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Jury's Action: What It Means to Nixon and 6 Defendants

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News Analysis

WASHINGTON, June 6—The naming of Richard M. Nixon as an unindicted co-conspirator in the Watergate cover-up is not, legally, the intrinsically significant act that his indictment would be. Unlike an indictment, it gives President Nixon no new clearcut rights and duties, no right to a trial, for instance, no duty to plead to the accusations.

But it has significance for Mr. Nixon and the six defendants as well. And for all seven, the implications seem largely negative at present.

The naming of Mr. Nixon gives the prosecution an advantage in the trial of the six cover-up defendants, by making it easier for the prosecution to use certain evidence.

It probably means that Mr. Nixon cannot escape his present problems by resigning unless he first makes a deal with the prosecution, such as the deal Vice President Agnew made.

It may also mean that Mr. Nixon's case in resisting the prosecution subpoenas, a case considered weak by some, may become even weaker.

It may also have some effect on the impeachment proceedings, for it could heighten public opinion against the President.

'Not Innocent Passers-By'

These implications stem mainly from two things—first, what the naming of someone as an unindicted co-conspirator suggests about the evidence against the person; and second, the law of conspiracy.

Unindicted co-conspirators are often named in conspiracy prosecutions. As Ronald L. Goldfarb, a lawyer here and a former Justice Department official, said, "They're not innocent passers-by." They are persons against whom the prosecution has at least some incriminating evidence.

Sometimes a grand jury does not have sufficient evidence to indict. Other times, the prosecution agrees to an arrangement in which an individual will testify against the other accused conspirators in return for which he or she will not be prosecuted.

The prosecution may name such a person in an unindicted coconspirator to take advantage of a rule of law that allows evidence about one conspirator to be used against another, or as Mr. Goldfarb noted, the prosecutor may want to "smear" the person. This is not a particularly acceptable or common practice, but it does seem to show up now and then.

Potential Legal Problems

The reports about the Watergate grand jury's action in Mr. Nixon's casei ndicate another possibility. According to some sources, the jury voted to name the President a co-conspirator because it had originally wanted to indict him, but the special prosecutor, Leon Jaworski, had advised them that indictment of an incument President raised legal problems.

In this interpretation, the jury was trying to put on record its view that the President was "culpable" though not "indictable." This is similar to what a grand jury does when it issues a "presentment," a report alleging certain wrongdoing but not subjecting the target of the report to criminal prosecution.

If this is true, then the only bar to indictment of Mr. Nixon is the fact that he is President. If he resigns, he removes that bar and thus becomes vulnerable to prosecution. He would thus be extremely unlikely to resign unless he could be assured—perhaps through a bargain with the prosecution—that he would not be indicted.

The problems for the six cover-up defendants arose because of an aspect of the law on conspiracy called the co-conspirator rule.

The rule says that once a conspiracy is shown to exist and certain persons are shown to be involved in it, acts or statements that any conspirator makes in "furtherance" of a conspiracy are attributable to the other conspirators.

According to Daniel Rezneck, a Washington lawyer expert in criminal defense matters, the "showing" that must be made before the rule is applied—the showing that a conspiracy exists and that certain persons were in it—is only a "prima facie" showing. It need not be proved beyond a reasonable doubt.

In the cover-up case, Mr. Rezneck suggested, the tape of Mr. Nixon's conversation on March 21, 1973 in which he discussed hush money payments, might be enough for a prima facie showing that Mr. Nixon was a co-conspirator.

Courts 'Generous'

Once the showing is made, the prosecution can introduce evidence of things Mr. Nixon may have said regarding the culpability of any defendant. The only condition is that Mr. Nixon must have made the statement in a conversation "in furtherance" of the conspiracy, and, according to Mr. Rezneck, courts have been "generous" in interpretations of what is "in furtherance" of a conspiracy.

The defendants cannot argue that they did not know of or agree to Mr. Nixon's statements or acts, because, as Mr. Rezneck put it, under the rule each conspirator is "deemed" to act for the other.

If Mr. Nixon is impeached for his alleged part in the conspiracy and then acquitted by the Senate, defense counsel in the cover-up trial can argue that the co-conspirator rule does not apply.

Easier for Prosecution

A lawyer for one defendant in the cover-up case said today that the prosecution might have boon able to get some or perhaps all of the same evidence introduced, one way or another. He agreed, though, that because of the co-conspirator rule, the naming of Mr. Nixon made the prosecution's job substantially easier.

Lawyers disagreed today about the effects that the development would have on Mr. Nixon's attempt to have the courts quash, on the ground of executive privilege, the latest subpoena by Mr. Jaworski for White House tapes. Some suggested it would have no effect. Some other lawyers prediced it would weaken Mr. Nixon's tapes case.

'Overriding Need'

The basic law, pending the Supreme Court's ruling expected this summer, is that the President's claims of privilege in response to a subpoena are to be judged by a balancing test—weighing the need for the subpoenaed material against the need to protect the interest that the privilege is designed to protect (in this case, the confidentiality of Presidential communications.)

Mr. Jaworski has asked for tapes of 64 conversations, all but one of them between the President and his aides for use in the cover-up trial.

Mr. Jaworski has said that the conversations were carried out "in the course of" the conspiracy. The fact that Mr. Nixon has been named a co-conspirator is, to some legal observers, an additional factor to show overriding need by the prosecution.

Aas for the impact of the latest development on the President's impeachment prospects, the picture is less clear. One lawyer said today, "This isn't calculated to help him."

There is another possible interaction between the cover-up case and the prosecution, one potentially helpful to the defendants. With Mr. Nixon nam as a co-conspirator, it is unlikely tht eh cover-up trail will be held this fall if the impeachment proceedings are going on then, because of prejudicial publicity. Even before the disclosure of Mr. Nixon's being named as a co-conspirator, it was considered likely that the cover-up trial would be delayed on the ground of such publicity.