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Plea Bargaining Debate

Jaworski's Agreements Show Problem of Vast Powers Given to Prosecutor

By LESLEY OELSNER
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WASHINGTON, June 21—The growing debate over the plea bargaining between Leon Jaworski and the Watergate criminals points up one of the oldest and most troublesome features of the criminal justice system—the vast amount of power given to prosecutors, partly by necessity and partly by default, and the difficulty in assuring that prosecutors do not abuse that power.

News Analysis

Plea bargaining is the most graphic example of prosecution power. The prosecutor negotiates with a defendant about the charge to which the defendant will plead guilty, choosing a less serious charge in return for the guarantee of a guilty plea. In so doing, the prosecutor is deciding who is convicted, he is deciding the charge on which the person is convicted and he is affecting the sentence the person will get.

He does this, moreover, almost entirely in secret, with only the barest outline of the bargain becoming public.

To many observers here — including some of Mr. Jaworski's supporters — the recent criticism of some of the Watergate prosecution's plea bargains is healthy. It means that the public is finally looking carefully at what the special prosecution is doing, after months of what one Jaworsk aide calls a "honeymoon" of nonquestioning acceptance.

This public analysis, the observers say, is one of the few checks that exist against abuse of prosecutorial power.

The legislation creating the special prosecution force provides only the most general limits to Mr. Jaworski's power —essentially, just jurisdictional limits, specifyng that his jurisdiction covers crimes arising out of the Watergate break-in, crimes arising out of the 1972 Presidential election and allegations involving the President, the President's aides and the President's appointees.

Within those limits, Mr. Jaworski has the same general power — or "discretion," as it is sometimes called — as any other prosecutor. This is the power to decide what persons and areas to investigate and not to investigate, what to present to a grand jury and what not to present and how matters should be presented to a grand jury.

Prosecutors can insure a grand jury vote of "no bill" of indictment, for instance, by presenting the case to the jury in a certain manner, emphasizing the loopholes of the law, say, or the inconsistencies in the evidence.

When the Watergate grand jury decided not to indict Mr. Nixon in the Watergate cover-up but to name him instead as an unindicted co-conspirator, it did so, sources have said, because of the prosecution's statement to the jury that the law was unclear on whether or not an incumbent President could be indicted.

The Watergate prosecutors are quite aware of their power. "I'm exhausted," one senior Jawarski aide said recently. "It's very hard to play God."

Some Discretion Needed

Prosecutors have this huge power for a number of reasons.

First, they need a certain amount of discretion.

Plea bargaining is allowed partly because the prosecution needs another way beside time-consuming trials to dispose of cases; partly because a prosecutor sometimes needs evidence from a defendant and cannot get it without offering the defendant something in exchange; partly because he does not have enough evidence to prove all the charges against a defendant but needs — or thinks he needs—a conviction nonetheless.

Mr. Jaworski could not at this point provide trials for all the defendants and potential defendants in the Watergate affair, for that would take far more personnel than he has, or, using his present staff, far more time than the Constitution's speedy trial provisions allow.

He needs testimony and evidence from some of the defendants to make cases against other defendants, soms of them implicated in far more serious crimes.

A second reason for prosecution power is the need to inject some flexibility, some humanity, into the legal system. Some criminal statutes still on the books are outmoded or silly; some laws provide far harsher penalties than most people would approve.

"The breadth of criminal legislation necessarily means that much conduct which falls within its literal terms should not always lead to criminal prosecution," say the American Bar Association's standards of prosecution behavior, standards that Mr. Jaworski quotes.

Power through Secrecy

Part of a prosecutor's power is that much of his work is done in secrecy; this too is partly due to necessity. Secrecy is obviously necessary for investigations; it is also necessary to protect the rights of individuals under investigation but not yet formally charged.

Yet some of the power comes from default—default of legislatures, who could re-establish their role as lawmakers by keeping the statutes up to date and realistic, and default of the public and the press, who could keep a closer watch on prosecutors.

To great extent, when things seem to go wrong, the public forcuses its interest and its ire on the police and the judges. Yet when the public sees an abuse by prosecutors, and then complains, the prosecutors generally respond.

In New York, when plea bargaining slipped to new lows a few years ago, with homicide cases ending in four-year terms, press reports led to a tightening up of the procedures, at least temporarily. The new Manhattan District Attorney, Richard H. Kuh, moreover, recently ordered his staff to stop bargaining with defendants about sentences.

There are few other potential checks against a prosecutor's power, mostly ineffectual against all but the most serious abuses. Elections are one, in areas where prosecutors are elected; appeals courts are another; the A.B.A guidelines, which can be used in disciplinary proceedings, another.

Juries and Judges

Trial juries sometimes act as a check, as when juries threw out one after another conspiracy case brought against supposed radicals; trial judges can reject plea bargains, so they too could be a check.

Yet judges rarely do reject bargains, sometimes because judges are prosecution-minded, but often for the same reason that the other checks rarely work: it is very difficult to know if the prosecutor is using his discretion wisely.

Plea bargaining is the classic example of the difficulty. Whether a bargain is good or bad depends in part on the evidence in the case; as Mr. Jaworski said this week, in defending his bargains, "We're the ones who know what the evidence is."

So, the best guarantee against abuse of power by prosecutors is picking honest and intelligent prosecutors. And to many observers, that is not good enough.

The Jaworski case is an example: he is very highly regarded, his reputation high inside and out of his profession. Yet even in his own office, where his integrity is unquestioned, there is dissatisfaction over one of his bargains—the bargain in which Richard G Kleindienst, the former Attorney General, avoided prosecution for perjury by pleading guilty to a misdemeanor of failing to testify and withholding information.