

The New York Times

Founded in 1851

ADOLPH S. OCHS, *Publisher 1896-1935*

ARTHUR HAYS SULZBERGER, *Publisher 1935-1961*

ORVIL E. DRYFOOS, *Publisher 1961-1968*

Senate vs. Court 6/24/73

The American public has been confronted with the conflicting opinions of Senator Sam J. Ervin and Special Prosecutor Archibald Cox concerning the difficult and vital question whether the Senate hearings on the Water-gate scandals jeopardize the judicial proceedings. The two antagonists are honorable men, both respected constitutional authorities and unquestionably dedicated to the search for truth and punishment of the culprits.

Professor Cox argues that the public hearings impede the investigation and present the public with too scattered a view of the facts. He warns that premature disclosure of testimony by some witnesses may make it more difficult for prosecutors to extract the true facts from other defendants and that, as a result of the pre-trial publicity, "many of those who are guilty of serious wrongdoing will never be brought to justice." In addition, concern has been voiced that such publicity may make it difficult to select an objective jury.

Senator Ervin denies that the hearings need in any way prevent the indictment and conviction of the guilty. He even suggests that the defendants may have a better chance for a fair trial "in an atmosphere of judicial calm" long after the hearings have cleared the air of uncertainties and suspicions.

Although we have consistently believed that the Senate hearings and the work of the special prosecutor should continue without interruption, we appreciate the widespread concern over potential conflicts between the two.

Public testimony by some witnesses may indeed forewarn others, thus rendering the prosecution's task more difficult. Grants of immunity by the committee may raise questions later about the admissibility of some testimony. Unless the hearings are conscientiously disciplined, they could indeed imply guilt where none exists.

These are serious arguments. But they overlook that crucial role of the public hearings which was highlighted when the Senate committee said in reply to Mr. Cox: "We would be unpardonably remiss if in this time of national emergency, we did not push forward to full revelation of the facts."

There can be little doubt that the revelations about the Nixon Administration's resort to extensive lawbreaking and violations of the Constitution have created a "national emergency." To allow uncertainties about the clandestine abuse of governmental power to remain un-

exposed for months, perhaps for years, would destroy the last vestiges of public confidence in the Administration's authority.

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The conflicts between the hearings and the prosecution are surmountable because they are not fundamental. Immunity granted by the Senate committee need not rule out testimony given to the grand juries and developed independently by the prosecution.

It is not necessary—even if it were possible in this television age—that prospective jurors be totally ignorant of what has been going on. The criteria in cases that involve public officials are the same as for any criminal case: a sense of fairness and lack of prejudice until all the evidence is in. When the jurors are ultimately selected, long after the hearings have been concluded, it will surely be found that for every citizen who avidly followed the television proceedings and has made up his mind, there will be scores—though fully aware of the Senate inquiry—who can still honestly declare that their judgment as to guilt or innocence is reserved until they hear the testimony and argument in a court of law.

As a matter of fundamental principle, the hearings and the prosecution represent two purposely separate functions—the one to inform the Congress and the American people; the other to dispense justice. These functions flow naturally from the Constitution's intent that the separate branches of government should discharge their duty independently of each other.

The courts will try specific acts committed by members of the executive branch; but the courts cannot deal with the corruption of executive power itself. Only the Senate hearings can lay bare the causes of that corruption and the grand strategy of governmental power abused and of political process subverted. The courts can punish; the Senate must show the nation the way out of its moral crisis.