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Independent Prosecutor

Acting under powers delegated to him by Congress, Atty. Gen. Elliot Richardson last May created the Office of Watergate Special Prosecution Force. Archibald Cox was appointed Special Prosecutor, and detailed regulations were published authorizing Cox to investigate all offenses arising out of the 1972 presidential election and all allegations involving the President, members of the White House staff or presidential appointees. These regulations gave Cox plenary investigative and prosecutorial powers and bore the promise that "the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part."

On Oct. 20, on orders from President Nixon and after Richardson and William Ruckelshaus had resigned, acting Atty. Gen. Bork revoked the regulations, abolished the Special Prosecutor's office and fired Cox. On Nov. 1 Bork reestablished the Office of

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Special Prosecutor, reissued the original regulations, and appointed Leon Jaworski as the new Special Prosecutor.

The principal change in the regulations under which Mr. Jaworski will operate is that they state that he will not be relieved of his responsibilities without consultation with the majority and minority leaders of both houses and the senior majority and minority members of the Senate and House Judiciary Committees. This promise is presumably as revocable as the promise that Cox would not be removed except for extraordinary improprieties.

One of the responsibilities of the Special Prosecutor is to investigate allegations concerning the President. Congress must now decide whether a man selected by the President—even one as eminent as Leon Jaworski—can satisfy the demands of truth and justice. In the deliberations on this important question, there should be no doubt that Congress may by statute make the Watergate Special Prosecutor independent of the President and may withdraw from the President and

the Attorney General any power to appoint or remove the Special Prosecutor.

The critical provision of the Constitution (Art. II, sec. 2, cl. 2) states that the advice and consent of the Senate is required for appointment by the President of "Officers of the United States," and that "the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Several things are made clear by this provision: First, the President has no inherent, constitutional authority to create offices of the United States, including an Office of Special Prosecutor. It lies with Congress to create by statute such offices as it deems proper for exercising the powers of the United States government, and to decide which shall be "inferior offices." The President has his usual veto powers over such legislation, but he has no independent power to create offices.

Second, the President has no independent, constitutional power to appoint the persons who will fill the offices created by Congress. The President's power to appoint "Officers of the United States," such as the Attorney General, is subject to the advice and consent of the Senate. As to the appointment of lesser officers, the Constitution says merely that *Congress may give appointment powers to the President, the courts or department heads.* Thus, whatever power he

may have to choose personal advisers, the President cannot appoint officers to act for the United States without a delegation of authority from Congress to do so. Furthermore, whether any such appointment will require the advice and consent of the Senate is basically for Congress to decide.

Finally, it is implicit in the constitutional provision just quoted that Congress may itself retain and exercise the power to appoint lesser officers, such as a Special Prosecutor, which it might otherwise delegate to the President, department heads or the courts.

In short, it is clear from the Constitution that Congress has the power to create an Office of Special Prosecutor. It is equally clear that Congress may withdraw from the President or the Attorney General any previously delegated power to create a Special Prosecutor and, by doing so, terminate the powers of any incumbent prosecutor. Congress may determine the jurisdiction and the powers of the Special Prosecutor it creates and either choose the individual who will hold that office or delegate that function to the courts.

The fact that a Special Prosecutor had been appointed by a court or directly by Congress would not make him a judicial officer incapable of acting as a criminal prosecutor, or a mere arm of the legislature. The Special

Prosecutor would have whatever powers and independence Congress conferred upon him by statute, and he could unquestionably be placed beyond the control or removal of the appointing body other than for gross improprieties or malfeasance.

The belief that there is a constitutional impediment to creating a Special Prosecutor independent of the President derives partly from the fact that we have not previously in our history faced the necessity to do so, and partly from the myth that our Constitution divided government into three watertight compartments.

The necessity for an independent Special Prosecutor arises from the uniqueness of our present crisis. The Constitution enjoins the President "to take Care that the Laws be faithfully executed." When a criminal investigation requires examination of allegations involving the President and his closest personal advisers, however, the appearance and perhaps the actuality of faithful execution of the laws is possible only through a Special Prosecutor with sufficient independence and power to follow wherever the trail of evidence may lead.

As to separation of powers, the realities of government do not present themselves neatly creased in three labeled piles, nor does the Constitution require that we force all governmental functions into three preconceived molds. By virtue of congressional enactment, there already exists a "headless fourth branch" (e.g., the independent regulatory agencies) which for all practical purposes operate independently of Congress, the President or the courts.

Strong arguments can be made that Congress could not force the courts to act in a way which would impair their independence and integrity, nor remove from the President's realm certain irreducibly "Executive" functions, such as the conduct of foreign affairs. These inhibitions are not involved in the present dispute, however, and there is simply no significant constitutional impediment to making the Special Prosecutor independent of the President by statute.

The Watergate crisis has gone too far for any turning back. No scaling down of the investigation or withholding of evidence can be tolerated. Faith in our government and its leaders will not be restored unless and until the truth has been pursued to the limit, relentlessly and fearlessly. Congress manifestly has power to create a Special Prosecutor independent of the President. The only danger to our country and our Constitution lies in the possibility that Congress may fail to do so.