

# Light in the Dark

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By Anthony Lewis

BOSTON, Nov. 11—President Nixon is reportedly planning one last effort to dispose of what he calls "the deplorable Watergate matter." He may make himself available to Senator Sam Ervin's committee for questions. He may publish the version of the White House tapes prepared by his secretary, Rose Mary Woods. He may put out a white paper answering a whole range of charges, from the Watergate cover-up to his challenged tax deductions.

Any of those steps might have had a decisive effect at an earlier stage of this Nixon crisis. Now they will be seen as too late and too little. No unilateral act by the President can satisfy the public feeling that Senator Robert Dole, the former Republican chairman, has characterized as a demand for "light in the dark corners and shadows of our national dilemma."

It is clear to just about everyone by now that the most effective engine for unearthing the facts is a special prosecutor. The Ervin committee has performed an important function, and other inquiries have their role. But investigation by the proven process of law—prosecutor and grand jury operating in the framework of the courts—is most likely to discover the truth.

The dismissal of Archibald Cox, and what we have learned about it subsequently, dramatize the need for the prosecutor and the investigation to be totally independent of the President.

As far back as last July 23, former Attorney General Elliot Richardson has now testified, White House chief of staff Alexander Haig warned him that "the President wants a tight line drawn, and no further mistakes, or we'll get rid of Cox."

There were other warnings. With the firing of Mr. Cox on Oct. 20 Mr. Nixon plainly hoped to be rid of the whole special prosecution staff—and the whole idea—for good.

Public reaction overwhelmed that hope. Mr. Nixon has been forced to accept another special prosecutor. The new man, Leon Jaworski, has made a fine first impression on Washington generally and on the old Cox staff in particular. But the lurking problem of independence is still there.

Right now, for example, the public outcry is likely to help Mr. Jaworski get "Presidential documents" that Mr. Cox never could. But if Mr. Jaworski keeps asking, will the White House lawyers love him in January as they do in November? The essential in this enterprise is tenacity.

Mr. Cox was assured independence by rules formally written into the Code of Federal Regulations. They were dodged—rather legally is a question—by repealing on Oct. 23, retroactive to Oct. 21 and then reissuing them in slightly different form Nov. 2. Mr. Jaworski will not find much assurance in that history.

The intent of the proposal before Congress for a statutory special prosecutor is to put him, whoever he is, beyond the control of the President.

## ABROAD AT HOME

Various bills would have the prosecutor appointed by the courts, or at any rate restrain his removal by the President.

The legislation is at the point of decision in House and Senate committees. There it has encountered objections that raise fundamental questions about the seriousness of everyone's intention to shine light into the dark corners.

The main objection at least on the surface is Constitutional. The Constitution happens to say, explicitly, that "Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, the courts of law, or in the heads of departments." But the objectors say that that language is overridden by the Constitution's unstated general assumption about separation of powers.

"It is impossible to believe," Acting Attorney General Robert Bork testified, "that as an afterthought, and without discussion, the Framers carelessly destroyed the principal of separation of powers they had so painstakingly worked out in the course of their deliberations."

A considerable number of constitutional scholars has examined these arguments now, and overwhelmingly rejected them. Indeed, many regard the constitutional objections as flimsy.

For one thing, it is hardly cricket to read actual words out of the Constitution by saying that "it is impossible to believe" the Framers meant them. Words still come before inferences—not least, one would think, in an Administration supposedly devoted to "strict construction" of the Constitution.

Secondly, the argument as summarized by Mr. Bork confuses the power of appointment with the power to perform the functions at issue. The President appoints Federal judges. Does anyone regard that as a violation of the separation of powers?

Separation of powers in the American Constitution is not a notion of neat and totally distinct packages. The idea rather is a system of sometimes overlapping, even conflicting authority.

The constitutional purpose, Justice Brandeis said, was "not to promote efficiency but to preclude the exercise of arbitrary power." It would be ironic to put it mildly to say that a principle designed to avoid arbitrary power requires Presidential appointment of a prosecutor to investigate the President.

The constitutional argument is so strained that there has to be a suspicion of underlying political objection. But Republicans in Congress should think very carefully before opposing meaningful measures to assure the special prosecutor independence. In the long run their advantage, as well as public integrity, surely lies in insistence on a genuine, unfettered search for the truth.