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The Special Prosecutor

By Anthony Lewis

ABROAD AT HOME

WASHINGTON, Nov. 4—For reasons going back centuries in Anglo-American legal history, we have an adversary system of justice in this country. The premise of that system is that truth is most likely to emerge, in a court of law, from an open clash of conflicting interests. It is not the only possible view; other cultures differ. But it is ours.

Under the adversary system, lawyers are required to devote themselves wholeheartedly to one side of a controversy. A lawyer may regularly represent some client; but if that client is sued by another party with whom the lawyer also has connections, his duty is to withdraw. Legal ethics say that he must not put himself in a situation where his loyalties might be — or might appear to be — confused.

That is the difficulty that clouds the Nixon Administration's appointment of Leon Jaworski as special prosecutor. It is impossible for the ordinary citizen to believe that a man who owes the most basic loyalty to one side in a courtroom, the loyalty arising from appointment, can take a position wholeheartedly adversary to that side.

Right now President Nixon's lawyers are arguing in Judge John Sirica's courtroom that there are good reasons for the non-existence of two White House tapes. The public interest requires the most rigorous cross-examination of those claims. The special prosecution staff appointed by Archibald Cox is presently cross-examining. Would there be public confidence if the job were assumed by someone chosen at this point by the very people under challenge?

Most of a prosecutor's work is not in the public eye of the courtroom, and if anything the concealed part of the job even more urgently requires a committed adversary relationship. What evidence to demand, what lawyers to assign, what compromises to accept—such decisions are crucial. Mr. Cox got into trouble by insisting on evidence withheld as "Presidential papers." Can the public believe that a Nixon Administration appointee will resist the Administration's blandishments in the same resolute way?

The circumstances of Mr. Jaworski's appointment make the problem the more acute. Mr. Cox was chosen by Elliot Richardson and given explicit independence in rules that were written into the code of Federal regulations. Mr. Jaworski was named with White House approval after the shattering of those rules.

Moreover, his appointment has the look of a characteristic Nixon move to head off unwelcome Congressional action by a *fait accompli.* That impression is strengthened by the frantic effort to have Senator Saxbe confirmed as Attorney General before Congress can deal with legislation to create a genuinely independent special prosecutor.

A lawyer of the greatest probity could not function under those conditions. That is the view of, among others, close colleagues of Leon Jaworski at the bar — men who admire and respect him deeply but think he would be in an impossible position.

With his lifetime of litigating experience, Mr. Jaworski may well come to that conclusion himself. His duty then would be to withdraw. It would not be easy, but it would be the course of honor.

In any event, there is undiminished support in Congress for the creation by statute of a special prosecutor entirely independent of the President—one named by the courts. That is the real issue on which the next phase of the battle to discover the truth of Watergate and the other political crimes of recent years will be fought.

The idea of judicial appointment raised some early constitutional doubts, the concern being that it might violate the separation-of-powers concept. On reflection, those doubts have faded in the relevant Congressional committees. Leading constitutional authorities have supported the legislation, on two broad grounds that deserve at least brief statement.

First, there is uncommonly clear authority in the text of the Constitution for precisely this kind of appointment by the courts. Article II, Section 2 says 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."

That explicit language led the Supreme Court in 1879 to uphold a statute vesting in the courts the appointment of election supervisors. Professor Paul Freund of Harvard, who is widely regarded as the country's leading constitutional scholar, makes the point that such election appointments are much more remote from the usual business of courts than prosecutors. Indeed, a long-established law directs Federal judges to fill interim vacancies in the office of United States Attorney.

Second, and more broadly, the Constitution of the United States is not a theoretical document, a closet drama. It has always been read to meet the practical necessities of government, and there could hardly be a need more obvious than to avoid having a suspected President pick the person to investigate him.

"The Constitution is not a suicide pact," Justice Robert H. Jackson once said. Chief Justice Marshall put the same thought more elegantly a century earlier. The Constitution, he said, was "intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs." The italics were in the great Chief Justice's original.