Shock of Watergate May End Tradition

Effort Begins to Depoliticize Justice

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Politics, especially White House politics, has traditionally been an intrusive fact of life at the Justice Department. Now, in the aftershock of Watergate, a number of academics, practicing lawyers, and members of Congress are proposing to end that tradition.

As he began a recent series of hearings on the subject, Sen. Sam J. Ervin Jr. (D-N.C.), outlined the problem:

"We must begin the task of rebuilding the confidence of the American people in their government. Without trust in government, our system surely will fail. There is no better place to begin than the Department of Justice."

Whether, as one lawyer put it, there shall be "Justice without politics" was the key issue underlying two proposals before Ervin's Subcommittee on Separation of Powers. One proposal would make the department a completely independent entity; the other would order a study of whether a permanent special prosecutor is needed to investigate high-level corruption.

Since the office of Attorney General was created in 1789, some of its occupants have considered themselves apolitical. One was Edward Bates, who served under Abraham Lincoln.

"The office I hold is not properly political, but strictly legal," Bates said, "and it is my duty, above all other ministers of state, to uphold the law and to resist all encroachments, from whatever quarter, of mere will and power."

But Bates the apolitical was also Bates the atypical: Constitutional law professor Arthur S. Miller, a consultant to Ervin's subcommittee, notes, "At least since the days of Andrew Jackson, the Attorney General has been regarded as the President's lawyer."

In that sense, Miller adds, he is a "political officer charged with legal duties."

Jackson made it clear that politics came first during the 1830s national bank controversy. He wanted to designate certain banks as depositories of U.S. funds, and, learning that his Attorney General had doubts about the proposal, declared:

"Sir, you must find a law authorizing the act or I will appoint an Attorney General who will."

The intrusion of politics into the decisions of attorneys general may produce good or bad policies. The question, according to one scholar, John T. Elliff of the Brandeis University department of politics, is: "Do we overlook politics when it produces ends we have desired?"

Elliff, in a paper presented last month at a conference on the Justice Department sponsored by the Committee for Public Justice, said that Richard Olney, Attorney General from 1893 to 1895, and Frank Murphy, who held the job in 1939, took actions for highly political reasons.

Olney, says Elliff, "did almost everything he could in cooperation with bankers, merchants, and railroad interests to sabotage the recently enacted Sherman Antitrust Act."

Murphy, after discussions with labor and civil libertarian leaders in 1939, ordered an exhaustive survey of federal civil-rights laws and set up a civil-liberties unit in the Justice Department—the forerunner of today's civil-rights division.

Historians today applaud Murphy, who was a board member of both the NAACP and the American Civil Liberties Union when he became Attorney General, and deplore Olney, says Elliff.

"But who was more political? Surely Murphy matched Olney as a channel for the influence of specific interests on the administration of justice."

Direct pressure from the White House has often been

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documented in the last 30 years.

But past White House intrusions have paled in significance when compared with the concentrated efforts of the current administration in the Watergate scandal.

Last year Assistant Attorney General Henry E. Petersen told the Senate Watergate committee that when he first informed President Nixon about the White House-directed break-in at the office of Daniel Ellsberg's psychiatrist, Mr. Nixon replied, "I know about that. That is a national security matter. You stay out of that."

But Petersen and then-Attorney General Richard G. Kleindienst agreed they would resign if Mr. Nixon did not change his mind. He did, and the break-in was disclosed to the judge presiding over Ellsberg's trial. Thus, the Justice Department fought off one intrusion from the White House. Yet it succumbed to others.

Petersen, who had been responsible for the Watergate investigation, testified that former White House aide John D. Ehrlichman had applied great pressure on him to try to keep Maurice H. Stans, Mr. Nixon's campaign finance chairman, from appearing before the Watergate grand jury. Stans did not appear.

Former Acting FBI Director L. Patrick Gray III testified that he had destroyed sensitive documents taken from the White House safe of Watergate conspirator E. Howard Hunt Jr. because, he said, Ehrlichman and former White House Counsel John W. Dean III had given them to him "with the clear implication" that they should be destroyed.

Besides demoralizing the Justice Department, the Watergate revelations raised the question of whether this department is capable of investigating this administration in this case.

The quick answer was no, and the office of Watergate special prosecutor was established.

At the same time deeper questions were being asked in legal and academic circles: Can any Justice Department investigate any administration if the alleged corruption goes all the way up to the White House? Are there certain kinds of probes—of election fraud and crimes by government or political party officials—that ought to be handled by a permanent agency other than Justice? Can the department be insulated from politics as it is now organized? Or should it be entirely free of presidential control?

The responses have been as numerous as the questions.

When Elliott L. Richardson was Attorney General, he proposed to de-politicize the department—while leaving it basically intact—by foreswearing politics himself and asking his key assistants to do the same.

He also required department employees to write memos on any call they received from the White House or Congress or any other "non-involved party" about a pending case. That order remains in force although the current Attorney General, William B. Saxbe, has expressed the reservation that there should be a free exchange of ideas between Justice and Congress.

Last December Sen. Ervin introduced a bill, mainly to start a dialogue, that would insulate the Attorney General from direct political control by the President.

Under Ervin's proposal the President would still have appointment and removal power but would choose the Attorney General for a six-year term.

Ervin also would remove the Attorney General from the Cabinet and would grant him, instead of the President, power to hire and fire assistant attorneys general.

Rep. Peter J. Rodino (D-N.J.), chairman of the House Judiciary Committee, has introduced a bill that in effect would prevent a President from naming his campaign manager as Attorney General, a tradition that began with Dwight Eisenhower, who named Herbert Brownell, and continued with John Kennedy, who named his brother Robert, and Richard Nixon, who named John N. Mitchell.

Sen. Alan Cranston (D-Calif.) has proposed a measure that would set up a com-

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Taking Politics Out of Justice Dept.

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mission to study creating a permanent prosecution force.

Such a force has been suggested in two forms—one by Law Prof. Paul Miskin of the University of California at Berkeley and one by Washington attorney Lloyd N. Cutler, a corporate lawyer who was executive director of the National Commission on the Causes and Prevention of Violence that grew out of the Robert Kennedy assassination.

Miskin would create an independent office of Counsel General by constitutional amendment. The official would be chosen by the Supreme Court, "possibly with confirmation by the Senate," for 15 years and could be removed only by impeachment or by the Supreme Court for cause, Miskin says.

The Counsel General could not run for public office for the 15-year term and for three years after that and would serve both as the national ombudsman, checking into official corruption, and as the enforcer of election laws.

A President would have no claim of executive privilege and would have to turn over any administration record, even national security material, to the Counsel General.

Cutler's proposal would establish a permanent special prosecutor, chosen by the President and confirmed by the Senate for a six-year term, to handle election-law violations and crimes committed by federal or political party officials.

The rationale for taking major areas of prosecution away from the Justice Department permanently was given by Cutler in a paper last month to the Committee for Public Justice:

"An incumbent Attorney General has an obvious conflict of interest in investigating or prosecuting a campaign-law violation or a breach of public trust by a member of his own administration or party."

Noting that interim special prosecutors were chosen both in Watergate and in the Teapot Dome scandal of the 1920's, Cutler said, "They have not only prosecuted successfully the crimes that had already come to the surface; their very existence led to the discovery and prosecution of additional crimes. . .

"These experiences suggest that Teapot Dome and Watergate were only the tips of icebergs that float in political waters all the time, and that much more would have been discovered if we had a continuing institutional arrangement for doing so."

His theory of permanent scandal is central to those who believe that radical structural changes must be made in the Justice Department.

Yale Law professor Burke Marshall, who served as an assistant attorney general under President Kennedy, does not believe that corruption is always at a high level. "You can't set up permanent institutions to deal with a corrupt presidency," he says. "We don't have that many corrupt ones."

If the problem is sporadic, as Marshall contends, then "a permanent office would atrophy," he says. "The career people staffing it would not be very good—or they would be bored silly."

Former Attorney General Ramsey Clark also opposes the idea of a permanent prosecutor. "Prosecution is perhaps the quintessential executive function," he said. "The way to solve the problem we face now is not to usurp the powers of the executive but to insist that the executive do its duty."

Clark argues, "To set up an independent agency is terribly wrong. When you spin off an agency, it tends to lose power after a while, become dormant, or get captured by some constituency."

What is needed, he says, is a method "to insulate the investigative and prosecutorial process from political influence." Clark advocates a "standing mechanism" for investigating corruption in extraordinary cases that the Justice Department could not handle.

Clark has also proposed a rule that the attorney general and deputy attorney general should belong to opposing political parties, that Senate confirmation of the 94 U.S. attorneys should be eliminated, and that Justice Department contacts with the White House or Congress on pending cases should be made public.

Recently a panel of public administration experts sent a report to the Senate Watergate committee that took note of the issues raised by proposals for major institutional changes.

It rejected the idea of an independent Justice Department, arguing that the department and the Attorney General "play such key roles in the constitutional responsibilities of the President that they should not be removed from his overall direction."

Instead, the panel backed the idea of a "permanent" special prosecutor appointed for a six-year term, but it qualified the recommendation by saying that the officer "should be regarded as a transitional arrangement, the need for which would wither as the department moved from its present political role to one of a nonpolitical office."

Drunk "politics" not as significance – a factor in injustice as policy in which the great federal power is used to corrupt the law.

While the question can DJ investigate the administration of which it is part is valid, the equal [illegible] is who investigates the DJ? It has the only investigative arm & the only prosecutorial arm.

All the former government officials quoted have been part of cover-ups, as is Evans in more than one instance. These are the parts needed to solve the problems of the present and of the past of which they are part?