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NIXON V. COX:
DUE PROCESS OF EXECUTIVE AUTHORITY

Luis Kutner*

The President's power of removal was called sharply into question by President Nixon's dismissal of Watergate Special Prosecutor Archibald Cox. Mr. Kutner examines the legal issues involved and concludes that the Cox discharge was legally justifiable, and that the imposition of any restraints on the power to appoint and remove Executive officers would be unwise.

I think it absolutely necessary that the President should have the power of removing from office.

—James Madison

I. INTRODUCTION

This paper will examine the constitutional questions with regard to the removal power of the Chief Executive, more specifically, those relating to the recent dismissal of Archibald Cox as Special Prosecutor in the Watergate inquiry. Unfortunately, it seems that the efforts of President Nixon in proposing his “Stennis compromise,” in the hope of averting a pending constitutional confrontation over the matter of his subpoenaed tapes, led to developments that created a new constitutional crisis instead of swiftly resolving the tapes dispute.

The Stennis compromise, put forward by the White House on the evening of October 19, 1973, whereby Senator John L. Stennis of Mississippi would listen to the relevant presidential tapes sought by Cox and then verify a non-verbatim record of these tapes to be given to the courts,2 appeared to be a satisfactory and workable arrangement that could prevent a legal showdown on the thorny tapes issue. It was

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11 ANNALS OF CONG. 387 (1789) [1789-1791].

2 See N.Y. Times, Oct. 20, 1973, at 1, col. 8. See also Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973), where Judge Gesell held that the discharge of Cox was illegal without a finding of “extraordinary impropriety on his part.” Notwithstanding that subsequent events made the case moot, Judge Gesell felt impelled to suggest that there is an insistent demand for some degree of certainty to declare a rule of law that will give guidance to future events in the Watergate inquiry. See generally Separation of Powers and Executive Privilege: The Watergate Briefs, 88 POL. SCI. Q. 582 (1975).

In Miller, The Presidency and Separation of Powers, 60 A.B.A.J. 195 (1974), the premise is advanced that the firing of Mr. Cox, who would not accept a compromise on the Watergate matter, was thoroughly justified because of the partisan and biased, as well as unethical, actions of Mr. Cox.

441
sensible and prudent from the standpoint that if such an issue were brought before the Supreme Court, the ultimate ruling handed down might have far-reaching ramifications for all future presidents, no matter which way the case was decided. A hard and fast ruling either way, once set down as precedent, could, under the principle of stare decisis: (1) possibly wreck the executive branch for all time, by gravely diminishing a President's power if his property, such as documents, tapes, or information of every other manner, became subject to subpoenas from the legislative and judicial branches, since a certain degree of operating privacy and classification of national security material is essential if the government is to continue to operate; or, conversely, (2) merely promote the cause of presidential arrogance through undue secrecy, if a President could withhold anything within his office by using some claim of privilege as a shield to prevent the disclosure of information which might be politically embarrassing (as distinguished from sensitive security material), and thereby thwart efforts by either of the other two branches of government to obtain information or documentary evidence.

Given this delicate balance, any definitive decision on where the right to investigate ends and the right to withhold information begins seems almost impossible to render since neither is an absolute engraved in stone—nor ought one be superior to the other. Constitutional dilemmas like this have often been worked out in the past among the coequal branches of government, and the compromise proffered by the President again made a solution to such an impasse possible, at least in principle.

However, when Cox rejected the terms of that compromise, the President doubtless felt that the Special Prosecutor was attempting to force, rather than forestall, an undue constitutional confrontation and ordered the Attorney General to fire him on October 20. In the wake of the Cox discharge, many concerned individuals who had viewed the prior appointment of the Watergate Special Prosecutor as an important step toward restoring the faith of the American people in the integrity of the Nixon Administration, as well as in our entire democratic system of government, now began to lose what measure of confidence they had been regaining. Almost immediately following the dismissal, cries for the impeachment of the President were once again raised in and out of Congress. The mood here was one mixed with angry, emotional hysteria, and, in too many cases, pure partisanship. To be sure,

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this partisan antagonism served only to heighten the growing distrust and distress of the people in their government.

Moreover, as far as Congress is concerned, the continued calls for impeachment in both Houses are especially unsettling because the impeachment process involves difficult decisions confronting Congressmen and Senators that must be examined very carefully. Under article I, section 2, clause 5 of the Federal Constitution, the House of Representatives "shall have the sole power of Impeachment," while section 3, clause 6 of article I provides that "The Senate have the sole Power to try all Impeachments." Hence, Representatives and Senators, as prospective jurors, should not prejudge any case they may eventually be called upon to decide. Under these circumstances, then, the members of either body have a duty to reserve judgment here.

Article II, section 4 of the Constitution provides that the President "shall be removed from office on Impeachment for, and Convicted of Treason, Bribery, or other high Crimes and Misdemeanors." Granting that "high Crimes and Misdemeanors" are not confined merely to criminal conduct, President Nixon's direct order to remove Cox as Special Prosecutor nevertheless was not an impeachable offense—no matter how unfortunate the events surrounding that firing may seem to be; indeed, it is the position of this paper that the removal was quite constitutional.

II. THE REMOVAL POWER

Whose Responsibility?

"The executive Power," according to article II, section 1 of the Constitution, "shall be vested in the President of the United States," and he is obligated under section 3, to "take Care that the Laws be faithfully executed." There may be debate on the exact nature and extent of this power, but there can be little dispute that the four original federal departments—State, dealing with foreign relations; War, dealing with military command; Treasury, dealing with fiscal matters; and Justice, dealing with law enforcement—represent core powers of executive authority, with the executive officers in those departments responsible for these fundamental functions. For example, the court declared in the 1965 case of United States v. Cox that the Attorney General as head of the Justice Department "is the hand of the President in taking care that the laws . . . be faithfully executed."

In the more recent Cox case, former Attorney General Elliott Richardson appointed Archibald Cox Special Prosecutor to serve in the Department of Justice on May 31, giving him broad investigatory powers which included policy decision-making of an executive nature. This was naturally so, for opinions have indicated that the prosecution of offenses is an executive function stemming from article II powers. Indeed, of all the functions of the executive departments, the duty to bring before the courts evidence of violations of federal laws is central to the constitutional concept of the Executive.

In regard to this power, the position of the Watergate Special Prosecutor may be compared to that of a United States Attorney, who, although an officer of the court as a member of the bar, according to the 1965 Cox case, "is nevertheless an executive official of the government and it is as an officer of the Executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case." United States Attorneys are within the control of the executive branch, subject to the direction of the Attorney General and removal by the President. Clear authority that the removal power here should rest with the executive branch may be found in United States v. Solomon, to be discussed at greater length in part III of this paper.

Hence, it seems basic to the executive power vested in the President to execute laws—"and the responsibility must reside with that power"—that he have the power to dismiss executive officers, for any effort to limit a President's removal power (which some might call residual) could likewise limit presidential control over the four above-mentioned purely executive functions which are his concerns. As James Madison told the first Congress:

I conceive that if any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling those who execute the laws.

Does History Repeat?

By historical coincidence, the problems generated for President Nixon as a result of the Cox dismissal are surprisingly similar to those which confronted President Andrew Johnson over a century ago. When

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5 28 C.F.R. § 0.37 (1973).
7 342 F.2d at 171.
9 Newman v. United States, 382 F.2d 479, 482 n.9 (D.C. Cir. 1967).
10 1 ANNALS OF CONG. 481 (1789) [1789-1791].
Johnson assumed the Presidency upon the death of Abraham Lincoln, he perceived his mandate to be that of carrying out the reconciliation policy of the martyred President toward the defeated South. Extremists in Congress were hostile to such a policy, however, and were determined to make their own branch supreme, with the impeachment and removal of President Johnson from office as their ultimate aim. Thus began the struggle between executive and legislative authority.\(^1\)

In order to check the President’s power, the Radicals in Congress enacted the Tenure of Office Act\(^1\) in 1867 over the veto of the President who maintained it was unconstitutional. (To be sure, all the Presidents to follow Johnson also objected to the Act until its eventual repeal.) The law forbade a President from removing appointive government officeholders without the consent of the Senate.\(^1\) Johnson was to take steps that would place him in violation of that Act and result in the House instituting impeachment proceedings against him.

Convinced that Secretary of War Edwin M. Stanton was really acting as an agent for his opponents in Congress, Johnson moved to summarily suspend the surreptitious Stanton from office. But the President’s action met with the disapproval of the general public who felt he had intentionally broken the law.\(^1\) The Senate, for its part, ignored the name of the nominee which the President had sent that body as a permanent successor to Stanton; instead, it demanded his reinstatement.\(^1\) In the House, while past attempts to adopt impeachment resolutions had failed, either in committee or on the floor, the Radicals were now successful in quickly reporting out of the Reconstruction Committee a new resolution to impeach Johnson, which was overwhelmingly approved on February 24, 1868, by a vote of 126 to 47. Of the 11 Articles of Impeachment contained in the resolution, 9 were based on the removal of Stanton as a violation of the Tenure of Office Act.\(^1\)

During the trial before the Senate, the lawyers for the President argued that the Tenure of Office Act was null and void and clearly violative of the Constitution.\(^1\) This Act, around which the entire impeachment question had centered, had, according to one of the President’s attorneys, Benjamin R. Curtis, a former Justice of the Supreme Court, “cut off a power confided to the President by the people through

\(^{11}\) J. F. Kennedy, Profiles in Courage 126-27 (Harper ed. 1961) [hereinafter cited as Kennedy].

\(^{12}\) Act of March 2, 1867, ch. 154, 14 Stat. 430.

\(^{13}\) See S. Lorant, The Glorious Burden 285-87 (1968) [hereinafter cited as Lorant].

\(^{14}\) Kennedy, supra note 11, at 130.

\(^{15}\) Lorant, supra note 13, at 287.

\(^{16}\) Kennedy at 130-32; Lorant at 288-89.

\(^{17}\) Kennedy at 132.
the Constitution. . . ." Curtis not only cited the Constitution but also offered precedents in support of the President’s actions.\textsuperscript{16}

Yet, no matter how sound and solid were the arguments presented on the President’s behalf,\textsuperscript{19} it soon became clear as the trial progressed that the Radicals were intent on deposing Johnson—even if the formal charges on which the impeachment was based proved groundless—simply because he had not agreed to follow their own policies. “Prejudgment on the part of most Senators was brazenly announced,” as John F. Kennedy later described the situation in his \textit{Profiles in Courage}. “The chief interest was not in [a fair] trial or the evidence, but in the tallying of votes necessary for conviction.”\textsuperscript{20} A contemporary observer of the proceedings, Secretary of State Gideon Welles, lamented in his diary that

[t]he Senatorial judges . . . are not legally wise, nor honest, nor candid. They are less safe as triers than an ordinary intelligent jury. The latter would give heed to the clear mind of an intelligent and impartial judge. These Senators are judge and jury in a case of their own, prejudiced, self-consequential, and incompetent. Such a tribunal, it appears to me, is to be treated peculiarly, and not upon trust. They must have it made to appear to them that they are in the wrong. Earnest, vigorous, unwearied efforts are wanted. Scholarly, refined legal ability are not alone sufficient with men who were tested before trial was ordered and who meet in secret caucus daily.\textsuperscript{21}

To be sure, counsel Curtis had begun his defense with the following appeal to the Senate:

Here party spirit, political schemes, foregone conclusions, outrageous biases can have no fit operation. The Constitution requires that here should be a “trial,” and as in that trial the oath which each one of you has taken is to administer “impartial justice according to the Constitution and the laws,” the only appeal which I can make in behalf of the President is an appeal to the conscience and the reason of each judge who sits before me. Upon the law and the facts, upon the judicial merits of the case, . . . the President rests his defense.\textsuperscript{22}

And there were some Senators who were mindful of that duty. William Pitt Fessenden of Maine, an opponent of the President, still recognized that he was “acting as a judge . . . sitting in judgment upon the Presi-

\begin{itemize}
  \item \textsuperscript{16} Lorant at 292.
  \item \textsuperscript{19} Id.
  \item \textsuperscript{20} Kennedy at 133.
  \item \textsuperscript{21} Lorant at 293.
  \item \textsuperscript{22} Id. at 292.
\end{itemize}
dent,” and vowed that “whatever I may think and feel as a politician, I will not decide the question against my own judgment.”23 John Henderson, a freshman Senator from Missouri, stated, “I am sworn to do impartial Justice according to law and conscience, and I will try to do it like an honest man.”24 Another freshman, Edmund Ross of Kansas, told one of his colleagues from Rhode Island, “Well, Sprague, ... so far as I am concerned, though ... opposed to Mr. Johnson and his policy, he shall have as fair a trial as an accused man ever had on this earth.”25 In the end, these Senators were among those voting to acquit the President.26

After a trial lasting two months Johnson was acquitted by one vote, the Radicals having failed to secure the two-thirds necessary for conviction.27 One of Johnson’s most bitter senatorial critics, James W. Grimes of Iowa, so ill and infirm from the effects of a recent stroke that he had to be carried to his seat in the Senate chamber to cast a vote of “Not guilty,”28 later reflected on his vote before his death:

[In that troubled hour ... when many privately confessed that they had sacrificed their judgment and their conscience at the behests of party newspapers and party hate, I had the courage to be true to my oath and my conscience. ... Perhaps I did wrong not to commit perjury by order of a party; but I cannot see it that way. ... I became a judge acting on my own responsibility and accountable only to my own conscience and my Maker....]29

Senator Lyman Trumbull of Illinois explained his own ultimate vote against conviction as follows:

Once set, the example of impeaching a President for what, when the excitement of the House shall have subsided, will be regarded as insufficient cause, no future President will be safe who happens to differ with a majority of the House and two-thirds of the Senate on any measure deemed by them important. ... What then becomes of the checks and balances of the Constitution so carefully devised and so vital to its perpetuity? They are all gone....30

President Johnson was further vindicated many years later when the Supreme Court, in Myers v. United States,31 noting “the extremes

23 KENNEDY at 145-46.
24 Id. at 147.
25 Id. at 134.
26 Id. at 144-51.
27 Id. at 139.
28 Id. at 150.
29 Id. at 150-51.
30 Id. at 148.
31 272 U.S. 52 (1926).
of that episode in our government," found the Tenure of Office Act unconstitutional for its invasion of presidential power.

The Myers Precedent

To the mind of this writer, Myers is the controlling case on the issue of the removal power of a President. Considering the alleged wrongful discharge of a postmaster by order of the Postmaster General (as sanctioned by the President), the Court held that it was unconstitutional to limit a President's dismissal power. As Chief Justice William Howard Taft wrote in his opinion, "The power to remove . . . is an incident of the power to appoint," ergo,

[t]he further implication must be, in the absence of any express limitation respecting removals, that as his [the President's] selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible.

. . . .

[T]o hold otherwise would make it impossible for the President . . . to take care that the laws be faithfully executed.

Similarly, in Ex parte Hennen, it is stated that while "[t]he Constitution is silent with respect to the power of removal from office, where tenure is not fixed," the Court declared that "[i]n the absence of all constitutional provision, or statutory regulation, it would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment."

The absolute power of the President to remove, as expressed in Myers, has been somewhat curtailed by two cases in particular, Humphrey's Executor v. United States and Wiener v. United States, both of which pertained to the discharges of two commissioners in quasi-judicial executive agencies (distinguishing them from Myers, which ruled on "an executive officer restricted to the performance of executive functions").

In Humphrey, Franklin Roosevelt dismissed a member of the Federal Trade Commission without cause required by
statute,\textsuperscript{43} while in Wiener, President Eisenhower dismissed a Truman appointee to the War Claims Commission.\textsuperscript{44} In both cases, limits on the power to discharge were upheld by the Court. It was unanimously held in the Humphrey case, for example, that the validity of statutory limitations on presidential removal powers turned on the question of whether those agencies involved included functions either partially legislative or judicial: such a body "cannot in any proper sense be characterized as an arm or an eye of the executive,"\textsuperscript{45} and its officers should "exercise ... judgment without ... leave or hindrance. ..."\textsuperscript{46} Wiener further clarified "[t]his sharp differentiation" when Mr. Justice Frankfurter spoke of "the difference in functions between those who are part of the executive establishment and those whose tasks require absolute freedom from executive interference."\textsuperscript{47} Then, too, the Special Prosecutor himself is surely neither a judicial nor quasi-judicial officer.

Therefore, these cases do not overrule the Myers decision — in fact, Myers has yet to be overruled or modified. Moreover, both cases proceeded on the premise that, since it is the obligation of the President to see that the laws are faithfully executed, he may direct and supervise his subordinates and, if necessary, remove certain officers.

As for the argument that the Watergate Special Prosecutor could fall into the category of "inferior Officers" under article II, section 2, clause 2 of the Constitution (perhaps setting him outside the executive branch), Myers, while recognizing this excepting clause, nonetheless states: "The power to remove inferior executive officers, like that to remove superior executive officers, is an incident of the power to appoint them, and is in its nature an executive power."\textsuperscript{48} The removal authority of the President within the executive branch is so wide, according to the Chief Justice, that it cannot be circumvented by article II, section 2, clause 2, if the President appoints inferior officers by and with the advice and consent of the Senate.\textsuperscript{49} Myers does approve the decision in United States v. Perkins,\textsuperscript{50} where both the Court of Claims and the Supreme Court agreed that the exempting clause of article II "implies authority to limit, restrict, and regulate ... removal."\textsuperscript{51} But

\textsuperscript{43} Id. at 618.
\textsuperscript{44} 357 U.S. at 350.
\textsuperscript{45} 295 U.S. at 628.
\textsuperscript{46} Id. at 625.
\textsuperscript{47} 357 U.S. at 353.
\textsuperscript{48} 272 U.S. at 161.
\textsuperscript{49} Id.
\textsuperscript{50} 116 U.S. 483 (1886).
\textsuperscript{51} Id. at 485.
Myers also emphasized, in connection with removal, that Perkins "is limited to the vesting . . . of the appointment of an inferior officer . . . in someone other than the President . . . "52 Even so, it would seem most incredible to suggest that the Special Prosecutor comes under the category of "inferior Officers" — inside or outside the executive branch. As already pointed out, the Prosecutor's powers are clearly executive by their very nature: investigating and prosecuting violations of the law.

All in all, Myers still stands unequivocally in support of a President's broad and essential authority to remove as it relates to the scope of this paper.

III. SOME PRACTICAL AND CONSTITUTIONAL CONSIDERATIONS IN THE APPOINTMENT AND/OR REMOVAL OF A NEW SPECIAL PROSECUTOR

To renew confidence in the adequacy of our governmental institutions, as well as to serve the ends of justice, it is necessary that a Special Prosecutor continue to pursue a full and complete investigation and prosecution of any offenses arising out of the unauthorized Watergate entry and related matters, a far more beneficial effort, to be sure, than dragging out the already monotonous proceedings of the Ervin Committee, with all its second and thirdhand hearsay.

Yet, a number of legislative proposals offered in Congress to vest the power of appointing and/or dismissing a new Special Prosecutor in either the Congress itself or in the judiciary undoubtedly raise serious legal questions as to their constitutionality. Therefore, this paper now proceeds to review in some depth these highly questionable proposals, the passage of any one of which might well precipitate even further constitutional crises, perhaps as severe as any this system of government has ever had to withstand.

Congressional Appointment or Dismissal

Those measures introduced to vest the appointment power for a Special Prosecutor in the Congress can be dealt with here rather quickly. Again quoting the majority opinion by Chief Justice Taft in Myers: "If there is any point in which the separation of Legislative and Executive powers ought to be maintained with great caution, it is that which relates to officers and offices:"53 and Mr. Justice Sutherland added further, in another decision: "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce

52 272 U.S. at 162.
53 Id. at 116.
them or appoint the agents charged with the duty of such enforcement. The latter are executive functions." Thus, law enforcement cannot be engaged in by any branch of government other than the executive, and Congress cannot deal with something over which it has no power.

It should be noted, in passing, that a measure proposed by Senator Percy of Illinois would require that the presidential appointment of the Prosecutor be confirmed by the Senate. There is certainly nothing wrong with that approach; however, as to removal, section 12(a) of the bill says that the President may remove the Special Prosecutor for "neglect of duty, malfeasance in office, or violation of this Act," contrary to the Myers holding. Subsection (b) of the Percy proposition further flies in the face of Myers by blocking the President's power to remove if either House of Congress adopts a resolution to that end, since "the power of the Senate to check appointment by and with advice of the Senate... does not by implication extend to removals."56

Judicial Appointment and Dismissal — The Bayh Proposal

Another direction taken by legislation introduced by Senator Bayh of Indiana and cosponsored by Senator Hart of Michigan and 51 other Senators would "authorize and direct" the Chief Judge of the United States District Court for the District of Columbia to appoint a Special Prosecutor. In addition, the Chief Judge would be "empowered to dismiss the Special Prosecutor... if, in his discretion he determines that the Special Prosecutor has willfully violated the provisions of this Act or committed extraordinary improprieties...." Hence, only the Chief Judge would have power to determine whether the Special Prosecutor had exceeded his statutory authority in any particular case. A House bill introduced by Congressman Hungate provided for the appointment of the Special Prosecutor by a panel of three members of the same United States District Court.62

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56 Id. This bill was revised somewhat in a new proposal, but it still strictly limits the reasons for which the President can remove his own appointee. S. 2734, 93d Cong., 1st Sess. (1973).
57 S. 2616, supra note 55.
60 Id. § 3(a).
61 Id. § 10. Other bills introduced to provide for judicial appointment of a Special Prosecutor include S. 2600 (by Senator Chiles of Florida) and S. 2603 (by Senator Stevenson of Illinois), 93d Cong., 1st Sess. (1973).
62 H.R. 11401, 93d Cong., 1st Sess. (1973). This appointment proviso contained in the Hungate bill was substituted in the Bayh bill as an amendment thereto when S. 2611 was
Legislatively vesting the appointive power for a Special Prosecutor in the courts is premised on two basic contentions. The first involves the exception to the presidential appointment power as found in article II, section 2, whereby clause 2 allows that "the Congress may by Law vest Appointment of such inferior Officers, as they think proper, . . . in the Courts of Law. . . ." But there is no legal authority there giving Congress the open-ended power to vest all appointments in the courts, for, under such a broad interpretation there would be few limitations on the type of "inferior Officers" that could be appointed.

Indeed, courts may appoint "such inferior Officers" as court commissioners or clerks, but such employees clearly belong to the judicial branch and, are, therefore, not executive officers. The Supreme Court, in Ex parte Siebold, has also upheld as proper the power of Congress to vest the appointment of federal election supervisors in a United States circuit court, but, characteristically, because it found the appointment was not incongruous with the performance of regular judicial functions. In examining the type of appointment power in terms of appropriateness, the Court noted:

*Siebold* was concerned with the area of regulating federal elections, clearly controlled, under article I, section 4, clause 1, by the Congress, which delegated part of that power to the courts on the basis of article II, section 2, clause 2. However, it would not be constitutionally proper for the legislative branch to delegate to the judicial branch the appointment power over a prosecutor to enforce the law, which power the Constitution provides shall reside in the executive branch. What could be more of an "incongruity," a la *Siebold*? To be sure, the controlling case here remains the old *Hennen* decision, which held that the appointment power "was, no doubt, intended to be exercised by

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66 *Id.*
67 100 U.S. 371 (1879).
68 *Id.* at 398.
69 *Id.*
70 U.S. CONST. art. II, §§ 1, 3.
71 100 U.S. at 398.
the department of the government to which the officer to be appointed most appropriately belonged."^72

Of course, the argument classifying the Special Prosecutor as an inferior officer has already been dismissed in this paper as incredible even to suggest; and, at the risk of being redundant, it may again be maintained that the Special Prosecutor (who, for instance, could appoint his own staff and set their compensation^73) is an executive-type officer.

It is also asserted that the authority of the Chief Judge to appoint a Special Prosecutor is analogous to the process whereby the courts appoint a temporary prosecuting officer to fill a vacancy under section 546, title 28 of the United States Code^74—as if this were to provide a legal threshold by which to accomplish an unconstitutional shift of power from the executive to the judiciary. But the assertion is not a valid one. This specific statute does not confer—nor have any courts assumed that it does—any authority over a prosecution officer like a United States Attorney so appointed by the court. As the district court noted in United States v. Solomon,^75 the executive branch is still "free to choose another . . . at any time, the judicial appointment notwithstanding." Solomon is significant here, for it is the only federal case to have passed on a constitutional challenge to congressional authorization of a court-appointed prosecuting officer, with the court addressing itself to what section 546 "clearly contemplates" in regard to the limited appointive power of the judiciary vis-à-vis that of the President under article II. The court distinguished that "[t]he appointive power of the judiciary" in this statute "in no wise equates to the normal appointive power" because, for one, "the judiciary's power is only of a temporary nature."^76 This was also stressed in a prior opinion from the Attorney General, declaring that the appointment itself is "only a temporary mode of having the duties of the office performed until the President acts . . . ."^77 In addition, the exercise of this judicial appointment power "in no wise binds the executive," according to the court, as he had the power to displace the judicial appointee with a nominee of his own.^78 At this point, the court cited In re Farrow^79 on the statute in question: "It [section 546] was not to enable the circuit justice to oust

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^72 38 U.S. (13 Pet.) at 258.
^73 See note 5 supra.
^74 See S. 2611, supra note 59.
^76 Id. at 842.
^77 16 Op. ATT'Y GEN. 538, 540 (1880).
^78 216 F. Supp. at 842.
^79 5 F. 112 (C.C.N.D. Ga. 1880).
the power of the president to appoint, but to authorize him to fill the vacancy until the president should act, and no longer."80

The inherent deficiencies of following a course authorizing court appointment and removal of a Special Prosecutor, as advocated by Senator Bayh and others, are most apparent. In the first and only case thus far to involve the judicial appointment of a non-judicial officer under a statute prohibiting the President any power of removal, the court held, according to the vigorous dissent delivered by Judge Skelly Wright in a 2-1 decision, that Congress may impose on . . . any . . . federal court a duty so totally unrelated to the judicial function. . . . [A]ttention to extrajudicial activities is an unwanted diversion from what ought to be the judge's exclusive focus and commitment: deciding cases. . . . Most critically, public confidence in the judiciary is . . . placed in risk whenever judges step outside the courtroom into the vortex of political activities. . . .81

For the judiciary to take a direct interest and responsibility in the selection of a Special Prosecutor might, indeed, create the feeling that it was entertaining some bias.

Obviously, the court-appointment proposal can be challenged as unwise and improper due to the mixing of judicial and prosecutorial functions. As Judge Learned Hand warned: "Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge."82

It may well be a violation of due process for the court to assume the responsibility for supervising the conduct of the prosecutor, on the one hand, and, on the other, be responsible for a judicial determination of the case on its merits. The Supreme Court, in Tumey v. Ohio,83 stated that "[t]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice."84 And, the Court found further:

Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance, nice clear and true between the State and the accused, denies the latter due process of law.85

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80 Id. at 116.
82 United States v. Marzano, 149 F.2d 923, 926 (2d Cir. 1945).
83 273 U.S. 510 (1927).
84 Id. at 532.
The problem of removal, too, by the courts (also provided for under the Bayh bill)\textsuperscript{86} could be referred to here as another "nexus between court and prosecutor too close to comport with due process of law."\textsuperscript{87} \textit{Tumey} contains much the same language.\textsuperscript{88}

Furthermore, the court would find itself in a very difficult position, to be sure, if called upon to determine questions of jurisdiction as to whether, for instance, the Special Prosecutor is to be responsible for the prosecution of a specific matter. Given the earlier parallel drawn in this paper between a United States Attorney and the Special Prosecutor (acting as attorney for the Government), "the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States on their control over criminal prosecutions," resulting for the "constitutional separation of powers,"\textsuperscript{89} to quote again from the 1965 \textit{Cox} case, in which it was held that transferring the power committed to the executive to determine whether to prosecute would be in derogation of article II.\textsuperscript{90} Concurring opinions in that case elaborated on the reasons emphasized in the majority opinion as to why the neutral branch of government — the judiciary — should remain neutral in criminal prosecutions:

> Responsibility for determining whether a prosecution is to be commenced or maintained . . . may not, with safety, be left to a body whose great virtue is the combination of anonymity, transitory authority, and political unresponsibility.\textsuperscript{91}

It is important to note at this point that the very court which would receive the power to appoint a prosecutor under the Bayh bill\textsuperscript{92} — the United States District Court for the District of Columbia — also recognized in \textit{Nader v. Bork},\textsuperscript{93} the latest case to consider the removal issue, that "[t]he Courts must remain neutral. Their duties are not prosecutorial;"\textsuperscript{94} thus flatly rejecting the theory of court appointment. This was underlined in the opinion of Judge Gerhard Gesell which declared that the dismissal of Cox carried out by Acting Attorney General Robert Bork was illegal. While this paper does not support the decision handed down by Judge Gesell, his opinion does contain some sound advice on the court appointment approach. The judge correctly stated in \textit{Bork}:

\textsuperscript{86} See note 61 \textit{supra}, and accompanying text.
\textsuperscript{88} 273 U.S. at 532.
\textsuperscript{89} United States v. Cox, 342 F.2d 167, 171 (5th Cir.), \textit{cert. denied}, 381 U.S. 935 (1965).
\textsuperscript{90} \textit{Id.} at 171-72.
\textsuperscript{91} \textit{Id.} at 182 (Brown, J., concurring).
\textsuperscript{92} See note 60 \textit{supra}, and accompanying text.
\textsuperscript{94} \textit{Id.} at 109.
Although these are times of stress, they call for caution as well as decisive action. The suggestion that the Judiciary be given responsibility for the appointment and supervision of a new Watergate Special Prosecutor . . . is most unfortunate. Congress has it within its own power to enact appropriate and legally enforceable protections against any effort to thwart the Watergate inquiry. . . . If Congress feels that laws should be enacted to prevent executive interference with the Watergate Special Prosecutor, the solution lies in legislation enhancing and protecting that office as it is now established and not by following a course that places incompatible duties upon this particular Court. . . .

John J. Sirica, Chief Judge of the same court, told the press he concurred with Judge Gesell regarding the appointment of a Special Prosecutor by the courts and averred that "I do not know of any judge who thinks it's a good idea." Judge Sirica also sent to Senator James O. Eastland, the Chairman of the Senate Judiciary Committee, a letter in which he reiterated his position "in full agreement with Judge Gesell's statement," adding that he was "informed that several other active judges, members of this court, were of the same opinion. . . . I had lunch with eight of our judges, each of whom remarks that he disapproves of [such] a procedure. . . ."

In light of these objections from members of the court that would be designated by the Bayh bill to appoint a Special Prosecutor, one must wonder whether the United States District Court for the District of Columbia would ever exercise this appointment power in the event the bill were enacted into law. Hopefully it would not, for judges take an oath to uphold the Constitution and, to the mind of this writer, this legislation would be in violation of the constitutional doctrine of separation of powers. Members of Congress take a similar oath when they assume their official duties, and, from that standpoint, it would seem they should use every reasonable means at their disposal to prevent the passage of dangerous legislation that could strain our whole constitutional fabric of government.

Barring that, it is not unlikely that the President would himself veto, on the basis of sound legal arguments, such unconstitutional legislation. His duty requires him to veto any legislation he feels transcends the proper boundaries of power between the branches. After all the President, too, must swear, before entering office, that he "will to the best of [his] ability, preserve, protect and defend the Constitution" as set forth in article II, section 1, clause 7.

95 Id.
Though the great concern over the issues of "Watergate" is understandable, we must still remain within constitutional bounds. The appropriate constitutional role for the judiciary here is as a neutral forum for impartial adjudication, and the Special Prosecutor, clearly an executive officer, should properly be appointed by and function as part of the executive branch — perhaps, as a special officer within the Justice Department. It is impossible to isolate the Special Prosecutor from such contact with the executive branch, given the prosecutorial powers of that branch. If the Special Prosecutor were rendered immune from removal by the President or by some department head, subject to his direction, by the enactment of this questionable legislation, there would be no reporting or control responsibility in the executive branch.

Protecting the Prosecutor and His Prosecutions

Yet another serious threat created should Congress pass such legislation is running the risk that indictments or convictions achieved through the efforts of the Special Prosecutor might well be quashed or reversed if the law is later declared unconstitutional. Anticipated constitutional challenges to the validity of the acts of the Special Prosecutor could come when the first witness was called or when attempts were made to seek additional evidence. No matter what the courts would ultimately decide, the functioning of the Prosecutor could be delayed several months and, in the event the decision was unfavorable, his actions could be nullified altogether.

A number of cases sustain the argument that indictments and convictions arising out of the activities or influences of an unauthorized attorney constitute a defect in procedure sufficient to invalidate the results. Cases may thus be thrown out and justice never done, since subsequent attempts to prosecute could run afoul of the prohibition against double jeopardy,98 totally precluding prosecution of those crimes sought to be punished.

Apropos here is In re Wyrick,99 where a lower court was held without jurisdiction to proceed due to the defect in the legal status of a special prosecutor. Because the court-appointed special prosecutor was not legally authorized to participate in the proceedings that led to the conviction of the defendant in the lower court, the conviction and the sentence for contempt of court were overturned and the defendant released from custody. Explained the court:

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99 301 Mich. 273, 3 N.W.2d 272 (1942).
The state has wisely provided that this power should lie in the discretion of the prosecuting attorney or the Attorney General in certain cases. . . . "It is directly contrary to public policy to allow any general delegation of a prosecutor's powers, and the courts cannot recognize any such arrangement. . . ."

In *United States v. Heinze,* an attorney general had appointed a special prosecutor — without proper legal authority — to help him in the investigation and prosecution of a case. As a result, the court granted a motion to quash the indictment because this legally unauthorized person was present in the grand jury room during the investigation. Also, in *State v. Heaton,* the daily attendance at grand jury sessions of an illegally appointed special counsel who advised and assisted in the deliberations was found to be so substantial an irregularity in the proceedings for the presentment of the indictment that the court set it aside.

On the basis of the above-cited cases, it is important to insure that there exists a Special Prosecutor whose indictments and convictions will legally stand. The best solution — that is to say, the one alternative which presents no constitutional challenge — seems to be for the Special Prosecutor to serve within the executive branch where the right to appoint and (necessarily) remove must be vested in order to accord with our Constitution.

Circumstances surrounding serious misconduct alleged to have been committed by a number of high officials within the executive branch during the so-called "Teapot Dome" scandal of the Harding Administration are applicable to the Watergate issues of today, although some material differences between the two exist. (For example, the latter apparently did not involve any personal enrichment.) At any rate, President Coolidge had first suggested the appointment of a special prosecutor to investigate those allegations of wrongdoing that arose out of Teapot Dome, and when the Congress subsequently saw fit to require such a special prosecutor in 1924, it adopted a resolution (unanimously in the Senate and by a division of 120 to 4 in the House), provided that

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100 9 N.W.2d at 274, quoting Engle v. Chipman, 51 Mich. 524, 16 N.W. 886, 887 (1883).
101 177 F. 770 (S.D.N.Y. 1910).
102 Id. at 773.
103 21 Wash. 59, 56 P. 843 (1899).
the President is ... authorized and directed to appoint, by and with the advice and consent of the Senate, special counsel who shall have charge and control of the prosecution of such litigation anything in the statutes touching the powers of the Attorney General of the Department of Justice to the contrary notwithstanding.106

In the context of Watergate, however, some members of Congress have indicated their preference that the Attorney General exercise the appointment and removal powers instead of the President whose own role in the affair has been alleged. But a procedure placing the power to appoint and remove with the Attorney General rests squarely on the claim that the Special Prosecutor falls within the category of "inferior Officers" in article II, section 2, clause 2. Still, the office of the Special Prosecutor must be established under the aegis of the executive branch to avoid a conflict with the other branches over separation of powers and, thus, leave untrammeled the authority of the President to appoint or remove. While it is certainly expected that the Special Prosecutor should have a maximum degree of independence with which to pursue his duties, there can be no legislative or judicial infringement on the President's exercise of executive power in the name of "prosecutorial independence."

Of course, the Office of the Special Prosecutor has already been reestablished, and Leon Jaworski named as successor to Archibald Cox. The Washington Post believes that the appointment of Mr. Jaworski by the Nixon Administration "would at once oblige him to demonstrate his prosecutorial independence and give particular force to his position..."107 This paper would only add here that the appointment of the new Special Prosecutor ought to be subject to formal confirmation by the Senate, as the Percy bill requires. In this way, the Senate, through its advice and consent, would have a check by which it might mollify the concern of the people and Congress that there be no interference with the Special Prosecutor in the performance of his duties. To quote again from the Post in this regard:

[An] administration-appointed Special Prosecutor whose views and purposes had been examined by the Senate in confirmation hearings, [and] whose subsequent confirmation made him in some appreciable degree answerable to Congress ... would be as free of administration pressure and dictation as could be guaranteed by any process... 108

108 Id.
Of further merit in considering removal of the Special Prosecutor is a relevant proviso drawn in Senator Hruska’s proposal, which sets out the following method: the Prosecutor could be immediately suspended, such suspension becoming a final dismissal 30 days thereafter; within that period, a notice of dismissal would be transmitted to both Houses of Congress in order to advise each body of the reasons for that dismissal before it took effect. By the procedure set out in that bill, immediate dismissal would be impossible, and the President would have 30 days to reconsider his action.

Finally, there must be an insistence upon the non-partisanship of the staff chosen by the Special Prosecutor to assist in the investigation of all alleged Watergate-related crimes. Individuals assigned to the Prosecutor’s task force must be capable of resisting temptations involving partisan considerations and of meeting the test to fulfill unerringly their independent and impartial roles. Otherwise, the creditability of the Special Prosecutor’s office could be threatened and a taint put on any work produced or investigations and prosecutions carried out by that office.

IV. CONCLUSION

One of the ramifications of the Cox firing has manifested itself in cries that Congress impeach the President or, at least, that he resign. All this has only resulted in increasing the air of distrust and partisan political selfishness already running rampant between the executive and legislative branches at a time when one of the first priorities of the people’s elected representatives ought to be, in a spirit of cooperation, to rebuild the faith of the people in their government and in themselves as a country. Thus, a further confrontation, such as the folly of an impeachment action with all its shattering implications, though it can still be tried, is difficult to justify now. The temper of the times—one of insecurity and uncertainty—demands statesmanship rather than partisanship for partisanship will not control the fate of the country.

Resolution of the special prosecutor issue lies within the confines of our constitutional structure, for any solution to that dilemma must fit into the tripartite pattern of government created by the Founding Fathers. Immediate pressures must not disrupt the system of checks and balances that have proven so durable in carefully restraining each branch through cooperation and interaction.