NYTimes JUN 4 1973

Justice First

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ESSAY

WASHINGTON — Great shocks churn up great waves. The shock of Watergate has posed a question fundamental to our system of government: Is the courtroom or the hearing room the best place to arrive at the truth?

Senator Sam Ervin, whose year-long "presibuster" resumes tomorrow, has made his choice as if the question were inconsequential: "It is much more important for the American people to find out the truth about the Watergate case," as stated before the start of the hearings, "than sending one or two people to jail."

That is an extraordinary philosophy. "Ye shall know the truth, and the truth shall make you free," is good gospel, but placing the exposure of facts ahead of the enforcement of law is, to say the least, breaking new ground. Here in Novocain, D. C., nobody has risen to challenge it publicly, because to question the Ervin committee is to be in favor of bugging, breaking and burgling.

Consistent with its decision to put justice second, the Ervin committee has exercised a new Congressional power to grant partial immunity from prosecution to certain witnesses. In addition, its hearings on television systematically prejudice future juries; even if convictions are obtained against wrongdoers, the hearings sharply increase the likelihood of any convictions being upset on appeal, on the grounds that pretrial publicity made fair trials impossible.

That is why the Justice Department, which is trying to investigate, indict, convict and seek punishment for the guilty, is so furious with Congressional willingness to grant immunity. Prosecutors at Justice do not consider it necessary in this case to let culprits go free in order to get them to testify.

That is also why Special Prosecutor Archibald Cox warned the Ervin committee counsel of the "risk of damage to investigations and any resulting prosecution." If the Supreme Court was willing to release Sam Sheppard, convicted of murder, because of prejudical publicity, it is unlikely the courts will uphold convictions of men charged with lesser crimes whose trials were corrupted by prejudgment.

The difference of opinion between the inquisitors and the prosecutors is too important to continue to be argued by leaks and counter-leaks. In bringing their debate into the open, Mr. Cox and Mr. Ervin need not impugn each other's motives: The Justice Department is not trying to suppress the truth and the Truth Department (as Senator Ervin sees himself) is not trying to let the guilty go free. We know that the conflict will not be resolved by either folding its tent in deference to the other, nor should it —the enforcement of present law can go hand in hand with the development of new law.

But the issue can no longer be fudged: What is the best forum for getting at the truth? When justice whispers low "thou must not" and the Senate replies: "I can," which is to prevail? What bargain can be struck that will get at the truth without undermining the process of justice?

These are not quibbles. If Senators realized that justice is held to be secondary in the Ervin doctrine, the Senate floor would ring with the debate of modern-day Websters, and the editors of scholarly journals, in sedate hysteria, would be commissioning learned articles.

In less than two weeks, we will celebrate the first anniversary of the Watergate break-in, and scorn at "the law's delay" is one point Senator Ervin can fairly make. But it was Judge Sirica's court that broke the case—not the press, not the Senate—proof, if any is needed, that the best place to find truth is in the courtroom.

In the course of several centuries, the fairest method we have been able to arrive at for the discovery of truth is the adversary proceeding in a court that subjects witnesses and attorneys to rules of evidence, with hearsay denied and cross-examination fierce.

Is Watergate too big for the courts, or is the judicial system too slow for the world's greatest deliberative body, or has the Senate discovered some better way of getting at the truth than adversary proceedings in a court of law? No; there is plenty of investigating for the Senate to do in connection with the campaign of 1972 without hamstringing the special prosecutor the Senate wisely insisted the Justice Department employ.

In a case where men in high places are charged with obstructing justice, the last thing Congress should want to do is to obstruct justice in a case before a grand jury.

In a climate where claims of a "higher law" are made to justify lawbreaking by zealots of the left and right, the last thing the law needs is Congress to place justice below a "higher law" of public exposure.

The only way the truth can keep us free is if we approach it through, and not around, the rule of law: "That justice is the highest quality in the moral hierarchy I do not say," wrote economist Henry George at the turn of the century, "but that it is the first. That which is above justice must be based on justice, and include justice, and be reached through justice."