NYTimes MAY 23 1973

The Laws That Apply

By Leonard Orland

WEST HARTFORD, Conn. — The question of whether or not Attorney General Mitchell and/or the Presidential confidants Ehrlichman and Haldeman, acted unlawfully in the Watergate and Ellsberg incidents and, if so, whether or not this occurred with the prior or subsequent knowledge or approval of President Nixon raise a number of significant questions concerning the criminal and constitutional process.

Three legal issues emerge as central: the potential for liability under Federal criminal law; the constitutional relationship between the impeachment and ordinary criminal process when the putative defendant is the President and the risks of exposing the President to the traditional grand jury inquisitorial and accusatorial process.

Two Federal criminal statutes are relevant to the issues of criminal liability. Section 1503 of the Federal criminal code imposes a maximum of five years imprisonment for anyone who "corruptly . . . influences, obstructs, or impedes or endeavors to influence, obstruct or impede the due administration of justice."

Section 1510 of the same code imposes a five-year maximum penalty for anyone who "wilfully endeavors by means of bribery, misrepresentation, intimidation or force or threats thereof to obstruct, delay, or prevent the communication of information related to a violation of any criminal statute of the United States by any person to a criminal investigator." Conspiracy to commit either of these offenses is independently punishable by a five-year maximum.

The ordinary process for charging violation of these statutes is by Federal grand jury indictment; but where the putative defendant is the President, constitutional questions must be considered.

The Constitution addresses itself to the issue of impeachment of Presidents with singular specificity. "The President," declares Article II, Section 4, "shall be removed from office upon impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." Article I, Section 2, vests in the House of Representatives "the sole power of impeachment." The Senate, by virtue of Article I, Section 3, is given the "sole power to try all impeachments" which "shall be on oath or affirmation," with the Chief Justice presiding. Conviction for impeachment requires the "concurrence of two-thirds of the members present." However, "judgment in cases of impeachment" does not "extend further than in removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States."

So much is clear; what is unclear is whether the Constitution permits a President to be investigated by a Federal grand jury or indicted by that jury *without* the constitutional processes of impeachment. The sole constitutional comment is that if the President is "convicted . . . of impeachment," he "shall nonetheless be liable and subject to indictment, trial, judgment and punishment, according to law." (Article I, Section 3). This language addresses itself to a sequence in which the criminal indictment follows removal after a Senatorial judgment of guilty by impeachment. But it leaves open the question of whether the Constitution precludes grand jury investigation and indictment of a President even without impeachment.

The constitutional history, meager as it is, points to the conclusion that impeachment followed by indictment, rather than the reverse, was contemplated by the framers. Hamilton, in the Federalist Papers, declares that "the President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law" and that "after having been sentenced to a perpetual ostracism from the esteem and confidence, and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law."

Moreover, the nature of the broad and sweeping investigative and accusatorial power lodged in grand juries raises grave concern as to whether or not Presidents should be obliged to respond to investigative demands or accusatorial charges prior to the process of impeachment contemplated by the Constitution.

Federal grand juries are composed of 16 to 23 citizens, selected at random under the supervision of the Federal District Court, and, in the ordinary course of events, under the control of a United States attorney.

Grand jury sessions are secret; the investigate must respond to the subpoena and answer questions on pain of contempt and imprisonment; the investigatee is not permitted the assistance of counsel in the grand jury room.

The grant to Federal grand juries of broad power to investigate, coupled with the relatively low quantum of evidence needed to indict, raises concern over whether such power should properly be invoked against the President prior to impeachment.

Leonard Orland is professor of law at the University of Connecticut.