Unindicted Co-Conspirator

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Now that it is known that the original Watergate grand jury decided unanimously to name President Nixon as an unindicted co-conspirator in the Watergate cover-up, what can the President do about it?

For that matter, what can any citizen do when he has that status and doesn't want it?

The answer, according to criminal law expert G. Robert Blakey of Cornell University, is, "Nothing. He has no standing in court to complain about that." In other words, he suffers no legal injury, because he does not stand to be convicted or acquitted.

In the usual run of conspiracy cases, the person who is a conspirator but not a defendant may turn up as a prosecution witness at the trial. His other functionis to be a vehicle for the introduction of evidence that otherwise might not be admissible.

Thus, while no one expects Mr. Nixon to testify against his former Attorney General or his White House and campaign staff members the prosecution could use the President's status as a means for letting former counsel John W. Dean III testify about what the President told him.

Ordinarily such testimony is excluded as hearsay—second-hand evidence. But the utterances of co-conspirators are admissible as an exception to the rule prohibiting hearsay evidence.

To reach that stage, the prosecution must first link the individuals as participants in an illegal agreement. The trial judge must be satisfied that a prima facie showing has been made.

Once the linkup is made, the utterances of one conspirator may be used against the others as well, no matter how damaging. It would remain for the jury to decide whether the evidence was credible and whether the defendants actually were guilty of conspiracy to cover up Watergate.

Mr. Nixon's status as an unindicted co-conspirator is not expected to have any legal effect on the contests in court and in the House Judiciary Committee over whether he must produce more Watergate-related tapes and documents. It could, however, make it politically more difficult for some representatives and senators to vote for Mr. Nixon on impeachment issues.

That is, the impeachment inquiry could be influenced, a result Special Prosecutor Leon Jaworski apparently sought to postpone or avoid.

Mr. Nixon had the implications of being named as an unindicted co-conspirator explained to him explicity in a conversation with Assistant Attorney General Henry E. Petersen in the Oval Office last year.

The edited transcript of their conversations, on April 17, 1973, shows Mr. Petersen laying it out this way:

"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're named as an unindicted co-conspirator. You are just as guilty as I am, but your are a witness—we are not going to prosecute you."

Criticism of the naming of unidicted co-conspirators is frequently voiced by civil libertarians who object to the whole idea of linking individuals in this manner.

When the defendants in the 1968 trial of Dr. Benjamin Spock and other draft protesters sought the names of unindicted co-conspirators, the government replied with the names of numerous leaders of the peace movement who had attended rallies and planned non-violent demonstrations with the five conspiracy defendants.

Except within the peace movement, no widespread complaint was heard at the time, though defense counsel —including President Nixon's current lawyer, James D. St. Clair— attacked the legal sufficency of the prosecution's move.

It is known that there has been some fear on Jaworski's staff of adverse public reaction to treating Mr. Nixon this way. They expected the principal complaint to be that there is no way to defend against such a charge.

The grand jury action is certain to rekindle debate over whether an indictment against a President—which would at least have had the virtue of permitting Mr. Nixon to try to vindicate himself—was a permissible alternative.

President Nixon, however, takes the position that he cannot be indicted while in office. His Justice Department lawyers went out of their way to state their agreement with him on that point when they argued last fall that similar immunity was not available to former Vice President Spiro T. Agnew.

Agnew's lawyers contended before his sudden guilty plea and resignation that a sitting vice president could not be prosecuted unless he had first been impeached and removed. The Justice Department claim that only the President enjoys that immunity drew sharp rebukes last month from Harvard legal scholar Raoul Berger.

Writing in the Yale Law Journal, Berger called the "elaborate argument" of U.S. Solicitor General Robert H. Bork an "analytical somersault" that distorted consitutional history.

Berger contended that both a President and his Vice President are open to prosecution while in office. The Constitution says that the "party convicted" by the Senate "shall nevertheless be liable and subject to indictment," but that, Berger argued, merely preserves the right to prosecute after removal rather than requiring that impeachment occur first.

Highly pertinent to this debate is a petition pending before the Supreme Court to review the conviction of federal Judge Otto Kerner. The Seventh U.S. Circuit Court of Appeals, of which Kerner is still a member (but on leave), held that the judge could be prosecuted for bribery while holding his judicial post.

Kerner's argument that he must be impeached first is his strongest point in favor of high court review, a "virgin issue in this court," according to his lawyers.

Bork has filed a brief opposing review, asserting that the lower court was correct but not denying the importance of the issue.