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Thinking About Impeachment (II)

EVENTS OF THE past few days have highlighted a problem faced by those public officials—prosecutors, judges and members of Congress alike—who are charged with getting to the bottom of the Watergate affair and with bringing those responsible for it to justice. By Watergate, of course, we mean that whole array of official crimes and improprieties that goes by the general name. The problem we have in mind both concerns the President and has been created by him. It is that Mr. Nixon has played very skillfully on his dual role as citizen and President. On the one hand he demands to be accorded each and every legal safeguard and constitutional protection due an ordinary citizen in a criminal case, and on the other, he invokes at every turn privileges no other citizen has—privileges deriving from the presidency—by way of impeding the investigation into his activities.

An ordinary citizen—to take only the latest case of Mr. Nixon's maneuvering in this respect—could hardly issue a statement refusing to comply with a prosecutor's request for potential evidence (the tapes) on the grounds that the prosecutor had enough already, and that the requested material was, in any event, protected by presidential privilege from scruitiny by a prosecutor. The ordinary citizen, again, would not find himself in the unique position of having authorized the prosecutor's appointment in the first place. Nor would his defense be prepared by a team of attorneys on the government payroll. He would not have access to all the media at all times to characterize the legal proceedings as he wished. And he would not have exclusive control over files and materials relevant to his case or authority to classify them as "presidential papers" or national security secrets as he pleased. Mr. Nixon has all that at his disposal—and more. For above all, the ordinary citizen, whose humble and vulnerable status Mr. Nixon seems to be claiming on alternate days of the week, is not immune from trial in the courts. He is subject to proceedings in a criminal court, including indictment by a grand jury and prosecution for a crime—and Mr. Nixon, according to the judgment of legal experts, is not. The President in other words, is ready to argue, and many lawyers are ready to concede, that he cannot be subjected to such proceedings until he has first been removed from office by the processes of impeachment.

It is against this background that one must view the predicament of those legislators and judicial officers who are trying to breach the wall of special privilege Mr. Nixon has built around himself and yet who feel bound by certain legal procedures and by their own desire to abide honestly by constitutional and statutory requirements. Consider, first, the position of the Special Watergate Prosecutor's office. Originally under Archibald Cox and subsequently under Leon Jaworski, it has been investigating Watergate and Watergate-related crimes for the better part of a year. Those investigations have involved prolonged court struggles with the White House over the availability of evidence; they have also involved painstaking and prodigious efforts to acquire and understand a vast body of information and testimony, and to prepare it for presentation to grand juries. This work, in so far as it involves officials other than the President, is well advanced; indictments of a number of Mr. Nixon's former associates evidently are almost at hand. But it is important to remember that while the Special Prosecutor's official charter also specifically included "full authority for investigating and prosecuting . . . allegations involving the President," it does not tell him how this part of his assignment is to be carried out; it does not, in other words, provide a procedure for prosecuting an incumbent President. What, then, is the Special Prosecutor meant to do with the fruits of his investigation in so far as they relate to the conduct of Mr. Nixon? As a practical matter, whether he has material in hand vindicating the President's conduct or implicating the President in breaches of the law he can apparently do nothing with it or about it.

If it is accepted that a sitting President can only be "investigated and prosecuted" in terms of impeachment, then in a very real sense the Special Prosecutor, under the plain terms of his charter, has to be thought of as a part of the impeachment process in Congress in respect to any matter in which the conduct of the presidency is at issue, rather than as an officer of the courts. From this it would seem to follow that any evidence the Special Prosecutor may have that bears on impeachable offenses ought to be made available to those in Congress who are charged with making the inquiry into the President's conduct. And there, precisely, is the problem. For there is no assurance that the White House means to make the relevant material available to the impeachment proceedings. And there is no provision—no obvious conduit—for making the Special Prosecutor's findings available to the House Judiciary Committee even though this body is under heavy pressure from Mr. Nixon, among others, to wrap up its inquiry as speedily as possible.

On the contrary, that part of the evidence that Mr. Jaworski has passed along to the grand juries, and which also relates to the conduct of the President, is governed by regulations controlling the confidentiality of grand jury proceedings. It is, of course, conceivable that Mr. Jaworski may have found among the tapes and documents turned over by the White House some material that bears directly and exclusively upon the President and might raise questions of impeachable offenses, but which was *not* sent to grand juries. But here again, the Special Prosecutor is constrained by an understanding that material made available to him by the White House and not used in grand jury proceedings would be returned. Thus Mr. Jaworski may regard himself as legally bound on the one hand, or honor-bound on the other, not to give the House Judiciary Committee access to any of the White House tapes or documents in his possession.

One obvious solution suggests itself, and that is for the courts—in this case, presumably Judge John Sirica—to relieve Mr. Jaworski of the constraints which now would seem to make it almost impossible for him to fulfill his charter with respect to the investigation and possible prosecution of the President. Either the House Judiciary Committee or the Special Prosecutor—or both, acting in concert—could ask for a declaratory judgment for this purpose. Alternatively, Congress could presumably find a legislative solution. The White House, of course, might well object, just as it has objected and resisted at almost every step of the investigative process along the way. But in that event, the President would be inviting a very harsh presumptive judgment by the public, especially in light of his performance on these questions to date.

What could be left to be said of a President, after all, who requires a team of trial lawyers to defend his record in office; who cannot bring himself to give a full and persuasive accounting of his performance of his job to the people who elected him; who one day grudgingly yields up tapes and personal papers which ought to do no more than clear his name if he has done nothing wrong, and the next day abruptly and arbitrarily invokes a high constitutional principle to justify withholding precisely the same sort of material which his own Special Prosecutor says is necessary to an investigation of the case—and does so, according to his spokesmen, without its even having been inspected by his lawyers or by himself? Are we to say that he is innocent? Are we to conclude from this performance, as he would insist that we do, that he has nothing to hide—only the integrity of his office to protect? More to the point—and this is not the least of the questions about impeachment which Congress must think hard about—at what stage in the proceedings does a persistent pattern of presidential evasion and obstruction and concealment begin to become, of and by itself, an impeachable offense?