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**Amnesty and Calley**

By Daniel J. Kornstein

The reversal of Lieut. William Calley's My Lai conviction shows that Congress in effect granted amnesty to Lieutenant Calley. Congress did so, moreover, in a backhanded way that was not known to most Americans and probably even most Congressmen.

In 1970, before the court-martial began, Congress refused to permit Lieutenant Calley's lawyers to inspect testimony given by prosecution witnesses to a Congressional subcommittee investigating the My Lai incident.

Last September, a Federal judge reversed Lieutenant Calley's conviction because, among other things, the prosecution was allowed to call all its witnesses even though their prior statements to the subcommittee were

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unavailable to Lieutenant Calley's defense.

This decision made important new law by recognizing for the first time that Congress could indirectly grant amnesty if it refused to release subcommittee testimony.

The Army has appealed the decision, notwithstanding Lieutenant Calley's parole. A few weeks ago, the Court of Appeals for the Fifth Circuit heard oral arguments in the Calley case. That court, and perhaps the United States Supreme Court eventually, will have to answer these questions:

1. Does a criminal defendant have the right to inspect testimony given to Congress by prospective Government witnesses?

If the Government refuses to produce relevant statements by a witness, a Federal statute called the Jencks Act directs the judge to strike the witness's testimony, or declare a mistrial. The act contains no express exception for testimony given to Congress. Nor does its legislative history reveal any hint of an implied exception.

In 1969 the United States Supreme Court said that denying production of Jencks Act-type statements might, in some circumstances, also violate a criminal defendant's constitutional right to full and effective cross-examination of witnesses against him. The constitutional rights of a criminal defendant do not disappear simply because a Congressional committee, rather than a Federal Bureau of Investigation agent, possesses a statement.

2. Does Congress have the power to refuse to produce such testimony?

The Constitution expressly gives Congress the right to withhold certain information. Article I provides that, "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as in their Judgment require Secrecy."

The legislative powers granted to Congress by the Constitution also include the power to call witnesses to aid in the writing of laws. Moreover, a Congressional committee could reasonably conclude that a promise of secrecy would elicit more candid and comprehensive testimony from reluctant witnesses.

And, of course, like the President, Congress may deem secrecy essential to national security.

3. If Congress refuses to disclose such testimony, what should be done?

Given Congress's explicit powers, a court's attempt to compel Congress to produce testimony might violate the doctrine of separation of powers. But such compulsion is unnecessary because of a judge's own battery of other remedies. A judge can prevent witnesses from testifying, strike their testimony, declare a mistrial, or even dismiss the charges.

4. What are the ramifications of such Congressional and judicial action?

By hampering or blocking the prosecution as the price of Congress's nondisclosure of pretrial testimony by Government witnesses, a court does justice to the defendant. But at the same time it gives Congress a previously unknown way of obliquely exercising amnesty.

Congress's new-found way to use its amnesty power, is, like the President's pardon power, liable to abuse. Consider the following scenario:

A Congressman or one of his aides, or a member of an administration with a majority in Congress, is indicted. Some members of Congress want to prevent the accused person from being convicted. They decide to have a Congressional committee investigate the subject matter of the charges, and in the course of its investigation, to call probable prosecution witnesses to testify in executive session, knowing full well that the defendant will inevitably try to inspect such testimony. If the committee refuses to release the testimony, the prosecution witnesses' in-court testimony may be stricken, or a mistrial declared.

Such a scenario is possible, but the risk must be run. Any alternative would deny defendants their basic procedural rights.

The main thing is for all of us, especially Congress, to be aware of this means of granting amnesty, and of the paradox of granting amnesty to a mass murderer while insisting that draft offenders perform alternate service.

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