The Proposed Judicially Appointed Independent Office of Public Attorney: Some Constitutional Objections and an Alternative

Howard H. Baker Jr.

Follow this and additional works at: https://scholar.smu.edu/smulr

Recommended Citation
https://scholar.smu.edu/smulr/vol29/iss3/1
THE PROPOSED JUDICIALLY APPOINTED INDEPENDENT OFFICE OF PUBLIC ATTORNEY: SOME CONSTITUTIONAL OBJECTIONS AND AN ALTERNATIVE

by

Senator Howard H. Baker, Jr.*

The Senate Select Committee on Presidential Campaign Activities,¹ which for better or worse will be recorded in history as the Senate Watergate Committee, recommended the enactment of legislation in a number of areas in its final report on presidential campaign activities.² The first, and perhaps principal recommendation by the committee was the establishment of a permanent Office of Public Attorney, with the Public Attorney to be appointed for a fixed term by members of the judicial branch, with the advice and consent of the Senate.³ Senate Bill 495, the Watergate Reorganization and Reform Act of 1975,⁴ introduced on January 30, 1975, is a multifaceted bill essentially designed to incorporate the recommendations contained in the committee’s final report. Section 101 of S. 495 implements the committee’s recommendation as to the establishment of the Office of Public Attorney. It is certainly the most controversial provision of this legislation,⁵ primarily because it poses serious constitutional questions, spe-

---

¹ LL.B., University of Tennessee. United States Senator from Tennessee.
³ See id. at 96. But see id. at 1105 (individual views of Senator Howard H. Baker, Jr.), 1171 (individual views of Senator Edward J. Gurney). Senator Gurney and this writer both dissented from the committee’s recommendation, the author recommending the “[e]stablishment of an Office of Public Prosecutor within the Department of Justice, appointed by the President for a fixed term and subject to Senate confirmation.” Id. at 1105.
⁴ S. 495, 94th Cong., 1st Sess. (1975) [hereinafter cited as S. 495]. This bill was introduced by Senators Abraham Ribicoff, Charles H. Percy, et al., and referred to the Senate Committee on Government Operations. As yet unpublished hearings on S. 495 were conducted by the Government Operations Committee on July 29, 30, and 31, 1975, with further hearings to follow. For additional views on this legislation, see Watergate Reorganization and Reform Act of 1975, Perspectives of the American Legal and Academic Communities on S. 495, 94th Congress, 1st Sess. (Gov’t Op. Comm. Print, May 1975) which contains the replies of various members of the American legal and academic communities to a letter from Senators Abraham Ribicoff and Charles Percy, February 20, 1975, inviting comment on S. 495 [hereinafter cited as Perspectives on S. 495].
⁵ A virtually identical bill was introduced by Senator Sam J. Ervin, Jr., Chairman of both the Select Committee on Presidential Campaign Activities and the Committee on Government Operations, just prior to his retirement at the conclusion of the Ninety-Third Congress. See S. 4227, 93d Cong., 2d Sess. (1974).
⁶ Other recommendations made by the committee which are incorporated in S. 495, include, inter alia, provision for the establishment of a Congressional Legal Service, establishment of stringent financial disclosure requirements for the President and the
specifically in relation to the doctrine of separation of powers. This Article focuses upon the constitutional and practical deficiencies of this proposal, and in light thereof offers an alternative designed to present a sound and constitutionally valid response to the institutional deficiencies which surfaced during and after the original Watergate investigation by the Department of Justice.

I. PROVISIONS AND HERITAGE OF SENATE BILL 495

The Office of Public Attorney as proposed in S. 495 would operate “as an independent establishment of the Government” under the direction of a Public Attorney appointed, with the advice and consent of the Senate, by a panel of three retired court of appeals judges designated by the Chief Justice of the Supreme Court. The bill provides that the Public Attorney shall serve a first term of five years, may be reappointed for an additional term, and must agree in writing, prior to assumption of his office, not to seek election to federal office or to accept other government employment for five years after the cessation of his service as Public Attorney. The Public Attorney would possess primary and preemptory jurisdiction to investigate and prosecute (1) allegations of corruption in the administration of the law by the executive branch; (2) cases referred by the Attorney General because of actual or potential conflict of interest; (3) criminal cases referred by the Federal Election Commission; and (4) allegations of violation of federal election laws. Once the Public Attorney has asserted his jurisdiction and notified the Attorney General to that effect, the Attorney General, under S. 495, would be required to direct the Justice Department to refrain from any related investigation or prosecution, unless prior written approval is given by the Public Attorney.

The origins of the proposal to establish a judicially appointed, permanent Public Attorney operating independently of the Department of Justice were

---

Vice President, prohibition of political contributions by executive agency employees, application of the Hatch Act to the Department of Justice, prohibition of ad hoc intelligence activities by executive office personnel, restriction of White House access to tax returns, clarification of the investigative authorities of congressional committees, upgrading of criminal penalties for campaign-related violations, and explicitly making certain questionable campaign activities unlawful. S. 495, §§ 102-405.


7. S. 495, § 101(a).

8. Id. (proposed § 581(d)).

9. Id. With respect to matters within the jurisdiction of the Office of Public Attorney, the Public Attorney would be authorized to exercise all powers in the conduct of criminal investigations, prosecutions, civil proceedings, and appeals as the Attorney General would have, including the authority to issue instructions to the Federal Bureau of Investigation. Id. (proposed § 583).

10. Id. (proposed § 582). New § 584 would require the Public Attorney to provide the Attorney General with five days written notice prior to signing or filing any indictment of criminal information, and it permits the Attorney General to appear amicus curiae if he “disapproves.” If enacted, this section would place the Justice Department in the unusual position of a quasi-public defender vis-à-vis defendants being prosecuted by the Public Attorney.
founded, of course, in the general dissatisfaction with the speed and effectiveness of the original Department of Justice investigation and prosecution of the June 17, 1972, Watergate break-in, and subsequent cover-up, and in the aftermath of the “Saturday Night Massacre,” which resulted in the firing of the Director of the Watergate Special Prosecution Force, Archibald Cox, and in the resignations of Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus.

The latter event inspired a bevy of legislation designed to provide statutory independence for the new Watergate Special Prosecutor. These included the Hart-Bayh bill which provided for the appointment of a Watergate Special Prosecutor by a three-judge panel of the United States District Court for the District of Columbia, with removal by the panel for gross impropriety, dereliction of duty, or incapacity; a Taft-Hruska bill which provided for appointment of the Special Prosecutor by the Attorney General, with the Attorney General agreeing not to appoint anyone whom the Senate disapproves by a resolution, and with removal by the Attorney General for cause; and the Percy-Baker bill which provided for appointment of the Special Prosecutor by the President, by and with the advice and consent of the Senate, and for removal by the President for cause, with dismissal to become effective thirty days after delivery to Congress of notice thereof. After extensive discussion and committee consideration, these
three proposals were scheduled to be considered on the floor of the Senate during the second week of December 1973, and a unanimous consent agreement was effected by the Senate leadership allocating debate time amongst the proponents of the three measures. As it became increasingly apparent, however, that all three proposals possessed potential constitutional or practical infirmities which might vitiate or delay prosecutions and litigation then being conducted by the Watergate Special Prosecutor, Senate consideration of statutorily creating an independent Watergate Special Prosecutor was put aside and never resumed.

Thus, almost two years later, a proposal for a judicially appointed independent special (i.e., public) prosecutor has reemerged in S. 495—although the S. 495 variety is permanent and possessory of much broader jurisdiction. As was the case both during consideration of the aforementioned Hart-Bayh proposal and in the deliberations of the Senate Watergate Committee in formulating its final report, this writer is unable to support, as a matter of policy and law, the proposal in section 101 of S. 495 to establish an independent, judicially appointed Office of Public Attorney.

II. Senate Bill 495 Is Constitutionally Infirm

The constitutional concept of "separation of powers" is characterized by the conscious ambiguity and delicate imprecision at which the framers of the Constitution were so adept. Similarly, the question of whether Congress, consistent with the Constitution, can statutorily reallocate the appointment and supervision of a public prosecutor of government oriented crimes from the executive branch to the judiciary is fraught with uncertainty. Nevertheless, because article II, section 1, provides that the "executive Power shall be vested in a President" and article II, section 3, directs that the President

17. See id. S 22,257.
19. There was not a complete two-year hiatus in Senate committee consideration of this issue. See Hearings on S. 2803 & S. 2979, Removing Politics from the Administration of Justice, Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 93d Cong., 2d Sess. (1974) (Senator Sam J. Ervin, Jr., Subcomm. Chairman).
20. See note 9 supra and accompanying text.
21. See text accompanying note 13 supra.
23. Former Solicitor General Erwin N. Griswold, with reference to § 101 of S. 495, has stated: The question of constitutionality of some of the provisions of S. 495 is a close and difficult one, at best. No one can give a definitive answer to it, except the Supreme Court. In many other areas, an opinion of counsel can be advanced on a question, even one of constitutional law, with considerable confidence. I do not believe that this is the case here. It is not irrelevant to point out that the most recent decisions of the Supreme Court on the closely related question of standing to sue were reached by 5-4 or 6-3 decisions in the Court. United States v. Richardson, 418 U.S. 166 (1974); Schlesinger v. Reservists to Stop the War, 418 U.S. 208 (1974). PERSPECTIVES ON S. 495, at 81.
“shall take Care that the Laws be faithfully executed,” it is submitted that the prosecutorial function is the exclusive province of the executive branch. Secondly, although it is arguable that under article II, section 2, clause 2, Congress conceivably could vest the power to appoint a public attorney in the “Courts of Law,” an official exercising the prosecutorial and investigative authorities of a public prosecutor constitutionally must function as an officer of the executive branch, and, therefore, is subject to Presidential direction and control. Third, the President constitutionally may be vested with authority to remove a public attorney—at least for cause. Thus, the fundamental objection to the creation of the Office of Public Attorney as provided in S. 495 is that such a scheme constitutes a direct impingement upon traditional separation of powers tenets.

Admittedly, the Constitution does not create analytically precise or rigidly segregated categories of governmental function amongst the three branches; there are areas of overlap and shared responsibilities arising from a system of checks and balances. On the other hand, the coupling of the vesting of the “executive Power,” under article II, section 1, and the charge, under article II, section 3, that the President shall “take Care that the Laws be faithfully executed,” seemingly delineates an immutable area of executive responsibility, that is, enforcement of the laws, which would be revocable only by constitutional amendment. A statement made by James Madison, while serving as a representative in the first United States Congress, supports this assertion: “I conceive that if any power whatsoever is in the nature of

25. Id. art. II, § 3.
26. Id. art. II, § 2 states in part: “but 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.”
27. Madison argued that the branches were to have partial agency in and some control over the acts of each other. The framers had acted on the principle, he contended, “that unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.” The Federalist No. 48(47), at 327 (P. Ford ed. 1898) (J. Madison). Similarly, in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), Justice Jackson, concurring, stated: “While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.” 343 U.S. at 635 (Jackson, J., concurring). But see Springer v. Philippine Islands, 277 U.S. 189, 201-02 (1928); Myers v. United States, 272 U.S. 52 (1926), wherein wrote Chief Justice Taft:

[The Constitution was so framed as to vest in the Congress all legislative powers therein granted, to vest in the President the executive power, and to vest in one Supreme Court and such inferior courts as Congress might establish, the judicial power. From this division on principle, the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they are not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires.

28. See E. Corwin, The President—Office and Powers 1787-1957, at 178-82, 194-95 (4th rev. ed. 1957) for a recital of the argument that the vesting of “the executive Power” was an affirmative grant of power and that the subsequent, more precise grants, except when coupled with express restrictions or limitations, serve to interpret the general grant of power. It should be noted that the Supreme Court has rejected the argument that article I, § 1 confers all “executive” power minus only what is specifically excepted. See United States v. United States District Court, 407 U.S. 297 (1972); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
the executive, it is the power of appointing, overseeing and controlling those who execute the laws.\textsuperscript{29}

Although distinguishable from a potential challenge to the provisions of S. 495, numerous decisions have ruled that the prosecution of offenses against the United States is an executive function and, in accordance with separation of powers, cannot be exercised either by the judiciary or by the legislature.\textsuperscript{30} In \textit{Ponzi v. Fessenden}\textsuperscript{31} the Supreme Court ruled that the faithful execution clause of article II makes clear that the President is vested with the federal prosecutorial authority, stating that: “The Attorney General is the head of the Department of Justice . . . . He is the hand of the President in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offenses, be faithfully executed.”\textsuperscript{32} A similar decision was reached by the Court of Appeals for the Fifth Circuit in \textit{United States v. Cox},\textsuperscript{33} where the court ruled that a United States Attorney cannot be required by the district court to sign an indictment initiating the prosecution of federal offenses. Reiterating the “hand of the President” principle of \textit{Ponzi}, the court in \textit{Cox} declared that the United States Attorney was “an executive official of the government” when exercising the discretion as to whether or not to prosecute a particular case.\textsuperscript{34} The court then found “as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States . . . .”\textsuperscript{35}

Furthermore, in \textit{United States v. Nixon}\textsuperscript{36} the Supreme Court, in concluding that the Special Prosecutor possessed sufficient standing to bring an action to enforce the tapes subpoena against the President, explicitly acknowledged that the power being exercised by the Special Prosecutor was the executive power under article II to conduct the criminal litigation of the United States, which had been vested in the Attorney General\textsuperscript{37} and then delegated in part to the Special Prosecutor.\textsuperscript{38} As has been stated by former Counsel to the Special Prosecutor Philip Lacovara:

\begin{itemize}
\item \textsuperscript{29} 1 Annals of Cong. 481-82 (1789).
\item \textsuperscript{31} 258 U.S. 254 (1922); accord, Springer v. Philippine Islands, 277 U.S. 189 (1928); Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967). The Court in \textit{Springer} found that the executive function includes “the authority . . . to enforce [laws] or appoint the agents charged with the duty of such enforcement.” 277 U.S. at 202 (emphasis added). See also 2 Op. Atty Gen. 482, 487-93 (1831).
\item \textsuperscript{32} 258 U.S. at 262.
\item \textsuperscript{33} 342 F.2d 167 (5th Cir.), cert. denied, 381 U.S. 935 (1965).
\item \textsuperscript{34} 342 F.2d at 171.
\item \textsuperscript{35} Id.; accord, Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967). The court of appeals held that the lower court possessed no authority to review prosecutorial decisions as the “Constitution places on the Executive the duty to see that the ‘laws are faithfully executed’ and the responsibility must reside with that power.” 382 F.2d at 482 n.9.
\item \textsuperscript{36} 418 U.S. 683 (1974).
\item \textsuperscript{38} 418 U.S. at 694 n.8. The “independence” of the Watergate Special Prosecutor as upheld in the case depended upon the existence of regulations promulgated by the Attorney General which had the force of law. \textit{Id.} at 695-96.
\end{itemize}
It was always implicit in the arguments submitted [to the Court] . . . that the President had the ultimate constitutional responsibility to take care that the laws were faithfully executed. We argued only that Congress could authorize that function to be exercised by subordinate Executive officials . . . and that they are free to pursue this responsibility . . . only until the President chooses to exercise his ultimate constitutional power to remove the subordinate from office . . . .39

The decision in United States v. Nixon also complements a line of cases beginning with Myers v. United States40 and ending with Wiener v. United States,41 recognizing that purely executive functions, that is, the irreducible powers conferred upon the President by article II, must be performed under the direction of the President. In other words, the article II executive power, which includes the faithful execution of the laws, is exercisable only by the President and his subordinate executive officers, and, therefore, constitutionally cannot be allocated by Congress to independent agencies.42 It is only those “executive” tasks which are merely incidental to the quasi-legislative and quasi-judicial responsibilities delegated to independent agencies which constitutionally can be delegated to such agencies by Congress.43 The Watergate Special Prosecutor in United States v. Nixon was a subordinate of the Attorney General, and hence of the President, and was exercising an exclusive article II power in prosecuting criminal offenses against the United States—a power which, according to the rationale of Myers and Wisner, could not be exercised by an independent agent. In short, the Myers line of cases recognized that article II power could be exercised only by the President and his subordinates, and correspondingly, implicit in United States v. Nixon is the proposition that the special prosecutor was a subordinate executive officer under the ultimate authority of the President and was not independent per se of the executive branch.

The decisions in the Myers line of cases clearly support the proposition that the executive power can be exercised only by purely executive officers subject to Presidential control. In Myers the Supreme Court affirmed the power of the President to remove a postmaster from office. The opinion in Myers, delivered by Chief Justice Taft, asserted that the vesting of the “executive power” in the President implied a broad, inherent constitutional power to remove officials appointed by the President, no matter what restrictions Congress may have imposed regarding the nature of their tenure.44 In the second of this series of three cases dealing with the power of the President to remove government employees, the Court in Humphrey's Executor v. United States45 limited the reach of Myers in overturning a

39. PERSPECTIVES ON S. 495, at 113.
40. 272 U.S. 52 (1926).
43. See Humphrey's Executor v. United States, 295 U.S. 602 (1935); note 46 infra and accompanying text.
44. 272 U.S. at 163-64.
45. 295 U.S. 602 (1935).
dismissal by the President of a member of the Federal Trade Commission who had been removed from office for personal and political reasons, and not for any of the causes statutorily specified by Congress. Finding that the FTC "cannot in any proper sense be characterized as an arm or eye of the executive," the Court in Humphrey's confined the Myers holding to "purely Executive officers," stating that Myers "goes no farther;—much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President." 47

Twenty-four years later, the Court in Wiener defined Humphrey's as drawing "a sharp line of cleavage between officials who were part of the Executive establishment and were thus removable by virtue of the President's constitutional powers, and those who are members of a body 'to exercise its judgment without the leave or hindrance of any other official or any other department of the government.'" 48

While undoubtedly restricting the reach of Myers as to the President's power to remove independent regulatory agency personnel, both Humphrey's and Wiener are compatible with the premise that the President's obligation to see to the faithful execution of the laws is a "purely Executive" function, as to which the President constitutionally must possess authority to supervise the performance of subordinate officers exercising the executive power for which the President is ultimately accountable. 49 Although it is perhaps arguable that under Humphrey's and Wiener Congress could limit or control the authority of the President to remove a Public Attorney, 50 the distinctions

46. Id. at 628. Writing for a unanimous Court, Justice Sutherland observed that "[t]o the extent that [the FTC] exercises any executive function—as distinguished from the executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government." Id. (emphasis added). With respect to the determination of the Humphrey's Court that the FTC was not "an arm or eye of the executive," compare the statement in Ponzi that the Department of Justice "is the hand of the President in taking care that the laws . . . be faithfully executed." 258 U.S. at 262; see notes 31-35 supra and accompanying text.

47. 295 U.S. at 627-28 (emphasis added).
48. 357 U.S. at 353.
49. The Court in Humphrey's, in finding that the President's arbitrary attempt to remove the FTC Commissioner exerted a "coercive influence" on the independence of an agency "not only wholly disconnected from the executive department, but . . . an agency of the legislative and judicial departments," 295 U.S. at 630, stated that: The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there. Id. at 629-30. Obviously, this principle would operate in turn to bar a legislative or judicial attempt to influence or control the independence of the executive branch within its own sphere. See Kilbourn v. Thompson, 103 U.S. 168, 190-91 (1880).

As an appointee of the Attorney General, [Special Prosecutor] Cox served subject to congressional rather than Presidential control. . . . The Attorney General derived his authority to hire Mr. Cox and to fix his term of service from various Acts of Congress. Congress therefore had the
made in these cases between "purely Executive" personnel performing "Executive functions" and those occupying "no place in the Executive Department" and who exercise "no part of the Executive power" indicate that a Public Attorney, responsible for enforcement of the laws of the United States, an admitted executive responsibility, must be accountable to the President, and arguably subject to removal by the President as a subordinate executive officer.

In addition to the argument that the establishment of an independent judicially appointed Public Attorney constitutes an unconstitutional usurpation of executive power, it can be argued that the constitutional validity of vesting the appointment of Public Attorney with three retired court of appeals judges is far from clear. The authority for judicial appointment of the Public Attorney is based, as mentioned previously, upon article II, section 2, clause 2, providing that "... Congress may by Law vest the Appointment of such inferior Officers . . . in the Courts of Law . . . ." S. 495, however, provides for vesting the appointment of the Public Attorney in an ad hoc group of retired court of appeals judges, as opposed to a court of law, and such a group of judges may not constitute a court of law within the meaning of the Constitution. Prior instances in which Congress authorized judicial appointment of inferior officers involved the vesting of appointment power in a formally established court, possessing a defined identity. Consequently, a defendant challenging a prosecution undertaken by a Public Attorney appointed under the provisions of S. 495 could utilize the potential directly to limit the circumstances under which Mr. Cox could be discharged.

51. See 295 U.S. at 627-28; notes 46-48 supra and accompanying text.
52. See note 47 supra and accompanying text.
53. It is important to note that while the Senate Watergate Committee report stated that the "Public Attorney could be removed only by the three retired circuit court judges and only upon a finding of gross improprieties," S. Rep. No. 93-981, supra note 2, at 100, S. 495 is silent on the question of removal. Presumably, only through resort to impeachment could the Public Attorney be removed from office under S. 495. But see Ex parte Hennen, 38 U.S. (13 Pet.) 230 (1839), holding that the power to remove, in the absence of a contrary provision, accompanies the power to appoint. Furthermore, the question of removal cannot be isolated from the threshold constitutional considerations of appointment. Removal necessarily implies a relationship to direction and control. That is to say, if a Public Attorney is absolutely immune from removal by the President or the Attorney General, in reality there would be no reporting or control responsibility in the executive branch, and, thus, the same separation of powers conflicts need be considered as are discussed with respect to placement of an "executive" functionary outside the executive branch. See generally Myers v. United States, 272 U.S. 52 (1926); United States v. Perkins, 116 U.S. 483 (1886).
55. U. S. Const. art. II, § 2, cl. 2 (emphasis added).
56. A similar question was raised when Congress in the Bankruptcy Act of 1867, ch. 176, § 3, 14 Stat. 517, 518, delegated to the Chief Justice of the United States the power to nominate registrars in bankruptcy for the district judges to appoint. Cong. Globe, 39th Cong., 2d Sess. 1011 (1867).
ly telling argument that the power of appointment had not been vested constitutionally in a "court of law." 58

Finally, assuming that the appointment powers are vested in a constitutionally proper "court of law," the broader question remains as to whether article II, section 2, encompasses the congressional authorization of an appointment of a prosecutor by a court. The most relevant case is United States v. Solomon, 59 holding that article II, section 2, permits a federal district court, pursuant to statute, 60 to appoint a United States Attorney when a vacancy occurs, effective until the vacancy is filled by the President. Relying on the language of article II and of Ex parte Siebold, 61 the court found no infringement upon the separation of powers doctrine. The court in Solomon carefully noted, however, that the judicial appointment was temporary and that it did not bind the President, who had the power to displace the judicial appointee with a nominee of his choosing at any time. 62

A comparable decision, also sharply limited, was reached in Hobson v. Hansen, 63 where the court upheld the validity of a provision of a District of Columbia statute requiring the members of the District of Columbia Board of Education to be appointed by the judges of the Federal District Court for the District of Columbia. Significantly, the court relied upon the unique dual character of the District of Columbia courts and upon the special constitutional powers granted Congress over District of Columbia affairs. 64 More-

58. Although perhaps less problematic, there exists the question of whether a Public Attorney, being the pro tanto possessory of plenary powers and significant responsibilities currently held by the Attorney General and the President, constitutes an "inferior officer" within the meaning of article II, § 2, cl. 2. The question of what officers are "inferior" within the meaning of this provision has never been adjudicated by the Supreme Court. The term seems to suggest officers intended to be subordinate to those in whom their appointment is vested, and at the same time, to exclude the courts of law and the heads of departments. See Auffmordt v. Hedden, 137 U.S. 310, 327 (1890); United States v. Germaine, 99 U.S. 508, 509-10, (1878). A substantial argument can be made that this clause was intended to permit Congress to relieve the President of the burden of appointing all inferior and unimportant executive and judicial officers in whom the President's interest would be minimal. The office of Public Attorney clearly would not fall within such a category.


61. 100 U.S. 371 (1880). In Ex parte Siebold the Court upheld a federal statute which provided that circuit courts appoint special deputy supervisors for congressional elections. The Supreme Court's opinion was based on the fact that the appointment of the supervisors in question could not have been with equal propriety or convenience assigned to any other official. Geographic proximity and necessity for quick action in appointing local election supervisors justified placing the appointing power in a local federal court. The Court further stated, however, that:

It is, no doubt, usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officer appertain. But there is no absolute requirement to this effect in the Constitution; . . . and in the present case there is no such incongruity in the duty required as to excuse the courts from its performance or to render their acts void.

Id. at 397-98.

The Siebold decision is often cited as supporting the constitutionality of judicial appointment of a Public Attorney. See S. REP. No. 93-981, 93d Cong., 2d Sess. 98 (1974).

62. 216 F. Supp. at 842-43. The court emphasized that the removal power was with the President and not the court. Id. at 843. S. 493 is silent on removal of the Public Attorney. See note 53 supra.


64. U. S. Const. art. I, § 8.
over, the court stressed that the power to appoint involved no supervisory responsibilities and acknowledged that if the court possessed the authorization to administer the schools, it would constitute "such incongruity in the duty required as to excuse the courts from its performance or to render acts void."65

The "incongruity in the duty" that would be cast by S. 495 upon the panel of senior circuit judges, as well as their mentor, the Chief Justice, might prove substantial. Rejecting the proposals to vest the appointment of a Watergate Special Prosecutor in the District Court of the District of Columbia,66 Judge Gesell, in *Nader v. Bork* commented:

The suggestion that the judiciary be given responsibility for the appointment and supervision of a new Watergate Special Prosecutor, for example, is most unfortunate. . . . The Courts must remain neutral. Their duties are not prosecutorial. 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. As Judge Learned Hand warned in *United States v. Marzano*, 149 F.2d 923, 926 (2d Cir. 1945): 'prosecution and judgment are two quite separate functions in the administration of justice; they must not merge.'68

In summary, the precepts of separation of powers and the constitutional vesting in the Executive of the exclusive authority and responsibility to faithfully execute the laws of the United States necessarily lead this writer to conclude that an officer exercising the powers and jurisdiction of the proposed Public Attorney cannot be set apart from the executive branch and inherently is subject to Presidential direction and control, perhaps including

65. 265 F. Supp. at 913, quoting *Ex parte Siebold* 100 U.S. 371 (1880). For further discussion of *Ex parte Siebold* see note 61 supra.

Although both Siebold and Hobson vested in the courts appointments to "executive" positions, neither case represented an encroachment, much less one of major proportions, upon a central responsibility of the executive branch—the faithful execution of the law.

66. See note 13 supra and accompanying text.


68. Id. at 109. Additional force was provided Judge Gesell's observation by a communication from Chief Judge John J. Sirica to Senator James O. Eastland, Chairman of the Senate Judiciary Committee, stating that "personally, I am in agreement with Judge Gesell's statement" and that "eight of our judges . . . remarked that he disapproves of a procedure that would require this court to appoint a special prosecutor." Letter dated November 15, 1973, reprinted in S. REP. No. 93-596, 93d Cong., 1st Sess. 25 (1973).

Furthermore, it was contended in *Solomon* that the merging of the power to appoint, coupled with a concomitant authority to remove the United States Attorney, created a nexus between judge and prosecutor too close to satisfy due process. The court rejected the argument by finding that the removal power was left to the President. 216 F. Supp. at 843. Cf. *In re Murchison*, 349 U.S. 133 (1955); *Tumey v. Ohio*, 273 U.S. 510, 532 (1926). As has been previously stated, S. 495 is silent as to removal of the Public Attorney. See note 53 supra. The power to appoint, in the absence of specific instructions to the contrary, could be construed as vesting an attendant power to remove the Public Attorney. See *Ex parte Hennen*, 38 U.S. (13 Pet.) 230 (1839) (upholding the legality of the removal from office by a district court of its clerk, appointed by it). So construed, the nexus between the court (through the panel of retired judges and indirectly the Chief Justice) and the prosecutorial function may be too close to satisfy standards of due process. However, under S. 495, proposed new § 581(d) bars the retired judges from participating in proceedings in which an employee of the Office of Public Attorney is a party.
the unrestricted power to dismiss from office. Secondly, while it is unclear whether the courts would uphold the appointment of a Public Attorney by a "Court of Law" pursuant to congressional authorization, the very nature of the article II executive power to be exercised by the Public Attorney indicates that the President, nevertheless, must retain a modicum of authority to supervise a Public Attorney appointed under the alternative means provided by article II, section 2, clause 2. Third, the proposed judicial appointment of the Public Attorney under article II, section 2, faces sufficient legal uncertainty so as to mandate the development of a more constitutionally certain reform, designed to increase the capacity of the federal government to prosecute and investigate governmental crime.69

III. A CONSTITUTIONAL ALTERNATIVE

Pursuant to a suggestion made by former Solicitor General Erwin Griswold,70 Senator Charles H. Percy and this writer have introduced an amendment to S. 495 which would replace section 101 of the bill with a proposal to create within the Department of Justice a new Division of Government Crimes,71 under the supervision of an Assistant Attorney General for Government Crimes to be appointed by the President, subject to the advice and consent of the Senate. Under this amendment, the Assistant Attorney General for Government Crimes would have jurisdiction equivalent to that given the Public Attorney under S. 495,72 and, in addition, would have jurisdiction over alleged violations of federal law by members of Congress, congressional staff, and the federal judiciary.73

Under the Percy-Baker amendment the Assistant Attorney General for

69. Furthermore, there are substantial policy considerations which mandate against an independent judicially appointed Public Attorney. S. 495, as currently written, would establish a virtually inviolate fourth branch of government, and would substantially diminish the accountability of law enforcement officials to the President, the Congress, and the American people. Insulation of the administration of justice from partisan politics clearly is desirable; however, insulation from the political process and public opinion is not. See, e.g., PERSPECTIVES ON S. 495, at 71-72 (reply of Thomas Ehrlich), 74-90 (reply of Erwin Griswold), 107-24 (reply of Philip Lacovara); Watergate Special Prosecution Force Report 137-140 (October, 1975) (For sale by the U.S. Government Printing Office). The Watergate Special Prosecution Force concluded its 28 month investigation by recommending, inter alia, against the creation of a permanent Special Prosecutor because only in "extraordinary situations such as 'Watergate,' [can] an independent prosecutor . . . be held accountable directly to the public . . . [as] his actions are subject to intense and continuous press scrutiny," id. at 138; because "there is no reason to believe that a permanent special prosecutor's office would be immune from the rigidity that comes over most organizations," id.; and because "different policies [between the Justice Department and a special prosecutor] easily lead to unequal justice . . . and provide great potential for a special prosecutor's abuse of power." Id. at 139. In the alternative, the Report recommended an expanded section within the Criminal Division, "or, similar to the proposal of Senators Baker and Percy . . . a new Division of Government Crimes . . . ." Id. See notes 70-74 infra, and accompanying text.

70. Id. at 88-89.
72. See note 9 supra and accompanying text.
73. Proposed new § 528 of title 28 U.S.C. states in part that "the Assistant Attorney General shall have jurisdiction . . . (1) with respect to any matter as to which there is reasonable cause to believe involves the violation of any Federal law by any Government officer or employee, whether elected or appointed . . . ." Amend. No. 13, 94th Cong., 1st Sess. (1975) (emphasis added). Compare S. 495, proposed § 582.
Government Crimes would be vested with the full investigative and prosecutorial powers of the Department of Justice, subject to the ultimate authority of the Attorney General. The amendment specifies that the Attorney General must report promptly to the Congress any instance in which he overrules any action taken or proposed to be taken by the Division of Government Crimes. Furthermore, should the Assistant Attorney General for Government Crimes be removed from office, the Attorney General is required to report in writing to the Congress the precise reasons for such removal. By vesting the authority and responsibility to investigate and prosecute allegations of violations of law by governmental officials and violations of federal campaign law in a subordinate executive officer appointed by the President, the Percy-Baker amendment clearly avoids the separation of powers problems inherent in S. 495. Moreover, the establishment of a Division of Government Crimes would provide an institutional arrangement clearly lacking in the original Department of Justice Watergate investigation. Finally, requiring reports to Congress of instances in which the Government Crimes Division is overruled by the Attorney General and the requirement of a full report in the event of the dismissal of the Assistant Attorney General for Government Crimes, provide a rather substantial safeguard against efforts to distort the legal process.

**IV. Conclusion**

Admittedly, one of the most grievous institutional deficiencies revealed by Watergate—this is, the absence within the Department of Justice of a division solely and specifically entrusted with the mandate and requisite authority to investigate allegations of official misconduct—remains extant. Reform, in whatever fashion it assumes, must be effected calmly and dispassionately. For the remedy could be as damaging as the malady if, as a result of Watergate, legislation were enacted that violated the basic plan of the Constitution, eroded the doctrine of separation of powers, diffused public accountability, or substantially impaired the ability of the President of the United States to fulfill his constitutional responsibilities. As was stated by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*: “The tendency is strong to emphasize the transient result on policies . . . and lose sight of enduring consequences upon the balanced power and structure of our Republic.”

---

74. Precedent for Presidential appointment of a public prosecutor is found in the congressional reaction to the “Teapot Dome” scandal, involving allegations of personal enrichment and violation of law during the Harding Administration. A joint resolution passed by both Houses provided that “the President is further 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 . . . .” S.J. Res. 54, Feb. 8, 1924, ch. 16, 43 Stat. 5.


76. 343 U.S. 579 (1952). See also J. HAMILTON, HISTORY OF THE REPUBLIC OF THE UNITED STATES 34 (1859), quoting Alexander Hamilton: “Nothing is more common than for a free people, in times of confusion and violence, to gratify momentary passions, by letting into government principles and precedents which afterwards prove fatal to themselves.”

77. 343 U.S. at 634 (Jackson, J., concurring).