

The President has now presented us with a nominee to be his fourth Attorney General in less than five years, Sen. William Saxbe (R-Ohio). And Acting Attorney General Robert Bork has presented us with the new Special Prosecutor for the Watergate and related investigations, Leon Jaworski. Ordinarily the discussion of the wisdom of appointing these two men would proceed from an examination of their experience, ability and judgment. And ordinarily the nomination of a U.S. Senator who had served for eight years as attorney general of his own state would move quickly and smoothly through the Senate. Similarly, the appointment of a past president of the American Bar Association who has a reputation as an excellent lawyer and a strong law-and-order man to be Special Prosecutor would be widely hailed.

It scarcely needs to be noted, however, that these are not ordinary times. Both the circumstances creating the vacancies these men are to fill and the congressional proposals for alternative action to advance the Watergate investigations and prosecutions have to be taken into account. Mr. Nixon was so determined to be rid of Archibald Cox that he was willing to sacrifice two of the ablest officials in his administration—the top two men in the Justice Department—in order to achieve that end. In effect, Mr. Cox was offered a deal in which he had to agree to give up any further attempts to obtain vast amounts of evidence in the White House files which he had already identified as necessary to his pursuits. Both houses of Congress are now considering legislation to set up a truly independent prosecutor—one beyond the reach of presidential fiat and one whose search for evidence, recourse to the judicial process to secure it and judgments both as to the scope of his investigations and the nature and number of indictments he will ultimately bring, would be unimpeded.

Thus, the independence that is envisioned for Mr. Jaworski is the yardstick by which the new arrangement should be judged. That in turn depends on two questions. The first is the scope and nature of the assurances of independence which have been made to Mr. Jaworski. The second is his own independence of spirit and resolve to pursue these investigations wherever they may lead. All of that has to be weighed on the scale against the independence which Congress, on behalf of the people, is trying to achieve in the bills now before it.

On the first issue—the assurances Mr. Jaworski has received—the record is mixed. Mr. Nixon has made it clear he believes that presidential papers should not be made available to the Special Prosecutor and there is disquieting evidence that Senator Saxbe agrees with the President—or did, at least, prior to his nomination as Attorney General. Mr. Bork, on the other hand, has dusted off Mr. Cox's recently discarded charter and seems to have strengthened it. In addition to the extraordinarily wide latitude Mr. Cox had—at least on paper—Mr. Jaworski has the assurance that the President can't fire him until he has at least consulted with the majority and minority leaders of both houses and with the chairmen and the ranking minority members of both the Senate and House Judiciary Committees. In addition, Mr. Jaworski is given the power to sign indictments, a power Mr. Cox never had.

On its surface, all of that seems fine, but in light of recent events, it has to be tested. The best test we can think of is drawn from those recent events. The question of how complete these investigations ultimately turn out to be revolves not simply around how much evidence the Special Prosecutor is empowered to seek, but also how much evidence he is *inclined* to seek. Here, the only available standard is the range of investigations Mr. Cox has mounted and the nature and

amount of information which Mr. Cox thought he needed in order to accomplish a full investigation into the matters within his jurisdiction.

Mr. Cox was conducting investigations into a number of matters. Among them were the Watergate burglary, the cover-up, the activities of the White House "plumbers," campaign dirty tricks, campaign financing, the ITT antitrust settlements and the political use of the Internal Revenue Service. Attorney General Elliot Richardson has told us that from time to time the White House would raise certain questions about Mr. Cox's jurisdiction and that he—the Attorney General—discussed them with Mr. Cox and invariably backed him. Will Senator Saxbe be as restrained and as resolute?

And further, will Mr. Jaworski be as diligent in pursuing all of these investigations and the evidence needed for them as Mr. Cox was? Mr. Cox has informed us that the subpoenaed tapes and related notes and memoranda were simply the tip of the evidentiary iceberg now buried in the White House. While the legal issue was being tested in the courts, Mr. Cox said, he didn't make a large point of going after the other evidence, but he did give us some idea of how important he thought it was and of the nature of the cooperation he was getting from the White House. He said:

*... my efforts to get information beginning in May have been the subject of repeated frustration. This is a very special investigation in some ways. The problem is unique because nearly all the evidence bearing not only on the Watergate incident and the alleged coverup, but on the activities of the Plumbers and other things of that kind, is in the White House papers and files, and unless you have access to those, you are not able to get the normal kinds of information that a prosecutor must seek.*

Mr. Cox can't be faulted for the independence with which he conducted himself. He knew what he wanted and why he wanted it. He also knew what the obstacles were. The President has said that the Special Prosecutor will not have access to presidential papers, whatever those may be. Apparently, whatever they are, the definition expands day by day. Mr. Cox, again at his press conference, explained how this works:

*You will recall that the papers of many White House aides, Haldeman, Ehrlichman, Krogh, Young, Dean and others, were taken into custody, and they were in a special room. And many of their papers were taken out of the usual files and put in something special called Presidential Files."*

So we have another veil to add to "national security," executive privilege, separation of powers, confidentiality of presidential conversations and the rest. It is "Presidential Files" or "Presidential Papers." The Congress has to judge whether it believes Mr. Cox's pursuit of this evidence was reasonable and necessary to the performance of the Special Prosecutor's duties. If it believes Mr. Cox was reasonable, it has to decide whether Senator Saxbe and Mr. Jaworski agree with the course upon which Mr. Cox was embarked. It has the means at its disposal to do this. In the consideration of the legislation now pending to set up a new Special Prosecutor, both judiciary committees can call Mr. Cox and explore his views in these matters. They can then call Senator Saxbe and Mr. Jaworski and test the views of these two men against the legislators' own judgment of the correctness of the course Mr. Cox was pursuing. That, in our view, would be an essential first step toward redeeming the terrible damage Mr. Nixon has done to the investigative process that was set up to deal with evidence of wrongdoing in his administration—and thereby to restore public confidence in the workings of our system of justice.