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Trial and Prejudice

The recent debate on the free press-fair trial issue—between Archibald Cox, the Watergate special prosecutor, and the Senate Select Committee, chaired by Sen. Sam Ervin (D-N.C.), presents two questions, one conventional and one unique.

The traditional free press-fair trial debate centers on the question: Does pre-trial publicity about a crime or a defendant so charge the community atmosphere or expose specific jurors to prejudicial material as to deprive the defendant of a fair trial at a later time? The constitutional quandry is how to balance the First Amendment right of the press to be free (and the corresponding right of the public to know what is going on) with a defendant's Fifth and Sixth Amendment rights to be tried in a fair and dispassionate atmosphere, before an impartial jury and with due process of law.

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Cox's argument that the Ervin committee should delay it hearings or take them behind closed doors was denied Tuesday by Judge John Sirica despite the proper but parochial arguments of the prosecutor that the hearings will increase the risk that major guilty parties may go unpunished. "The fact remains," Sirica wrote in his decision, "that there are no indictments, no defendants, and no trials" and the court "cannot act on suppositions." Ervin has consistently argued that it is less important that particular individuals be tried, convicted and sentenced than that the public gets a full airing of the whole Watergate mess; and that under the separation of powers doctrine the committee should be allowed to do the work charted by the Senate.

The answer to this traditional free press-fair trial question is I think, in favor of continuing the hearings.

Two Supreme Court cases are notable. The first, *Shepard* v. *Florida,* was decided in 1951; it involved a state trial of four blacks charged with raping a white girl. Furious local press coverage of the case whipped up to fever pitch a hostile community which burned Negroes' homes and attempted to run people out of town. The conviction was reversed on the ground that pre-trial publicity deprived the defendants of due process of law. Justice Robert Jackson ruled that the defendants had been prejudged as guilty and that their trial was "but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated."

Fifteen years later, in *Sheppard* v. *Maxwell* (the Sam Sheppard murder case) the Supreme Court reversed a murder conviction because the trial judge had failed to protect the defendant from "massive, pervasive and prejudicial publicity that attended his prosecution," depriving him of due process of law.

In both court cases, pretrial publicity was virulent and the local trial atmosphere was of carnival proportions. But more important, in both cases the Supreme Court criticized the trial judges and placed the blame for prejudicial publicity on their failures to use available techniques to filter away the effects of prejudicial pretrial publicity: instructions to the jury, sequestrations, *voir dire,* continuances, changes of venue, and special rules of court to govern the conduct of prosecutors, defense counsel and even the press. The Supreme Court has made it clear that these available techniques must be tried and must fail before a case will be reversed.

A similar finding was made in *Delaney* v. *United States* in which a federal appellate court reversed a criminal conviction on the ground that *post-indictment* publicity generated by a congressional investigation was so extensive and prejudicial as to have permeated and corrupted the trial process. Here, too, however, the trial court refused to grant a continuance.

Whatever publicity emanates from the Senate Watergate hearings will not have been generated by the prosecutor (indeed, much of the publicity came from leaks and statements by the defendants themselves). The trial courts that ultimately hear these cases will have the responsibility to assure that the juries impaneled to decide these cases are not affected by pre-trial publicity generated by the Senate hearings or any other source. A jury without extra-judicial information or hard opinion about notorious cases can be found with some effort. Judges can control the courtroom atmosphere of trials so that infamous defendants can get fair trials. Widespread publicity, per se, does not mean fair trials are impossible. And, as extensive as the Watergate publicity has been, it is not of a sort which is likely to arouse a lynching climate and deprive defendants of due process of law.

There is a second question. Another prejudicial publicity problem could be caused by the Ervin committee hearings: the effect of forcing reluctant witnesses to appear before the committee, on camera, and either 1) to commit contempt for refusing to answer questions, 2) to commit perjury by answering falsely, 3) to incriminate themselves by telling all, or 4) to take the Fifth Amendment repeatedly in the face of accusatory questions. Putting a witness in this position is a flagrant, unnecessary violation of civil liberties: it is a discreditable form of badgering and prejudicial publicity. It has been done, however, so it is not paranoid to fear its recurrence.

This kind of prejudicial publicity can be avoided if the committee does not pillory reluctant witnesses who are indicted or who are clearly subjects of a criminal investigation. The sight of a reluctant witness sitting before the microphone predictably responding to accusatory statements-dressed-up-like-questions ("Isn't it true that . . .") by politely invoking his constitutional rights ("Sir, on advice of counsel, I respectfully refuse to answer that question on the ground . . ."), is demeaning to all involved and accomplishes no public purpose.

The committee's treatment of this issue will determine whether or not it is guilty of a regretful form of prejudicial publicity. The issue can be avoided if the committee is rigorously fair in its conduct of its hearings, and the evidence to date indicates that the Ervin committee intends to be. Congress can carry out its true investigative work by using only willing witnesses and experts who are always happy to appear, instead of dragging unwilling witnesses before it and engaging in a public battle with them about their right not to testify. Suspects who are not reluctant to testify (Herbert Porter's recent incriminatory testimony, for example) can also be called.

This second kind of pre-trial publicity may poison the streams of the judicial process at a later time; but it can be prejudicial in the sense that it is fruitless, overreaching and persecutorial. A broader question also is raised: With the pervasiveness and impact of present media coverage, can congressional investigations serve a new and important function of public education, or does this kind of invetsigatory hearing inevitably turn into a crude form of guerrilla theater?

The committee's ruling on Tuesday denying Maurice Stans' request to defer his testimony gets close to this issue: He is indicted in another case and asked only for a delay in his testimony. The committee was polite, understanding, solicitous, but resolute; it ordered Stans to testify although it promised to skirt any references to the Vesco case. How the committee handles the anticipated refusal of G. Gordon Libby to testify about the Watergate case will tell even more.

So long as the Ervin committee continues to deport itself with the bend-over-backwards fairness and care it has exhibited to date, it can avoid the kind of mischievous prejudicial publicity that a commitment to important principles demands. If it does this, the committee also can write a proud page in the history of congressional investigations.