

A Watergate 'Warren Commission'

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By Paul M. Bator

CAMBRIDGE, Mass. — Ambiguities and confusions abound in the discussions of an independent prosecutor in the Watergate case.

There is, first, the question of what it is that we want. Is it simply an impartial and independent investigation and airing of the facts? If so, what we need is not a special prosecutor appointed by the Attorney General but a person or group appointed to function as a commission of inquiry as, for instance, the Warren Commission. Such a person or group can be made completely independent of the executive branch and given subpoena and other necessary powers.

But this is not what is primarily talked about. What is sought is, a prosecutor whose purpose in making an investigation would be to determine whether criminal charges should be brought and, in the event, to press them.

But if this is what is in mind, then the extent to which we can or should demand independence may be limited. It is highly doubtful that the function of bringing criminal prosecutions on behalf of the United States can be taken away from the executive branch of the Government. The Constitution vests executive power in the President and commands him to take "care that the laws be faithfully executed." The enforcement of Federal criminal law is a central part of the function of executing the laws. For the Congress or anyone else to purport to create an agency wholly independent from the executive branch with power to enforce the criminal law would probably

be unconstitutional. It may also be unwise.

The Watergate prosecutor should be independent but he must also be accountable. There should be someone to pass on his performance with power (to put it brutally) to fire him. Until impeached, the President (or his officers) must retain that authority.

Elliot Richardson, nominated to be Attorney General, is therefore on sound ground when he insists that the independent prosecutor must ultimately be accountable to and subject to the authority of the Attorney General and the President.

But this does not mean that the prosecutor cannot be given wide de facto independence. Mr. Richardson should draft instructions which make it clear that the prosecutor may proceed to subpoena (and procure immunity for) witnesses and to seek indictments without advance clearance from him. Indeed, it would be quite legitimate and desirable to instruct the prosecutor to engage in no advance consultations with Mr. Richardson. But this is not the equivalent of total independence. The prosecutor should be required to report from time to time to the Attorney General, who must retain the power to appraise his performance and to fire him if necessary.

I appreciate that even this creates an uncomfortable dilemma. Many do not trust the President in this matter; how can they trust the prosecutor if he is in any way accountable to the President? My answer is that to some extent the dilemma is unsolvable: under our Constitution, lack of confidence in the Presidency does not justify creating an extraconstitutional independent prosecuting authority. Notice, however,

that the solvent of public opinion alleviates the dilemma; the best guarantee of the prosecutor's independence will be his ability to say to the public that the President (or Mr. Richardson) is interfering with the impartial execution of his functions.

And one aspect—perhaps the most significant aspect—of the dilemma is, I believe, solvable. The executive branch is not the proper authority to pass on the question whether the President should be impeached. It would be proper, I believe, to insulate from the executive's authority evidence discovered by the prosecutor bearing on Presidential misconduct. Mr. Richardson should instruct the prosecutor to transmit any such evidence directly to the House of Representatives, which should authorize its Judiciary Committee (or create a select committee) to receive and consider it.

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