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Unfinished Business

A former member of the Special Prosecutor's staff says the office had its failures as well as its triumphs.

For 15 months I served as Counsel to the Watergate Special Prosecutor—first Archibald Cox, then his successor, Leon Jaworski. The Special Prosecutor's Office was established in May 1973 as the price the Senate exacted from President Richard Nixon for confirming his nomination of Elliot L. Richardson—soon to become one of the victims of the Saturday Night Massacre—as Attorney General. Although the Watergate trial of John N. Mitchell, John D. Ehrlichman, H.R. Haldeman and Robert Mardian has become a part of our legal and political history, other unfinished business of the Special Prosecutor's Office, including the bribery trial of former Treasury Secretary John Connolly now scheduled for April, will keep the office functioning as an independent appendage of the Justice Department until at least the end of June. The office has been blessed with almost flawlessly good press during its busy but frenetic existence, and indeed the dedicated men and women of the office have earned a great deal of public approval and respect.

But it is only fair to acknowledge that the record of the Special Prosecutor's Office has not been one of unmitigated triumph. It seems to me that it is important to recognize the areas of disappointment and failure as well as those of success and achievement.

Some of the achievements of the Special Proseutor's Office are quantifiable; others are more elusive but perhaps of more profound significance. Of preeminent importance is the role in Watergate. The Special Prosecutor's Staff, working in conjunction with the Watergate grand jury, kept tugging at the threads loosened by Judge John J. Sirica until virtually the whole Watergate cover-up unraveled before a trial jury in Judge Sirica's courtroom and three of former President Nixon's closest aides were convicted.

The investigation of the White House plumbers led to the convictions of Ehrlichman, Egil Krogh, and G. Gordon Liddy for conspiracy to violate the civil rights of Daniel Ellsberg's psychiatrist by breaking into his medical office to search for psychiatric information; and former Presidential counsel Charles W. Colson pleaded guilty to endeavoring to obstruct the fairness of Ellsberg's espionage trial by devising a plan to disseminate derogatory tales about him. Dirty trickster Donald Segretti and his "controller," Presidential Appointments Secretary Dwight Chapin, both received jail terms for their escapades.

And of course the Special Prosecutor's Office played a key role in the departure of President Nixon. Under the guidance of the prosecutors the Watergate grand jury submitted to the House Judiciary Committee the first damning tapes of Nixon conversations, and it was the Supreme Court's decision to order President Nixon to turn over 64 additional subpoenaed tapes to the Special Prosecutor that led ineluctably to the President's resignation two weeks later. The Court's decision that even a President is subject to the judicial process certainly marked the most important long-term contribution to our democratic system made by the Special Prosecutor's Office.

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The investigation of corporate contributions to political campaigns presents perhaps the greatest ambivalence of any aspect of the performance of the Special Prosecutor's Office. Critics point out that, although an average of about 10 lawyers out of the 38 on the Staff, have worked for well over a year on the Campaing Contributions Task Force, only 19 corporations and 20 executives have been charged with criminal violations, all but four of them pleading guilty to misdemeanors and only the two milk co-operative officials receiving jail sentences (of four months each).

They point out that it is inconceivable that of the thousands of large corporations in this country, less than two dozen engaged in illegal political giving.

Furthermore, they note that the investigative process did not lack for major clues helping to focus the inquiry more narrowly than Standard and Poor's list of major corporations. These cynics aptly point out that the list of generous contributions maintained by President Nixon's secretary, Rose Mary Woods, and uncovered in a law suit filed by the citizens' lobby, Common Cause, provided a convenient starting point to track down big corporate gifts that may have been disguised as personal contributions. Pressing their point further, these critics observe that most of the criminal charges filed involved "volunteers" or "quasi-volunteers"—corporations and officers who either took the initiative in acknowledging illegal contributions or at least began cooperating early on in an investigation.

There is much force to these criticisms. Measured in terms of prosecutive successes, the results of the vast investment of time and personnel by the Campaign Contributions Task Force rival those of the ITT Task Force in failing to live up to expectations. And it may well be that the

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disappointing experience in this area of inquiry, pursued by some of the most able and industrious members of the Prosecutor's Staff, defeats the ultimate objective that was in mind at the beginning of the enterprise. The plain fact is that few violations were discovered beyond those voluntarily disclosed by corporate executives and their lawyers. As a consequence, one highly regarded Washington lawyer who brought in an early "volunteer" confided not long ago that he has had somber second thoughts about his advice to his client to initiate full disclosure of past violations. Although he insisted that he would never counsel a corporate official to make illegal corporate expenditures for political campaigns, he mused that he might not be so eager in the future to advise a gratuitous confession.

Prior to the establishment of the Special Prosecutor's Office, there had been virtually no prosecutions for these offenses in the 45-year history of the statutes involved. The patterns of corporate giving that have been uncovered during the Special Prosecutor's investigations left little doubt that the responsible corporate officers knew that the law prohibited the political use of corporate funds, for they frequently devised ingenious stratagems to cloak the true source of the funds, like making bogus bonuses to nominal contributors or debiting their books for contrived charges for mythical services. Yet the consistent practice of nonenforcement of these statutes rose almost to the level of desuetude, and compelled the adoption by Special Prosecutor Cox of a policy limiting prosecution to the misdemeanor level, except in aggravated cases. But it does seem fair to conclude that, despite some short-term deterrence from these highly publicized prosecutions of a number of Fortune "500" corporations and board chairmen, any corporate official who believes it may be in his company's business interests to invest in a political candidate stands a very high chance of being able to get away with such an offense.

The new campaign finance law enacted by Congress and the warning furnished by the score of cases filed by the Special Prosecutor's Office may make the consequences of detection somewhat more severe, but realistically the chances of complete evasion remain distressingly high. It is doubtful, indeed, that any future administration will crank into the Department of Justice anything like the resources temporarily committed to the inquiry in this area by the Special Prosecutor's Office. An internal revenue agent might stumble on some future illegal corporate contributions if a disgruntled employee may blow the legal whistle on such a scheme, but the experience of the Special Prosecutor's Office strongly suggests that conventional law enforcement will not protect the political process from the taint of institutional financial power.

The Special Prosecutor's ITT inquiry has generated several controversial decisions. Best publicized of these was Special Prosecutor Jaworski's decision to lodge only a misdemeanor charge of "contempt of Congress" against former Attorney General Richard G. Kleindienst. The charge grew out of Kleindienst's failure to answer "accurately and fully" questions put by Senate Judiciary Committee members concerned about his fitness to be confirmed as Attorney General in light of his uncertain role in the settlement of a government antitrust case against the giant conglomerate. Some commentators have contended that Kleindienst's various sworn denials of and contact with Attorney General Mitchell and President Nixon over the handling of the suit seem perjurious in light of subsequent evidence, including a tape recording of a vivid conversation between Nixon and Kleindienst on this subject.

The Chief of the Special Prosecutor's ITT Task Force, Joseph J. Connally, and two of his top assistants resigned when the misdemeanor plea was offered and accepted.

In what has become an almost trite example used to support the thesis that power and influence had their effect even in the Special Prosecutor's Office, the Kleindienst plea bargain more than any others has raised nagging questions about prosecutive deals. The factors that entered in to the decision to proceed only with a specially designed misdemeanor plea have never been disclosed publicly—although perhaps they will be if Special Prosecutor Ruth prepares and submits a Final Report to Congress giving an account of the work of the office. So far all that has been disclosed about this mysterious decision is Jaworski's statement that Kleindienst had been cooperative and his obscure intimations on a national television interview program that his decision was somehow influenced by actions of his predecessor, Professor Cox, and that Cox had indicated that he might not have prosecuted Kleindienst at all.

Even assuming the existence of extraordinary factors that would explain an otherwise incomprehensible exercise of prosecutorial discretion, the Kleindienst plea bargain illustrates the unwholesome ripple effect flowing from even the best-intentioned judgment. Any expectation that the prosecutor could construct a specially lenient charge for the former Attorney General, couched in transparent euphemisms, and then leave it to the courts to pierce the deal, quickly evaporated. Following the Special Prosecutor's decision to knock down a possible perjury charge, Chief Judge George L. Hart in the exercise of his sentencing discretion, imposed the minimum sentence permitted by the "contempt of Congress" statute—30 days (the maximum being a year's imprisonment)—and immediately suspended even that. The judge then proceeded to bestow on the defendant Kleindienst the kind of encomiums seldom awarded to confessed offenders by a sentencing judge. The visibly surprised and relieved Kleindienst was able to avoid any awkward confrontation with the press when he and his lawyer, Herbert L. "Jack" Miller (now representing former President Nixon), were allowed to leave through a side door while all spectators, including newsmen, were required to remain in their places. Not long thereafter, two

panels of District of Columbia courts ruled that the offense to which Kleindienst had been allowed to plead guilty did not involve any "moral turpitude," thus saving him from even a temporary suspension of his right to continue practicing law in the nation's capital.

In contrast to the Kleindienst disposition, California's Lt. Governor Edwin Reinecke, an incidental witness at Kleindienst's confirmation hearings, was indicted by the Special Prosecutor's Office for three felony counts of perjury. Although he too received a suspended sentence on the one count on which he was convicted, the consequence of the felony conviction was grave, for Reinecke was required by California law to resign the office to which he had been elected. The case underscores the paradoxical treatment of some figures by an office that was set up to be a model prosecutor's office. While I am firmly convinced of the good faith of all those involved in these decisional processes, the Kleindienst/Reinecke phase of the ITT investigation shows vividly that the inability to treat all offenders with mathematical equality will lead observers to question the justice of our system and the motives of its administrators.

Perhaps the most glaring omission in the work of the Special Prosecutor's Office, of course, involves former President Nixon himself. Although there is great question whether Special Prosecutor Jaworski would have exercised his power under his "charter" to prosecute Nixon for Watergate offenses, income tax fraud, or any of a host of other possible crimes under investigation, it was President Ford's Sunday morning pardon to his predecessor that decisively carved Nixon out of the field of exposure into which so many other men had been led, with personally disastrous consequences, out of loyalty to the then President. Some of us feared that the glowing inequality of Mr. Nixon's pensioned retirement might be too much for the Watergate trial jury to swallow, but their guilty verdict against the four principal Nixon subordinates proved otherwise.

Nevertheless, history may be more critical of the cynical double standard established by President Ford's loyal gesture to his sponsor. Indeed, in a surprisingly little-noticed aside in the opinion of the federal appeals court affirming the conviction of Watergate burglar James McCord, Chief Judge David L. Bazelon noted that President Nixon appears to be the "one exception" to the Special Prosecutor's mandate to prosecute those public officials involved in Watergate for "breach of duty" and suggested that those actually prosecuted might plausibly argue that it is impermissibly selective to pack them off to jail at the same time the government, through President Ford, has guaranteed a secure and comfortable retirement for their ringleader.

The record, to date, therefore, is a mixed one. Though admittedly affected by self-interest, I venture to suggest that history will judge kindly the work of the three Special Prosecutors and their common Staff. Yet there is much in the record to question, if only to insure that the decisions were made responsibly, in the exercise of good faith and professional judgment on the basis of adequate investigation and analysis.

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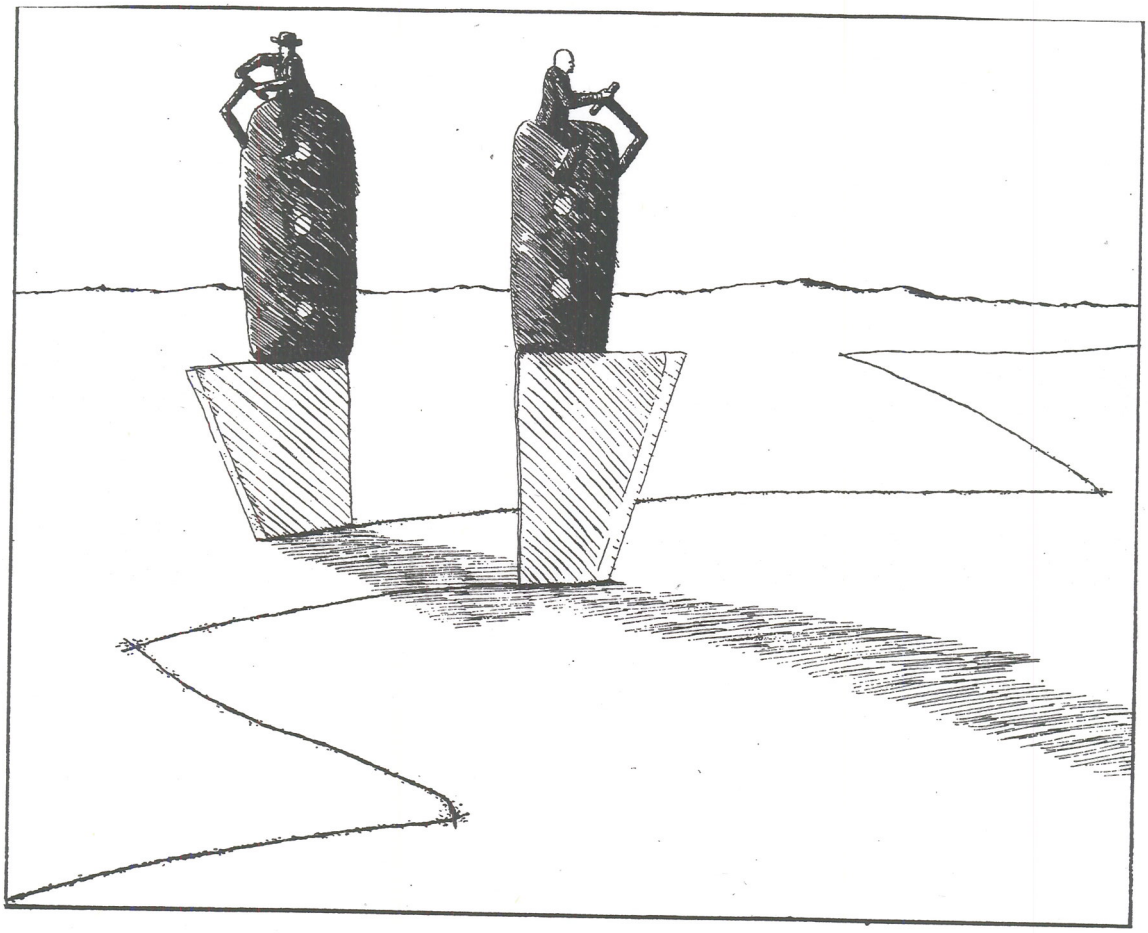
Philip A. Lacovara
Washington, D.C.
Philip Lacovara resigned from the Special Prosecutor's Office following the Nixon pardon. He now practices law in Washington.



JONATHEN WELD