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The Unindicted Co-Conspirator

YESTERDAY it was revealed that the main Watergate Grand Jury had named President Nixon as an unindicted co-conspirator in the Watergate cover-up case. What is an unindicted co-conspirator? The President himself put that question to Assistant Attorney General Henry Petersen on April 17, 1973, well before he became one himself. Their conversation, as recorded in the recently released presidential transcripts, reads in part as follows:

President: . . . explain to me what unindicted co-conspirators means.

Petersen: That just means that for one reason or another we don't want to charge them at the time. For example, I am indicted—you are named as an unindicted co-conspirator. You are just as guilty as I am but you are a witness—we are not going to prosecute you. . . .

President: In other words, you are going to put in there people you know you can indict.

Petersen: That's right. Now—

President: Well then I'll (inaudible)—I can consider that a charge?

Petersen: That's right.

Leaving aside Mr. Petersen's uncautious use of the word "guilty," his explanation of the relative seriousness of being named an unindicted co-conspirator seems to us—as it evidently did to the President at the time—to be sound. Most lawyers would agree with this estimate of the gravity of such a charge by a grand jury. But now, evidently, the President and his more recently hired legal adviser, James D. St. Clair, have an altogether different estimate of what unindicted co-conspirator means—if anything. "He's not a co-conspirator only because a grand jury says he is," Mr. St. Clair said yesterday. "It won't be the first time that a grand jury was wrong and it has no legal effect." Mr. St. Clair went on to share with us Mr. Nixon's response when he was informed several weeks ago of the grand jury's unanimous conclusion: "They just don't have the evidence," the President said, "and they are wrong."

One is compelled to wonder, finally, what judgment other than its own self-interested one the White House will accept with respect to the President's conduct. For many months now, Mr. Nixon's lawyers have been asserting in the face of contrary legal judgments that a President cannot be indicted, and can only be impeached and removed from office for committing an indictable crime. But if a President cannot be indicted, what machinery is available to judge whether the President has committed an indictable crime? Until yesterday there did not seem to be an answer to this question—the House Judiciary Committee is not, after all, a grand jury; moreover, it is being denied by Mr. Nixon tapes and other evidence it thinks would be required for it to function effectively in the manner of a grand jury. But now it turns out that in at least one instance a federal grand jury has unanimously declared it believes the President should be charged with an indictable crime. It has done so in the only manner that was available to it: first, by registering informally its conclusion, also unanimous, that Mr. Nixon should be indicted in the cover-up case; and second, after having been persuaded by Special Prosecutor Leon Jaworski that an indictment of a President would be unwise, by naming him as an unindicted co-conspirator.

And what was the President's reaction to all this? The grand jury, he decreed, was "wrong." Presumably, any number of people—including most of Mr. Nixon's closest and most influential advisers in his first term—would like to be able to dismiss grand jury charges against them in this airy fashion. Presumably, too, Mr. Nixon would like to believe that by his decree he can make the whole matter go away. Once again the burden of rendering a judgment on Mr. Nixon's conduct of his office shifts to the members of the House Judiciary Committee. With each passing day their obligation becomes more clear.