

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

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SUPREME COURT, U.S.

No. 73-1766

UNITED STATES OF AMERICA, PETITIONER.

v.

RICHARD M. NIXON, PRESIDENT OF THE  
UNITED STATES, ET AL., RESPONDENTS

No. 73-1834

RICHARD M. NIXON, PRESIDENT OF THE  
UNITED STATES, PETITIONER

v.

UNITED STATES OF AMERICA

MEMORANDUM ON BEHALF OF THE PRESIDENT IN REPLY  
TO THE MEMORANDUM OF THE SPECIAL PROSECUTOR IN  
OPPOSITION TO MOTION TO DISCLOSE AND TO TRANSMIT  
GRAND JURY MATTERS

STATEMENT

On June 19, 1974, the President of the United States, through his counsel, filed in this Court a Motion for Disclosure and Transmittal of Grand Jury Matters to complete the record for review in the above-styled cause. On June 20, 1974, the Special Prosecutor filed a Memorandum in Opposition to the President's motion. This memorandum will reply to the Special Prosecutor's opposition.

ARGUMENT

I. NEWLY DISCOVERED EVIDENCE IS BASIS FOR MOTION

The Special Prosecutor argues that this motion should be denied because:

A challenge to the factual sufficiency of the grand jury's finding was not raised in the President's motion to expunge and therefore was not passed upon by the district court's decision of May 20, 1974. Memorandum of the United States in Opposition to Motion for Disclosure and Transmittal of Grand Jury Matters [hereinafter 'Memo in Opposition'] at 4.

-2-

This reason cannot be used to deny this motion because the grand jury excerpts, which we use as the basis for our claim that the grand jury was acting outside its authority, were only released by the House Judiciary Committee to the President's Counsel on May 21, 1974, one day after the district court's decision of May 20, 1974, and can be considered legally as "newly discovered evidence." As we have already pointed out to this court, this material only recently came into our possession. Memorandum in Support of Motion for Disclosure and Transmittal of Grand Jury Matters [hereinafter Memo in Support] p. 7; Memo in Support, Appendix A, p. 1. After receipt and subsequent analysis of this new evidence, the President's counsel proceeded in the district court to seek full disclosure of the grand jury material. The district court without holding an evidentiary hearing denied the President's Fed. R. Crim P. 6(e) motion.

Under Fed. R. Crim P. 33, courts have developed criteria to evaluate a claim that "newly discovered evidence" entitles a defendant to a new trial. If this court were to consider the instant motion under the criteria developed under Rule 33, our claim unquestionably satisfies all requirements. The criteria for "newly discovered evidence" under Rule 33 utilized in most courts is as stated in Thompson v. United States, 188 F. 2d 652 (D.C. Cir. 1951) (new trial motion following robbery conviction denied when defendant made an insufficient showing of "newly discovered evidence") which sets out a five-pronged test:

To obtain a new trial because of newly discovered evidence (1) the evidence must have been discovered since the trial; (2) the party seeking the new trial must show diligence in the attempt to procure the newly discovered evidence; (3) the evidence relied on

must not be merely cumulative or impeaching; (4) it must be material to the issues involved; and (5) of such nature that in a new trial it would probably produce an acquittal." 188 F. 2d at 653. (emphasis added) Accord: U.S. v. Gordon, 246 F. Supp. 522 (D.D.C. 1965); U.S. v. Rodriguez, 437 F. 2d 940 (5th Cir. 1971).

In the instant case, these requirements are met. The grand jury excerpts were given to the President's Counsel by the House Judiciary Committee in executive session after the district court order of May 20, 1974. Due to the nature of the material, it could not have been discovered earlier, and thus it was impossible to advance this argument before the district court rendered its decision. This newly discovered evidence is relevant to the issue of whether the grand jury was acting outside its authority in naming the President. It stands to reason that the grand jury passed that which it considered the most incriminating evidence of the President's role to the House Judiciary Committee. Yet that material which has been presented to the House Judiciary Committee and which we have attached as a sealed appendix to our motion could not justify probable cause in naming the President as an unindicted co-conspirator and does form the basis of our motion for limited disclosure in the instant case.

II. THE GRAND JURY MATTER IS RELEVANT TO THE ISSUES BEFORE THIS COURT

The Special Prosecutor at page six of the Memo in Opposition urges that the material requested in the instant motion "would not even be relevant to the issue posed by the President's cross-petition for certiorari." It is not for the Special Prosecutor to determine the relevancy

of this motion. This court will perform that function. The issues of this case pertain to whether the grand jury was acting within its authority in naming the President as an unindicted co-conspirator and whether the grand jury determination in this regard made out a prima facie case of criminal activity. The Special Prosecutor astutely has focused on the legal aspects of these issues, but has blithely ignored that there is a basic factual consideration inherent in an analysis of the issues. A grand jury or any judicial body can overstep its authority by crossing over the legal bounds of its jurisdiction or by making determinations of fact without any factual basis.

In this regard, it is significant to note that the material forwarded to the House Judiciary Committee by the grand jury was that quantum of material deemed to be relevant to the Committee's inquiry. If the Special Prosecutor now contends that there is additional "indirectly relevant" evidence available that justified the grand jury's action, then it is noteworthy that the grand jury did not at that time deem it of sufficient substance to merit transmittal. On the other hand, if there is no other evidence, then the grand jury was outside its authority in reaching a determination without a factual basis. The affidavit and the appendices attached to the Motion to Disclose demonstrate a sufficient showing to warrant this limited release of the grand jury materials to resolve the question of whether the grand jury acted outside its authority.

Furthermore, it is possible that this Court, in its analysis of the grand jury's action, would desire to examine the purported factual basis for the grand jury's action. A grand jury may indict only on competent evidence. E. g., United States v. Smyth, 104 F. Supp. 283, 287 n. 1 (N. D. Cal. 1952). A grand jury may act only upon knowledge acquired either from its own observations or upon the evidence of witnesses given before it. Hale v. Henkel, 201 U.S. 43, 65-66 (1906). The purpose of our motion is to allow this court to have a full record so a complete analysis of the grand jury's determination is possible.

Furthermore, this Court may decide to view the factual basis for the grand jury's action in relation to the issue of whether the grand jury's determination pertaining to the President constituted a "prima facie" showing of criminal activity sufficient to overcome the claim of executive privilege. The Special Prosecutor apparently would limit the focus of this Court in its resolution of the above-captioned case. It is in the interest of justice to insure that this Court has the fullest record possible in order to not dampen the breadth of its analysis.

More basically, what the Special Prosecutor has failed to demonstrate in his opposition to this motion is what harm will occur if the grand jury material is released under seal to the Supreme Court and to the President. Certainly the purposes of Fed. R. Crim. P. 6(e) will not be frustrated by this limited disclosure to the highest Court in the land. The historic function of the grand jury it would seem would be in consonance with our motion. As the Supreme Court in Woods v. Georgia, 370 U. S. 375, 390 (1962) said:

Historically, this body [grand jury] has been a primary security to the innocent against hasty, malicious and oppressive prosecution.

In the instant case, the showing we made in our motion warrants an inquiry into the grand jury itself to prevent the oppressive persecution of the President without a trial in an adversary forum where he can rebut the grand jury's charge that he is an unindicted co-conspirator. The Special Prosecutor in his opposition completely fails to assert any reason for denying the motion other than his obvious self-serving desire to limit the argument pending in this Court, and perhaps

his fear that factual analysis by an impartial body will not support the grand jury's action.

III. THE MOTION TO DISCLOSE IS NOT A REQUEST FOR A DE NOVO REVIEW OF THE GRAND JURY'S FINDING

Another reason why the Special Prosecutor would have this court deny the instant motion is because:

Courts have unanimously rejected an invitation to determine de novo whether a grand jury's finding of probable cause was supported by the evidence and the circumstances of the present application make it especially inappropriate for this Court to assume that function. Memo in Opposition at 4.

This reason is patently insufficient to use as the basis for a denial of the motion to disclose. In the first place, de novo means "anew; afresh; a second time." Black's Law Dictionary (Rev. 4th Ed.) at 483. In the instant case there has been no judicial review of the grand jury's action. The court below never had an evidentiary hearing on our motion to disclose the grand jury matter. The Special Prosecutor himself, in his haste in attempting to enforce the subpoena upon the President, has chosen this Court as the forum in which to test the grand jury's action.

The Special Prosecutor contends that:

The grand jury's action regarding the President was merely incidental to its indictment of seven other persons in this case, and he was not the focus or target of its action. Memo in Opposition at 8-9. (emphasis added).

Such action and its effect on a President undergoing impeachment proceedings in Congress can hardly be called "merely incidental." It has been reported that the grand jury originally wished to indict

the President, but they were informed that an incumbent President could not be indicted.<sup>1/</sup> Apparently, the grand jury then decided to name the President as an unindicted co-conspirator and to forward evidence showing the President's alleged complicity to Congress.

The Special Prosecutor contends that the House Judiciary Committee is a forum available to the President "to litigate the weight of the evidence before the grand jury" and that "the evidence is being fully available to counsel" in that proceeding. Memo in Opposition at 9. Contrary to the Special Prosecutor's suggestion, Counsel for the President has not had full access to the evidence through the Judiciary Committee. Only a portion of the evidence has been made known to the President. In addition, the evidence made available to the President has been screened by two independent bodies -- the grand jury and the Special Staff of the Committee on the Judiciary. The first screening was conducted by the grand jury which forwarded to the Judiciary Committee evidence of the President's alleged involvement in the conspiracy.<sup>2/</sup>

There has been no showing, nor assertion by the Special Prosecutor to the effect that the Judiciary Committee has received any exculpatory material. Moreover, the Special Prosecutor acknowledges in his opposition memorandum that "indirectly relevant" material was not forwarded. (Memo in opposition at 4n.2).

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1/ See, New York Times, March 12, 1974 p. 1.

2/ The proceedings pursuant thereto are styled In Re Report and Recommendation of June 5, 1972, Grand Jury Concerning Transmission of Evidence to the House of Representatives, 370 F Supp. 1219 (D. D.C. 1974).

The second screening was undertaken by the Special Staff of the Judiciary Committee which attached only a limited number of documents to its presentation. In addition, the Special Staff Presentation only included portions of the testimony for each witness. Thus, counsel for the President has been given no access to the complete materials held by the Judiciary Committee. In either of the screenings, exculpatory materials could have been deleted.

Lastly, it should be noted that the Special Prosecutor leaves us confused as to whether we have seen all the relevant material in this matter. At page 13 n. 6, of his Memo in Opposition, the Special Prosecutor claims there is "evidence indirectly relevant<sup>3/</sup> to the President's complicity<sup>4/</sup> which was not forwarded to the House Judiciary Committee." Yet at page nine, the Special Prosecutor suggests that we have seen all material when he says "since the evidence the grand jury considered directly material to the President has been transmitted to the House Judiciary Committee where, it is apparent from counsel's papers in support of the pending motion, this evidence is being made fully available to counsel in accordance with the Committee's procedures."

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<sup>3/</sup> How relevant material can be categorized as "indirectly relevant" adds greatly to our confusion.

<sup>4/</sup> In this regard we are confident that the Special Prosecutor's oversight in failing to modify "complicity" with the necessary adjective "alleged" was unintentional. Yet, that the omission was inadvertent, does not reduce the prejudicial effect.

IV. THIS MOTION IS JUSTIFIED BY THE  
EXTRAORDINARY NATURE OF THIS CASE

The Special Prosecutor, citing authority in this Court, suggests that an inquiry into factual questions is required only in "exceptional circumstances." Memo in Opposition at 7. If the action of a federal grand jury in naming the President as an unindicted co-conspirator is not an "exceptional circumstance," we are at a loss to know what is. The Special Prosecutor chides us for "not citing a single case in which any person named as an unindicted co-conspirator has been allowed to litigate the sufficiency of the evidence." Memo in Opposition at 12. Yet the Special Prosecutor, in spearheading numerous attempts to overturn the doctrine of executive privilege, has failed to cite any precedent which authorizes the grand jury's action in naming the President as an unindicted co-conspirator. The reason for his failure to offer any support for the unauthorized, impermissible action of the grand jury is starkly simple. There is no such authority in the annals of American jurisprudence.

We agree with the Special Prosecutor's claim at page 4 of Memo in Opposition that courts uniformly do not consider "whether a grand jury's finding of probable cause was supported by adequate evidence."... However, our agreement abruptly ends when he continues "and the circumstances of the present application make it especially inappropriate for this Court to assume that function." We submit that the circumstances in this case demand that this Court require judicial scrutiny and vindication. The Special Prosecutor's statement conveniently ignores the rationale for courts' declining to review grand jury's findings. In an ordinary case any error committed by the grand jury may be offset in the adversary

-10-

forum with the full panoply of constitutional safeguards available, and will, of course, be remedied by a petit jury's acquittal. More importantly, in an ordinary case, the adversely affected party is not the President of the United States, a putative respondent in an ongoing impeachment inquiry, who has been and continues to be irremediably prejudiced unless this Court provides "Equal Justice Under Law."

CONCLUSION

For the foregoing reasons, we respectfully request that the Motion to Disclose and to Transmit the Grand Jury Matters be granted.

Respectfully submitted,



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Dated: June 21, 1974

CERTIFICATE OF SERVICE

I, James D. St. Clair, Special Counsel to the President, certify that on the 21st of June, 1974, I have caused to be served on the counsel of record and the Solicitor General either by personal service or by placing in the United States mail, postage prepaid, one copy each of the foregoing Memorandum On Behalf Of The President In Reply To The Memorandum Of The Special Prosecutor In Opposition To Motion To Disclose And To Transmit Grand Jury Matters properly addressed to:

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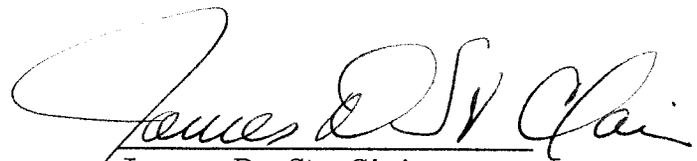
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