

The Prosecutor

By Birch Bayh

WASHINGTON—The appointment of Mr. Jaworski as the new special prosecutor is not responsive to the valid, sustained public demand for an independent prosecution of Watergate and other cases that had been under investigation by Archibald Cox. The appointment of Mr. Jaworski within the executive branch to investigate the executive branch—a person who could be dismissed by the President as abruptly as was Mr. Cox—will, with good cause, fuel public concern that justice is not being pursued thoroughly and without constraint.

Also, the informal agreement that the new special prosecutor can be dismissed only with the agreement of Congressional leaders does not have the force of law. There is nothing that can be done legally to prevent the President from changing his mind, as he did in the case of Mr. Cox, and unilaterally dismissing Mr. Jaworski.

After an exhaustive study I am convinced that a statute giving the United States District Court authority to appoint an independent prosecutor would be upheld.

The first issue with which we must deal is whether the Congress has the power to delegate such an appointment. That power is specifically derived from Article II, Section 2 of the Constitution which states:

"The 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." These clear words, and the judicial interpretation of them, leave no doubt that Congress is empowered to authorize judicial appointment of an independent prosecutor.

Moreover, there is a law on the books, the constitutionality of which has been sustained, that specifically gives U.S. District Courts authority to appoint U. S. Attorneys to fill vacancies.

The second issue is whether the creation of an officer, subject to dismissal only by the court, violates the separation of powers doctrine. On the contrary, court appointment of an independent prosecutor may be the only means of affirming the separation of powers, and is corollary doctrine of checks and balances.

The separation of powers is not a

formal, rigid doctrine dividing our Government into watertight compartments. Rather, it is a functional doctrine to assure that checks and balances prevent one branch of Government from assuming unreasonable powers. In the situation now confronting us, it would do violence to this concept of checks and balances to leave within the executive branch the authority for an investigation of the executive branch.

The power to prosecute alleged wrongdoing in the executive branch clearly is among those powers vested by the Constitution in the Government. As Chief Justice Marshall wrote in his classic description of constitutional power: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." (McCulloch v. Maryland).

In this context of Congressional power it is both "appropriate" and "plainly adapted" to the end of prosecuting wrongdoing in the executive branch for Congress to create an office of independent prosecutor.

Also, the "necessary and proper" clause has been held to give Congress certain responsibilities lodged in other branches of Government. While prosecutorial powers traditionally reside in the executive branch, the unusual circumstances created by the President's action necessitates that the Congress share in those responsibilities.

Mr. Jaworski's appointment as special prosecutor is totally inadequate, as any Presidential appointment would be. In light of recent events, the word "special" is meaningless. Independent authority, not special authority, is what the American people demand of a new prosecutor. Congress must respond if we are to restore the public faith and confidence from which a democratic government derives its strength and authority. There is no means left to us for the restoration of that faith and confidence other than the creation of a legal and constitutionally proper independent prosecutor to see that justice is administered fairly, fully and promptly.

Senator Birch Bayh, Indiana Democrat, is chairman of the subcommittee on constitutional amendments and sponsor of the 25th Amendment.