Whose Special Prosecutor?

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By Paul M. Bator

WASHINGTON — I've changed my mind. When I first considered the question of the constitutionality of empowering a prosecutor outside the executive branch to prosecute crime, my initial reaction was that such a measure would probably be unconstitutional. Further study and reflection have, however, led me to a different conclusion: Although the matter is not free from doubt, there is powerful and, ultimately, persuasive support in the law for the position that Congress has the constitutional authority to create such an office of special prosecutor.

Article II, Section 2, Clause 2 of the Constitution explicitly authorizes Congress to vest the power of appointment of inferior officers "as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

This clause has been broadly interpreted. The leading case is Ex parte Siebold (1879) in which the Supreme Court rejected the proposition that the courts may, under this clause, be authorized to appoint only those inferior officers whose work is related to the administration of justice. The Court stated that the choice between the listed appointing authorities "is a matter resting in the discretion of Congress," so long only as the choice does not involve a manifest "incongruity." In fact, as far as I know, no case has invalidated a Congressional statute empowering the courts to make appointments under Article II, Clause 2, although a variety of appointments have been so vested.

Giving the courts the power to appoint a special prosecutor to investigate and prosecute crimes committed by high executive officers and crimes related to Federal elections is not only "incongruous," but would seem to be encompassed even by a narrow reading of Article II, Clause 2. Such a power is more easily sustained than the power to appoint election supervisors, upheld in Siebold. Indeed, such a power is but an extension of the courts' existing authority to appoint United States Attorneys in cases where vacancies occur. Prosecutors are officers of the court; courts are intimately familiar with their qualifications; courts appoint defense counsel daily; appointing a prosecutor would not involve the court in "incongruous" political or military functions (as might be the case if courts had to appoint ambassadors or generals).

Is the function of prosecuting crime so "inherently" executive that it would violate the principle of separation of powers to authorize the courts to appoint a prosecuting officer for special purposes? I do not believe so. The leading case of Humphrey's Executor v. United States (1935) reafirms the proposition, already clearly articulated by Madison in The Federalist, that the separations of powers is not a rigid abstraction.

The notion that the prosecution of crime is "inherently" a part of the executive power seems to be without strong historical justification. At the time our Constitution was adopted, even private citizens could bring criminal charges, both here and in England; indeed, the very first Congress explicitly authorized private prosecution in the Federal territories. The notion that public officials have a monopoly of the right to prosecute apparently did not develop until the nineteenth century.

It is also relevant in this regard that almost every state permits its courts to appoint temporary prosecutors when that office is vacant; and that at least a dozen states permit their courts to appoint special prosecutors when the regular prosecutor is involved in a conflict of interest.

Vesting the power to appoint the special prosecutor in the Federal courts would not involve those courts in the performance of functions inappropriate to the judiciary. And all claims of possible bias or unseemliness would be eliminated if the legislation were to provide that the judge or judges making the appointment should not sit on cases brought by the special prosecutor.

Ultimately, the constitutional justification for Congress' power to create an office of special prosecutor outside the executive branch lies in the words of Chief Justice Marshall in McCulloch v. Maryland (1819) "This . . . constitution [is] intended to endure for ages to come and, consequently, to be adapted to the various crises of human affairs." It seems to me clear that our country needs and wants independent investigation and prosecution of possible criminal conduct by the high officers of the executive branch, investigation and prosecution not under control of that same executive branch.

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By Roger C. Cramton

ITHACA, N. Y.—The New York Times has carried views of editorial writers and eminent lawyers that the difficult legislation before Congress dealing with a special prosecutor for Watergate-related matters is a proper exercise of legislative authority. But Congress should give consideration both to constitutional doubts and practical considerations that counsel against enactment.

Proponents of legislation which would direct Chief Judge John Sirica or other Federal judges to appoint a special prosecutor who would not be subject to Presidential control or removal argue that the Constitution permits Congress to vest the appointment of an "inferior officer" of the Federal Government, such as the special prosecutor, in the "courts of law."

If the clause referred to is given a broad, literal meaning, it would permit Congress, for example, to vest in the Attorney General the appointment of all the employes of the Supreme Court or in the Chief Justice the appointment of the advisers who serve in the executive office of the President. Such legislation, never before attempted by Congress, would be an intolerable and unconstitutional encroachment on the independence of the branch.

Legislation directing the Federal judiciary to appoint officers who would exercise executive functions can be justified only if several conditions are satisfied: first, there is a rational and close relationship between the judicial branch and the function the appointed officer is to perform; second, the hiring, supervising and possible firing of the executive officer is properly considered a "judicial" function of the kind that courts can properly undertake; and third, the President's authority over the executive branch is not impaired by the legislation. It is doubtful whether the proposed legislation satisfies these conditions.

Most of the limited instances in which the Federal courts have been authorized to appoint officers who perform functions which are partly "executive" in character do not involve the prosecution of criminal offenses. And in the few instances in which criminal law enforcement is involved, such as the statutory provision allowing a Federal court to appoint a temporary U.S. Attorney until the President fills the vacancy, the President could always remove the court-appointed officer.

Controlling decisions make it clear that the President's power to remove executive officers cannot be infringed by Congress. True, the Supreme Court has allowed Congress to protect the members of independent regulatory agencies from arbitrary removal when such protection is related to the independent performance of their quasi-judicial and quasi-legislative functions as creatures of Congress. But the Court has repeatedly said that Congress could not shield from Presidential control or removal "purely executive officers."

Just as Congress could not confide the conduct of delicate international negotiations in a person not under the direction of the President or his agent, the Secretary of State, it cannot splinter the executive power to enforce the laws merely because an emergency is thought to exist. The existence of an emergency, the Supreme Court has held, does not create power where none exists.

A longer view provides support for treating prosecutional authority as a fundamental part of the President's power. In the past decade we have benefited from the fact that the Attorney General, acting for the President, could protect blacks in the South from indictment by Southern grand juries unsympathetic to the cause of civil rights.

Involvement of the Federal judiciary in the hiring, supervising and possible firing of executive officials is also bound to interfere with their judicial duties, involve them in political controversy, and threaten the impartial performance of judicial tasks.

Practical considerations support the constitutional doubts. The President is unlikely to cooperate with a statutory special prosecutor, and the plausibility of his assertions that the legislation is an unconstitutional infringement of executive power would require litigation which might take many months. Meanwhile, the conduct of the pending investigation under Mr. Jaworski's direction would also be undermined. If both investigations proceed simultaneously, there would be vexing problems of immunized witnesses or cases settled in return for testimony; and the overlapping investigations might prejudice individual rights.

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