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A Truly Independent Prosecutor

By now, almost no one questions the need for an independent special Watergate prosecutor. Instead, the challenge before us is to agree on the *process* by which the prosecutor shall be established by law and protected from arbitrary dismissal. The goal, of course, is credibility. When eventually the prosecutor declares that Mr. X deserves to be prosecuted or, perhaps more important, that Mr. Z is completely innocent, we must be able to believe him.

This week, the Senate will debate and choose between three proposed processes for creating and protecting the special prosecutor. Basically, they differ in two fundamental ways: how the special prosecutor would be appointed and how he could be dismissed.

One proposal, the early front-runner, would take the appointment of the prosecutor away from the executive branch and hand the responsibility, however unwelcome, to the federal courts. This method quickly achieved the co-sponsorship of more than half of the Senate and has substantial support in the House. But under study, the court-appointed prosecutor appears to many of us to be the wrong approach. In an unusual series of statements, judges of the U.S. District Court for the District of Columbia have expressed their opposition to the bill. Judge Gesell, declaring that "the courts must remain neutral," points out bluntly that "Congress has it within its own power to enact appropriate and legally enforceable protections against any effort to thwart the Watergate inquiry."

Instead of propelling the Watergate investigation toward a full and credible conclusion, the court-appointed approach would be subject to months of legal challenges. The possibility that all of the work of a court-appointed prosecutor might eventually be nullified as unconstitutional is very real. The nation would not hold blameless a legislature that managed only to make more complicated an already tangled web.

Even if it should pass the Congress, the court-appointed approach faces a sure presidential veto. There is little

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chance that Congress has the votes to override such a veto. We would be back to square one.

A second approach, one which has White House support, would merely codify the present situation. Under it, the Attorney General would appoint the special prosecutor and he could only be fired by the Attorney General for cause. If this sounds familiar, it is because Archibald Cox received these same "ironclad" guarantees last May. Now, however, we are offered the additional protection of a letter from the Acting Attorney General to the President Pro Tempore of the Senate promising that the prosecutor would have to have the "approval" of the Senate before his appointment and that he wouldn't be fired without the "consensus" approval of a selected group of congressional leaders.

As solemn as such a promise might be, it still is not law. It could quickly become inoperative. Given recent events, both the nation and the Congress would be rightly skeptical of such an informal arrangement.

It can be argued here that we already have a special prosecutor, Mr. Jaworski, in place; that he is both sounding and acting quite independent and that any legislative action would only delay his important work.

But Mr. Jaworski's only real job security at this point is the memory at the White House of the public outcry over the dismissal of his predecessor. There is no legal guarantee that what happened before could not happen again.

This becomes a prime argument for the third alternative, one which I am convinced is not only safe from constitutional challenge but offers the prosecutor credibility and sufficient job security.

The President should *nominate* the special prosecutor, subject to formal confirmation proceedings by the Senate. Some will argue that the President should not appoint a prosecutor who will be investigating the presidency itself. But this method is unquestionably constitutional. It is also the traditional process used, for example, for appointing federal judges and Supreme Court Justices who must be guaranteed independence because they routinely hear cases involving the U.S. government and the President himself.

Because the independence of the special prosecutor is an absolute necessity, Congress should limit the grounds on which he can be dismissed to three: malfeasance in office, neglect of duty or violation of the statute which created his office. A bill which Sen. Howard Baker (R-Tenn.) and I have introduced—co-sponsored by Sens. William Brock (R-Tenn.), Marlow Cook (R-Ky.), and Milton Young (R-N.D.)—would provide for this method of appointment and limitation of dismissal. In addition, it would provide a 30-day period before any dismissal became effective. During that "cooling off" period the prosecutor could challenge his dismissal in court. If the court decided the dismissal was illegal, the prosecutor would continue in office.

If, however, the office became vacant through legal dismissal, illness or resignation, the court would appoint an interim special prosecutor to serve until a new prosecutor had been nominated by the President and confirmed by the Senate.

This is the responsible approach. It assures the process of law we must have to achieve our common goal: an impartial and unfettered resolution of the Watergate nightmare which will stand up both in court and in the minds of a skeptical nation.