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DUE PROCESS OF LAW

An editorial from the Times of London of June 5.

The President of the United States is in the unenviable position of being tried by his fellow countrymen in three different forums, each of which has its own particular deficiencies and two of which have the power to offer freedom from prosecution to those whose evidence may accuse him. That is not to say the President is innocent, or that he would be innocent if any precisely formulated charges had been brought against him. It is perfectly possible for a wholly guilty man to be tried in a wholly unjust way. Indeed, many of the men who have been lynched in the course of history were lynched for crimes they had actually committed. That does not alter the fact that what Mr. Nixon is now receiving is a Washington variant of lynch law, and that while he may or may not be innocent, he may never be proved guilty by a process so clearly lacking in justice.

The three forms of trial, which are taking place simultaneously, are the Ervin committee in the Senate (and this leaves out other related inquiries by five other Senate or congressional committees), the grand jury, and the media, including The New York Times and The Washington Post.

Publicity

The Ervin committee is investigating precisely because the Senate thought that the due process of law was working too slowly. The senators are trying to ask fair and relevant questions; there is no allegation that this is a Senate committee on the lines of the McCarthy committee, though it has approximately the same powers and rules. Yet Senate committees are not courts: they do not have an adversary procedure; they do not have cross examination by counsel for the accused; they can take and certainly do take hearsay evidence. The Ervin committee has already been warned by Archibald Cox, the special prosecutor, of "risk of damage to investigations and any resulting prosecution". The enormous publicity given to hearsay evidence in televised hearings is so prejudicial that it alone would seem to preclude the possibility of fair trial for any accused, even including the President himself if there were impeachment proceedings.

The second tribunal is the grand jury. No student of British law will forget that we abandoned the grand jury procedure because of its notorious weaknesses as an instrument of justice. Grand jury proceedings provide the prosecutor with opportunities to introduce prejudicial evidence, which would not be admissible in a trial. The Watergate grand jury proceedings have been held in camera but have been widely leaked. The public has therefore a partial and unreliable account of these proceedings; that must be more damaging to the administration of justice than if there were a full account or no account at all. The publication of alleged reports of proceedings held in camera would be contempt of court under British law.

The third tribunal is the press, with television. But for the work of The Washington Post the real elements of the Watergate scandal would not have been uncovered. However, now we have a simultaneous process of trial by newspaper allegation, beside the Senate hearings and the grand jury. The American press, and particularly The Washington Post, deserve their full credit for forcing the Watergate affair into the open. They are however now publishing vast quantities of prejudicial matter, that would be contempt under British law, which again must tend to prejudice the fair trial of any accused, or, if it came to that, of the President.

The latest and most damaging example of this is the evidence given by John W. Dean III. According to The New York Times and The Washington Post, Mr. Dean told Senate investigators that he conferred with President Nixon thirty-five to forty times between January 1 and April 30 of this year. The subject of these conversaions was alleged to be the concealment of the fact that White House men were behind the break-in of June 17 last year, the Watergate burglary. Mr. Dean also alleged that the President agreed to buy the silence of the accused. These allegations have been denied specifically by the White House, though it is agreed that the President saw Mr. Dean, who was indeed the White House counsel at the time.

This is evidence of the greatest possible importance. It is not too much to say that if Mr. Dean's evidence is true, Mr. Nixon is not fit to remain the President of the United States. Mr. Dean's evidence, if believed, would convict the President on two counts, firstly of conspiracy to pervert the course of justice and secondly of deliberate, continued and systematic lying to cover up his own part in that conspiracy. In practice, if Mr. Dean's evidence comes to be accepted, it could well lead to the successful impeachment of the President of the United States, and it is the first evidence in the whole case which takes the central matter straight home to the President, not by hearsay but by direct account.

This evidence of Mr. Dean's has come out first in two great newspapers, the most important national newspapers of the United States. Perhaps one should consider what the quality of Mr. Dean's statement is as evidence. In the first place it was given to Senate investigators whose committee has the power to give or withhold immunity from prosecution to witnesses before the Senate committee. Mr. Dean has stated that he will not be the fall guy, and one way in which he could avoid being the fall guy would be to obtain immunity for himself in return for his evidence against other people. There is a long legal tradition that the evidence of those who wish to turn Queen's evidence should be treated with suspicion.

That is not a crucial inconsistency; Mr. Dean could well have been dribbling out the truth, a little last month, a little this month. In the same interview, however, Mr. Dean's friends quoted another story of Mr. Dean seeing the President. Mr. Dean admitted that he had never conducted the supposed inquiry into White House involvement, and told the President so on March 21, 1973. "The President came out of his chair" in apparent shock. So by Mr. Dean's first account we have the President shocked by a fact which, if Mr. Dean's second account were true, the President could scarcely have failed to know. That little physical detail of President Nixon bouncing out of his chair when he hears that Mr. Dean has been organizing a cover-up tells strongly in the President's favor, particularly as it comes from a hostile witness, and particularly as it refers to a date as recent as March 21 of this year.

Same principles

That is not to say that this contradiction cannot conceivably be explained. What it does do is illustrate the danger of prejudice inherent in press reports of unsworn, untested, uncorroborated evidence. This is leakage of evidence likely to prejudice the Senate committee, which when it is presented to the Senate committee will further prejudice any trial that may depend upon it. It is prejudice very close to the fountain of information on which justice at some later stage is supposed to be done. The Dean leak is lethal, if believed, and yet of minimal evidential value; it alone could make a fair public trial impossible.

The tragedy is that the whole case is concerned with justice. What the President is accused of that really matters is to have interfered with the course of justice. That would be as grave an offense as a President could commit. Yet are not the Senate committee who are taking and publishing hearsay evidence to the whole country also interfering with the course of justice? "It is much more important for the American people to know the truth . . . than sending one or two people to jail," said Sen. Ervin, the chairman of the committee. That is not only interfering with the course of justice, but justifying the decision to do so.

And what about the press? Of course the American law of contempt is very different from ours, but the principles of fair trial are the same. How can one justify the decision to publish the Dean leak? Here is a real piece of hanging evidence, the missing element —if it is believed—in a chain of proof. Here is a piece of wholly suspect evidence—unsworn, unverified, not cross-examined, contradicting previous evidence, subject to none of the safeguards of due process, given by a man who may be bargaining for his freedom. How can the newspapers defend themselves from the very charge that they are bringing against the President, the charge of making a fair trial impossible, if they now publish evidence so damning and so doubtful with all the weight of authority that their publication gives?

Slender evidence

Mr. Dean's evidence was a preparatory statement; it was not given on oath; it was not given in open hearings; it was not given in open court; it must have been subject to questioning by the staff of the Senate committee, but not to public examination. It was most certainly not open to cross-examination by counsel for the President. On these grounds alone it is hard to think how evidence could be less satisfactory. Yet on this evidence could well be based public conclusions which could destroy a President of the United States.

The case is in fact worse than this. Any cross-examination would have put to Mr. Dean the apparent contradictions between this statement, now so unfortunately leaked to the press, and the earlier statement made by Mr. Dean's "friends" in an interview published by Newsweek on May 6. Mr. Dean's friends reported that Mr. Dean did think that Mr. Nixon knew of the cover up, but gave only the slender evidence of an interview in September 1972, in which the President stated: "Good job. Bob told me what a great job you've been doing." Mr. Dean took this to refer to the cover-up. By May 6 we are therefore already dealing with a Mr. Dean who is a hostile witness to President Nixon. He makes no mention then of the 35 meetings, but provides much more remote evidence for his belief that the President knew what was happening.

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