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Watergate Jury Quest

Pretrial Publicity Creates a Problem That Many Believe Is Insurmountable

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WASHINGTON, Oct. 10—It is clear that Judge John J. Sirica will impanel a jury in the watergate cover-up case, probably by tomorrow night. What is not clear in many minds here is whether it will be an impartial one. The defense lawyers and other commentators are saying that it seems improbable.

News Analysis

Press coverage of Watergate has been massive, with gavel-to-gavel national television broadcasts of the Senate Watergate committee hearings and the House Impeachment proceedings, and with wide reprinting of the transcripts of the White House tape recordings.

Judge Sirica has said that the prospective jurors he has questioned knew "something about the case," and the defense lawyers have said that the jurors' knowledge has been detailed.

Many prospective jurors, including a number who have been cleared for duty and can now be eliminated only through the limited number of peremptory challenges by lawyers in the case, have said that they consider it unfair to prosecute thee five former White House and Nixon campaign aides in the case while Mr. Nixon goes free.

Defendants in other famous cases, including Jack Ruby, who killed Lee Harvey Oswald before a national television audience, have been tried and convicted, and their convictions were sustained.

The supreme court has overturned few convictions on the ground that publicity prejudiced the jury; in many highly publicized cases, it refused to consider appeals based on that argument.

The law does not require jurors to be ignorant of the cases they are to decide. It does not forbid the impaneling of jurors who have a preconceived opinion of the case.

The law requires only that prospective jurors promise to set aside their opinions and decide the casely solely on the evidence presented at trial and on the judge's instructions.

The Test

The test, as Prof. Yale Kamisar of the University of Michigan Law School phrased it, is the prospective juror's testimony during jury selection, combined with the "nature and magnitude of the publicity" about the case.

There is some point where hte "nature and magnitude" are such that a juror's promise to be impartial is disregarded on the theory that the pretrial publicity was so pervasive, inflamatory or one-sided that it became psychologically impossible for the juror to keep an open mind.

But that point, has rarely been found to exist.

The courts have not always been precise in their explanations, but generally, they seem to reason as follows:

It is impossible in an age of mass communications to find reasonably intelligent jurors who have heard nothing about famous cases; defendants in sensational crimes should not be freed before at least an attempt has been made to try them; the courts can often meet the problem of prejudicial pretrial publicity by delaying the trial until the publicity abates, moving the trial t oa town where publicity is less extensive, sequestering the jury, ordering lawyers and witnesses in the case not to talk to the press, and interviewing prospective jurors carefully.

Judge Sirica has used many of these techniques in an effort to combat whatever prejudicial effect pretrial publicity may have had, and has imposed what some lawyers consider an unjustifiably high degree of secrecy in the proceedings.

The cases of the past do not specify very clearly how a judge is to decide when the publicity is such that he should disregard a potential venireman's statement that he could be impartial.

They do, however, give some hints.

In 1963, in a case called Rideau, the Supreme Court reversed the conviction of a man whose confession had been on television. A 20-minute film clip showing the defendant answering leading questions from the sheriff was played three times in two days in the area where the man was subsequently tried. The Supreme Court said this was too muchc.

The Sheppard Case

In 1966, in Sheppard v. Maxwell, the high court reversed the murder conviction of Dr. Sam Sheppard in the death of his wife because of vast pretrial publicity stemming largely from the authorities and because of the "carnival" atmosphere at the trial.

Last year, in United States v. Abbott Labarotories, a Federal District Court dismissed misdemeanor charges relating to allegedly adulterated and misbranded drugs on the ground that the prosecutor and other authorities had disseminated publicity linking the company to a series of deaths not mentioned or involved in the indictments.

It thus seems clear that pretrial publicty spread by the prosecution, particularly misleading information, could lead to reversals or dismissals.

However, is it notr clear whether publicity spread by other branches of government is also a possible ground for reversing convictions. In Delaney v. United States in 1952, the United States Court of Appeals for the First Circuit reversed a conviction in part because of publicity stemming from a Congressional hearing.

The Watergate special prosecution has been fairly reserved in its press statements, but Congressional committee proceedings have resulted in extensive publicity.

Another factor that has been important in previous cases, according to some lawyers, is the nature of the charges. One of the Supreme Court's few reversals on publicity grounds, for instance, involved publicity engendered in a small community by six murders.

Indeed, one Washington attorney, Daniel A. Rezneck, suggests that it might be easier to get an impartial jury in the cover-up case, than in some other types of cases.

Should Judge Sirica impanel a jury, he will be ruling, in effect, that an impartial jury could be found, despite the publicity. Many lawyers will agree with him, but many will disagree. If any defendant is convicted, there will be an appeal, and one of the main bases of appeal will undoubtedly be prejudicial publicity and its affect on the jurors.