"President Nixon Can Be Made to Appear Before the Grand Jury" Post 6/1/73

The May 29th edition of The Post carried a story saying that the Watergate prosecutors believe President Nixon should be called before the grand jury, but that they and their superiors feel that the Constitution precludes this. The latter feeling is in accord with a long standing Justice Department policy of objecting whenever a party in a civil suit has sought to make the President a defendant. The Justice Department has continuously taken the position that separation of powers precludes the President from being subject to the jurisdiction of courts. Separation of powers was also cited by the White House when, in response to The Post's story, it said the President would not appear before the grand jury.

As one who has litigated the question of whether the President is subject to the jurisdiction of courts in proper cases, I believe that it is incorrect to think that the President cannot be subpoenaed to appear before the grand jury. They are wrong both as a matter of legal policy and as a matter of legal precedent.

As a matter of legal policy, to say that the President is not subject to the jurisdiction of arms of the judiciary in proper cases is to say that he is above the law. This is particularly the case when the question is whether he can be brought before a grand jury which is investigating illegal activities which he conceivably could have encouraged or even ordered. But separation of powers, upon which the Justice Department has always relied, does not dictate that the President or anyone else is above the law, nor does it dictate that any one branch cannot in any respect be subject to the properly exercised jurisdiction of another branch. On the contrary, each branch is subject to other branches in various ways. For example, the courts are subject to Congress' power to make exceptions to their jurisdiction, the Congress and Executive are subject to having their actions ruled illegal by the courts, the President and judges are subject to impeachment and conviction in Congress, and the President is constitutionally required to obey the duly enacted and signed laws of Congress.

As a matter of legal precedent, it has become more and more clear that the President is subject to the jurisdiction of the judiciary. First, in two recent cases, lower court judges clearly indicated that it might be permissible to make the President a defendant if he were a so-called "necessary party" in a civil case. In a third recent case, Judge June Green of the U.S. District Court in Washington ruled on April 25, 1973 that the President was in fact a necessary party and could be made a defendant in the case.

Second, in the case of Aaron Burr, John Marshall held that a subpoena *duces tecum* can be issued to the President. Marshall pointed out that, unlike the King of England, the President is not a monarch, but, like any citizen, is subject to being called to testify.

Third, a five man majority of the Supreme Court, including the four Justices appointed by Nixon, recently gave a clear indication that the President is subject to being called before a grand jury. In the Caldwell case, where the Court struck down the newsman's privilege, the majority said "the long standing principle that 'the public has a right to every man's evidence', except for those persons protected by a constitutional, common law, or statutory privilege ... (citations omitted), is particularly applicable to grand jury proceedings." The court, in a footnote, then continued this theme, citing Jeremy Bentham for the proposition that even "men of the first rank and consideration" can be brought into courts to testify: men like the Prince of Wales, the Archbishop of Canterbury and the Lord High Chancellor. The Court concluded the footnote by pointing out that in the Burr case, Justice Marshall "opined that in proper circumstances a subpoena could be issued to the President of the United States."

There is one further point to be considered in regard to whether the President could be called before a grand jury. The Constitution provides that "Judgment in Cases of Impeachment shall not extend further than to removal from office ..., but the party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." In other words, the Constitution explicitly indicates that a party can be indicted by a grand jury and tried on criminal charges *after* he is impeached and convicted in Congress. But it does not say whether he can be indicted by a grand jury, or made to testify to one, *before* he is impeached and convicted in Congress. In my judgment, the Constitution does not preclude indictment by a grand jury before there are any impeachment proceedings in Congress and still less does it preclude merely making an impeachable party testify to a grand jury before there are impeachment proceedings.

The phraseology of the above constitutional clauses appears to have been dictated by the framers' desire to ensure that officials could be criminally punished as well as removed from office, but to also ensure that it would not be one and the same tribunal, but different tribunals, which passed on the separate matters of removal from office on the one hand and criminal punishment on the other. Though the framers appear to have been assuming that impeachment and conviction in Congress would antedate criminal proceedings in the normal course of events, they do not appear to have excluded the contrary order of events. In the past, moreover, parties have been indicted and convicted in criminal courts before there were any impeachment proceedings. Judge Kerner's case is the latest example of this, and I have as yet heard no persuasive reason for treating the President differently than judges in this regard. Certainly no such distinction appears in the Constitution itself.

Moreover, even if a President cannot himself be indicted and criminally tried before there are impeachment proceedings, I know of no good reason why he could not at least be made to testify to the grand jury about crimes for which *other* people can be indicted. As I have indicated earlier, separation of powers would not preclude such an appearance before the grand jury, and the principle invoked by the four Nixon justices and Justice White in the Caldwell case would support it: unless there is some applicable privilege (and there is none here), in grand jury proceedings the public has a right to every man's evidence, including the evidence of exalted personages like the President.

Thus, on the basis of legal policy, legal precedent, and constitutional history, President Nixon can be made to appear before the grand jury. The only question is whether the circumstances known to the prosecutors warrant issuing a subpoena to him. If they do, as was indicated in The Post's story, then he should be subpoenaed lest the public believe, as many have in the past, and possibly correctly, that the Department of Justice is simply acting as a political tool whose purpose is not to further justice, but to protect the President.

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