you already ruled that had to be the order of cross examination.

THE COURT: This is the policy if followed in practically every case I have had.

MR. BITTMAN: I don't think it is right when the government can dictate to defense lawyers the order of cross

examination. They draft these indictments.

THE COURT: Now wait a minute. What difference does it make who cross examines who first or last?

MR. BITTMAN: Your Honor, it may make a tremendous amount of difference. I think any time we can possibly get some advantage I would like to do it. The government has all the edges in this case, they got all the benefits, and I think with respect to certain things at least we should be heard, and I respectfully ask Your Honor to give us the opportunity to be heard on this at our next pretrial.

THE COURT: I will hear you at the next pretrial, all right.

The next item is 4d, entitled Courtroom arrangements including accomodations forthe press. And this was requested by the defendants. Who wants to comment about this?

MR. BITTMAN: Your Honor, No. 1, all defense counsel would object to the use of the Ceremonial Courtroom for this trial.

Now, obviously we are not going to object to selecting a jury in the Ceremonial Courtroom because of the potential number of venireman called but we do think it would be prejudicial to conduct this trial in the Ceremonial Courtroom. There are very few trials conducted in the Ceremonial Courtroom. We believe that to have it there would give the case some hyper dignity it is not entitled to. The government's counsel said this is

nothing but a street crime, second degree burglary; and on other occasions they use other arguments. But we believe we would be prejudiced by using the Ceremonial Courtroom. We believe that it might be, and I emphasize it might be similar to the circus type atmosphere that the Supreme Court has condemned from time to time.

We don't see any reason to use any courtroom other than Your Honor's regular courtroom.

With respect to how Your Honor wants the furniture arranged I don't think makes much difference as far as we are concerned as long as we can hear the witness. But we would object to use of the Ceremonial Courtroom, Your Honor.

THE COURT: All right, any other comments?

I have no way of knowing how many people want to come in, it is going to be a public trial. I have no way of knowing how many representatives of the news media want to cover the trial. I have no way of knowing that. We may know more about it later on. If there is a very small attendance at the trial we probably will move down here, but I will have to wait and see.

MR. BITTMAN: Your Honor, let's assume this courtroom is not big enough to accomodate the press --

THE COURT: --wait a minute. I will give you two cases that come to my mind: James Hoffa trial was tried in the Ceremonial Courtroom, right?

MR. BITTMAN: I have no idea.

THE COURT: It was tried shortly after I became a judge.

A narcotics case was tried up there presided over by Judge Robinson. I have forgotten how many defendants there were. Do you know, Mr. Glanzer?

MR. SILBERT: Seven to begin with, Your Honor.

THE COURT: He tried the case in that courtroom. There are at least two cases I know about.

MR. BITTMAN: Was there any objection by defense counsel? I just think it creates an atmosphere, Your Honor, of a false dignity which is prejudicial to the defendants. I mean my earlier point that I started to make was if the press cannot be accomodated in this courtroom perhaps there should be limitations on the press. From time to time judges limit how many reporters can cover a trial because of the impact on the jury. I have seen several trials such as that where they limited the first two rows. Here in the Ceremonial Courtroom you have two jury boxes. I assume the press would like to use one box. The press would be inside the rail. Your Honor has to impose certain limitations on the press because when the jury gets the feeling that there are 40 newspaper reporters and artists sketching the witnesses, sketching the attorneys, sketching the jury, this all to me precipitates a prejudicial atmosphere to the defendants and I don't think justice loses anything by having this case tried in Your Honor's regular courtroom.

THE COURT: Do you think the jurors will get to the point where they are going to decide this case on whether or not it is an important case or an unimportant case?

MR. BITTMAN: I think it is a possibility of that, Your Honor. I think you are adding a dimension that doesn't normally exist in a trial. Certainly that is one of the reasons why they won't have cases on television is because of the fact the jurors react and witnesses react, witnesses start performing, etc., etc.

Now here I think the number of press should be limited to a normal trial, either one or two rows as Your Honor sees fit and I think to just open up to any members of the press who take copius notes and who are talking to each other and sketching pictures, I think creates an atmosphere which is prejudicial to the defendants.

The Baker case wasn't tried in the Ceremonial Courtroom, it was tried in Judge Gasch's courtroom.

THE COURT: Anything further?

MR. GLANZER: The Baker case was one defendant. We have seven defendants here. We have a problem with just seating arrangements in this courtroom.

THE COURT: Well, this is going to come up, I might as well settle it now.

MR. BITTMAN: Your Honor, I can't believe Mr. Glanzer would ask to have this case tried in the Ceremonial Courtroom.

THE COURT: I don't think he is asking it be tried there.

MR. BITTMAN: The suggestion is this courtroom isn't big enough therefore I gather from that the government wants a big spectacle and I object to it and that is what I am trying to avoid.

THE COURT: I don't put that interpretation on his remarks at all. Now we are going to have to make some provisions for the news media because I imagine we have gotten several requests already --not too many, but several-- for passes, etc. So I think it is only fair I make this statement at this time and before I decide to do this I have checked on the matter. We have a man who had a lot to do with the security and the admission of the members of the press at the Berigan Brothers trial in Harrisburg, Pennsylvania. That was a highly publicized case as you know.

So this is what I am going to do in this case. The security of the Court and related matters such as seating arrangements for the news media, officials, the public and the control and issue of passes will be coordinated by the U.S. Marshal, our U.S. Marshal, with General Services Administration and other appropriate agencies. I desire at this time to provide you with the following preliminary information:

The only persons who will be permitted inside of the rail will be officers of the court, counsel, jury, witnesses ,

and the defendants. Prior to the commencement of the trial counsel for the government and the defense will furnish to the U.S. Marshal, or furnish the U.S. Marshal with a roster setting forth the names and identities of each attorney who will be participating in the trial.

Since it is planned to use the Ceremonial Courtroom for this trial --at least that is the tentative plan-- the seats to the left of the bench will be set aside for accredited members of the news media. As you know there is a standing order that no recording devices, cameras, television, or similar equipment will be permitted within any judicial area of the courthouse.

Arrangements are in process to designate the press rooms on the fourth floor for use of/out of town accredited local and members of the news media. The cost for any installation that might become necessary and the use of telephones or other means of communication must be borne by the news agency concerned.

The U.S. Marshal informs me that announcements will be made by the national wire services containing details regarding arrangements for the news media at trial. In the meantime should any counsel or members of the news media have questions regarding the subject he should contact our U.S. Marshal, Mr. Anthony Pappa.

We will take a 15 minute recess.

(Recessed at 11:15 a.m.)

AFTER RECESS -- 11:30 a.m.

THE COURT: The next item, No. 5, suggested by the government which states: Novel questions of law that is anticipated will be raised. I will hear from the government.

MR. SILBERT: If the Court please, that was put on as Mr. Glanzer indicated, if there are novel questions of law that are going to be raised perhaps prior to trial, might be some memoranda submitted to the Court in advance to avoid undue breakdowns during the course of the proceedings. We put it on as an exploratory issue as Mr. Bittman referred to earlier, we review this in many senses as a street crime, burglary. From out point of view we know of no novel, unique, extraordinary issues of law. I think the indictment is clear and sets forth the charges with clarity and precision. If the defendants anticipate any novel issues of law they intend to raise we are unprepared for, we don't know about at this time. They are complaining about the length of the trial and speeding up the trial we think would expedite the trial if raised beforehand so that the parties would have an opportunity to explore them.

THE COURT: Mr. Bittman.

MR. BITTMAN: Of course it is difficult for us to focus on that, Your Honor. Certainly there will be attorney-client argument which is not novel. My interpretation is dramatically different from the governments. I am sure Bruten question is going to come up, depending upon how they attempt t o prove

their case. If they put i n any evidence that is admissible against one defendant and not another it is very prejudicial. Other than that at this early stage it is difficult to anticipate novel questions.

THE COURT: All right.

MR. ROTHBLATT: Your Honor, may I suggest this: I think it is no secret, should be apparent to the government and certainly Your Honor, that at least speaking for my defendants we are going to put the government to a very close --put them to their proof-- and they are going to have to put their proof in well and properly.

If I knew what that proof is going to be I would like to have briefs and memoranda of law from Your Honor on every question that will come up so that hopefully we can convince Your Honor our objections are not frivolous and they have merit.

Again I say if we could have Jencks Act material and statements now we could have this briefed and at the time of trial wouldn't have to intemupt the trial. I don't know what the evidence is going to be or how I'm going to object --how I'm going to raise it. We can speed this up considerably if we know it is coming and we can be most helpful to you and to ourselves, that we don't have to do our reaearch under hurried conditions. Right now I would say I know nothing. We would certainly put the government to its very close proof on every issue possible.

MR. SILBERT: If the Court please, I do not understand how Mr. Rothblatt can make that argument to Your Honor. With respect to 6 of the 8 counts of the indictment almost all proof against his clients is based on the fact they were caught inside the Democratic National Committee Headquarters at approximately 2:00 a.m. on June 17, 1972 and a good deal of material recovered from them.

Now Mr. Rothblatt can stand up and say to Your Honor he knows none of the facts all he has to do is speak to his clients and ask them certain questions. He can come down to our office and see all the evidence --a 100 exhibits that we have marked, I indicated to Your Honor that were recovered from the defendants at the time of their arrest which we intend to introduce in the trial.

I do not for the life of me understand how Mr. Rothblatt can make that argument in good faith to Your Honor.

MR. ROTHBLATT: Your Honor, we don't speak the same language. I think I speak pretty simply and succinctly. If I knew what the witnesses are going to testify, they have the statements of the witnesses, they have the Jencks Act material. If I knew precisely what was to come out then I could save them a lot of time and I could submit these briefs and say if your witnesses are going to testify such and such we will have no objection. All they have to do is lay it out to us, give us what they got and we will move this case up considerably.

THE COURT: I think the better thing to do is this: as you make your objections you prepare it on what you think the law is and the government will do the best they can and I will do the best I can. That is all we can do, take it step by step.

MR. ROTHBLATT: That is all we can do.

THE COURT: All right. Now, this is one thing I think counsel on both sides should do: prior to the trial and no later than Tuesday, January 2nd, I would like counsel for all parties --government and defendants-- to submit to me proposed instructions to the jury in which you will, as to each count, set forth the elements of the offense set forth in that count that you feel the government must prove beyond a reasonable doubt, each element. So I will have some idea what you are thinking about as to the law applicable to the various counts. It has been done many times before.

Now, No. 7: Schedule for the production of Jencks and Brady material --requested by the defendants.

All right, whoever wants to talk to that.

MR. BITTMAN: Your Honor, number one, it is inconceivable to me to believe that the government does not have some Brady material after by their own admission, the biggest investigation in ten years. None has been turned over. I think the case law is clear on this we are entitled to this prior to trial. They haven't turned over one piece of paper to us, any information whatsoever. And I think, Your Honor, if their posiition is this

kind of investigation, that no such information exists, I think either Your Honor or some designee should go through some of this evidence because we are entitled to it and obviously they are holding it back and not turning it over to us. It is not going to do us any good in the third, fourth, and seventh week of trial for the government to say, oh, wait a minute, it is in drawer 3 of file cabinet 17 and we should have turned it over to you. It is their obligation to conduct an exhaustive search now. It helps us to prepare a defense if we get it now not later. And as I said, it is inconceivable to me that there is no Brady material in the possession of the government.

Point No. 2: the government only because Your Honor ordered it has agreed to give us the Jencks material on two witnesses the Friday before the trial begins. We now know for the first time that there are some 80 or 90 witnesses, 50 to 60 they intend to call even if we do stipulate to everything they want us to stipulate to. So certainly it is a very hollow victory, Your Honor, to have the Jencks material of two witnesses prior to trial when they are going to call 50 to 60 more.

Mr. Silbert indicated to me that it is the government's intention to turn over the Jencks material to us which would include the grand jury testimony the night before that witness testifies. I respectfully suggest, Your Honor, that that is completely and totally unsatisfactory. I am aware of what Title 18, Section 3500 states but I am also aware how courts

have interpreted Section 3500. Here we are going to have apparently a sequestered jury, it is going to be tremendous pressure on all counsel, the government is going to call 50 to 60 witnesses at least, maybe as many as 90 witnesses. They have this information now, they have for sometime. I think for the government to piecemeal turn this information over to us the night before that witness testifies I think is incredible. It is indicated by Mr. Silbert what a strong case they have, after all five were arrested there. Why play these games? Why not attempt to assist defense counsel? If I don't have time the night before to read the Jencks material they turn over I will ask Your Honor most respectfully every morning to be given time to read it.

Now, the difficulty with that is, No. 1: Your Honor may not give me the time, so I can't conduct cross examination and if I do it may not be meaningful. But more importantly, how is this going to look to the jury that is locked up that is going to hold the defendants responsible for their being locked up if we have to ask for a number of recesses to read this Jencks material? Clearly, with this kind of a case, with the kind of an investigation that they embarked upon and completed, certainly we are entitled to receive this information in advance. There is no suggestion here of tampering with witnesses, no suggestion of perjury, the classical crime that lawyers state someone is going to get killed, threaten someone, that has not been suggested here as I indicated earlier, nor can it be, so I think to expedite

this trial so the defendants will not be prejudiced the government should turn over this information to us at least a week before the trial and give us an opportunity to prepare it.

THE COURT: All right.

MR. SILBERT: If the Court please, on the question of Brady --

THE COURT: --excuse me, I have a message here.

(Clerk handed the Court a note.)

Gentlemen, I just received an important message. I am sorry to do this but I have to take a brief recess for about ten minutes.

(Recessed at 11:45 a.m to 11:50 a.m.)

THE COURT: All right, Mr. Silbert.

MR. SILBERT: If the Court please, with respect to the request for Brady material, as we indicated in the oral argument before Your Honor back on October 25, I believe it was, we are aware of our obligations under Brady and are fully prepared to comply with it.

I make the representation at this time and I have conferred with Mr. Glanzer and with Mr. Campbell, that we do not have any Brady material to turn over to the defense counsel at this time and are not aware of any. If we become aware of any evidence which exculpates any defendant or mitigates their punishment we will hand it over to them well in advance of trial or

when we become aware of it so they may make proper use of it in preparation of their defense.

If the Court please, with respect to the Jencks statements, counsel seem to ignore before Your Honor --and we have been through this before-- the law. They say we are aware of what Congress says but somehow the Court can simply ignore it or not follow it.

If the Court please, those rules, the statutes were set up specifically for the ordinary conduct of the trial. If the rules are to be disregarded on the statements to Your Honor, that Your Honor is free to forget them, overlook them, ignore them, then there is no law, we become a society almost of persons not of law. When the Congress passes a law, when the Supreme Court and the Federal Rules of Criminal Procedure specifically sets up what is discoverable and what is not, and Rule 16b specifically exempts statements under 18 U.S.C. 3500, we are at a loss how counsel for the defendants can come up and say follow this procedure. The argument is made to follow the military procedure. Judge Sirica, that is the military procedure but specific procedure and different one has been set up for the conduct of trials in federal courts.

Now we agreed previously because of the voluminous nature of material, to turn over the grand jury testimony of two persons, two witnesses before the defense and Your Honor has

incorporated that in an order and we are required now to turn it over on January 5th.

Now, in view of the fact Your Honor already indic ated that selecting a jury and disposing of the pretrial matters may take a week. In view of the fact those particular witnesses will not be called the first week of the government's case, defense counsel will have over two weeks w ith respect to those two witnesses to prepare cross examination.

To expedite the trial we have gone further, if the Court please, and Jencks Act requires it, we have stated we will turn over material the night before and we cited authority that supported this procedure. The Garrison case which is at least a ten defendant major conspiracy in Louisiana in which counsel who represents defendant McCord is a party, counsel in that case, there the judge ruled Jencks statements will be turned over the night before.

Another case arises, a multi-conspiracy case arises out of the Southern District of Florida; the two defendants besides Heidi Fletcher, Judge Green ruled after defense request and our opposition that the statements had to be turned over the day before. There was no difficulty, the trial was not delayed because of inadequate time to examine the statements.

And finally the latest case out of the Court of Appeals that I am aware of dealing with this issue, United States vs Harris in the Fifth Circuit, 458 F.2d 670, a case remarkably

similar to this one, there it was a charge of conspiracy with burglary as substantive offenses, there the key government witness was indicted, coconspirator, and the Court of Appeals even after petition for rehearing specifically held that there was no requirement to turn material over until after the witness testified. And it was not done. In this case testimony of the key witness is coming up two weeks before, all the other witnesses is going to come out the day before.

The defense counsel in their argument before you always talk about a criminal case. It is a one-way street with them. There are only two things that really separate a criminal case from a civil case, and that is the burden of proof which is different and the Fifth Amendment privilege which applies to specific defendants. Otherwise they are the same, witnesses testify, they are cross examined, they are examined, exhibits are introduced, there is no difference. Yet they would have it come all one way, so that they know everything about our case and they can prepare their defense and catch us by surprise, or by ambush. That is not the way the system works. That is why the Federal Rules of Criminal Procedure are drafted differently than the Civil Rules of Procedure, and we submit that this Court as any court should follow the rules prescribed by the Congress and by the Supreme Court.

MR. BITTMAN: Your Honor, could I respond briefly?

THE COURT: Yes.

MR. BITTMAN: To address myself to Mr. Silbert's last point first, he says there is very little distinction between the civil rules and criminal rules, the Fifth Amendment and the burden of proof. What about discovery? We could take a deposition and examine every document in their files. It is even remotely relevant. So I don't think I have to go beyond that, Your Honor should be well aware of that, and that is a very inaccurate and erroneous argument.

Why does the U.S. Attorney's Office in this district pick and choose which cases they are going to liberally give the Jencks matters and which they do not?

In the Brewster case just tried, a very significant case, the government turned over hundreds of pages of grand jury testimony and I think 107 page affidavit of the FBI a month before the trial began, and all Jencks material was turned over for all witnesses the Friday before the trial began.

THE COURT: Let me ask you a question. I don't know what your answer is going to be, but when you prosecuted Bobby Baker how long before the witness testified did you turn the statement over in that case?

MR. BITTMAN: Your Honor, I am not sure but I think it was the night before.

THE COURT: There you are, there is a precedent.

MR. BITTMAN: I would say with respect to most of the witnesses, I think there were some witnesses we turned over well in advance but I think generally the night before.

THE COURT: That is generally the practice.

MR. BITTMAN: Your Honor, that was a two and a half to three week trial.

THE COURT: I understand but that was a highly publicized case, it was on the front pages of every newspaper in the country practically for days and you saw fit to turn over the statements the night before. What is wrong with the government doing the same thing i n this case?

MR. BITTMAN: I would like to say first of all this is going to be a very lengthy trial, certainly a lot longer than that case.

THE COURT: It may not be as long as you think.

MR. BITTMAN: There were five or six lawyers represented one defendant in that case, that all could piecemeal review the Jencks material. I don't believe any of the cases Mr. Silbert relied on --I think Garrison; Heidi Fletcher I am not sure of; the Harris case, that we had a sequestered jury.

The sequestration of the jury to me makes all the difference in the world because if you have an ordinary case, if you don't have time to review the Jencks material you can ask for a recess and the Court would normally give it to you but you can't do it in a sequestered jury.

THE COURT: Now you have got assistants --you have Mr. Mittler, he can be reading the statements over. A lot of these statements will be statements I suppose which witnesses may

take 20 or 30 minutes on the stand.

MR. BITTMAN: One thing I don't think Your Honor addressed yourself to, that is, why should this U.S. Attorney's Office pick and choose the cases where they will in advance turn over the Jencks material?

THE COURT: I don't know they are doing that.

MR. BITTMAN: I just gave Your Honor an example, a case that was just tried, started October 30th where they turned over much of the evidence of a key witness a month in advance and all the witnesses in the whole trial the Friday before trial.

THE COURT: Judges think differently. Just because one judge does something down the hall doesn't mean I have to do the same thing.

MR. BITTMAN: Certainly this is discretionary with the Court at this time in my opinion if we are required to ask for a number of continuances during the trial and Your Honor denies it, then I think we should go to a different dimension. If these are routine 302's, routine grand jury testimony, why should the government not turn it over to us? What difference would it make to the government if they turn over this information to us, say the Friday before that week of trial? What difference does it make to them? Why should a different standard be applied to this case as to other cases? Some judges will take 3500 literally and some will not. Certainly because this is going to be a locked up jury, a protracted trial, because of the

government's investigation in this case and all the other reasons this should be a case where I think a more liberalized rule should be extended, particularly because of the prejudice of the jury in the event we are not prepared for cross examination.

THE COURT: All right, anything further?

MR. ROTHBLATT: Yes, Your Honor, I would like to be heard briefly on this.

Your Honor, I am disturbed when the prosecutor says this is the law and Your Honor has to apply the law of the Jencks Act. That is baloney because all these rules of evidence can be waived and stipulated to, that is what they are asking to do. Sure, he wants to play it strictly as to law, but by stipulation or agreement it is not the law.

Now, I disagree that that is even the law as he suggests it.

THE COURT: Have you ever used that expression "baloney" in another federal court? I don't think it is becoming.

MR. ROTHBLATT: Perhaps it is not the best term, Your Honor. The argument is specious, that is a better term.

THE COURT: All right.

MR. ROTHBLATT: Your Honor, I will tell you why I feel that strongly. Judge Jack Weinstein of the Eastern District of New York routinely for over a year and half issued an order on his own --on his own-- in order to expedite trials, directing the government counsel to turn over to the defendant all of the

Jencks Act material by certain specified dates, not just the night before the witness testifies but in advance of trial in the interest of expediting the trial.

Now, if Judge Weinstein is violating the Jencks Act or the law as Mr. Silbert suggests, apparently the Department of Justice has not taken a mandamus proceeding against him in the Second Circuit to say he is violating the Jencks Act by doing it. Let's get down to it, we are being asked to speed up this trial, we all want to speed up this trial, I disagree with Mr. Bittman, I don't want it a week in advance, I want it now if they want to speed up the trial. There is no reason they can't do it, they can't say it is the law; it is the law if they are interested in speeding up the trial to agree to anything. They are asking us to waive rules of evidence, we want them to waive that if that's the way they interpret the law.

THE COURT: All right.

MR. BITTMAN: Your Honor, one additional argument. I would like, if Your Honor feels it appropriate, to have Mr. Silbert make a statement on the record that he is familiar with all of the documents and records in this case before he makes a statement there is no Brady material in this case because traditionally the argument the government makes on appeal when certain evidence comes up, that was not turned over to the defendants under Brady, they say well, we had 15 file cabinets and obviously we can't know all of the documents that we have.

I want to remove that obstacle right now. If Mr. Silbert can say he is familiar and has reviewed all of the documents that the government has in this case and there is no Brady material we have to accept it. If he can't make that statement then I ask Your Honor direct the government to review all their records and then make the statement so they can't come in two, three, four or five months from now and saw we forgot to look in the last drawer of file cabinet 15.

MR. SILBERT: If Your Honor please, first of all I know of no law that says we have to review and go out hunting for defense material to prepare t h defense case for them. I know of no case that requires t hat.

Insofar as any material has come across our desk --and when I say our desk I am talking about the three attorneys representing the United States before you-- and I just asked them after Mr. Bittman made the request. I can't say I know every single document in the case personally. I think between us we are familiar with the evidence that has been gathered that we have had an opportunity to look at, and on the basis of that I reiterate the statement that I made to you previously. But as to whether or not I have to go hunting for files to determine whether or not there may be possible Brady material, the defendants seem to think this is a one way street, that they can lay back and do nothing, don't have to investigate, don't have to talk to witnesses, don't have to go to the scene, don't

have to do anything, the government has to do everything for them. That is not the law and never has been, but on the basis of what we know, that representation I am willing to make.

THE COURT: On the basis of what you know and also besides the fact in two weeks we will have another pretrial I would suggest if you don't have time personally to do it, get one or two of your assistants and put them to work on the exhibits and evidence and see if they can find any Brady material and you can report back two weeks from tomorrow.

MR. SILBERT: Yes, Your Honor.

THE COURT: Now, anything further on that point?

MR. JOHNSON: May it please the Court, if I might?

The significance of the late production of Jencks material, Your Honor, is that as Mr. Silbert pointed out it puts the defendants in a distinct disadvantage insofar as the investigation is concerned. It may well be that material discloses points which the defendants may want to investigate but may not have the time to investigate. I think that may be of more significance, Your Honor, than the opportunity for counsel to simply review this material.

THE COURT: All right, I think you will have plenty of time to do your investigating.

Item No. 8 --Scheduling of preliminary hearings relating to defendant Hunt's motion for suppression of evidence and the possible appearance of M. Douglas Caddy as a government witness.

This was requested by the defendants. Does anybody want to talk about that?

MR. BITTMAN: Yes. Your Honor will recall at the time of the argument in the pretrial motions I asked to have the evidentiary hearing with respect to seizure of certain material from Mr. Hunt's safe at the White House to be held immediately and Your Honor indicated at that time the hearing would begin after the jury is selected.

THE COURT: But before they are sworn in.

MR. BITTMAN: But before they are sworn in. And so obviously we don't have to discuss that. One thing I would like to ask Your Honor is the fact that certain White House witnesses that will be necessary to testify at that hearing, that the government make the arrangements to have those witnesses testify. This is customary in motions to suppress and taint hearings.

THE COURT: Will you give them the names of the witnesses you will need?

MR. BITTMAN: Yes, Your Honor, and if they will make them available I would appreciate that.

MR. SILBERT: No problem with that, Your Honor.

MR. BITTMAN: I would also, Your Honor, like to have a hearing before the witness Douglas Caddy testifies. I think there are some very serious issues that are presented with respect to that testimony, issues which are not the same as that presented to the Court of Appeals o n the earlier occasion. Mr. Silbert

refers to that as the law of the case. I don't see it as the law of the case at all. The Court of Appeals directed itself to the facts that there were certain questions that could be asked and should be answered to relate whether or not there was a bonafide attorney-client privilege between Hunt and Caddy. Now the government has taken that opinion as Pandora's box to ask Mr. Caddy anything and everything they wanted. This was Mr. Hunt's attorney, I don't think the government disputes the fact and I think there was some serious questions and I am fearful if Mr. Caddy testifies before this jury and then eventually the testimony has to be stricken I think the entire proceedings might be tainted to the extent a mistrial will have to be granted. No one wants a mistrial.

THE COURT: Well, that can be handled if it becomes necessary if during the trial the Court believes you should examine Mr. Caddy out of the presence of the jury first that can be handled if I feel that way.

MR. BITTMAN: That is what I am asking for Your Honor, a voir dire hearing.

THE COURT: I might decide you can do that. I will not decide at this point. It depends on the nature of the evidence and many other things.

MR. BITTMAN: Fine. Thank you.

THE COURT: Item No. 9: Schedule for reciprocal discovery pursuant to Rule 16(c) Federal Rules of Criminal Procedure. Mr. Silbert.

MR. SILBERT: If the Court please, some of this material has already been referred to. This came up during the argument before Your Honor on October 25th and Your Honor ruled with respect to any defendant that wished to get 16(a)(2) discovery and 16(b) discovery from the government that he would be required to give reciprocal discovery pursuant to Rule 16(c) in return.

At that time, if the Courtplease, it was after a period of ten days. That applied specifically to the defendant Liddy. Defendant Hunt through his counsel, Mr. Bittman, withdrew his request for discovery, 16(b) and 16(a)(2). Subsequent to that time, if the Court please, in an informal conversation between myself and Mr. Bittman, he agreed to the procedure that basically Your Honor had set out with respect to Mr. Liddy. So far as I understand therefore, all counsel have agreed to that procedure.

As I mentioned earlier, on November 9th I mailed a letter to all counsel for the defendants which I would request be made a part of the record just so it shows things have been done, with respect to discovery, and I mentioned that all the material relating to 16(a)(2) and 16(b) discovery was available for defense counsel to come and avail themselves of for inspection and once they did this we would then be expecting our reciprocal discovery as ordered by the Court, and that one of the purposes of doing this as quickly as possible would be to expedite the possibility of any stipulations counsel might be able to enter into.

As I mentioned previously to Your Honor, counsel for Mr. Liddy with their clients have been down several times to examine the material. Mr. Bittman has been in. Thus far counsel for McCord and t he four defendants from Miami have not been in to examine any of the material.

I have sent out to all counsel all th scientific and other expert kind of reports such as FBI fingerprints and handwriting. I mailed that to all defendants representing the clients. That is 16(a)(2) discovery on request as I mentioned, all the documents that we intend to introduce into evidence, some o fwhich are admittedly difficult to read from photocopies have been sent to counsel for Mr. Liddy and counsel for Mr. Hunt.

And I might also say at this time statements of the defendants given before the grand jury or to agents of the government, 16(a)(1) discovery have been sent to all counsel, specifically to counsel for Mr. Liddy, counsel for Mr. Hunt, counsel for Mr. McCord and counsel for Mr. Martinez. So I think all that discovery by the government, its obligations, its responsibilities have been complied with and we are simply waiting for defendants to come in and complete their examination and inspection of our documents and tangible items.

We would 1 ike at this time to have a date set on which they are to comply with Your Honor's ruling pursuant to 16(c) to let us know, give us all the documents,tangible evidence they intend to introduce in evidence at trial.

THE COURT: Mr. Bittman, I'11 hear from you first on that.

MR. BITTMAN: Yes, Your Honor. The problem we have here, Your Honor, is that Mr. Silbert has not turned over to us all of the documents. There are a number of documents they intend to introduce into evidence they apparently have not turned over to us. Mr. Silbert in our initial discussion many weeks ago indicated why don't you examine everything here and tell me what you want and I will xerox it. I told him if he would make a copy of everything and send it to me. He has not done that. He has obviously made good faith efforts and sent a number of documents but not everything. I am willing to comply with the reciprocal discovery provisions after the government indicates they have sent everythin g to me. I don't want to go to Mr. Silbert's office with my client and review whatever documents they have in their office, I want to do it in my own office. I have indicated that to Mr. Silbert and he told me there would be no problem with that procedure. But I assume because of administerial matters and problems he has not been able to do so. I do understand there is a number of documents that have not been sent to me.

MR. SILBERT: If Your Honor please, I think the sole exceptions have been what we referred to previously as the photographs, the copies of the view, the general scene type, like aerial photographs and some of the other photographs that will

be introduced in evidence. But so far as the documents are concerned with perhaps one or two exceptions, to my knowledge everything we intend to introduce in evidence, not everything seized but everything we intend to introduce in evidence has been sent to him. If something is missing, you know, we would be happy to go back and check but we have made a good faith effort to try and determine everything we are going to use. There may be one or two documents and if we come across them, if there are any we discover we are going to introduce we'll send them.

MR. BITTMAN: Your Honor, I don't think he turned over any documents to me that were seized at the time of the arrest of the five defendants.

MR. SILBERT: If the Court please, I believe there were four pieces of paper, and I am more than willing to --

MR. BITTMAN: --excuse me. Your Honor, I believe there was other information seized, it has been in the newspaper. There were things that were seized on the persons of these people other than four blank pieces of paper. I don't have the four blank pieces of paper, but I don't believe I received the other information seized from certain defendants arrested the night in question.

MR. SILBERT: Ifthey were like driver's licences or something like that, we consider that tangible evidence, that is not documentary evidence. They can come in and look at that just like they can come in and look at the screwdrivers, something like that, they can come in and look at it, the wallet, they

can come in and look at it, but papers, documents, you know --

MR. BITTMAN: --Your Honor, I understand there were certain documents seized from the defendants that had my client's name on it. I assume the government is going to attempt to use that in evidence and I would like to have that turned over. These are documents.

THE COURT: I don't know what they have. Why don't you two sit down in your office, say here, this is what we have, do you want a copy of this? Get them a copy of it. You might find a lot of things are immaterial, like a wallet, something you are looking for which the government might offer in evidence anyway, I take it.

MR. SILBERT: I think,Your Honor, they will be able to determine what they need from our exhibit list.

May we say this: after we give them the final exhibit list which we will do before the next pretrial --

MR. BITTMAN: --Your Honor, we need it before then.

THE COURT: Just a second. Maybe I better get something out of my system right now before we start this long trial. I was going to tell you this at the bench after we get the jury.

Now you have been in my court a lot of times, Mr. Silbert. Mr. Glanzer has. I will not permit these colloquys back and forth between the lawyers because we don't get a good record that way. If you address your remarks and objections to me I will give each of you an opportunity to talk and I don't want one lawyer interrupting the other lawyer while the lawyer

is speaking because you can see the c onfusion that causes, the record isn't clear at times and things appear in the record that sometimes a lawyer doesn't say. We can't expect the reporter to report 2, 3 or 4 people talking at the same time. So I will enforce that rule strictly. I have been liberal on it in these informal hearings but I will have something more to say about that at the proper time.

MR. BITTMAN: I apologize, Your Honor, I was at fault.

THE COURT: I understand, you didn't mean it intentionally. All right.

MR.SILBERT: Your Honor, may I represent this to the Court? Your Honor has set a pretrial conference for December 19th, two weeks from tomorrow. One week prior to that we are ready to make available a list of 140 exhibits today. By next Tuesday we will have the rest of all the exhibits, copies set forth, provided for counsel for the defendants. Would Your Honor then set a date, say of ten days from that as requiring reciprocal discovery?

THE COURT: Is that agreeable?

MR. BITTMAN: It is agreeable with me, Your Honor, except why can't they give it to us a week from today? The trial is almost a month away.

THE COURT: Can you get it this week?

MR. SILBERT: Your Honor, depending on the length of the pretrial conference today, if we end at an early hour we might

be able to. Other than that, all three of us will be out of town for the rest of the week.

THE COURT: Try to do the best you can.

All right, let's proceed and try to get as much completed as possible here. Is that all to be said on Item No. 9 now?

Now, Item No. 10, this was requested by the government, states: Response of defendants Hunt and Liddy to the Government's demand for information concerning the possible use of an alibi defense. That relates to the substantive Counts 2, 3 4, and 5. I have read the memoranda that has been submitted in support of the government's position and the objections.

MR. SILBERT: If the Court please, as we indicated in our renewed demand before Your Honor we are simply at a loss to understand what the basis for the defendants' objection to compliance with the rule.

THE COURT: Let me interrupt you, maybe I can save time. Let me hear from defense counsel on this point. Mr. Maroulis? You seem to take the position because the theory of the case is that Mr. Liddy and Mr. Hunt were aiders and abettors, therefore you don't have to set forth or answer this question about whether you are going to interpose an alibi defense, is that correct? In substance you say that, don't you?

MR. MAROULIS: Substantially.

THE COURT: I don't understand your argument in this case.

MR. MAROULIS: Well, it would seem, Your Honor, an alibi defense would only --I withdraw that.

It would seem that notice of intention to rely upon alibi would only be required in a circumstance where an alibi defense would lie. If the government claims that the defendant Liddy was an aider and abettor of a passive variety as opposed to an active variety, and I will explain what I mean by that. By passive, what I intend to mean is a man who gets involved in aiding and abetting for example by planning or by providing funds, or by providing burglar tools and by active I mean an aider and abettor who actually participates in the transaction whose presence is necessary at the scene, for example, a look-out man, or driver of a get-a-way car, something along that line. That is the sense in which I am using those words.

If the government contends that the defendant Liddy was a passive aider and abettor, then it makes no difference where Liddy was. He could have been in Siam, he could have been in London, or in New York City and that would be no defense whatsoever to him.

On the other hand, if it is the government's contention that Liddy was an active aider and abettor whose presence was necessary within the confines of the space that they claim he was in, then it makes sense if Liddy is going to claim he was elsewhere that he should comply with the rule.

THE COURT: I think you are getting pretty technical on this point. It seems to me it comes down to a question of common sense.

If the government can establish and the government has indicted Mr. Liddy and Mr. Hunt as principals in connection with the second, third, fourth and fifth counts, correct?

MR. MAROULIS: Yes, sir.

THE COURT: They are indicted as principals along with the other defendants. If the government can establish --this remains to be seen-- either by direct or circumstantial evidence, either by prearrangement or somehow that Mr. Liddy or Mr. Hunt, or both were in on this plan to enter the offices of the Democratic National Committee, but they didn't actually go into those premises, if the government can establish as I said and submit sufficient evidence to get to the jury on that point, it doesn't make any difference whether Mr. Liddy was across the street, if those are the facts, or two blocks away.

Take the simple example, hypothetical set of facts which I try to give to the jury in these robbery cases sometimes so they will understand what we are talking about when we say a defendant was an aider and an abettor. What does the average juror know about aiding and abetting? It is a very technical thing but after you give them a set of facts which are hypothetical of course, then they understand.

Let's assume five men get together in the Washington

Hotel today over a drink or two --five robbers, and are going to hold up the Riggs Bank at 3:00 o'clock this afternoon. And they scheme and plan that John Brown among the five will get an automobile to drive the four robbers to the bank. John Brown will go up to 15th and H Streets about a block away, he will drive them away after they rob the bank. Two defendants will be outside the bank as look-out men and two going in with guns. The two with guns go to the teller and say stick'em up, this is a hold-up, give me the money or I will kill you. And they get the money and four of them meet outside. The four go up to the automobile at 15th and H by prearrangement. The man at 15th and H is just as guilty as if he had actually gone into the bank. It doesn't make any difference whether he had a lesser part in the commission of the crime or not, he is just as guilty under the theory of aiding and abetting.

Now, under those set of facts wouldn't the government be entitled under the rules to say to the defendants' lawyer, assuming he is going to try to establish an alibi, the man who drove t he robbers away, the rule provides how you go about it and the government served notice on you and co-defendant Mr. Hunt, we want to know whether you are going to interpose a defense of alibi and you come along with the argument and say you don't have to answer it. I don't follow you. I don't think it makes a bit of difference if Mr. Liddy --if facts prove this-- is a block away or two blocks away, or a mile away. If he was in on

this scheme or plan the government is going to try to prove, they were going into the premises for whatever reason they went in, he would be just as guilty as the man who was actually caught in the premises. I don't think there is any question about it. That is the theory of the government's case.

MR. MAROULIS: Your Honor, if I might address myself to the hypothetical you have given, under the hypothetical case that you gave I have no disagreement whatsoever. I would say that is an entirely proper case in which an alibi demand could be made and an answer should be given. However, if you were to change the hypothetical a bit and have a sixth man in on the scheme whose job it was simply to plan the deal and send off the five men to do the job as you described, and this sixth man could then go to New York or go anywhere, or he could if he wanted to if he was curious, go to the bank to see that the job was pulled off properly. But his participation in the crime would have been complete at the time he sent everybody off to do his job.

I would say under those circumstances you would have a passive aider and abettor whose presence or absence from the scene of the crime is irrelevant insofar as it affects his guilty participation and his guilt or innocence.

And that is the position that I have taken on behalf of the defendant Liddy. I say that before a defendant is required to answer whether he is going to raise an alibi defense

or not the government must make clear whether it intends to show in its proof that Liddy's presence or absence from the scene is an essential element of the crime.

THE COURT: You can take care of that at a motion for judgment of acquittal at the end of the government's case, If you don't think the evidence is strong enough or sufficient to go to the jury you offer the motion. But you have got to give the government the opportunity to put the evidence in. They can't do it all at one time. It must be done piecemeal. Especially in a case charging conspiracy with substantive counts.

MR. MAROULIS: If I might focus in onthe problem from a different point of view, there are certain crimes which would require a court to charge that the defendant's presence at the scene is a necessary element of the crime. For example, a crime of assault where one man is accused of assaulting another man, and we are not talking about any agency problems, where John Doe is accused of assaulting a victim physically. If John Doe can demonstrate that he was elsewhere it becomes very, very material to whether or not the prosecution can prove its case. However, where the defense of alibi would be irrelevant John Doe need not set forth whether he has an alibi or not.

That is my approach to it.

THE COURT: I don't agree with you. The government is entitled to know. Maybe Mr. Bittman has something to say.

MR. BITTMAN: One short point, Your Honor.

I think the true distinction in this case is the fact that the government does not state that either Mr. Hunt, Mr. Liddy were in the Democratic Headquarters. In the bank robbery case they say you were in the bank, you are going to put in an alibi defense you were not at the bank, is one thing. But if we come in and say we are not going to have alibi defense, their witnesees can say anything. They could say he was across the street, up on the 15th floor, over here, and that may not be true. We can't waive that kind of defense. If they say Mr. Hunt was right there --

THE COURT: --right where? What do you mean?

MR. BITTMAN: I am saying if they can state in their motion with specificity, with some precision, where they contend Mr. Hunt was then we can focus on the point whether or not we have an alibi or not, but the government in this instance wants their cake and eat it too. They say we don't know where he was, we are not going to tell you, he was some place one or two blocks of the Watergate, we want you to waive all alibi defenses which gives their witnesses carte blanche. Joe Blow can take the stand and say Mr. Hunt was one place and Mr. Liddy another. Maybe they weren't, and we have a viable defense to that.

THE COURT: But you don't want to tell the government the names of your witnesses to that which you would call alibi.

MR. BITTMAN: Your Honor, the burden of proof is on the government. In order for me to put on that kind of response

for their request for alibi I want them to tell me where their proof indicates Mr. Hunt was. If Mr. Hunt was there in fact allegely and we don't have an alibi defense we will so state. But the government can't do it in a vacuum. They can't say he was someplace which could be anywhere in a quarter of a mile and we are supposed to waive alibi defense. I just don't think that is right. I don't think that is the intention of the rule. The rule is if you are robbing a bank are you going to say you robbed the bank or aren't you.

THE COURT: Let's take a look at the rule, Rule 87 of our rules which says:

> "When a defendant in a criminal case proposes to offer the defense of alibi he shall unless the judge at pretrial directs otherwise, upon written demand of the prosecutor stating the time, date and place at which the alleged offense was committed, serve upon the prosecutor within 20 days a written notice of his intention and shall state therein the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi."

Paragraph (b):

> "Within ten days thereafter the prosecutor shall serve upon the defendant or his attorney a written notice stating the names and addresses of the witnesses

upon whom the government intends to rely to establish the defendant's presence at the scene of the alleged offense."

It is pretty clear, unambiguous language.

MR. BITTMAN: Yes, it is, Your Honor and I think the government's obligation is to show the place. I don't think they can say somewhere on or about the premises. I am not willing to buy a pig in a poke.

THE COURT: Didn't they say in answer, I think to one of the motions as to the defendant Mr. Liddy that he was within a block of the Watergate? I believe there is something to that effect.

MR. BITTMAN: Yes, Your Honor. That gets back to my analogy. If they have a witness, either they have a witness or they don't have a witness, let's get down to basics.

THE COURT: Look, Mr. Bittman, I can't take an axe and split your head down the middle to see what you are thinking, but you are either going to have an alibi defense, if it is a true defense, I am sure you wouldn't put anything other than that, or not guilty, didn't do it, you don't have to put on any alibi defense.

Now, if the government has evidence and it comes down to the question of what kind of evidence they have, they can show a plan or scheme, or conspiracy, put it thatway, agreed upon among these defendants, prior to the commission of this alleged

offense that each one was to have a certain part, and Mr. Liddy was part of the scheme, assuming he was for purposes of the argument, and Mr. Hunt, but were not actually to go into the premises but were doing certain things --giving aid and comfort, aiding, assisting, I don't have to go through the whole thing-- it wouldn't make any difference whether either one or both were two or three blocks away or across the street if they were in on this kind of scheme or plan. Each would be equally guilty as a principal offender.

MR. BITTMAN: I agree, Your Honor, but we are talking about culpability or guilt. We are talking about whether or not we are required to in advance of trial to indicate whether or not he has an alibi to some indefinite place where Mr. Hunt might have been.

THE COURT: Let me ask counsel --

MR. BITTMAN: --and I would like the government to cite a case where the defense had to set forth an alibi defense where they did not set forth with some specificity where they contend the defendant was. There is no such case.

THE COURT: I think the burden is upon the defendant.

MR. BITMAN: No, Your Honor, I respectfully disagree. The burden is on the government. What happens if the defendant is up in New York? You mean to say they can come in and say we want an alibi, you state you want to know when they don't tell you where it is he is supposed to be?

THE COURT: The rule says: when a defendant in a

criminal case proposes to offer defense of alibi. Suppose you want t o prove Mr. Hunt was in New York at the time this occurred and you are able to do it, wouldn't that be alibi?

MR. BITTMAN: Yes, but normally when you put on alibi defense you know what the government's factual assertion is. In this case the government says we are not going to tell you where we believe he was, he was someplace in the general vicinity.

THE COURT: Suppose the government had to do all that with bank robbers and they say Mr. Defendant, this is what we know about you, you were at such and such a place when the crime was committed,now you come around and tell us w hat you are going to put in on. Why should the government tell you what the evidence is? That is whatyou want them to do.

MR. BITTMAN: Yes, Your Honor, that is the way it is done.

THE COURT: I don't agree.

MR. BITTMAN: I think generally the government says A,B, and C you were arrested in the bank. You going to put on an alibi you were in the bank or not? That's the way it is done. What Your Honor is getting close to saying is that a conspiracy case the government can ask you for alibi with respect to each and every overt act, did you have that conversation? Were you in such a place? There is no precedent for that.

THE COURT: Listen, this is a two-way street as you know as a former prosecutor and a defense lawyer. The government

by this rule should have the right to know if you are going to put in an alibi defense -- period. It is that simple. If you are going to put it in they are entitled to know the names of your witnesses in order to meet that defense.

MR. BITTMAN: But it depends upon Your Honor what the government's proof is.

THE COURT: You want to know what their proof is first before you decide whether to put in the alibi defense, isn't that your position?

MR. BITTMAN: That is --

THE COURT: --isn't that your position? Just a minute, before you answer that question. And file the answer to their request, you want to know what their evidence is, isn't that your position?

MR. BITTMAN: I would say in oversimplification, yes.

THE COURT: Yes, that is yo ur position. I don't think the government is obligated to do that.

MR. BITTMAN: I am saying the government either has this information or they don't. If the government does not have the information where my client was I don't think they can insist I put on alibi defense just by asserting they want an alibi whether we are going to put that defense in or not. If the government knows they have the obligation of saying we believe that Hunt was here, at this corner, or in this room, or something. Now, if you have an alibi defense that he wasn't there, tell us. But I don't think they can do it in an abstraction.

THE COURT: Let's follow this out to a logical conclusion. Take the example that I gave you about the five bank robbers. I think you will admit if the government were able to prove the facts as I delineated them they could make out a case to go to the jury as to all defendants.

Suppose that defendant who was up there at 15th and H Streets wanted to put on an alibi defense that he was home sleeping and brought in his mother, his brother, etc., which a lot of them do as you know. Suppose the government was put to the burden of telling that defendant first, Now, Mr. Brown, here is the evidence we have against you that you were at such and such a place a block away from the Riggs Bank. Officer Brown and Smith said you were there, this is our evidence. Do you think he is going to come in with the alibi defense that he was home asleep? He is going to move around some other way.

MR. BITTMAN: Your Honor, I think you made my point for me. If the government believes someone was driving the get-away car, they say we won't tell you what evidence we have that you did drive the get-away car, we are not going to tell you, we just believe you were an accessory. You tell us you have an alibi to being an accessory. They don't even know about 15th and H. I am contending is the government knows he is at 15th and H with a get-away car, then they can ask the defense you can put an alibi in as to whether or not you were at 15th and H. They can't say, look, we know you were driving the get-away car somewhere within a half mile radius, now are you

going to put in a alibi defense that you weren't within a half mile radius? This is what the law does not contemplate and the rule does not contemplate, and this is what the government done in this case.

THE COURT: You haven't convinced me yet.

MR. BITTMAN: I would like to have the government cite one case to the contrary.

MR. ROTHBLATT: Judge, may I interject a comment?

THE COURT: This doesn't apply to you now.

MR. ROTHBLATT: I agree, there is no question, but I am so tempted in this discussion because it has come up in cases where I have been affected.

I want to give Your Honor what I think is a simple answer to this whole problem. I have contended where the government demands a defense proof of alibi in advance of trial, what the government is saying in effect is we want to discover with specificity your defense before we tell you what we intend to prove. And if that is the government's contention I say that that rule/would require a defendant to do it would violate his privilege against self incrimination because there is no burden at any time about the defendant giving any proof or telling the government anything. First the government must say we claim you are there. I would suggest we agree completely with Mr. Bittman the government knows what its theory is. You say you were sticking up a bank, you were in a restaurant, say it. Then you

say it, we told you what our theory is, tell us what you intend--

THE COURT: --haven't we got a similar situation with respect to socalled defense of insanity now under the rules? I think we have. You want to say anything?

MR. SILBERT: I do, Your Honor.

First of all, if the Court please, we have set out in pleadings filed with this court with respect to the second, third, fourth and fifth counts of the indictment that between the hour of 1:00 a.m. and 2:30 a.m. the defendants were within or in one block of the Watergate complex.

Now, the rule that Your Honor referred to refers particularly in the obligation of the prosecutor to establish the defendant's presence at the scene of the alleged offense. We don't have to say the exact spot within a yard area where he was. The Watergate complex obviously was the scene of this offense. We have said where he was, we have said the time that he was there. So far as alibi is concerned there is no mystery as to defendants Liddy and Hunt. Either they were within that small area or they weren't. And if they are going to allege with respect to those four counts of the indictment that they were not, that is the purpose of this rule. We have followed the rule of this court to the letter, making our demands, specifying the time and location. We are not going to say to them when they say/where they were as required by the rule under 87(a) you have to give us a five yard area. Obviously they can give a general

area where they were commensurate to a building or street, something like that. That is what we have done, that is what we expect they should do in compliance with this court's rule.

THE COURT: All right.

MR. MAROULIS: Your Honor, the problem as I see it and the problem that it has caused me is this: initially the question must be asked and answered: is alibi a defense?

Now before any alibi notice can be given that question must be raised and answered. And only if the answer is in the affirmative can one even begin to think of complying with an alibi notice. That is why in the case of an aider and abettor it becomes very, very important to know what the theory is, whether the theory is active aiding and abetting or passive. The question as to where the defendant is alleged to have been is most important and that is required by the rule.

THE COURT: Let me interrupt you. He has told you by an answer --Mr. Silbert-- that your client was within a block, we'll say of the Watergate, correct? Now you know the rule of law that goes something like this:

> Mere presence by a defendant at the scene of the commission of a criminal offense in and off itself is not sufficient to base a verdict of guilty upon.

We know that. You have to have more than mere presence. You have to have some evidence that he was there either by prearrangement, or to lend encouragement, or he knew it was going

happen, or he paid somebody some money to do what he didn't want to do personally, things like that. I don't know what is coming out in this case. You have to show more than mere presence within the block. You have to show some participation on the part of your client Mr. Hunt in this alleged conspiracy to burglarize or whatever they did in the premises there.

Now, take the example I gave before about the bank robbery which I tell the jury quite often in this type case. Suppose a man who went up and said, with a gun, to the teller: give me the money or I'll kill you. Suppose a depositor who would be standing by at the moment, that depositor would be present at the commission of an offense but wouldn't be guilty of anything because he was present. You couldn't convict the depositor because he was next to the defendant.

If your client happened to be there within that block and wasn't committing any crime or anything, what is he guilty of? Nothing. But the government wants to know, and I think they have a right to know if you are going to say my client was in New York at the time this crime was committed, or was home in bed, would bring his wife in, etc., they have a right to know that according to this rule so they won't be taken by surprise and you have a right to know if they have any witnesses. Then after you furnish them with a list of your witnesses to support your alibi. It is that simple. Look at Mr. Rothblatt

smiling over there. Maybe he is agreeing with me, I don't know. He doesn't have that problem, he has a different problem.

MR. MAROULIS: Your Honor, I quite agree that the presence is one item and the next item is what was the person doing there. I think that is what Your Honor was driving at.

THE COURT: Let's find out what the evidence is, let's don't anticipate what might happen. I say now if you are going to try to prove your client was not within a block of that Watergate, tell the government and they will reciprocate and give you the witnesses and tell you where they contend he was. There is no surprise about this. It is a two-way street. The government is entitled to a fair trial too besides the defendants, in this court anyway.

Let's recess for lunch till, say 1:45.

(Recessed at 12:50)

AFTERNOON SESSION -- 2:00 p.m.

THE COURT: All right.

MR. SILBERT: If the Court please, with respect to the last matter that Your Honor handled just before the luncheon break as to the notice of alibi, can Your Honor set a date for that to be done by the defendants and as we have indicated before, once we receive that notice we won't even wait for the ten days to which we are entitled but will make it available immediately. The government is entitled to ten days and defense is supposed

to reply twenty days after the initial request by the government. Of course that was made on October 24th and this is now a month and a half since it was done.

THE COURT: I think they ought to be able to reply within a week, it shouldn't take longer than next Monday.

MR. BITTMAN: I didn't understand Your Honor ruled yet --

THE COURT: --just a minute. I thought I had in effect ruled on it. I think they are entitled to know whether or not you are going to interpose an alibi defense. I will give you a week to answer.

MR. BITTMAN: Without one citation from the government as authority for this --

THE COURT: I think the rule is clear and unambiguous. I think they are entitled to know whether you are going to have what is known as an alibi defense.

MR. BITTMAN: I assume then, Your Honor, on behalf of Mr. Hunt, we refuse to answer that question that any such appearance would not be permitted during the course of the trial?

THE COURT: All you have to do is read the rule, Mr. Bittman, what happens if you don't give them the information within a certain amount of time;and they served this on you sometime in October?

MR. BITTMAN: Yes, Your Honor, but an opposition was filed and never ruled on. As long as the opposition was

pending we were not under any compulsion to turn over any information to them.

THE COURT: All right, I will give you the ten days from today --that would be the 15th. The government will have one week after that, till the 22nd.

The next item on the agenda is No. 11, and this was suggested at the request of the defendants:

Subpoena to the Los Angeles Times for production of materials relating to Alfred C. Baldwin III.

MR. BITTMAN: Yes, Your Honor. You will recall when the motions were argued before Your Honor that I made the request to subpoena the Los Angeles Times for certain documents, etc., in their possession relating to their some six hour interview of Mr. Baldwin. The reason of course that I so moved was because we learned at that time that Mr. Baldwin had in his possession a tape recording of the interview that allegedly, so the affidavit states, at the request of his attorney he destroyed it, which I think raises other problems.

In any event Your Honor indicated that we could issue that subpoena. Approximately a month ago --little less than a month ago-- I sent to Your Honor an order in a draft copy of that subpoena which I thought was appropriate. I also sent copies to the other attorneys and also to Mr. Silbert. As I understand, Your Honor does not want that subpoena returnable until the trial begins. I mean no order has been entered giving

us the right to serve the subpoena, number one; and also I understand that the return day would be after the jury is empaneled. I believe that this seriously prejudices our rights.

As I said, Baldwin is the key government witness. He himself destroyed this tape recording and the problem that I have with this contemplated schedule, Your Honor, is the Los Angeles Times in the newspaper has taken the position that they are going to fight this subpoena through the courts. Baldwin is the key government witness. It is essential we have whatever information we can get in order to effectively cross examine him.

THE COURT: Let me interrupt you to see if I can get your thinking on this.

This is not a case where you are trying to discover the source of information because you know the source.

MR. BITTMAN: We know the source.

THE COURT: Mr. Baldwin allegedly gave the statement to the Los Angeles Times and therefore as a result of that the Los Angeles Times published his story, or statement?

MR. BITTMAN: There were a series of articles run by the Los Angeles Times.

THE COURT: I think that run all over the country, including the local media.

MR. BITTMAN: It did.

THE COURT: Is it your contention that the reason you need this information is because you want to find out what Mr. Baldwin told the reporter from the Los Angeles Times for the

purpose of ascertaining whether or not there are any inconsistent statements which you could use or would use on cross examination of Mr. Baldwin which might go to his credibility as a witness, is that the purpose of your seeking this information?

MR. BITTMAN: That is principally the purpose but not the only purpose, Your Honor.

THE COURT: What is the other purpose?

MR. BITTMAN: To endeavor to find out what other information he has given so we can conduct some meaningful discovery before this case going to trial.

THE COURT: For example?

MR. BITTMAN: Perhaps Mr. Baldwin told the Los Angeles Times of another witness that might have some relevant information in this case. I would then like to go to that other witness and interview him. But as Your Honor correctly indicates, principally impeachment. Before he gave his statement to the Los Angeles Times, I assume he had been interviewed by the FBI, I assume he testified before the grand jury, and I also have strong feelings because there was a court order outstanding which in my opinion prohibited such a disclosure by a government witness. But in view of the fact the government witness himself and/or through his attorney destroyed the six-hour tape recording which he had, it is incumbent upon us to adequately prepare for trial to have this information.

Now the real problem I have is a tiny point of view. In the draft subpoena I sent Your Honor the return date was approximately a week after I sent the order and draft subpoena to Your Honor. Now if the Los Angeles Times challenges the subpoena in the Court of Appeals and then to the Supreme Court, assuming they lose, and I am confident they will lose, our trial will be over with before we receive the information. And therefore we will be severely prejudiced in not having this information readily available for use at this trial for impeachment of Mr. Baldwin. That is what bothers me.

They have been on the record saying they will challenge us in the courts. That is the reason I want an early return date so if they take it to the Court of Appeals we can then immediately ask the Court of Appeals to expedite it through the courts because of the pendency of this trial and if necessary expedite it on a petition for certiorari. I believe the case law is clear that we are entitled to this information.

But if Your Honor continues to take the position that the return date doesn't have to be until the trial begins we will be completely frustrated and will have to be arguing the case in the Court of Appeals and possible the Supreme Court the same time the trial is going on. But more important, there may not be a decision before the trial is over with and our hands will be tied with respect to cross examination of Mr. Baldwin. And very essential impeachment evidence will be denied to us.

THE COURT: I understand your position. Mr. Silbert, do you have any comment on that?

MR. SILBERT: If the Court please, again so the record is clear, the affidavit was filed by Mr. Baldwin makes it clear he did it on advice of his own attorney and we have nothing to do with that.

As to the timing of the request by counsel for the defense, Mr. Bittman, to us there is some sense to it in the sense if there is this litigation arising as we anticipate there may be prior to trial, it may delay the course of the trial particularly if they go to the Court of Appeals or to the Supreme Court, you know, depending on the outcome in the Court of Appeals, or either side might go to the Supreme Court in that situation.

On the other hand as we see it, the disadvantage is to engender more potential pretrial publicity and that is something, it is a balancing kind of proposition.

THE COURT: That is one thing I had in mind, frankly, trying to keep down the publicity as much as we can.

MR. SILBERT: But so far as to resolve the issue and not delay the trial, for example, we already have at least three issues coming up after the jury is selected --the motion to suppress the evidence seized from the White House, perhaps some eye witness identification problems but we don't really anticipate they will be extensive --

THE COURT: --excuse me. Let me have that case. (addressing law clerk)

All right. This is not a case where the defendants are attempting to find out the source of the information, we know the source of the information, it has been publicized all over the country. Mr. Bittman said they want it primarily for the purpose of possible impeachment. So we have a different situation than some of these cases that have gone to the Supreme Court where a reporter refuses to divulge the source of his information. That has been decided, don't you see.

However, in this particular case what I would like counsel on both sides to do --I will first ask Mr. Bittman and co-counsel to submit a legal memorandum on your position by next Monday, and I will give the government till the end of that week to answer. It shouldn't take you too much time. Then I will consider the matter and then I can, if I decide to issue the subpoena, can either make it returnable after the jury is sworn in if I think the defendants are on safe ground, or right.

You see one of the advantages of putting a witness on the stand after the trial begins, because the Court has jurisdiction of that witness, you understand. If the Court orders a witness to produce that evidence which he should have with him, that is the material subpoenaed, and the witness refuses to do it, you have the power of contempt --citation for contempt, and I could commit him to jail. They can take an appeal from that. This is one of the advantages of having a witness brought

into court and put under oath. Did you ever think of that?

MR. BITTMAN: Yes, Your Honor. He is under subpoena anyway.

THE COURT: I understand that. Talking about Mr. Baldwin will be under subpoena. You don't intend to subpoena the Los Angeles Times?

MR. SILBERT: No, Your Honor. I thought Your Honor was addressing himself to the representative or custodian of the Los Angeles Times or whoever --

THE COURT: --you didn't indicate the name of any person.

MR. BITTMAN: Your Honor, the names are on the subpoena and it is addressed to the Los Angeles Times and there is a corporate name also included.

THE COURT: Is there a local office here?

MR. BITTMAN: Yes, Your Honor.

THE COURT: Why wouldn't you want to serve a subpoena on the publisher or head of the paper and have him designate somebody to come here?

MR. BITTMAN: Your Honor, principally I think subpoena like this, civil rules provide that you can designate any authorized officer of the Los Angeles Times, in other words --

THE COURT: --this is a criminal case, you can subpoena anybody from different parts of the country.

MR. BITTMAN: I know, Your Honor, but the government sends out subpoenas like this all the time. You serve a subpoena on a corporation, you don't know who that man might be; this is the same situation so I did not name the publisher or the editor by name in the subpoena. I think any challenge to that subpoena would be frivolous.

THE COURT: I would like both of you to think about what I indicated. Would it be better to have the witness brought into court after the jury is sworn and when it is time to call him, ask him out of presence of the jury, of course, if he has produced the material. If he says he has or hasn't, let him take a position. Then I will let you argue the legal problems. Then if I think the defendants are right and I think he ought to be cited for contempt of court it is time enough to take care of the matter, you understand. The Court would have jurisdiction. I am not threatening to do that, I am just saying a great deal will depend upon the authorities you cite.

MR. BITTMAN: Yes, Your Honor. One thing I would like to mention, that is with respect to publicity.

Approximately a month ago I stated to your law clerk that all defense counsel felt this was a significant issue in this case, that if the serving of this subpoena or any legal proceedings as a result of serving the subpoena would generate publicity, that all defense counsel would waive whatever rights

they would have to that publicity. It was our feeling at that time if the subpoena had been served there would not have been such a magnitude to anyway jeopardize the rights of the defendants. The closer we get to trial of course the more of a problem. The problem we have here, let's assume hypothetically, that the witness from the Los Angeles Times is served with a subpoena and testifies and refuses, as they have indicated they will to turn over these documents, Your Honor certainly then can and has the power to hold him in contempt of court, but you don't have the power to force him to give us this information which is crucial to our defense. Then he would undoubtedly go to the Court of Appeals, ask to be released on bond, to be argued in the Court of Appeals, and perhaps then the Supreme Court. But then this trial may be over with and we are deprived of this information for cross examination. That is the reason I would simply again urge Your Honor before a legal memo on Monday, give us the right to serve the subpoena on the Los Angeles Times for a return date as soon as next week so that in the event they refuse to turn over this information we can immediately go to the Court of Appeals. And I believe Your Honor has the same power as in trial under Rule 17(c). You Honor can approve a subpoena to have certain documentary evidence turned over prior to the trial.

Implicit in that, Your Honor, is certainly the power of the Court to enforce such a subpoena once Your Honor gives

defense counsel permission to serve such a subpoena. This is 17(c) page 36 of the Federal Rules.

THE COURT: Maybe after they read the cases and understand what you are seeking --you are not seeking the source of the information --

MR. BITTMAN: --that is correct. We know the source.

THE COURT: Primarily you want to know whether or not Mr. Baldwin made any inconsistent statements to the Los Angeles Times which might affect his credibility as a witness on the stand.

MR. BITTMAN: Let me read this one sentence, Your Honor.

"The Court may direct that books, papers, documents, or objects designated in the subpoena be produced before the Court at a time prior to the trial, or prior to the time when they are to be offered in evidence, and may upon their production permit the books, papers, documents, or objects or portions thereof to be inspected by the parties and their attorneys."

Clearly Your Honor has the power to have the subpoena issued and have it returnable well before this trial. Then in the event they refuse to turn over these documents to me Your Honor will have the same power at that time that you would if the trial were actually taking place. And to me, Your Honor, the sooner we get to this the better off we will be.

THE COURT: I think first things ought to come first. I would like to have this memorandum from counsel on both sides.

I would like to have legal memoranda on this point from Mr. Bittman and the other attorneys for the defendants by the 11th, say early that morning at 9:30 and you ought to have until the 15th to answer. I think that will give you plenty of time and I will try to act upon it as soon as I can.

MR. SILBERT: Yes, Your Honor.

MR. ROTHBLATT: Judge, may I give you my thoughts on this question since it is so important?

Implicit in our right to subpoena witnesses as I believe this circuit said in Gregory vs United States is the responsibility of defense counsel to properly investigate a case before it goes to trial.

Now, what Mr. Baldwin said to the very able reporter of the Los Angeles Times who was able to get this statement, where he got this exclusive statement, could be most significant in our investigation which we wouldn't be able to do at the time of the trial and I only say this hypothetically: let us assume this reporter who interviewed him consistent with his ability in being a good reporter dug up a lot of unfavorable information that would be helpful to us --I am not saying it is so-- perhaps Mr. Baldwin was in a mental hospital, or was known to be a pathological liar and we can call witnesses to prove this, this goes to the heart of credibility. We would hardly have time to investigate this at the date oftrial. We ought to have this as

early as possible. And we assume that reporter did a very diligent job and we would like to have all the benefits so we can do a diligent job to properly investigate this case.

THE COURT: In the meantime, Mr. Bittman, I think you ought to try and find out, reconsider the question who you want subpoenaed, whether the publisher or president of the company, or some agent that they might designate, or the reporter himself.

MR. BITTMAN: I will, Your Honor.

THE COURT: That should be settled and we will go on from there.

MR. DYK: Your Honor, could I be heard a moment?

My name is Timothy Dyk, I am counsel for the Los Angeles Times.

THE COURT: Counsel, I would like to hear you but you are not party to this case yet.

MR. DYK: What I was going to ask Your Honor was if we could have the right to file a reply memorandum?

THE COURT: No, I don't think you are party to this case yet. If the time comes and the Court makes a decision on whether or not this reporter testifies or produces the materials, that will be time enough for you to come in and file whatever you want to file. But you are not a party to the litigation at this time.

MR. DYK: Thank you, Your Honor.

THE COURT: All right, No. 12. There is a request

by the defendants to strike prejudicial matter from the caption of the indictment. All right, Mr. Bittman or Mr. Rothblatt?

MR. BITTMAN: Your Honor, I believe the government in connection with drafting the indictment has resorted to tactics which could prejudice the defendants by putting the aliases in this indictment.

Clearly under Rule 7 all surplusage should be struck from an indictment. The Court has discretion to do so. But I think this goes beyond that, Your Honor. I have seen organized crim indictments where they say, "Joe, the Killer Rat, whatever his name is, and they put in all these socalled nicknames the mob apparently has in many instances.

In respect to the caption in any place in this indictment this is not part of the charge, they are not being charged with using a false name in the event they did, or aliases, and it is prejudicial that this indictment in part will be read to the jury, it may go back to the jury room depending upon Your Honor's practice. Some judges do and some do not. Clearly I think this is calculated to prejudice these defendants by the fact perhaps they may be from time to time used aliases.

An article recently in the newspapers indicated the Chief Justice of the Supreme Court traveled under an alias, so on its face there is nothing inherently wrong with it. But I think for the government to try to imply by the drafting up of

this indictment that these people are suspicious characters, or doing things that are improper, I think is absolutely wrong. I respectfully move pursuant to Rule 7 to have any and all references to aliases stricken from this indictment.

THE COURT: All right, sir.

MR. SILBERT: May it please the Court: we oppose the motion for two reasons.

First of all insofar as it is a motion brought pursuant to Rule 7, subsection (d) of the Federal Rules of Criminal Procedure it is dilitory and Your Honor previously ruled all motions would be filed long time ago. Defendants have had a copy of the indictment since it was returned I believe on September 15th and they were arraigned September 19th. So with respect to filing appropriate motions we submit the motion is out of time and should be denied.

As to the merits we think it also should be denied. Mr. Bittman has cited no case. We suggest to the Court that the cases are in our favor. I would like to cite to the Court the case of United States vs Adonizio, 313 Fed. Supp. 486 from the District Court of New Jersey. The case was affirmed on appeal, 451 F. 2d and certiorari was denied by the Supreme Court only this year.

THE COURT: That is the Mayers case? (phonetic spelling)

MR. SILBERT: That is correct, if the Court please.

In the course of the opinion the district court judge said with respect to a similar motion:

"The cases hold that where relevant the use of an alias in an indictment is permissible. In a pretrial motion to strike it should not be granted."

Similar to that case, two other district court cases, of fairly recent vintage, United States vs Johnson, 298 Fed. Supp. 58, District Court of Illinois, 1969; United States vs Machi 324 Fed. Supp. Eastern District of Wisconsin, last year, that is 1971.

Also relevant is a Second Circuit case by Judge Friendly, United States vs Miller 381 F.2d 529; certiorary denied 392 U.S. 929. All of these cases follow the line that I just indicated to Your Honor, quoted from the Adonizio case.

And if the Court please, we submit it absolutely is relevant and as the cases have also indicated if we don't bear out our proof that the aliases listed in this indictment are relevant they are always subject to a subsequent motion to strike in a curative instruction.

But just for example to show Your Honor as to the relevancy of these aliases, all of the five defendants who were arrested inside the Watergate gave different names than their true names when arrested. Four were registered under different names at the Watergate Hotel. These are the names we have set forth as aliases in the indictment. Six of the seven defendants

were registered at the Watergate Hotel from May 26th to May 30th and we have set under aliases what we contend were registered at the hotel during that period and we have set forth their aliases.

In our view the use of aliases is an integral part of the conspiracy and the scheme and we intend to prove in support of our charge. Therefore, consistent with authorities that we have cited to Your Honor we submit the motion of defense counsel should be denied.

THE COURT: All right, anything further?

MR. BITTMAN: Just briefly, Your Honor.

The government trying to say our motion isn't timely, here again I don't think the government gives up anything by not including aliases. For every case Mr. Silbert can cite I bet there are 50 examples where district courts on their own have struck these aliases, many cases I am personally familiar with never went up on appeal or did not give rise to District Court opinion and certainly the fact that something is relevant, Your Honor, they contend is relevant, doesn't mean that it has to be in the indictment. Why don't they put checks and financial transactions in the indictment? But they put aliases in only to prejudice the defendants.

THE COURT: Motion denied. The next item. No. 13 is at the request of the government: Request to prohibit any reference at trial to polygraph (lie detector) tests. I'll hear you, Mr. Silbert.

MR. SILBERT: If the Court please, the only reason for our listing this on a suggested item for pretrial conference is to eliminate it as issue from the case so no one, counsel or defendants or government or government attorneys, or any witness would through inadvertance refer to the fact during testimony or argument in front of the jury and thereby have an unwanted prejudicial effect on the jury.

As I am sure Your Honor knows the law in this circuit has been very clear since the Fry opinion of 1923 of our United States Court of Appeals that such testimony is inadmissible and as the Court may also know only less than a month ago on November 9th of this year the Court of Appeals reversed a decision of the District Court judge in this circuit who had in a written memorandum opinion held such testimony would be admissible, the United States took an emergency appeal and by per curiam order the decision of the District Court judge was reversed. And just for the record may I submit at this time to the Court, and I will make also available to all counsel for the defendants, a copy of that order.

THE COURT: Well, let's wait till somebody attempts to do that. I doubt they will.

MR. SILBERT: I am sure they won't, but we are trying to do it in advance so no one can claim I passed a lie detector test and it will be out before anything can be done with it.

I am sure counsel and defendants will agree not to mention it and we are satisfied as far as we are concerned.

MR. ROTHBLATT: Your Honor, may I be heard on this?

Polygraphs is one of the subjects my co-author Lee Bailey has spoken and written about and since it is relevant to this case I feel tempted to respond.

I would urge Your Honor that this application is a motion by the government in limiting to restrain us from making reference to it and I would make the same argument Mr. Silbert made, it is not timely, he hasn't complied with the rules, therefore, Your Honor should dismiss it as being not timely.

But let's get to the merits of it so we know where we are going. I would agree and I am familiar with the decision of your colleague in this court who wrote a very fine opinion and I am sorry what the Court of Appeals did do it, but there is still a decision come down from the District Court of Michigan; California has been writing in this area. Judge Winestein of the Eastern District of New York just admitted polygraph evidence.

Now, we maybe faced with this dilemma and since it is brought up it ought to be brought out. If this material we are attempting to get, 3500 material --I don't mean 3500 material, the FBI reports, 3500 and other material, we conclude some of their witnesses are lying and it becomes an issue of credibility against the testimony of our clients. I would, and will, and will do, submit my clients to a polygraph examination on those issues

and I will offer the government the opportunity to have their witnesses to be polygraphed by their expert examiners and ask that polygraph evidence be admissible by stipulation. They are asking us to stipulate certain things and we can admit polygraph evidence by stipulation and they may very well want to stipulate and let the triers of fact consider the polygraph expert opinions as to who is telling the truth.

THE COURT: Let me caution you about one thing, Mr. Rothblatt. You better not do that in front of this jury.

MR. ROTHBLATT: No, I am just saying these would be raised to Your Honor as a matter of law, we would move that it be made admissible. The government can take the position as they say in trial, we object to it even though they might know of it so that we can preserve our rights on it.

THE COURT: We can argue that out of presence of the jury.

MR. ROTHBLATT: I agree with you, it has to be done out of presence of the jury, but I certainly don't want to foreclose all these possibilities. If we had this information that we seek I would have a motion dealing with polygraph providing our own investigation requires it. I simply don't want to preclude it.

MR. SILBERT: So the record is clear, if the Court please, our only position was no reference should be made in front of the jury without first giving Your Honor opportunity to pass upon it.

THE COURT: I think counsel know that, any serious question of law you ought to ask leave to approach the bench and put it on the record and let me consider it. But after something is said the damage is done, you see. All right.

Now, another item. I put this on myself:

Necessity of the appearance of Michael J. Brennan as a Government witness.

I think he is a government witness who was subpoenaed in Miami, Florida. Why do we need him here? He sent a letter to me. Did you get a letter from him?

MR. BITTMAN: Your Honor kindly sent a copy you received to us and it was appended to the agendum.

THE COURT: He is with some travel bureau or something.

MR. SILBERT: If Your Honor please, we subpoenaed him on the basis of the information available to us at the time. We have not personally interviewed him and after we interview him would be in a position to make a better judgment. However, based on the information that is known to us at this time it is our belief and I personally talked to the FBI agents who talked to him that he is a witness who should testify. We have subpoenaed him. Contrary to earlier suggestions, none of the witnesses listed in the proposed stipulation have yet been subpoenaed by us and perhaps we better get busy and do so.

But as to Mr. Brennan, if the Court please, we will try to do with him as we will with all witnesses and that is gauge

for them as best we can and so as not to delay the trial in any way, approximately when they will be scheduled to testify, that is, we are not going to ask every witness to come up to court particularly if they are from out of town and sit around from January 8th, say until the 20th when they have to testify here. We will try to minimize as far as we can any inconvenience any witness might suffer as a result of having to testify. But so far as we know if he is a necessary witness, his public duty requires he testify.

THE COURT: All right.

Now our next pretrial conference will be Monday, the 18th -- no, I'm sorry, Tuesday the 19th. Is there anything else you can think of that we should talk about?

MR. BITTMAN: Your Honor, I don't believe the government has responded to our request whether or not they conducted any electronic surveillance of any of the defendants or defendants' attorneys. I don't think I am mistaken in that. And I mean that term in its broadest sense.

MR. SILBERT: That was something I thought we could handle by informal discovery. I am perfectly happy to disclose that information to counsel and defendants, and the answer is no, there was none.

THE COURT: All right, that answers that.

MR. BITTMAN: Your Honor, could I ask Your Honor to

intercede so we could set up a conference this week with the government prosecutors to go over exhibits I have not yet received and discuss the matter of stipulations so we can resolve this at the earliest possible date? I recall Mr. Silbert mentioned in this morning's session that all three prosecutors are going to be out of town all week. I believe we have got to get on this immediately, Your Honor. I have to review the documents I do not have and the other information Mr. Silbert mentioned this morning, and I don't want to wait till next week.

MR. SILBERT: Your Honor, we are going to be out of town this week in connection with this case. It is something we scheduled sometime in advance. It is necessary that we do so. We will get together whatever exhibits we have not sent to Mr. Bittman. We will prepare tonight the remaining exhibit list and send him copies. We are willing to sit down with him first thing Monday morning.

THE COURT: How about Monday morning?

MR. BITTMAN: Your Honor, I will have to check my schedule but I would like to get on this this week.

THE COURT: Well, in view of the statement that he is going to be out of town is there anybody else in your office can handle it?

MR. SILBERT: Your Honor, only the three of us and we will be out of town.

MR. BITTMAN: Your Honor, can't they arrange to have one stay back?

THE COURT: Would you want to deprive them of a nice trip? You would like a nice trip yourself.

MR. BITTMAN: I don't very often get a chance to do it very often, I guarantee you.

I wish something could be done so we could start this this week, Your Honor, we are wasting another week. Because there are a lot of documents I have I can't read which they know and I am not faulting them, but --

THE COURT: --excuse me. When are you going out of town?

MR. SILBERT: We are leaving early tomorrow morning, Your Honor.

If Your Honor please, for two weeks all that material, I sent that letter on November 9th, at Mr. Bittman's request we sent him the material. It has been sitting there for a week or two now and all of a sudden/because for four days we want to be out of town he is complaining. I say that is not fair.

MR. BITTMAN: Your Honor, I don't want to interrupt Mr. Silbert, I am aware of the Court's admonition, but I sat down with Mr. Silbert and told him that I wanted copies of everything he was going to introduce and he agreed to furnish it to me. This isn't exactly accurate when he says I was supposed to go down there and look at them. I did have conferences with him, I did review certain of the information. I told him with

respect to other documents to send them to and he said he would. I have not been dilatory in any respect whatsoever in this case.

THE COURT: All right, I will give them till next Monday. Get together next Monday.

MR. BITTMAN: Your Honor, there is one matter I would like to discuss with the Court at the bench.

THE COURT: All right.

( AT THE BENCH )

(The proceedings at the Bench were ordered sealed by the Court.)

OPEN COURT

THE COURT: All right.

MR. ROTHBLATT: Your Honor, Mr. Shankman and I have a minor application now. On the 26th of January, 1973 I am scheduled to preside at a morning session of the American Trial Lawyers Criminal Law Seminar in Las Vegas.

THE COURT: That is a nice place to be.

MR. ROTHBLATT: I will only be there for the day and I am wondering whether Your Honor could excuse me. I will have some counsel here substitute for me and hopefully try to arrange with the government that no significant testimony on that day come out concerning my clients or at least where I would be called to cross examine/preserve my right to cross examine or I only need to be excused for that day.

Mr. Shankman has his own problems. I don't know

how many days he wants and I don't think his role in the case will be as active as mine, so we would like to call that to Your Honor's attention.

THE COURT: You will have to work it out with the consent of your four clients, they will have to consent to it on the record and you will have to have counsel of their choice or satisfaction.

MR. ROTHBLATT: Yes. I just wanted the Court to be aware so it doesn't come as a surprise on the eve when I am going to ask to be excused.

THE COURT: All right, sir.

MR. ROTHBLATT: Then I have a further application, Your Honor, with respect to my client Virgilio Gonzalez.

He is, as you know, he was born in Cuba and spent most of his life in Cuba and his principal first language of course is Spanish, although he is, I would say, somewhat fluent in the English language. At times I have found in dealing with him that I could communicate best with him by speaking to him in Spanish, so he and I have complete rapport.

Now, it would seem to me in a case as important as this to Mr. Gonzalez, that he ought to have benefit of knowing exactly what is going on without me, with my concern for tactics of the trial and also serving as his interpreter, I would respectfully ask the Court assign an interpreter to Mr. Gonzalez to make him familiar with all proceedings in this case.

THE COURT: I think that is the first request of that nature I have ever had.

MR. ROTHBLATT: We do this routinely in the City of New York, Your Honor.

THE COURT: I understand. I mean it has never happened in my court.

Well, Mr. Silbert, will you look into that for the Court? I will give you the job of getting an interpreter. The government has got to pitch in here and do some of these things.

MR. SILBERT: Your Honor, I could ask one thing: if Your Honor recalls shortly after the indictment was returned on the day it was returned we filed a motion with respect to the four defendants represented by Mr. Rothblatt seeking inquiry into separate counsel. Subsequent to that Mr. Rothblatt filed a response opposing the motion and attached an affidavit of each one of the defendants making it perfectly clear that Mr. Rothblatt was their only choice of counsel and Your Honor, based on that denied our motion. Two months have passed since that time, it is only a month before trial and my only reason for bringing this up to you is since the need to appoint any separate counsel should a conflict develop or delay the start of trial, Mr. Rothblatt give us some indication if in the two month period any evidence of any potential conflict has arisen --

THE COURT: --Mr. Rothblatt, can you answer it?

MR. ROTHBLATT: Our position is precisely as it was when I submitted the affidavit, Your Honor. I see no conflict.

I intend to vigorously, hopefully, represent all these defendants and that has been their position up to this date as far as I know.

THE COURT: Very well, thank you.

MR. SHANKMAN: Your Honor, I am the convention sub-chairman for the American Trial Lawyers and I set this meeting up two years ago. I am local counsel for McCord. There are two gentlemen who are prime counsel here --Gerald Alch and Al Johnson. They will be here and I request respectfully that I be excused for the period of from the 21st to the 28th.

THE COURT: They are going to be here?

MR. SHANKMAN: Yes, Your Honor, either one or both.

THE COURT: What is our rule, 92 isn't it? You are familiar with the rules, I mean where out of town counsel must have local counsel and I think I mentioned this before. If I haven't, if anything happens out of town counsel cannot appear I am going to look for local counsel to represent the defendants.

MR. SHANKMAN: I understand, Your Honor.

THE COURT: All right.

* * * (2:40 p.m.)

CERTIFICATE

It is certified the foregoing is the official transcript of proceedings indicated.

Nicholas Sokal
NICHOLAS SOKAL
Official Reporter