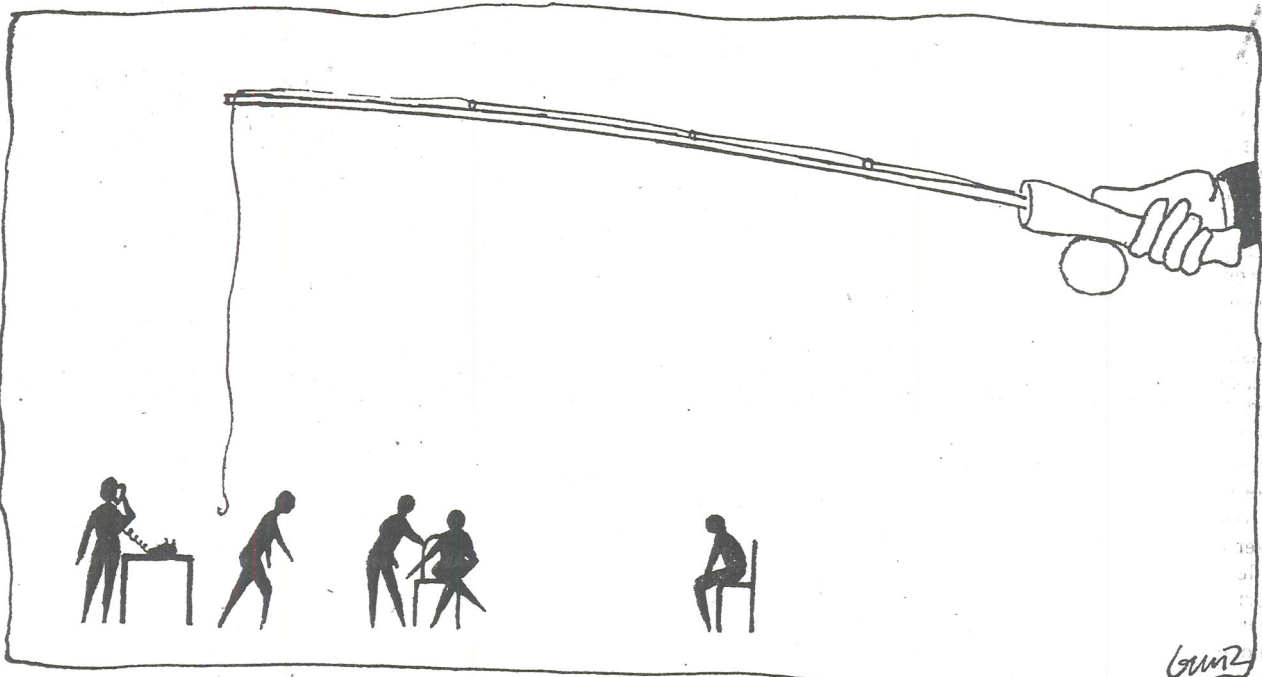


A Permanent 'Special Prosecutor'?



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By David Gunderson

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Yes

The reasons for the current interest in the creation of a continuing public prosecutor are clear. The Attorney General and his principal assistants in the Department of Justice are not simply prosecuting officers but also appointees of the President and members of an elected administration team that usually hopes for reelection. They have an obvious conflict of interest when they investigate whether crimes have been committed in their own

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election campaigns or thereafter by high officers of the executive branch. In directing the Attorney General, the President and his White House aides have an equally obvious conflict. Moreover, because of the live-and-let-live principle of elective politics, they may be similarly reluctant to investigate the conduct of their predecessors and the campaign finances of the opposing party.

Conflicts of this sort are doubly incapacitating. They prevent unfettered

and vigorous prosecution of those who should be prosecuted. Equally important, they breed public distrust of decisions not to prosecute that may be entirely justified on their merits, and would be accepted as such if made by a prosecutor free from any conflict of interest.

We have recognized this need for an independent prosecuting official every two or three decades, when instances of official misconduct and conflict of interest have become particularly notorious. Our experience with these special prosecutors has been salutary. Not only have they successfully developed cases that had already surfaced, they have discovered and prosecuted additional crimes that we would never have known about if they had not been appointed. Archibald Cox and Leon Jaworski, for example, have filed and successfully prosecuted the only significant campaign financing cases that have been brought by the federal government in the last 40 years.

What independent prosecutors uncover once we appoint them suggests that official and campaign misconduct is not rare, but rather that it tends to flourish whenever there is little reason to fear prosecution. Teapot Dome and Watergate may have provided us rare glimpses of predators that regularly roam beneath the surface of the political waters. For example, we never learned from the Eisenhower or Kennedy administrations how much money business friends gave Sherman Adams over the years, or why he was never

prosecuted even for tax evasion.

We should not be content with a system that requires massive purgatives once a generation. An ongoing institution devoted to the investigation and prosecution of such offenses would increase the likelihood of bringing offenders to justice, and its very existence could deter the commission of offenses that would go undiscovered in its absence. Most important, a continuing public prosecutor might go a long way to restore the public confidence in our institutions that is essential to the operation of a democracy.

Some argue that if men of integrity held the office of Attorney General, and the offices in the White House whose occupants deal with the Attorney General, then no other remedy would be needed. I do not think that integrity is enough. In other situations where men of integrity find they have a conflict of interest—and men of integrity can have a conflict of interest—we all agree that their duty is to disqualify themselves, to have someone else do the job, even though they may be men of such high character that they are capable of overcoming the conflict and discharging their responsibilities conscientiously.

There are men who are capable of doing that, as we all know. But there are also men who are not capable. The appearance of conflict is as dangerous to public confidence in the administration of justice as true conflict itself.

When former Attorney General Elliot Richardson made his decisions in

the case of former Vice President Agnew, he came close to stretching public credulity in the ability of a man of the highest integrity to deal uprightly with an acute political situation. I believe he brought it off, but I do not think that we can depend for the success of our institutions on having heroes like Mr. Richardson around all the time.

Creation of an independent public prosecutor would be neither unconstitutional nor unwise. The only serious question is whether Article II, vesting the power to execute the laws in the President, requires that senior prosecuting officials of the nation must act under the President's direction even when he or they have a conflict of in-

terest. One cannot read the Constitution as forcing us to tolerate conflicts of interest on the part of the President, the Attorney General, and their immediate assistants that we cannot, and do not, tolerate in judges and lawyers.

To minimize constitutional problems, I would have the public prosecutor nominated by the President and confirmed by the Senate. To assure his non-political status, I would provide him with a six-year term, make him removable only for misconduct or incapacity, and bar him from thereafter holding elective federal office. To assure harmony with the Department of Justice, I would preserve the prosecutor's present status within the department, with jurisdiction over election offenses and breaches of public trust by presidential appointees, and within that limited field, with statutory independence of the President and the Attorney General.

It has been argued that non-political lawyers of high quality cannot be recruited for such an office, that we would get either nonentities or unscrupulous and ambitious men who would ride the prosecutor's white horse into the White House. But with the above precautions, I should think these dangers would be less acute than when the President appoints and the Senate confirms other government prosecutors today.

Finally, it is argued that most of the time, the prosecutor's office would have nothing to do. At the very least, he should be quite busy discharging the Department of Justice's criminal enforcement responsibilities under the new Campaign Financing Act. Moreover, whether or not the former President is a crook, he is certainly not a fluke. The qualities that betrayed him and us are far from unique, and we will see them in future administrations again. To be ready for that contingency, we need a deterrent we lack today.

No

When the work of the Watergate Special Prosecutor's Office is completed, the public judgment probably will be that a necessary, difficult and unique job was accomplished professionally and competently. But whether or not that is so, there is no need to make the office a permanent part of the bureaucracy.

In my judgment, the idea of institutionalizing the office of the special prosecutor is simplistic, and even dangerous. It would be a futile example of "closing the barn door" too late to solve a past problem. And it would be

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likely to produce new problems as well, by creating a false sense of confidence; even a "special" institution would, in time, cease to be "special." Eventually it would become no less vulnerable to all the frailties that threaten existing law enforcement mechanisms.

Special prosecution offices have been set up before to deal with special problems; no doubt the necessity to go outside the regular channels of government will arise again. But those kinds of problems will no more be preempted by the establishment of a permanent special prosecutor than are more mundane crime problems preempted by the existence of the ordinary prosecutor. Indeed, some problems might be exacerbated or created by such an office.

One reason for the success of special prosecutors' offices in the past has been that they were "special." In each instance an extraordinary effort involving special staff, special resources and special powers were galvanized to solve a unique, discreet problem. I doubt that these efforts would have been successful without their explicit short-lived, evanescent charters, without a staff which was not wedded to and, inevitably, dependent upon any bureaucracy. Surely that was the case in my own experience, in the organized crime drive under Attorney General Robert F. Kennedy.

There was an organized crime section before Robert Kennedy arrived at the Justice Department; there has been one ever since. But few could argue with the judgment that during the Kennedy years a unique effort was launched through this special prosecutive drive and that its work was a hallmark of the New Frontier. New legislation was passed, extra appropriations provided, a talented and dedicated staff assembled and a major national problem highlighted and attacked. What happened during those years was different from what went before and what has happened since. One factor

was the use of non-career government lawyers. The leaders and most key staff men came from the private world outside Washington and left when their specific jobs were done. That was the case in other comparable situations as well.

One problem highlighted by Watergate and offered as the chief rationale for creating a permanent special prosecutor's office is the public need to assure itself of the integrity of campaign officials and federal employees through a prosecutor who is independent of the White House. But the solution raises more questions than it answers.

Must we presume that the government is unable to maintain its integrity when one of its own commits an offense? Surely, the U.S. Attorneys and Justice Department officials acted with unquestionable integrity and notable determination in handling the prosecution of former Vice President Agnew, under the most vexing circumstances.

Is there a necessity for a special prosecutor's office in all cases of government corruption? The Justice Department regularly handles the prosecution of federal employees, with no remarkable abuses reported. The involvement of the President of the United States in a criminal investigation occurred once in the country's 200-year history, and is not likely to

become a regular event.

Would adding a permanent special prosecutor to the federal establishment answer this problem or compound it by creating another level of high government officials who as human beings also must be presumed not to be immune from error, favoritism, pressures, even corruption? Who would watch them? When do we stop the precautions? More importantly, how would we insure against the latent potential for abuse of civil liberties inherent in any super prosecutorial office?

To say that the government ordinarily cannot be trusted to handle tough cases is to insult many competent and honest men and women; to damn the whole system upon which we rely day to day; and it is to deny experience, as well. Despite special problems which arise from time to time and require outside help, the prosecutive system works. In fact, the system can be criticized more for over-activity than for pulling punches. It is the nature and habit and interest of prosecutors to prosecute, and ordinarily they do not need encouragement to do so.

Even in the historic quandary of Watergate, it could be said that "the system" worked and did so under incredibly taxing conditions. The U.S. Senate, the House of Representatives, the federal courts and grand jury system, as well as the special prosecutor's office, can be congratulated for coping with an impossibly sticky and vexing situation.

To deny the need for a permanent special prosecutor is not to ignore the need for innovative steps designed to accomplish the needs envisioned by its proponents. Why not legislation to de-politicize certain functions of the Department of Justice—appointments of judges and U.S. Attorneys, for example? Why not more use of special grand juries to assist courts and prosecutors in scrutinizing the functioning of government? Why not an ombudsman outside the executive branch to receive complaints and exhort officials and agencies within the system and report to the public; someone whose role would fall between Jack Anderson and Leon Jaworski? Why not more and better investigatory reporting and legislative oversight, now that we see how well it works?

In thinking about how to avoid future Watergates and how to assure more responsible government, we should resist any answers to future problems based on institutionalizing yesterday's unique answers to yesterday's unique problems. That would be to view public affairs, in Marshall McLuhan's term, through a rear view mirror, thinking that we are looking ahead. Many people, intellectuals in particular, are inclined to insist on programmatic solutions to all problems. But some aberrations cannot be predicted or avoided. Formularistic answers rarely solve the hard problems.

It is, after all, in finding good public officials that future Watergates can be avoided; not in prosecuting bad ones.