THOMAS M. GANNON

Watergate and Pretrial Publicity

With the possible exception of the bankruptcy proceedings of the Penn Central Railroad, the Watergate affair has created more business for lawyers than any event in the nation's recent history. More problems, too, and one of them has brought Special Prosecutor Archibald Cox and the Senate Select Committee on Presidential Campaign Practices into open, though polite, conflict.

The precise point of disagreement is the publicity generated by the committee's nationally televised public hearings. The committee's mandate directs it to gather information that will help the Senate to write new laws governing the conduct of Presidential election campaigns, but the committee is performing a quasi-magisterial function as well, running a seminar in American politics and government, complete with guest lecturers, for those citizens with the leisure and the inclination to tune in.

As special prosecutor, Mr. Cox is not without interest in information about the Watergate, but he seeks a special kind of information—hard evidence of criminal conduct that will eventually lead to convictions in a court of law. For Mr. Cox's real interest lies in criminal convictions, since his performance as Watergate special prosecutor will surely be judged by the number of principals in the affair he succeeds in putting behind bars. It was therefore to be expected that if the Ervin committee's procedures appeared to endanger the convictions he hopes to secure, he would protest vigorously.

In late May, Mr. Cox began to explore the publicity question with Samuel Dash, chief counsel for the committee's Democratic majority. The committee's position on the matter was then, and continues to be, that the public's interest in learning all of the details of Watergate takes precedence over securing criminal convictions of those involved in the original burglary and its subsequent cover-up.

Both Mr. Cox and Mr. Dash described their initial discussions as cordial, but it soon became clear that Mr. Cox had made a request of the committee and that the committee had denied it, for early in June he went to court. The committee had asked Federal Judge John Sirica to grant immunity to two key witnesses, Jeb Stuart Magruder and John W. Dean III. Such a grant prevents witnesses from invoking their Fifth Amendment privilege against self-incrimination, because it assures them that nothing they say in their Congressional testimony will later be used against them in a criminal trial. Mr. Cox asked Judge Sirica to modify the immunity order and direct the committee to take testimony from Messrs. Magruder and Dean only in closed session or, in the alternative, without live radio and television coverage.

According to the prosecutor, both men were likely to confess to crimes during the course of their testimony. If those confessions were extensively publicized, it would be difficult, if not impossible, to select an impartial jury at any subsequent criminal trial of either man, since an impartial jury is by definition composed of citizens who have not formed an opinion about the guilt or innocence of the accused. Mr. Cox further argued that disclosure of the testimony of Messrs. Magruder and Dean would, in effect, telegraph the prosecution's case against other prospective defendants.

The committee replied on two levels, one constitutional, the other practical. It contended that under the doctrine of separation of powers the courts had no authority to regulate the lawful activities of a coordinate branch of government. It also noted that Mr. Cox himself had said that no indictments would be handed down for two or three months, that therefore no trials were likely to be held for another six months to a year, and that the passage of time would abate any prejudicial effect of the publicity generated by the hearings.

On June 12, Judge Sirica decided in the committee's favor. The court's role in granting immunity to Mr. Magruder and Mr. Dean, he said, was purely ministerial. To attempt to modify the immunity order would be to assume, without warrant, a power the court did not possess. Moreover, the issue itself was not ripe for judicial decision. Neither Mr. Magruder nor Mr. Dean had been indicted. Until they were, their rights were not in jeopardy and did not require the court's protection. Finally, Judge Sirica explicitly accepted the committee's argument that Congressional proceedings are insulated from judicial interference.

The committee hearings are continuing, in public session; Mr. Magruder and Mr. Dean have given sensational testimony, with near-saturation coverage by the media. But Judge Sirica's ruling does not necessarily work irreparable damage on Mr. Cox's future prosecutions. The leading case in the area of prejudicial pre-trial publicity created by Congressional hearings is *United States* v. *Delaney*, a 1952 decision by the U. S. Court of Appeals for the First Circuit. In *Delaney*, the court did overturn the malfeasance conviction of a district collector of internal revenue because widely publicized congressional hearings in the three months preceding the trial had inflamed public opinion against the defendant. The court, however, refused to rule that the defendant could never receive a fair trial. It merely stated that the trial in question should have been postponed until the prejudicial effects of the publicity had worn off.

The *Delaney* precedent seems likely to control the conduct of any future trials of alleged Watergate conspirators. If Mr. Cox has the hard evidence he needs, he will get the convictions he is looking for, but he may have to wait months, perhaps years, to get them. It probably wasn't part of the job description for special prosecutor, but to do his job properly Mr. Cox is going to need, as much as any other quality, a long patience.