

Excerpts From Judge Sirica's Denial of Delay in Senate

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Following are excerpts from an opinion by Chief Judge John J. Sirica of the United States District Court denying a request by Special Prosecutor Archibald Cox that the Senate Watergate hearings be delayed or that, if continued, they be held without live radio and television coverage, and the text of a statement by Mr. Cox deciding not to appeal. The motion by Mr. Cox, who heads the Watergate criminal investigation, was opposed by the Senate Watergate committee, the American Broadcasting Companies, Inc., Columbia Broadcasting System, Inc., National Broadcasting Company, Inc., and Public Broadcasting Service.

Opinion by Sirica

The Court has today entered orders which will confer what is commonly termed "use immunity" on two witnesses who are scheduled to appear before the Senate Select Committee on Presidential Campaign Activities (Select Committee). The orders provide that should the witness refuse on Fifth Amendment grounds to give testimony as requested by the Select Committee, "use immunity" may be conferred by the committee chairman. Thereafter, on pain of contempt, the witness will be required to fully answer the questions put to him and provide the information sought unless such testimony is otherwise privileged.

The prospective witnesses, Jeb Stuart Magruder and John W. Dean 3d, have not opposed entry of these orders.

The Attorney General, however, as represented by Special Prosecutor Archibald Cox, has objected to grants

of immunity without attendant conditions limiting the publication of testimony.

The court, upon application of the Attorney General's representative, granted a 20-day delay in consideration of the Senate requests, and in the meantime asked the Select Committee and the Special Prosecutor to file written memoranda treating the question of judicial discretion under the applicable statute. Specifically the court asked whether a court might properly exercise any discretion to deny an immunity request of the legislative branch even though procedural prerequisites were met. The court subsequently heard oral argument in the matter. Pursuant to the reasoning set forth below, the court has concluded that in this case, its duties are purely ministerial, and that any attempted exercise of discretion on its part, either to deny the requests or to grant immunity with conditions, would be an assumption of power not possessed by the court.

[Title 18 of the United States Code] Section 6005 deals with "use" as opposed to "transaction" immunity. Transaction immunity may be simply described as that which precludes prosecution for any transaction or affair about which a witness testifies. Use immunity, by contrast, is a grant with limitations. Rather than barring a subsequent related prosecution, it acts only to suppress, in any such prosecution, the witness' testimony and evidence derived directly or indirectly from that testimony. Evidence obtained wholly independently of immunized testimony may serve as a basis for prosecuting the witness for activities and transactions including those covered in his own statements.

On its face, Section 6005

casts the role of the court in terms of ministerial duty. The language is mandatory: ". . . a United States District Court shall issue . . . upon the request of a duly authorized representative of the house of Congress or the committee concerned, an order . . ."

The statutory language imposes only two prerequisites or conditions, both procedural, for issuing the requested order: (1) If the proceeding is before a house of Congress, the request for an immunity order must have been approved by a majority of the members present; if the proceeding is before a committee, subcommittee or joint committee, the request must have been approved by two-thirds of the full committee membership, (2) At least 10 days prior to filing the immunity request with the court, the committee or house must have provided the Attorney General with notice of an intention to seek immunity for the named witness or witnesses. In short, judicial discretion cannot be found on the face of the statute.

It was with the intent of minimizing any prejudicial impact on present and future law enforcement plans that the provision requiring notice of intended immunization was adopted. It was expected that timely notice would allow the Attorney General to assess the effect of a grant of immunity on investigations or prosecutions and then, should he feel it necessary, communicate with the concerned house of Congress or committee to "lobby" for a modification of immunity plans.

The memorandum filed by the Special Prosecutor indicates that he has made use of this opportunity although to no avail, as yet.

It was also anticipated that a period of time up to 30 days would permit the Attorney General to "insulate" from the immunity grant any incriminating data already in his files prior to the witness' testimony." Presumably, if such incriminating data is available to the Special Prosecutor in this case, he has taken advantage of the opportunity to "insulate" it. Thus, though he is accorded no right to be heard in court in opposition to an immunity request, the Attorney General is given some protection in his role as the administrator of Federal law enforcement by the notice requirement of Section 6005.

Conditional Orders Sought

While the Special Prosecutor acknowledges that the court cannot withhold entry of the immunity orders here at issue, he nevertheless asks the court to make such orders conditional. The specific conditions recommended are listed from the Special Prosecutor's memorandum.

(1)

Requiring, as in the case of the criminal trials, the exclusion of the broadcast media (radio and television), when an immunized witness is required to furnish self-incriminating testimony, at least in the absence of an express waiver by the witness and his counsel of any objection to such potentially prejudicial coverage.

(2)

Limiting the grant of an order directing the witness to testify before the committee to testimony given in executive session.

[3]

Conditioning the grant of the committee's application on the assurance that it will

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receive the testimony only in executive session and will not publicly release the transcript of the testimony or any summary of it pending completion of the committee's investigation.

[4]

Supplementing one or more of the above by directing the witnesses not to discuss or comment upon their testimony with members of the press or with any persons other than their counsel, members of the committee and its staff, and prosecuting officers of the Department of Justice.

[5]

Supplementing one or more of the above by conditioning the grant of immunity on an understanding that the committee and its staff will not make public statements about the witnesses' testimony pending completion of the committee's investigation.

In an oral argument, counsel for the Special Prosecutor apparently abandoned most of the above recommendations and urged upon the court a single restriction: That the immunity orders direct the witnesses to testify only outside the presence of television cameras and radio microphones, thus permitting them to assert a fifth amendment privilege based on the type of news coverage given their testimony.

Insofar as the Special Prosecutor's proposals ask the court to judge the wisdom of granting immunity to these witnesses or the appropriateness of coverage by the broadcast media, the foregoing discussion suffices to show that the court lacks completely any power of intervention. Insofar as the proposals ask the court to exercise inherent powers in

the interest of preserving the rights, additional considerations forbid judicial interference with the Select Committee's investigation and procedures.

Variety of Cases Cited

The Special Prosecutor has cited a variety of cases which highlights the sort of judicial protection which he seeks.

These decisions, however, are not precedents for what the Special Prosecutor proposes. The one distinguishing feature found each of the cases regarding fair trials and defendants' rights is the fact that indictments were exact and defendants identifiable. The court here cannot confront any such "case or controversy."

Counsel for the Special Prosecutor at the hearing represented to the court that indictments in the matter being investigated by the Select Committee are sure to be forthcoming, although a time cannot be estimated, and that Mr. Magruder and Mr. Dean would very probably be named as defendants in such indictments. To broadcast nationally the possibly self-incriminating testimony of Messrs. Magruder and Dean, compelled pursuant to the orders herein, would, asserts the Special Prosecutor, endanger (1) the ability of any persons named by the witnesses in their testimony to obtain a fair trial, (2) the validity of future indictment, and (3) the ability of the Government subsequently to prosecute the witnesses.

The fact remains, however, that there are no indictments, no defendants and no trials. However much the court may sympathize with the Special Prosecutor's wish to avoid serious potential dangers to his mission, it cannot act on

suppositions, and the Special Prosecutor himself has been unable to show where any court has so acted. The matter is simply not ripe for judicial action.

Where a court has indictments or trial proceedings pending before it, it can draw on a well-stocked arsenal of measures designed to preserve the integrity of proceedings and the rights of individuals. It may act to change venue, grant a continuance, restrict extrajudicial statements, control the courtroom, etc.

But even supposing that a court might be able to act in a premature situation such as the instant one, it is clear that the court could not go beyond administering its own affairs and attempt to regulate proceedings before a coordinate branch of government. The case authorities cited by the Special Prosecutor cannot sustain intervention in this situation under the immunity statutes. On the contrary, decisional law mandates a "hands-off" policy on the court's part.

In conclusion, the court finds that the Select Committee requests have met the two procedural requirements established by Section 6005. The court is, therefore, compelled to grant unconditionally the immunity orders sought.

Inasmuch as the court is without discretion in this matter, it is not invited to comment on the wisdom or unwisdom of granting immunity in this case to express its opinion on the desirability or undesirability of implementing the Special Prosecutor's proposals. To comment would be not only gratuitous but graceless. The court's decision and action, therefore, cannot be inter-

preted as anything more than the court acting as it is required by the law to act.

Cox Statement

I have decided not to appeal Judge Sirica's order.

I judged it important to present to both the Senate Select Committee and the U.S. District Court the considerations stated in my letter of June 4 and our legal memorandum. The committee decided to continue taking public testimony. Judge Sirica has now ruled that the court has no power to intervene.

Both points have now been fairly heard. I regret the outcome but to press the legal argument further would risk unduly delaying proceedings and divert attention from our essential tasks. As I wrote Senator Ervin on June 4, 1973, the Senate Select Committee and the Watergate special prosecution force have the same goals: "To get at the truth whatever it may be, to have the truth brought out in public fairly and responsibly, and to restore public confidence in the integrity and capacity of our governmental institutions. I have the additional duty of prosecuting the wrongdoers."

There is ample room for cooperation in pursuit of these goals, even though the focus is not identical. I am anxious to do my part in achieving such cooperation. I am sure that the Senate Select Committee shares this desire and would welcome my taking up with the chairman or counsel from time to time any particular adjustments in its schedule of hearings or other arrangements that might seem necessary in order to minimize any possible danger to holding fair trials.