Justice: Agnew Lawyers Are Trying to Confuse the Issue

Following are excerpts from the text of a brief filed yesterday by the Justice Department rejecting the claim by Vice President Spiro T. Agnew's lawyers that the department has been the source of leaks to the press:

The government submits this memorandum in opposition to a motion filed by counsel for the Vice President. That motion seeks a full evidentiary hearing on unsupported charges the the Department of Justice has engaged in a "campaign" of news leaks in order to support the further request that the grand jury investigation be halted and the Department required never to disclose its evidence to any person, including, presumably, members of the House of Representatives.

Analysis of the papers submitted by counsel for the Vice President discloses that their motion is supported by neither the facts nor the law. They are engaged in an attempt to confuse the issue and to halt a legitimate investigation by the common defense tactic of trying the prosecutor.

The Department of Justice is at least as concerned as counsel for the Vice President about the publicity this investigation has received. Counsel for the Vice President concede that "in all probability, such publicity is inevitable when a Vice President is the subject of a criminal investigation." . . . The department has, nevertheless, made vigorous efforts to discover whether personnel with knowledge of the investigation have divulged facts to unauthorized persons. But since the unsupported charges made by counsel for the Vice President are serious, the department wishes to meet them head on and meet them now. For that reason, despite the lack of any basis for the charges, the department will not object to or seek relief from the order that senior officials give their deposition under oath.

Since no showing has or can be made that any department "campaign" or conspiracy exists, however, we strongly object to the subpoenas issued by counsel for the Vice President to newsmen. We have supported the right of courts to the testimony of newsmen when its relevance and importance were plain. We have never supported incursions into this sensitive area for the mere purpose of conducting fishing expeditions, and it is plain that that is all that is involved here.

In order to obtain an evidentiary hearing as a basis for further relief, counsel for the Vice President must do two things: (1) show facts that give probable reason to believe that the department has conducted a "campaign" of news leaks: and (2) articulate a valid legal theory that would justify halting a legitimate grand jury investigation and suppressing the evidence. They have done neither.

We first demonstrate that the affidavit filed by Jay H. Topkis, counsel for the Vice President, does not contain a single fact tending to show that there is any campaign of news leaks by the Department of Justice. The department has made an extensive investigation of its own personnel and has taken strong measures to prevent news leaks. There are, moreover, many sources other than the Department of Justice for stories about the course of the investigation. Thus, under any possible legal theory, counsel for the Vice President have failed to make a showing sufficient to justify an evidentiary hearing.

The charges are, in any event, legally irrelevant. A grand jury's awareness of publicity unfavorable to a person under investigation does not invalidate its proceedings. To the best of our knowledge no court has ever stopped a grand jury investigation because of unfavorable publicity and, in our view, courts do not have the authority to fashion such relief. The most that a court has ever suggested is that it might have the power to dismiss an indictment if actual bias and prejudice on the part of grand jurors were shown.

That showing could only be made upon investigation after indictment when the grand jury's function had ended. The allegation that the Department of Justice has been the source of the publicity unfavorable to the Vice President provides no basis for halting the grand jury investigation or suppressing the evidence. The source of such news stories has no constitutional relevance.

Both the facts and the law, therefore, require that applicant's motion be denied. We are willing to go farther than the law requires, however, and we offer the following to assure the Court of the department's good faith in this matter.

- Senior officials of the Department of Justice will testify by deposition. This will establish that there has been no "campaign" of news leaks and that the department has made every effort to ensure that no leaks came from its personnel.
- We will agree to a proper protective order, applicable to all parties and their counsel, prohibiting the disclosure of the evidence. The order cannot, of course, preclude an appropriate disclosure to the House of Representatives.
- We have filed with the Court, contemporaneously with the filing of this memorandum, a copy of the reports made by Acting Assistant Attorney General Glen E. Pommerening concerning his investigation to determine whether department personnel have been the source of any news stories. Since portions of this report necessarily refer to information developed in the United States attorney's investigation, and on occasion to persons furnishing such information, those poritons of the report have been excised and have been submitted under seal for *in camera* inspection by the Court.
- If counsel for the Vice President are contending that the department has engaged in a campaign to prejudice the grand jury because there is no adequate evidence for that body, we will offer a sealed summary of the evidence developed so far for the Court's *in camera* inspection.

It is important to bear in mind what it is that counsel for the Vice President have undertaken to show. The gravamen of the charge is not that some employees of the Department of Justice have given information, misinformation, or rank speculation to newsmen. They charge a calculated campaign by the department to give information to the press in order to prejudice the Vice President's case. That is what they attempt, and completely fail, to show in order to justify an evidentiary hearing.

The pattern of the affidavit is to quote a story and then assert the source must have been the Department of Justice. Unfortunately for the affidavit's persuasiveness, its first and most choice exhibit has turned out rather poorly. Mr. Topkins characterizes as the "most disgraceful" episode in the department's supposed conspiracy the story that appeared in the Sunday, Sept. 23 issue of The New York Times, in "The Week In Review." The story said that counsel for the Vice President and officers of the department had engaged in plea bargaining and that CBS quoted Assistant Attorney General Henry Petersen as saying "We've got the evidence; we've got it cold."

Mr. Topkis flatly asserts that "The source of this report can only have been in the Department of Justice." It is certainly not self-evident that the source must have been in the department. The remark was allegely made to counsel for the Vice President.

They are members of large law firms and report as well to the Vice President, who may in turn discuss matters with any number of people. . .

The remaining eight news stories lend no more support to counsels' claim. Two (New York Times Aug. 16 . . . and New York Times, Aug. 29. . .) refer to "sources close to the investigation" or "sources familiar with the investigation." It is obvious from The Times' attributions as well as from the contents of the stories that the material could have come from persons associated with the Vice President, from associates of other persons under investigation, or from witnesses. A third story (Time, Sept. 3). . .contains no mention at all of a source and Mr. Topkis actually concedes that the witnesses referred to in the story may have been sources. Indeed there are many possible sources for this story.

Three stories (Newsweek, Aug. 20. . .Washington Post, Aug. 20 . . . Time, Aug. 27) refer to remarks by Department of Justice personnel.

Not one of the stories indicates that the remark was made to the reporter, though one does say a remark was made to yet another reporter . . . Nothing in these stories supports a charge of a conspiracy to talk to newsmen by senior department officials.

Of the remaining two stories (Washington Post, Aug. 22, . . , Baltimore Sun, Aug. 24,) . . . one says that United States Attorney George Beall held press conferences but had said this one might be the last. There is no suggestion in the story or in the affidavit that Mr. Beall ever said anything improper at any press conference. The other story cites "a reliable Justice Department source" as saying that at least some of the allegations made publicly about the criminal investigation involving Vice President Agnew are erroneous. The remark is not in quotes and is not necessarily reported verbatim. If an official did so speak to a newsman, it is highly regrettable, but such a statement can in no way be construed as part of a campaign against the Vice President. Its content is to the contrary.

Those are the nine items of "evidence" offered and they show precisely nothing.

The affidavit wholly ignores news stories that clearly come from sources other than the department . . . A Sept. 24 story by Ben A. Franklin in The New York Times states that "sources close to Agnew's attorneys" said a compromise with the Department of Justice was still possible. On Aug. 20, Time reported that the Vice President said he first heard rumors of the investigation in February. UPI reported on Aug. 14 . . . that sources close to the grand jury reported Mr. Agnew might ask to appear personally. The Washington Post on Aug. 9 . . . stated that Lester Matz asked the Vice President to intervene to prevent the investigation but that the Vice President refused.

If Mr. Topkis' mode of reasoning were applied, we would have to conclude that the Vice President's counsel have engaged in a campaign of news leaks. We do not so contend, of course, but this demonstrates the fallacy of the affidavit's argument.

The only plausible explanation of the news leaks that have plagued this investigation, as well as many other matters of similar newsworthiness in modern times, is that they have come from a wide variety of sources. The articles just cited demonstrate that . . . .

It is noteworthy that the investigation of the Vice President had been in progress for a considerable time without any publicity until the existence of a letter from the United States Attorney to the Vice President informing him of the investigation was brought to the attention of the public by the Vice President. Problems with publicity date from that time.

In light of the news stories cited in the Topkis affidavit and others, the Attorney General directed Glen E. Pommerening, the acting assistant attorney general for administration, to conduct an inquiry to determine if the stories were originating within the department. Professional personnel from the Administrative Division and law enforcement investigators from the Drug Enforcement Administration and the Federal Bureau of Investigation were employed in the inquiry. Some 134 employees of the Department of Justice were identified who might have some knowledge of the investigation being made into the Vice President's activities. This inquiry resulted in a report of Sept. 24, 1973, to the Attorney General, revealing that there are some 59 persons who do have some knowledge of the facts of the investigation.

Of these, 10 have thorough knowledge, 20 have some knowledge and 29 have almost no knowledge. All have signed affidavits denying that they have been the source of any information which has appeared in the news media, and denying that they know of any person who has been such a source. These statements have been submitted subject to the penalties of 18 U.S.C. 1001.

As a result of this investigation a preliminary report was delivered to the Attorney General on Sept. 24, 1973. The report was then updated by means of a progress report submitted Oct. 5, 1973. This continuing investigation has revealed that stories published in the press could have been derived from sources outside the Department of Justice, that in important respects a number of the stories have published information at variance with information in the possession of the department, and that no information about the investigation of the Vice President became public until after the Vice President had been notified that the investigation was proceeding.

In addition, the Internal Revenue Service has conducted a similar and equally thorough investigation of its employees.

This far-ranging investigation was more exhaustive than that counsel for the Vice President can hope to conduct by means of deposition in the time available. Yet it failed to reveal any reason to believe that the Department of Justice is in fact the source of the news stories.

In response to the Vice President's motion, the Department of Justice has now taken further steps designed to eliminate the need for an evidentiary hearing. These steps have been taken in recognition of the fact that there are special considerations in this case that render application of the normal rules inappropriate.

First, the Pommerening Report has been filed with the Court for examination. Since the report contains some material relating to the grand jury investigation now under way, those portions have been tendered to the Court for *in camera* inspection only.

Second, we have not objected to depositions of the Department of Justice officials responsible for this investigation. Since counsel for the Vice President charge that the department has engaged in a conscious campaign of news leaks designed to deprive the Vice President of a fair hearing, these officials are in a position to deny the charge under oath.

Third, because of our concern about the impact of publicity on the proceedings, the Department of Justice is willing to enter into a protective order enjoining the improper dissemination of information about this case by everyone concerned.

Not only have counsel for the Vice President failed to provide a factual showing in support of their charges, but the Department of Justice has gone to extraordinary lengths to answer them. The only purpose a further hearing would serve is to give an opportunity to counsel for the Vice President to compel the authors of the various news stories in issue to reveal their sources, if any. The newsmen will doubtless refuse, claiming privilege and thus introducing a highly publicized collateral issue into the proceeding. . . Since we believe that there is no need for a hearing in any event we do not support the effort of applicant to compel the testimony of newsmen as to their sources in this situation. Any hearing should begin and end with the depositions of Department of Justice officials. . .

Counsel for the Vice President place great importance on their allegations that publicity unfavorable to the Vice President has emanated from the prosecution. They seek to add substance to their charges by conducting extensive evidentiary hearings. We have agreed to the deposition of responsible Department of Justice officials. But we consider further hearings, involving newsmen and others, to be wholly inappropriate. In the first place, we fear that such hearings will be disruptive and unseemly; the issue of newsman's privilege will be very much at the fore, and it may be anticipated that little fact-finding will be accomplished. More importantly, however, it seems clear that even under a theory of the case most favorable to the Vice President, i.e., that the remedy for prosectorial misuse of the new media is immunization of ie suspected offender fron prosecution, there has beeno showing here sufficieneven to justify an evidentry hearing. The allegatis of prosecutorial abu: made by counsel for the Vice President are emp . . .

Moreover, in our view the source of any unfavorable publicity has no constitutional significance. It is the substance of publicity, not its source, that bears upon the grand jurors' ability fairly and objectively to consider the matters before them. A grand jury exposed to "unfavorable" publicity that has been "leaked" by the prosecution is in no different a position from that of a grand jury that is exposed to similar information uncovered by diligent investigative reporters . . .

In this case, however, there are obvious special considerations that render application of the normal rules inappropriate. It would be damaging to the nation and unfair to the Vice President if he were indicted by a grand jury on the basis of insufficient evidence, merely because of unfavorable publicity. As we have indicated, we will make a good faith showing that no responsible official of the Department of Justice or member of the staff of the United States Attorney has been involved in an effort to spread unfavorable publicity about the Vice President. That should end the matter.

The legal theory of counsel for the Vice President is somewhat ambiguous, however. If they are saying more—if they are claiming that there is danger the United States attorney may go forward without evidence, relying upon publicity—then we also will offer to the Court a sealed summary of the evidence now in our possession for *in camera* inspection by the Court. This Court may then determine whether the Vice President is in fact in serious danger of unwarranted indictment based upon insufficient evidence. We believe that this procedure would be more relevant to the protection of the legitimate interests of the Vice President than an evidentiary hearing into the sources of news leaks, especially since we deem the question of sources to be constitutionally irrelevant.

The public interest in even-handed law enforcement, and especially in expeditious handling of this case, require that the grand jury be permitted to go forward without further litigious delay . . .

Moreover, the Vice President's motion additionally requests that the Department of Justice be barred from "discussing with or disclosing to any person any such testimony, documents or materials." Again, the intended scope of the requested relief is unclear. At its broadest, however, it could be read as barring the Attorney General from informing the President of the status of the investigation into the activities of the Vice President; the impropriety of any such order is too obvious for extended discussion.

Furthermore, the proposed order could also be read as prohibiting the Department of Justice from forwarding its investigative files to the House of Representatives. There is of course no possible legal basis for any order of that kind; whatever immunity the Vice President may or may not have against prosecution, he clearly has none against impeachment.

There being no factual basis for the charges made by counsel for the Vice President that the Department of Justice has engaged in a press campaign, and there being no legal basis for interference with the grand jury's investigation, the relief sought by applicant should be denied. The Court should, moreover, deny any evidentiary hearing beyond the testimony now planned by officers of the Department of Justice. To frame a rule requiring an evidentiary hearing on allegations as frivolous as those made here would be to extend a standing invitation to thousands of prospective defendants to tie up legitimate investigations with similar unsupported charges.

Respectfully submitted.

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