The Proposed Court-Appointed Special Prosecutor: In Quest of a Constitutional Justification

The Watergate episode brought to public consciousness the challenging question of how to limit executive control over prosecutions of executive officials without transgressing constitutional limits. Although the Constitution does not speak specifically to this problem, it is clear on at least two points. First, it vests the executive, not the legislature or the judiciary, with the power to enforce the law. Second, the provision for impeachment establishes the fundamental concept that the executive must be accountable to the public. The tension between these two principles is unavoidable: unless there are some limits to executive control of the mechanisms for law enforcement, the concept of accountability could be circumvented by a corrupt executive intent.

1. On June 17, 1972, agents of the Committee to Re-Elect the President were arrested while they were burglarizing the Democratic National Committee headquarters in the Watergate office complex. WATERGATE SPECIAL PROSECUTION FORCE, REPORT 4 (1975). The term “Watergate” refers to a “conglomerate of various illegal and unethical activities in which various officers and employees of the Nixon Reelection Committee and various White House aides of President Nixon” sought to destroy the integrity of the political process and to obstruct justice. SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES, THE SENATE WATERGATE REPORT 8 (1974) (statement of Sen. Ervin).


5. The founding fathers, acquainted with the English history of impeachment as a means of controlling corrupt Crown officers, considered the impeachment process a way of dealing with corruption and misconduct by high federal officeholders. The cumbersome impeachment process, perhaps appropriate for the 18th century, cannot serve as a meaningful check on corruption that may exist in the vast layers of government below the President. Removing Politics From the Administration of Justice: Hearings on S. 2803 and S. 2973 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 93d Cong., 2d Sess. 8 (1974) (statement of Sen. Cranston) [hereinafter cited as 1974 Hearings].

1692
Court-Appointed Special Prosecutors

upon obstructing the machinery of justice and the operation of the political process. The task for legislators who seek to ensure that the executive branch will not escape the reach of the law is to pinpoint the limits of the executive’s power to thwart prosecutions against itself—a task that, because of the absence of explicit constitutional provisions, requires striking a proper balance between the executive responsibility to enforce the law and the need to ensure that the law will be enforced against the executive itself.

Among the efforts to strike such a balance has been a flurry of legislative proposals for the creation of an independent office of special prosecutor authorized to investigate and prosecute executive wrongdoing. The most recent attempt is S. 555, which provides a mechanism for the appointment of independent temporary special prosecutors, at the request of the Attorney General, by a panel of five judges who would comprise a division of the United States Court of Appeals for

6. See, e.g., S. 495, 94th Cong., 2d Sess., 122 CONG. REC. S12,112 (daily ed. July 21, 1976). This bill would have established within the Department of Justice an independent Office of Special Prosecutor headed by a Special Prosecutor appointed by the President with the advice and consent of the Senate. The Special Prosecutor would have been appointed for a three-year term and would have been removable by the President only for extraordinary improprieties. The bill was passed with amendments by the Senate, id., but it died in the House, 94 CONG. Q. WEEKLY REP. 1362 (1977).


8. S. 555, § 592(c)(1).

9. Section 49(a) of S. 555 provides that five judges or Justices be assigned every two years to a division of the United States Court of Appeals for the District of Columbia, as a special panel for appointing temporary special prosecutors when needed. Section 49(d) authorizes the Chief Judge of the United States Court of Appeals for the District of Columbia to request that the Chief Justice of the United States designate and assign five federal court of appeals judges or Supreme Court Justices, one of whom would be a judge of the United States Court of Appeals for the District of Columbia, to the special panel. In assigning judges or Justices to sit on this panel, priority would be given to senior retired judges and senior retired Justices. Id. § 49(c). No more than one judge or Justice from a particular court could be named to the panel. Id. § 49(d). The legislation prohibits judges serving on the panel from sitting in any case brought by the special prosecutor. Id. § 49(f).
The District of Columbia. The bill's scheme would endow the Attorney General with wide discretion to determine whether to ask for appointment of the special prosecutor; after appointment, however, the Attorney General would exert no control except for a limited power to remove the special prosecutor for "extraordinary improprieties." The Attorney General would apply to the panel for appointment of a special prosecutor to investigate alleged federal crimes involving the President, the Vice President, a cabinet officer, or other specified individuals. He would also have to apply to the judicial panel for appointment of a temporary special prosecutor whenever he determined that the continuation of an investigation or the outcome of a prosecution "may directly and substantially affect the partisan political or personal interests of the President, the Attorney General, or the interests of the President's political party." If the panel disagreed with the Attorney General's judgment that such a conflict or appearance of conflict did not exist, it would be required to appoint a special prosecutor. A temporary special prosecutor appointed by the judicial panel would be authorized to exercise all investigative and prosecutorial powers vested in the Department of Justice and the Attorney General except the power to conduct wiretaps.

10. Id. § 49(a).
11. Id. § 592(b)(1); see note 13 infra.
12. S. 555, § 596(a). Under this section, a special prosecutor may also be removed for "malfeasance in office, for willful neglect of duty, for permanent incapacitation, or for any conduct constituting a felony." An action may be brought before the appointing panel to challenge the Attorney General's decision to remove the special prosecutor. Id. The legislation also provides that a particular office of special prosecutor may be terminated upon the submission by the special prosecutor of written notification to the Attorney General that his obligations have been fulfilled. Id. § 596(b)(1). The special appointing panel is also empowered to terminate offices of special prosecutor. Id. § 596(b)(2).
13. Before making the application, the Attorney General may first conduct a preliminary investigation in order to determine whether the allegations of criminal misconduct warrant further investigation and prosecution. Id. § 592(a).
14. The allegations may be relevant to any federal criminal law, other than a law whose violation would constitute a petty offense. Id. § 591(a).
15. Id. § 591(b)(1), (2) (President, Vice President, and cabinet members); id. § 591(b)(3), (4), (6) (all persons in Executive Office of President compensated at Level IV of executive schedule or greater, Justice Department officials compensated at Level III or greater, Assistant Attorneys General involved in criminal law enforcement, Director or Deputy Director of Central Intelligence, Commissioner of Internal Revenue, and campaign manager or chairman of President's election or re-election campaign). The special prosecutor would also supervise investigation and prosecution of members of Congress in cases involving receipt or acceptance of any valuable consideration from foreign governments for the purpose of influencing legislation. Id. § 592(e)(1).
16. Id. § 592(e)(1).
17. Id. § 592(e)(3)(C).
18. Id. § 594(a)(10). Among the special prosecutor's power would be "full power, and independent authority ... to conduct proceedings before grand juries and other investigations," "to participate in court proceedings and engage in any litigation including civil
Court-Appointed Special Prosecutors

This Note seeks to establish a principled constitutional justification for a court-appointed special prosecutor and to delineate the limits of his powers.\textsuperscript{10} It argues that these issues are best addressed through an appreciation of the varying interests of the actors and institutions involved at different stages in the criminal process. The Note contends that the separation of powers does not demand that the executive be free to control the investigation of executive wrongdoing or to obstruct the bringing of a valid indictment. It reasons that the principle of accountability can be viable only when investigations are made and information reaches the public. If the executive branch is not to be insulated from the pressures of the political system, the prosecutor must be free of executive control during his investigation of alleged corruption. Central to the Note is its recognition that the grand jury plays a major role in giving content to the basic assumption of the accountability concept: the premise that the public will be provided with the information necessary to alert them to alleged wrongdoing. By focusing on the grand jury's function as an independent body that can respond to executive wrongdoing and by recognizing the prosecutor's duties in aid of the grand jury's investigative function, the Note derives a compelling justification for court appointment of a special prosecutor empowered to investigate and bring indictments while functioning independently of the executive. The Note also argues that the provision in the special prosecutor bill that would, in effect, permit the grand jury to return indictments without executive concurrence is necessary to ensure executive accountability. Crucial to this claim is the argument that the reasoning of the 1965 case of \textit{United States v. Cox}\textsuperscript{20} is unpersuasive and should no longer be followed. Finally, the Note concludes that once information has been made public through an indictment, the political process can check abuse of executive prerogatives.

and criminal matters," "to appeal any decision of a court in any case or proceeding" in which the special prosecutor participates, and "to initiate and conduct prosecutions in any court of competent jurisdiction, frame and sign indictments, file informations, and handle all aspects of any case in the name of the United States." \textit{Id.} § 594(a)(1)-(5), (9).

19. This Note does not discuss the serious problems of implementing the special prosecutor legislation. For discussion of such practical difficulties, see \textit{Provision for Special Prosecutor: Hearings on H.R. 14476, H.R. 11357, H.R. 11999, H.R. 8281, H.R. 8039, H.R. 15634, and Title I of S. 495 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 3 (1976) (Sen. Ribicoff) (staff of Justice Department estimates that anywhere from 6 to 40 temporary special prosecutors could be required at any one time); id. at 11 (Sen. Kennedy) (danger of proliferation of temporary special prosecutors). Other unresolved questions raised by the special prosecutor legislation include selection and certification of lawyers to serve in a special prosecutor "pool" and accommodation of possible conflicts among special prosecutors with overlapping jurisdictions.

tive. At this stage, grand jury independence no longer serves as a basis for the special prosecutor's powers, and separation-of-powers considerations necessitate that prosecution be controlled by the executive, subject to the requirements of Rule 48(a) of the Federal Rules of Criminal Procedure. Hence the special prosecutor legislation is unconstitutional insofar as it empowers a court-appointed officer to make post-indictment prosecutorial judgments.

I. The Constitutional Framework

Because the prosecutor has traditionally been considered a part of the executive branch, the constitutionality of court appointment of a special prosecutor who would be independent of the executive is a separation-of-powers question. This separation-of-powers issue arises in the context of the meaning of the appointment clause, which provides that “Congress may by Law vest the Appointment of such


Debate about court-appointment of the special prosecutor takes place within the Madisonian arena. The problem is not whether there can ever be a mixing of powers and functions, but what the appropriate boundaries of the judicial and executive roles are. See Baker, The Proposed Judicially Appointed Independent Office of Public Attorney: Some Constitutional Objections and An Alternative, 29 Sw. L.J. 611, 675 (1975) (Senate Minority Leader, an opponent of court-appointed special prosecutors, acknowledging “areas of overlap and shared responsibilities” among three branches “arising from a system of checks and balances”).

1696
inferior Officers, as they think proper . . . in the Courts of Law . . . .”

Although this language appears to grant unlimited discretion to Congress, it is well settled that the doctrine of separation of powers narrows the reach of the appointment clause.

Recent discussions have regarded two theories, developed during the nineteenth century in other contexts, as touchstones for interpreting the appointment clause as it bears upon court appointment of the special prosecutor. The “most appropriate branch” theory argues that the appointing power should be exercised by the judiciary if that is “the department of the government to which the officer to be appointed most appropriately belong[s].” The “incongruity” theory supports court appointment of inferior officers when “there is no such incongruity in the [courts’ exercise of the appointing power] as to excuse the courts from its performance, or to render their acts void.”

The incongruity theory also asks whether “the appointment of the officers in question could, with any greater propriety, and . . . with equal regard to convenience, have been assigned to any other depository of official power.”

25. Ex parte Hennen, 38 U.S. (13 Pet.) 230, 258 (1839). In Hennen, the Court held that a statute empowering the district courts to appoint clerks was constitutional under the appointment clause. The theory of the case was discussed in Ex parte Siebold, 100 U.S. 371, 396 (1880), where the Court noted that the language in Hennen vesting the appointment power in the department to which the appointee most appropriately belonged was meant to guide rather than to limit congressional enactments under the appointment clause. See 1973 Hearings, supra note 6, at 370 (Prof. Paul Freund).
27. Id. at 398. In Siebold, the Court upheld a federal statute that authorized the circuit courts to appoint special deputy supervisors for congressional elections. The petitioners contended that the duties of the election supervisors were “entirely executive in their character” and that no power could be conferred upon the courts of the United States to appoint officers whose duties were not connected with the judicial branch of government. Id. at 397.

In rejecting the petitioner’s claim, the Court observed: “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 officers appertain.” But there was “no absolute requirement to this effect in the Constitution.” Id. Moreover, the Court noted that it would be difficult in many cases to identify the department to which an office properly belonged. The selection of the appointing agent was left to the discretion of the Congress. Id. at 397-98.

It has been argued that Siebold “should not be viewed as authorizing a totally un-
The two appointment clause theories are functional in that they require a balancing of the interests of the branches of government. But when these interests overlap, the appointment clause theories provide no clear answer unless one can differentiate the functional elements of the issue in question. More specifically, they cannot resolve the special prosecutor appointment controversy unless one distinguishes between the prosecutor's "executive" and "investigative" functions.28

limited delegation of appointive powers to the Federal judiciary." 1973 Hearings, supra note 6, at 350 (statement of Dean Roger Cramton). Dean Cramton contended that Siebold was merely an affirmation of congressional power to enact legislation pursuant to its duty to investigate the qualifications of its own members and did not involve criminal law enforcement. Id. at 351. In Siebold, the Court passed quickly over what was viewed as a minor objection in a case involving a major collision between the Federal Government and the States concerning the conduct of state elections in which Federal offices were on the ballot. Consequently, this case is hardly definitive authority for a dissimilar conflict between two branches of the Federal Government concerning the appointment of an officer to exercise criminal law enforcement functions.

Id. Siebold has also been distinguished on the ground that in that case, unlike the special prosecutor situation, "geographic proximity and necessity for quick action in appointing local election supervisors justified placing the appointing power in a local federal court." Baker, supra note 21, at 680 n.61; cf. Hobbs v. Hansen, 265 F. Supp. 902, 921 (D.D.C. 1967) (three-judge court) (Wright, J., dissenting) ("conflicting and ambiguous language in 19th century cases" should not preclude independent evaluation of appointment clause, with guidance of fundamental doctrines of constitutional structure).

28. Thus far, the special prosecutor debate has not been attuned to such a distinction. Typically, appointment clause arguments favoring court appointment have taken two forms. First, it is argued that the special prosecutor would serve as an officer of the court, 1973 Hearings, supra note 6, pt. 2, at 557-58 (memorandum of Profs. S. Breyer and P. Heymann), and that, therefore, it would be most appropriate that the appointing power be lodged in the judiciary. Second, it is argued that it is more incongruous for courts to appoint special prosecutors than it is for courts to appoint a wide variety of other officials—including marshals, temporary United States Attorneys, election supervisors, and members of the District of Columbia Board of Education. See, e.g., 1973 Hearings, supra note 6, at 342 (Prof. Paul Freund). Supporters of court appointment could similarly observe that courts have been empowered to appoint bankruptcy referees, Birch v. Steele, 165 F. 577, 586 (5th Cir. 1908), United States Commissioners, Go-Bart Importing Co. v. United States, 282 U.S. 444, 353 (1931), mental hospital overseers, Wyatt v. Stickney, 344 F. Supp. 373, 376 (M.D. Ala. 1972), modified, 503 F.2d 1305 (5th Cir. 1974), masters, Fed. R. Civ. P. 53(a), and expert witnesses, Fed. R. Evm. 706. Moreover, it would be incongruous to expect an officer to pursue wrongdoing diligently in the branch that appointed him. 1973 Hearings, supra note 6, at 20 (Prof. Archibald Cox). It has also been contended that Siebold's incongruity concept supports court appointment of the special prosecutor because the special prosecutor is more closely identified with the promotion of justice than are election supervisors, for whom Siebold allowed judicial appointment. Id. at 342 (Prof. Paul Freund).

Opponents of court appointment have also made two main points. First, they argue that since the special prosecutor is engaged in the enforcement of federal criminal laws, the most appropriate test of Hennen, 38 U.S. (13 Pet.) 230, 258 (1839), requires that his appointment be vested in the executive. See 1973 Hearings, supra note 6, at 350 (statement of Dean Roger Cramton); id. at 39 (staff memorandum on unconstitutionality of independent special prosecutor); cf. Watergate Reorganization and Reform Act of 1975: Hearings on S. 495 and S. 2036 Before the Senate Comm. on Govt' Operations, 94th Cong., 1st Sess., pt. 1, at 264-67 (1975) (statement of Philip A. Lacovara, former counsel to special prosecutor) (prosecution is inherently executive function); Bickel, On the Special Prose-
Courts have held that the prosecutor performs a number of functions that must be subject to executive control, such as decisions to go forward with prosecution, to grant witness immunity, and to plea-bargain. In contrast to these executive activities, the prosecutor performs investigative duties—those functions that under the constitutional scheme need not be carried out under executive control.

The distinction finds strong logical support in constitutional theory. The theory of checks and balances contemplates that the executive will be accountable to the people through such mechanisms as impeachment and the ballot box. For the citizenry to possess the information on which accountability depends, a suspect executive must not be allowed to obstruct processes that may yield damaging allegations. In short, when the executive is itself the target of inquiry, the executive

cutor, Yale L. Rep., Winter 1974, at 24 (“constitutional policy” dictates that special prosecutor must be in executive branch). Second, they argue that appointment of the special prosecutor would impose an incongruous duty upon courts because of the danger that it would tarnish the neutrality of the judiciary and assign it prosecutorial duties. Baker, supra note 21, at 681 (citing Nader v. Bork, 366 F. Supp. 104, 109 (D.D.C. 1973) (Geisel, J.)).


32. In a series of prosecutorial immunity cases, courts have taken note of a distinction between investigative and prosecutorial functions. See, e.g., Imbler v. Pachtman, 424 U.S. 409, 430-31 (1975); Helstoski v. Goldstein, 552 F.2d 564, 566 (3d Cir. 1977). The investigative/prosecutorial distinction in immunity cases concerns the scope of the prosecutor's authority rather than the need under certain circumstances to free the prosecutor from executive control.

33. The theory of checks and balances argues that abuse of power can best be prevented if positive checks are placed on powers of the branches of government. United States v. Cowan, 524 F.2d 504, 513 (5th Cir. 1975), cert. denied, 425 U.S. 971 (1976) (framers established system of checks and balances, where power checks power, in order to prevent abuse of power); M. Vile, supra note 21, at 18 (definition of checks and balances). The Madisonian conception of the separation of powers, see note 21 supra, by permitting a blending of functions, incorporates the notion of checks and balances.
must not control the prosecutor's investigative activities, lest the executive be insulated from the principle of accountability embodied in the Constitution.34

Although the justifications for independent investigation of the executive do not depend on the grand jury, that body supplies the vehicle for the prosecutor's non-executive, investigative functions. Analysis of the grand jury as an institution demonstrates the importance of investigative activity and the appropriateness of court-appointment under the appointment clause theories.

II. Prosecutor and Grand Jury

The role of the prosecutor as an aid to the grand jury indicates that court appointment of the special prosecutor is justifiable and does not unduly restrict executive power. The grand jury is traditionally an independent body whose existence is secured by the Fifth Amendment;35 it is subject neither to legislative nor to executive will. In its role as a “people's panel,”36 the grand jury serves two functions. As a shield,37 it protects the accused against the power of the executive38 by bringing indictments only upon a showing of probable cause.39 As a sword40—the role most pertinent to the special prosecutor debate—it provides a check on executive political corruption41 through its powers

34. For an approach that derives constitutional principles from inferences about structure, see C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969). In these lectures, Professor Black observes that “[t]here is . . . a close and perpetual interworking between the textual and the relational and structural modes of reasoning, for the structure and relations concerned are themselves created by the text, and inference drawn from them must surely be controlled by the text.” Id. at 31.

35. See U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .”)


41. Note, Discretionary Power in the Judiciary to Organize a Special Investigating Grand Jury, 111 U. PA. L. REV. 954, 959 (1963). In its very early history, the grand jury was an executive adjunct of the sheriff. This role soon changed to that of an agency that can inquire generally into the misconduct of public officers. Id. at 959; see Kuh, The Grand Jury 'Presentment': Foul Blow or Fair Play? 55 COLUM. L. REV. 1103, 1105-09, 1117
Court-Appointed Special Prosecutors

of investigation and indictment, thus providing information to the public and helping to ensure executive accountability.

To inquire effectively into executive corruption, the grand jury must be served by a prosecutor free to make independent judgments. When the grand jury investigates executive corruption, the need for a special prosecutor is most immediate, and in such situations the prosecutor's investigative obligations move in concert with the grand jury's needs. The role of the grand jury, and its relationship with the prosecutor, the executive, and the court, demonstrate that a court-appointed special prosecutor who serves the grand jury in the bringing of an indictment is constitutionally permissible.

A. Grand Jury and Prosecutor: Independence of the Executive

The grand jury's independent role as a weapon against wrongdoing in the executive has been dramatically demonstrated at times in our nation's history when, as an accusatory body, the grand jury has brought indictments against high public officials. But equally important, the grand jury checks political corruption through its powers as an inquisitorial organ. Courts have recognized that the grand jury's investigation of corruption has a constitutional basis, and that the grand jury possesses "independent legal authority" to investigate and (1955) (grand jury has developed into check on possible executive abuses); cf. United States v. Nixon, 418 U.S. 683 (1974) (President of United States not immune from grand jury subpoenas).

42. See, e.g., F. BUSCH, ENEMIES OF THE STATE 123 (1954) ("Teapot Dome" cases); WATERGATE SPECIAL PROSECUTION FORCE, supra note 1, at 155-58 ("Watergate" indictments).


44. See notes 45, 46 & 48 infra (citing cases).

45. Nixon v. Sirica, 487 F.2d 700, 712 n.54 (D.C. Cir. 1973). The court stated: We reject the contention, pressed by counsel for the President, that the Executive's prosecutorial discretion implies an unreviewable power to withhold evidence relevant to a grand jury's criminal investigation. The federal grand jury is a constitutional fixture in its own right, legally independent of the Executive. . . . If the grand jury were a legal appendage of the Executive, it could hardly serve its historic functions as a shield for the innocent and a sword against corruption in high places. Id. (emphasis added).

In the same footnote, the court remarked that "[a] practical, as opposed to legal matter, the Executive may . . . cripple a grand jury investigation by denying staff assistance to the jury . . . ." Id. (emphasis in original). But the court concluded that it was not its role to assume the "burden" of "eviscerating the grand jury's independent legal authority." Id. The court's view on the practical power of the Executive over the grand jury is inaccurate because it ignores the ultimate power of Congress to make appropriations and to override the veto of the President. See, e.g., H.R. 94, 95th Cong., 1st Sess. § 3330 (1977) (providing resources for independent grand jury inquiry).
assemble evidence of criminal activity without the consent of the executive. In this ongoing role as a "grand inquest" whose inquiries need not be those necessary for bringing indictments, and in its power to issue reports, the grand jury serves as a watchdog of government.

In this capacity, the grand jury assumes a posture of active vigilance quite distinct from its role in protecting a defendant against prosecution in the absence of probable cause. In either role, the grand jury must be independent of the executive. This independence, however, is threatened when the grand jury investigates the executive itself, for the danger is that the executive, through its control of the prosecutor's allegiance, will act to prevent the exposure of political abuse to public scrutiny.

The prosecutor, who serves as the grand jury's investigator and consultant on legal issues, is instrumental to that body's effectiveness as a


47. See, e.g., United States v. Calandra, 414 U.S. 338, 343 (1974) ("grand jury may compel . . . testimony of witnesses as it considers appropriate"); Bursey v. United States, 466 F.2d 1059, 1076 (9th Cir. 1972) (grand jury "decides what it shall investigate, which witnesses shall be called, and how the witnesses shall be interrogated").


The grand jury report has been criticized as a potential vehicle for harassment. See In re United Elec., Radio & Mach. Workers, 111 F. Supp. 858, 865-70 (S.D.N.Y. 1953) (court disapproved of grand jury report that publicly censured on basis of evidence not sufficient to warrant indictment, that portrayed individuals in derogatory context, and that did not provide victims with judicial forum in which to establish innocence); Dession & Cohen, supra at 710-11 (criticizing grand jury report). Under controlled circumstances, however, the grand jury report can serve an ombudsman function. For example, the grand jury may wish to indict yet be prevented from doing so when, following United States v. Cox, 342 F.2d 167 (5th Cir.), cert. denied, 381 U.S. 935 (1965), the prosecutor withholds his signature from the indictment. See In re Grand Jury January 1969, 315 F. Supp. 662, 678-80 (D. Md. 1970), discussed in note 82 infra. A second controlled circumstance for the issuance of grand jury reports exists when the report is sealed and issued for the benefit of impeachment proceedings. See In re Report & Recommendation of June 5, 1972 Grand Jury, 370 F. Supp. 1219, 1223-27, 1230 (D.D.C. 1974) (grand jury allowed to deliver information gathered to House Judiciary Committee in impeachment investigation of President since report drew no accusatory conclusions and deprived no one of official forum in which to respond). See generally Kuh, supra note 41, at 1124-29 (circumstances in which grand jury reports proper).

50. See R. BEN-VENISTE & G. FRAMPTON, STONEWALL 71, 246 (1977) (Watergate grand jurors took active role and provided prosecutors with list of witnesses they wanted to hear).
Court-Appointed Special Prosecutors

watchdog for political corruption. Indeed, the court recognizes the importance of the prosecutor as the grand jury’s legal adviser when it invites the grand jurors to complain to the bench if they conclude that the prosecutor has failed to provide assistance or advice. In this role as adviser to the grand jury, the prosecutor’s investigative function is of prime importance.

It is no doubt true that in practice the prosecutor often appears before the grand jury, not to serve the people’s panel, but to use its process on behalf of executive interests. The non-executive responsibilities of the prosecutor must, however, take priority when he is serving the grand jury, particularly in the context of executive accountability. When the political fortunes of the executive branch are not at stake, a clash between grand jury and executive interests is unlikely. But when the executive is under inquiry, there is a danger that an executive-appointed prosecutor who is loyal to the branch that endowed him with his office will neglect his constitutionally rooted investigative functions and thus undermine the grand jury’s established role as an independent check against executive corruption. The determination that the prosecutor in such instances should be aligned with the grand jury rather than with the executive is based on the essential difference between the roles played by the executive and the grand jury in the criminal process.

Executive involvement in this process is extensive and continues well beyond the point at which the grand jury’s functions have ended. There


53. See, e.g., United States v. Cleary, 265 F.2d 459, 461 (2d Cir.), cert. denied, 360 U.S. 936 (1959) (Grand jury is law enforcement agency). The conception of the grand jury as an “arm of the executive” has been succinctly set forth: “The show is run by the prosecutors—the Federal United States Attorney and his assistants. . . . The prosecutors decide what is to be investigated, who will be brought before the grand jurors and—practically and generally speaking—who should be indicted for what.” Frankel & Naftalis, supra note 49, at 9. In practice, the court often calls the grand jury into session at the prosecutor’s request. D. Mernitz, A Practical Handbook of Federal Grand Jury Procedure § 2:1 (1968).

Although in practice the prosecutor can have wide influence in grand jury proceedings, he cannot abuse the grand jury, and his powers before that body are limited. Thus, he cannot comment on the weight or sufficiency of the evidence. United States v. Wells, 163 F. 313, 325-26 (D. Idaho 1908). Moreover, he is not permitted at grand jury deliberations. Fed. R. Crim. P. 6(d). The existence of separate, and sometimes overriding, grand jury interests is demonstrated when the court dismisses an indictment because the prosecutor has acted in bad faith before the grand jury. See, e.g., United States v. Basurto, 497 F.2d 781, 786 (9th Cir. 1974); United States v. Estepa, 471 F.2d 1132, 1137 (2d Cir. 1972).
are many post-grand jury junctures—such as the plea-bargaining stage and the trial itself—at which executive concerns can be promoted by the prosecutor. Even if executive interests do not predominate at the grand jury stage, they may prevail later. For the grand jury, by contrast, there is no second chance. Unless the grand jury is effective in its investigations at the early stages of the criminal process, it will have little functional significance as a sword against corruption. The health of the political system itself may suffer as a result, for the grand jury stands as the last independent ombudsman in the process. If the prosecutor owes allegiance not to the grand jury but to the executive, the checks-and-balances principle of accountability may very well be subverted because the citizenry may be denied information necessary for informed governance. When the prosecutor appears before a grand jury investigating executive corruption, grand jury needs outweigh those of the executive, and the prosecutor must accordingly be aligned with grand jury and not executive concerns. It is thus essential that, when the executive is suspected of wrongdoing, the officer who serves the grand jury should be appointed by a body standing outside the executive branch.

B. Court Appointment

Because, at the investigation and indictment stages, the special prosecutor’s functions are limited to those more closely identified with grand jury process than with executive concerns, court appointment can be justified by either of the two appointment clause theories. Court appointment of the special prosecutor in his grand jury role is “most appropriate” on the theory that the grand jury is an “arm of the court.” The arm-of-the-court conception, and the consequent appropriateness of court appointment, are supported by the court’s powers to initiate grand jury deliberations and to supervise them once begun.

54. See note 109 infra.
55. See, e.g., In re Long Visitor, 523 F.2d 443, 447 (8th Cir. 1975) (federal grand jury is “an arm of the district court through which it derives its power”); United States v. Campanale, 518 F.2d 352, 366 (9th Cir.), cert. denied, 423 U.S. 1050 (1975) (grand jury “is an appendage of the court”).
56. See Fed. R. Crim. P. 6(a) (“The court shall order one or more grand juries to be summoned at such times as the public interest requires.”) The court also appoints the foreman and deputy foreman, id. at 6(c), hears challenges to individual grand jurors, id. at 6(b)(1), has the power to excuse a juror either permanently or temporarily, id. at 6(g), and determines when matters occurring before the grand jury may be disclosed “preliminarily to or in connection with a judicial proceeding,” id. at 6(e).
57. See Branzburg v. Hayes, 408 U.S. 665, 688 (1972) (“[P]owers of the grand jury are not unlimited and are subject to the supervision of a judge . . . .”); United States v. Stevens, 510 F.2d 1101, 1106 (5th Cir. 1975) (with regard to its function of investigation,
Court-Appointed Special Prosecutors

Thus, the judge charges the grand jurors\(^6^8\) and may instruct them as to matters of law.\(^6^9\) His assistance is essential to the success of grand jury investigations.\(^6^6\) Witnesses are summoned to attend and to give testimony by means of judicial process, and they may be compelled to testify after appearance by court order.\(^6^1\) The integrity of the grand jury, as an arm of the court, is protected by the judiciary's power to punish prosecutorial misconduct\(^6^2\) and to prevent abuse of the subpoena.\(^6^3\)

If the grand jury is viewed, not as an arm of the court, but rather as an independent institution that defies classification,\(^6^4\) the judicial branch may still be, simply by default, the most appropriate appointing instrumentality. This argument draws on the incongruity test as well: it is incongruous for the executive to appoint the official charged with investigating alleged executive wrongdoing. At the same time, history\(^6^5\)

"grand jury is essentially an agency of the court, and exercises its powers under the authority and supervision of the court"). The court is also authorized during or after deliberations to expunge unauthorized grand jury action. United States v. Briggs, 514 F.2d 794, 806-07 (5th Cir. 1975) (grand jury exceeded its power and authority in charging petitioners with criminal conduct without indicting them); In re Grand Jury Proceedings, 479 F.2d 458 (5th Cir. 1972) (court ordered expunction of parts of grand jury report relating to nonfederal subject matters and serving no federal purpose). Significantly, however, the judge may not be present when the grand jury is deliberating or voting. Fed. R. Crim. P. 6(d). Moreover, the court may not limit the scope of investigation. United States v. Calandra, 414 U.S. 338, 343 (1974); Bursey v. United States, 466 F.2d 1059, 1075 (9th Cir. 1972).


60. Brown v. United States, 359 U.S. 41, 49 (1959) (despite grand jury's "great independence in many areas," it is "powerless to perform its investigative function without the court's aid").

61. Id.

62. United States v. Chanen, 549 F.2d 1306, 1309 (9th Cir. 1977).

63. See, e.g., United States v. Dionisio, 410 U.S. 1, 11 (1973) (dictum) (court can invoke Fourth Amendment to deny unreasonably general grand jury subpoena duces tecum); Branzburg v. Hayes, 408 U.S. 665, 707-08 (1972) (subpoenas impermissible when undertaken not for purposes of law enforcement but in order to harass press); In re Black, 47 F.2d 542, 544 (2d Cir. 1931) (grand jury subpoena may not be used for ulterior purposes).

64. See, e.g., In re Dymo Indus., Inc., 300 F. Supp. 532, 533 (N.D. Cal. 1969) ("The grand jury is a creation of the Fifth Amendment and is not wholly identifiable with any one of the three traditional branches of government.");

65. Judges have held the appointment power since colonial times. A. VANDERBILT, THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE 113-20 (1953). Indeed, section 32 of the Draft Bill of the Federal Judiciary Act of 1789 provided that the office of Attorney General would be filled by the Supreme Court. C. Warren, NEW LIGHT ON THE HISTORY OF THE FEDERAL JUDICIARY ACT OF 1789, 37 Harv. L. Rev. 49, 108-09 (1923). The fact that the drafters entertained such a provision demonstrates that the notion of judicial appointment was not unheard of in 1789.

Moreover, the framers of the Constitution did not anticipate the creation of an executive department for law enforcement. The Attorney General was originally a legal adviser to the President, not the head of a prosecutorial arm of government. It was not until 1870
and state practice demonstrate that it would not be incongruous for a court to appoint the special prosecutor.

III. The Scope of the Special Prosecutor's Authority: The Cox Problem

Court appointment of the special prosecutor is not by itself sufficient to ensure that the executive will be held accountable for its misdeeds. If the grand jury, assisted by the special prosecutor, is to be an effective check on wrongdoing, it must be able to bring indictments against the executive. The indictment is crucial because it exposes alleged corruption to public pressure and subjects misconduct to the reach of legal process. The special prosecutor bill, by providing that the special

that the Department of Justice was organized and the Attorney General given control over all federal legal officers. H. CUMMINGS & C. MCFARLAND, FEDERAL JUSTICE 7, 20, 224-25 (1937); L. HUSTON, THE DEPARTMENT OF JUSTICE 4-8 (1967) (early legislators did not want to vest executive branch with enforcement power that could deprive citizens of their freedoms). Hence it would be a fallacy to argue that court appointment of the special prosecutor would disrupt the distribution of power that the framers incorporated into the Constitution. See 1973 Hearings, supra note 6, at 565 (testimony of Prof. Philip Heymann) (since prosecution was largely conducted by private citizens for 10 or 15 years after 1789, it appears that framers did not believe that this task had to be carried out by President). The historical argument, although suggestive, is not dispositive because it finds no specific constitutional support. Indeed, the failure of the final version of the Federal Judiciary Act of 1789 to provide for Supreme Court appointment of the Attorney General could have been a reflection of the belief that vesting such power in a court would violate the constitutional scheme.

66. Most state courts are authorized by statute to appoint special prosecutors when "the regular district attorney is absent, disqualified because of interest, or fails or refuses to perform his duties." Note, The Special Prosecutor in the Federal System: A Proposal, 11 AM. CRIM. L. REV. 577, 579-83 (1973) [hereinafter cited as Special Prosecutor]; see 1974 Hearings, supra note 5, at 362 (citing 42 states "whose statutes or cases have empow- ered judges to appoint special prosecutors"). See generally Note, Legal Methods for the Suppression of Organized Crime: Circumventing the Corrupt Prosecutor (pt. III), 48 J. CRIM. L. CRIMINOLOGY & POLICE SCIENCE 531 (1958). State courts have also invoked the "inherent power" doctrine as a basis for appointing special prosecutors. E.g., People ex rel. Lindsley v. District Court, 29 Colo. 5, 15-16, 66 P. 896, 898-99 (1901) (judge has inherent power to appoint special prosecutor to advise grand jury in place of district attorney implicated in crimes under investigation); State ex rel. Thomas v. Henderson, 123 Ohio St. 474, 478, 175 N.E. 865, 866-67 (1931) (court has inherent power to appoint special prosecutor to assist grand jury); Lizar v. State, 82 Okla. Crim. 56, 63-64, 166 P.2d 119, 123 (1946) (court has inherent power to appoint special attorney to preserve machinery of justice); see Special Prosecutor, supra at 580-82 (discussion of inherent power doctrine).

In Connecticut, the Supreme Court has upheld the constitutionality of a statute providing for judicial appointment of prosecutors. See State v. Moynahan, 164 Conn. 560, 225 A.2d 199, cert. denied, 414 U.S. 976 (1973) (statute did not violate separation of powers because state's attorney not merely executive officer).

67. Upon indictment, a court, at the request of the prosecuting attorney, may issue a summons ordering the defendant to appear before the court or a warrant for the defendant's arrest. Fed. R. CRIM. P. 9. A grand jury report, by contrast, does not subject the accused to the legal process. When a report is published, the accused may flee or the witnesses may escape the court's jurisdiction. Moreover, the statute of limitations may run

1706
Court-Appointed Special Prosecutors

prosecutor may frame and sign indictments, recognizes that the effectiveness of the grand jury can be promoted only if it is free to bring indictments without the consent of the executive.

A major challenge to the special prosecutor scheme is the contention that an indictment is valid only if signed by an executive official. Since the special prosecutor is neither appointed by nor answerable to the executive, it is argued, an indictment signed by the special prosecutor cannot be valid.

The crucial decision supporting this argument is United States v. Cox, a case that presented to the Fifth Circuit, sitting en banc, an issue new to the jurisprudence of the federal courts: whether Rule 7(c), which provides that an indictment "shall be signed by the attorney for the government," is a recognition that the validity of an indictment depends upon the approval of the executive. In Cox, a case from the civil rights era, a federal grand jury in Mississippi sought to indict for perjury two black government witnesses in a voting rights case against a local registrar. The United States Attorney, following instructions from then-Acting Attorney General Nicholas deB. Katzenbach, refused either to prepare or to sign any such indictment. District Judge Harold Cox, who had ordered the United States Attorney to draft the indictments and to sign them, held him in contempt and imposed a jail sentence for disregard of his ruling.

On appeal by the government, a divided court overturned the judge's order requiring the United States Attorney to sign the indictment and
also reversed his contempt citation.\textsuperscript{76} Four of the seven judges held that Judge Cox could not compel the executive, as personified by the prosecutor, to sign the “draft indictment” and thus vitalize the instrument;\textsuperscript{77} a different four-three combination agreed that courts may order United States Attorneys to assist a grand jury by drafting “forms of indictment” according to the jury’s wishes.\textsuperscript{78}

Viewing the case in its civil rights context,\textsuperscript{79} one can only applaud the fact that, as a result of Cox, the two government witnesses were spared the burden of a trial.\textsuperscript{80} It is unfortunate, however, that in its effort to reach a holding that freed the executive from the obligation of going forward with prosecution, the court\textsuperscript{81} was not more respectful of the grand jury’s special role as a guarantor of executive accountability. In Cox the grand jury had been operating as a screening device protecting citizens, not as an investigative mechanism for exposing political wrongdoing. Nonetheless the Cox holding that executive concurrence, as embodied in the prosecutor’s signature, is essential to an indictment’s validity was later decisive in thwarting a grand jury’s desire to issue indictments against corruption.\textsuperscript{82}

\textsuperscript{76} Id. at 172. There were four opinions in the case. Judge Jones wrote the opinion for the court, in which Chief Judge Tuttle fully joined. Id. at 169-73. Judge Brown wrote a separate concurring opinion, id. at 182-85, and Judge Wisdom wrote a special concurrence, id. at 185-96. Judges Rives, Gewin, and Bell joined in an opinion concurring in part and dissenting in part. Id. at 173-81. The dissenters would have affirmed the judgment of civil contempt against the United States Attorney. They concurred, however, with the majority’s procedural rulings, which denied the issuance of a writ of prohibition barring Judge Cox from enforcing his order and dismissed the appeal of the Acting Attorney General from that order.

\textsuperscript{77} Id. at 172 (Tuttle, C.J., and Jones, Brown, and Wisdom, JJ.).

\textsuperscript{78} In his separate concurrence, Judge Brown argued that the United States Attorney is required to draft forms of indictment upon the request of the grand jury. 342 F.2d at 182. The three dissenters, Judges Rives, Gewin, and Bell, agreed with this position but went further in their holding that the United States Attorney is required to sign any indictment that may be found by the grand jury. Id. at 181.

\textsuperscript{79} There can be no doubt that the civil rights era of the 1960s was a great chapter in American history, a period when the ideal of law as an agent for justice was given substance. S. Lawson, Black Ballots: Voting Rights in the South, 1944-1969 (1976). The success of the federal effort is all the more impressive when one considers the attitudes of some of the federal judges. See C. Hamilton, The Bench and the Ballot: Southern Federal Judges and Black Voters 132-35, 155-56 (1973) (comparison of Judge Frank M. Johnson, who was sympathetic to civil rights enforcement, with Judge Harold Cox, who was uncooperative).

\textsuperscript{80} In his special concurrence, Judge Wisdom noted that the government witnesses, if prosecuted, ran “the risk of being tried in a climate of community hostility.” 342 F.2d at 196.

\textsuperscript{81} Throughout this Note, the phrases “the Cox court,” “the court,” or “the Cox opinion” are meant to signify the views embodied in the opinion written by Judge Jones for the court.

\textsuperscript{82} In 1970, a Baltimore grand jury investigating possible corruption in connection with federal construction projects wanted to vote indictments. In re Grand Jury January 1969, 315 F. Supp. 662 (D. Md. 1970). Two United States Attorneys agreed with this conclusion but were forbidden to sign the indictments by higher officials in the Justice
of the grand jury as the people's ombudsman is to retain any vitality, the Cox argument must be rejected. The prosecutor's signature should be considered irrelevant to an indictment's validity because the grand jury has the power to indict without executive concurrence; the executive, however, may move under Rule 48(a) to have the court dismiss the indictment.\textsuperscript{83}

In concluding that the signature rule required ultimate prosecutorial control over the bringing of indictments, the Cox court engaged in a process of reasoning that might be described as "backward tracking"; it reached its holding indirectly by arguing from assumptions about the breadth of prosecutorial discretion and the nature of Rule 48(a). Regrettably, the court considered the grand jury solely in terms of its role as a shield for the accused and did not recognize its function as an affirmative check on political corruption in the executive. This narrow conception of the grand jury, implicit in the court's view of the nature of prosecutorial discretion, permitted the Cox court to arrive at its mistaken holdings with respect to Rules 7(c) and 48(a). The opinion further erred in its failure to give appropriate attention to the traditional role of the prosecutor's signature on an indictment.

1. \textit{The Legislative History of Rule 7(c)}

Though the main issue in Cox was the significance of the signature requirement of Rule 7(c), the court opinion made no attempt to establish whether case law supplied the signature with substantive importance. In fact, it is clear that the Cox holding that a signature is necessary to vitalize an indictment fundamentally alters the traditional prosecutor-grand jury relationship.

a. \textit{Common Law Roots of Rule 7(c)}

At early common law, in an age when even prosecution for criminal offenses was initiated by private parties,\textsuperscript{84} the prosecuting officer neither attended grand jury sessions nor signed indictments.\textsuperscript{85} With Department. \textit{Id.} at 678. The court held that Cox controlled and that the grand jury could not indict without the prosecutor's signature. \textit{Id.} at 674.

\textsuperscript{83} This conception is essentially the one posited in the dissenting opinion of Judges Rives, Gewin, and Bell, 342 F.2d at 179-80. The dissenters, however, did not suggest how they would have dealt with a Rule 48(a) motion had it been before them. \textit{See} note 109 \textit{infra}.


\textsuperscript{85} State v. Reed, 67 Me. 127, 129 (1877); State v. Farrar, 41 N.H. 53, 60 (1860); Brown v. Commonwealth, 86 Va. 466, 468, 10 S.E. 745, 746 (1890). The private prosecutor was often required to endorse the indictment because in specified circumstances he was liable to pay the costs of frivolous, malicious, or unsuccessful proceedings. 1 J. \textit{Bishop}, New
the advent of public prosecution and the collaboration of the grand jury and the prosecutor, the inclusion of the prosecutor's signature on the indictment became common practice and was even required by some state statutes.\textsuperscript{86} State cases indicate that the signature was regarded as a ministerial function.\textsuperscript{87} Although state precedent does not directly address the problem of a conscious refusal to sign in an attempt to thwart the grand jury's decision to bring an indictment, dicta support the principle that since the grand jury is a distinct and autonomous body, its power to indict cannot depend on the consent of the prosecutor.\textsuperscript{88}

Federal cases decided prior to Rule 7(c) express a similar conception of the signature. Although not arising out of situations in which the executive sought to stifle grand jury decisions, they are enlightening in that they treat the signature either as a certification to the court that the prosecutor has performed his required service to the grand jury\textsuperscript{89} or as a mode by which the prosecutor attests the action of the grand jury.\textsuperscript{90} This latter view finds support in the language of a Supreme Court opinion.\textsuperscript{91} History thus does not support the Cox notion that the signature was necessary at common law to vitalize the indictment. Moreover, Rule 7(c) did not depart from the common law understanding.

\textsuperscript{86} 1 J. Bishop, supra note 85, § 703; W. Clark, supra note 85, § 48.

\textsuperscript{87} The prosecutor's signature has been held to be the work of the grand jury's "scribe." See Duke v. State, 11 Ind. 557, 563 (1858). It has also been described as an instrument for identification. See People v. Foster, 60 Misc. 3, 15, 112 N.Y.S. 706, 714 (Ct. Gen. Sess. 1908).

\textsuperscript{88} See, e.g., State v. Reed, 67 Me. 127, 129 (1877) (if signature were essential to validity of indictment, grand jury would be completely under control of prosecuting attorney); People v. Foster, 60 Misc. 3, 19, 112 N.Y.S. 706, 716 (Ct. Gen. Sess. 1908) (power of grand jury to indict not dependent upon consent of district attorney); cf. Anderson v. State, 5 Ark. 444, 453 (1844) (valid indictment need only be found by grand jury and endorsed by foreman); State v. Squire, 10 N.H. 558, 560 (1840) (indictments found solely by grand jury).

\textsuperscript{89} United States v. McAvoy, 26 F. Cas. 1044 (C.C.S.D.N.Y. 1860) (No. 15,654); see United States v. Sheffield Farms Co., 43 F. Supp. 1 (S.D.N.Y. 1942) (signature only matter of form, not going to substance of indictment).

\textsuperscript{90} See Miller v. United States, 300 F. 529, 536 (6th Cir. 1924) (by implication).

\textsuperscript{91} See Crowley v. United States, 194 U.S. 461, 475 (1904); The indictment embodies charges made by grand jurors, and the signature of the United States Attorney merely attests the action of the grand jury, whereas an information rests upon the responsibility of the attorney representing the Government, and imports an investigation of the facts by him in his official capacity. By definition, an indictment is an accusation found by the oath of 12 jurors. An information is the allegation of only a single individual, the prosecuting attorney. Weeks v. United States, 216 F. 292, 293 (2d Cir. 1914). On the use of indictment and information, see Fed. R. Crim. P. 7(a) (Indictment and Information) (capital offense may not be prosecuted under information, but if indictment is waived, an offense that may be punished by imprisonment for term exceeding one year or at hard labor may be prosecuted by information).
b. Rule 7(c)

Before the adoption of Rule 7(c) in 1946,92 there was no federal requirement that the prosecuting officer sign his name on the indictment.93 If the signature requirement of Rule 7(c) was meant to institute a departure from established practice, one might have expected the Advisory Committee Notes to so indicate; they are, however, silent on this question.94 The claim that Rule 7(c) establishes the necessity of executive concurrence is further undermined by examination of earlier drafts of the rule, which suggest that the inclusion of the signature language in the final draft may have been inadvertent.95

93. Miller v. United States, 300 F. S529, 536 (6th Cir. 1924).
94. Fed. R. Crim. P. 7(c), Notes.
95. At the time of the adoption of the Federal Rules of Criminal Procedure, the indictment form typically stated that "the grand jurors ... accuse ..." The signature of the prosecuting attorney was not included in the form of the indictment. ALI Code of Criminal Procedure § 152, at 69-70 (6th draft 1931) (model section); see id. at 537 (typical indictment forms provided by state statutes). By contrast, the information form stated that the prosecuting attorney makes the accusation. See id. § 153 (model section); id. at 537-38. The signature of the prosecuting attorney was required on the information. See id. § 151, at 69 (model section); id. at 535-37 (typical state information forms required verification by prosecuting attorney). The differences in the prosecutor's role in the preparation of an information and an indictment, articulated in Crowley v. United States, 194 U.S. 461, 475 (1904), see note 91 supra, make it understandable that his signature should be essential to an information's validity, though not necessary for an indictment.

The early drafts of the Federal Rules of Criminal Procedure reveal a conception of the prosecutor's signature that conformed to the practice just described. Rule 8 of the Preliminary Draft, Fed. R. Crim. P., Preliminary Draft with Notes and Forms (1943), entitled "The Indictment and the Information," contained six sections. Section (c), Signing and Filing of Information, stated: "The information shall be signed by the attorney for the government and may be filed only by leave of court." Id. at 28. Section (d), Nature and Contents, stated: "The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It need not contain a formal commencement, a formal conclusion, or any other matter not necessary to such statement ...." Id. In short, the preliminary draft required a prosecutor's signature only on an information.

In the final version of the rule on indictment and information (current Rule 7), the requirement of obtaining leave-of-court to file an information was abolished; hence, section (c) of Rule 8 of the preliminary draft—Signing and Filing of Information—was omitted. Instead, the signing requirement was incorporated into section (c) of Rule 7, a provision that, like section (d) of the analogous draft rule, refers to both the indictment and the information. Rule 7(c) now states:

Nature and Contents .... The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement.

Fed. R. Crim. P. 7(c) (emphasis added). The argument could be made that in their search for economy of language, the drafters inadvertently transposed a phrase from an abolished section (Rule 8(c) of the Preliminary Draft); thus a signature requirement that had applied only to the information could now be taken to refer to both the indictment and the information. Unfortunately, subsequent proceedings on the rules make no mention of the attorney's signature. See 6 New York University School of Law Institute, Federal Rules of Criminal Procedure, With Notes and Proceedings (1946).
Cases interpreting Rule 7 show no recognition of a change. They continue to speak only of the “authenticating” function of the prosecutor’s signature. With the exception of Cox and its limited progeny, these cases do not discuss the significance of the signature in the wider, more fundamental context of executive-grand jury relationships because they arise out of situations in which there is no divergence of interest between the prosecutor and the grand jury. But like the pre-Rule 7 cases, they neither support the Cox holding nor conflict with the established conception of the indictment as an instrument given life by the grand jury alone.

2. Cox and Prosecutorial Discretion

The lack of support from precedent and legislative history would not of course be determinative if the Cox interpretation of Rule 7(c) were constitutionally mandated. Indeed, the holding that the executive can frustrate the grand jury’s desire to indict rests on a premise that “[i]t follows, as an incident of the constitutional separation of powers, that courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.” This view, however, is incorrect and, moreover, led the court to a further error with respect to Rule 48(a).

a. The Mistaken Assumption

Cox’s basic assumption of absolute prosecutorial control has not withstood the test of time. Judicial intervention in plea-bargaining cases, for example, demonstrates that there are limits to the execu-

96. See, e.g., United States v. Keig, 334 F.2d 823, 827 (7th Cir. 1964), rev’d on other grounds, United States v. Cleveland, 477 F.2d 310, 316 (7th Cir. 1973) (signature necessary only as evidence of authenticity of indicting document); Wheatley v. United States, 159 F.2d 599, 600 (4th Cir. 1946). The Cox dissenter also believed that the signature serves only an authenticating function. 342 F.2d at 177 (Rives, Gewin, and Bell, JJ., dissenting).


98. In the typical scenario, an indictment is found and filed in court without the prosecutor’s signature. The prosecutor tries the case, the defendant is convicted and then challenges the conviction because of the absence of the prosecutor’s signature. See, e.g., United States v. Keig, 334 F.2d 823 (7th Cir. 1964), rev’d on other grounds, United States v. Cleveland, 477 F.2d 310, 316 (7th Cir. 1973); cf. United States v. Vanc, 256 F.2d 82 (6th Cir. 1958) (defendants argued indictment invalid because signed by Assistant U.S. Attorney and not by U.S. Attorney).

99. 342 F.2d at 171. The Cox court, however, made no attempt to define discretion.

100. See Santobello v. New York, 404 U.S. 257 (1971) (denial of due process for new prosecutor to refuse to honor predecessor’s promise that had induced a defendant’s guilty plea); United States v. Ammidown, 497 F.2d 615, 622 (D.C. Cir. 1973) (trial judge may withhold approval of guilty pleas when “the action of the prosecuting attorney is such a departure from sound prosecutorial principle as to mark it an abuse of prosecutorial discretion”); cf. Bordenkircher v. Hayes, 98 S. Ct. 669 (1978) (“undoubtedly [there are] constitutional limits” on exercise of prosecutorial discretion).
tive's control over criminal prosecution. More fundamentally, the court's concept of absolute prosecutorial discretion was based, at least in part, on a misapplication of precedent. The cases cited in the Cox opinion and Judge Wisdom's concurrence do not deal with the question of whether the executive can ignore at will the grand jury's decision to indict.\textsuperscript{101} Some of these "authorities" address situations in which the executive is pitted not against the court or the grand jury, but against private individuals.\textsuperscript{102} The courts have upheld prosecutorial

\textsuperscript{101} The "controlling" cases cited in Cox can be found at 342 F.2d at 171 n.8. In actually, they are irrelevant. For example, the federal cases cited, Dear Wing Jung v. United States, 312 F.2d 73 (9th Cir. 1963), and Sweptson v. United States, 289 F.2d 166 (8th Cir. 1961), cert. denied, 369 U.S. 812 (1962), merely deal with relations between prosecutors and administrative agencies. In Dear Wing Jung, the court simply stated that a defendant in a prosecution for false and fraudulent representation could not ask the trial court to subpoena the documents of the Immigration and Naturalization Service concerning alleged prosecution lists, since the decision whether to prosecute in the first place rested not with the Service but with the United States Attorney. See 312 F.2d at 75. Similarly in Sweptson, the court merely held that the United States Attorney was not bound by proceedings before the United States Commissioner. 289 F.2d at 170. People v. Florio, 301 N.Y. 46, 92 N.E.2d 881 (1950), cert. denied, 369 U.S. 812 (1962), also has no bearing on Cox. Florio deals with the prosecutorial role in recommending indictments, and, in fact, upholds the grand jury's competence in choosing among statutes upon which indictments are based.

Judge Wisdom also cited cases that do not stand for the proposition that the prosecutor may freely disregard the grand jury's desire to indict. 342 F.2d at 192 (citing United States v. Thompson, 251 U.S. 407 (1920); Goldberg v. Hoffman, 225 F.2d 463 (7th Cir. 1955)). In Goldberg, the Government was prosecuting pursuant to a grand jury indictment and the court dismissed, for lack of jurisdiction, the accused's petition for mandamus to the Attorney General and Assistant Attorney General to compel them to withdraw the indictment. In Thompson, the Court refused to quash an indictment covering matters that had been submitted to and ignored by one grand jury and were then resubmitted to another grand jury without leave-of-court. Thompson is not persuasive because it does not involve the prosecutor's control over bringing indictments, as in Cox, but deals with the right of the Government to go forward with prosecution when it so desires. Indeed, the case constitutes an affirmation of prosecutorial dependence upon grand jury approval.

Two other cases presented by Judge Wisdom, 342 F.2d at 191, to support absolute prosecutorial discretion have been superseded by Rule 48(a). The two cases—the Confiscation Cases, 74 U.S. (7 Wall.) 454 (1869), and United States v. Woody, 2 F.2d 262 (D. Mont. 1924)—stood for the old common-law rule that the public prosecutor may enter a nolle prosequi without any action by the court. However, as is stated in the Advisory Committee Notes to the Federal Rules of Criminal Procedure, Rule 48(a) changed the old rule in the federal system. The Notes indicate that the Confiscation Cases and Woody have been superseded by Rule 48(a).

\textsuperscript{102} For example, the Cox opinion cited Hassan v. Magistrates Court, 20 Misc. 2d 509, 191 N.Y.S.2d 238 (Sup. Ct. 1959), and Murphy v. Summers, 54 Tex. Crim. 569, 112 S.W. 1070 (Crim. App. 1908). 342 F.2d at 171 n.8. In both Hassan and Murphy, the courts refused to grant mandamus when the petitioner sought to compel the prosecutor to initiate criminal proceedings. In neither case had indictments been found. Both cases were examples of unsuccessful attempts at a kind of private prosecution.

discretion in these circumstances in order to protect against the dangers of private prosecution, including circumvention of the grand jury. Far from supporting an alleged prosecutorial right to disregard the grand jury, the "private prosecution" cases cited in the *Cox* opinion and by Judge Wisdom attest to the importance of that body.

The *Cox* opinion's mistaken assumption of absolute prosecutorial discretion was also a product of the court's fundamental failure to appreciate fully the grand jury's role. Though the court recognized the grand jury's function as finder of probable cause, it did not consider the argument that, in light of the grand jury's historic role as a check on executive abuses, the checks-and-balances principle of accountability demands that the prosecutor not be allowed to disregard the people's panel. Given the factual context of *Cox*, the court probably viewed the issue before it as a judge-executive conflict rather than a grand jury-executive conflict. This perception, coupled with a narrow understanding of the grand jury's role, permitted the court to overemphasize the importance of protecting prosecutorial discretion at the indictment stage. Had the court recognized the checks-and-balances considerations in favor of grand jury independence, it might have been more inclined to strike a careful balance.

b. *Prosecutorial Discretion and Rule 48(a): The Nolle*

The failure of the *Cox* court to appreciate the importance of protecting the integrity of the independent grand jury is also reflected in

103. See *Nader v. Saxbe*, 497 F.2d 676, 679 n.18 (D.C. Cir. 1974) ("The federal courts have customarily refused to order prosecution of particular individuals at the instance of private persons."); cf. Comment, *supra* note 84, at 763 (American colonists turned away from private prosecution system of their English forebearers and turned to concept of public prosecutor because they "recognized a need to have criminal proceedings administered by impartial government officials rather than by interested private parties").

104. See *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 380 (2d Cir. 1973) (courts should not compel prosecution at instance of private parties in absence of indictment because such procedure evades grand jury, which serves "to protect the accused's reputation from public damage based upon insufficient, improper, or even malicious charges"); *Kennan v. McGrath*, 328 F.2d 610, 611 (1st Cir. 1964) (court held that state prisoner could not initiate criminal prosecution in his own name in federal court by complaint alleging that state officers had conspired to deprive him of rights, saying that to sanction such a private prosecution procedure "would be to provide a means to circumvent the legal safeguards provided for persons accused of crime, such as . . . indictment by a grand jury").

105. 342 F.2d at 171 ("The role of the grand jury is restricted to a finding as to whether or not there is probable cause to believe that an offense has been committed.")

106. See pp. 1701-04 *supra*.

107. See pp. 1707-08 *supra*.

108. See p. 1712 *supra*.

1714
Court-Appointed Special Prosecutors

its misinterpretation of Rule 48(a). Had the court perceived that Rule 48(a) represents a system of limitations on the executive designed to preserve the grand jury, it might not have concluded that the signature requirement of Rule 7(c) provides a vehicle for executive control.

The court argued that there has always existed some juncture at which the executive could freely prevent a criminal prosecution and that, before the adoption of the Federal Rules of Criminal Procedure in 1946, the Attorney for the United States could at his discretion enter an unreviewable nolle prosequi of a criminal charge at any time after indictment and before trial. Hence, if Rule 7(c) were not construed to preserve for the prosecutor a point of absolute freedom to prevent an indictment by withholding signature, then the requirement of Rule 48 that leave-of-court be obtained for dismissal of a pending prosecution might be an unconstitutional interference with prosecutorial discretion.

In essence, this argument infers from the prosecutor's previous unbridled use of the nolle a requirement that the executive be free to disregard a grand jury's decision to indict. The inference is unpersuasive because it mistakes a past practice for a constitutional justification. The power of prosecutors to invoke the nolle at will has never been subjected to a constitutional test. More fundamentally, the court failed to understand the origins and evolution of the nolle; this history does not countenance the outcome in Cox.

Prior to the adoption of Rule 48(a) in 1946, federal courts did follow the common law tradition of permitting the prosecutor to dismiss a case by filing a nolle prosequi without court approval. This practice, however, must be understood in light of its origins. The nolle can be traced to sixteenth-century England and a legal system in which criminal prosecutions were conducted entirely by private citizens, with the sovereign only a nominal party.

109. FED. R. CRIM. P. 48(a). ("The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.")

110. Nolle prosequi means "I am unwilling to prosecute."

111. 342 F.2d at 170-71.

112. Id. at 172.


tions were initiated by individuals seeking vengeance.115 The nolle was intended to be used only when the private system failed the public good; contrary to the Cox conception, it was not originally conceived as a device to be invoked against the grand jury. Indeed, it was reserved for only the “most unusual” cases.116

One might imagine that the public prosecution system in the United States would have obviated the need for the nolle prosequi. But the nolle did make the journey across the Atlantic,117 and, in contrast to the English practice, it was freely exercised in this country by a decentralized network of prosecutors.118 The scandals that often accompanied the extensive use of the nolle119 eventually led most states to limit prosecutorial exercise of the nolle, either through statute120 or judicial decision.121 Such restrictions, which usually required court approval of the nolle, restored and reinforced the power of the grand jury.

The Cox court did not recognize that on the federal level Rule 48(a) was a development consistent with state limitations on the nolle designed to protect the grand jury from prosecutorial disregard. It is true that, other than a statement by the Advisory Committee that Rule 48(a) conforms to the practice prevalent in many states,122 “[t]here is scant historical material as to its purpose.”123 Courts, however, have

115. R. MoLEY, POLITICS AND CRIMINAL PROSECUTION 150-51 (1929) (nolle intended to be used “to prevent grave injustice”); Note, The Nolle Prosequi and the Lesser Plea, 33 CORNELL L.Q. 407 (1948); Comment, supra note 114, at 997.
116. R. MoLEY, supra note 115, at 150; cf. P. Howard, CRIMINAL JUSTICE IN ENGLAND 136-37 (1931) (circa 1930 Attorney General invoked nolle not more than six or seven times a year).
117. R. MoLEY, supra note 115, at 151-52; Note, supra note 115, at 408.
118. R. MoLEY, supra note 115, at 151-52 (extreme decentralization of criminal justice administration in the United States was conducive to proliferation of nolle).
119. Id. at 152-55; Williams, Discretion in Prosecuting, 3 CRM. L. REV. 222, 226-27 (1956); Comment, Private Prosecution: A Remedy for District Attorneys’ Unwarranted Inaction, 65 YALE L.J. 209, 210 & n.7 (1955).
120. R. MoLEY, supra note 115, at 153; see Note, supra note 115, at 408 (New York legislature, reacting to widespread use and possible abuse, “early provided that the prosecuting attorney could no longer nolle prosequi an indictment without permission of the court”).
121. United States v. Cowan, 524 F.2d 504, 509 n.12, 509-10 (5th Cir. 1975), cert. denied, 425 U.S. 971 (1976) (before adoption of Rule 48(a), state judicial decisions gave courts role in “dismissal of a pending criminal proceeding by requiring an ‘order’ or ‘leave’ or ‘consent’ of court”); see, e.g., State v. Lauder, 11 N.D. 136, 145, 90 N.W. 564, 569 (1902) (“more modern rule” provides that “while the prosecutor may file with the court his reasons for not filing an information in a criminal action, it is the province of the court to determine . . . whether the case shall be prosecuted or dismissed”); Guinther v. City of Milwaukee, 217 Wis. 354, 258 N.W. 865 (1933) (nolle subject to judicial review).
122. FED. R. CRIM. P. 48(a), Notes (citing ALI CODE OF CRIMINAL PROCEDURE, Commentaries, at 895-97).
implied that the rule was designed, at least in part, to preserve the independence of the grand jury.124

The Cox opinion construed Rule 48(a) in a manner inconsistent with most other judicial interpretations. The court sought to limit the reach of Rule 48(a) by restricting its coverage to the defendant alone.125 It did so by implying that, in order to make a successful motion under Rule 48(a), the prosecutor need establish only that the dismissal was not for the purpose of subjecting a defendant to harassment by charging, dismissing and recharging the defendant, without placing him in jeopardy.126

Such an interpretation has not found general acceptance. With one possible exception,127 courts have uniformly required more: the government must show that it lacks sufficient evidence to warrant a prosecution128 or that trial would be impossible.129 Both of these grounds are predicated on the notion that the wishes of the grand jury can be frustrated only when changes in circumstances make prosecution frivolous or infeasible.130 Recently, courts have begun to enunciate a different criterion for dismissal that is also not limited to the protection of the defendant. Cases have held that motions under Rule 48(a) will be granted only after the court has weighed prosecutorial concerns against the "public interest."131 Under this public interest standard,

124. See United States v. Biddings, 416 F. Supp. 673, 675 (N.D. Ill. 1976) (denying government's motion under Rule 48(a) for dismissal of indictment based on court's conclusion that opposite result "would delegate to the prosecutor the right to decide between conflicting evidence and make a mockery of the grand jury system"); United States v. Doe, 101 F. Supp. 609, 611 (D. Conn. 1951) ("The court may not properly approve a dismissal of the entire case against any given defendant unless satisfied that the government lacks sufficient evidence to warrant a prosecution. Especially is this so where the matter is before the court on indictment [by grand jury] as distinguished from information.")

125. 342 F.2d at 183 n.6 (Brown, J., concurring) ("The Court seems to be in virtual agreement that this rule is for the protection of the defendant alone.") The Cox court's narrow understanding of Rule 48(a) may have stemmed, at least in part, from its limited conception of the grand jury as a mere screening mechanism.

126. Id. at 171.

127. Woodring v. United States, 311 F.2d 417 (8th Cir.), cert. denied, 373 U.S. 913 (1963), was cited by the Cox opinion as controlling authority. 342 F.2d at 171. It should be noted, however, that, in the factual context of the case, the Woodring court had to construe Rule 48(a) in terms of harassment and double jeopardy. There was no need for it to discuss the possible broader reaches of Rule 48(a).


131. See, e.g., In re Washington, 531 F.2d 1297, 1301-02 (5th Cir. 1976), vacated on other grounds sub nom. Rinaldi v. United States, 434 U.S. 22 (1977) (purpose of Rule 48(a) was
which more liberally accommodates the needs of the prosecution, the courts have been sensitive to the policy concerns of the executive in such key areas as plea bargaining and national security.

These strictures placed on resort to Rule 48(a) indicate an attempt to maintain a balance between the grand jury and the prosecutor. Although it is recognized that the prosecutor must have a broad prerogative to exercise policy judgments concerning the merits of prosecution, the grand jury cannot be disregarded at will.

It is clear, then, that the Cox holding, in its willingness to give the executive free rein to ignore the grand jury, runs counter to the policy of respect implicit in Rule 48(a). There are, however, additional reasons why Cox should be overturned. Not only does its spirit contravene the Rule 48(a) limitations, but its endowment of the prosecutor's signature with substantive impact is inconsistent with precedent, legislative history, and sound public policy. If, as Cox holds, the validity of an indictment is dependent upon executive concurrence

protection of both defendant and public interest in fair administration of criminal justice; issue was whether prosecution's motion to dismiss was "clearly contrary to 'manifest public interest'"); United States v. Cowan, 524 F.2d 504, 511 (5th Cir. 1975), cert. denied, 425 U.S. 971 (1976) (Rule 48(a) vests in the courts "the power and the duty to exercise a discretion for the protection of the public interest"); United States v. Biddings, 416 F. Supp. 673, 675 (N.D. Ill. 1976) (prosecutor's decision to terminate pending criminal prosecution will be "judicially disturbed" where "clearly contrary to manifest public interest"). See generally 45 Geo. Wash. L. Rev. 260, 266-67 (1977) (discussion of various Rule 48(a) standards).

132. See United States v. Ammidown, 497 F.2d 615, 620-21 (D.C. Cir. 1973) (decision to plea bargain presumptively executive, but under Rule 48(a), trial court not intended to serve merely as "rubber stamp" for prosecutor's "conclusory" statements).


134. In practice, it is unclear how or whether the government can be compelled to proceed in the event that its motion to dismiss is denied. Judge Weinfeld, in dictum, has stated that the court could not issue mandamus to compel prosecution because such action would violate the separation of powers. United States v. Greater Blouse, Skirt & Neckwear Contractors Ass'n, 228 F. Supp. 483, 489-90 (S.D.N.Y. 1964). This view was reiterated in United States v. Cowan, 524 F.2d 504, 511 (5th Cir. 1975), cert. denied, 425 U.S. 971 (1976) (dictum). The confusing history of the drafting of Rule 48(a) suggests a desire to give the courts some way of enforcing refusals to dismiss under the rule. The Cowan court noted that the preliminary drafts provided: "The Attorney General or the United States Attorney may file a dismissal of the indictment or information with a statement of the reasons therefor and the prosecution shall terminate." In the final version, the Supreme Court deleted the phrase "with a statement of the reasons therefor" and substituted the phrase "by leave of court." Id. at 510.

135. If Cox is overruled, then one of the circumstances permitting the issuance of grand jury reports, see note 49 supra, would be obviated since grand juries would have the power to force indictments.

Even if Cox were not overruled generally, the more limited claim that its holding should not apply where executive corruption is at issue remains persuasive. In such circumstances, the public's compelling interest in accountability tips the balance against executive concerns. See pp. 1699-1700 & 1703-04 supra.
as embodied in the signature, then the effectiveness of the grand jury's constitutional role as a check on executive corruption will be endangered.

In sum, the special prosecutor bill provision empowering the special prosecutor to sign indictments is constitutional, not because Congress may confer on a non-executive official a prerogative vested in the executive, but because the signature is irrelevant to an indictment's validity; the grand jury is entitled to return indictments without executive approval. The signature has only ministerial significance.

Thus, the proposed legislation, in providing that the special prosecutor sign indictments, does not in any way encroach upon the executive; it merely gives the special prosecutor a testimonial function in keeping with his service to the grand jury.

IV. The Post-Indictment Stage

Analysis of the constitutional limits of the court-appointed special prosecutor's power cannot end at the indictment stage: under the proposed legislation, the duties of the special prosecutor would not conclude with the signing of an indictment but would extend to carrying a case beyond indictment, through trial to judgment. In ascertaining whether the envisaged post-indictment responsibilities of a court-appointed special prosecutor possess constitutional support, it is important to avoid the error of excessive categorization. Thus far, debate about the special prosecutor has rigidified into the issue of whether either court or executive appointment is justified. Such discussion has been unsatisfactory because it has not recognized that the interests of various concerned actors and institutions change at different stages in the criminal process. When this more sensitive approach is adopted, it becomes clear that, although a balancing of interests justifies court appointment up through the return of a valid indictment, once an indictment has been brought, the balance shifts in favor of executive appointment.

The checks-and-balances principle of executive accountability can be meaningful only insofar as investigations of alleged wrongdoing are made and information reaches the public. In the pre-indictment stage, there is the greatest danger of a self-serving cover-up by the executive.

136. In light of the signature's ministerial significance, the court may order the prosecutor to sign the indictment. Courts may compel the performance of ministerial acts. See Wilbur v. United States, 281 U.S. 206, 218 (1930).

137. The special prosecutor would be empowered to exercise the prosecutorial functions of the Attorney General and the Department of Justice. S.555, § 594(a)(10); see p. 1694 & note 18 supra.
at the expense of an unsuspecting public. At that stage, the grand jury's needs and the prosecutor's investigative obligations combine in favor of court appointment.\textsuperscript{138} Any executive interests that might exist diminish in importance, for the executive may later move to dismiss the indictment under Rule 48(a).\textsuperscript{139} Once the indictment has been brought, the public's compelling interest in accountability has been served: the executive can then be subjected to political control and pressure.

Beyond indictment, there is a lessening of grand jury and prosecutorial investigative concerns and an increase in executive interests. The standard of proof needed for successful prosecution is not that of probable cause, but of proof beyond a reasonable doubt.\textsuperscript{140} Executive interests hitherto protected by grand jury secrecy may now be disclosed at trial to the detriment of the nation. In this different, post-indictment world, the predominance of executive concerns shifts the balance in favor of executive appointment of the special prosecutor.

Courts have agreed that the decision whether to go forward with prosecution or move for dismissal under Rule 48(a) is an essentially executive\textsuperscript{141} one, and that the policy considerations on which such a judgment is based fall primarily within the expertise of the executive branch.\textsuperscript{142} That these policy decisions are made by the executive, subject to review under Rule 48(a), is consistent with the system of checks on power that underlies the Constitution; in theory at least the executive will be answerable to the people directly through the ballot box.\textsuperscript{143}

The executive nature of the decision to stop or go forward with a prosecution illustrates the constitutional infirmity of appointment of the “post-indictment” special prosecutor by an entity other than the

\begin{footnotes}
\textsuperscript{138} See pp. 1699, 1702-04 supra.
\textsuperscript{139} See p. 1718 and notes 132-33 supra.
\textsuperscript{140} In re Winship, 397 U.S. 358, 364 (1970).
\textsuperscript{141} See United States v. Cowan, 524 F.2d 504, 513 (5th Cir. 1975), cert. denied, 425 U.S. 971 (1976); cf. In re Washington, 544 F.2d 203, 209 (5th Cir. 1976), vacated on other grounds sub nom. Rinaldi v. United States, 434 U.S. 22 (1977) (presumption exists that executive is best judge of when to terminate case, but can be rebutted by evidence of bad faith).
\textsuperscript{142} See note 29 supra (executive nature of policy decisions); cf. Nader v. Saxbe, 497 F.2d 676, 679 n.18 (D.C. Cir. 1974) (court, in analyzing customary refusal of federal courts to compel prosecution of individuals at instance of private persons, stated that decision not to prosecute was “executive” in character in that it required the “balancing” of “permissible” policy factors).
\textsuperscript{143} Cf. Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (executive decisions as to foreign policy are complex and should be undertaken “only by those directly responsible to the people whose welfare they advance or imperil”); Bickel, supra note 28, at 24 (prosecutor has “great opportunities to make discretionary decisions which in our present system are ultimately subject to political control”).
\end{footnotes}
Court-Appointed Special Prosecutors

The special prosecutor—who in effect would not be accountable to anyone—would be charged with making post-indictment prosecutorial decisions that courts have recognized as executive in character. It is not difficult, for example, to imagine scenarios in which the special prosecutor would be forced to make decisions involving national security or the relative merits of prosecutions. The proposed special prosecutor law is thus unconstitutional insofar as it empowers a non-executive official to make such post-indictment decisions. The bill remains constitutional, however, to the extent that it empowers the judiciary to appoint special prosecutors who would serve the grand jury through the point at which the indictment is brought.

Conclusion

The unconstitutionality of the post-indictment court-appointed special prosecutor does not vitiate the value of the special prosecutor bill. Those aspects of the bill that survive can still effectively serve the desired goal of exposing crimes. If the special prosecutor grand jury

144. Cf. Springer v. Philippine Islands, 277 U.S. 189, 202 (1928) ("executive functions" include enforcement of laws and appointment of agents charged with duty of such enforcement).

145. Conceivably, the special prosecutor would have to determine whether to prosecute high government officials and risk disclosure of national security secrets at trial. Cf. N.Y. Times, Nov. 1, 1977, at 25, col. 1 (President and Justice Department allegedly weighed considerations of national security and justice in deciding not to prosecute Richard Helms, former Director of CIA).


147. See S. 555, § 594(a)(1), (9) (special prosecutor empowered to assist grand jury in conduct of investigations and other proceedings, and to frame and sign indictments).

It might be argued that a scheme could be devised that would both permit the special prosecutor to continue past the indictment stage and also protect the interests of the executive. Under such a scheme, the court would invite the Attorney General at a pre-trial conference to submit arguments as to why the indictment should be dismissed under Rule 48(a). If the Attorney General did not submit arguments, the special prosecutor would automatically continue through the remainder of the criminal process. If the Attorney General accepted the court's invitation, the court could then either dismiss the indictment, or reject the claims of the executive and permit the special prosecutor to continue through trial to judgment. There are two essential weaknesses with such a scheme. First, the special prosecutor's discretionary decisions at trial, contrary to the constitutional plan, would remain unaccountable. Cf. Bickel, supra note 28, at 24 (it is not difficult to imagine dangers, if during McCarthy era, independent special prosecutor, impervious to political control and to changes in political climate, had been appointed to "root out subversives"). Second, the proposed procedure would not adequately protect the legitimate interests of the executive at the trial stage. The uncertainties of trial often make it difficult to predict the witnesses who will be called, the kinds of questions that may be asked, and the information that may be disclosed. Cf. Williams v. Florida, 399 U.S. 78, 109 (1970) (Black, J., concurring in part and dissenting in part) (great uncertainties and "guesswork" exist before trial).
brings an indictment, the Justice Department, upon regaining control of the proceedings, can refuse to proceed only by making a motion under Rule 48(a), which gives the court a measure of control over dismissal of the indictment. This scheme, especially when viewed in conjunction with the Attorney General's role in requesting court appointment of the special prosecutor, seems in theory to be an acceptable balance between the goal of preserving the most crucial aspects of executive control and that of forcing public recognition of, and affirmative action against, alleged crimes by executive officials.148

148. On the various problems of implementation raised by the special prosecutor legislation, see note 19 supra.