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A RESPONSE:

WATERGATE PROCEDURES FOR ALL?*

ALAN I. BARON**

We are all indebted to George Frampton for having shared with us his insights and reflections on the problems inherent in the prosecution of public officials, gained from the unique perspective of the Watergate Special Prosecution Force. The material he has presented is so rich in content, touching upon so many fundamental issues, that a comprehensive response would have to be far more elaborate than can be afforded here.¹ Several salient points, however, deserve particular comment.

A cartoon appeared in the New Yorker magazine several months ago depicting Santa Claus seated attentively before a congressional investigating committee, by which he was being asked: "And just

* This article is based on a response by the author to the speech given by Mr. Frampton.

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1. Although it is beyond the scope of Mr. Frampton's paper and of this response, attention should be paid to the practical and ethical problems confronting the public official who is accused of overeating at the public trough. Approximately 6 years ago, an article appeared in *The Washington Monthly*, in which James Boyd detailed the rules of the game from the public official's point of view. The basic rules are as follows:

1. If you speak out at all, confess what is known, evade what is unknown and cry a lot. The classic implementation of this rule was Mr. Nixon's "Checkers" speech in which he turned his slush fund disclosure into a campaign rally.
2. If at all possible, give the money back.
3. If unpleasantness persists, appear as a stranger in paradise, dewy-eyed declaring how you can't help it if goodhearted friends have an urge to shower you with gifts.
4. At the moment of deepest disgrace announce for reelection.
5. Find a scapegoat — the Communist conspiracy, the power-hungry media or the chief witness for the prosecution will do.
6. Threaten but do not file a libel suit.
7. If, by chance, the case goes to trial:
 - A. Never appear without your wife and children. The experience may cause emotional damage to the kids, but that can be repaired later; right now its go for broke.
 - B. Feign illness and adopt a glazed look. This will help when your memory fails you on the stand.
 - C. When questioned by the press, emphasize how you welcome this chance to clear your name; that you insisted on this trial; that you'd still go after the commies if you had it to do all over again, and you'll be glad when the verdict is in so you can return to your duties.

Boyd, *The Ritual of Wiggle — From Ruin to Reelection*, THE WASHINGTON MONTHLY 28 (Sept. 1970).

how do you find out who's been naughty and who's been nice?" That, in a humorous nutshell, is the quintessential issue facing the prosecutor in a public corruption case. We must recognize that, although the public loses about four billion dollars annually as the result of bribery alone,² many of the practical and ethical problems encountered in a corruption case stem from the fact that corruption is in one sense a victimless crime — both the giver and the taker are satisfied with the hidden, corrupt bargain they have struck. Precisely because of the covert nature of public corruption, it is almost inevitable that critical evidence in such cases (identifying those who have been "naughty," as it were) can only be obtained by grants of immunity, plea bargaining and other "deals" between the prosecution and insiders who are in a position to provide incriminating information. Only the atypical corruption case can be prosecuted without witnesses of this sort, and unless the public is willing to accept this fact, it will rarely hear the sound of the whistle being blown on public corruption.

Mr. Frampton is properly concerned that there is potential for abuse in a system of criminal justice where so much power and discretion are vested in the prosecutor, and where clear-cut legal and ethical norms to guide such discretion and power are absent. I would suggest, however, that the combination of power and discretion found in the prosecutor's office is not unique in our system of government, and in the case of the prosecutor there are at least two powerful checks which serve to limit abuse. The most obvious limitation on abuse is the fact that a portion of the prosecutor's activity will at some time be subject to scrutiny by the courts, either at trial or by virtue of motions seeking relief in the courts during the investigatory stages of a case. Granted that the operative legal and ethical norms may be less than models of clarity in given situations, the fact that at some point the prosecutor's decision may be subject to judicial review will tend to restrain prosecutorial power.

The other check on the prosecutor's office is the media. Watergate was undoubtedly covered more intensively by the media than any other investigation and prosecution in history, and thus can hardly be regarded as typical in that regard. Every investigation of public corruption, however, will attract substantial media coverage. The close scrutiny by reporters of every visible detail of the investigation, the ability of persons affected by the investigation to gain access to reporters, and independent investigation by the media combine to deter the misuse of power.

2. *White Collar Justice, A BNA Special Report on White Collar Crime*, 192 CRIM. L.R. 1, 3 (1976).

There remains, of course, an important residue of "in house" decisions, often more tactical than substantive, which are unlikely to be disclosed to the press or reviewed in court. It is unrealistic to suppose that a precise list of prosecutorial "do's" and "don'ts" can be created to provide clear answers to the many complex issues which arise in the course of any investigation or prosecution of corrupt activity. Here the check on abuse must inevitably be based upon the integrity, the good judgment and the professional competence of the prosecutor and his staff. In Maryland, we have been, in my judgment, particularly fortunate that over the years the persons who have held the office of United States Attorney have had both the courage to "turn over the rocks" in order to bring to light corrupt activity, as well as the commitment to conduct difficult investigations and prosecutions with integrity and vigor.

Mr. Frampton has related some of the "showcase prosecution" aspects of the Watergate investigation, such as writing up every witness interview, notifying individuals that they were being investigated and inviting them to appear before the grand jury if they wished, permitting witnesses to claim the fifth amendment privilege by letter rather than by personal appearance, and engaging in informal adversary hearings with defense counsel. In light of the extraordinary nature of Watergate, where corruption at the highest levels of government was the subject matter of the investigation, it is hard to disagree with the adoption of standards for prosecutorial conduct which would be beyond reproach. An important factor in reaching the conclusion to implement these procedures was the realization that history would inevitably sift through every aspect of an investigation and prosecution of such importance, and it was critical that later generations should have no doubt about the integrity and fairness of every aspect of the proceedings. A broader justification for such extraordinary measures, pertaining to any investigation of public corruption, is the fact that the careers of persons holding public office are fragile in the face of alleged scandal. The public official, particularly one who has been elected to office, can be ruined in the public's perspective, even if ultimately vindicated. Accordingly, even if history will quickly forget the prosecution of a lesser public official, this particular vulnerability mandates stringent, if self-imposed, safeguards against even the appearance of unfairness.

Inherent in this approach, however, is the recognition that we are creating a double or even triple standard in the administration of justice. Are the high standards that were self-imposed by the prosecutors in Watergate applicable in every public corruption case? Many

prosecutors would balk at the notion that every witness interview has to be written down and turned over to the defense as Jencks material. And what of routine non-corruption cases? In such routine cases, shall we have still another standard for discovery with fewer opportunities for the presentation of exculpatory evidence and lower standards for the quantum of evidence necessary to justify indictment? By formulating variable norms in order to do justice in different types of cases, I suggest that we are evading our commitment to equality and neutral principles in the administration of justice.

The fact that few specific legal and ethical norms exist to guide the prosecutor's conduct should not justify the informal creation of an elite class of defendants who are accorded special consideration. Many of the standards applied in the Watergate prosecution could be applied in the most mundane case without damage to the Government's interest. The generous discovery policy is but one example. Other standards dealing with the grand jury investigation could be applied to grand jury investigations of far less historic significance than Watergate without undermining the integrity of the inquiry. I am suggesting, in short, that the standards adopted by the Watergate Special Prosecution Force may very well serve to assist prosecutors in formulating policy for the conduct of their offices generally. One must also recognize, however, that the pressures of time and the circumstances of particular cases make it unrealistic to expect that the Watergate model can ever be more than a general guideline, to be implemented when appropriate by prosecutors who are committed to scrupulous fairness toward all potential and actual defendants, not only the white-collar elite.