

# The Prosecutor Issue

## Congress Faces Legal Hurdles If It Seeks to Create a Watergate Office

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There's little question any more that Congress will at least try to create a special prosecution office to take over the Watergate investigation. The question instead is whether Congress can do it legally—or, more precisely, whether Congress can create an effective prosecution office that is also legal. Lawyers and Congressmen are offering their guesses now, and more seem to be guessing yes than no. But even those who say yes do so reluctantly and less than confidently, saying, as one constitutional expert put it, "No one likes this."

### News Analysis

For the law is unclear. The Constitution and the statutes and past court decisions all offer hints, but only hints. The issues go to the heart of the Constitution and the make-up of the Government.

As in the constitutional battle over the Watergate tapes, a main issue here is the separation of powers. And in a nation already dubious over the integrity of its legal system, it is risky—no matter how necessary—to pass a bill of uncertain legality.

There are two basic proposals now before the Congress. One, known as the Hart-Bayh bill and supported by more than half the Senate as well as many Representatives, would create a special prosecution office with the prosecutor appointed by—and removable by—the chief judge of the District Court here.

The second, introduced today by Senator Charles H. Percy, would also create a special prosecution office. The President, however, would have the power to appoint the prosecutor, subject to Senate confirmation. The President could also remove the prosecutor unless either house of Congress overruled him by majority vote.

### Grounds for Dismissal

Senator Percy described his bill as a compromise and indeed, legally at least, it is less troublesome than the Hart-Bayh proposal. Constitutional experts say there is no real doubt that Congress can create a prosecution office, set duties for it and provide for Presidential appointment of the prosecutor. Department of Justice, after all, was created by Congress.

But there are problems, nevertheless. There is the obvious, commonsense question of the advisability of letting a possible

target of an investigation pick the person to conduct the investigation. Beyond that, though, there is the President's authority to dismiss the prosecutor.

The Percy bill specifies that either house could overrule the President's dismissal, and that the only grounds for dismissal would be malfeasance & neglect of duty or violation of the law that creates the office. According to some constitutional experts, however, a 1926 decision of the Supreme Court seems to make those provisions of the Percy bill inoperative.

In that case, *Myers v. U.S.*, the Court said that the President's executive power includes his power to remove—without Senate consent—officials whom he has previously appointed with Senate consent.

Thus, assuming that the Percy bill was passed, and a special prosecutor were appointed, the President could simply dismiss him, as he dismissed the former special prosecutor, Archibald Cox.

The Hart-Bayh bill seeks to avoid this possibility and, if it survives attack, would clearly create a more effective prosecutorial office. Under it the prosecutor, appointed by the judiciary and removable only by the judiciary, would not be subject to White House control.

The problem is, the power of the judiciary to have this precise role in a prosecution is nowhere spelled out in law. Certain provisions of the Constitution and other laws give the courts some role in prosecutions, and it is on these provisions that the bill's advocates rely.

### Issue of Judiciary Power

There are actually several questions regarding the judiciary's power.

The first is whether the judge specified in the bill as the appointer of the prosecutor—the chief judge of the District Court, John J. Sirica—is the appropriate person to do the appointing. Judge Sirica has been involved in the Watergate litigation all along. According to some lawyers, letting him pick the new special prosecutor would create too much of a link between judge and prosecution.

The president of the American Trial Lawyers Association, Leonard Ring, said today that the appointment of Judge Sirica would probably be unconstitutional as a violation of due process.

This problem, of course, is easy to solve—the bill could be

modified and require appointment by either another judge or by all the judges on the court.

The next question is whether appointment by any judge is proper. The bill's supporters point to two specific pieces of law to justify this. One is Article II, Section 2, Clause 2 of the Constitution, which states that "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."

The other is a Federal law—Section 546 of Title 28 of the United States Code—which says that when there is a vacancy, a Federal district court may appoint someone to be United States Attorney.

There are other bits and pieces of the law that at least sustain the general idea of the judiciary having a role in appointments. One quasi precedent is an 1880 Supreme Court case upholding the Federal court's authority to appoint officers to supervise Federal elections, for instance; another is the court's tradition of appointing lawyers to serve as defense counsel.

And indeed, some of the bill's critics are willing to accept the argument that the courts can at least make the appointment. What they are not willing to accept though, is the next, and basic premise of the bill: That the sole power of removal may be given to the courts as well, and that the prosecution is thus accountable only to the court.

To Alexander Bickel, a Yale law professor who is one of the bill's better-known opponents, it is this particular feature that is crucial, for it violates, he says, the basic law of separation of powers.

The debate, essentially, is over the question of whether the power to prosecute is a power of the executive branch. As Professor Bickel sees it, there is no question. "How can you call the prosecution function anything but an executive function?" he asks. But as the bill's advocates and drafters see it, the power to prosecute is a power that can be shared.

Traditionally, of course, the executive branch, in the Federal Government at least, has been in charge of prosecutions. But against this, there is another tradition—that, as Professor Paul Mishkin of the Berkeley Law School puts it, "separation of powers has never been watertight."

The Constitution specifies that it is the President's task to enforce the laws; but some regulatory agencies, which are supposed to be free from executive interference also enforce the law.