NYTimes NOV 7 1973

The Prosecutor

By Raoul Berger

CONCORD, Mass.—It is generally agreed that the appointment of a special prosecutor to carry on the task begun by Archibald Cox is indispensable to restoration of confidence in the administration of justice. The nation cannot tolerate the spectacle of a potential defendant in the Presidency dictating to a prosecutor how far investigation may go. Acting Attorney General Bork's protestation that he means to be utterly independent in pursuing the Watergate and related investigations furnishes even less security than was furnished by the express charter of independence given to Mr. Cox by Attorney General Richardson.

As the Supreme Court stated in *Humphrey's Executor v. United States*, "one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will."

With good reason, therefore, has public sentiment crystallized in favor of a statute that would establish a special prosecutor as an agency completely independent of the President, to be appointed by a court. The power of Congress to establish independent agencies is indisputable; power to vest appointments in the courts is expressly conferred by Article II, Section 2(2) of the Constitution: "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."

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Prof. Alexander Bickel argues that "the prosecutorial function belong[s] solely to the executive branch and 'judicial power is not compatible with the exercise of hiring, firing and, for all I know, of supervising of prosecutors.'" It is a mistake to regard the prosecutorial function as immovably embedded in the executive branch. In *Ex parte Seibold* (1879), the Supreme Court said that a marshal, for instance, an "executive officer" ordinarily appointed by the President, is yet "preeminently an officer of the courts," whose appointment could be vested in the courts. As a lawyer, a special prosecutor is no less an officer of the court, who closely shares in its administration of justice. It was objected in *Seibold* that "the Act of Congress imposes upon the Circuit Court duties not judicial, in requiring them to appoint supervisors of election, whose duties, it is alleged, are entirely executive in character."

Commenting on Article II, Section 2(2), the Court stated, "It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution. . . ."

Had the framers considered that appointments and functions fell into ironclad compartments, they would have lodged all "executive" appointments in the President. Instead they gave him quite limited powers of appointment and left the bulk of the appointment power in the discretion of the Congress. They left Congress free, in the present extraordinary circumstances, to place a prosecutorial function outside the executive department when quite plainly it could not be trusted to investigate and prosecute itself.

Those who have been ready enough to argue for an illimitable power of removal — a power nowhere mentioned in the Constitution, which was the subject of protracted controversy in the first Congress, and which argument is discredited by Madison's statement in that debate that the President would be impeachable "for the wanton removal of meritorious officers" — should not be too quick to place limits upon the express and unqualified Congressional power to vest appointments in the courts.

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Particularly is this true when the result of an illiberal interpretation is to insulate the close aides of the President and the President himself—70 per cent of the American people believe that he was implicated in the Watergate cover-up conspiracy—from full and independent investigation. For centuries it has been a canon of interpretation that even express terms must give way when a given application produces absurd or unreasonable results. Implied powers stand no higher.

To insist that the President must investigate and prosecute himself, for that is what the argument for executive control of prosecution boils down to, is plainly unreasonable. The power of appointment and the separation of powers were not designed to obstruct justice.

Let our guide be the utterance of Congressman Bland in the first Congress. Faced with the fact that the Constitution made no provision for removal, he said, "it was essentially necessary that such a power should be lodged somewhere, or it would be impossible to carry the Government into execution."

Somewhere there must exist power to provide for an independent special prosecutor to carry forward an untrammeled investigation of White House participation in a criminal conspiracy. Without straining, it can be found in Article II, Section 2(2). It follows that a statute authorizing a court to appoint a special prosecutor would be constitutional.

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