

Post 11/17/75 In Defense of the Special Prosecutor

I served as Counsel to Special Prosecutors Archibald Cox and Leon Jaworski until my resignation in September, 1974. In a recent national news magazine story, I was described as the leader of the "hawks" in the Special Prosecutor's Office. Thus, I trust that this letter responding to Clayton Fritchey's October 28 column, "Henry Ruth Strikes Out," will not be dismissed as a rationalization from someone who is "soft on crime."

Mr. Fritchey's column takes as its starting point a recent Herblock cartoon in *The Post* depicting former Special Prosecutor Ruth as striking out in his handling of the last phase of the Special Prosecutor's Office. Both that cartoon and Mr. Fritchey's column betray a naive misunderstanding of the criminal justice process and constitute an unfair attack on Henry Ruth. While there are certainly ample areas for critical analysis and commentary about the two and one-half year history of the Watergate Special Prosecutor's Office (and I in fact have written some critical comments myself), it is simply baseless to accuse Ruth, as the last Special Prosecutor, of having failed to measure up. Moreover, such charges just miss the real issues that deserve attention.

When Ruth accepted appointment as the third Special Prosecutor in October 1974, it was clear to him and to many of the rest of us that he was undertaking a "no win" assignment. As he understood at the time, the person who is given the task of wrapping up a widely heralded venture will receive none of the credit for its achievements but will have to account for any of the apparent failures left at the end.

That grimly realistic prophecy has now come true, but its foreseeability does not make it just.

There is a deceptive simplicity in underscoring the unanswered questions of Watergate and in taxing Ruth with the failure to answer them. It is understandable why a regular diet of televised police shows might delude an observer into believing that every crime can be neatly solved by the cracking of a key witness or by a tearful confession from the culprit right before the last commercial. Unfortunately, that is not the way it is in the real world.

The adjective "Special" in the Special Prosecutor's title was not a description of superhuman cunning, nor was it an authorization to disregard the traditional requirement of proof beyond a reasonable doubt or a license to manufacture evidence where none could be uncovered. Instead, Ruth's function as a "Special" Prosecutor was to pursue investigations thoroughly, freed from the pressure either not to prosecute or to prosecute in response to considerations that have no legitimate place in enforcing the law. Indeed, one of the most important features of the Special Prosecutor's independence was his ability to decide that, despite intense public speculation about alleged wrongdoing, there was insufficient evidence to justify indictment.

What intrigues me about these articles faulting Ruth is their shortsightedness. It was clear to me when I left in September, 1974, before Ruth succeeded Special Prosecutor Leon Jaworski, that there was not going to be enough evidence to justify indictments in the investigations now

being highlighted by Mr. Fritchey and others. It is only fair to point out in this context that when Leon Jaworski resigned in October, 1974, he announced that the major work of his Office had been completed. To anyone with a modicum of attentiveness, that pronouncement could only have been understood as certifying that the major allegations that were capable of being resolved had been the subject of indictments and that there were going to be "loose ends" in other areas, no matter how regrettable that might be.

That Henry Ruth accepted the assignment under those circumstances and continued to press onward for another year should convince any fair-minded observer that he is a man of courage and determination who should no more be faulted for not solving the unsolvable than were his predecessors.

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