

# Protecting the Special Prosecutor

*"Although these are times of stress, they call for caution as well as decisive action. The Suggestion that the Judiciary be given responsibility for the appointment and supervision of a new Watergate Special Prosecutor, for example, is most unfortunate. Congress has it within its own power to enact appropriate and legally enforceable protections against any effort to thwart the Watergate inquiry. The Courts must remain neutral. Their duties are not prosecutorial. If Congress feels that laws should be enacted to prevent Executive interference with the Watergate Special Prosecutor, the solution lies in legislation enhancing and protecting that office as it is now established and not by following a course that places incompatible duties upon this particular Court."*

Part 11/16/73

THE QUOTATION comes from U.S. District Judge Gerhard A. Gesell's memorandum explaining his decision in an important Watergate-related case the other day. Judge Gesell made his observation in the course of declaring that Acting Attorney General Robert H. Bork had acted illegally in firing Special Watergate Prosecutor Archibald Cox on October 20. Taken together, Judge Gesell's admonitions concerning the proper role of the courts and his interpretation of the law as it concerns the Special Prosecutor's tenure seem to us to argue forcefully against legislation now pending that would authorize the appointment of a Special Prosecutor by the U.S. District Court. The question is whether such legislation is either necessary or desirable, and we believe the answer on each count is, no.

The purpose of the congressmen and senators who are supporting the creation of a court-appointed prosecutor is admirable: it is to guarantee an independent, impartial, pressure-free prosecutor's office, one that is not subject to the will, whim or threat of those under investigation. And, not incidentally, it is to assure that the appearance of all this will be equal to the reality, so that people will be able to have confidence in the integrity of the prosecutor's office. However, we believe that this purpose would best be satisfied by other means—specifically by the enactment of legislation requiring Senate confirmation of the administration-appointed Special Prosecutor and also giving even firmer statutory basis to the office of the Special Prosecutor.

Judge Gesell's reading of the law is relevant here. He did not find that Acting Attorney General Bork had acted illegally in firing Mr. Cox by reason of any breach of the commitments given the Senate by Elliot Richardson concerning Mr. Cox's position. Those commitments, Judge Gesell said—whatever the "moral or political" implications of abandoning them—"had no legal effect." Rather, he found the illegality to reside in Mr. Bork's violation of a Justice Department regulation authorized by statute and setting forth the conditions governing the Special Prosecutor's job. Those conditions, as Judge Gesell observed, included the following: "He was to remain in office until a date mutually agreed upon between the Attorney General and himself, and it was provided that 'The Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part.'"

has just been named to the job by Acting Attorney General Bork. It seems to us that an administration-appointed Special Prosecutor whose views and purposes had been examined by the Senate in confirmation hearings, whose subsequent confirmation made him in some appreciable degree answerable to Congress and whose job security had been enhanced by strengthening of the statutory basis of his office would be as free of administration pressure and dictation as could be guaranteed by any process—including the process of having him appointed by and answerable to the U.S. District Court.

We would argue that such a prosecutor would have another special advantage: it is the likelihood that any findings he made or charges he brought against the President of the United States would be credited by the public. Here we find ourselves taking an entirely opposite view from those who hold that a court-appointed prosecutor would enjoy more public confidence than anyone—Mr. Jaworski included—who owed his appointment to the Nixon administration. On the contrary, it seems to us that his appointment by the administration would at once oblige him to demonstrate his prosecutorial independence and give particular force to his position, especially as he pursued investigations of those intimately connected with the administration. It is important now that people believe in the integrity of the Special Prosecutor. But it is not nearly as important as it will be if and when the Prosecutor comes into direct conflict with Mr. Nixon, as Mr. Cox did, or actually implicates him in criminal activities.

These are essentially political considerations, and it seems to us that they weigh equally in the scale when you are thinking about the Special Prosecutor's freedom to pursue the work Mr. Cox began. High among those considerations we would list a new political restraint on Mr. Nixon: at what cost could he repeat his performance of the weekend of October 20? The President is only now recovering—and just barely—from the repercussions of that event and to the extent that he is recovering at all, he owes everything to a hasty retreat from his position on releasing the subpoenaed tapes and on abolishing Mr. Cox's office along with Mr. Cox's appointment.

What with the Ervin Committee, the House Judiciary Committee and the Special Prosecutor's office already in existence, it seems to us that the addition of a court-appointed prosecutor would only dissipate energy and promote confusion in the task of bringing the Watergate offenses to light and the Watergate offenders to justice. There is, in fact, too much confusion, distraction and overlap now. We think the center of action should be the Special Prosecutor's office. And we think the tools are at hand for Congress to guarantee that this is so.

What is particularly interesting and apt about this judgment is that the Justice Department regulation, which Judge Gesell sees as having had "the force and effect of law" and which he also sees as preventing the President himself from dismissing a Special Prosecutor, is back in effect. In other words, its terms extend to and protect Leon Jaworski, the new Special Prosecutor who