

# With Unclean Hands

By Anthony Lewis

BOSTON, Dec. 7—"The first requisite of civilization," Freud said, is "justice—that is, the assurance that a law once made will not be broken in favor of an individual." Or against one, he might have added. The abuses of power in the world since Freud wrote that in 1930 have made clear how much our safety depends on applying the rules equally, to those we like and dislike, those in favor and out.

The point seems obvious enough, but it has to be learned over and over. Recent American history is soiled by examples of right-wing authorities twisting the Constitution in order to get at persons they deemed dangerous. And there are some on the left who argue for civil liberties but evidently would bend the rules to get at those they dislike.

These thoughts are evoked by a piece in the current issue of the New York Review of Books. It is an article so silly as to warrant no attention in itself. What is troubling is that the New York Review, a distinguished intellectual journal particularly sensitive to the abuse of official power, should have published it.

The piece is an attack on the work of the Watergate Special Prosecution Force and on its recent report.\* The author, Kirkpatrick Sale, says the special prosecutors' performance was so "shoddy" that "one wonders if a deliberately restrictive policy might not have been at work."

What were the sins of the special prosecutors? For one, they "grandly" refused to use "electronic surveil-

## ABROAD AT HOME

lance." That is, they did not have bugs planted in the homes of the former Nixon assistants being investigated and did not tap their telephones.

Another fault was that the prosecutors did not bring enough criminal conspiracy cases. Their report said that they eschewed prosecutions for conspiracy when there was "little or no evidence that the plan had actually been implemented." A feeble excuse, says Mr. Sale.

Then the prosecutors' results were so meager. For example, they did not find any culprits in "the clear crime" of erasing eighteen and one-half minutes of a White House tape. Ah, if life were only as clear as Mr. Sale believes it to be—or if bad guys could only be convicted for being in the vicinity of a crime, without the necessity of evidence actually connecting them to it.

The prosecutors' report is denounced for failing to lay out evidence concerning persons who were not prosecuted. This omission, says Mr. Sale, was "the ultimate cover-up." He scorns the view that it would have been an abuse of prosecutorial power to name persons without the protections of a trial where charges would have to be proved beyond a reasonable doubt.

The article quotes a statement by Archibald Cox in favor of fuller factual reports, made in Senate hearings in May, 1973, before he took office. The context then was very different. There was not yet a glimmer of an impeachment proceeding, with all the evidence that it brought to light. Even then Mr. Cox showed concern about damaging individuals in a report. If he had remained special prosecutor, I think he would have limited the report in the same way as his successors. After all, he established the careful rules of procedure, to assure fairness, that so outrage Mr. Sale.

If not through the report, Mr. Sale argues, the prosecutors could have brought out more facts through the "well established" procedure of a

grand jury presentment without indictments. But there is no general authority for Federal grand juries to make presentments, which are frowned upon by civil libertarians. Even the Watergate grand jury's right to send evidence to Congress outside of an indictment was argued in terms of the special circumstances of impeachment.

At what may be the high point of his fustian, Mr. Sale compares the prosecutor's report with "its infamous predecessor, the Warren Report." Life for him is one giant conspiracy, involving Earl Warren, Richard Nixon and the young lawyers of the Special Prosecution Force.

Of course there were disappointments in the work of the special prosecutor. But how many expected, in the beginning, that it would lead to the unmasking and disgrace of a President and the conviction of his principal assistants? And was it wrong that the prosecutors showed care for defendants' rights? Should they have copied the Nixon pattern of eavesdropping and conspiracy prosecutions? Would we want the precedent of a prosecutor acting like a fact-finding commission?

When the Senate assassination report came out, Spiro Agnew said the C.I.A. should not give up the option of murder. "It's typical of Americans," he said, "to expect themselves to abide by the rules while others don't." In short, we should copy the totalitarian world in believing that the end justifies the means. Spiro Agnew, meet Kirkpatrick Sale.

\* Report made public  
15 Oct 75.