WATERGATE ANTICLIMAX

SCARCELY A FULL REPORT

REP. ELIZABETH HOLTZMAN

Washington

The office of the Watergate Special Prosecutor was given the responsibility for conducting perhaps the most important criminal investigation in the history of the United States. Its mandate included prosecuting all crimes arising out of the break-in at the Democratic headquarters on June 17, 1972, and investigating criminal charges against Richard M. Nixon, then President of the United States and his staff or appointees.

The Report of the Watergate Special Prosecution Force, issued on October 16, is disappointing.* It fails to answer many of the old questions—including those that gave rise to the formation of the Special Prosecutor's office. We still don't know who ordered the Watergate break-in, and why. And this report, unfortunately, raises many new questions about the thoroughness of the Special Prosecutor's investigations and the soundness of some of his decisions not to prosecute. "Was the investigation itself completed?" remains an open question.

*Although it is not called the Final Report, Special Prosecutor Henry Ruth has indicated that the job of his office is substantially completed and that this document summarizes its work.

Archibald Cox, the first Special Prosecutor, in respon to a question at Senate Judiciary Committee hearin about the nature of the final report, pledged that "pro cutions [would] be brought where there is a proper bas for prosecution" and "the reasons for not bringing oth prosecutions or reason for not indicting other figures . [would] . . . be included certainly in the final report." H added that "all the facts with respect to [individuals high office] ought to be out."

It is difficult to imagine that the Senate would ha accepted any lesser commitment from the Special Prosec tor. In fact, it is inconceivable that the Senate would ha been satisfied had it been told that no prosecutions woul be brought for the Watergate break-in, that th investigation would not disclose who ordered the break or why, and that the report would not even attempt explain these failures.

Distressingly, the report abrogates the commitme Archibald Cox made to the United States Senate. Mo important, it fails to meet the reasonable expectations

Elizabeth Holtzman is the Democratic Representative Congress from the 16th District of Brooklyn. She is a member the House Judiciary Committee.

the American public and the Congress that, when the Special Prosecutor's investigations were completed, criminal responsibility would have been clearly pinpointed through the bringing of prosecutions, or that failure to assign criminal responsibility would have been clearly explained.

The most serious defect of the report is that it does not allow the Congress and the public to judge whether a full, thorough investigation was in fact conducted. In this regard, it is noteworthy that *after* the report was issued the Special Prosecutor's office reopened the investigation into corporate contributions because of disclosures that the Gulf Oil Corporation illegally contributed to Nixon's 1972 re-election campaign, as well as to well-known Democratic and Republican officeholders.

In order to assess whether the Special Prosecutor did conduct a full investigation, we need to know whether he tried to obtain all relevant Presidential tape recordings—the most important and probative evidence available. Unfortunately, the report is silent on whether the Special Prosecutor obtained all such tapes, or even if he sought to obtain them. Now, WHY WOULD He?

In another instance, we are unable to judge the degree of investigative thoroughness because the description of the $100,000 that was contributed by Howard Hughes and held by Bebe Rebozo is so cursory. According to the Senate Select Committee report, Rebozo refused to produce for the committee a number of financial records. Were these materials obtained by the Watergate Special Prosecution Force? No prosecutions ensued in this case.

The Senate committee was thwarted in its attempt to obtain relevant information about this and other matters when Thomas Wakefield, a lawyer who represented both Rebozo and Nixon, asserted the attorney-client privilege. Was his full testimony obtained by the Special Prosecutor? If not, was it because the Special Prosecutor failed to challenge his claim of privilege? If that is the case, why was the claim unchallenged? HoHo!

On September 21, *The New York Times* reported that certain financial records in the Rebozo investigation were never obtained and that Bebe Rebozo and Robert Abplanalp were never called before the grand jury. If that story is accurate, the Special Prosecutor should explain what happened. The report should have given us enough information to determine if the Hughes-Rebozo matter was properly investigated—and it could have done so without compromising the parties' rights.

It may well be that the Special Prosecutor conducted a comprehensive, complete, relentless investigation of all the matters falling within his jurisdiction. But one would never know it from this report alone, and we are entitled to the assurance. The central lesson that Watergate taught is that neither the public nor the Congress should be required to accept on faith that public officials do their jobs.

In my judgment, another serious inadequacy in the report is its failure to describe the investigation of criminal charges against Richard Nixon. We know that on September 3, 1974, the Special Prosecutor was investigating ten areas of Richard Nixon's possible criminal liability, but the report is silent on the outcome of these investigations. Were they completed, or did they instead abruptly halt when the pardon was issued? The Special Prosecutor has no basis for refusing to disclose whether these investigations were completed. His failure to do so is puzzling indeed.

Hugh Haynie, Louisville Courier-Journal

"There, That Pretty Well Wraps It Up."

Aside from mentioning Mr. Nixon's status as an unindicted co-conspirator in the Watergate cover-up, the report does not describe his complicity in criminal activity nor does it exonerate him of any charges. The Special Prosecutor may certainly raise a number of serious arguments against disclosing information about individuals who were never prosecuted, but these arguments are not persuasive in the case of a President who accepted a pardon, thus precluding criminal prosecution, and tacitly acknowledging his guilt. The Supreme Court has determined that a public official's right to privacy about matters directly connected to the discharge of his official duties is severely restricted when the public's right to know about such conduct is invoked.

The Special Prosecutor told a House Judiciary Subcommittee in January 1975 that a fuller report from his office was neither necessary nor desirable, inasmuch as voluminous disclosures would eventually occur under the Presidential Recordings and Materials Preservation Act. The Special Prosecutor misses the point. The issue is not only whether the information will become public but how soon and in what form. The litigation on the constitutionality of the tapes legislation has not even reached the Supreme Court. Even if the Act is upheld, the General Services Administration estimates that the first set of documents will not see the light until three years after the

Supreme Court's decision.

Finally, the public needs guidance through this welter of materials. The Special Prosecutor, a nonpartisan official with a broad mandate, has a special credibility. He alone can answer the public need for a nonpartisan account of official misdeeds. Thus, another serious shortcoming of the report is its failure to explain convincingly why prosecutions were not brought in certain circumstances. For example, I am perplexed by the report's account of the decision not to prosecute in connection with the submission of incomplete transcripts to the House Judiciary Committee. The report claims that no criminal intent could be found.

The Special Prosecutor decided that President Nixon's offer to allow the chairman of the House Judiciary Committee and its ranking Republican member to verify the transcripts submitted to the committee was a bona fide offer. The report concludes: "All the available evidence indicated that the verification offer made by the White House to the committee was made with the full expectation that the offer might indeed be accepted." The relevant question is not whether the offer would be accepted but whether, if accepted, it could have resulted in verification. The report, surprisingly, assumes so, although the House Judiciary Committee rejected the White House offer after a full discussion about why the offer was unlikely to produce verification. The problems the committee raised then are still valid:

(*1*) The authenticity and completeness of the tapes heard could not be verified, since no technical experts would be allowed to examine them.

(*2*) The time factor involved in having two people listen to the tapes—even assuming that all tapes had indeed been presented—was unrealistically long.

The Nixon verification offer covered twenty-three tapes containing thirty-five hours of conversation which had been reduced to 1,308 pages of typed transcript. A former Judiciary Committee staff member has said that a "conservative estimate" of the time it took the staff to transcribe the eight tapes submitted to the committee in October 1973, was two hours per minute of tape.* At that rate, had Chairman Rodino and ranking minority member Hutchinson undertaken to verify the transcripts—doing nothing but listen for eight hours a day, five days a week—verification would have taken two years. They would still be listening to the tapes today. The impeachment inquiry would not have been resumed until President Nixon's term had expired. To accept such an offer as bona fide simply strains credulity.

Another questionable explanation for a failure to prosecute is given in regard to the investigation of so-called "national security wiretaps." The report states that no prosecution occurred for any wiretap that might at any time have been construed as related to national security. This is a dubious policy because the report itself concedes that there was "room to contend" that some national security wiretaps were later "altered to an impermissible domestic political goal." It is not clear whether this excessive prosecutorial caution springs from prudence or a desire to establish a perfect win-loss record.

Even more disturbing, the report states that no prosecutions were brought for two wiretaps that were wholly unrelated to national security from the outset. In these instances, the report claims there was "insufficient evidence to bring criminal charges, particularly when weighed against other matters under inquiry by WSPF [Watergate Special Prosecution Force] as to some of the subjects of the wiretap investigation."

What does this statement mean? How can there be "insufficient evidence, particularly when weighed against" something else? If insufficient evidence existed, there was no point in weighing the matter further. If sufficient evidence existed, what "other matters" would have warranted dropping charges involving such a serious infringement of civil liberties? This smoke screen of words raises serious doubt about the legitimacy of the Prosecutor's decision.

The report outlines another decision which, to me, has disturbing implications—the policy not to bring additional charges against persons already convicted of a "serious crime." I do not advocate the unsavory prosecutorial tactic of "overcharging" a defendant with every possible offense in order to force a favorable plea bargain. But that is quite different from ignoring separate and distinct episodes of criminal conduct, as the Special Prosecutor tells us he did.

The only justification given for this policy is that concurrent sentences would probably have resulted from prosecuting the same person for several different crimes. But concurrent sentences are not imposed in every case. Also, what if the single "serious" conviction is reversed on appeal?

This policy produces a situation in which a public official who commits twenty crimes receives no more black marks on his public record than an official who commits only one. So deceptive is this policy that the public cannot tell if failure to prosecute resulted from too little evidence or from too much.

For the Special Prosecutor, speed and efficiency seem to justify the policies of single prosecutions and extensive plea bargaining. But one must understand the cost of these policies: the information about official crime consequently lost to the public, and the damage to the important civic sense that justice has been done.

Perhaps the real reason for the thinness of the report lies in a casual remark made to me by Special Prosecutor Henry Ruth. He said that full disclosure was less than important because the American public (except, perhaps, in my district), had rapidly lost interest in Watergate. I found that remark deeply troubling. The Special Prosecutor's mandate was to pursue the responsibilities of his office regardless of pressure from anyone—the President or the opinion polls. Also, I do not think that Americans are indifferent to efforts to bring high public officials to justice.

One could detail a host of further inadequacies in the report, the sum of which may create the impression that we still operate a dual system of justice in this country—one for the highly placed and one for the thousands of ordinary citizens convicted of crimes. □

*Tapes from the Executive Office Building were of very poor quality; some portions had to be listened to nine or ten times. Tapes were reviewed by at least three people on the Judiciary Committee staff.

The General Services Administration has estimated that under the Presidential Recordings and Materials Preservation Act they would require an average of twenty minutes to transcribe each minute of tape—ranging up to sixty minues for a minute of sensitive subject matter on tapes with poor audio quality.

* A New Policy!