

The Ex-President as a Witness

By Leonard Orland

AMAGANSETT, N.Y. — Richard M. Nixon's recent admission of complicity in the Watergate cover-up make him a crucial witness in the forthcoming trial of those Watergate defendants who have not yet pleaded guilty.

That trial, scheduled to begin next month, will adjudicate the guilt or innocence of the three men who were closest to Mr. Nixon: John N. Mitchell, H. R. Haldeman and John D. Ehrlichman. Mr. Nixon's testimony can either incriminate or exculpate, but it cannot be ignored.

Mr. Nixon's possible role in the Watergate trial presents a cluster of problems quite apart from the broad and difficult questions of the efficacy or constitutionality of grants of immunity from criminal prosecution.

Perhaps Congress, President Ford, or the Watergate special prosecutor Leon Jaworski can constitutionally save Mr. Nixon from criminal prosecution. There is, however, no legal means by which anyone can save Mr. Nixon from the subpoena power of the courts.

That power, a unanimous Supreme Court declared in *United States v. Nixon* may "outweigh" even Presidential privilege, since it is "essential" to the "legitimate needs of the judicial pro-

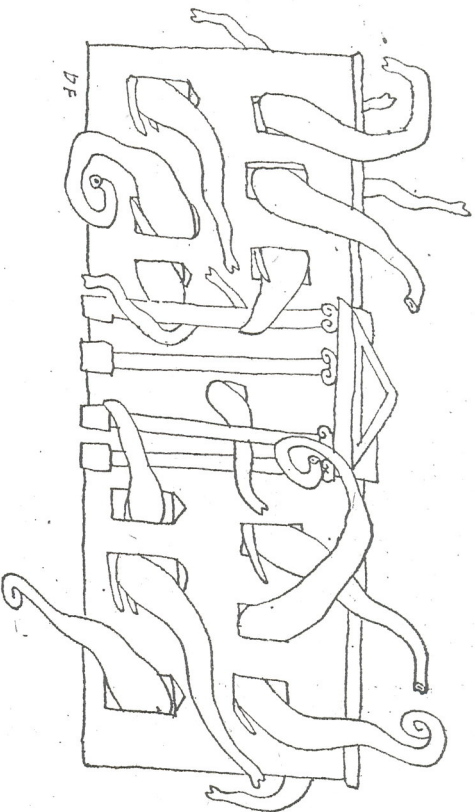
cess."

The criminal process has already been invoked against high Watergate defendants. Within the last year, 13 men have been sentenced to prison for their part in Watergate. Within the last six months, some of those once extremely close to Mr. Nixon, including Charles W. Colson, Jeb Stuart Magruder and John W. Dean 3d, have pleaded guilty to obstruction of justice for their roles in the Watergate affair and have received prison sentences.

The Mitchell-Ehrlichman trial will begin shortly unless, before that time, they and the remaining Watergate defendants plead guilty and thereby complete the circle of high Watergate defendants summarily dealt with by the criminal process.

In the absence of entry of guilty pleas, a trial will begin that will test the strength of the American adversary process of criminal justice. For at that trial, the prosecution witnesses may include not only those previously convicted Watergate defendants but Mr. Nixon himself.

Mr. Nixon, as a trial witness, would, like any other witness, be subject to criminal prosecution for perjury in a trial. Like any other witness, he could invoke his constitutional rights against self-incrimination under the Fifth



Amendment, unless already immune from further criminal prosecution by legislative or prosecutorial grant of immunity.

And the ill-fated Presidential tapes, the subject of the Supreme Court's opinion in *United States v. Nixon*, would continue to be relevant and subject to subpoena. But with Mr. Nixon available as a witness, both prosecution and defense, by examination or cross-examination, could seek to have Mr. Nixon explain or amplify unrecorded as well as recorded Water-

gate conversation.

The scope of examination and cross-examination of a former President of the United States in a Federal criminal trial would present extremely difficult, but not insurmountable evidentiary problems for the court. What would be an insurmountable problem, however, would be Mr. Nixon's unavailability as a witness.

Under prevailing Supreme Court decisions, the Watergate prosecution must either make Mr. Nixon available as a witness, so that particular de-

fendants can seek to extract from him exculpatory information, or risk dismissal of pending criminal charges.

As the United States Supreme Court explained in its 1963 decision in *Brady vs. Maryland*: "A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not the result of guile."

Dismissal of pending Watergate charges under the Brady ruling, because of Mr. Nixon's unavailability as a witness, would undoubtedly stimulate efforts by other Watergate defendants to withdraw the numerous guilty pleas already accepted.

Whatever the merits of immunizing Mr. Nixon from personal criminal liability for Watergate, it is unlikely that the nation could or would, under any circumstances, tolerate the outrage of dismissal of all criminal charges against all Watergate defendants as the price of Mr. Nixon's departure from office.

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