

# Prosecutor Jaworski's Duty

By Anthony Lewis

WASHINGTON, Jan. 16—Last July 23, in a letter to Senator Sam Ervin, President Nixon said that the White House tapes would remain "under my sole personal control." When some tapes were subsequently subpoenaed, there was a legal obligation to preserve that evidence even while the subpoena was contested. Experts have now found that a critical portion of one tape was erased by at least five separate manual actions.

The responsibility for dealing with this apparent destruction of evidence falls on the special prosecutor, Leon Jaworski. His staff is examining witnesses in court now, and he will probably begin a grand jury investigation. Whatever may be discovered, Mr. Jaworski faces hard decisions.

If the President of a large corporation publicly stated that he had "sole personal control" of subpoenaed evidence in an antitrust case, he might be legally responsible if an underling was found to have tampered with it. But this is the President of the United States.

If Mr. Jaworski concludes that there was tampering, does he proceed against Richard Nixon for contempt of court? Ask the grand jury to indict him? Refer the evidence to the House Judiciary Committee for its impeachment inquiry?

What this example indicates is that Leon Jaworski faces questions of a kind that few prosecutors have ever had to consider. And he must decide them largely on his own, without the broad consultation that a lawyer would often seek on hard problems.

"I don't mind telling you," Mr. Jaworski said in a conversation the

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other day, "I feel lonesome sometimes." But he added that he didn't "sit around and agonize."

One thing immediately apparent about Mr. Jaworski is that he has a deep respect for the Presidency. Discussing the question whether a President can be indicted before impeachment, he said first that the law was not clear on the issue and then asked: "Are you going to forget the consequences in this world we live in now?"

But it would be equally wrong to think that he would act so as to immunize this President from being called to account for wrongdoing. Some voiced that concern after Mr. Jaworski said he felt he could not turn over to the House Judiciary Committee ma-

terial that he had obtained from the White House for use before grand juries.

In discussing that problem, he made clear that his main concern was with a prosecutor's obligation to maintain grand jury secrecy. Witnesses have no such obligation, and courts have considerable discretion to release grand jury evidence.

"The committee's recourse lies in asking for it by a proper legal proceeding," Mr. Jaworski said, "either at the White House or the court."

Other legal scholars pointed out that a person asked to give evidence in a valid legal proceeding has no right to resist on the ground that he has given the same evidence to a grand jury. In fact, witnesses—the source of evidence—are excluded from the secrecy imposed on grand jurors and lawyers by Rule 6 (e) of the Federal Rules of Criminal Procedure.

The issue was authoritatively decided in a 1960 case before the Court of Appeals for the Second Circuit, *U.S. v. Interstate Dress Carriers Inc.* There the Justice Department had asked to examine and copy some company records that had been presented to a grand jury in a separate proceeding. The company resisted.

The court—composed of Judges J. Edward Lumbard, Charles E. Clark and Henry J. Friendly—dismissed the company's objections. Judge Lumbard wrote:

"When testimony or data is sought for its own sake—for its intrinsic value in the furtherance of a lawful investigation—rather than to learn what took place before a grand jury, it is not a valid defense to disclosure that the same information was revealed to a grand jury or that the same documents had been, or were presently being, examined by a grand jury."

Thus the House Judiciary Committee, if it obtains the necessary subpoena power, could seek tapes and documents from the White House, and the grand jury issue would be no bar. But Mr. Nixon's lawyers would doubtless try to raise other objections, at least delaying the impeachment inquiry.

The question then would be whether the committee could get the material directly from the court, by order of Judge John J. Sirica. Rule 6(e) says a judge may turn over material for use "preliminary to or in connection with a judicial proceeding." The terms of the House committee's subpoena power should therefore treat impeachment, or the subsequent Senate trial, as a form of judicial proceeding.

Does Mr. Jaworski have evidence now that links President Nixon to the crimes of Watergate? Of course he would not say. But his evident concern with the problem of indictment and/or impeachment of a President leads one to infer that there must be such evidence. He said only that material obtained from White House files had included some things "substantial and very meaningful and highly relevant."