# Leaks, the Law and the Press

*Sufficient cause appearing therefor,*

*It is hereby ordered that the attorneys for applicant may take the depositions of such persons as they deem appropriate and necessary . . .*

So, in part, read one of the more unusual directives ever issued by a U.S. federal judge. The order, by Judge Walter E. Hoffman, came last week in response to complaints by lawyers representing Vice President Spiro Agnew, who is being investigated by a Maryland grand jury for allegedly taking bribes and for other misconduct. The lawyers had contended that the grand jury's investigation should be halted because a campaign of "malicious, immoral and illegal" leaks by Justice Department officials was designed to deprive the Vice President of his "basic rights to due process and fair hearing."

In effect, Hoffman turned the hunted into the hunter. He gave Judah Best, Martin London and Jay Topkis—attorneys for a man who has not yet even been indicted—sweeping authority to subpoena Justice prosecutors, newsmen and anyone else they think may know about the leaks.

Anybody subpoenaed who refuses to answer questions could be subject to jail sentences for contempt of court. Newsmen are particularly vulnerable, of course, because of their resistance to naming confidential sources. Doing a little leaking of his own, a source close to Agnew's defense indicated to TIME that the lawyers may not insist that reporters name each individual who provided information: the newsmen may be asked merely to confirm under oath that their stories accurately attributed leaks to "Justice Department sources." But what if they balk at this compromise? Will Agnew's attorneys then try to use the court's contempt power? "Obviously," said TIME's source, "they'd be inclined to go all the way in the case of someone giving them trouble."

Two days after Judge Hoffman handed down his order, Agnew's lawyers served subpoenas on TIME and *Newsweek,* plus reporters for both magazines, the New York *Times,* the New York *Daily News,* the Washington *Post,* the Washington *Star-News,* CBS and NBC. Subpoenas also were headed for Attorney General Elliot Richardson, Deputy Attorney General William Ruckelshaus and Assistant Attorney General Henry Petersen.

Judge Hoffman has ordered that the testimony of those subpoenaed "be sealed and not made part of any public file." He has also instructed Agnew's lawyers not to discuss the testimony publicly. Whether or not this attempt to impose some rare secrecy on the Agnew case succeeds, it was clear that Hoffman's three-paragraph directive posed a perplexing array of public questions relating not only to the case but to the order itself. It also raised again the issue of how to reconcile the rights of a defendant with the rights of a free press.

### *What authority did Hoffman have to issue his order?*

The order seems to be unprecedented. Nonetheless, "the judge had the discretion to do this," says Stanford Criminal Law Professor John Kaplan. "Any district-court judge has," because he has wide latitude in determining how the use of subpoena power will most effectively serve the court's interests.

### *What interest of the court was Hoffman trying to serve?*

If prosecutors have conducted, as Agnew says, a "deliberate campaign" of leaks, it constitutes a serious breach of their duty as officers of the court. In that context, the judge's grant of broad subpoena powers can be seen as giving Agnew the fairest chance of gathering evidence to support his contention.

### *What, then, are the objections to Agnew's having such powers?*

They can be used to tactical advantage for other purposes. The statute of limitations may soon bar prosecution of some of Agnew's alleged offenses, so any delay resulting from an investigation into the leaks would be to Agnew's advantage. And Harvard Law Professor John Ely points out that it will be difficult for the defense attorneys "to investigate leaks without being given access to the entirety of the Government's case, which is wrong." The broad powers to fish for any information they want could also be used to harass the prosecution. Says Columbia Law Professor Abraham Sofaer: "No one's ingenuity could possibly anticipate all the ways the defense lawyers could misuse this power." In addition, the threat of being subpoenaed could intimidate some newsmen and keep them from pursuing stories unfavorable to Agnew. Because he is, after all, a high-ranking public figure, continued scrutiny of the Vice President is clearly in the public interest.

### *What happens if Agnew proves his charges?*

The judge could go along with Agnew's request and terminate the grand jury investigation. There is a recent rough analogy. In the Ellsberg case, the judge ruled that Government misconduct had so infected the charges that they must be permanently dropped. If Judge Hoffman made a similar ruling, however, the Vice President would not

necessarily be free of further investigation. He could still face impeachment charges. Of course, Hoffman could find that the leaks have caused Agnew no significant harm before the grand jury. The few faintly relevant cases suggest that the present grand jury will be allowed to continue. The theory, says Columbia Law Professor Telford Taylor, is that "it is no remedy against leaks to keep a person from trial."

### *Can the practice of leaking information serve the public interest?*

Clearly, yes, after the Pentagon papers and Watergate. And where leaks make the public aware of a secret investigation, they serve another useful purpose: the chance of a special deal being struck is reduced; at the same time, public scrutiny helps to protect a defendant (even a Vice President) from being railroaded. Says Harvard Political Scientist Martin Shapiro: "The press provides a better check for the public on the criminal law process ... It's better for the public to know what's happening."

Of course, the practice of leaking is open to abuse. False information can be spread to damage someone's reputation or prejudice his rights to a fair trial. In such cases, however, the offender is the leaker and not the newsman who reports the information in good faith. Says John Flynn, a law professor at the University of Utah: "To get at that person over the dead body of the First Amendment is not a price I want to pay."

### *If Justice Department leakers are identified, what penalties do they face?*

At a minimum, they have violated department rules that ban any potentially prejudicial comment. The President has said that he will fire anyone found to have disobeyed that regulation. Leaky prosecutors may also be liable to contempt of court penalties for compromising the secrecy of a grand jury. The secrecy requirement dates back to common law and is designed, among other things, to protect the innocent from publication of unsubstantiated charges and to prevent the guilty from fleeing or tampering with witnesses. Technically, the Agnew case did not go to the grand jury until two weeks ago, and the majority of leaks came before then. Experts are divided over whether this distinction would prevent any contempt sentences. There is no doubt, however, in the unlikely event that a full-blown prosecutorial plot to prejudice Agnew's case is proved, there could be criminal charges of conspiracy.

### *Is there any evidence to date of a possible conspiracy against Agnew by Justice officials?*

Not in the eyes of newsmen who have worked on the story. The first leaks on the Agnew case did not even come from the Justice Department. They came from political sources in Maryland who got an idea what was afoot from questions being asked by investigators. Agnew quickly confirmed that an investigation was under way. A succession of leaks ensued from the White House and the Vice President's office. Only then did the Justice Department leaks begin. In the circumstances, they could have been designed merely to demonstrate what the President himself said last week: that the charges against Agnew were "serious and not frivolous."

AP

**THE AGNEW LAWYERS—TOPKIS, BEST & LONDON—LEAVING COURT**
*In pursuit of the "malicious, immoral and illegal."*

### *Do newsmen face penalties as a result of Hoffman's order?*

Not for printing their stories. But if a journalist should refuse to name his source, he could be held in contempt of court. The Supreme Court last year ruled that newsmen do have some special constitutional rights but must nonetheless answer grand jury questions unless the connection to a criminal investigation is "remote and tenuous." Because of the faint possibility of a criminal conspiracy being proved in this case, newsmen might be able to invoke successfully the inglorious but sturdy Fifth Amendment privilege against self-incrimination. More likely, though, their lawyers will again raise privilege arguments under the freedom of the press guarantees of the First Amendment.

### *Can the Agnew case still get a fair hearing before the grand jury?*

Yes. For one thing, the prosecutors apparently have not been leaking information that they are not prepared to bring before the grand jury anyway. Moreover the publicity over Agnew's case may even help his cause. Usually a potential defendant is not told what charges are being considered by a grand jury; thus he is unprepared to combat them. Even if he is prepared, he often gets no clear opportunity to present a defense. Grand jurors, as Judge Hoffman pointed out last week, decide only whether "the credible evidence before you, if unexplained and uncontradicted, would warrant a conviction." If the prosecution's story adds up to enough, the defendant always gets his chance to respond at a trial.

### *Can Agnew get a fair trial if he is indicted?*

The overwhelming majority of legal experts consider a fair trial for Agnew entirely possible. Stanford's Kaplan thinks the prejudicial damage is "not even close by the standards we usually apply to criminal law." He cites the Charles Manson case, in which damaging mid-trial publicity included a personal verdict of guilty by President Nixon. "Even there," notes Kaplan, "the court did not have much trouble deciding he could get a fair trial." Manson was, of course, convicted. But Philip Berrigan and the rest of the Harrisburg Seven got off, even after their alleged conspiracy to kidnap Henry Kissinger was loudly leaked by J. Edgar Hoover. Furthermore, the inevitability of leaks and publicity in famous cases, as well as modern means of communication, has long since rendered obsolete the notion of the pristinely "ignorant" jury. Experience in such trials has demonstrated the precautions that can protect the process—a delay to let the pretrial publicity die down, especially careful questioning of potential jurors to weed out the biased and sequestering of the chosen jurors during the actual trial.