Justice Undone

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In particular, the Special Prosecutor shall have full responsibility . . . for determining whether or not to contest the assertion of "Executive privilege" or any other testimonial privilege . . . The Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions . . . The Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part.

Those are the crucial provisions from the original order setting up the office of Special Prosecutor Archibald Cox—an order which also gave him full authority to investigate and prosecute offenses arising out of just about any aspect of the Watergate case, in its broadest sense, including specifically "allegations involving the President, members of the White House staff, or presidential appointees . . ." And these are also a part of the guidelines for Mr. Cox which were presented in advance to the Senate Judiciary Committee in its hearings on the appointment of Elliot Richardson as Attorney General. They formed the basis, in other words, of a solemn compact between the Nixon administration and the Senate, which was a condition for Mr. Richardson's confirmation for reasons which are all too familiar to all of us.

It was President Nixon's brutal violation of this compact which directly brought about the crisis in government which is now upon us, with the resignations of Attorney General Richardson and his his deputy, William Ruckelshaus.

It is impossible at this stage to measure the full consequences of what has happened, or to predict how events will now unfold. What is important for now is to be very clear in our minds about the defaults and abuses of presidential power that brought us to this critical juncture.

Two successive "investigations" of Watergate by the President had been demonstrably incomplete if not criminally negligent. John W. Dean III, who allegedly conducted the first, pleaded guilty Friday to actual obstruction of justice; the second investigation was supposedly conducted by John Ehrlichman who has conceded that he thought of it as no more than an "inquiry." Throughout, it appears from testimony before the Senate Watergate committee, there was a singular lack of cooperation with Justice Department investigators; access to White House officials and materials was systematically impeded. The President himself had conceded that there may have been a cover-up, while denying participation in it—or even knowledge of it—until early this year.

It was this stark and demoralizing record which caused the Senate Judiciary Committee to demand strict commitments from Mr. Richardson and from Mr. Cox that the latter would be given a totally free hand. And it is against this background that one must examine the extraordinary statement by President Nixon on Friday night recounting his failed effort to seek a compromise with Mr. Cox over the latter's demand for tapes of presidential conversations, memoranda, notes and other material which he deemed to be essential to his work. The U.S. Court of Appeals has held that this material should be turned over to Judge John Sirica of the federal district court here for a determination as to which parts, if any, should be presented to the grand jury as a part of Mr. Cox's evidence. In his statement, the President said he had decided against further appeal to the Supreme Court, but that he wouldn't abide by the appeals court ruling that he must submit the material in the absence of an out-of-court agreement with the special prosecutor. Instead, he described in great detail his efforts to work out a settlement with Mr. Cox—and then announced that it had failed. Accordingly, the President said, he had "felt it necessary to direct (Mr. Cox), *as an employee of the executive branch*, to make no further attempts by judicial process to obtain tapes, notes or memoranda of presidential conversations."

In other words, faced with three choices, the President failed to adopt any of the three. Instead he, in effect, shredded the compact with the Senate which was a condition precedent to Mr. Richardson's confirmation for his job and to Mr. Cox's acceptance of his—a compact which plainly precluded interference in the special prosecutor's work and specifically authorized the special prosecutor to make any effort he saw fit to obtain precisely the material that the President finally sought, in defiance of the court, to place beyond his reach.

The proposed bargain, as described by the President's statement, was that he would prepare a summary of the relevant portions of the requested tapes and would have Sen. John Stennis authenticate it by listening to the tapes and comparing them with the summary. Along the way, the President elicited some kind of agreement—the extent and nature of that agreement is not yet clear—from Sen. Sam Ervin and Sen. Howard Baker of the Watergate committee to this arrangement. He also cited large questions of national interest as his reason for wanting to dispose of this matter now, without taking it to the Supreme Court.

In return for the summaries he was willing to provide, Mr. Nixon wanted Mr. Cox to agree that "there would be no further attempt by the special prosecutor to subpoena still more tapes or other presidential papers of a similar nature." After Mr. Cox turned the deal down, Mr. Nixon went ahead and announced that he was going to pursue the route suggested in his aborted bargain anyway and that the summaries, after having been duly authenticated by Senator Stennis, would then be made available to Judge Sirica and to the Senate Watergate committee.

What, in sum, did Mr. Nixon do? Having lost two rounds in court, he attempted to seize immediate control of the prosecution of a series of criminal cases in which he is at least potentially a defendant. He further sought to substitute his own judgment and enforcement power for that of the federal courts, whose jurisdiction he acknowledged by sending his lawyers to plead his case there in the first place. In recent days people have been heard to observe that Vice President Agnew got a very lenient deal in his tangle with federal prosecutors. But consider by comparison the arrangement Mr. Nixon contrived for himself: In matters in which he and many of his most important associates are under examination for possible misconduct in office, he proposes to define what the prosecutor may or may not do and what the grand jury may or may not hear and, in many important senses, to preside as judge, as well.

Mr. Nixon, in other words, has served notice to the world that, in one crucial aspect touching on his own conduct, the Watergate investigation had gone as far as he intends to permit it to go. For his part, Mr. Cox served notice that he would carry out his responsibilities for as long as he would be permitted to do so. He responded, in other words, as a man of honor and integrity, as did the two senior officials of the Justice Department. Honor has been a rarity in the long, dismal history of the Nixon administration's performance in this affair. To recall this history is to raise the most profound questions about Mr. Nixon's own honor—as well as his competence to conduct the affairs of government.