Judicial Independence Grows

More Judges Reject 'Plea Bargaining'

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Federal judges who refuse to go along with the Justice Department deals known as "plea bargaining" are stirring fresh controversy over the place of the federal judiciary in the American legal system.

Should the judge play a passive role, ratifying agreements acceptable to the prosecution and defense? Or should the judge be a more aggressive figure, ferreting out truth and pursuing justice when he sees both sides failing to achieve it by adversary methods?

Such questions were raised last year when Judge John J. Sirica stepped in at the Watergate burglary trial with sharp questioning after losing patience with the Justice Department's handling of the case. Upheld and praised recently by the U.S. Court of Appeals, the judge is pursuing similar inquiries in the current cover-up trial.

Two similar incidents, related to Watergate and possibly inspired by it, have recently occurred:

•A federal judge in Dallas has thrown the prosecution of former Treasury Secretary John B. Connally into a turmoil by refusing to accept the plea bargain in which Texas charges against former White House aide Jake Jacobsen were dropped and Jacobsen agreed to plead guilty here to a single count of offering Connally a

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payoff. The judge shocked the government by ordering Justice Department prosecutors replaced with lawyers of his own choosing to press the case against Jacobsen.

•Sentencing judges in Baltimore's federal court stunned prosecution and defense alike by imposing prison terms on two businessmen who helped build the case against Vice President Agnew, who wound up pleading no contest to income tax evasion and was fined $10,000. Elliott L. Richardson, the restrained former Attorney General, said he thought the men should have been spared prison for their cooperation.

The entire subject of plea bargaining—in which a defendant usually pleads guilty to a reduced charge and the prosecution avoids the trouble, expense and risk of a trial—has become increasingly controversial as thoughtful persons have become concerned over "bartered justice" on a mass basis to clear court dockets. In Watergate and related cases the bargains themselves have been challenged as unduly favoring the affluent and politically powerful.

Prosecutors were severely criticized for the deal that kept Agnew out of jail. But they defended the action on grounds that a "higher risk"

See JUDGES, A24, Col. 3

JUDGES, From A1

regard" of executive authority.

Ruth and Petersen have obtained a stay of Judge Hill's order appointing three Dallas attorneys to take over over the Jacobsen case. They have asked the Fifth U.S. Circuit Court of Appeals for an expedited hearing.

Jacobsen and an associate, Ray Cowan, were indicted in Dallas last February on six count of conspiracy, embezzlement and defrauding $825,000 from a federally insured savings and loan association in San Angelo, Tex., in which they had been directors and controlling shareholders. Jacobsen was charged in a seventh count with lying to the grand jurty that returned the indictment.

Meanwhile, the Watergate special prosecutor here was investigating illegal campaign contributions in the milk industry and zeroed in one Jacobsen's dealings with his Texas political friend of 25 years, John Connally. Jacobsen was indicted for lying to the Washington grand jury but the ndictment was dismissed and he began to plea bargain.

Jacobsen agreed to plead guilty to a single charge of making an illegal $10,000 payoff to Connally in 1971 for Connally's recommending higher dairy price supports.

This charge was part of an indictment against Connally on charges of taking the payoff, lying about it and conspiring to cover it up. In return for Jacobsen's plea and his testimony against Connally, the Justice Department and the Watergate prosecutors agreed to seek dismissal of the Texas charges. Attorney General William B. Saxbe gave his approval.

Judge Hill refused to accept the arrangement. "The interest of justice would not be served by a dismissal of this case," he ruled Sept. 6.

"This court is unable to perceive," he said, "how the best interest of justice could be served by dismissing serious charges with a potential penalty of 35 years' imprisonment and a $70,000 fine in exchange for a guilty plea in an unreleated case carrying a maximum penalty of 2 years and a $10,000 fine."

The judge said the prosecutors had produced no evidence "that Jacobsen's testimony is vital or essential to the successful prosecution of the District of Columbia case." He refused to dismiss the Texas indictment.

When the Justice Department gave notice that it would not prosecute, Hill responded with his order supplanting the Justice Department with three specially appointed private attorneys from Dallas.

How Hill's action is viewed "depends on which end of the telescope you're looking through, Washington or Dallas," according to one lawyer close to the case who would not speak for attribution.

"From the Washington end it looks like an attempt to help Connally. From the Dalls end it looks like Jacobsen got a pretty good deal." A number of Texas lawyers describe Hill, a 1970 Nixon appointee, as an able, independent and honest

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jurist with no special political connection to Connally.

The government's appeal brief says Hill was wrong about the fairness of the Jacobsen deal but that even if he were correct, it would be none of his business to disturb it. It calls the refusal to dismiss the indictment "astounding" and the appointment of special prosecutors "a usurpation of judicial power."

Focus of the legal argument is a provision in the federal criminal court rules that dismissal of an indictment must be "by leave of court." Hill says the phrase gives him all the power he needs. The prosecutors say the provision's only purpose is to guard defendants against prejudicial government actions such as dismissing and re-indicting to obtain some tactical advantage.

Nobody [illegible] why the provision [illegible] into the rules when they were first adopted in 1946. The Supreme Court itself [illegible] rules, [illegible] Congress declined to veto them.

In the Maryland case the issue is not one of legal power— since it was [illegible] the sentencing [illegible] not required [illegible] Justice Department [illegible] but of policy.

The Justice Department's initial plea bargain with the two key witnesses against Agnew, I. H. (Bud) Hammerman III and Allen [illegible] did not include a recommendation for probation rather than prison. Later, when Agnew escaped imprisonment—after receiving assurances that his nolo contendere plea would not bring a prison sentence—the government sought leniency as a matter of prosecution policy and "equal justice" vis-a-vis Agnew.

But the specially designated sentencing panel of three federal judges had policies of its own. The judges said they applied sentencing standards by which the seriousness of the offense would not be downgraded and the fear of jail sentences would remain a deterrent to others.

One of the judges, Joseph H. Young, another Nixon appointee with four years on the bench, [illegible] that every case cannot be judged in the shadow of the Nixon pardon and the Agnew plea bargain.

U.S. Attorney George H. Beall had pleaded with the court to consider at least the Hammerman-Green case in light of Agnew's probation sentence, but the judges chose to make the case a vehicle for declaring their independence of prosecutorial policy.

[illegible] sentences of 12 months for Green and 18 months for Hammerman raise still another question: now that the judges have said emphatically that they will set their own policy, what will the policy be? Will more white-collar offenders actually see the inside of prisons, or will the judges resume old patterns of light penalties?

Whether the Texas judge is declared right or wrong, and whatever the verdict on the Baltimore sentences, the evidence is mounting that there is a new spirit of independence in post-Watergate jurisprudence.