

Bar Group Here Favors New Special Prosecutor

By RONALD SMOTHERS

The Association of the Bar of the City of New York said yesterday that the dismissal of the special Watergate prosecutor, Archibald Cox, was "the latest step in a disgraceful and cynical game plan" and called upon Congress to pass legislation allowing the courts to appoint a new special prosecutor.

The proposal for a court-appointed prosecutor is embodied in legislation submitted to the Senate Judiciary Committee on Tuesday by Senator Adlai E. Stevenson 3d.

The 10,000-member association sees a court-appointed prosecutor as the only way of "insulating the investigation from the executive branch," its president, Orville H. Schell, said. He cited Article II of the United States Constitution, which allows Congress to "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."

Many experts differ on whether the prosecutory function, normally the province of the executive branch of government, can be turned over to another branch.

Drafted by 10 Members

Leonard Friedman, a New York lawyer constitutional lawyer who was among the 10 members who drafted the association's position, said that a body of legal opinion and some precedent for the action existed. He recalled that in 1971 an Illinois court appointed a special prosecutor to look into two deaths that resulted from the investigation of the Black Panther party by the Cook County State's Attorney's office.

"Courts obviously pick a lot of their ancillary personnel, such as administrative personnel, and Article II clearly suggests that Congress can give them the power to appoint anyone else except ambassadors, consuls and judges of the Su-

preme Court," Mr. Friedman said.

Mr. Schell said at a news conference that the new special prosecutor should not be subject to control by the Attorney General or President Nixon and should have the full powers enjoyed by the Attorneys General in any Federal district.

"The outrageous events of the past few days have proven that the pursuit of justice requires undivided loyalty," he said. "No man can be the servant of this Administration and at the same time prosecute it for flouting the country's laws."

Not all agree, however, that Congressional authorization of a court-appointed prosecutor would be legal. Alexander M. Bickel, a Yale Law School professor, argued that the prosecutorial function belonged solely to the executive branch and "judicial power is not compatible with the exercise of the hiring, firing and, for all I know, he supervising of prosecutors."

He said that if Article II was read literally, it would mean that the courts could appoint postmasters as well.

"Furthermore, the courts are appointive bodies and not politically responsive," he added. "Prosecutors ought to be supervised by a politically responsive branch."

Eugene V. Rostow, Sterling Professor of Law at Yale, a former official of the Johnson Administration, called the court-appointed prosecutor to "most satisfactory approach to the problem both politically and constitutionally." He countered Mr. Bickel's argument that prosecutors should come from a politically responsive branch of government by noting that Connecticut judges appoint the state's prosecutors and public defenders.

"A practice that is constitutional in Connecticut cannot be unconstitutional under the United States Constitution," he said.