

Excerpts from Sirica's Decision

Following are excerpts from Judge John J. Sirica's decision to turn over the secret Watergate grand jury report to the House Judiciary Committee for its impeachment inquiry.

The President's position, through counsel, is that he has no recommendation to make, suggesting that the matter is entirely within the court's discretion. He has requested that should the report be released, his counsel have an opportunity to review and copy the materials. The House Judiciary Committee through its chairman has made a formal request for delivery of the report materials. The special prosecutor has urged on behalf of the Grand Jury that its report is authorized under law and that the recommendation to forward the report to the House be honored. Finally, attorneys for seven persons named in an indictment returned by the same June, 1972, Grand Jury on March 1, 1974, just prior to delivery of the Grand Jury report, have generally objected to any disclosure of the report, and in one instance recommended that the report be expunged or returned to the jury.

Having carefully examined the contents of the Grand Jury report, the court is satisfied that there can be no question regarding their materiality to the House Judiciary Committee's investigation. Beyond materiality, of course, it is the committee's responsibility to determine the significance of the evidence, and the Court offers no opinion as to relevance. The questions that must be decided, however, are twofold: (1) whether the Grand Jury has power to make reports and recommendations; (2) whether the court has power to disclose such reports, and if so, to what extent.

I.

Without attempting a thorough exposition, the court, as a basis for its discussion, notes here some

principal elements in the development and authority of the grand jury. Initially, the grand jury, or its forerunner, was employed to supply the monarch with local information regarding criminal conduct and was wholly a creature of the crown. As the grand jury gained institutional status, however, it began to act with a degree of independence, and in some cases refused to indict persons whom the state sought to prosecute. Thereafter it becomes common for grand juries to serve the dual function of both charging and defending. By virtue of the Fifth Amendment, grand jury prerogatives were given institutional status in the United States, and grand juries have ever since played a fundamental role in our criminal justice system.

The grand jury is most frequently characterized as an adjunct or arm of the judiciary. While such a characterization is in the general sense accurate, it must be recognized that within certain bounds, the grand jury may act independently of any branch of government. The grand jury may pursue investigations on its own without the consent or participation of a prosecutor. The grand jury holds broad power over the terms of charges it returns, and its decision not to bring charges is unreviewable. Furthermore, the grand jury may insist that prosecutors prepare whatever accusations it deems appropriate and may return a draft indictment even though the government attorney refuses to sign it.

Prerogatives

We come thus to the question of whether grand jury prerogatives extend to the presentation of documents that disclose evidence the jury has gathered but which do not indict anyone. The sort of presentment men-

tioned above, where government attorneys decline to start the prosecutorial machinery by withholding signature from a draft indictment, is in the correct sense such a report since grand jury findings are disclosed independent of criminal proceedings, and it appears that nowhere has grand jury authority for this practice been denied, particularly not in this circuit. Nevertheless, where the jury's product does not constitute an indictment for reasons other than an absent signature, there is some disagreement as to its propriety.

It should be borne in mind that the instant report is not the first delivered up by a grand jury, and that, indeed grand juries have historically published reports on a wide variety of subjects. James Wilson, a signer of both the Declaration of Independence, and the Constitution and later an Associate Justice of the Supreme Court, made these pertinent observations in 1791:

The grand jury are a great channel of commu-

nication, between those who make and administer the laws, and those for whom the laws are made and administered. All the operations of government, and of its ministers and officers, are within the compass of their view and research. They may suggest publick improvements, and the modes of removing publick inconveniences: they may expose to publick inspection, or to publick punishment, publick bad men and publick measures.

On this historical basis, with reliance as well upon principles of sound public policy, a number of federal courts have upheld and defined the general scope of grand jury reportorial prerogatives....

(There follows a 13-page

section discussing previous cases involving procedures of grand juries, and then Judge Sirica's conclusions):

Compelling Need

Here, for all purposes relevant to this decision, the Grand Jury has ended its work. There is no need to protect against flight on anyone's part, to prevent tampering with or restraints on witness or jurors, to protect grand jury deliberations, to safeguard unaccused or innocent persons with secrecy. The person on

whom the Report focuses, the President of the United States, has not objected to its release to the committee. Other persons are involved only indirectly. Those persons who are not under indictment have already been the subject of considerable public testimony and will no doubt be involved in further testimony, quite apart from this report. Those persons who are under indictment have the opportunity at trial for response to any incidental references to them. And although it has not been emphasized in this opinion, it should not be forgotten that we deal in a matter of the most critical moment to the nation, an impeachment investigation involving the President of the United States. It would be difficult to conceive of a more compelling need than that of this country for an unswervingly fair inquiry based on all the pertinent information.

These considerations might well justify even a public disclosure of the report, but are certainly ample basis for disclosure to a body that in this setting acts simply as another grand jury. The committee has taken elaborate precautions to insure against unnecessary and inappropriate disclosure of these materials. Nonetheless, counsel for the indicted defendants, some having lived for a considerable time in Washington, D.C., are not persuaded that disclosure to the committee can have any result but prejudicial publicity for their clients. The court, however, cannot justify non-disclosure on the basis of speculation that leaks will occur, added to the further speculation that resultant publicity would prejudice the rights of defendants in

United States v. Mitchell, et al. We have no basis on which to assume that the committee's use of the report will be injudicious or that it will disregard the plea contained therein that defendants' rights to fair trials be respected.

Great Import

Finally, it seems incredible that grand jury matters should lawfully be available to disbarment committees and police disciplinary investigations and yet be unavailable to the House of Representatives in a proceeding of so great import as an impeachment investigation. Certainly Rule 6(e) cannot be said to mandate such a result. If indeed that Rule merely codifies existing practice, there is convincing precedent to demonstrate that common law practice permits the disclosure here contemplated. In 1811, the presentment of a county grand jury in the Mississippi Territory, specifying charges against federal territorial Judge Harry Toulmin, was forwarded to the House of Representatives for consideration in a possible impeachment action. Following a committee investigation, the House found the evidence inadequate to merit impeachment and dismissed the matter. Though such grand jury participation appears not to have occurred frequently, the precedent is persuasive. The court is persuaded to follow the lead of Judges Hastings, Barne's and Sprecher speaking for the Seventh Circuit, Judges Friendly and Jameson of the Second Circuit, Judge Wisdom of the Fifth Circuit, and Judge Thomsen of the District of Maryland. Principles of grand jury secrecy do not bar this disclosure.

III.

Consistent with the above, therefore, the court orders that the Grand Jury "Report and Recommendation," to-

gether with accompanying materials be delivered to the committee on the Judiciary, House of Representatives. The only individuals who object to such order are defendants in the United States v. Mitchell, et al. case currently pending in this court. Their standing is dubious at best given the already stated facts that (1)

their mention in the report is incidental, (2) their trials will provide ample opportunity for response to such references, none of which go beyond allegations in the indictment, and (3) considerations of possible adverse publicity are both premature and speculative. Their

ability to seek whatever appellate review of the court's decision might be had, is therefore questionable. Nevertheless, because of the irreversible nature of disclosure, the court will stay its order for two days from the date thereof to allow defendants an opportunity to pursue their remedies, if any, should they desire to do so.

The President's request to have counsel review the report's contents has not received comment from the committee counsel due to their feeling that such comment would be inappropriate. It is the court's view that this request is more

properly the committee's concern and it therefore defers to the chairman for a response to the President's counsel.

Having ruled that the recommendation of the Grand Jury and request of the House Judiciary Committee should be honored, the court relinquishes its own control of the matter, but takes advantage of this occasion to respectfully request, with the Grand Jury, that the committee receive, consider and utilize the report with due regard for avoiding any unnecessary interference with the Court's ability to conduct fair trials of persons under indictment.