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A Proposal for a Continuing Public Prosecutor

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In the fall of 1973, after the "Saturday Night Massacre," there were several proposals that once Watergate was behind us, we should create an ongoing public prosecutor, independent of direction by the executive branch, and charged with the investigation and prosecution of violations of federal election laws and federal crimes committed by high government officials. The Senate Watergate Committee has endorsed this recommendation. Senator Ervin has recently introduced a bill to carry it into effect.

The reasons for the current interest in creating a continuing public prosecutor are clear. The attorney general and his principal assistants in the Department of Justice are not simply prosecuting officers but are also appointees of the president and members of an elected administration team that usually hopes for re-election. They have an obvious conflicts of interest when they investigate crimes that have been committed in their own election campaigns or thereafter by high officers of the executive branch. In directing the attorney general, the president and his White House aides have equally obvious conflicts. Moreover, because of the live-and-let-live principle of elective politics, they may be similarly reluctant to investigate the conduct of their predecessors and the campaign finances of the opposing party. We tend to follow the supposed rule of the old Chinese war lords that you never kill your prisoners, because in two or three years' time you were bound to become a prisoner yourself.

Conflicts of this sort are doubly incapacitating. They prevent unfettered and vigorous prosecution of those who should be prosecuted. Equally important, they breed public distrust of decisions not to prosecute that may be entirely justified on their merits, and would be

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accepted as such if made by a prosecutor free from any conflict of interest.

We have recognized this need for an independent prosecuting official every two or three decades, when instances of official misconduct and conflict of interest have become particularly notorious. Our experience with these special prosecutors has been salutary. Not only have they successfully developed cases that had already surfaced but, in the course of their investigations, they have discovered and prosecuted additional crimes that we would never have known about had they not been appointed. Mr. Cox and Mr. Jaworski, for example, have filed and successfully prosecuted the only significant campaign financing cases that have been brought by the government of the United States in the last forty years.

What independent prosecutors uncover once we appoint them suggests that official and campaign misconduct is not rare, and that that it tends to flourish whenever there is little reason to fear prosecution. Teapot Dome and Watergate may have provided us rare glimpses of predators that regularly roam beneath the surface of the political waters. For example, we never learned from the Eisenhower or Kennedy administrations how much money business friends gave Sherman Adams over the years, or why he was never even prosecuted for tax evasion.

How many of us expect that, as a result of Watergate, the conduct of political campaigns and the behavior of public officials will fundamentally change? How long will it be before we once again, in Mr. Harding's phrase, return to normalcy?

We should not be content with a system that requires massive purgatives once a generation. An ongoing institution devoted to the investigation and prosecution of such offenses would increase the likelihood of bringing offenders to justice, and its very existence could deter offenses that would be committed in its absence. Most important, a continuing public prosecutor might go a long way in restoring the public confidence in our institutions that is essential to the operation of a democracy, that seems to be diminishing with every passing day.

Some argue that if men of integrity occupied the office of attorney general and the offices in the White House whose occupants deal with the attorney general, then no other remedy would be needed. I do not think that integrity is enough. In other situations where men of integrity find they have conflicts of interest—and men of integrity can have conflicts of interest—we all agree that their duty is to dis-

qualify themselves, to have someone else do the job, even though they may be men of such high character that they are capable of overcoming the conflict and discharging their responsibilities conscientiously.

There are men who are capable of doing that, as we all know; but there are also men who are not capable. The appearance of conflict is as dangerous to public confidence in the administration of justice as is true conflict itself. Having men of integrity operate in the face of conflict is an insufficient protection for a system of justice, and insufficient to warrant the confidence of the public.

When Mr. Richardson made his decisions in the case of Mr. Agnew, he came close to stretching public confidence in the ability of a man of the highest integrity to deal uprightly with an acute political situation. I believe he brought it off, but I do not think that we can depend for the success of our institutions on having heroes like Mr. Richardson around all the time. Of the last twenty attorneys general, at least one in four fell short of what most would regard as an impeccable standard of integrity. We certainly have not had twenty consecutive heroes as attorney general. We have had a few.

Creation of an independent public prosecutor would be neither unconstitutional nor unwise. The only serious constitutional question is whether article II, vesting the power to execute the laws in the president, requires that senior prosecuting officials of the nation must act under the president's direction even when he or they have a conflict of interest. One cannot read the Constitution as forcing us to tolerate conflicts of interest on the part of the president, the attorney general, and their immediate assistants that we cannot, and do not, tolerate in mere judges and lawyers.

To minimize constitutional problems, the public prosecutor should be nominated by the president and confirmed by the Senate. To assure his nonpolitical status, I would provide for a six year term, make him removable only for misconduct or incapacity, and bar him from thereafter holding elective federal office. To assure harmony with the Department of Justice, I would preserve the prosecutor's present status within the department, with his jurisdiction limited to election offenses and breaches of public trust by presidential appointees, and, within that limited field, with statutory independence of the president and the attorney general. If there is concern that charges involving presidential appointees are likely to be too rare to keep him busy, the prosecutor's jurisdiction could be enlarged to include breaches of trust at somewhat lower levels of the federal service. A

case might also be made for including charges of misconduct by government law enforcement agents involving mistreatment of private citizens—for example, the recent narcotics agent raids—where the department's conflict of interest is equally apparent.

As to the wisdom of the proposal, many believe that the power to prosecute is so intimately connected with the other powers of the executive that no one should exercise this power independent of the president. The argument makes sense in the context of discretionary enforcement decisions with a high degree of economic or social content—such as antitrust or civil rights cases—which involve policy judgments that may cut across other policies that the administration is simultaneously pursuing. But in the field of political crimes where conflicts of interest are involved, this argument, it seems to me, must bow to the fundamental principle that no man can be a prosecutor or judge in his own case.

Moreover, we have many American and English precedents for separating the executive and enforcement powers. While our own federal government has never created an independent prosecuting office for criminal cases, it has vested officers such as the comptroller general and numerous regulatory agencies with responsibility for the civil enforcement of many laws, including in some cases the power to enforce through its own attorneys rather than the Department of Justice. In the new Campaign Financing Act we have vested civil investigation and enforcement power in a new and independent Campaign Financing Commission. Moreover, a majority of the states provide for independently elected attorneys general. Many of them are of the opposite party than the governor and have political as well as statutory independence. In England, it has been part of the unwritten constitution for fifty years that the attorney general and the public prosecutor make enforcement decisions independent of the prime minister and the rest of the cabinet. In the words of Lord MacDermott, a leading English jurist:

> the days are gone when a subservient Attorney [meaning the attorney general of Great Britain] could be told whom to lay by the heels or whom to spare. He must now maintain complete independence in this difficult and sometimes delicate sphere, and if he fails to do so, the remedy lies in his dismissal, or that of the administration.

Other advocates of the status quo say that to create an independent special prosecutor would do great harm to the morale and self esteem of the Department of Justice, and especially its criminal and tax divisions. I cannot see why this would be so. It does more harm

to the morale and self esteem of the department when its leaders feel compelled to act in the face of a conflict of interest—instead of abstaining as our normal principles of ethics require—and to report to and take directions from men in the White House who are acting in the face of conflicts of interest. It would relieve them from the burden of having to risk their professional careers or political futures in order to bring cases that should be brought. It would also relieve them of the temptation of bringing cases that should *not* be brought, merely to prove they are too virtuous to be influenced by their conflicts.

It has also been argued that nonpolitical lawyers of high quality cannot be recruited for such an office, and that we would get either nonentities or unscrupulous and ambitious men who would ride the prosecutor's white horse into the White House. But with the above precautions, I should think these dangers would be less acute than when the president appoints and the Senate confirms other government prosecutors. In any event, I would rather take this risk than today, leave the prosecution of political crimes in the hands of at least half the attorneys general since 1920. In an immortal phrase of a distinguished Senator, one might as well try to deliver a head of lettuce by means of a rabbit. It just won't get there. Instead, the present corroding cynicism about our political morality will continue.

Finally, it is argued that most of the time, the prosecutor's office would have nothing to do. At the very least, he should be quite busy discharging the Department of Justice's criminal enforcement responsibilities under the new Campaign Financing Act. Moreover, whether or not the former president is a crook, he is certainly not a fluke. The qualities that betrayed him and us are far from unique, and we will see them in future administrations again. To be ready for that contingency, we need a deterrent we lack today.

If a future public prosecutor should have nothing to do, it will be because the deterrent has served its purpose. If that should ever happen, I will eat this word for word.