

Endangering the Special Prosecutor

Justice Holmes once wrote that a "catchword can hold analysis in fetters for 50 years." It is a noteworthy observation, for as Congress prepares to debate and deliberate on the subject of a special prosecutor, it is in danger of being mesmerized by the popular call for an "independent" prosecutor. The need for a special prosecutor whose independence cannot be summarily intruded upon by the body that is the subject of investigation can no longer be a matter of legitimate debate. The question is, how can the objective of establishing the office of special prosecutor be achieved most expeditiously and in a manner that will survive constitutional attack?

The House Judiciary Committee has reported favorably on a bill that would require a panel of U.S. District Court judges to appoint the special prosecutor. Though the bill has several commendable features designed to strengthen it against challenges that are certain to follow, most proponents of the bill, including Archibald Cox, have conceded that it is not free from Constitutional doubt.

It is argued, however, with a familiar ring of pain reliever commercials, that three out of four experts agree that the bill is Constitutional. When further delay in taking action on Watergate-related criminal activities can only contribute to the distintegration of public confidence in our institutions, one must ask what public interest is being served in adopting a bill that has a quarter-moon chance of being invalidated?

In addition, the U.S. District Court in Washington, in a unique, unsolicited "advisory" opinion, stated that the proposal would be unwise, unwelcomed and (impliedly) unconstitutional. Proponents of the bill dismiss the admonition as not rising to the dignity of judicial *dicta*. It is interesting to speculate what reception the Court's opinion

would have received had it endorsed the Judiciary Committee's proposal.

But all of this misses the mark. The question really is not one of independence. Mr. Cox was independent and Leon Jaworski, to the great despair of some, is demonstrating daily that he too is independent. Congress can draw statutory prohibitions against arbitrary orders emanating from the White House concerning the prosecutor's tenure. The problem has been and is the lack of access to presidential documents, memoranda and recordings. Congress, through a confirmation process by the Senate, could insist upon a commitment that is tantamount to a waiver of that vague and seemingly all-purpose doctrine of executive privilege as a condition precedent to its approval of a special prosecutor nomi-

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nated by the President. Mr. Nixon has said in private that the "special prosecutor should have everything and when he asks for it, he shall get it." Vice President Ford has testified that in his opinion executive privilege should not be invoked in any claims involving alleged criminal conduct. This proposal would simply commit broad promises into the semi-permanence of statutory ink.

Congress, however, dazzled by the glitter of obtaining a special prosecutor who could never be fired by the President for any reason — legitimate or not — appears unwilling to adopt any alternative course of action. Moreover, many proponents of the court-appointed prosecutor privately suggest that whether or not the committee bill proves to be constitutional is of little consequence, since the question soon will be moot.

These members envision the following sequence of events: The bill for a court-appointed special prosecutor will pass the House and Senate. The President will veto the bill and the veto will be sustained. Mr. Jaworski, in the meantime, will continue his efforts in securing indictments against all wrongdoers. If he succeeds, he will be praised by all; should he fail, the proponents of the bill can maintain that they stood tall in the pursuit of justice while the President and his votaries (anyone who opposed their bill) achieved their goal of frustrating and defeating the search for truth.

But assume a different scenario. Assume that certain White House advisers, unhappy with Mr. Jaworski's independence, were to suggest to the President that while they believed the bill to be unconstitutional, the President should not veto it and allow the courts to make the determination. The immediate result would be weeks and perhaps months of delay, confusion and confrontation. Mr. Jaworski would not be able to continue his efforts because congressional action would have superseded his appointment. The President would be under no obligation to "fully cooperate" with a court-appointed prosecutor whose office would almost certainly be challenged, if not by the White House, then surely by prospective defendants. Thus the quest for truth would be delayed and perhaps even derailed.

While it is not the most desirable arrangement, what is best for the country "at this point in time" is to allow Mr. Jaworski to continue in office, with his integrity and demonstrated independence buttressed by strong statutory protection. The greatest safeguard against his dismissal by the President is public opinion. President Nixon crossed that Rubicon on October 20, 1973. He is not in a position to cross it a second time.