

The President and the Special Prosecutor

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"The Special Prosecutor shall have full authority for investigating and prosecuting offenses against the United States arising out of the unauthorized entry into Democratic National Committee Headquarters at the Watergate, all offenses arising out of the 1972 Presidential Election for which the Special Prosecutor deems it necessary and appropriate to assume responsibility, allegations involving the President, members of the White House staff, or Presidential appointees, and any other matters which he consents to have assigned to him by the Attorney General."

THIS IS THE authority granted to the Special Watergate Prosecutor described in the regulation re-establishing the Office of Watergate Special Prosecution Force after it had been abolished by President Nixon in the wake of his famous "Saturday night massacre." There was, until last week, *nothing* in that document about limiting the jurisdiction of the Special Prosecutor nor was there anything on that subject in the original charter, under which Archibald Cox operated.

Now, however, there is.

Acting Attorney General Robert Bork amended the charter a week ago Monday. He added wording which provides, for the first time, the manner in which the President can limit the Special Prosecutor's jurisdiction — by first consulting with certain specified leaders of Congress. Mr. Bork explained that this new proviso was merely a correction of a "drafting error," and he added that it was really a safeguard for the Special Prosecutor because any limit on his jurisdiction will now require a consensus—a consensus, by the way of a congressional leadership group that includes a majority which, based on past performance, would generally incline toward the President's point of view on most issues.

The fact is that it is *not* a mere correction of a drafting error and it is *not* a measure which strengthens the prosecutor's hand. Flat and simple, it is the first move to *legitimize* presidential intrusion into the jurisdiction of the Special Prosecutor.

There is no question that the White House is strongly inclined to intrude on that jurisdiction. Elliot Richardson has told us that he received a number of inquiries from the White House as to whether Mr. Cox was exceeding his jurisdiction. On these occasions, Mr. Richardson always consulted with Mr. Cox, but never attempted to limit the Special Prosecutor's jurisdiction. Nobody knows what Mr. Bork's reaction will be in a similar situation or what Sen. Saxbe's reaction will be if the Senate confirms him as Attorney General.

What we do know, however, is that the new Special Prosecutor, Leon Jaworski, inherited from his predecessor five separate task forces, that these task forces have remained intact, and that they are working in areas that go far beyond the Watergate break-in and subsequent cover-up. The other four areas include the activities of the so-called plumbers unit of special presidential parapolice, campaign contributions (including the milk deal), the ITT affair, and campaign "dirty tricks." So far as we know, Mr. Jaworski has given no indication that he

considers any of these subjects beyond his jurisdiction, and the five original task forces have been retained intact. All the evidence suggests, what's more, that the new prosecutor accepts Mr. Cox's belief that the nine subpoenaed Watergate tapes and supporting documents represent only a fraction of the material that is needed from the White House and that would have been sought by Mr. Cox once the separation of powers question and the related issue of executive privilege had been resolved, as they largely have been, by the courts.

We do know, moreover, what the inclination of the White House is and that is what troubles us. In his meeting with Associated Press Managing Editors, Mr. Nixon told us how he would limit the Special Prosecutor's jurisdiction. "I told Mr. Petersen," the President said, "that the job he had—and I would have said the same thing to Mr. Cox—was to investigate the Watergate matter, that national security matters were not matters that should be investigated, because there were some highly sensitive matters involved, not only in Ellsberg, but also another matter so sensitive that even Senator Ervin and Senator Baker have decided that they should not delve further into them.

"I don't mean by that that we are going to throw the cloak of national security over something because we are guilty of something. I am simply saying that where the national security would be disserved by having an investigation, the President has the responsibility to protect it, and I am going to do so."

So, we have from Mr. Nixon's own mouth his notion of the breadth of the Special Prosecutor's jurisdiction. He would have told Mr. Cox that his job was solely the Watergate matter — excluding, presumably, investigations of the plumbers, the milk case, campaign contributions and ITT — and, but for the insistence of Messrs. Kleindienst and Petersen, he would have kept the prosecutors out of the burglary of Dr. Ellsberg's psychiatrist's office. Yet, in California, that "national security" burglary has produced four criminal indictments and in the Federal District Court here, it has already produced another indictment, with more, presumably, to come. Nevertheless, as of Nov. 17, Mr. Nixon did not seem to have tailored his national security cloak to any significant degree.

It is quite clear that the cloak Mr. Nixon is in fact using is much too broad. By his promiscuous use of such terms as national security, presidential papers and presidential confidentiality, Mr. Nixon has effectively disqualified himself as a competent judge of what the Special Prosecutor's responsibilities are appropriately to be. Fortunately, Leon Jaworski seems not to be unduly cowed by Mr. Nixon's invocation of such slippery phrases. Nevertheless, Mr. Bork's latest addition to Mr. Jaworski's charter is disconcerting in view of the White House's demonstrated desire to hem the investigations in at every turn. The least the public should require of this latest procedure is that there be full disclosure of each negotiation the White House has with the specified leaders of Congress on any matters involving the prosecutor's handling of his responsibilities and the breadth of the jurisdiction his office has in the investigations he is conducting.