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The Nixon Inquiry: Exceptions to Grand Jury Secrecy

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WASHINGTON, Jan. 22—It looks like yet another Watergate impasse: The special Watergate prosecutor sits in his closely guarded office on K Street, saying he does not see how he can legally turn over to the House Judiciary Committee the information that his grand juries have developed about President Nixon; the chairman of the committee sits in his office on Capitol Hill, saying that unless he gets the special prosecutor's information, the impeachment inquiry will go 12 months more than already expected, pushing it into the spring of 1975.

News Analysis

But like other Watergate problems, it is hardly insoluble. The principle of grand jury secrecy, on which the prosecutor, Leon Jaworski, relies, allows many exceptions.

Prosecution Finding

The warning issued by the chairman, Representative Peter W. Rodino Jr., today carried the threat of additional months of agony for the nation, of indecision in government and politics. But such warnings are generally issued with a purpose in mind, and the likely purpose of the one by Mr. Rodino was to add to the pressure for picking—quickly—one or another of the possible ways for transferring the grand juries' information to the House committee.

The Wategate prosecution itself, in fact, has apparently made the problem easier to solve than it might otherwise be: Despite public assertions that the question is still "open," the prosecution is known privately to have all but determined that Mr. Nixon should be not be indicted while still in office. According to some legal experts, if a grand jury has damaging evidence against someone but is unable to indict him, there are avenues for turning over that evidence to another body that could take some kind of action.

As a result, the most significant element of the seeming impasse between the prosecution and the House may well be the suggestion that the Watergate prosecution may have found evidence damaging to the President.

Mr. Jaworski, in his statements on the subject, has referred repeatedly to the general rule that grand jury proceedings are to be kept secret. And, indeed, that rule is long establish, both in court decisions and in the Federal Rules of Criminal Procedure.

The Supreme Court has termed grand jury secrecy "indispensable," and has recited the reasons—to prevent the escape of someone whose indictment is under considerations, to allow the grand jurors to operate freely, to prevent subornation of perjury, to encourage witnesses to speak freely, and to protect the innocent person who had been accused but was exonerated by the jury.

Exceptions Cited

But the Supreme Court has also said that there are times when the secrecy can be broken.

In 1958, in an antitrust case, it found no fault in the fact that grand jury material had been used in a civil proceeding. It said that the secrecy must not be broken "except where there is a compelling necessity," but that "there are instances when the need will outweigh the countervailing policy."

Courts have approved the transfer of grand jury transcripts or information to such groups as bar association grievance committees and agencies that discipline policemen, as well as to the civil side of the Justice Department.

These precedents do not automatically mean that Mr. Jaworski can give the committee evidence that his grand jury has turned up. They are not exact precedents, for the present situation has no parallels in the past; beyond that, they were decided within the context of Rule 6(E) of the Federal rules, which allows a judge to order disclosure of grand jury information in certain circumstances, such as the existence of some judicial proceeding.

The wording of 6(E) does not specifically include impeachment as one of those permissible circumstances.

Justifying Objections

However, to many lawyers, many of the reasons for the exceptions already made in the rule of grand jury secrecy can be used to justify an exception in the Nixon case.

The rationale of a "compelling necessity," for instance. There are certain public interests to be served in keeping the Watergate grand juries' information secret—publicity, for instance, might jeopardize future prosecution of others in Watergate—related crimes, or even, perhaps, an eventual indictment of Mr. Nixon. But to some, there is an even greater public interest in having as rapid an impeachment inquiry as possible.

This rationale could perhaps justify several of the options now being discusesd — an amendment to Rule 6(E) for instance, including impeachment as one of the permissible circumstances, as suggested by Leon Friedman at the American Civil Liberties Union, an expert on grand juries. Another possibility is a bill such as the one that Representative Thomas F. Railsback, Republican of Illinois, will propose Thursday, requiring prosceutors to turn over material bearing on Presidents and Vice Presidents.

Mr. Friedman, moreover, suggests an even more specific rationale than has been used in the past: The fact that a grand jury is for some reason unable to indict someone against whom it has damaging evidence, and that another group exists that could bring some kind of action.

This is the rationale that has been used to justify turning grand jury information over to the civil side of the Justice Department, according to Mr. Friedman, and could be used in the Nixon case if the grand jury is deemed incapable of indicting the President.

There is currently great debate about whether or not a sitting President can be indicted, and the Justice Department, in the Spiro T. Agnew case last fall, stated that it believed the Constitution barred the indictment of a President while in office. Mr. Jaworski's office is known to believe that it might not be fair to indict a President, particularly when there is an impeachment inquiry in progress.

If this situation continues, many lawyers suggest, the solution to the present problem is for Mr. Jaworski, or the counsel for the impeachment inquiry, or both together, to go to Federal Judge John J. Sirica, who is in official charge of the Watergate grand jury, and ask for an order to turn the material over to the impeachment committee.

House Could Vote

If the prosecution should change its mind and decide to indict Mr. Nixon, of course, this rationale fails. However, that does not mean that the House could not get the information from the grand jury. The House need only vote subpoena powers to the Judiciary Committee — as it is expected to do next week or the week after — and the committee could subpoena either Mr. Jaworski or Mr. Nixon, if he is the one who has control of the information.

Some legal authorities, such as Prof. Richard Uviller of the Columbia Law School, believe that the subpoena route is the one that should be used regardless of whether or not the prosecution plans to indict Mr. Nixon.

Secrecy

For one thing, courts have ruled that the recipient of a subpoena cannot automatically resist it by saying that the information sought in the subpoena has already been turned over to a grand jury.

For another, the defense that the President has used in fighting subpoenas from the prosecution and the Senate Watergate committee—the defense of executive privilege and separation of powers—would probably not be a very successful defense to a subpoena from an impeachment inquiry.

"If executive privilege could frustrate impeachment," said Mr. Uviller, "there's not much left of impeachment."

Mr. Jaworski has met several times with the counsel to the impeachment committee inquiry, John W. Doar, presumably to discuss possible ways by which Mr. Doar might obtain some of Mr. Jaworski's information without flouting the rules of grand jury secrecy.

It is not clear what progress they have made or even whether they have made any progress at all. Nor is it clear which is the most likely course to be followed. But it is clear, to many lawyers at least, that a way can be found.