

Simon Lazarus

Pardons and the Special Prosecutor

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In the surprise over the Nixon pardon and President Ford's evident interest in similar treatment for other Watergate figures, too little attention has been paid to the terms of the regulation by which the Special Prosecutor's office was originally established. The same point was ignored by Congress and by the press in the aftermath of the Saturday Night Massacre nearly one year ago—until Nov. 14, 1973, when District Judge Gerhard Gesell found that effort to abort justice to have been an illegal incursion on the independence granted the Special Prosecutor's office.

The considerations underlying Judge Gesell's decision have in the meantime gained heightened authority from the Supreme Court's decision of July 24, ordering then-President Nixon to surrender his tapes to Judge John Sirica. The principle decided in these cases costs serious doubt on any exercise by Nixon's successor of his power to pardon targets of the Watergate investigation, at least until the completion of judicial proceedings.

The regulation establishing Leon Jaworski's office guaranteed that the Special Prosecutor, alone and without interference from the Attorney General or the President, would have full authority to investigate and prosecute the Watergate affair and all other presidential-related offenses. In plain terms, the regulation stated: "In accordance with assurances given by the President to the Attorney General . . . the President will not exercise his constitutional powers to limit the independence of the [Special Prosecutor] is hereby given . . ."

The regulation is still in force and

The writer is an attorney in Washington.

President Ford is therefore bound by it. That point was driven home by the Supreme Court's tapes decision: "So long as this regulation remains in

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force," the Court held, "the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it." In effect, the Court held, by effecting the promulgation of the Special Prosecutor regulation, the President waived his "constitutional powers" to control matters within the jurisdiction of Mr. Jaworski's office. There is no reason to suppose that the pardon power is not one of the "constitutional powers" covered by the terms of the regulation—and placed beyond the President's purview by the President's own hand.

Post-judgment disposition of the cases of Watergate defendants would not be within the Special Prosecutor's jurisdiction. Hence, after judgment in their individual cases, the President may remain free to pardon or to take other action pertinent to their fate.

But prior to judgment, while the case was within Jaworski's hands, the regulation is plainly inconsistent with exercise of the pardon power or any other power to interfere with his mandate for full and complete investigation and prosecution.

If the White House chooses once again to ignore the legal commitment embodied in this regulation, it would seem clearly the obligation of Congress to protest. Congress, after all, forebore from taking independent measures to establish a Special Prosecutor by statute, in exchange for that presidential commitment. More particularly, a pre-judgment pardon would impose on Special Prosecutor Jaworski himself an obligation to give challenge. Jaworski's office is the creature of the regulation and chief guardian of its high purposes. Were such a challenge to come to court, precedents give much reason to expect that the White House would be rebuffed in its efforts to stand above the law, as it has been in the past.

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