



PROVISION FOR SPECIAL PROSECUTOR

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HEARINGS

BEFORE THE

SUBCOMMITTEE ON CRIMINAL JUSTICE.

OF THE

E. Congress. House.
^
COMMITTEE ON THE JUDICIARY. ✓

HOUSE OF REPRESENTATIVES

NINETY-FOURTH CONGRESS

SECOND SESSION

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

TO PROVIDE FOR A SPECIAL PROSECUTOR

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JULY 23, AUGUST 26, AND SEPTEMBER 1, 1976
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PROVISION FOR SPECIAL PROSECUTOR

FRIDAY, JULY 23, 1976

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIMINAL JUSTICE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:35 a.m., in room 2141, Rayburn House Office Building, the Honorable William L. Hungate [chairman of the subcommittee] presiding.

Present: Representatives Hungate, Holtzman, Drinan, Wiggins, and Hyde.

Also present: Thomas W. Hutchison, counsel; Robert A. Lembo and Toni Lawson, assistant counsel; and Raymond V. Smietanka, associate counsel.

Mr. HUNGATE. The subcommittee will come to order.

The Subcommittee on Criminal Justice today is opening hearings on a topic that has been before the American public for 2½ years, ever since the Saturday night massacre of October 1973. The issue is whether a Special Prosecutor is necessary to investigate and prosecute criminal wrongdoing by government officials.

The Senate recently resolved this issue when it passed S. 495 by a lopsided vote of 91-5. The Senate bill creates a permanent Office of Special Prosecutor to handle criminal cases involving certain high-level Government officials. Criminal cases involving other government officials will be handled either by the Office of Government Crimes or the Office of Professional Responsibility, both part of the Justice Department.

This subcommittee, too, has previously addressed this issue. Shortly after the Saturday night massacre, the subcommittee began work on an independent special prosecutor bill. The subcommittee recommended a bill, H.R. 11401. The full committee reported the bill favorably on November 26, 1973. The Senate had a special prosecutor bill at about the same time, and it had some 55 cosponsors. As I recall, the Senate bill did not get out of committee.

An earlier version of the Senate bill in this Congress resolved the issue differently. It established a Government Crimes Division in the Justice Department to handle cases involving Government officials. However, if a conflict of interest arose, as the bill defined conflict of interest, then a temporary Special Prosecutor was to be appointed—either by the Attorney General or, if he failed to do so, by a special panel of judges. I introduced this earlier version of the Senate bill in order to provide the subcommittee with a bill upon which to begin working.

We will receive testimony today from several witnesses, all of whom, I am sure, will prove to be quite helpful to us in our work. We will hear first from several of the Senators whose hard work and legislative skill fashioned a bill that could pass the Senate with an overwhelming vote.

The Attorney General, whose role in the shaping of title I of S. 495 has been well publicized, will testify.

We are also fortunate to have with us the president-elect nominee of the American Bar Association, Mr. William B. Spann, Jr. Mr. Spann served as chairman of a special ABA committee to study Federal law enforcement agencies. That committee produced a long and thoughtful report, and a number of its suggestions are embodied in H.R. 14476. Mr. Spann will be accompanied by Prof. Herbert S. Miller, the expert consultant to the ABA special committee.

Our final witness is Mr. Charles Morgan, who will testify on behalf of the ACLU.

We appreciate the time constraints that are on our colleagues of the Senate today. We welcome today Senators Ribicoff, Kennedy, Percy, Weicker, and Javits.

Senator Ribicoff, you are scheduled first.

TESTIMONY OF HON. ABRAHAM A. RIBICOFF, A U.S. SENATOR FROM THE STATE OF CONNECTICUT; HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS; HON. CHARLES H. PERCY, A U.S. SENATOR FROM THE STATE OF ILLINOIS; HON. LOWELL P. WEICKER, JR., A U.S. SENATOR FROM THE STATE OF CONNECTICUT; AND HON. JACOB K. JAVITS, A U.S. SENATOR FROM THE STATE OF NEW YORK

Mr. RIBICOFF. Thank you very much, Mr. Chairman.

You will have to excuse me for leaving after my testimony. Senator Kennedy has caused a great deal of headaches to the Finance Committee. And at 10 o'clock this morning we are meeting to go over many items of the tax bill which Senator Kennedy feels are most horrendous. So I will give him the burden with Senator Weicker of answering your questions.

Mr. KENNEDY. I think I had better come with you.

Mr. RIBICOFF. Mr. Chairman and members of the committee, on Wednesday the Senate passed the Watergate Reorganization and Reform Act of 1976—S. 495—by an overwhelming vote of 91 to 5. That bill was based upon the recommendations of the Senate Watergate Committee. The first man to conceive this bill and introduce it in the last Congress was Senator Sam Ervin. We worked for 18 months on this legislation. There were 20 witnesses, 7 days of hearings, and many legal experts who gave us the benefit of their written opinions.

Our committee has been concerned with how we presently handle investigations and prosecutions of possible criminal activity by high level Federal Government officials. The serious deficiencies of our present system of handling these cases were highlighted by Watergate but were in no way caused by or limited to Watergate.

The Government Operations Committee held extensive hearings on this subject and initially considered a proposal for a permanent

Office of Special Prosecutor. Because of objections raised by the Department of Justice and others that there was not enough work to keep such an office busy and that a high caliber individual couldn't be attracted to such a position, the Government Operations Committee adopted the approach recommended by the American Bar Association for a statutory mechanism requiring the appointment of a temporary Special Prosecutor, when needed, by the Attorney General or the court.

During the last 3 weeks, Senators Percy, Javits, Weicker, Kennedy, and I, and our staffs have had extensive discussions with the Attorney General and his staff.

Mr. Chairman, I would like to pay public tribute at this time to my colleagues, Senators Percy, Javits, and Weicker of the Government Operations Committee, and Senator Kennedy from the Judiciary Committee, for their consistency, their persistence, their hard work and their many contributions to this measure.

Three major factors discovered in the course of these discussions led us to decide to return to our original concept of a permanent Special Prosecutor. First, we were told that there were many more presently active cases than we expected which would have required the appointment of a temporary Special Prosecutor under the committee's bill. The staff of the Justice Department informed us that anywhere from 6 to 40 temporary Special Prosecutors could be required at this time. Therefore the concern that a permanent Special Prosecutor would be bored or have nothing to do was not as serious a possibility as we thought.

Second, the Department expressed great concern about the actual operation of a mechanism requiring the appointment of a temporary Special Prosecutor at an early stage in an investigation. While the committee was prepared to offer amendments to minimize these problems, the legitimate concerns of the Department had to be weighed against any disadvantage of a permanent Special Prosecutor. And talking for myself, the more I studied the bill, the more uncomfortable I personally was with our concept of a convoluted, complicated way to appoint a Special Prosecutor. And the more I studied the bill, and I think my colleagues felt the same way, we realized that probably the best proposal was that of the President and the Attorney General to return to the permanent prosecutor concept that we had in our original bill.

And then the President indicated a willingness to support a permanent independent Special Prosecutor. The fair administration of justice should not be a partisan matter or a matter of one branch of Government pitted against another. I am pleased that every Republican member of the Senate Government Operations Committee is a co-sponsor of this legislation. Congress and the President working together can this year establish the necessary institutional framework to insure that whatever high level Government corruption which exists now or in the future will be investigated impartially, vigorously and, most importantly, fairly.

The compromise proposal which the Senate adopted is much less complex than the version of S. 495 reported by the Senate Govern-

ment Operations Committee. At this point I will briefly describe the major provisions of title I of the Senate passed bill.

The first part of the amendment establishes a permanent independent Office of Special Prosecutor within the Department of Justice headed by a Special Prosecutor appointed by the President by and with the advice and consent of the Senate. The Special Prosecutor would be appointed for a 3-year term, and would not be eligible for reappointment to that office.

No person could be appointed Special Prosecutor if he has at any time during the preceding 5 years held a high level position working on the campaign of any candidate for any elective Federal office.

A Special Prosecutor could only be removed by the President for extraordinary improprieties, for malfeasance in office, for willful neglect of duty, for permanent incapacitation, or for any conduct constituting a felony.

The Special Prosecutor would have jurisdiction to investigate and prosecute possible violations of Federal criminal law by a person who holds or who at the time of such possible violation held any of the following positions in the Federal Government: President, Vice President, Attorney General, or Director of the Federal Bureau of Investigation, any Cabinet Member or other high level Government officials compensated at a rate of at least level II of the executive schedule, all Members of Congress and all members of the Federal Judiciary.

The Attorney General is also required to refer to the Special Prosecutor any matter where the Attorney General determines that in the interests of the administration of justice it would be inappropriate for the Department of Justice—other than the office of Special Prosecutor—to conduct such investigation or prosecution. Thus in cases where the subject of an investigation is a top aide to the President or is a very powerful staff aide to a Member of Congress, and the Attorney General believes that he or the President has a very serious conflict of interest because of the appearance that partisan political consideration might influence their handling of the case, the Attorney General would refer such a case to the Special Prosecutor.

The authority of the Special Prosecutor is specifically set forth. It is based on the powers given the Watergate special prosecution force. The Special Prosecutor will be required to periodically report to the Judiciary Committees of the House of Representatives and the Senate. So, therefore, the Judiciary Committee would have the responsibility and authority for the oversight of this office.

The remainder of title I would create an Office of Government Crimes within the Justice Department.

The Office would be headed by a Director who is appointed by the President with the advice and consent of the Senate. The Director will serve at the pleasure of the President. And again no person may be appointed Director if he has actively participated in a political campaign on behalf of a candidate for elective office during the 5 years preceding the appointment.

The Office of Government Crimes would have jurisdiction over:

One: All criminal violations of Federal law by any past or present lower level Federal Government officer, employee or special employee if the violation relates to the person's Federal Government employment;

Two: Criminal violations of laws relating to lobbying, conflict of interest, campaigns and election to public office by any person except violations related to discrimination on the grounds of race, color, religion or national origin; and

Three: Any other matters the Attorney General believes are appropriate.

The Attorney General is specifically given the discretion of placing this Office of Government Crimes anywhere administratively within the Department. However, the Director of this office would also report directly to the Attorney General.

Finally, the amendment includes the President's proposal for establishing the Office of Professional Responsibility. This office now exists in the Department and this proposal will simply legislatively sanction what already exists.

The Office of Professional Responsibility does preliminary investigations on behalf of the Attorney General of wrongdoing by employees of the Department of Justice.

The members of this distinguished committee are well acquainted with the legal and policy issues involved in this legislation. I hope you will give serious consideration to title I of S. 495 as passed by the Senate as well as to H.R. 14476.

Please be sure that our committee and staffs will be more than happy to cooperate with you and any member of your committee if you feel that we can be of any assistance in providing material and information that we have as a result of our hearings and that we have accumulated on the general topic. And I would hope the House of Representatives will join with the Senate and the President in enacting a piece of legislation this year to insure that any high level Government corruption which occurs will be investigated in an apolitical, impartial manner in which the public can justifiably have confidence.

Thank you.

And, Mr. Chairman, I ask unanimous consent to be able to present to you various material and exhibits which I feel will be of help to this committee.

Mr. HUNGATE. Without objection it will be so ordered.

I very much appreciate your attendance here and the helpful testimony you have given us, Senator.

Mr. RUBICOFF. I would have time to answer one or two questions.

Mr. HUNGATE. Perhaps we should proceed with your questions, since you have to leave, and then we will proceed with the statements of the others, as a panel. That would be most useful.

Mr. Wiggins.

Mr. WIGGINS. Senator, welcome to the Judiciary Committee. I don't believe I have ever seen such a distinguished array of witnesses before this committee.

I would like you to discuss briefly the considerations in the Senate concerning the limitations which are imposed by this legislation upon the President's appointing authority. Under normal circumstances, as you know, the President nominates and the Senate in its wisdom can grant or withhold its advice and consent for any reason it deems appropriate. Now, here we draft in a statute limitations on the ability of the President presumptively even to nominate. He cannot nominate a

person and submit to the Senate a name for a renomination in the case of a special prosecutor, he is limited to one term. He cannot even send to the Senate a name of a high campaign official. And I think at least it raises a separation of powers issue. And I would like for you to discuss it.

Mr. RIBICOFF. First when Mr. Jaworski and Mr. Ruth appeared before our committee they were deeply concerned with the great power that would be lodged in the hands of a permanent prosecutor. It is a very delicate consideration to get a man who could abuse this office, who through ambitions could use it as a political springboard for notoriety. And from the civil rights standpoint, who is going to supervise the permanent prosecutor.

And consequently, it was felt that we did not want to establish for a long period of time any person in the position that would almost have more power than anybody in the Government to be able to investigate any high level official or any Member of Congress.

And consequently it was felt that in the case of an office of this type of sensitivity and delicacy that we should limit the time.

As a fallout of Watergate, what bothered us and what also might bother you gentlemen and ladies who played such a major role in the whole Watergate episode was the feeling that anyone in this position should not have been so politically involved with the executive branch or the legislative branch. There should be a restriction on this person to assure that he did not go into this office with a strong political bias. And frankly, this office of permanent prosecutor is an attempt by Government officials to lean over backward. And if you are reaching over backwards in the whole concept, you should lean over backwards as well with the person who is appointed.

Mr. WIGGINS. Senator, I understand the policy considerations that may make it undesirable to have such a person serve. And those policy considerations may prompt the Senator in a given case to withhold its consent to a nomination. But this by statute precludes even the nomination of such a person, and is an apparent erosion upon the powers of the President to send the name up to the Senate, which I have always regarded as within his exclusive prerogatives.

Now, you as Senators may elect not to confirm that person because of his prior political associations or because it is a renomination. But now we are intruding, as I see it, on the power of the President to make nominations. And it does raise at least constitutional questions. And if you would discuss it, I would certainly appreciate your rationale.

Mr. RIBICOFF. First I would say that the recommendation for this particular proposal was made by the American Bar Association. It was carefully studied. We will submit documents we have on opinions as to constitutionality. And may I say also, the recommendation was basically approved—we have made some changes—by the Attorney General. It was only during the past week that the Attorney General came in with a proposal. There was a great reluctance on the part of the Attorney General to accept many features of this bill. And it was only after considerable discussion between the Attorney General and ourselves that we arrived at this conclusion.

Now, my feeling is that the constitutionality problems raised by the Attorney General mostly went to the temporary Special Prosecutor

and referring it over to the circuit court to make the choice of the Special Prosecutors. They thought that was unconstitutional. But it did have the basic approval of the Attorney General, who has been very sensitive, and also President Ford. So we do feel that it is constitutional. And we will be glad to send over to your staff the backup material, Congressman Wiggins.

Mr. JAVITS. Congressman, I would like to say a word on that, on the constitutional question. It troubled me greatly because title I not only contains limitations on the power of appointment respecting the Special Prosecutor, but we have now included limitations on the appointment of the Attorney General, a Cabinet officer. These are even stronger limitations.

Nonetheless, after consideration I am persuaded that it is constitutional, because I believe that none of these appointments, none of these offices are constitutional offices, they are all statutory offices. And I believe that the Congress has the right to delimit the nature of the job. And having delimited the nature of the job, for example, the President is often asked to appoint from a list. There are various statutes on that. The President is often asked to appoint even in the case of regulatory agencies from people who have certain skills. And in my judgment, therefore, as we are laying out the job, we are statutorily creating and defining the job, we have the right to determine its qualifications. And the President's appointing power is statutorily modified.

Mr. HUNTGATE. Ms. Holtzman.

Ms. HOLTZMAN. Thank you, Mr. Chairman.

And welcome, Senator, and the other distinguished Senators.

First, I have a question about the jurisdiction of the Special Prosecutor as set forth in the bill as passed by the Senate. Looking at S. 495 as reported, it indicates much broader jurisdiction for the Special Prosecutor than the provisions that emerged in the final bill. For example, the reported bill would include any elected or appointed Federal officer or employee who was compensated at level III in the Executive Schedule, on criminal violations of Federal law by any elected or Federal Government officer or employee, and violations which indirectly relate to the official Government work of such officer or employee. Special Government employees would be covered as well as criminal violation of Federal laws relating to lobbying, campaigns, and the election to public office.

Mr. RIBICOFF. May I interrupt, Congresswoman Holtzman?

Ms. HOLTZMAN. Yes.

Mr. RIBICOFF. What you are reading from is the jurisdiction for the "Division of Government Crimes," not the jurisdiction of the Special Prosecutor. There are two offices here. We have an Office of Government Crimes—

Ms. HOLTZMAN. That is correct.

Mr. RIBICOFF [continuing]. And then we have a permanent prosecutor taking care of the higher level executive officials, Congresswoman, and so on.

Ms. HOLTZMAN. That is correct. But in any case, having brought these questions about the scope of jurisdiction to your attention, it seems clear to me that if this bill had been in effect during the Water-

gate case, the Special Prosecutor would not have had jurisdiction to prosecute any possible criminal action related to the Committee to Reelect the President, even though such action did in fact have very intimate connection to the criminal activity going on with the Government itself. Is there any reason that these broader areas of jurisdiction were deleted from the reported bill?

Mr. RIBICOFF. I am trying to recall whether we even discussed it.

Mr. JAVITS. We did.

Mr. RIBICOFF. I think what we have here, we allow the Attorney General to refer such a case that you mentioned to the Special Prosecutor. We leave that within the discretion of the Attorney General. And my feeling is, knowing Watergate and what public opinion does, if something came up similar to that involving the Committee to Reelect the President I would imagine that the Attorney General would refer that within his discretion to the Special Prosecutor.

Ms. HOLTZMAN. I thought that the purpose of this legislation was to create an institutional framework so that we wouldn't have to rely on the good faith of any Attorney General, and that the Government would respond regardless of the motivation of any particular Attorney General.

Mr. RIBICOFF. Well, Senator Javits said we did think about it. I don't think we had much of a discussion on this. But I could see, this is why we have two Houses. And if you come up with some thoughts and ideas that you think ought to go into this legislation, certainly this is something that we could discuss in conference. If you felt and the House felt that it should be nailed down that way instead of discretionary, the Special Prosecutor could have this type of jurisdiction. If he was going to be involved in the political staffs of anyone running for Federal office I think you would be giving him an awful lot of work. We do give the Office of Government Crimes jurisdiction to take care of political abuses, and violations of lobbying and conflict of interest laws. And the Office, we feel, could handle that without burdening the Special Prosecutor with that matter.

Mr. JAVITS. May I just add one further word. We did talk about the fact that the President's proposal took us down one step, that is, we didn't cover Assistant Secretaries, who are very numerous. And we felt that the desirability of the Special Prosecutor, which would have a much better constitutional standing than the way we had to handle it to begin with when we ran into the administration opposition, was worth what we were giving up, especially as we had buttressed the Office of Government Crimes which really, except for the fact that it was related in the Attorney General's Office in a more intimate way, also had a unique and special standing. So I think it was advised, and it goes to a very important point, I felt—and I am only going to speak for myself—that it was extremely desirable in the matter of the Watergate experience to, if we could, come to an agreed upon bill, and one could say, I think quite fairly, that this was one of the things we yielded, because as I say, the Office of Government Crimes is also a very significant office.

Nonetheless we did reduce the number of officials who would be subject to the top level treatment by the Special Prosecutor. But on the whole I was myself very aware of it. I thought it was worth it, considering the other aspects of what we were achieving.

Mr. WEICKER. I think in that regard, Mr. Chairman, during the deliberations it became clear that it could very well end up with a situation where, No. 1, you could have a multiplicity of special prosecutors, where anybody could make an allegation against anyone else, and you would trigger a mechanism which had very serious import just by the nature of the mechanism itself and the triggering of it. I don't think there is any question as to the fact that the bill is better where the people who would be subject to the investigations of a Special Prosecutor are very limited, and where you have only one Special Prosecutor.

I think it is essential that we do limit the scope both in the sense of the number of officials who would come under this bill and in the sense of the prosecutorial effort. There is no question in my mind that what we don't want to do is set up a mechanism that is going to spray the landscape time and time again in the future. And I am going to be very candid, I don't mind the Committee To Reelect the President as being a unit and similarly to high level wrongdoing coming under investigation. But I do not want the political parties of this country subject to a Special Prosecutor. I think that would be bad. I don't want to see a political committee come under this particular agency. I think that what we are trying to do here is to make certain that the American people believe that our justice system is going to apply as well to the highest ranking officials as to the littlest guy on the street. And I think we have achieved that in the sense of limiting the number of persons covered. But make no mistake, if a bill came out on the floor of the Senate to set up this mechanism vis-a-vis a political party, it would certainly draw my fire and my opposition, because I think it is an encroachment on civil liberties.

Mr. RIBICOFF. Mr. Chairman, the Senate went into session at 9:35. We have other Senators here to make statements. I have to go to Finance. May I ask that the other members be called on to make their statements, and the panel can answer questions, and then I could go to Finance.

Mr. HUNGATE. Without objection I believe that would be the most useful procedure.

And I know Senator Weicker has a prepared statement. We also have Senator Kennedy and Senator Percy.

Thank you very much, Senator, for your attendance.

Mr. Weicker.

Mr. WEICKER. Thank you, Mr. Chairman.

I will be very brief.

This committee needs no reminder of the national pain, torment, and anguish which was wrought by Watergate.

You know full well the extent to which our system of law enforcement and criminal justice was subverted by political influence in order that a few—who felt they were above the law—might escape the law.

In retrospect today, we can all sit back and take small comfort in the fact that the system worked. The system did work, but it was cumbersome.

Now, more than 4 years later, we are still repairing the damage, and our chief law enforcement agency—the Department of Justice—can still be subjected to the same political pressures and influence which came so close to preventing the truth from ever surfacing.

It is for this reason that your committee must now get on with the job of hammering the last nail in the coffin of Watergate.

In the future—generations from now—there may not be a Sam Ervin, or somebody like the chairman, Bill Hungate, or Peter Rodino to relentlessly and impartially pursue the truth. The only true safeguard against future abuses of power is through law—a law which creates an effective mechanism to guide the hand of justice with deliberate speed and vigor, without regard for position, politics, or philosophy.

Mr. Chairman, in conclusion I don't think that anything we can do as Members of the House or Senate could contribute more to the future of this country than to establish equality of law in this country. At the present time this is probably the greatest credibility gap that exists. It all started basically in the public view with the issue of Watergate. The time has come now to assure every American that there is one standard of justice, and it applies to all of us. In that sense, yes, it is going to be changed from the conditions of the past. But it is essential.

It is my feeling that when the day comes when democracy falls it will be from within and not from without. And I think that this effort, that which your committee has already made, and is prepared to do, and that is what is voted through the Senate, can make that one very solid and important contribution to the future.

I thank you. And I stand ready to answer your questions.

MR. HUNGATE. Thank you, Senator Weicker, I appreciate your argument and contribution here.

Senator Kennedy, please.

MR. KENNEDY. Thank you very much.

Mr. Chairman, I just want to acknowledge, as my colleagues have in the Senate, and as I think all the people of this country have, what this committee and you, Mr. Chairman, have meant to this country during the very difficult Watergate period. And this committee itself has probably given as much attention and thought to the issues which are involved in this legislation as any committee on any particular issue in recent times. So I appreciate, just as a member of the Senate Judiciary Committee, having the privilege of making just a brief comment.

As you are aware, Mr. Chairman, the initial development in the fashioning of the Special Prosecutor proviso was accomplished in the Judiciary Committee in the spring of 1973 really as a condition for the approval of the then Attorney General Richardson. And through the course of this particular legislation and subsequent legislation we did consider in the Judiciary Committee a variety of different options in the fashioning of Special Prosecutor legislation. We had extensive hearings. We have considered the broad implications of constitutional law which have been suggested by it. And we have attempted, members of that committee, to work with the excellent work that has been fashioned by Senator Ribicoff and Senator Weicker, Senators Javits and Percy in the development of this legislation. And all of us on that Judiciary Committee feel strongly that their efforts and their work have really been an enormous advantage to us as an institution and to the American people.

Specifically on two issues, I think Senator Ribicoff has mentioned the practical problems that I think many of us have seen in the devel-

oping of the triggering device for a temporary Special Prosecutor, practical problems that existed in the drafting of that legislation—the possibility of a proliferation of various Special Prosecutors. The problem is that you could have one or two or three or four or five temporary Special Prosecutors, or you could have new matters that arise brought to the first temporary Special Prosecutor, in which case, you are really in fact creating a permanent Special Prosecutor situation. And you also have the situation where, under the original version, the Attorney General basically makes the appointment without the kind of protections which we think have been in the final Senate version which provides at least a very substantial opportunity if the confirmation function is exercised by the Senate Judiciary Committee and the full Senate.

So it seems to us that the move toward a permanent prosecutor, for briefly those reasons, elaborated upon by Senator Ribicoff, and testified to by my colleagues, justifies the establishment of a permanent prosecutor, with a very clear understanding, as brought out by the questions of Mr. Wiggins, of a vigorous kind of exercise of responsibility and advice and consent by the Senate Judiciary Committee, and by the 3-year limitation in term, and by the fact that no Special Prosecutor is going to have to curry favor because they know they are not going to be reappointed, and the other provisions which have been added in terms of excluding those who have been involved in political campaigns.

It seems to me, Mr. Chairman, that really on that particular issue, which I know is going to be very basic to the whole discussion and debate, that the recommendations that have been made, included in the legislation, warrant the support of the members of this committee.

I know that there are perhaps those who question whether it is necessary or that we should pass this legislation in the final hours really of this session. I think it is warranted and justified and necessary. And I am glad that the Attorney General and the President have supported this effort in recent times and really have extended the jurisdiction even to include Members of Congress, which I think generally is a strengthening provision and one which the American people would expect.

So I am very hopeful that action will be taken, and that the members of this committee will give the kind of careful attention which I know they can to the recommendations that have been made by the Senate that we really pass this legislation at the earliest possible time.

Mr. HUNGATE. Thank you very much, Senator.

Senator Percy.

Mr. PERCY. Mr. Chairman, I would like to just limit my comments to one particular phase of the legislation, because the details have all been outlined for you.

I think the House, the Senate, the President, the administration, and particularly the Justice Department all have common objectives: To establish greater integrity at the highest levels of Government, and to increase public confidence in the vigorous and impartial administration of justice with respect to senior officials in all three branches of Government. I certainly applaud the addition of Members of Congress by the administration. It was a terrible oversight that we in Congress didn't do it ourselves. I think that during the course of

our deliberations we did have some misunderstandings, sometimes among ourselves and sometimes with members of the administration. But as I review what has transpired and what will result from our own conference, which I feel assured we will have this year, I am certain we will send a bill to the President on which we can unite, as I am certain that the House in its wisdom can find ways to improve and refine what we present to it now. I think what has transpired, despite some misunderstandings, has been in the best tradition of the American legislative system.

I have not seen one shred of partisanship in this matter in the Judiciary Committee or the Government Operations Committee—at any time. There has never been any real rivalry between the executive and legislative branches of Government. Many times we in the legislative branch have a feeling that you've got to take it our way. Never have I seen the Senate reach out more to the Justice Department and the administration to say, we know there are imperfections.

There was very conflicting testimony. We had some 20 witnesses, including former prosecutors and members of the ABA, and there was a good deal of conflict. It came down to our final judgment that we wanted legislation the Justice Department believed in, because they would have to carry it out. Certainly we applauded the initiative taken by the Justice Department in this regard. Many of us went on the public record stating—and I don't recall many times that we did this in the past, but we did it unequivocally this time—that what the Justice Department presented to us, and what the President sent to the Senate earlier this week, was better than what we had come up with after months of deliberation.

But I hope that they did benefit from our deliberations and from our hearings as well.

The Attorney General did a magnificent job in meeting with us many times in his office and in the Senate to try to resolve our differences.

The argument was made by eminent authority that we shouldn't create a permanent Special Prosecutor. The former Special Prosecutor said we shouldn't have one because there wouldn't be enough work for him. We hope that is true. We hope our houses won't burn down, too, but we take out insurance policies. I think what we are doing here is taking out an insurance policy. And certainly by having all three branches covered there will be enough work for what I hope would be a modest permanent staff. But the mere existence of the office will, I hope, prevent a great deal of possible wrongdoing.

Finally, I would like to say that in this case we did not really respond to public pressure. It was rather interesting to me that my mail on this particular subject, and the mail of many of my colleagues, has been very light this year. And I wondered why, compared to the mail we get on gun control legislation, abortion, the present tax bill—

Mr. HUNGATE. Please quit. You are making me nervous just naming those subjects.

Mr. PERCY. Well, in this case I tried to determine why the mail has been light, and I have talked to many people about it. First of all, loud and clear to the American public came the message, as Sena-

tor Kennedy said, of what this committee meant. I think its proceedings were the finest demonstration of what the Congress can do. For the first time the American people were brought right into the deliberative process, and they gained tremendous respect for the Members of Congress who deliberated on the Watergate issue. I think people had confidence we were going to do something. And I think the Senate Watergate Committee—in which my distinguished colleague, Senator Weicker, participated—also added to that sense of confidence. But basically, I think the American public had confidence that Congress, the President, the Department of Justice, and the Special Prosecutor process itself would work this out. And I think that is why the mail has been light. But its lateness doesn't remove the urgency. People expect us to do something. And so, although we realize we are presenting this to the House late in the session, I believe the background and the knowledge that this committee has will enable it to move with great dispatch. We are very grateful indeed for this opportunity to sit before you on the other side of the table and present our views.

Thank you.

Mr. HUNGATE. Thank you very much for your helpful consideration. And we appreciate listening to these plaudits on behalf of the committee.

And I would hasten to say in the activities of my colleagues, Mr. Wiggins, Mr. Drinan, Mr. Mann, and others, we were not always in agreement, but I think this due process requires all sides be represented and represented ably. And I am very pleased to have been able to serve with these distinguished gentlemen on the committee.

Senator JAVITS, I apologize for getting to you last. Please regard it as being the cleanup man.

I haven't seen so many Senators in one place since the Democrats finally selected a nominee.

Mr. JAVITS. We are here because we want to be. And for me it is deeply moving that we should be appearing before a subcommittee of the Judiciary. Let us remember that it is you gentlemen who rang the bell first, and registered it with the country, and in my judgment brought about a change in the Presidency and the method of change which, while it might not have satisfied me as a purist, I would rather have seen a trial, nonetheless it worked for our country. And I think tribute should be paid to the members of the Judiciary Committee who faced and lent enormous credit to our country in the way that they handled this awesome responsibility.

Mr. Chairman, I shall not duplicate what any of my colleagues have said. I adopt it all. It has been very well and very effectively said. I would like to add just a few thoughts.

First, though the mail may not be great, this is an historic mission, writing this legislation. It does not follow other scandals—this was not the first—it did not follow the scandal in General Grant's time or the Teapot Dome. For the first time the Congress is making an effort to institutionalize an instrument of self-purification.

Second, we have suffered in the world, Mr. Chairman, great criticism by people who said that we have placed our system in grave jeopardy by shaking its foundations as we have. This statute will be

a vindication and validation of the fact that having gone through this purification by fire, we mean it, and having heard all of the concerns expressed both here and in the world, we still remain convinced that the way of exposure in purification is the best way. And I hope very much that the House will help to make this legislation law for that among many other reasons.

And, Mr. Chairman, I hope very much that you, too, here in the House will try to do what we did, which is to bring the Attorney General and the President to cooperation with us, so that this may be truly a national act, with the best minds and the best intentions of our country, both in the executive and legislative, joining together, with no party advantage taken or sought from what should be an expression of the highest national conscience. We did it, and we were quick to leap at the opportunity to join with the executive. Personally, I regret very much newspaper stories which may put a coloration on it, a reluctance by the President or the Attorney General. These men were very deeply convinced—the Attorney General is one of our most eminent lawyers ever to serve in the position of the Attorney General, and he had very deep convictions with this legislation. Indeed, the legislation now is quite different from the legislation which faced him.

So I hope the same spirit and the same technique will prevail in the House.

Third, I hope very much that you will look very carefully at the removal power of the President in respect to the Special Prosecutor. It is one sentence, Mr. Chairman, but a very portentous sentence. And it is found in section 591 (d) and it reads as follows:

A Special Prosecutor shall only be removed by the President for extraordinary improprieties, for malfeasance in office, for willful neglect of duty, for permanent incapacitation, or for any conduct constituting a felony.

Then it gives power to proceed in the U.S. District Court of the District of Columbia to challenge the President's action and even to seek a reinstatement. Now, that is a pretty long jump in law. And I hope you will look at it very carefully. Perhaps this or some other technique may be utilized for the purpose. But I think this technique is probably one of first impression in respect of law. And I hope you will also note that the power of the President to remove precedes the various powers which are specified in section 593 (a), which gives the Special Prosecutor a special standing, because the language there is "subject only to the power of the President under 591 (d)"—in short, subject to the power of the President to remove.

So I hope very much the members of this committee have heretofore evidenced their views about that. The power of removal was one of the big things that was the hallmark of the Watergate. And I hope very much that you will give this particular question your very considered attention, and getting whatever expert views on it.

And finally, Mr. Chairman, I have absolutely no doubts as to the result which the committee which was responsible for the Watergate impeachment will turn out. In my judgment it will be a good bill. And I hope also that as you progress with it you will be in close touch with us, both on the judiciary and Government operations side, so that just as I said what I did about the President and the Attorney

General, we may come out with an agreed upon bill and do it this year before a new administration takes office.

Mr. HUNGATE. Thank you, Senator, for your keen legal analysis of some of our problems. And we certainly will be in close touch.

Mr. Hyde.

Mr. HYDE. Thank you.

Mr. Chairman, I have some problems with this legislation. And unfortunately I have to leave in about 6 minutes, so I won't be able to wait for answers to many of my questions. But while we are here, I would like to ask Senator Javits, perhaps, or Senator Weicker, as you choose—it seems to me we are setting up a permanent office of Special Prosecutor. We are going to give him a 3-year nonrenewable term, and paying \$44,000 a year, which is probably about a third of what the type of person we want for this job makes. And if he has nothing to do, he is going to find something to do. Are we not going to generate the urge to prosecute on the part of a topflight lawyer sitting around with a staff on a 3-year term with nothing to do? He is going to find something to do. And isn't this a problem? We used to call it in the days of Senator Joe McCarthy witch hunting. That term is certainly not in fashion these days. But what is an energetic, dynamic achieving lawyer going to do if he can't find crimes to prosecute? And is that a healthy situation?

Mr. JAVITS. I think we were very cognizant of the danger of a runaway prosecutor. This is not anything unfamiliar to people with experience in the law. And I would like to direct my colleague's attention, because we were cognizant of that, to section 593(c) of the bill which reads as follows:

The special prosecutor may from time to time make public such statements or reports as he deems appropriate. The special prosecutor may present reports, statements or recommendations to the Congress, the President or the Attorney General.

We hope for a high level man. And that is why we limited it to one term, so that a man would know. But it is 3 years. And that is that. And it should be an extremely honored office.

And second, we felt that if his attention were directed to the institutional character of the job in terms of the means by which the Government may be kept as clear of corruption as possible, that we would give such a man a job quite outside the job of prosecution worthy of his efforts. That was written in for that purpose.

Now, there are a number of experienced lawyers on this subcommittee and the Judiciary Committee. For myself, I would welcome any other ideas as to how to restrain a runaway prosecutor, and second, protect people's civil liberties, which I think is not as popular, maybe, but is as vital as anything else in this bill.

And second, there are other things which might be given the Special Prosecutor to do, as I have indicated, which will give him an opportunity for the exercise of his talents.

Mr. HYDE. Let me just say in response to what you said, Senator—and I am encouraged about it—you wouldn't sit around and I wouldn't sit around for 3 years in this office, I don't care what you paid us, we would find something to do. And I am just concerned if this would be permanent as against an ad hoc position that this person is going to find something to do. And that creates a problem.

Now, we talk about a 3-year term. And this fellow or woman is supposed to be apolitical. How do you eliminate the desire to be a Federal judge? How do you eliminate the desire to have this person who is serving 3 years, and with great publicity value, with great attention, how do you eliminate the human element of currying favor with the appointing facility for future political office?

Mr. JAVITS. You don't eliminate it. And I don't know that you want to eliminate it. The incentive to exemplary conduct and to highly effective work is the future, whether it is a reputation or an office or what it may be. I don't think ambition is bad. I think ambition is good. And I think a man like this would be in such a fishbowl that we have learned now that the way of reaching is often the way of defeating one's own purposes. And finally, the quality and character of the person chosen we must be satisfied in advance will stand that test and stand it successfully. In short, if my colleagues can think of something else, I am more than interested. But I believe that with what we have developed here there are certain risks which we will run. And I have given my colleagues the way in which I think we can minimize these risks.

Mr. HYDE. I agree with you. And I just wanted to point out by my question that it is impossible to get somebody who is really apolitical.

Let me point this out, too. The bill apparently denies the position to someone who has held a high level position working on the campaign of any candidate for elective Federal office. I would assume, then, that maybe Mayor Alioto would qualify through this. I would assume that maybe Mayor Lindsay would qualify for this post. A former Governor would qualify for this post. And maybe we just rely on the good judgment of the President, and the dominant party of the Senate not to confirm a person who is obviously political. But we have to really ban in this legislation political creatures from holding this office.

Mr. JAVITS. I think you will find—and I am only doing this to help the committee with the things that we have already covered—you will find in 594(c) a greater specification of what we considered to be—and I am coming back to 591(c)—“a high level position of trust and responsibility.” And I would not have any objection if in both areas you try to refine what we have done. In the latter, to wit, respecting the Attorney General or a deputy, we actually define national campaign manager, national chairman of the Finance Committee, chairman of the national political party, or other comparable high level campaign role involved in electing a President. Now, as I say, there is room for certain innovation on the part of your committee in reconciling these two sections. And the reason they are different is that we had the amendment, the latter amendment on the floor, and were able to sharpen that up then and there. The former, that is, relating to the Special Prosecutor, was included in the draft of the bill which we worked on, based on our cooperation with the Attorney General. So that I should certainly say that this committee should use its expertise in respect to these two sections.

Mr. HYDE. Senator Percy, could I ask you one question. And welcome to the committee, my own Senator whom we are very proud of.

Are we too rigid in our strictures on how to remove this Special Prosecutor? Supposing he just does a lousy job. That isn't malfea-

sance. That may not be willful neglect, but he is just a big disappointment?

Mr. PERCY. I think it is important, if you have angels determining what a lousy job is, that you dismiss the Special Prosecutor for doing a lousy job. But maybe a lousy job in the mind of someone may be too good a job in the mind of somebody else. So I think we are open to any suggestion the House can come up with. What we are trying to get away from is dismissal just because he is too vigilant in exercising the responsibility that he holds. And there we must stand firm, there we want no loopholes.

Could I comment on whether there will be enough work? I have already said that I hope there will not be. But I don't think that is going to be the case. I just ask you, to consider your knowledge of the experience of the U.S. attorney in the Northern District of Illinois. A considerable amount of the time of the U.S. attorney and his assistants in the past decade has been devoted to prosecuting public officials. It is a shameful amount. I happen to believe that the Congress has not had enough oversight. I think some of the practices that go on in the Congress are disgraceful. I hope and I trust that the existence of this permanent Special Prosecutor is going to cause every Member of Congress to look introspectively and see what he would do if the practices that we are engaging in were submitted to public light or prosecution. And I think the very existence of such an office is going to bring about a great deal of necessary corrective action.

Mr. HYDE. Thank you, Senator. My time is up.

Mr. HUNGATE. Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman.

And welcome, Senators.

Whenever there is a consensus like this and legislation is passed 91 to 5 in the Senate, I become suspicious that some basic differences have been painted over. I wonder whether the capitulation of the administration and the consensus that is developing shouldn't cause us to examine some basic problems. Dr. Schlesinger said recently: "Of course many consequences of Watergate, one of the worst will be the panaceas it puts into circulation." I wonder too whether the basic objections of people like Prof. Philip Kurland and others have been satisfied in the enactment by the Senate. I would ask anyone who wants to respond how they meet the difficulty that Professor Kurland has restated in the Congressional Record on July 21. He feels that the utilization of Special Prosecutors at a stage prior to the criminal stage is once again an evasion of congressional responsibility. It indicates, in his judgment, an unwillingness of Congress to assume its place of primacy in the constitutional scheme. This thought kept coming back to me as the Senators here said gracious things about the impeachment inquiry by this committee. I wonder if anybody would talk to that basic difficulty which is echoed in the hearings by former dean of Harvard Law School Erwin Griswold and also by Prof. Harold Seidman of the University of Connecticut.

Mr. PERCY. Mr. Chairman, I would like my distinguished colleagues, who are both lawyers, to answer your question directly. But I would point out to you that there is not one shred of evidence justifying your use of the word capitulation. There was no capitulation by anyone in this legislation.

Mr. DRINAN. Just a chance.

Mr. PERCY. No, right from the outset the Justice Department and the administration had the common objective that we had; we never had a shadow of doubt about it. It was a question of how we would do it. There was a difference between the ABA testimony and the testimony of the Assistant Attorney General. But we are all working toward a common objective. If anyone capitulated, it was the Senate, and that is what the headline should have been—we capitulated on title I, because the administration's version was far better than what we had come up with. We may have been misled, in a sense, by testimony against the permanent investigator. But there were grave constitutional questions. In this case it was not capitulation. I think it is an improper use of that word. There was cooperation, there was the usual sort of compromise and reconciliation that should and must exist in a democratic form of government. You can call it capitulation if you want. I call it a reasonable, rational approach toward solving a problem. And there was good will on both sides, the executive branch and the Congress.

Mr. DRINAN. Senator, you state that there were grave constitutional problems. Do you think that they have been painted over so that those who advance those grave constitutional objections will in some form bring litigation or will continue to object to this? In other words, how were they resolved if they were so great?

Mr. PERCY. I think that the constitutional questions were raised by such eminent people as Phil Kurland, who wrote a detailed letter to me and Senator Ribicoff on this question, citing eminent authorities. I have no doubt that Phil Kurland and all other constitutional lawyers would say now that title I is far sounder constitutionally than it was before. It is not subject to the kind of criticism it was when we presented it on the floor of the Senate. There was a difference of opinion. Some felt it was constitutional, but we wanted to remove the doubt. And I think we have removed the doubt.

Mr. DRINAN. How would you and the others respond to this letter from Prof. Harold Seidman of the University of Connecticut: "The inevitable effect of the creation of such an office is to dilute the President's constitutional duty under article 2, section 3, to 'take care that the laws be faithfully executed' "?

Mr. WEICKER. Congressman, both Professor Kurland's letter and also Seidman's, I believe, were addressed to the original committee bill and not the bill you have before you at the present time.

Mr. DRINAN. You are quite right. And I want to know precisely how their difficulties have been resolved in the bill that passed the Senate?

Mr. WEICKER. I think that the power of the bill as I understand it now sits with the will to go ahead and appoint with the confirmation of the Senate. That is considerably more difficult than the vague provisions that were contemplated in the earlier legislation.

Let me also make the statement that as far as I see it the Congress' job is legislative, it is not to investigate criminal activity. I think that is one of the provinces of the executive branch of Government. I don't want to get Congress into the business of conducting criminal investigations. What I would like to do is to address, if I might, the overall point that you have raised as to what it is that we have done in the

sense of legislation, which is our job. Aside from what you have before you now, in the sense of the prosecutor and the Office of Government Crimes, the Senate has also passed, as a result of Watergate, the Select Committee oversight of the CIA-FBI, that came directly out of the Watergate. In the present tax reform bill there are tax privacy measures to insure that no longer will tax returns be used for political purposes. In other words, we are talking oversight, tax privacy, and talking Special Prosecutor. That which is before you, it seems to me is our responsibility, that is our legislative task. I don't feel that in any way that the efforts of the U.S. Senate since the Watergate are a papering-over job. The reason for this legislation being passed when it was, was the consensus of the Senate by a vote, I believe of 91 to nothing, that these three elements would be passed by the end of this session—the prosecutor, the Watergate Reform bill, and the Select Committee on Intelligence Oversight. It looks like that task is going to be accomplished.

Mr. DRINAN. Senator Javits.

Mr. JAVITS. Father Drinan, I have listened very carefully to what you say. But I don't consider this bill to be either a mandate to run wild as a prosecutor, or a mandate to make the President and the Congress slackers. All we are doing really is institutionalizing an experience we had. We are putting the machinery to work rather than being in the position where we have a time of grave hesitation as we did as to what to do and where to go. And we had a Saturday night massacre precisely because we had nothing in place in terms of a statute by which the executive could be controlled. I hope very much that the Congress will always do what you did here, and whatever we did there. I would expect the President will enforce the law. But we are putting in place something which proposes to take a precaution against the contingency that he won't or we won't.

Second, there is no reason whatever why these actions cannot be contemporaneous as they were, and successfully. And that will be up to us as legislators not to allow this statute to give us any mandate to overlook our duties and responsibilities.

So I hope very much that it will be looked at in those terms, that is, in terms of an institutionalization of what has occurred, rather than a vindication and denigration of the way it worked, which reflected so much credit. And we are not buttering you up, really, this is a monumental ground that was broken here in the Judiciary Committee. And I am one of its greatest admirers, and I believe it contributed enormously to the result.

Mr. HUNGATE. Senator, I believe you are one of our alumni.

Mr. JAVITS. Well, I wish I had been on the Judiciary Committee in those great moments. There are few historic things we do here. You know we are awfully busy, but there are very few things that are worthy of the jobs we hold. Sometimes circumstances, as in this case, present themselves to us. And we have to be grateful as a country that our men and women in the Congress measure up to the task. And I believe, and it is my only answer to it, that there are other men and women who have succeeded us who will equally measure up to the task and will not be lulled into any sense of commensary, or lulled into any false solutions by the presence of this statute on the books. Standing

as a statute it isn't going to change or fix anything, unless red-blooded men and women do it.

Mr. DRINAN. Thank you very much, Senator Javits. My time has expired.

Mr. HUNGATE. I would remind the subcommittee that the next witness is the Attorney General. And we have had him waiting for some time.

Ms. Holtzman.

Ms. HOLTZMAN. I would just like to followup with an observation about some of the problems that we encountered with respect to Watergate and the work of that Special Prosecutor, and ask you how we can address these problems with respect to any bill creating a Special Prosecutor. One of the problems that I would note with respect to the work of the Watergate Special Prosecutor is that 3 years have passed, and despite the intensive and very fine work of the office, we still don't know who specifically ordered the Watergate break-in, nor do we know why the break-in took place. There were other areas in which allegations of impropriety arose from the work of the Watergate Select Committee's investigation, but no prosecutions were ever brought. What assurance will the people of the United States and the Congress have that the work of any Special Prosecutor will be fully discharged, and fairly discharged.

I think that that is a matter of concern. I see that there are some reporting requirements in the bill that were passed by your committee and there are reporting requirements with respect to the permanent Special Prosecutor. I think that if the current Special Prosecutor were to close today there would be many dangling question marks. That is not to say that the job has not been completed, but what assurances will the public and the Congress have with respect to such matters in the future?

Mr. WEICKER. Let me state first of all that so far as the responsibility of the Special Prosecutor, the knowledge of that, and what they did, I think the Attorney General and the Special Prosecutor could best answer your question. But let me respond as one on the outside.

I have no doubt that the American people have learned through the efforts of your committee, the Watergate Committee, and the efforts of the Special Prosecutor, that we know 99 percent of the story. And I was always asked that question indeed when the investigation started out, "are we ever going to know the truth?" I have no doubt that the truth is known. There might be a few missing pieces, but I doubt very many.

There is no way that we can guarantee that a perfect job is going to be done. I think what we are trying to do here is to take the first step of eliminating a potential conflict of interest between a political administration and the administration of justice in this country. I think that is just the first step that we are trying to take at the highest level. And I think that is important. I can't guarantee that this system is going to work better. But I do know right now that people look upon our system of justice as operating at two levels, one for us, and I mean that not just in the sense of the President but the Congressmen and Senators, and one for them. I think that in this way they are guaran-

teed an institution at the highest level which assures that justice is going to be pursued with an equal hand.

Ms. HOLTZMAN. I agree with your concern. I think people are concerned about assuring that conflicts of interest do not taint the ability of our system of justice to deal evenhandedly with everybody who appears before it. I am just concerned institutionally how we can guarantee the public and the Congress that the Special Prosecutor will in fact conduct thorough, fair investigations.

I also wanted to raise a second issue that relates to the point you and Senator Javits raised about the investigations that were carried out with respect to a former Vice President and a former President. Namely, it appeared that the prosecutors in both instances were satisfied with the resignation of the official in question. I wonder whether there is going to be a direction to a future Special Prosecutor that bargaining for the resignation of the official in question may not satisfy the requirements of the job—rather if there is evidence to warrant prosecution, that that would be expected?

Mr. WEICKER. Again, the question, Congresswoman, is best asked of the Attorney General.

Ms. HOLTZMAN. I think this question must be addressed in the legislation.

Mr. WEICKER. I think where the difference comes here is that our job is to set up the institution. And I can't guarantee the people, as to how they are going to act in a given set of circumstances, but to put in place the mechanism, the institution. That is all we can do. Very frankly, this institution can be plagued with unfortunate types I suppose, just like the highest offices in this land. But right now there is no mechanism, there is no institution, there is nothing there. And I think all we can accomplish is the first step. And I can't guarantee it past that point. There is no way that I can respond to you that it is going to work perfectly.

Mr. HUNGATE. Your time has expired.

Mr. Drinan.

Mr. DRINAN. I think I will yield at this time. I don't want to keep the Attorney General waiting.

I want to thank Senator Weicker for all his work in this area.

Mr. WEICKER. Thank you.

Mr. HUNGATE. Thank you for your attendance and your patience and your many contributions in this field.

[The following material was submitted by Hon. Abraham A. Ribicoff for the record:]

FULBRIGHT & JAWORSKI,
Houston, Tex., May 6, 1976.

HON. ABRAHAM RIBICOFF,
Chairman, Committee on Government Operations, Russell Senate Office Building, Washington, D.C.

MY DEAR SENATOR RIBICOFF: For the record, I would like to note my approval of S. 495, the "Watergate Reorganization and Reform Act of 1976." It is a constructive piece of legislation that I hope will be adopted. May I add my commendation on the excellence of your Committee's work.

With kindest personal regards and every good wish, I am

Sincerely yours,

LEON JAWORSKI

BETHESDA, MD., May 11, 1976.

Hon. ABRAHAM RIBICOFF,
Chairman, Committee on Government Operations, Dirksen Senate Office Building,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I have read closely the provisions of Title I of S. 495, as amended and ordered reported by the Committee on Government Operations. In my testimony last year before the Committee, I had opposed the original bill's creation of a permanent special prosecutor.

I certainly endorse the amended bill in its proposed creation of a Division of Government Crimes in the Department of Justice and in its proposed vehicle, when needed, for the creation of a temporary special prosecutor. The temporary nature of any special prosecution effort, and the inclusion of a triggering mechanism to invoke the temporary appointment, represent an ideal solution for balancing the need for prosecutive independence against the potential abuses which exist in a permanent, independent office.

I appreciate the opportunity you have given me to comment on this amended bill and I certainly admire the skill and persistence of you, your Committee and the Committee staff in trying to ensure that appropriate institutional reform follows in the path of recent prosecutions and revelations about government abuses of power.

Sincerely,

HENRY S. RUTH, Jr.

AMERICAN BAR ASSOCIATION,
Washington, D.C., June 3, 1976.

Hon. ROMAN HRUSKA,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HRUSKA: At the hearings held before the Senate Judiciary Committee on S. 495 May 27, 1976, you asked me to comment on several issues which arose during the hearing. These included the thrust of *Ex parte Siebold*, 100 U.S. 371 (1880) with respect to the appointing power of the courts; and *United States v. Cox*, 342 F. 2d 167 (5th Cir. 1965), cert. denied 85 Sup. Ct. 1767 (1965), and *United States v. Cowan*, 524 F. 2d 504 (5th Cir. 1975), with respect to prosecutorial discretion. You also asked for an analysis of the meaning of the phrase "inferior officer" as contained in the Constitution and the role of the federal prosecutor as a minister of justice and quasi-judicial official. Finally, you asked for a comparison of the relevant provisions of Title I of S. 495 and the recommendations of the American Bar Association contained in the report of its Special Committee to Study Federal Law Enforcement Agencies.

THE APPOINTING POWER OF FEDERAL COURTS

The *Siebold* case involved a statute imposing upon federal circuit courts the duty of appointing supervisors of elections. It was alleged that these duties were entirely executive in character and that no power could be conferred upon the courts of the United States to appoint officers whose duties are not connected with the judicial branch of the government. The United States Supreme Court rejected these arguments and upheld the courts' appointment power.

The Court cited Article II, Section 2 of the U.S. Constitution which provides that "the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments." Of this provision the Court said:

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 is no absolute requirement to this effect in the Constitution; and, if there were, it would be difficult in many cases to determine to which department an officer properly belonged . . . but as the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress and, looking at the subject in a practical light, it is perhaps better that it should rest there than that the country should be harassed by the endless controversies to which a more specific direction on this subject might have given rise.

The Court also stated that the duty to appoint inferior officers, "when required thereto by law, is a constitutional duty of the courts. . . ." The Court then posited the "incongruity" test, stating that unless there exists an incongruity between the duties to be performed and the appointing authority such "as to excuse the courts from its performance, or . . . render their acts void," the appointment will be valid.

Congress has provided for the appointment by the district court of U.S. attorneys when a vacancy occurs (28 U.S.C. 546). This power was upheld in *United States v. Solomon*, 216 F. Supp. 235 (S.D.N.Y. 1963). Professor Paul Freund of Harvard believes that judicial appointment of a special prosecutor may rest on even firmer footing than the appointment of a U.S. attorney to fill a vacancy. He has pointed out that, although limited in tenure, a U.S. attorney appointed by the court assumes all the power of that office regardless of the subject matter. The special prosecutor, on the other hand, has a far more limited jurisdiction under S. 495, where the specific jurisdiction of the temporary special prosecutor is to be defined by the appointing power.

THE PROSECUTORIAL FUNCTION

During the hearing you raised a question as to whether or not the prosecutor performed a function so executive in nature as to render the appointment of a temporary special prosecutor, albeit under clearly defined circumstances and with limited jurisdiction, incongruous under *Ex parte Siebold*. In answering this question, we must consider three factors: the nature and scope of the prosecutor's function; the interrelationship between the different actors (judge, prosecutor, and defense attorney) in the criminal justice system; and the problems inherent in having individuals investigating and prosecuting crimes involving high-ranking government officials.

Former Attorney General Robert H. Jackson stated that the prosecutor has more control over life, liberty, and reputation than any other person in America, that he has tremendous discretion, and that the manner in which he conducts investigations has a profound effect on the lives of citizens.

The American Bar Association has stated that the prosecutor is not only an advocate but an administrator of justice and that his duty is to seek justice, not merely to convict. His obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public. The ABA concluded:

This is one of the senses in which the prosecutor has sometimes been described as a "minister of justice" or as occupying a quasi-judicial position. In the present context, both concepts can be embraced in more contemporary terminology by describing him as an administrator of justice. (*Standards Relating to the Prosecution Function and the Defense Function*, American Bar Association (1971), p. 44)

The function of the prosecutor in determining probable cause for arrest and for submitting a case to a grand jury has been described as quasi-judicial in several Supreme Court cases. See *Ocampo v. United States*, 234 U.S. 91 (1913) and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). In the pretrial stage of the criminal justice system, the police or other law enforcement officer makes an arrest and may cause a complaint to be filed. He then recommends to the prosecutor that a formal charge be instituted. The prosecutor carefully reviews the recommendation of the arresting officer and supporting evidence before deciding to submit the case to the grand jury for its consideration or before filing any information in open court.

The extensive responsibilities of prosecutors have given rise to their being regarded as quasi-judicial officials entitled to a type of "judicial immunity" befitting such quasi-judicial status. In *Golden v. Smith*, 324 F. Supp. 727 (D.C. Ore. 1971), the court found there was no liability on the part of a prosecutor for damages caused by an allegedly illegal arrest and detention, noting that "prosecutors, as quasi-judicial officers, have an immunity similar to that of judges for acts which constitute an integral part of the judicial process."

It is settled that a prosecutor is both an officer of the executive branch and an officer of the court. As Judge (now Chief Justice) Burger stated regarding the role of the U.S. attorney:

An attorney for the United States, as any other attorney, however, appears in a dual role. He is at once an officer of the court and the agent and attorney for a client; in the first capacity he is responsible to the court for the manner of his conduct of a case, i.e., his demeanor, deportment and ethical conduct. *Newman v. United States*, 332 F. 2d 479, 481 (D.C. Cir. 1967).

The American Bar Association points out that all serious criminal cases require the participation of three entities: the judge, the counsel for the prosecution, and the counsel for the accused. Absent any one of these (barring valid waiver of counsel), the court is incomplete. In short, a "court" must be viewed as a three-legged structure which cannot stand without the support of all three.

Thus, the prosecutor plays a role within the court system in the investigation and prosecution of crimes which goes far beyond purely executive or administrative functions. Appointing a temporary special prosecutor under the limited circumstances and with the limited jurisdiction set forth in S. 495 is no more incongruous than the appointment by the district court of temporary U.S. attorneys when there is a vacancy, or the appointment of defense counsel for indigent defendants. In fact, it would be far less incongruous than the appointment of a temporary U.S. attorney who would assume all the power of that office regardless of the subject matter.

S. 495 does not casually place the appointing authority in the court. The bill places upon the Attorney General the primary responsibility for appointing a temporary special prosecutor. It is only after a review of a case in which the Attorney General has held that there is no conflict of interest and has made no appointment that the proposed court division would consider appointing a temporary special prosecutor, and then only if it found a conflict. In such a circumstance, where the court has found a conflict of interest in the Executive Branch, it could well be said that incongruity would inhere in an executive appointment. But, whether that is true or not, this situation is one in which the Attorney General has decided not to make an appointment, and therefore an investigation might not occur unless another authority is given the power to make the appointment.

The American Bar Association has stated the following:

A prosecutor should avoid the appearance or reality of a conflict of interest with respect to his official duties. In some instances, as defined in the Code of Professional Responsibility, his failure to do so will constitute unprofessional conduct. (*Standards Relating to the Prosecution Function and the Defense Function*, § 1.2)

Chief Justice Burger stated in *Newman, supra*, that an attorney for the United States is responsible to the court for his ethical conduct. In *Sherman v. United States*, 356 U.S. 380 (1958), the Supreme Court spoke of the general supervisory power of courts over the administration of criminal justice:

Insofar as they are used as instrumentalities in the administration of criminal justice, the federal courts have an obligation to set their face against enforcement of law by lawless means or means that violate rationally vindicated standards of justice, and to refuse to sustain such methods by effectuating them. They do this in the exercise of a recognized jurisdiction to formulate and apply "proper standards for the enforcement of the federal criminal law in the criminal courts."

To impose "ethical conduct" and enforce "rationally vindicated standards of justice," a court of law may be authorized to appoint a temporary special prosecutor under clearly defined circumstances and with limited jurisdiction.

TEMPORARY SPECIAL PROSECUTOR AS AN INFERIOR OFFICER

During the hearing you raised the question of whether the temporary special prosecutor provided for in S. 495 was an "inferior officer" under Article II, Section 2 of the Constitution. (It should be noted that the Attorney General's authority under present law to appoint a temporary special prosecutor is based on this Section, and that the "inferior officer" question applies equally to his appointments and those by a court.) Professor Paul Freund holds that an office is an inferior office if it is inferior to those that have been enumerated in the Constitution, namely ambassadors, public ministers, consuls and judges of the Supreme Court. Another authority, Professor Paul Mishkin of the Boalt Hall School of Law of the University of California, believes that the history of the development of that clause in the Constitutional Convention indicates that "In-

ferior officer" means anybody inferior to the appointing authorities in Article II, Section 2.

The meaning of "inferior officer" has been explicitly interpreted in *Collins' Case*, 14 Ct. Cl. 569 (1878). In that case, the court characterized the Congressional power to establish appointing authority in this manner:

Thus it may authorize the President or the head of the war department to appoint an army officer, because the officer to be appointed is inferior to the one thus vested with the appointing power. The word "inferior" is not here used in that vague, indefinite, and quite inaccurate sense which has been suggested—the sense of petit or unimportant; but it means subordinate or inferior to those officers in whom respectively the power of appointment may be vested—the President, the courts of law and the heads of departments.

I conclude that the historical record, the language of the Constitution and the holding of the federal courts give clear indication that a temporary special prosecutor appointed under the provisions of S. 495 would be an "inferior officer."

PROSECUTORIAL DISCRETION

During the hearings it was stated by other witnesses that S. 495 would involve an unconstitutional interference with the discretion of the prosecutor in violation of separation of powers in the Constitution. I was asked to comment on *United States v. Cox* and *United States v. Cowan* in this respect.

At the outset it should be stated that S. 495 in no way authorizes the appointing court to interfere in the exercise of the prosecutor's discretion in handling a particular case. The court is given only two functions, both unrelated to the exercise of that discretion. First, the court may be called upon to review the relationship of the President or the Attorney General to potential defendants only insofar as it may constitute a conflict of interest as defined in S. 495. Should the court find such a conflict, it could then appoint a temporary special prosecutor.

Second, at the time of making such an appointment, the court would establish the overall jurisdiction of the temporary special prosecutor with respect to the matter to be investigated. Once having made the appointment based upon a conflict of interest standard, and after having stated the jurisdiction, the special division of the court would no longer have any authority to second-guess decisions made by the temporary special prosecutor in the course of the investigation and any subsequent judicial proceedings.

United States v. Cox and *United States v. Cowan* stand for the proposition that prior to the return of an indictment or the filing of an information, the Attorney General and subordinates have the absolute power and discretion to institute or not institute a prosecution. Nothing in S. 495 contravenes these holdings. We should not confuse the power of appointment and the authority to establish basic jurisdiction with the supervision of the prosecutor in a case as it progresses. To avoid any connotation of such supervision, S. 495 provides that the Attorney General, and only the Attorney General, may remove the temporary special prosecutor for "extraordinary improprieties." The only role which the court would play in such an instance would be to review the removal to ascertain whether or not this standard has been met.

You asked for some special commentary concerning *United States v. Cowan*. That case involved the appointment of a special prosecutor by a district court judge in Texas after he refused to dismiss a case under Rule 48(a) of the Federal Rules of Criminal Procedure and the local U.S. attorney then refused to proceed with the case. The Fifth Circuit Court of Appeals reviewed the history of the development of Rule 48(a) and concluded that, while a court could refuse to dismiss a case under certain circumstances, the district court in this matter had exceeded the bounds of its discretion in denying the government's motion to dismiss. Having so concluded the court stated, "We have no cause to consider the propriety of its order effectuating that denial by appointing special prosecutors." Thus, the case is not dispositive of any issues relating to the appointment of special prosecutors.

CONCLUSION

The questions you have raised focus on the scope of the powers of federal courts under the Constitution. The "separation of powers" principle inherent in

the Constitution did not assume tightly compartmentalized branches of government. In commenting on this structure the Supreme Court, in an opinion authored by Chief Justice Burger, stated:

In designing the structure of our government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.

While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed power into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. (*United States v. Nixon*, 418 U.S. 683, 707 (1974)).

In discussing the conflict between the absolute discretion of the prosecutor in initiating prosecution, and Rule 48(a) of the Federal Rules of Criminal Procedure authorizing the dismissal of a case "by leave of the court," Judge Murray in *United States v. Cowan* spelled out the nature of the court's power:

We think the rule [48(a)] should and can be construed to preserve the essential judicial function of protecting the public interest in the evenhanded administration of criminal justice without encroaching on the primary duty of the Executive to take care that the laws are faithfully executed. The resulting balance of power is precisely what the Framers intended. As Judge Wisdom put it, quoting Montesquieu, "To prevent the abuse of power, it is necessary that by the very disposition of things, power should be a check to power" . . . [thus] the Framers wove a web of checks and balances designed to prevent abuse of power" and "were too sophisticated to believe that the three branches of government were absolutely separate, airtight departments." *United States v. Cow*. . . . From this, it seems altogether proper to say that the phrase "by leave of court" in Rule 48(a) was intended to modify and condition the absolute power of the Executive, consistently with the Framers' concept of Separation of Powers, by erecting a check on the abuse of Executive prerogatives The rule was not promulgated to shift absolute power from the Executive to the Judicial Branch. Rather, it was intended as a power to check power.

The proposed authority in S. 495 for a division of the U.S. Court of Appeals to appoint a temporary special prosecutor is intended and acts as "a power to check power." The special prosecutor, once appointed, would exclusively exercise prosecutorial direction.

I am attaching a chart which compares the ABA recommendations on the Government Crimes Division and the temporary special prosecutor mechanism with the provisions of Title I of S. 495. As you will note, they are markedly similar.

I hope this letter is responsive to your requests. We stand ready to offer any further assistance should it be desired.

Sincerely,

HERBERT S. MILLER,

Reporter/Consultant to the Special Committee.

Enclosure.

A COMPARISON OF THE PROVISIONS OF TITLE I OF S. 495, THE WATERGATE REORGANIZATION AND REFORM ACT OF 1976, AND THE AMERICAN BAR ASSOCIATION RECOMMENDATIONS CONTAINED IN ITS REPORT, "PREVENTING IMPROPER INFLUENCES ON FEDERAL LAW ENFORCEMENT AGENCIES"

The Special Committee to Study Federal Law Enforcement Agencies of the American Bar Association published a report in January, 1976, entitled "Preventing Improper Influences on Federal Law Enforcement Agencies." The report contained twenty specific recommendations for preventing abuses of these agencies, all twenty of which were approved by the Association's House of Delegates in February, 1976, as official policy.

Two of those recommendations ("Prosecuting Government Crimes" and "Special Prosecutor") are almost totally in accord with the provisions of Title I of S. 495, the Watergate Reorganization and Reform Act of 1976, as reported on May 12, 1976, by the U.S. Senate Committee on Government Operations. The following analysis compares the ABA recommendations to the S. 495 provisions.

DIVISION OF GOVERNMENT CRIMES

Issue	S. 495 approach	ABA approach
Establishment of division Jurisdiction	By statute. Federal criminal law violations by high-level Government officials; Federal criminal law violations by all Government employees if work related; lobbying, campaign and election law violations.	By statute. Violations of Federal laws by Government officials; cases referred by the Federal Election Commission; violations of Federal campaign laws.
Selection of Assistant Attorney General. Qualifications of Assistant Attorney General.	Presidential appointment, Senate confirmation. Must not have held a high-level position of trust and responsibility in campaign of elected President or Vice President within 5 years preceding appointment.	Presidential appointment; Senate confirmation. No recommendation with respect to the Assistant Attorney General, although a similar restriction on nominees for Attorney General and Deputy Attorney General was recommended.
Term of Assistant Attorney General. Requirements in office	Coterminous with that of the President making the appointment. (a) Shall not engage in outside business. (b) Shall report to Congress each session on Division's activities.	No recommendation. (a) No recommendation. (b) No specific reporting recommendation; although the ABA report contemplates close congressional scrutiny of this statutorily mandated division.
Supervision of Assistant Attorney General.	By Attorney General	By Attorney General.

TEMPORARY SPECIAL PROSECUTOR (TSP) MECHANISM

Issue	S. 495 approach	ABA approach
Circumstances triggering	Conflict of interest or appearance thereof in which the President or the Attorney General has a direct and substantial personal or partisan political interest in the outcome of the proposed criminal investigation or prosecution (with matters involving specified Government officials being automatically deemed to create a conflict).	(e) Conflicts of Interest, Implications of partiality or alleged misconduct as delineated in ABA Standards Relating to the Prosecution and Defense Function; (b) Appearance of professional impropriety under Canon 9 of ABA Code of Professional Responsibility; (c) Improper influence or obstruction of justice as defined in 18 U.S.C. 1501-1510.
Action to be taken by Attorney General.	(a) File memorandum with court summarizing allegations and result of preliminary investigation, including information relevant to determining existence of a conflict of interest; the Attorney General's findings; and whether the Attorney General has disqualified himself and appointed a temporary special prosecutor or not; (b) Appoint a temporary special prosecutor if he deems it appropriate.	(a) File memorandum with court stating facts, legal conclusion and decision with respect to whether or not to appoint a temporary special prosecutor; (b) Appoint a temporary special prosecutor if he deems it appropriate; (c) Request the court to make the appointment.
Alternative means of bringing conflict situation to court's attention.	Any individual, after 30 days' notice to Attorney General of information raising a conflict issue, may petition court to review the matter.	The court can act on its own authority to review allegations of conflict.
Response by court where no TSP appointment made by Attorney General.	Review matter and determine whether a conflict exists, and if so appoint a TSP.	Review matter and determine whether a conflict exists, and if so, either call upon the Attorney General to appoint a TSP or make such appointment itself.
Response by court where Attorney General has appointed a TSP.	Review appointment to determine if TSP is himself in a conflict situation and, if so, appoint a different TSP.	Review appointment to determine if TSP is himself in a conflict situation and, if so call upon the Attorney General to make a new appointment or appoint a different TSP.
Jurisdiction of TSP	Whoever appoints the TSP shall specify in writing the matters which such prosecutor is authorized to investigate and prosecute. The statement of jurisdiction in the case of appointment by the Attorney General is subject to review by the court to determine whether it is "sufficiently broad to enable the TSP to carry out the purposes of this chapter."	The appointing authority would delineate the jurisdiction. Where the Attorney General has made the appointment, the statement of jurisdiction in his memorandum to the court would be reviewed by the court and modified where necessary.
Removal of TSP	(a) Upon filing with Attorney General of report stating that all investigations and prosecutions have been completed; (b) By Attorney General for "extraordinary improprieties," subject to review by Court.	(a) No specific recommendation. (b) By Attorney General for "extraordinary improprieties," subject to review by court.

TEMPDRARY SPECIAL PROSECUTOR (TSP) MECHANISM Continued

Issue	S. 495 approach	ABA approach
Power of TSP.	Within specified jurisdiction the same power as an Assistant Attorney General for Government Crimes, except that TSP can appeal any decision in a case to which he is a party without approval of Attorney General or Solicitor General.	Within specified jurisdiction the same power as the Attorney General or a U.S. attorney in prosecuting a case.
Nature of court.	Division of 3 judges of the U.S. Court of Appeals for the District of Columbia; judges to be assigned for a 2-year term by the chief judge, with priority given to senior retired circuit court judges and senior retired justices; prohibition against judges who participated in process of appointing TSP from deciding on matters brought thereafter by TSP's office.	Special court of appointment composed of 3 retired senior Federal circuit court judges appointed by the Chief Justice for a 2-year term.
Expedited judicial review.	Detailed mechanism for expediting judicial review of actions challenging TSP's authority.	No recommendation.
Disqualification of Department of Justice employees.	Requires Attorney General to promulgate rules and regulations requiring officers and employees of the Department to disqualify themselves in matters where a conflict, or appearance thereof, may result.	No recommendation.

Mr. HUNGATE. Our next witness is Edward Levi, Attorney General, Department of Justice.

We welcome you here, Mr. Attorney General. We apologize for the delay, and I am sure you understand the legislative process and that delay is unavoidable. Without objection we will include your prepared remarks in the record.

[The prepared statement of Attorney General Edward H. Levi follows:]

STATEMENT OF HON. EDWARD H. LEVI, ATTORNEY GENERAL OF THE UNITED STATES

Mr. Chairman and Members of the Committee, I appear here today in response to your invitation to comment upon H.R. 14476 which, as you know, provides for appointment of special prosecutors in certain cases and establishes a Division of Government Crimes within the Department of Justice.

H.R. 14476 represents an understandable effort to remove personal or partisan bias—or the public perception of such bias—from Federal law enforcement. The effort is an important one. My view is, however, that H.R. 14476 is not the most effective or appropriate means for erasing the evils at which it is directed. The President has proposed an alternative to H.R. 14476 which I would also like to discuss with you.

I should like to summarize very quickly the main provisions of H.R. 14476. It provides for the appointment of a temporary special prosecutor for each case in which the President or Attorney General has a conflict of interest or appearance of a conflict. "Conflict of interest" is defined in section 594(c)(1) as "a direct and substantial personal or partisan political interest in the outcome of the proposed criminal investigation or prosecution."

Under the next paragraph, a conflict of interest or its appearance is automatically deemed to exist in all cases involving the President, the Vice President, any Cabinet officer, an individual in the Executive Office of the President compensated at a rate of Level V or above, the Director of the FBI, and any person who has held such a position in the four years prior to the investigation or prosecution. In cases not involving these stated individuals a conflict of interest or its appearance still may be held to exist under other circumstances and to require the appointment of a special prosecutor. The test would be the direct and substantial personal or partisan interest of the President or Attorney General.

Section 594(a) provides that within thirty days of learning of a matter in which a conflict of interest or appearance of conflict may exist, the Attorney

General must file with a special division of three judges of the United States Court of Appeals for the District of Columbia a memorandum, which would be available to the public, setting forth (1) a summary of the allegations received; (2) the results of his preliminary investigations; (3) a summary of the information relating to the possible conflict of interest; and (4) a finding on whether the case is "clearly frivolous" and therefore does not justify any further investigation or prosecution. A decision that an allegation is "clearly frivolous" is not judicially reviewable. It will terminate, unless new allegations or evidence are received, the Court's ability to appoint a special prosecutor. Absent such a finding by the Attorney General, the question of conflict of interest becomes material. When the Attorney General determines that a case does not involve a conflict of interest, the court reviews his decision *de novo* and appoints a special prosecutor if it disagrees with his conclusion. If the Attorney General has determined that the case does involve a conflict of interest or the appearance of a conflict, the Attorney General must appoint a special prosecutor and define his jurisdiction. The court will then review this action to assure that the appointee meets the statutory criteria, including breadth of authority, and may make a superseding appointment.

In addition, Section 594(b) establishes a procedure by which a private citizen may initiate court consideration of the appointment of a special prosecutor thirty days after the citizen has requested the Attorney General to consider such an appointment.

Under section 594(d), no employee of the Federal government, including a special prosecutor, may be appointed a special prosecutor. This requires that a new special prosecutor, if one is to be named, be named for each case. Thus there could and indeed would be a multitude of independent special prosecutors.

Section 595(e) gives a temporary special prosecutor the same authority as the Assistant Attorney General for Government Crimes—whose authority is not defined in the bill—and, in addition, empowers him to appeal any court decision without obtaining the Attorney General's approval. Pursuant to section 595(d) (2) a special prosecutor could be removed by the Attorney General only for extraordinary improprieties and then only subject to court review.

In my view, H.R. 14476 is of highly questionable constitutionality. It would create opportunities for actual or apparent partisan influence in law enforcement; publicize and dignify unfounded, scurrilous allegations against public officials; result in the continuing existence of a changing band of multiplicity of special prosecutors; and promote the possibility of unequal justice.

The role of the judiciary under H.R. 14476 raises substantial constitutional questions. These include:

(1) The conferral upon a court of the power to appoint an official who is to perform significant "executive functions" and who is not "inferior" to any other official in the sense of being subject to direction and control;

(2) The assignment to a court of powers (I don't know whether Article II or III), such as the reviewing of Attorney General appointments and decisions, which are unrelated to the constitutionally prescribed function of deciding "cases and controversies."

H.R. 14476 might have several significant unintended effects which should be recognized. The bill requires that the Attorney General determine whether he or the President has a "direct and substantial personal or partisan interest in the outcome of a proposed criminal investigation or prosecution." It would often be necessary for the Attorney General to consult the President concerning matters which are, under the bill, apparently regarded as particularly sensitive. This would, I think, require checking with the White House with respect to names which might arise, in fact, would arise, in the course of routine criminal investigations—a kind of checking as to interest which otherwise I should not think the bill would wish to require.

The bill requires that whenever the Attorney General receives an allegation of wrongdoing which is directed against certain high government officials or which would otherwise present a possible conflict of interest, he must file a detailed memorandum describing the charge and the results of the investigation into it with the special court. Any individual who submits an allegation of criminal wrongdoing to the Attorney General has the power to compel a similar reference. No safeguards for confidentiality are set forth.

This procedure enables any individual to convert a private allegation against a high government official into a highly publicized investigation. Charges of this

sort could well become the natural corollary and complement to most civil suits involving government officials. The fact that such charges would be disseminated and dignified by the process established by the bill would inevitably encourage those who wish to use it for partisan or other improper purposes.

In enabling the criminal investigative process to be transformed into a media event each time high state or federal officials or members of Congress are involved, the bill casts aside one of the most decent traditions of our criminal law system. This procedure for spreading improper charges contributes to a public attitude of cynicism and distrust of government officials—again a problem which the bill is intended to help solve.

I understand that some supporters of H.R. 14476 expected that it would rarely require the appointment of special prosecutors. But so far as we can tell from the definitions used, the contrary would be true. There might, for example, at the present time be twelve investigations where a per se conflict of interest would exist under H.R. 14476. The Criminal Division has located recent or current cases involving at least 40 public officials, in the Executive Branch, the Judiciary and the Congress, in which it would be necessary to determine whether the President or Attorney General have, or appear to have a substantial partisan or personal interest. There are other cases involving campaign contributions or politically active labor unions, or associates of prominent political figures which conceivably under the definition of the bill might trigger the appointment of a special prosecutor.

I realize that the appointment of a temporary special prosecutor would not be required if there is a certification of "clearly frivolous" made by the Attorney to give after only thirty days of investigation. The wildest allegations often require the most careful investigation and review—and wild allegations are to be expected. I do not believe any Attorney General with a sense of responsibility and a modicum of sense would give such a certification often.

The cumulative effect of these provisions would be the referral of many matters to numerous special prosecutors. The existence of a multiplicity of special prosecutors each with only one case enhances the likelihood of unequal justice. This kind of a special prosecutor would be subject to formidable public—and perhaps self-imposed—pressure to limit in the one case he was appointed to pursue. Decisions regarding electronic surveillance, immunity and every other area of prosecutorial discretion from plea bargaining to appeals would be made on an ad hoc basis by many special prosecutors who are independent of each other and have not regularly engaged in making such decisions.

These objections to H.R. 14476 have been shared with the Senate Government Operations Committee when it was considering the verbatim counterpart of this bill. Some of these problems can be ameliorated but in my view not cured by relatively simple amendments. But I believe these fundamental constitutional and practical difficulties still remain.

The President has submitted alternative proposed legislation, which I hope this committee will consider along with this bill. The President's proposal would establish a permanent Office of Special Prosecutor to investigate and prosecute criminal wrongdoing committed by high level government officials. The Special Prosecutor would be appointed by the President, by and with the advice and consent of the Senate, for a single three year term. At the end of the term, a new Special Prosecutor would be appointed. An individual would be disqualified for such an appointment if during the five previous years the individual held a high level position of trust on the personal campaign staff of, or in an organization or political party working on behalf of, a candidate for any elective Federal office.

Any allegation of criminal wrongdoing concerning the President, Vice President, Members of Congress, or persons compensated at the rate of Level I or II of the Executive Schedule would be referred directly to the Special Prosecutor for investigation and, if warranted, prosecution. Although allegations involving these officials would have to be referred to the Special Prosecutor, he could decline to assert jurisdiction if the allegation or information has a peripheral or incidental part of an investigation or prosecution already being conducted elsewhere in the Department or if, for some other reason, the Special Prosecutor determined that it would be in the interest of the administration of justice to permit the matter to be handled elsewhere in the Department. In such cases, the Special Prosecutor could establish such procedures as he thought necessary and appropriate to keep him informed of the progress of the investigation of

prosecution and at any time he could assume direct responsibility for undertaking the investigation or prosecution.

The Attorney General could also refer to the Special Prosecutor any other allegation involving a violation of criminal law whenever he found that it was in the best interest of the administration of justice. The Special Prosecutor could, however, decline to accept the referral of the allegation. In that event, the allegation would be investigated by the Department of Justice in the normal course which of course means that the investigation might be under the supervision of the Section on Government Crimes in the Criminal Division or conducted by a United States Attorney's office.

Under the President's proposal, the Special Prosecutor would have plenary authority to investigate and prosecute matters within his jurisdiction, including the authority to appeal adverse judicial rulings. In the event of a disagreement with the Special Prosecutor on an issue of law, the Attorney General would be free to present the views of the United States to the court before which the prosecution or appeal was lodged. In exercising his authority, the Special Prosecutor would not be subject to the direction or control of the Attorney General, except as to those matters which by statute specifically require the Attorney General's personal action, approval, or concurrence.

The President's proposal provides that the grounds for removal of a Special Prosecutor should be, and to the maximum extent permitted by the Constitution shall be, limited to those which constitute extraordinary impropriety.

This approach, I believe, avoids the serious constitutional issues—I don't say all—posed by the judicial appointment process set forth in H.R. 14476 by adopting the traditional model for the appointment of officials who perform functions exclusively executive in nature—nomination by the President and appointment with the advice and consent of the Senate. Other unfortunate consequences of H.R. 14476 are avoided as well. The possibility of multiple special prosecutors being appointed is eliminated. The appointment process is not fraught with vexing problems that arise from the vague standards which trigger the appointment and will not publicize allegations that may ultimately prove to be unfounded, because the appointment is not limited to a specific allegation. Unlike H.R. 14476 which places undue pressure upon a temporary special prosecutor to seek and secure a conviction for the single allegation over which he has jurisdiction, this approach allows the proper exercise of prosecutorial judgments because a permanent special prosecutor will have a broader jurisdiction.

I assume all recognize that in times of the greatest doubt concerning the ability of the administration of justice to function a special prosecutor is necessary. In the past, a special prosecutor has been appointed during at least some of those occasions. I believe it must be recognized that in addition that in those times of lingering concern, following periods of great doubt, a special prosecutor may be a necessary response. The law has to rest upon the confidence and faith of the citizenry. I realize people will judge differently when events cry out for this unusual remedy, or when the aftermath of such events makes the retention or creation of such a remedy wise public policy. The remedy itself can cause a message of unevenness in the enforcement of the law, unless the remedy itself is perhaps regarded as vestigial, left over from a crisis of the past, or as established in permanent form because that is the way to avoid some of the trauma of prior days. And even then the fact of the remedy may create an unevenness. But the failure to have a special prosecutor when there is a need for reassurance can further undermine faith. The dilemma of the public policy decision is obvious. I believe the prevailing sentiment of those scholars and lawyers who have considered the question over the last two years has been in general against the institution of a permanent special prosecutor. I need hardly remind the Chairman and this committee of those discussions.

As one approaches the question of the appointment of a special prosecutor today—for this period—one alternative would be to merely continue the Watergate Special Prosecutor's office now in place through the orders of the Department until such time as this is seen to be unnecessary. Such an alternative seems insufficient. The order would have to be revised in any event and there would be a strong desire to have it stand in statutory form. The attempt to put it in statutory form then becomes an exercise in the creation of a temporary special prosecutor, which can require a trigger mechanism as to when it is used, or comes into being, as in H.R. 14476, or some other kinds of mechanism,

presumably not yet tried or developed, as to when the mechanism is no longer necessary. A confrontation with these problems and other institutionalized forms for the temporary special prosecutor suggests that it is better to go against what was the prevailing wisdom and to decide that among these alternatives a permanent special prosecutor with succeeding incumbents limited to fixed periods of appointment, and with a defined area of automatic jurisdiction, and further jurisdiction by discretionary referral, is the preferable course. That is the course which the President has taken and I urge your favorable consideration of the President's proposal.

Mr. Chairman, there are other matters on which I might comment in connection with H.R. 14476, particularly with respect to the proposal for a Division of Government Crimes where the President has proposed an alternate way which recognizes the steps which have been taken under his administration in the Department of Justice to create such units in a way which I believe to be more workable. We can submit these views to you in writing or in further testimony if you desire. But I believe it is the Special Prosecutor point which requires and of course has received the greatest attention.

Mr. Chairman, I found when I came to my present office about a year and half ago that there was some kind of a division in Washington between those who had lived through the Watergate experience in this city, and those who like myself had come lately. Perhaps the perspective is different. I am rather sure it is. But the whole country, of course, lived through Watergate. And our constitutional system did work. I assume that whatever the perspective we have we all agree we must learn from the past but not cherish—or at least overly cherish—the scars. In saying this I do not mean to detract in the slightest from the awesome concerns of that time nor for that matter from the awesome responsibilities which government, this Committee, and citizenship always carry. I mean rather to suggest the mood with which all of us, I believe, would hope to approach the question of appropriate reforms. I have tried to do this. It has resulted in my own abandonment of the received wisdom against a permanent special prosecutor and in my advocacy for it as against the temporary special prosecutor.

TESTIMONY OF HON. EDWARD H. LEVI, ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Attorney General LEVI. Thank you, Mr. Chairman. I found it very interesting.

Mr. Chairman and members of the committee, I appear here today in response to your invitation to comment upon H.R. 14476 which, as you know, provides for appointment of Special Prosecutors in certain cases and establishes a Division of Government Crimes within the Department of Justice.

H.R. 14476 represents an understandable effort to remove personal or partisan bias—or the public perception of such bias—from Federal law enforcement. And that effort is an important one. My view is, however, that H.R. 14476 is not the most effective or appropriate means for curing the evils at which it is directed. The President has proposed an alternative to H.R. 14476 which I would also like to discuss with you.

Mr. Chairman, even though it may appear to be unnecessary, in which case I would be glad to skip it, I think it might be helpful if I summarized very quickly my view of the main provisions of H.R. 14476.

It provides for the appointment of a temporary Special Prosecutor for each case in which the President or Attorney General has a conflict of interest or appearance of a conflict. "Conflict of interest" is defined in section 594(c)(1) as "a direct and substantial personal or partisan political interest in the outcome of the proposed criminal investigation or prosecution."

Under the next paragraph, a conflict of interest or its appearance is automatically deemed to exist in all cases involving the President, the Vice President, any Cabinet officer, an individual in the Executive Office of the President compensated at a rate of level V or above, the Director of the FBI, and any person who has held such a position in the 4 years prior to the investigation or prosecution. In cases not involving these stated individuals a conflict of interest or its appearance still may be held to exist under other circumstances and to require the appointment of a Special Prosecutor. The test would be the direct and substantial personal or partisan interest of the President or Attorney General.

Section 594(a) provides that within 30 days of learning of a matter in which a conflict of interest or appearance of conflict may exist, the Attorney General must file with a special division of three judges of the U.S. Court of Appeals for the District of Columbia a memorandum, which would be available to the public, setting forth (1) a summary of the allegations received; (2) the results of his preliminary investigation; (3) a summary of the information relating to the possible conflict of interest; and (4) a finding on whether the case is clearly frivolous and therefore does not justify any further investigation or prosecution. A decision that an allegation is clearly frivolous is not judicially reviewable. It will terminate, unless new allegations or evidence are received, the court's ability to appoint a Special Prosecutor. Absent such a finding by the Attorney General, the question of conflict of interest becomes material. When the Attorney General determines that a case does not involve a conflict of interest, the court reviews his decision de novo and appoints a Special Prosecutor if it disagrees with his conclusion. If the Attorney General has determined that the case does involve the conflict of interest, or the appearance of conflict, the Attorney General must appoint a Special Prosecutor and define his jurisdiction. The court will then review this action to assure that the appointee meets the statutory criteria, including breadth of authority, and may make a superseding appointment.

In addition, section 594(b) establishes a procedure by which a private citizen may initiate court consideration of the appointment of a Special Prosecutor 30 days after the citizen has requested the Attorney General to consider such an appointment.

Under section 594(d), no employee of the Federal Government, including a Special Prosecutor, may be appointed a Special Prosecutor. This requires that a new Special Prosecutor, if one is to be named, be named for each case. Thus there could, and indeed would, be a multitude of independent Special Prosecutors.

Section 595(e) gives a temporary Special Prosecutor the same authority as the Assistant Attorney General for government crimes—whose authority is not defined in the bill—and, in addition, empowers him to appeal any court decision without obtaining the Attorney General's approval. Pursuant to section 595(d)(2) a Special Prosecutor could be removed by the Attorney General only for extraordinary improprieties and then only subject to court review.

In my view, H.R. 14476 is of highly questionable constitutionality. In addition, it would create opportunities for actual or apparent partisan influence in law enforcement; publicize and dignify unfounded,

scurrilous allegations against public officials; result in the continuing existence of a changing band of multiple Special Prosecutors; and promote the possibility of unequal justice.

The role of the judiciary under H.R. 14476 raises substantial constitutional questions. These include:

(1) The conferral upon a court of the power to appoint an official who is to perform significant executive functions and who is not inferior to any other official in the sense of being subject to direction and control; and

(2) The assignment to a court of powers—such as the reviewing of Attorney General appointments and decisions—which are unrelated to the constitutionally prescribed functions of deciding cases and controversies.

H.R. 14476 might have several significant effects, which should be recognized. The bill requires that the Attorney General determine whether he or the President has a "direct and substantial personal or partisan interest in the outcome of a proposed criminal investigation or prosecution." It would often be necessary for the Attorney General to consult the President concerning matters which are, under the bill, apparently regarded as particularly sensitive. This would, I think, require checking with the White House with respect to names which might arise in the course of routine criminal investigations—a kind of checking as to interest which otherwise I should not think the bill would wish to require.

The bill requires that whenever the Attorney General receives an allegation of wrongdoing which is directed against certain high Government officials or which would otherwise present a possible conflict of interest, he must file a detailed memorandum describing the charge and the results of the investigation into it with the special court. Any individual who submits an allegation of criminal wrongdoing to the Attorney General has the power to compel a similar reference. No safeguards for confidentiality are set forth.

This procedure enables any individual to convert a private allegation against a high Government official into a highly publicized investigation. Charges of this sort could well become the natural corollary and complement to most civil suits involving Government officials. The fact that such charges would be disseminated and dignified by the process established by the bill would inevitably encourage those who wish to use it for partisan or other improper purposes.

In enabling the criminal investigative process to be transformed into a media event each time high State or Federal officials or members of Congress are involved, the bill casts aside one of the most decent traditions of our criminal law system. This procedure for spreading improper charges contributes to public attitude of cynicism and distrust of Government officials—again a problem which the bill is intended to help solve.

I understand that some supporters of H.R. 14476 expected that it would rarely require the appointment of Special Prosecutors. But so far as we can tell from the definitions used, the contrary would be true. There might, for example, at the present time, be 12 investigations where a per se conflict of interest would exist under H.R. 14476. The criminal division has located recent or current cases involving at least 40 public officials, in the executive branch, the judiciary and the

Congress, in which it would be necessary to determine whether the President or Attorney General have, or appear to have, a substantial partisan or personal interest. There are other cases involving campaign contributors or politically active labor unions, or associates of prominent political figures which conceivably under the definition of the bill might trigger the appointment of a Special Prosecutor.

I realize that the appointment of a temporary Special Prosecutor would not be required if there is a certification of clearly frivolous. But I believe that in most matters such a certification would be difficult to give after only 30 days of investigation. The wildest allegations often require the most careful investigation and review—and wild allegations are to be expected. I do not believe any Attorney General with a sense of responsibility and a modicum of sense would give such a certification very often.

The cumulative effect of these provisions would be the referral of many matters to numerous Special Prosecutors. The existence of a multiplicity of Special Prosecutors each with only one case enhances the likelihood of unequal justice. This kind of a Special Prosecutor would be subject to formidable public—and perhaps self-imposed—pressure to indict in the one case he was appointed to pursue.

Decisions regarding electronic surveillance, immunity and every other area of prosecutorial discretion from plea bargaining to appeals would be made on an ad hoc basis by many Special Prosecutors who are independent of each other and have not regularly engaged in making such decisions.

These objections to H.R. 14476 have been shared with the Senate Government Operations Committee when it was considering the verbatim counterpart of this bill. Some of these problems can be ameliorated, but in my view not cured, by relatively simple amendments. But I believe fundamental constitutional and practical difficulties remain.

The President has submitted alternative proposed legislation, which I hope this committee will consider along with this bill. The President's proposal would establish a permanent Office of Special Prosecutor to investigate and prosecute criminal wrongdoing committed by high-level government officials. The Special Prosecutor would be appointed by the President, by and with the advice and consent of the Senate, for a single 3-year term. At the end of the term, a new Special Prosecutor would be appointed. An individual would be disqualified for such an appointment if during the 5 previous years the individual held a high-level position of trust on the personal campaign staff of, or in an organization or political party working on behalf of, a candidate for any elective Federal office.

Any allegation of criminal wrongdoing concerning the President, Vice President, Members of Congress, or persons compensated at the rate of level I or II of the executive schedule would be referred directly to the Special Prosecutor for investigation and, if warranted, prosecution. Although allegations involving these officials would have to be referred to the Special Prosecutor, he could decline to assert jurisdiction if the allegation or information was a peripheral or incidental part of an investigation or prosecution already being conducted elsewhere in the Department or if, for some other reason, the Special

Prosecutor determined that it would be in the interest of the administration of justice to permit the matter to be handled elsewhere in the Department. In such cases, the Special Prosecutor could establish such procedures as he thought necessary and appropriate to keep him informed of the progress of the investigation or prosecution, and at any time he could assume direct responsibility for undertaking the investigation or prosecution.

The Attorney General could also refer to the Special Prosecutor any other allegation involving a violation of criminal law whenever he found that it was in the best interest of the administration of justice. The Special Prosecutor could, however, decline to accept the referral of the allegation. In that event, the allegation would be investigated by the Department of Justice in the normal course which of course means that the investigation might be under the supervision of the section on Government Crimes in the Criminal Division or conducted by a United States Attorney's office.

Under the President's proposal, the Special Prosecutor would have plenary authority to investigate and prosecute matters within his jurisdiction, including the authority to appeal adverse judicial rulings. In the event of a disagreement with the Special Prosecutor on an issue of law, the Attorney General would be free to present the views of the United States to the court before which the prosecution or appeal was lodged. In exercising his authority, the Special Prosecutor would not be subject to the direction or control of the Attorney General, except as to those matters which by statute specifically require the Attorney General's personal action, approval or concurrence.

The President's proposal provides that the grounds for removal of a Special Prosecutor should be, and to the maximum extent permitted by the Constitution shall be, limited to those which constitute extraordinary impropriety.

This approach avoids the serious constitutional issues posed by the judicial appointment process set forth in H.R. 14476 by adopting the traditional model for the appointment of officials who perform functions exclusively executive in nature—nomination by the President and appointment with the advice and consent of the Senate. Other unfortunate consequences of H.R. 14476 are avoided as well. The possibility of multiple Special Prosecutors being appointed is eliminated. The appointment process is not fraught with vexing problems that arise from the vague standards which trigger the appointment and will not publicize allegations that may ultimately prove to be unfounded, because the appointment is not limited to a specific allegation. Unlike H.R. 14476 which places undue pressure upon a temporary Special Prosecutor to seek and secure a conviction for the single allegation over which he has jurisdiction, this approach allows the proper exercise of prosecutorial judgments because a permanent Special Prosecutor will have a broader jurisdiction.

I assume all recognize that in times of the greatest doubt concerning the ability of the administration of justice to function, a Special Prosecutor is necessary. In the past, a Special Prosecutor has been appointed during at least some of those occasions. I believe it must be recognized that in addition that, in those times of lingering concern, following periods of great doubt, a Special Prosecutor may be a

necessary response. The law has to rest upon the confidence and faith of the citizenry. I realize people will judge differently when events cry out for this unusual remedy, or when the aftermath of such events makes the retention or creation of such a remedy wise public policy. The remedy itself can cause a message of unevenness in the enforcement of the law, unless the remedy itself is perhaps regarded as vestigial—left over from a crisis of the past, or as established in permanent form because that is the way to avoid some of the trauma of prior days. And even then the fact of the remedy may create an unevenness. But the failure to have a Special Prosecutor when there is a need for reassurance can further undermine faith. The dilemma of the public policy decision is obvious. I believe the prevailing sentiment of those scholars and lawyers who have considered the question over the last 2 years had been in general against the institution of a permanent Special Prosecutor. I need hardly remind the chairman and this committee of those discussions.

As one approaches the question of the appointment of a Special Prosecutor today—for this period—one alternative would be to merely continue the Watergate Special Prosecutor's office now in place through the orders of the Department until such time as this is seen to be unnecessary. Such an alternative seems insufficient. The order would have to be revised in any event and there would be a strong desire to have it stand in statutory form. The attempt to put it in statutory form then becomes an exercise in the creation of a temporary Special Prosecutor, which can require a trigger mechanism as to when it is used, or comes into being, as in H.R. 14476, or some other kind of mechanism, presumably not yet tried, as to when the mechanism is no longer necessary. A confrontation with these problems and other institutionalized forms for the temporary Special Prosecutor suggests that it is better to go against what was the prevailing wisdom and to decide that among these alternatives a permanent Special Prosecutor with succeeding incumbents limited to fixed periods of appointment, and with a defined area of automatic jurisdiction, and further jurisdiction by discretionary referral, is the preferable course. That is the course which the President has taken and I urge your favorable consideration of the President's proposal.

Mr. Chairman, there are other matters on which I might comment in connection with H.R. 14476, particularly with respect to the proposal for a division of government crimes where the President has proposed an alternative way which recognizes the steps which have been taken under his administration in the Department of Justice to create such units in a way which I believe to be more workable. We can submit these views to you in writing or in further testimony if you desire. But I believe it is the Special Prosecutor's point which requires and of course has received the greatest attention.

Mr. Chairman, if I may say so, I found when I came to my present office about a year and a half ago that there was some kind of a division in Washington between those who had lived through the Watergate experience in this city, and those who like myself had come late. Perhaps the perspective is different. I am rather sure it is. But the whole country, of course, lived through Watergate. And our constitutional system did work. I assume that whatever the perspective we

all agree we must learn from the past but not cherish—or at least overly cherish—the scars. In saying this I do not mean to detract in the slightest from the awesome concerns of that time nor for that matter from the awesome responsibilities which Government and citizenship always carry. I mean rather to suggest the mood with which all of us, I believe, would hope to approach the question of appropriate reforms. I have tried to do this. It has resulted in my own abandonment of the received wisdom against a permanent Special Prosecutor and in my advocacy for it as against the temporary Special Prosecutor.

Mr. HUNGATE. Thank you very much, Mr. Attorney General, for a concise and illuminating statement on this problem with which we deal. And I would like to state that at the time of the invitation to testify we were of course considering H.R. 14476, the Senate counterpart, which we understand is basically the American Bar Association bill. And it appeared at that time that we might receive that bill here. Some of the issues, however, still remain before us, as I think you sense in your question here, and the discussions we hear—the issue of permanent versus temporary prosecutor. And as I read the writing, Jaworski, Ruth, Griswold, Clark Clifford, the litany of people with respect to judgments in some experience in the field, have come out against the permanent proposition. And if you go to the temporary prosecutor, then you face another problem immediately which is the triggering problem, the appropriate triggering problem that is going to have to be involved.

Then the questions inherent in all these bills about the political campaign figures, whether or not they should be or perhaps constitutionally could be debarred from holding such jobs, whether being a campaign manager means you are more apt to steal, or simply means that you are more apt to recognize stealing when you see it.

Then we have another issue of some concern, which is prosecutorial discretion. I have a sense as a minor former prosecutor that some of that discretion may be eroded somewhat here. I would like to guard that rather jealously, although sometimes I may have to yield on that.

Thank you for your testimony.

Mr. Wiggins.

Mr. WIGGINS. Thank you, Mr. Chairman.

Mr. Attorney General, it is highly probable that we will proceed to give special consideration to the Senate bill in which your agency played a prominent role rather than to deal with the House bill. The Senate bill is clearly a superior product, but it is not without problems.

I hope that you have a copy of your proposal before you. And I will question you with respect to your proposal.

Attorney General LEVI. I really don't have a copy of the Senate bill. I don't think my eyes are good enough to read it in the form it is in now.

Mr. WIGGINS. I understand.

I have something that I received from your office. I am sure you have a copy of that.

The first problem I have is whether you are satisfied that the limitations which were explicit on the power of the President to nominate and appoint and to remove are consistent with the Constitution. The problem isn't solved by any means, it is still open in your proposal.

Attorney General LEVI. I would not say that it is not possible that there is a constitutional set of problems there. My understanding is that there is a difference between the President's proposal on the removal and that which is included, as I think, not having the words in front of me, in the Senate proposal. The President's proposal really indicated that to the constitutional extent possible the removal would be only for extraordinary improprieties. And this of course is the language for the Watergate special prosecutor which, by the way, as you know, is still in place. And I kept it in place over the objections of his predecessor.

But the difference perhaps is not so great, because the Senate version immediately provides for really a court test if there is a removal for something less than these improprieties. So perhaps that in itself is not an extraordinary defect making much difference. And I think there is somewhat more language, and perhaps language which has an effect not quite what the Senate may have intended in this bill. But I really haven't had time to analyze it.

Mr. WIGGINS. It would help this member of the committee, Mr. Attorney General, if your staff, in the consideration of your proposal, prepared any memorandum on the legal issues addressed by this question, if you would share them with the committee.

Attorney General LEVI. Certainly. I didn't mean to say, Congressman Wiggins, that in trying to restrict the kind of appointment that the President might make can be said to be entirely without constitutional right, I didn't mean to say that.

Mr. WIGGINS. Section 591(c) is that section which indicates that the Special Prosecutor may not be appointed if he maintains certain political relationships to the President or any elective Federal office. I do believe that is going to have to be rewritten simply because it is my observation that those individuals who have real clout with the President are seldom members of the campaign staff. They are almost shadow figures, but they represent the real power. And I think we are talking about a certain intimacy of relationship rather than the official status of the staff. And I think we can correct that.

Now, the second sentence of section 591(c) in your proposal says as follows:

This provision shall not, however, form the basis for any challenge of the legitimacy of the special prosecutor or the validity of any of his actions once he has been appointed.

The Senate takes a different tack and uses the following language, I think to accomplish the same objective: "The confirmation by the Senate of a Presidential nominee of a Special Prosecutor shall constitute a final determination that he meet the requirements."

Do you want to comment as to the better of these two approaches?

Attorney General LEVI. I think they actually mean the same thing. So I am not sure I have a preference.

Mr. WIGGINS. That is good enough. I have my own views.

Now, jurisdiction of the Special Prosecutor includes the investigation, and if warranted, the prosecution of certain officials, including the Attorney General, the Vice President, and the Director of the Federal Bureau of Investigation.

I am concerned about the investigative power of the Special Prosecutor, especially if the investigation is of the FBI. Is it anticipated that the Special Prosecutor will have his own independent set of investigators, or whether he will call upon the FBI investigators to conduct the investigation mandated by the bill?

Attorney General LEVI. You must realize, I am sure you do, that you are asking me about an independent officer who can go in whatever direction he wishes to go. He will have jurisdiction to direct the FBI so he can use that. But I assume that if he wishes to have special investigators of his own he can do that also. Now, I really don't know that anybody has the answer to some questions which are down the line. As I say, he is quite independent. And really I suppose the only function which the Attorney General has with respect to him is to back him up. He might be watching to see whether there are improprieties, really. But I suppose they would have to be of a nature that would be common to all of us. So all I wanted to say is that there might be a problem of priorities within the Department, and I don't really know which could cause trouble, but I assume that that could be worked out. If one orders the whole FBI to do an investigation and they have other things to do, I can imagine that not in a time of crisis, when everybody understands what is the most important, but in terms of an everyday kind of functioning that there might be problems of priorities.

Mr. WIGGINS. I think with the inevitable growth of the office, if created, it will have a staff of investigators. That at least causes me to pause and reflect about it. It doesn't control the Special Prosecutor having almost exclusive jurisdiction over the staff of investigators.

The jurisdiction is given the Special Prosecutor in appropriate cases to prosecute among others the President of the United States and the Vice President of the United States. That is not all that easy a question. It troubled one of your predecessors in respect to the Agnew case, it troubled me then and it troubles me now, as to whether or not a President or Vice President may be prosecuted. I take it that the legislation really does not decide that issue. And if it developed down the road that the Special Prosecutor attempted to do that, there will be some constitutional bar to that, it will be litigated and read in the court, is that your view?

Attorney General LEVI. Yes. When you say that someone can prosecute, I assume that you will be free to prosecute.

Mr. WIGGINS. I reserve the balance of my time.

Mr. HUNGATE. Ms. Holtzman.

Ms. HOLTZMAN. Thank you, Mr. Chairman.

Welcome, Mr. Attorney General. I think you have raised some important issues with respect to the temporary Special Prosecutor legislation, especially with respect to the possible multiplicity of special prosecutors.

I would like, however, to ask you some of the questions that I posed to Senator Weicker, and some additional ones. First of all, do you have any objection to the jurisdiction of the Special Prosecutor that was set out in the original Senate bill which I believe was broader than the jurisdiction in the bill as passed? And if so, what do you think the jurisdiction ought to be now?

Attorney General LEVI. Actually I think the process was a little different. I think we had many discussions with the staff of the Senate committee. And the definition that we have used, that the President used in his proposal, which is now in the proposed Senate bill, is the one which was come to really by kind of mutual consultation with respect to the bill which I have just criticized. Now, you have a balancing problem. There is an attempt to set up an area for Special Prosecutors, forgetting for the moment whether it is permanent or temporary. And then there is this Office of Government Crimes, with an Assistant Attorney General of a very special kind. That was the original entity, you will recall, set up. And so it makes no sense to take everything that you are going to put under the jurisdiction of the Government Crimes Office, if you put all that under the Special Prosecutor, of course then you don't need that. So you really have to divide that, and you have to come to some more or less arbitrary point.

We thought that if you went to level II or above and for the sake of equality, and good government broaden it generally, that that would give the permanent Special Prosecutor quite a lot to do. If it didn't give him enough to do, or if there was a concern that something else should be handled by him, it could and it would undoubtedly be referred to him by the Attorney General.

Now, I must say—and this is an interesting situation which one often finds—one reason which I well understand for the permanent Special Prosecutor, who is appointed by the President and confirmed by the Senate, is a kind of distrust for the ability or motivation of the Attorney General, who is also appointed by the President, and confirmed by the Senate. If you follow that down, then you finally have the Special Prosecutor having all the things which the Attorney General might have had. If you increase that area just enormously, then I suggest you might have to transfer your distrust to the Special Prosecutor and depend upon the Attorney General to be the one who would be the watchdog. So it seems to me there is a kind of a balance in here. And I don't really have any—I don't know whether level II is the right level or not. But it was the intention to meet the high level kind of appointment problem where it was assumed that there would be what was called a conflict of interest.

Ms. HOLTZMAN. Mr. Attorney General, I think you have put your finger on something else that I find troublesome; namely, that the President would appoint the person who would presumably investigate him. I am not sure that is the best solution if we are trying to avoid a conflict of interest. In any case, the question I was referring to was whether you or the President had an objection to the original language in the Senate bill which included within the jurisdiction of the Special Prosecutor persons in the Executive Office of the President compensated at a rate of equivalent to or greater than level V.

Attorney General LEVI. I don't think there was any particular discussion about that. I think our view was that one should try to be as equitable as possible. There are problems of some unfairness when you pick up a group for this particular scrutiny. And if you are going to have it above level V in the Executive Offices of the President, then the question is, why don't you have it above level V throughout.

But I don't think—I can see a kind of unevenness and inequality which might finally become a fatal defect. And since we are talking about criminal prosecutions and defenses which will be made, one has to think about that.

Ms. HOLTZMAN. I don't know if I have adequate time, but at some point I would appreciate your addressing how the Congress, the executive branch, and the public can be assured that the investigation conducted by the Special Prosecutor has in fact been a thorough investigation. I think that that is a serious question, and I think that kind of accountability ought to exist. The Special Prosecutor should not be free from accountability with respect to the thoroughness and fairness and the quality with which he has discharged his responsibilities.

Attorney General LEVI. I would be glad to try to answer that, but I think the answer must be unsatisfactory, because when you try to use a prosecutor whose function it is to really bring criminal cases as a reporter or historian, you are mixing functions which taint many values of a civil liberties kind which we hold very dear. I do not think it is the function of a Special Prosecutor to report publicly that he could not bring the following cases, but he has the following observations to make on the facts as he sees them, although these facts have not been established or proven in any court. So I think it is improper to expect the Special Prosecutor to do that. I would have thought that was much more the job of a congressional committee, or perhaps a commission, as they have in England, of the crime commission type. But even when that is attempted, as I think we all know, there always remains some unsolved questions. So that I really don't think it is really satisfactory.

Ms. HOLTZMAN. That wasn't exactly my question. I would hope at some point you could tell us how we could hold the Special Prosecutor accountable for doing the job he is appointed to do.

Attorney General LEVI. I will try to answer that. I am sure the Special Prosecutor can be removed for extraordinary improprieties. But I don't think establishing the office in any way deprives the Congress of its oversight functions.

Mr. HUNGATE. Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman.

And thank you, Mr. Attorney General, for your leadership in this matter.

I am troubled as to who, in the actual order of things, would get this job. I am inclined to think that if a President doesn't want to make much fuss about this, he will take some career person in the Department of Justice and make him the Special Prosecutor for 3 years. Wouldn't it make sense, rather than banning politically active people, to ban people who have been career people in the Department of Justice or in the executive branch? Has thought been given to that?

Attorney General LEVI. I don't think so. You mean, have I thought about it? I have thought about it somewhat. I think it is going to be difficult—I think that is inherent—if not impossible to get the right kind of a Special Prosecutor. It is certainly not simple. But I don't know that I want to adopt that interesting rule that you have just given.

Mr. DRINAN. The Senate bill as passed puts an embargo on anyone who has been politically active for the last 5 years. The so-called Mitchell amendment is not going to reach the problem that I mentioned; namely, that you have a nice, quiet, very competent lawyer who is not going to rock the boat. They are the very people who allowed Watergate to come about.

Attorney General LEVI. I certainly agree that these are imperfect standards, and I don't know whether the political one is the right one. I assume it was put in there to reassure the public. But it might be equally inappropriate, it seems to me, to have someone who is closely identified with some particular interest group such as the ACLU or some other thing, so that you might think that he was biased on that side. I would certainly want to get somebody who is an active lawyer in the best sense of the American legal tradition.

Mr. DRINAN. A related point. The term of 3 years, it seems to me, causes all types of difficulties. That means that virtually every incumbent cannot remove him but can replace him. And that doesn't give this gentleman very much independence; he comes and he is appointed for 3 years, and he goes away forever.

Attorney General LEVI. That is the greatest independence; that is the most independent thing that can happen.

Mr. DRINAN. Why not 5 or 6 years so that he can go through a Presidency? The Comptroller General has 15 or 16 years. And the idea originally was to make this officer independent of every administration, independent of the Department of Justice. And it seems to me that a 3-year term weakens the independence that was originally desired and is still desired.

Attorney General LEVI. Mr. Congressman, I don't know, maybe it should be 2 years, a period of time that Congress is more familiar with.

Mr. HUNGATE. That is a very short period.

Attorney General LEVI. I am not sure what the length should be. My belief is, if you are appointing somebody to this kind of a job, and you want someone who is outstanding in the best American legal tradition as a lawyer, I really don't think this is the kind of a job where it is going to be easy to get somebody to say, in effect I want 6 years, or I have some implied obligation to stay 6 years. I think that will be very difficult.

Mr. DRINAN. I think it will be very difficult to go out into the real world of lawyers and ask somebody to come to Washington for 3 years. You have 3 years and 3 years only and then you are supposed to go back to Peoria. That reinforces my intuition that the administration is going to appoint somebody from within the executive branch who will do this nice and quietly and then go back to his job.

On other points, Mr. Attorney General, does this apply to the military and the CIA? Can we give assurance to the people that if any person in the CIA breaks into an apartment in Virginia, or if somebody in the military does something illegal, that the Special Prosecutor can reach him? He reaches those who get \$44,000 or more each year. That is a very limited number. What assurance can we give the people that this Special Prosecutor will give protection to the American people against the abuses that I have mentioned?

Attorney General LEVI. As I understand, what you are asking is whether this bill should take more the form of the bill which you introduced which would have the Special Prosecutor operate with respect to all abuses, which implies in the intelligence agencies. It certainly doesn't do that automatically, it would have to be by referral from the Attorney General. I do not think it would be a desirable kind of increased scope. It would be referred by the Attorney General, I would think that where the Attorney General had some concern as to how high the misdeed reached, that is, whether they be ordered or permitted by higher officials, when he was worried about that I think he would make reference. Otherwise it seems to me to be inappropriate to make the reference, and also that it would smack of unfairness. And I am not about to say that the Department of Justice or the U.S. attorney is incapable of enforcing the law with respect to those matters. But it is different than your bill. That is one reason I prefer it, I think, because I don't prefer your bill, but I can see there is a difference of view on it.

Mr. DRINAN. How are we going to reach the lack of public confidence, Mr. Attorney General, with regard to the crimes that I have mentioned when no FBI or CIA agent has yet been penalized or indicted? Yet there have been thousands of acts which are probably unlawful. If we can't reach that area by the Special Prosecutor, how can we reach it?

Attorney General LEVI. I really have to turn your question. What you really must be saying to me is that an honest and strenuous investigation which results in no prosecutions is all right if the Special Prosecutor's name is on it.

Mr. DRINAN. No, I didn't say that at all.

Attorney General LEVI. I say I have to turn it that way, because most of those things that you are referring to are barred by the statute of limitations. And so there is no way of saying that you can have prosecutions for most of those events. And if there is a kind of dismay about that, I think we perhaps should rejoice that we do have the statute of limitations, and that we understand that. But I also cannot comment, because as you know, there are existing investigations, and you cannot make a judgment as to how they will come out.

Mr. DRINAN. My time has expired. Thank you very much.

Mr. HUNGATE. Mr. Wiggins.

Mr. WIGGINS. Mr. Attorney General, in the bill passed by the Senate there is a duty cast upon the Special Prosecutor—I will read one line—"The Special Prosecutor may from time to time make public statements or reports as he deems appropriate. The Special Prosecutor may present reports, statements or recommendations to the Congress or the President for the Attorney General."

There is no similar provision in the bill provided by the President with respect to the Special Prosecutor, although there is a reporting requirement with respect to the section on government crimes.

If the Congress should in its wisdom give that authority to the Special Prosecutor for the purposes of some history would you like to comment upon the kind of lawyer-like discretion which the Special Prosecutor ought to exercise in making statements?

Attorney General LEVI. I think there is a difference on that. And I happen to feel very strongly that a Special Prosecutor has the lawyer's role of a prosecutor, and that he ought to be trying or reporting or in that sense trying his cases out of court. And if he is going to be used as a special investigator for a congressional committee to spread out the facts of the history, I think that really is inappropriate, and there is a problem.

Mr. WIGGINS. I am very strongly in accord with the gentleman's statements.

Section 593, "designated authority," subsection (b), indicates that the Special Prosecutor shall not be subject to the Attorney General's control. And then the proviso is added: "except as to those matters which by statute specifically require the Attorney General's personal action." You doubtless had a specific statute or statutes in mind, and I wonder if you could tell us what they were.

Attorney General LEVI. I think the only one—there may be others—probably is the title III wiretaps authorization, which, as we know, requires the personal approval of the Attorney General.

Mr. WIGGINS. That is the one that came to my mind as well. And if I were a suspicious individual, I would believe that the Attorney General would be reluctant to authorize the wiretap on the Attorney General or someone else subject to the jurisdiction of the Special Prosecutor. Would you think it wise to amend title III if necessary or by implication or directly in this statute to give the Special Prosecutor sole authority to approve that type of wiretap?

Attorney General LEVI. I really don't think so. It makes it difficult for me to speak about it, as I am Attorney General at the moment. But perhaps really because I am, I have some concern. But I have no solution for the complete lack of either collaboration or direction for the Special Prosecutor. And I have been, I guess, quoted at various times as expressing my concern. But I don't have the answer.

For example, the Department has a policy regarding dual prosecutions. It is a policy which is not automatically fulfilled, it requires a great deal of discretion and exercise of authority by the Attorney General.

I suppose that there is no injunction upon the Special Prosecutor even to try to follow that policy. I did wonder at some point whether it wouldn't be desirable even if the Special Prosecutor is going to make his own judgments and exercise his own discretion, whether it wouldn't be at least fair to the defendant, fairer to the defendant, if he exercised that discretion in terms of the policy of the Department as he understood it.

We have a similar policy with respect to subpoenas for newsmen. We are most reluctant to permit that where it compels the revelation of the source.

But the Special Prosecutor may not believe in that and may go off on his own, and so on.

So I think that is a problem. I don't know in terms of all the problems one has that those are major. But if I were sufficiently inventive, which I am not, I would try to think of some mechanism within the executive branch and within the Department of Justice. I certainly

do not accept the idea that you then would run to the court of appeals, which I think is unconstitutional.

Mr. WIGGINS. I yield the balance of my time.

Mr. HUNGATE. Ms. Holtzman.

Ms. HOLTZMAN. Thank you, Mr. Chairman.

Mr. Levi, I would like to get back to the point I raised earlier, because I think it presents a serious question. We can look at the past record with respect to the Watergate special prosecutor and say, is this situation likely to recur, and how would we deal with it differently if we could start from the beginning? Here we stand with the special prosecutor in the Watergate matter having conducted investigations for a number of years, but despite all the indictments which have been brought and all the activity of his office, we still do not know who was legally responsible for the break-in at Watergate. We know that a crime was committed, that there was a breaking and entering, but we have no inkling of the motivation. I wonder whether there is anything in the Senate bill now before us, which would permit the public with respect to Watergate or some future investigation to know whether a thorough investigation was conducted and when no prosecution were brought, what the reasons were—in other words, whether it was due to any inability to find the culprit—which may well be the case—or due to a failure to investigate, or some other possibility.

Since the Special Prosecutor is not accountable to the Attorney General and makes only those reports that he or she wants to make to the Congress, how do we insure that in fact thorough investigations are conducted by a Special Prosecutor? What protection does the public have with respect to this official? Perhaps you could address that question—I am not talking about the report. I am talking about possible misfeasance and how we can have accountability for the work of the Special Prosecutor?

Attorney General LEVI. Well, if I understand, and I am not sure I do, the notion of accountability as you are putting it, I did say before it doesn't seem to me that there was anything in the bill which deprived the Congress of its oversight function, nor would it deprive the Judiciary Committee of its oversight function. And so I assume that there would be a considerable number of reports of the particular kind which the committee might well ask for and receive. My concern was when you ask a question, not did you find out or didn't you find out, will you please give us a description of the facts which can't be proven in court, and so on.

Ms. HOLTZMAN. I thought you alluded to, and let me specifically quote, that exercise of the oversight function might create a problem. I would point you to section (e) of section 591, which says: "However, the report" and that is referring to the report of the Special Prosecutor—"shall not include any information"—I am skipping down—"which the Special Prosecutor determines would constitute an improper invasion of personal privacy or other improper disclosures."

The Special Prosecutor is given full discretion to withhold from Congress the information which he doesn't want to disclose. I would ask you what protection the public has, given the broad discretion given the current Special Prosecutor. How do we assure in future investigations that, in fact, a thorough investigation will be conducted.

Attorney General LEVI. I must beg off from answering that, because I have not seen that provision. And what you just said is apparently a provision in the Senate version which was not in the President's proposal. I will be glad to look at it and study it and write you a note about it. But I have not read it, and I have not seen it.

Ms. HOLTZMAN. I think it would be useful, because I think the question of accountability of a Special Prosecutor is an important one, and the public is entitled to have assurance of the thoroughness with which he discharges the job.

Mr. HUNGATE. Without objection—there may have been another issue or two on which you might wish to reply. Would a week be an adequate time, on or before a week from this date? Is that adequate time?

Attorney General LEVI. You mean for any questions?

Mr. HUNGATE. Such as this.

Attorney General LEVI. Sure, I would be glad to do that.

Mr. HUNGATE. Without objection, it is so ordered.

Ms. HOLTZMAN. Mr. Chairman, if I might, I would like now to raise this question specifically with respect to a report that may not be traditionally viewed as a report made by a prosecutor. It was the question I thought I had asked and you did not answer. But I would like to pose it, and if possible get some suggestions from you in respect to that.

When we are talking about questions of possible criminal conduct of the President of the United States the public is entitled to know the story of what happened. I think the public is also entitled to know about serious misfeasance, even if it does not amount to criminal conduct. There may be material about such misfeasance uncovered by a Special Prosecutor during the conduct of his investigation. What mechanism do we have, or should we develop, for permitting the public to be informed about serious misfeasance in office by the President when no prosecution is brought? How do we deal with that problem, which I think is a serious and important problem?

Attorney General LEVI. I think obviously it is a serious problem. But I think you have to sort of divide the questions. It may be, that as you understand, as we both understand—I haven't any idea what the Special Prosecutor found on anything.

Ms. HOLTZMAN. I am not talking about this past special prosecutor.

Attorney General LEVI. I don't know whether we are talking about a situation in which the Special Prosecutor's investigation has determined that there are facts as to serious misfeasance, but where no prosecution is brought. It seems to me that if I understand those words, one is really then talking about the question as to whether one can bring a prosecution against a President, a sitting President. And really, I don't somehow or other want to have that constitutional discussion. And I don't think you do. But my point is, I don't know whether a Special Prosecutor in his discretion would say, I think that at this level of high position it is appropriate for a Special Prosecutor who finds that for some reason he cannot prosecute can nevertheless record and speak. And as I say, I think that raises a serious question.

Mr. HUNGATE. The time of the gentlelady has expired.

Mr. DRINAN.

Mr. DRINAN. Thank you, Mr. Chairman.

Mr. Attorney General, I wonder if you would comment on the Senate bill as passed as to the powers of the Special Prosecutor to be self-starting. It is rather ambiguous, and perhaps they left it deliberately that way. That jurisdiction is clear enough, but then paragraph 2 of section 592 says that the Attorney General shall promptly refer to the Special Prosecutor for investigation, and so on. Do you feel that the intent of the legislation is that the Special Prosecutor shall be a self-starter, that he will get involved in these things under his jurisdiction, without any reference or suggestion by the Attorney General?

Attorney General LEVI. No. I think the answer is that under 592 (a) he is an automatic reference, and he is a self-starter. That is 592(b). It means a reference.

Mr. DRINAN. But what is the intent? Should he more or less confine himself to those things which the Attorney General wants him to investigate, or should he say, "I am here independently of the Attorney General"? Is that what his independence means?

Attorney General LEVI. I don't think that the Special Prosecutor can suddenly decide that since he is independent of the Attorney General, that he will bring an antitrust suit, or something of that kind. It is not so way out. After all, that might involve people. But it seems to me that maybe he will actually, as far as I know, on some of these people. So that what is being attempted is to say that this is automatic as to certain levels of persons, that is, not the person but their pay. And then beyond that he makes a reference.

Mr. DRINAN. In other words, he can initiate an FBI investigation on his own without the knowledge or approval of the Attorney General.

Attorney General LEVI. Oh, yes. He can also do it to the Attorney General.

Mr. DRINAN. The Special Prosecutor must report annually to this committee and the Senate Judiciary. One of the things he must comment on is this: The degree of independence exercised under section 593. I wonder whether the Senate felt that this would be a problem, that the Congress should regularly, at least annually, check on the degree of independence exercised? Would you anticipate that there would be tension there, really a serious dilemma, a problem as to who will in fact initiate action?

Attorney General LEVI. I have no way of reading that crystal ball. I don't think there will be any. I thought somewhat about it, because when one reads about the Special Prosecutor, one reads about Attorney General Richardson and his friend Cox. And I assume that that relationship was probably too friendly to be a good example for what is intended in this legislation, maybe it was too close. But I also assume that perhaps there was some tension, although I don't really know that. I don't know how that will work, except that my assumption is that the Special Prosecutor is completely on his own, and certainly the Special Prosecutor who is now in place is completely on his own, and there has been no tension whatsoever.

Mr. DRINAN. I wonder why the bill so elaborately states that the Attorney General shall promptly refer various things? Why does the Special Prosecutor rely so much upon the Attorney General? If he is on his own, he is on his own.

Attorney General LEVI. As I said before, he is on his own in terms of the jurisdiction which has been given to him by the Congress.

Mr. DRINAN. My question, or my quarrel, I think, Mr. Attorney General, is this: That this person has been created and is deemed to be independent. But I am not entirely certain that he has the independence from the Department of Justice that some of the bills on this matter contemplate or think desirable. Would you feel—and this will be my final question, because my time has run out—would you feel that he has sufficient independence under the Senate bill so the people will not think rightly or wrongly that the Special Prosecutor has not really risen above the Attorney General or the Department of Justice?

Attorney General LEVI. My guess is that it would be the other way around, that there would be a feeling of some concern in later years about the complete independence of the Special Prosecutor. If I had to guess, I think that would be more likely the result.

Mr. DRINAN. What would be more likely?

Attorney General LEVI. It would be more likely that people would wonder why there was this separate Attorney General—I don't know whether you call them No. 1 or No. 2—who has no supervision whatsoever, and is, of course, in his own area more independent than anyone else could be. So that there are two things you have to worry about. One is the independent. And the other is, are you going to get the kind of a person who will exercise this with such wisdom and care that you have not destroyed a variety of civil liberties and then get a kickback to that. Both things have to be worried about.

Mr. DRINAN. Thank you very much, Mr. Levi.

Mr. HUNGATE. We appreciate the time that was taken here. It will be helpful to us to conclude this as soon as we might. And we do have other witnesses. We also have airplanes to catch. As soon as we conclude with the Attorney General we will take a 5-minute recess and complete work around 1 p.m. or so.

Mr. Wiggins, I understand you have one final question.

Mr. Wiggins. Yes. It is for the purpose of legislative history. The authority and jurisdiction of the Special Prosecutor is to prosecute and define defendant individuals. The investigation often leads to codefendants. And if the President, let's say, is a potential codefendant with those who are not within the purview of the statute, what would you consider to be the proper interpretation of the statutes? The Special Prosecutor shall proceed to prosecutions? How would you construe it?

Attorney General LEVI. My understanding of it—and just for the purpose of legislative history—I am not sure my understanding as to the intention of all concerned is complete—would be that the Special Prosecutor could determine whether he wished to take the whole case with the other defendants or whether he wished to have it proceed in some other way. And there will be problems, of course. But he can take the whole thing.

As far as I was concerned, I didn't know how to make any suggestion on that which wouldn't give rise to some suspicion that because there were other defendants, in some way or other breaking it apart would weaken the case against the higher official. And in some way one is depriving the Special Prosecutor of the jurisdiction which was

intended for him so this has been left to the Special Prosecutor to determine.

Mr. WIGGINS. One further legislative history-type question. Under the section described as the authority of the Special Prosecutor it is indicated that he shall have authority to handle all aspects of the case. The case is by definition a criminal case targeted against defined individuals. That authority given to him should include, I take it, the right to commence such actions if appropriate and ancillary to the prosecution of a criminal case. There may be prohibitions, proceedings, there may be mandamus proceedings and things of that nature incidental to the case which I take it should be within the authority.

Attorney General LEVI. Yes; as you define it, the answer is yes.

Mr. HUNGATE. Famous last words, just a few questions.

What would you think, or have you considered the prospect sometimes suggested to us, that the confirmation procedure might be similar to that in the 25th amendment, where because of the unique and broad scope of the legislation, perhaps the person appointed would be approved by the Senate and the House?

Attorney General LEVI. I think we are becoming too dramatic at that point.

Mr. HUNGATE. You would at least not smile with great favor on that suggestion?

Attorney General LEVI. I really don't—when it is a theoretical matter, why not have all confirmation procedures both in the House and the Senate? I don't think the country is in a position where we have some kind of Dostoevski- or Kafka-like grand inquisition, including when the special prosecutors are appointed.

Mr. HUNGATE. Unless those fellows write for Reader's Digest, I haven't read them.

With regard to defining the people who initiate or cause a conflict and come within the coverage of this bill, it is done on the basis of salary. That concerns me a little bit. Maybe somewhere some guy will get promoted to a level II of the executive schedule for reasons totally unthinkable.

Attorney General LEVI. I think you should take the bitter with the sweet, and that those people you mention should inform the Special Prosecutor.

Mr. HUNGATE. But as to a salary level, do you know of another way, or can you think of any that might—

Attorney General LEVI. I think it gives rise to a great sense of injustice when you start going on some other basis myself.

Mr. HUNGATE. Basis other than salary level?

Attorney General LEVI. Yes.

Mr. HUNGATE. This is off the subject, but there was some discussion of the statute of limitations having run in some of the FBI-CIA cases. And this is just my legal education, I guess. Suppose that finally the sheriff or the county treasurer has been stealing for a number of years, and they don't find it out until they get a new one. Is it clear that the statute of limitations runs even though it would be a law enforcement agency that perhaps was covering up for itself?

Attorney General LEVI. Of course there are problems as to whether the statute has actually run or not, a conspiracy and so on can keep

it not from running, but I was putting the case in which there was no doubt that it had run. And statutes can run.

Mr. HUNGATE. Thank you very much, Mr. Attorney General, first for your time and patience, and waiting on us to get started here in response to the questions. We appreciate it. It has been helpful in its entirety.

The Chair would like to declare a 5-minute recess to reconvene at least at 12:15. We have additional witnesses to hear from, Mr. Spann and Professor Miller, representing the ABA; and Charles Morgan of the ACLU.

[Recess.]

Mr. HUNGATE. The subcommittee will be in order.

The next witness we are pleased to have with us is Mr. William B. Spann, Jr., the president-elect nominee of the American Bar Association, and chairman of the ABA's special committee to study Federal law enforcement agencies. With him I see Prof. Herbert Miller, reporter, special committee to study Federal law enforcement agencies.

We appreciate your efforts here, gentlemen, and your patience.

Do you have a prepared statement, Mr. Spann? If you do we will insert it in the record at this point.

[The prepared statement of William B. Spann, Jr., follows:]

STATEMENT OF WILLIAM B. SPANN, JR., ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Subcommittee, I am William B. Spann, Jr., a practicing attorney from Atlanta, Georgia, and a President-Elect Nominee of the American Bar Association. It is a privilege to appear before you today on behalf of the Association to share with you our views on the important subject your Subcommittee is addressing—the prevention of partisan and other improper influences from intruding upon and disrupting the functioning of agencies and departments of the federal government.

The Association, as the principal representative of and spokesman for the legal profession in this country, is particularly concerned about such improper influences being exerted upon federal law enforcement agencies and activities, and my comments today will be addressed primarily to those matters. The Association's interest in the subject of the proper administration of justice dates back, of course, to the Association's inception in 1878. The views expressed today, however, were formulated over the last three years by the Special Committee to Study Federal Law Enforcement Agencies, which was created in 1973 to examine the functioning of those agencies and to formulate recommendations to ensure they would not be improperly politicized or misused. While the creation of the Special Committee was occasioned by the series of events generically called Watergate, the Association and the Special Committee were fully aware that the problems being addressed were not peculiar to a particular administration but have been of concern for many years.

I have been privileged to serve as Chairman of the Special Committee since its inception. With the assistance of its consultant, Professor Herbert S. Miller of the Georgetown University Law Center, who is accompanying me today, the Special Committee produced a preliminary report of its findings in July, 1975, and distributed it for comment to a wide range of organizations and individuals interested in this topic.

Extensive comments were received from both within and without the ABA on the preliminary report. The Special Committee made substantial modifications of its recommendations in response to this input and published its final report, "Preventing Improper Influence on Federal Law Enforcement Agencies," in January of this year. The twenty specific recommendations for reform contained in the report were considered by the Association's House of Delegates at its Midyear Meeting in February, 1976, and were adopted in their entirety as

the official policy of the Association. A copy of the final report has been sent to each member of your Subcommittee.

The Subcommittee may be interested to know that, with today's appearance, I have now testified on this subject matter before committees and subcommittees of Congress four times within the last five months. My prior appearances were before the Senate Committee on Government Operations and the Senate Committee on the Judiciary with respect to S. 495, and before the House Judiciary Subcommittee on Civil and Constitutional Rights on the subject of FBI oversight. I mention these appearances because I think they provide strong evidence of my belief and the ABA's belief in the importance of Congressional action in this field.

In formulating its recommendations, the Special Committee began by rejecting the notion that problems of improper influence and corruption are solely attributable to a few bad individuals and that the preventive, therefore, is to ensure that only the good occupy positions of power. Such a "bad apple" theory does not bear up well when viewed in the historical context of the last several decades.

Our report documents a long and unfortunate history of the progressive politicization of the Department of Justice and the growing misuse of the FBI and the Internal Revenue Service and subsequent abuses of power by these organizations. Beginning in 1936 the FBI was asked by President Roosevelt to look into "subversive activity in the United States" and obtain "a broad picture of the general movement." Further memoranda from President Roosevelt and succeeding Presidents, brought the FBI into the domestic intelligence function and ultimately into highly questionable areas involving the civil and political rights of United States citizens. All but two Presidents since Roosevelt have appointed as Attorney General an individual who played a key role in that President's election campaign. Finally, beginning in 1961, the Internal Revenue Service, under pressure from the White House and some committees of Congress, has engaged from time to time in politically oriented intelligence activities unrelated to the administration of the Internal Revenue laws.

The ABA believes that basic institutional and structural reform is essential to assure the public of the integrity of our federal law enforcement agencies. The ABA agrees with the statement made by James Madison in the 51st Federalist Paper:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed, and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity for auxiliary precautions.

I emphasize this consideration because we now have a Department of Justice headed by an Attorney General and Deputy Attorney General held in the highest repute in the legal profession and by the American Bar Association. Nothing in the ABA recommendations is directed at them as individuals. Neither Attorney General Levi nor Deputy Attorney General Tyler had any connection, of course, with the events known as Watergate. But more importantly, they have taken and are taking strong measures to assure that official corruption will be prosecuted fully and to assure that the FBI will be closely monitored to prevent abuses of its great power. Professor Miller and I met with both the Attorney General and the Deputy Attorney General to discuss the Committee's recommendations, and, as a result of those discussions, the Committee modified certain of its recommendations. We are particularly pleased that the Department has now instituted some of the measures suggested in our report.

The Committee's recommendations will serve to preserve these measures against change under future administrations. We do not know what the future holds, but there is ample historical evidence that men are not angels and "auxiliary precautions" must be taken to prevent future officials from being tempted to abuse their power. I have spent some time on this point because it is fundamental to any discussion of how to prevent improper influences on our federal system of justice. The ABA believes the measures recommended in the report will go a long way towards preventing future abuses and illuminating more quickly those which may occur despite such reforms.

There are other fundamental concepts underlying the specific recommendations of the ABA. Perhaps the most important relates to Congress. As the body which enacts the laws which must be enforced by the Executive Branch, which confirms appointments to major executive positions, and which appropriates funds for the implementation of the laws it has enacted, Congress has the constitutional obligation to participate with the President in basic policy-making and the setting of priorities. Seventeen of the twenty recommendations focus on the role of Congress in legislating, confirming appointments, or appropriating monies for federal law enforcement agencies. The primary role that Congress must play in establishing basic policies in this area cannot be overemphasized.

There are other basic themes which underlie the recommendations. The ABA believes that responsibility for federal law enforcement activities must be focused in the Department of Justice. Our recommendations, if implemented, would require the Attorney General, subject to legislative guidance by Congress, to exercise internal oversight over the law enforcement functions of the Department of Justice, promulgate rules and regulations to guide FBI operations, supervise a new Government Crimes Division within the Department, adhere to legislatively-set standards in deciding whether or not to appoint a temporary special prosecutor, and set law enforcement resource allocations for presentation to Congress.

The ABA believes the Department of Justice must have the primary role in prosecuting crimes involving official corruption. But the ABA also believes that in certain very limited circumstances additional safeguards are required. We are speaking here of the investigation and prosecution of crimes in which law enforcement officials may find themselves in a conflict of interest, or simply the appearance of a conflict. Such a situation could prevent individuals of even the highest integrity from performing their duties without compromise and without raising fears in the public mind about the integrity of the investigation or prosecution. The Supreme Court has properly noted that "one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will."*

Former special prosecutor Archibald Cox, in testimony before a Senate Judiciary subcommittee last year, emphasized that a servant cannot investigate his master, and called for legislation providing a mechanism for triggering creation of a temporary special prosecutor's office at an appropriate time. He said the following about the investigation and prosecution of crimes which might involve the White House:

The pressures, the divided loyalty, are too much for any man, and as honorable and conscientious as any individual might be, the public could never feel entirely easy about the vigor and thoroughness with which the investigation was pursued. Some outside person is absolutely essential. The question is what, if anything, should be done.

The ABA believes the answer lies in the creation of a triggering mechanism which would take effect under certain circumstances and in accordance with carefully prescribed standards.

Finally, many of the recommendations of the ABA emphasize the concept of accountability. We have attempted to provide in our recommendations specific measures to assure the accountability of various actors in the criminal justice system to their superiors, to Congress, and to the public. The recommendations also emphasize, in our view, the accountability of Congress to the American people through its policy-setting and oversight role.

I would now like to discuss certain of the provisions of H.R. 14476, the bill your Subcommittee is considering today. Proposed Sections 591-593 of Title 28, Chapter 39 of the United States Code would establish in the Department of Justice a Division of Government Crimes headed by an Assistant Attorney General appointed by the President by and with the advice and consent of the Senate. The Division would have jurisdiction over all criminal allegations against top level officers or employees if the violation is directly related to the employee's work. The jurisdiction also includes violations of federal laws relating to campaigns for elective office and lobbying; and such other cases as may be referred by the Attorney General.

We believe this Division is consistent with the idea that the Attorney General has the primary responsibility for law enforcement and that Congress has the

**Humphrey's Executor v. U.S.*, 295 U.S. 602 (1935).

responsibility to set basic policies and oversee the Department of Justice. Former special prosecutor Henry Ruth has stated that such a statutorily-mandated division would at least ensure an allocation of resources to the corruption problem. Through its confirmation and appropriation process, Congress could assure that the personnel and resources devoted to this area would be sufficient in quality and quantity to fulfill the division's mandate.

The ABA believes that such a division is vitally needed. There is a history of inadequate monitoring of conflict of interest laws and of not prosecuting election law violations. We believe the recent establishment of a special Public Integrity Section by the Attorney General in the Criminal Division is a progressive first step toward rectifying a situation which has existed far too long. However, the ABA also believes that this approach to prosecuting government crimes should be perpetuated by legislation. The present Attorney General is committed to the impartial prosecution of such crimes. But what assurance do we have that his successors in office will be similarly committed?

With such a statute, and with Congress playing its proper confirmation and oversight role, there will be much greater certainty that such crimes will be vigorously prosecuted.

The ABA believes that the establishment of a Government Crimes Division by statute, while essential, is only one among many steps which should be taken to prevent the intrusion of improper influences in federal law enforcement activities.

One of these other measures which the Special Committee considered at great length was the concept of a special prosecutor. The Special Committee was established at a time when the ability of the Watergate special prosecutor's office to perform its functions fully and without political interference was of great public concern. In that context it was only natural for the Special Committee to devote considerable attention to this issue, and it is one of four principal topics addressed in the Committee's report.

At the time of the firing of the first special prosecutor, Archibald Cox, then-ABA President Chesterfield Smith stated:

It clearly was and is improper for an investigation of the Executive Branch of the government [to be conducted] by a prosecutor who is under the control or direction of either the President himself or some other person who himself is under the direction and control of the President.

This view is based on standards adopted by the American Bar Association in 1971 in its Project on Standards for Criminal Justice. In the *Standards Relating to the Prosecution Function and the Defense Function*, the ABA addressed the problem of conflicts of interest in § 1.2 as follows:

A prosecutor should avoid the appearance or reality of a conflict of interest with respect to his official duties. In some instances, as defined in the Code of Professional Responsibility, his failure to do so will constitute unprofessional conduct.

The *Standards* emphasize that it is of the utmost importance that a prosecutor avoid participation in a case in circumstances where any implication of partiality may cast a shadow over the integrity of his office. Finally, Canon 9 of the American Bar Association *Code of Professional Responsibility* provides that "a lawyer should avoid even the appearance of professional impropriety."

The final report of the Senate Select Committee on Presidential Campaign Activities emphasized the preventive role of a permanent office of public attorney, stating that its existence might have deterred some of the wrongful acts which comprised Watergate. The report concluded that it would be unwise to wait until another national crisis to reinstitute an office of special prosecutor:

It is far better to create a permanent institution now than to consider its wisdom at some future time when emotions may be high and unknown political factors are at play.

Although the ABA agrees with the concept underlying the Select Committee's recommendation, it opposes the establishment of a permanent office of special prosecutor. It is striking that the calls for the establishment of a permanent office of special prosecutor, once heard so loudly, have now become almost completely muted. Few individuals who have examined the problem from a legal and policy point of view now conclude that such a permanent office is the answer. The many issues which the establishment of such an office would raise have been adequately discussed before many congressional committees and are detailed in our report. I will not repeat them here.

But the ABA has also rejected the notion that the ad hoc approach taken in Watergate provides an adequate answer for the future. It is true that under

present law the Attorney General can appoint a special prosecutor. It is true that under severe pressure from the public and Congress such a special prosecutor was appointed for the Watergate investigation. But the appointment was made only after a crisis of grave constitutional proportions had developed. The basic thrust of the ABA recommendation is that procedures should be established now, in the calm of thoughtful discussion and deliberation, which would permit the appointment of a special prosecutor under such circumstances and in accordance with such defined standards as the public, through its elected representatives, shall have determined. Thus, the Special Committee spent much of its time searching for a triggering mechanism which would serve this purpose.

We have not been alone in this quest. All of the former special prosecutors have indicated their opposition to a permanent office of special prosecutor but have also indicated that some kind of triggering mechanism would be desirable.

Thus, the Special ABA Committee searched for answers to a variety of difficult questions. What should these objective standards be? Who should appoint a temporary special prosecutor? And who should remove? To whom would such a special prosecutor be accountable?

The Special Committee concluded that standards relating to conflicts of interest would provide the best guidelines for the appointment of a temporary special prosecutor. In line with the ABA's belief that the Attorney General is and should remain the responsible official, the primary obligation for making appointments under such a standard was placed in the office of the Attorney General. Under Section 593 in H.R. 14476 such responsibility would likewise be placed on the Attorney General.

It was the intent of the Special Committee that the Government Crimes Division conduct the great bulk of investigations involving government officials. The temporary special prosecutor mechanism was to be triggered only in those cases where a conflict of interest would be involved and only in those extraordinary cases involving relatively highly placed government officials. Section 594 of H.R. 14476 narrowly restricts the circumstances under which a temporary special prosecutor would be appointed. Subsection (c) (2) would mandate the appointment of a temporary special prosecutor when certain specified high government officials were the subject of a criminal investigation or prosecution. Subsection (c) (1) would apply the traditional notion of conflict of interest to all other government officials, but only if "the President or the Attorney General has a direct and substantial, personal or partisan political interest in the outcome of the proposed criminal investigation or prosecution." This language significantly narrows the traditional conflict of interest standard by requiring that there be a "direct and substantial" interest. This narrow standard is another assurance that the invocation of the appointing process for a temporary special prosecutor would occur only in those extraordinary instances which truly warrant it.

The Special Committee considered going no further than recommending that statutory conflict standards for appointment be established which would rely upon the Attorney General's willingness to recuse himself in a conflict situation. But the ABA believes that further safeguards must be provided. In the federal system Department of Justice attorneys may be called upon to investigate their immediate or indirect superiors or those responsible for their appointment. In these circumstances, conflict of interest, partiality and impropriety may well be present. The ABA has thus concluded that under certain circumstances an authority outside of the Executive Branch may be needed to make the appointment of a temporary special prosecutor.

I want to reiterate the ABA's view, and my personal feeling, that this in no way reflects upon the integrity of any individual. It does reflect the legal profession's constant concern with whether or not justice is administered with complete impartiality and, equally important, whether or not there is an appearance of such impartiality. The public must be assured that crimes involving government officials at the highest levels can be prosecuted with complete impartiality.

The ABA's recommended mechanism for the appointment of a temporary special prosecutor and the provisions of H.R. 14476 are very similar. I have appended to my testimony a comparative analysis of the two measures. I would like to briefly underscore a few key provisions.

First, it should be stressed that under both proposals, the Attorney General would play the primary role. The Attorney General would review the facts with respect to conflict of interest and decide whether he should recuse himself or not. If he does find it necessary to recuse himself, he is empowered under

both proposals to appoint a temporary special prosecutor. If he makes the appointment, he is directed to delineate the jurisdiction under which the special prosecutor will operate. The ultimate supervisory power—the power to remove the special prosecutor—is also vested solely in the Attorney General, who is empowered to remove a special prosecutor if he has indulged in “extraordinary improprieties.”

Thus, the Attorney General is significantly involved in every aspect of the temporary special prosecutor mechanism. But, as stated above, it is the ABA's belief that in certain limited circumstances, further measures may be needed. There must be another means by which a temporary special prosecutor may be appointed when the Attorney General is in a conflict of interest situation and does not recuse himself. Our proposal and your bill both provide for a court to be empowered to make the appointment in these limited circumstances. The procedure would be initiated in the first instance by the Attorney General's submitting a memorandum of law regarding the conflict of interest issue. The court would then review the matter and render a decision, solely on the narrow conflict of interest standard, that a temporary special prosecutor should or should not be appointed. If the Attorney General does not make an appointment, the court is empowered to do so. The court can also specify the jurisdiction of the special prosecutor it appoints and review the statement of jurisdiction given to a special prosecutor appointed by the Attorney General to ensure that it is “sufficiently broad to enable the temporary special prosecutor to carry out the purposes of this chapter” (Section 595 (c) (2) of H.R. 14476). Finally, the court can review a decision to remove the temporary special prosecutor prior to the completion of all investigations and prosecutions, but only to determine whether the “extraordinary improprieties” test has been met.

The question of removal hinges upon balancing the need for independence and accountability. The ABA feels that placing the removal power in the court would create intolerable strains and might place the court in a position of supervising the prosecutorial discretion of the special prosecutor. The ABA believes that such discretion is exercisable only by the prosecutor and is not subject to review by any court. The “extraordinary improprieties” standard would justify removal where appropriate but would not permit the Attorney General to remove a temporary special prosecutor without the fullest deliberation.

Finally, it should be stressed that the court would have no power to review discretionary prosecutorial decisions as to the merits of a particular case, whether or not it is frivolous or what tactics should be pursued in an investigation or prosecution. The courts, of course, cannot interfere with prosecutorial discretion.

The ABA believes that in normal circumstances the process will work well, that the findings of the Attorney General will not be reviewed adversely by the special court, and the matter will not become unduly complicated. However, if a situation arises in which the Attorney General does not perceive the existence of a real conflict, then admittedly tensions may arise and the matter may present difficulties. In such an eventuality, the ABA feels it is essential to have an authority outside the Department of Justice and the Executive Branch which can make the appointment. The mere existence of such an authority and such a power will we believe, act as a substantial preventive to extreme situations such as Watergate.

Section 594 of the bill provides an additional means for activating this outside authority. Under this section, an individual who has given the Attorney General information of federal criminal wrongdoing involving a potential conflict of interest may request the court to review the matter thirty days after the initial notification. If the Attorney General has not fulfilled his obligations to file a memorandum with the court under Section 594 (a), the court can then require him to do so.

Some fears have been expressed that these provisions will impose unreasonable administrative burdens upon the Attorney General and the Government Crimes Division. The provisions spell out in some detail the general recommendations of the ABA Special Committee requiring the Attorney General to inform the court of action taken in such matters and authorizing the court to act on its own authority when in its judgment the standards require appointment of a temporary special prosecutor.

The ABA does not believe these provisions place an unreasonable burden upon the Attorney General and the Government Crimes Division. At the present time

we can assume that information or evidence received concerning a possible violation of law by government officials is investigated. This may frequently require the FBI to participate and may require a decision in the Department that the case should be closed or that further investigation is required. The only new issue which the Department would have to consider under the provisions of this bill is whether or not there exists a conflict of interest as defined in Section 594 (c). Most such matters, we would assume, would involve lower level government officials and therefore would not involve the narrow conflict of interest situation defined in the bill. Thus, no further steps would need to be taken by the Attorney General.

Should a host of frivolous complaints and unwarranted allegations be made to the Department concerning these few high-level government officials. Section 594 (a) (3) authorizes the Attorney General to find that the information is frivolous and therefore does not justify any further investigation. This decision by the Attorney General is final under the bill and would not be subject to review by the court. It would, however, place the Department on record as finding that a particular case did not warrant further investigation.

The nature of the court is slightly different under H.R. 14476 than under the ABA proposal. We recommended the creation of a special court of appointment composed of senior federal circuit court judges. H.R. 14476 would establish a new division of the Court of Appeals composed of senior retired judges from the U.S. Court of Appeals for the District of Columbia and from other circuits, as well as retired Supreme Court Justices. The ABA believes that the two approaches are equally meritorious, and that the court would have a national perspective and would only act in cases of the utmost significance.

As a final note, the ABA believes the temporary special prosecutor should have the same powers in prosecuting the case or cases within its jurisdiction as reside in the Attorney General and the U.S. Attorneys. Thus, under Section 595, the temporary special prosecutor could carry to final completion any cases upon which his office lawfully had embarked, including criminal appeals.

A number of constitutional issues about the special prosecutor proposal were raised by members of the Senate Judiciary Committee when I testified before that body in May with respect to S. 495. In its report the ABA Special Committee considered many of these matters in some detail. Attached to my testimony is a memorandum of law prepared by the Committee's Consultant/Reporter, Herbert S. Miller, which discusses these issues in further detail.

The ABA has given long and careful consideration to these and other issues relating to the appointment of a temporary special prosecutor. We believe the proposal for a temporary special prosecutor embodied in H.R. 14476 is constitutional and that it proposes a mechanism which would go far towards ensuring that any future "Watergates" would not be permitted to reach the extreme crisis situation in which we found ourselves only a few years ago. The American Bar Association believes it is essential that action be taken now and that we do not wait for the advent of another crisis before we establish necessary safeguards.

I want to thank the Subcommittee for this opportunity to appear before you on a matter of such great importance. We stand ready to cooperate with the Subcommittee and provide any assistance we can.

**TESTIMONY OF WILLIAM B. SPANN, JR., PRESIDENT-ELECT
NOMINEE OF THE AMERICAN BAR ASSOCIATION AND CHAIRMAN,
SPECIAL COMMITTEE TO STUDY FEDERAL LAW ENFORCEMENT AGENCIES,
AMERICAN BAR ASSOCIATION; ACCOMPANIED BY PROF. HERBERT S. MILLER,
REPORTER, SPECIAL COMMITTEE TO STUDY FEDERAL LAW ENFORCEMENT AGENCIES,
AMERICAN BAR ASSOCIATION**

Mr. SPANN. Let me explain. The testimony which was filed with you earlier this week, which is 20 odd pages, is a prepared statement. It deals entirely with H.R. 14476. We did not know that there was to be a revised S. 495. I have a summary of the statement which has already

been filed with you dealing with H.R. 14476, and which in effect endorses it. This is the ABA bill, although there are certain differences between H.R. 14476 and the recommendations made in our report which was sent to you some time ago—Preventing Improper Influence on Federal Law Enforcement Agencies.

There are differences in what we recommended and what is in H.R. 14476. For instance, the 30-days provision that Attorney General Levi criticized, was not in our bill. We thought that it was too short a time.

Mr. HUNGATE. What was your time?

Mr. SPANN. We didn't have one. But if we were talking about the time in your bill, we would have said that we didn't think up to 6 months would have been too long. We agreed there must be a time, because otherwise there would be no action.

Mr. HUNGATE. That is an important point to raise, because 30 days is one of the difficult parts of that proposal.

Mr. SPANN. It is. And while our ABA committee didn't consider this, I would have to agree with Attorney General Levi that in order to determine that any complaint is frivolous, unless you can establish that it was made by someone that is a complete crackpot, I think it may be much too short a time. Ninety days might be enough, but certainly not more than 6 months. Beyond that we would not go.

But I am prepared to give you a summary of what I had as a prepared statement on your bill, and then make comments on S. 495.

Mr. HUNGATE. That will be fine. Please proceed.

Mr. SPANN. I can do both, as they are both fairly short. I will give you the summary first, and then I will explain my comments on S. 495.

The views I express today were formulated over the last 3 years by the Special Committee to Study Federal Law Enforcement Agencies, of which I have been privileged to serve as chairman. With the assistance of its consultant, Prof. Herbert S. Miller of the Georgetown University Law Center, who is accompanying me today, the special committee prepared a study of the problems in this area, "Preventing Improper Influence on Federal Law Enforcement Agencies," which was issued in January of this year. The 20 specific recommendations for reform contained in the report were considered by the association's house of delegates at its midyear meeting in February 1976, and were adopted in their entirety as the official policy of the association. A copy of the final report has been sent to each member of your subcommittee. The association's strong belief in the importance of this subject matter is perhaps best reflected by the fact that my appearance today is the fourth congressional appearance I have made on this subject since February—twice before the Senate committee and now twice before the House committee.

In formulating its recommendations the special committee began by rejecting the notion that problems of improper influence and corruption are solely attributable to a few bad individuals and that the preventive, therefore, is to insure that only the good occupy positions of power. Such a bad apple theory does not bear up well when viewed in the historical context of the last several decades.

Our report documents a long and unfortunate history of the progressive politicization of the Department of Justice and the growing

misuse of the FBI and the Internal Revenue Service and subsequent abuses of power by these organizations. For example, all but two Presidents since Roosevelt have appointed as Attorney General an individual who played a key role in that President's election campaign.

The ABA believes that basic institutional and structural reform is essential to assure the public of the integrity of our Federal law enforcement agencies. We agree with the statement made by James Madison in the 51st Federalist Paper:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. . . . A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity for auxiliary precautions.

I emphasize this consideration because we now have a Department of Justice headed by an Attorney General and Deputy Attorney General held in the highest regard in the legal profession and by the American Bar Association. Nothing in the ABA recommendations is directed at them as individuals. Neither Attorney General Levi or Deputy Attorney General Tyler had any connection, of course, with the events known as Watergate. But, more importantly, they have taken and are taking strong measures to assure that official corruption will be prosecuted fully and to assure that the FBI will be closely monitored to prevent abuses of its great power. Professor Miller and I met with both the Attorney General and the Deputy Attorney General to discuss the committee's recommendations, and, as a result of those discussions, the committee modified certain of its recommendations. We are particularly pleased that the Department has now instituted some of the measures suggested in our report.

Departing from the prepared statement I would add that in both cases when we met with the Attorney General and the Deputy they criticized the temporary special prosecutor, but never suggested the idea of a permanent Special Prosecutor. This was as new to us as this week, and it was not suggested at that time. And in the debate which I had with the Deputy Attorney General Tyler before the house of delegates he simply opposed the temporary special prosecutors as we had proposed it but did not make the alternative suggestion.

The committee's recommendations will serve to preserve these measures against change under future administrations. We do not know what the future holds, but there is ample historical evidence that men are not angels and auxiliary precautions must be taken to prevent future officials from being tempted to abuse their power.

I would now like to discuss certain of the provisions of H.R. 14476 and I will begin with the proposed establishment of a Division of Government Crimes.

The ABA believes that such a Division is vitally needed. There is a history of inadequate monitoring of conflict-of-interest laws and of not prosecuting election law violations. We believe the recent establishment of a special public integrity section by the Attorney General in the Criminal Division is a progressive first step toward rectifying a situation which has existed far too long. However, the ABA also believes that this approach to prosecuting government crimes should be perpetuated by legislation. The present Attorney General is committed

to the impartial prosecution of such crimes. But what assurance do we have that his successors in office will be similarly committed?

The other recommendation of the bill—the establishment of a triggering mechanism for the appointment of a temporary special prosecutor if needed in the future—is very similar to the mechanism recommended in our ABA report.

As noted above, we believe the Department of Justice must have the primary role in prosecuting crimes involving official corruption. But in certain limited circumstances—where law enforcement officials may find themselves in a conflict of interest or the appearance of a conflict with respect to a particular case—further processes are needed.

In the practice of law in the private sector, attorneys sometimes find themselves in conflict-of-interest situations, most notably where two clients end up on opposite sides of litigation. The conflict may be resolved by the attorney withdrawing from representation of one or both parties in the litigation, and counsel is then obtained from another law firm. But what options are available to the Attorney General if he finds himself in a conflict of interest? Presently there is no effective, systematic remedy for such a situation. In such cases, individuals of even the highest integrity may be prevented from performing their duties without compromise and without raising fears in the public mind about the integrity of the investigation or prosecution.

In responding to this problem, Congress first explored the establishment of a permanent office of Special Prosecutor. The American Bar Association opposes this approach, for a variety of reasons discussed in our report.

But the ABA has also rejected the notion that the ad hoc approach taken in Watergate provides an adequate answer for the future. The appointment was made in that instance only after a crisis of grave constitutional proportions had developed. The basic thrust of the ABA recommendation is that procedures should be established now, in the calm of thoughtful discussion and deliberation, which would permit the appointment of a Special Prosecutor in such circumstances and under such standards as may be statutorily established. Thus a triggering mechanism is needed.

I might add that all of the former special prosecutors have indicated their opposition to a permanent office of Special Prosecutor but have also indicated that some kind of triggering mechanism would be desirable.

It was the intent of the special committee that the Government Crimes Division conduct the great bulk of investigation involving Government officials. The temporary special prosecutor mechanism was to be triggered only in those cases where a conflict of interest would be involved and only in those extraordinary cases involving relatively highly placed Government officials. Section 594 of H.R. 14476 narrowly restricts the circumstances under which a temporary special prosecutor would be appointed. Subsection (c) (2) would mandate the appointment of a temporary special prosecutor when certain specified high Government officials are the subject of a criminal investigation or prosecution. Subsection (c) (1) would apply the traditional notion of conflict of interest to all other Government officials,

but only if the President or the Attorney General has a direct and substantial, personal or partisan political interest in the outcome of the proposed criminal investigation or prosecution. This language significantly narrows the traditional conflict of interest standard by requiring that there be a direct and substantial interest. This narrow standard is another assurance that the invocation of the appointing process for a temporary special prosecutor would occur only in those extraordinary instances which truly warrant it.

The ABA's recommended mechanism for the appointment of a temporary special prosecutor and the provisions of H.R. 14476 are very similar. I have appended to my testimony a comparative analysis of the two measures. I would like to briefly mention a few points about the mechanism.

First, it should be stressed that the Attorney General would play the lead role in determining whether a conflict of interest exists, in appointing a temporary special prosecutor if needed, in delineating the jurisdiction under which the Special Prosecutor will operate, and in removing the special prosecutor.

Thus, the Attorney General is significantly involved in every aspect of the temporary special prosecutor mechanism. But we believe there might be another means by which a temporary special prosecutor may be appointed when the Attorney General is in a conflict of interest situation and does not recuse himself. Our proposal and your bill both provide for a court to be empowered to make the appointment in these limited circumstances. We believe such an approach is fully constitutional, as discussed in Professor Miller's memorandum of law which has been submitted to you; and further we believe it remedies the conflict of interest problem in such a way as to avoid all appearances of conflict as well.

It should be stressed that the court would have no power to review discretionary prosecutorial decisions as to the merits of a particular case, whether or not it is frivolous or what tactics should be pursued in an investigation or prosecution. The courts, of course, cannot interfere with prosecutorial discretion.

There are a number of other issues and provisions which I might discuss with you particularly in light of the Senate action this week on S. 495—and I will go to those—but before I do so, a word of explanation: I did not see S. 495 as it was passed by the Senate until last night when I got to Washington. What I have to say here has been obviously hastily prepared.

Furthermore, the American Bar house of delegates, our policy-making body, approved our committee report. My comments in some measure will be inconsistent with the report. There is much in S. 495 now which we recommended, including the addition in there on the disqualification of people for the Office of Attorney General and deputy, which was not in the original S. 495, and which we think is a fine addition. On the other hand, there is material in it as to which either we took no position or we took an adverse position. I will indicate in discussing this very briefly what the committee's position was. But I am going to offer you my individual views with the understanding that in those areas I am simply giving you an opinion as to what the committee might do if it considered these matters.

The committee obviously has had no chance to meet and review S. 495 as it was passed. But I must qualify what I say in this area. I am speaking from the reactions of Professor Miller, and Bob Evans of our Washington staff, and for me and not for the remainder of the committee, since there was no chance to consult them.

I would emphasize at the outset that of the 20 recommendations that we had in the four areas that we dealt with—Justice Department, Special Prosecutor, FBI, and Internal Revenue—17 of the recommendations dealt with oversight—2 or 3 of them with internal oversight, and the rest of them with congressional oversight. And I would agree with what the Senators said to you earlier this morning, and what Ed Levi said: We want nothing to diminish congressional oversight. We think it is a vitally important matter, not only for the Senate in the appointing process, but the entire Congress in the oversight of what may be done about the Department of Justice, a Special Prosecutor, the FBI, and Internal Revenue, which is not part of our discussion here today.

We also agree that the time is now, that action really is needed by Congress. I think the American public expects something, and I think the lawyers and the ABA when we made our report were looking for it and waiting on it. I don't mean we need to enact something which will give us trouble later on, but as far as it can be done it ought to be done, because I think the time is certainly ripe to do something.

We are very gratified that the President has strongly endorsed the two basic concepts underlying the provisions of H.R. 14476: First, that there should be statutorily established within the Department of Justice an office devoted to the investigation and prosecution of crimes involving Government officials; and second, that a Federal prosecuting authority outside the usual processes of the Department of Justice is necessary and appropriate in certain situations.

We are very pleased that the Senate has overwhelmingly voiced its approval of legislation to achieve these objectives, and we strongly encourage the House to enact comparable legislation this term. While we have a number of concerns about the Senate-passed bill which I will discuss in a moment, we believe that the Senate bill goes a long way toward meeting the primary needs in this area.

Our committee unqualifiedly supports section 594(c) of S. 495 regarding standards for appointment of the Attorney General and Deputy General. This provision was added to the bill on the Senate floor on the motion of Senator Bentsen, who tracked exactly the language of a recommendation we had made in our report. I understand it was read out of the report on the floor of the Senate. The provision would prohibit the President from appointing as Attorney General or Deputy Attorney General a person who had played a leading partisan role in the election of a President. Individuals holding the position of campaign manager, chairman of the finance committee, and chairman of the national political party are specified as examples of those who would be considered to have played a "leading partisan role." But the term "leading partisan role" is not limited to only those individuals. We would encourage this subcommittee to include such a provision in the legislation it develops.

With respect to the investigation and prosecution of Government crimes within the Department of Justice, we are substantially satis-

fied with the approach taken in S. 495. We had recommended a Division of Government Crimes rather than an Office within the Criminal Division. However, S. 495 provides for Presidential appointment and Senate confirmation of the Director of that Office, and this was one of our major objectives in proposing that a Division be created. I might note that the President's proposal would have had the appointment made by the Attorney General, which would have been far less acceptable to us.

We do, however, believe certain provisions can and should be amended.

We greatly prefer, for example, the jurisdiction provision of H.R. 14476, which would provide for the Government Crimes Division to have responsibility for any Federal crimes committed by high-level Government officials, whether the crimes are employment-related or not.

We also believe the Attorney General's report to Congress should contain information on all prosecutions and investigations conducted by the Government crimes unit, and that the protection of ongoing investigations and of privacy should be accomplished by the sealing of appropriate portions of the report at the congressional level. S. 495 as passed would permit the Attorney General to withhold from Congress information he believes would constitute an invasion of privacy.

The "disqualification" provision of S. 495, and of the President's proposal, would not permit anyone to serve as head of the Government crimes unit if he held a high level position in the election campaign of a candidate for any elective Federal office within 5 years preceding his appointment. Such a disqualification seems unnecessarily broad, and our committee would prefer limiting disqualification to the campaigns of the President or Vice President as in H.R. 14476. We simply don't feel that because someone served as a campaign manager for someone who may have run for Congress and was defeated 4 years ago, he ought to be disqualified from anything. This seems to us to be far too severe.

We disagree strongly with the President's assessment that the temporary special prosecutor mechanism in H.R. 14476 is unconstitutional. The memorandum of law submitted to you by Professor Miller has discussed this issue in detail and I will not elaborate on them here.

We were pleased that the legislative history of S. 495 reflects the bill's sponsors' understanding that there would be no constitutional problem with the provisions of the original S. 495, which are now in our bill. Senators Ribicoff and Kennedy emphasized this point at some length in the Senate Wednesday morning.

We also do not share the President's assessment that a different Special Prosecutor would necessarily be appointed for each case. As with the Watergate special prosecution force, we would assume that one office under one temporary special prosecutor would, in nearly all situations, have jurisdiction over all cases which the Department of Justice could not handle because of a conflict of interest. Thus, the specter of numerous Special Prosecutors is greatly exaggerated.

It is true that the appointment issue must go back to the court, whether it be the court which is defined in this bill, a division of the Circuit Court of Appeals for the District of Columbia, or whether our special court, which we recommended be appointed by the Chief

Justice for a 2-year period. But there is nothing to prevent that court from assigning a matter to the same Special Prosecutor to which they assign others. If he is overloaded, or if the matter involves something entirely different in its nature, then it would seem likely that they may appoint a second one, and maybe they should. But the idea that every complaint would require a different Special Prosecutor, which has been stated here today, we don't understand.

With these comments aside, let me repeat that we think the version of S. 495 passed by the Senate goes a long way toward responding to the problems in this area. I must continue to point out, however, that our ABA policy is one of opposition to the concept of a permanent Office of Special Prosecutor. I believe S. 495 addresses satisfactorily many of the problems we had with the concept of a permanent office, though not all, and our position remains one of favoring H.R. 14476 over S. 495.

The reasons we have stated for opposing a permanent office are as follows: First, we believe that the primary duty to enforce the law must reside in the Attorney General and not be split on an ongoing basis among two offices; second, we believe such a split will inevitably create tensions between the Department of Justice and the Special Prosecutor's office over jurisdiction and use of investigative resources. Section 591(a)(2) of S. 495 is of some help on the jurisdictional issue in that it requires the Attorney General to refer all allegations of violations to the Special Prosecutor. It is unclear, however, what would happen if the Attorney General did not refer a matter. Section 593(b) attempts to address the issue of investigative resources, but we believe problems will still arise in this area.

Third, we have questioned whether there would be sufficient business to occupy a permanent prosecutor of the order of those who have recently served in that office. The President on Monday stated that there were at least six current matters which he thought would fall within the ambit of our proposed temporary special prosecutor mechanism and another 50 which might. If this is correct, perhaps there is sufficient business.

Fourth, we are concerned that making the office a permanent one may result in a runaway Special Prosecutor situation. The 3-year term limitation is the bill's effort to deal with this problem, but it is a questionable solution.

Apart from those general considerations, I would mention the following specific aspects of the bill:

Appointment and term: The proposal provides for a 3-year term as Special Prosecutor with no reappointment. I question—and again I am speaking as an individual, because my committee did not have this bill before it—I question the feasibility of having the Special Prosecutor's term expire in the midst of an important investigation or prosecution. This approach would then require the President to appoint a new Special Prosecutor. The ongoing case may well involve the President himself or persons close to him. Will not the credibility of his appointee be seriously, perhaps fatally, impaired in such circumstances?

This problem might be dealt with by having the outgoing Special Prosecutor continue with any matter in which an indictment has been filed or on which a preliminary examination has been completed, or

he might be asked to stay on by the new Special Prosecutor. But that would not answer the problem if the President appointed a new prosecutor that he thought might help out in a bad situation.

As to removal, we are pleased that the "extraordinary improprieties" standard is used. And we feel that with the judicial review provided, this is probably a sound provision.

The jurisdiction, we feel, is at once too broad and not broad enough. As I just mentioned, it covers members of Congress and of the Federal judiciary, both of which we feel can be adequately prosecuted by the Department of Justice and, more specifically, the Office of Government Crimes.

At the same time, the jurisdiction does not extend to levels III, IV, or V of the executive schedule and does not cover lower level White House employees, which our recommendation would have covered.

This concludes my very hastily prepared remarks on S. 495, and I will undertake to answer any questions.

[The memorandum of Prof. Herbert S. Miller follows:]

MEMORANDUM OF LAW REGARDING CERTAIN ASPECTS OF H.R. 14476
BY PROF. HERBERT S. MILLER

Section 594(d) (1) of H.R. 14476 authorizes a court of law to appoint a temporary special prosecutor under carefully prescribed circumstances and standards. The report of the American Bar Association Special Committee to Study Federal Law Enforcement Agencies, "Preventing Improper Influence on Federal Law Enforcement Agencies," recommended a similar mechanism and discussed a variety of constitutional issues with respect to the appointment of a temporary special prosecutor. Further questions about these issues have been raised by representatives of the Department of Justice and by certain members of the Senate Committee on the Judiciary during their consideration of Title I of S. 495, which is substantively identical to H.R. 14476. These questions related to the thrust of *Ex parte Siebold*, 100 U.S. 371 (1880) with respect to the appointing power of the courts; *United States v. Cox*, 342 F. 2d 167 (5th Cir. 1965), cert. denied 381 U.S. 935 (1965), and *United States v. Cowan*, 524 F. 2d 504 (5th Cir. 1975), with respect to prosecutorial discretion. The meaning of the phrase "inferior Officer" as contained in the Constitution and the role of the federal prosecutor as a minister of justice and quasi-judicial official were also questioned. This memorandum addresses those specific issues; as indicated above, the Special Committee's report contains a more general discussion of these and related issues.

THE APPOINTING POWER OF FEDERAL COURTS

Article II, Section 2 of the U.S. Constitution provides that "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." A number of Supreme Court decisions have interpreted this provision (see pages 100-101 of the Special Committee's report). The *Siebold* case is of paramount importance.

Siebold involved a statute imposing upon federal circuit courts the duty of appointing supervisors of elections. It was alleged that these duties were entirely executive in 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 the government. The United States Supreme Court rejected these arguments and upheld the courts' appointment power. Citing Article II, Section 2, the Court stated:

"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 is no absolute requirement to this effect in the Constitution; and, if there were, it would be difficult in many cases to determine to which department an officer properly belonged . . . but as the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting

in the discretion of Congress and, looking at the subject in a practical light, it is perhaps better that it should rest there than that the country should be harassed by the endless controversies to which a more specific direction on this subject might have given rise." 100 U.S. at 397.

The Court also stated that the duty to appoint inferior officers, "when required thereto by law, is a constitutional duty of the courts. . . ." The Court then posited the "incongruity" test, stating that unless there exists an incongruity between the duties to be performed and the appointing authority such "as to excuse the courts from its performance, or . . . render their acts void," 100 U.S. at 398, the appointment will be valid.

Congress has provided for the appointment by the district court of U.S. attorneys when a vacancy occurs (28 U.S.C. 546). This power was upheld in *United States v. Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963). Professor Paul Freund of Harvard believes that judicial appointment of a special prosecutor may rest on even firmer footing than the appointment of a U.S. attorney to fill a vacancy. He has pointed out that a U.S. attorney appointed by a court, although limited in tenure, assumes all the power of that office regardless of subject matter jurisdiction. The special prosecutor, on the other hand, has a far more limited jurisdiction under H.R. 14476, where the specific jurisdiction of the temporary special prosecutor is defined by the appointing power.

THE PROSECUTORIAL FUNCTION

A further question has been raised as to whether or not a prosecutor performs a function so executive in nature as to render the appointment of a temporary special prosecutor by a court, albeit under clearly defined circumstances and with limited jurisdiction, incongruous under *Ex parte Siebold*. In answering this question, three factors must be considered: the nature and scope of the prosecutor's function; the inter-relationship between the different actors (judge, prosecutor, and defense attorney) in the criminal justice system; and the problems inherent in the investigation and prosecution of crimes involving high-ranking government officials.

Former Attorney General Robert H. Jackson believed that the prosecutor has more control over life, liberty, and reputation than any other person in America, that he has tremendous discretion, and that the manner in which he conducts investigations has a profound effect on the lives of citizens.

The American Bar Association has stated that the prosecutor is not only an advocate but an administrator of justice and that his duty is to seek justice, not merely to convict. His obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public. The ABA concluded:

"This is one of the senses in which the prosecutor has sometimes been described as a "minister of justice" or as occupying a quasi-judicial position. In the present context, both concepts can be embraced in more contemporary terminology by describing him as an administrator of justice." (*Standards Relating to the Prosecution Function and the Defense Function*, American Bar Association, 1971, p. 44).

The extensive responsibilities of prosecutors have given rise to their being regarded as quasi-judicial officials entitled to a type of "judicial immunity" befitting such quasi-judicial status. In *Golden v. Smith*, 324 F. Supp. 727 (D.C. Ore. 1971), the court found there was no liability on the part of a prosecutor for damages caused by an allegedly illegal arrest and detention, noting that "prosecutors, as quasi-judicial officers, have an immunity similar to that of judges for acts which constitute an integral part of the judicial process." 324 F. Supp. at 730. An earlier court decision, in upholding such immunity, characterized United States attorneys as follows:

"A United States attorney, if not a judicial officer is at least a quasi-judicial officer, of the government. He exercises important judicial functions. . . ." *Yaselli v. Goff*, 12 F.2d 396, 407 (2nd Cir. 1926). See also *Kenny v. Fox*, 232 F.2d 288, 290 (6th Cir. 1956), cert. denied 352 U.S. 855.

It is settled that a prosecutor is both an officer of the executive branch and an officer of the court. As Judge (now Chief Justice) Burger stated regarding the role of the U.S. attorney:

"An attorney for the United States, as any other attorney, however, appears in a dual role. He is at once an officer of the court and the agent and attorney for a client; in the first capacity he is responsible to the Court for the manner

of his conduct of a case, i.e., his demeanor, deportment and ethical conduct." *Newman v. United States*, 382 F.2d 479, 481 (D.C. Cir. 1967).

The American Bar Association points out that all serious criminal cases require the participation of three entities: the judge, counsel for the prosecution, and counsel for the accused. Absent any one of these (barring valid waiver of counsel), the court is incomplete. In short, a "court" must be viewed as a three-legged structure which cannot stand without the support of all three.

Thus, the prosecutor plays a role within the court system in the investigation and prosecution of crimes which goes far beyond purely executive or administrative functions. Appointing a temporary special prosecutor under the limited circumstances and with the limited jurisdiction set forth in HR 14476 is no more incongruous than the appointment by the district court of temporary U.S. attorneys when there is a vacancy, or the appointment of defense counsel for indigent defendants. In fact, it is far less incongruous than the appointment of a temporary U.S. attorney who would assume all the power of that office regardless of the subject matter.

HR 14476 does not casually place the appointing authority in the court. The bill places upon the Attorney General the primary responsibility for appointing a temporary special prosecutor. It is only after a review of a case in which the Attorney General has held that there is no conflict of interest and has made no appointment that its proposed D.C. circuit court division would consider appointing a temporary special prosecutor, and then only if it found a conflict. In such a circumstance, where the court has found a conflict of interest in the Executive Branch, it could well be said that incongruity would inhere in an executive appointment. But, whether that is true or not, if the situation is one in which the Attorney General decided not to make an appointment, the resulting investigation might be suspect unless another authority was given the power to make the appointment.

The American Bar Association has stated the following:

"A prosecutor should avoid the appearance or reality of a conflict of interest with respect to his official duties. In some instances, as defined in the Code of Professional Responsibility, his failure to do so will constitute unprofessional conduct." (*Standards Relating to the Prosecution Function and the Defense Function*, § 1.2)

Chief Justice Burger said in *Newman, supra*, that an attorney for the United States is responsible to the court for his ethical conduct. In *Sherman v. United States*, 356 U.S. 369, 380 (1958), Justice Frankfurter spoke of the general supervisory power of courts over the administration of criminal justice:

"Insofar as they are used as instrumentalities in the administration of criminal justice, the federal courts have an obligation to set their face against enforcement of law by lawless means or means that violate rationally vindicated standards of justice, and to refuse to sustain such methods by effectuating them. They do this in the exercise of a recognized jurisdiction to formulate and apply 'proper standards for the enforcement of the federal criminal law in the criminal courts.'" (concurring opinion).

To impose "ethical conduct" and enforce "rationally vindicated standards of justice," a court of law may be authorized to appoint a temporary special prosecutor under clearly defined circumstances and with limited jurisdiction.

Temporary Special Prosecutor as an Inferior Officer

Article II, Section 2 provides that "inferior Officers" may be appointed by courts of law. The question has arisen whether the temporary special prosecutor provided for in HR 14476 is an "inferior Officer" within the meaning of that section of the Constitution. (It should be noted that the Attorney General's authority under present law to appoint a temporary special prosecutor is based on this Section, and that the "inferior Officer" question applies equally to his appointments and those by a court.) Professor Paul Freund holds that an office is an inferior office if it is inferior to those that have been enumerated in the Constitution, namely ambassadors, public ministers, consuls and judges of the Supreme Court. Another authority, Professor Paul Mishkin of the Boalt Hall School of Law of the University of California, believes that the history of the development of that clause in the Constitutional Convention indicates that "inferior Officer" means anybody inferior to the appointing authorities in Article II, Section 2.

The meaning of "inferior Officer" has been interpreted in *United States v. Germaine*, 99 U.S. 508 (1879). The court characterized the Congressional power to establish appointing authority in this manner:

"The Constitution, for purposes of appointment, very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But . . . in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments." 99 U.S. at 509-510.

The language of the Constitution and the holding of the Court give clear indication that a temporary special prosecutor appointed in accordance with the provisions of HR 14476 would be an "inferior Officer."

PROSECUTORIAL DISCRETION

It has been stated that the temporary special prosecutor mechanism provided for by HR 14476 would involve an unconstitutional interference with the discretion of the prosecutor in violation of the separation of powers doctrine in the Constitution. At the outset it should be stated that HR 14476 in no way authorizes the appointing court to interfere in the exercise of the prosecutor's discretion in handling a particular case. The court is given only two functions, both unrelated to the exercise of that discretion. First, the court may be called upon to review the relationship of the President or the Attorney General to potential defendants only insofar as it may constitute a conflict of interest as defined in the bill. Should the court find such a conflict, it could then appoint a temporary special prosecutor.

Second, at the time of making such an appointment, the court would establish the jurisdiction of the temporary special prosecutor with respect to the matter to be investigated. Once having made the appointment based upon a conflict of interest standard, and after having delineated the jurisdiction, the special division of the court would have no authority to second-guess decisions made by the temporary special prosecutor in the course of any investigation or prosecution.

United States v. Cox and *United States v. Cowan* stand for the proposition that prior to the return of an indictment or the filing of an information, the federal prosecutor has the absolute power and discretion to institute or not institute a prosecution. Nothing in HR 14476 contravenes these holdings. The power of appointment and the duty to specify jurisdiction should not be confused with the supervision of the prosecutor in a case as it progresses. To avoid any connotation of such supervision, HR 14476 provides that the Attorney General, and only the Attorney General, may remove the temporary special prosecutor for "extraordinary improprieties." The only role which the court would play in such an instance would be to review the removal to ascertain whether or not this standard had been met.

The recent *United States v. Cowan* case involved the appointment of a special prosecutor by a district court judge in Texas after the judge had refused to dismiss a case under Rule 48(a) of the Federal Rules of Criminal Procedure and the U.S. Attorney then refused to proceed with the case. The Fifth Circuit Court of Appeals reviewed the history of the development of Rule 48(a) and concluded that, while a court could refuse to dismiss a case under certain circumstances, the district court in this matter had exceeded the bounds of its discretion in denying the government's motion to dismiss. Having so concluded the court states, "We have no cause to consider the propriety of its order effectuating that denial by appointing special prosecutors," 524 F.2d at 515. Thus, the case is not dispositive of any issues relating to the appointment of special prosecutors.

CONCLUSION

The questions which have been raised focus on the scope of the powers of federal courts under the Constitution. The "separation of powers" principle inherent in the Constitution does not assume tightly compartmentalized branches of government. In commenting on this principle the Supreme Court, in an opinion authorized by Chief Justice Burger, stated:

"In designing the structure of our government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.

"While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable

government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *United States v. Nixon*, 418 U.S. 683, 707 (1974)."

In discussing the conflict between the absolute discretion of the prosecutor in initiating prosecution, and Rule 48(a) of the Federal Rules of Criminal Procedure authorizing the dismissal of a case "by leave of the court," Judge Murrain in *United States v. Cowan* spelled out the nature of the court's power:

"We think the rule [48(a)] should and can be construed to preserve the essential judicial function of protecting the public interest in the evenhanded administration of criminal justice without encroaching on the primary duty of the Executive to take care that the laws are faithfully executed. The resulting balance of power is precisely what the Framers intended. As Judge Wisdom put it, quoting Montesquieu, "To prevent the abuse of power, it is necessary that by the very disposition of things, power should be a check to power". . . . [thus] the Framers wove a web of checks and balances designed to prevent abuse of power' and 'were too sophisticated to believe that the three branches of government were absolutely separate, airtight departments.' *United States v. Cox*. . . . From this, it seems altogether proper to say that the phrase 'by leave of court' in Rule 48(a) was intended to modify and condition the absolute power of the Executive, consistently with the Framers' concept of Separation of Powers, by erecting a check on the abuse of Executive prerogatives. . . . The rule was not promulgated to shift absolute power from the Executive to the Judicial Branch. Rather, it was intended as a power to check power." 524 F.2d at 512.

The proposed authority in HR 14476 for a division of the U.S. Court of Appeals to appoint a temporary special prosecutor is "designed to prevent abuse of power" and acts as "a power to check power" should abuses occur. The special prosecutor, once appointed, would exclusively exercise prosecutorial direction.

A COMPARISON OF THE PROVISIONS OF H.R. 14476, AND THE AMERICAN BAR ASSOCIATION RECOMMENDATIONS CONTAINED IN ITS REPORT, "PREVENTING IMPROPER INFLUENCES ON FEDERAL LAW ENFORCEMENT AGENCIES"

The Special Committee to Study Federal Law Enforcement Agencies of the American Bar Association published a report in January, 1976, entitled "Preventing Improper Influences on Federal Law Enforcement Agencies." The report contained twenty specific recommendations for preventing abuses of these agencies, all twenty of which were approved by the Association's House of Delegates in February, 1976, as official policy.

Two of those recommendations ("Prosecuting Government Crimes" and "Special Prosecutor") are almost totally in accord with the provisions of HR 14476, the Special Prosecutor Act of 1976, sponsored by Congressman William L. Hungate. The following analysis compares the ABA recommendations to the provisions of HR 14476.

DIVISION OF GOVERNMENT CRIMES

Issue	H.R. 14476 Approach	ABA Approach
1. Establishment of division	By statute.	By statute.
2. Jurisdiction	Federal criminal law violations by high-level Government officials; Federal criminal law violations by all Government employees if work-related; lobbying, campaign and election law violations.	Violations of Federal laws by Government officials; cases referred by the Federal Election Commission; violations of Federal campaign laws.
3. Selection of Assistant Attorney General.	Presidential appointment, Senate confirmation.	Presidential appointment, Senate confirmation.
4. Qualifications of Assistant Attorney General.	Must not have held a high-level position of trust and responsibility in campaign of elected President or Vice President within 5 years preceding appointment.	No recommendation with respect to the Assistant Attorney General, although a similar restriction on nominees for Attorney General and Deputy Attorney General was recommended.
5. Term of Assistant Attorney General.	Coterminous with that of the President making the appointment.	No recommendation.
6. Requirements in office	(a) Shall not engage in outside business. (b) Shall report to Congress each session on Division's activities.	(a) No recommendation. (b) No specific reporting recommendation; although the ABA report contemplates close congressional scrutiny of this statutorily mandated division.
7. Supervision of Assistant Attorney General.	By Attorney General.	By Attorney General.

DIVISION OF GOVERNMENT CRIMES—Continued

Issue	H.R. 14476 Approach	ABA Approach
TEMPORARY SPECIAL PROSECUTOR (TSP) MECHANISM		
1. Circumstances triggering.....	Conflict of interest or appearance thereof in which the President or the Attorney General has a direct and substantial personal or partisan political interest in the outcome of the proposed criminal investigation or prosecution (with matters involving specified Government officials being automatically deemed to create a conflict).	<p>(a) Conflicts of interest, implications of partiality or alleged misconduct as delineated in ABA Standards Relating to the Prosecution and Defense Function;</p> <p>(b) Appearance of professional impropriety under Canon 9 of ABA code of professional responsibility;</p> <p>(c) Improper influence or obstruction of justice as defined in 18 U.S.C. 1501-1510.</p>
2. Action to be taken by Attorney General.	<p>(a) File memorandum with court summarizing allegations and result of preliminary investigation, including information relevant to determining existence of a conflict of interest; the Attorney General's findings; and whether the Attorney General has disqualified himself and appointed a temporary special prosecutor or not;</p> <p>(b) Appoint a temporary special prosecutor if he deems it appropriate.</p>	<p>(a) File memorandum with court stating facts, legal conclusion and decision with respect to whether or not to appoint a temporary special prosecutor.</p> <p>(b) Appoint a temporary special prosecutor if he deems it appropriate.</p> <p>(c) Request the court to make the appointment.</p>
3. Alternative means of bringing conflict situation to court's attention.	Any individual, after 30 days' notice to Attorney General of information raising a conflict. Issue, may petition court to review the matter.	The court can act on its own authority to review allegations of conflict.
4. Response by court where no TSP appointment made by Attorney General.	Review matter and determine whether a conflict exists, and if so appoint a TSP.	Review matter and determine whether a conflict exists, and if so, either call upon the Attorney General to appoint a TSP or make such appointment itself.
5. Response by court where Attorney General has appointed a TSP.	Review appointment to determine if TSP is himself in a conflict situation and, if so, appoint a different TSP.	Review appointment to determine if TSP is himself in a conflict situation and, if so, call upon the Attorney General to make a new appointment or appoint a different TSP.
6. Jurisdiction of TSP.....	Whoever appoints the TSP shall specify in writing the matters which such prosecutor is authorized to investigate and prosecute. The statement of jurisdiction in the case of appointment by the Attorney General is subject to review by the court to determine whether it is "sufficiently broad to enable the TSP to carry out the purposes of this chapter."	The appointing authority would delineate the jurisdiction. Where the Attorney General has made the appointment, the statement of jurisdiction in his memorandum to the court would be reviewed by the court and modified where necessary.
7. Removal of TSP.....	<p>(a) Upon filing with Attorney General of report stating that all investigations and prosecutions have been completed;</p> <p>(b) By Attorney General for "extraordinary improprieties," subject to review by court.</p>	<p>(a) No specific recommendations.</p> <p>(b) By Attorney General for "extraordinary improprieties," subject to review by court.</p>
8. Powers of TSP.....	Within specified jurisdiction the same power as an Assistant Attorney General for Government Crimes, except that TSP can appeal any decision in a case to which he is a party without approval of Attorney General or Solicitor General.	Within specified jurisdiction the same power as the Attorney General or a U.S. attorney in prosecuting a case.
9. Nature of court.....	Division of 3 Judges of the U.S. Court of Appeals for the District of Columbia; judges to be assigned for a 2-year term by the chief judge, with priority given to senior retired circuit court judges and senior retired justices; prohibition against judges who participated in process of appointing TSP from deciding on matters brought thereafter by TSP's office.	Special court of appointment composed of 3 retired senior Federal circuit court judges appointed by the chief justice for a 2-year term.
10. Expedited judicial review.....	Detailed mechanism for expediting judicial review of actions challenging TSP's authority.	No recommendation.

Issue	H.R. 14476 Approach	ABA Approach
TEMPORARY SPECIAL PROSECUTOR (TSP) MECHANISM		
11. Disqualification of Department of Justice employees.	Requires Attorney General to promulgate rules and regulations requiring officers and employees of the Department to disqualify themselves in matters where a conflict, or appearance thereof, may result.	No recommendation.

Mr. HUNGATE. Mr. Spann, we appreciate your work here and the difficulty under which you labor, because we all started out on one bill, and we were perhaps nearly as surprised as you when we changed our course. We would hope to derive the best features from both of those bills and that this testimony helps us.

Mr. SPANN. In answer to that, let me express my personal feeling. As I say, I cannot say that this is the American Bar's feeling. But I feel quite sure that although we recommended adversely as to the permanent Special Prosecutor, if that comes out as what is done, we feel we ought to have the bill. Even though we would regard the temporary special prosecutor as being preferable, that would not cause us to be opposed to having the bill, which I think is needed and is highly desirable.

Mr. HUNGATE. Thank you.

And this subcommittee, I can't resist saying, passed such a bill out and through the full Judiciary Committee and through the Rules Committee in November 1973. We were restrained at that time waiting for a better bill from another body which had 55 sponsors and never left the subcommittee. So this subcommittee is attending to the problem.

Mr. Wiggins.

Mr. WIGGINS. Thank you, Mr. Chairman.

I am puzzling over some language here, and perhaps you can give me some guidance. I am looking at S. 495. And particularly at those provisions of the bill which prevent the appointment of an individual as Special Prosecutor if he has had a certain political connection with the President in his campaign. And of course also the language seems to indicate that the Attorney General or Deputy shall not be appointed if he has had a leading partisan role.

As I understand the process by which one becomes a high-level executive official, the nominations are made, and the Senate considers and gives or withholds the consent to the nomination. At the conclusion of that process the individual is appointed. The appointment is the final action after the confirmation process. This says that no one shall be appointed.

Do we really mean that the President will be prohibited from nominating to the Senate the people who fall under the limitation of the act, is that your understanding?

Mr. SPANN. I think that is what we mean. Obviously if he can't be appointed it would be a futile thing to nominate that person, and the appointment is prohibited by the language of the act. And perhaps where the nomination is from the President, the bill should refer to nomination by the President rather than appointment.

Mr. WIGGINS. Professor Miller, do you see any problem that troubles you that ought to trouble members of this committee about the limitations on the President's powers to nominate officials? Does that raise any separation powers question with you?

Mr. MILLER. I believe that the Congress can establish qualifications for offices to which the President can make appointments. And these are only negative qualifications, if you will. I think there are many instances—I believe Senator Javits alluded to several this morning. I think there are some four court cases which have upheld the right of Congress to set forth the qualifications. Our committee did look at that, and I am personally satisfied that Congress has the power to do this.

Mr. WIGGINS. The limitation which we impose here in several places is that the person nominated shall not have held a high-level position on the staff of the organization of a political party working on behalf of a candidate. This would seem to exclude candidates themselves. That is to say, a candidate for Congress, for the Senate, who may lose probably is more intensely partisan than his staff, perhaps. But the prohibition is limited to staff. Do you think we ought to contemplate that problem?

Mr. SPANN. As far as I understand it, it is too broad whether you include the candidate or not. I don't see the merit to eliminating someone who was a losing party several years ago from consideration for another office. I think the problem is the relationship this person may have to the people in a high level he is supposed to investigate. And if the person appointed has been active in electing the President, and the President should be investigated, I think we have a problem. But I just don't find the disqualification of the staff of a candidate for Congress, particularly of a defeated candidate, as being sound. But I think you are right, if you are going to exclude the staff, you exclude the candidates too.

Mr. WIGGINS. There have even been some successful candidates—Senator Saxbe, for instance—who became for a brief period Attorney General of the United States and I presume he was a partisan on behalf of the authority which appointed him. I don't know that to be a fact, in fact there was some mixed evidence on that, but at least he was certainly not hostile to that authority's candidacy. But is it wise policy in the long run to narrow the list of available candidates to serve in the high office of Attorney General so as to exclude Senators, for example?

Mr. SPANN. Well, our feeling is that—and we use this language in our report, though it doesn't appear in the language of any bills—our concern should be with the appearance of impropriety. This comes out of the canons of professional responsibility of the ABA. We feel that although we may have highly qualified Members of Congress—Saxbe may have been one for all I know—for the office of Attorney General, that there are certainly a number of people who are available who would not give that appearance of impropriety. And we feel that we might well sacrifice the services of that limited number of people who may be considered in order to avoid what the public would, I think, never understand.

Mr. WIGGINS. Of course the prosecutor might well be presenting that case to a judge who was very active in the campaign involved. We don't extend that prohibition to the consideration of judicial appointments.

Mr. SPANN. That is true. And that is another horse.

Mr. WIGGINS. Can't we trust the Senate to fail to confirm a person who would not meet this test of propriety without attempting to prohibit the President from even sending the name up? Any attempt on the part of Congress to specify in the statute all of these considerations is going to be futile. And in the final analysis I think we have to depend upon the good judgment, the collective judgment, of a majority of the Senate to anticipate whether the nominee is so tainted with considerations that he ought not to be nominated. Can't we depend on the Senate for that?

Mr. SPANN. In my own opinion I do not believe we can consistently depend on the Senate for that. History indicates to me that appointments have been made in the past which were made on a partisan basis and which perhaps should not have been made. I do not believe every Attorney General that has been appointed who has been close to the President in his political campaign has been the best man for the job. I will not undertake at this point to call any names. I think some of them have been fine. I think that in other cases there were far superior people available for the job of Attorney General. And in every case you had the appearance of evil.

Mr. WIGGINS. I understand. Most persons active in the American Bar Association hold that view, that the appointment of an Attorney General really ought to be brought about through the practice of those active in the ABA rather than that which might be reflected as well in political life.

Mr. SPANN. I would not go so far as to say from the ranks of the ABA. We would hope that almost every lawyer in active practice is a member of the ABA, but I think we would not put that qualification on it.

Mr. HUNGATE. The time of the gentleman has expired. The commercials will be stricken. Ms. Holtzman.

Ms. HOLTZMAN. Thank you. Mr. Chairman.

I just want to ask one technical question. Nowhere in the Senate bill 495 does it say that the Special Prosecutor's jurisdiction shall be exclusive. I wonder whether this raises some problems. In other words, while this bill may confer jurisdiction on a Special Prosecutor, it does not give him exclusive jurisdiction to prosecute matters for which he has accepted or has been given jurisdiction. I wonder if you consider that a problem?

Mr. SPANN. It may not say exclusive. If that is a technical defect, I think it can be very easily cured. But the sense of the bill to me is that the jurisdiction is exclusive. When you get to section 593 it provides that nothing in this bill would prevent the Attorney General or the Solicitor General from making any presentations in court as to issues of law raised by any case or appeal, which means that they may take a position. But it seems to me that this provision does not convey the idea that they may become themselves a prosecutor in the case. If the special prosecutor is active, if their position is inconsistent with his, the bill gives them a right to express their views. And of

course this provision is acceptable so far as we are concerned, because if they feel the Special Prosecutor is completely off base, then they can come in and say so. And the record has had the benefit of both views. But their role would not be as a separate prosecutor with a dual jurisdiction for the prosecution itself, as I read the bill.

Ms. HOLTZMAN. In any case, you think any bill that is enacted with respect to the Special Prosecutor ought to provide for exclusive—

Mr. SPANN. Yes; I would use the word "exclusive."

Professor Miller had an observation.

Mr. MILLER. I think, as the Attorney General said, sections 592 (a) (1) and (2) of S. 495 do confer exclusive jurisdiction for certain crimes committed by certain enumerated officials. One says, the Special Prosecutor shall have jurisdiction to investigate, and two says, the Attorney General shall promptly refer any allegations concerning those officials to the Special Prosecutor. I think as to those officials the bill is exclusive. It is not exclusive as to others who were not included. And that is where the referral comes in. I don't think we are saying that there should be exclusive jurisdiction as to all government officials, just as to the ones enumerated in the statute. I think the bill in fact does confer such exclusive jurisdiction as it is written right now.

Ms. HOLTZMAN. I am not sure that I agree that there is exclusive jurisdiction.

Mr. HUNGATE. Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman.

Mr. Spann, I want to thank you once again for your work in this area and commend you and Professor Miller for the excellent material which you have given us.

I really only have one question, that in Mr. Spann's testimony on page 11 he quotes an ABA document which says: "Prosecutor should avoid the appearance of a conflict of interest." And I wonder whether we should consider some type of a ban for this office of Special Prosecutor on any individual who has worked for the Department of Justice, say, for 3 or 5 years, or for the FBI. Because that individual, if he is appointed, will be called upon immediately, or could be called upon to investigate his immediate or indirect superiors or some prospective future superiors, and there will be an appearance of a conflict of interest. I wonder, Mr. Spann, whether you or Professor Miller or the committee or the ABA has given consideration to this point?

Mr. SPANN. Your own bill, H.R. 1476, contains such a provision in section 595(b). I would certainly retain it. I think it is entirely appropriate to eliminate anybody that is already serving in the Government, and you don't limit it there to people who are serving in Justice. It says, he shall not be appointed unless such individual is not serving as an officer or employee of the Federal Government. And I think I would go with it just the way you have got it.

Mr. DRINAN. That is the best news I have heard all morning.

Thank you very much. And thank you for your appearance.

Mr. HUNGATE. Thank you very much.

Mr. Wiggins.

Mr. WIGGINS. Are you satisfied that the ABA proposal—let's talk about the Senate bill—imposes an affirmative duty on the President

to appoint, and that is, can the President simply sit by and leave the office vacant and not exercise his authority?

Mr. SPANN. You mean in S. 495?

Mr. WIGGINS. Yes, sir.

Mr. SPANN. I am not that familiar with the actual language of it, as I said. When I got here at 6:30 last night they gave me the whole record in the Senate, and by the time I got back to the bill I was sort of buried. If the bill does not require it, it certainly should. It should not be discretionary with the President. I did not read it as being discretionary; but I would not say positively that the language is clear enough.

Mr. WIGGINS. It says that the office shall be created, and that the Special Prosecutor shall be appointed for a certain time. And the word "shall" appears in several places. But it would not be unheard of for Presidents not to fill vacancies for reasons known best to themselves.

Mr. SPANN. Yes, I understand. And it perhaps ought to be made more mandatory than just the use of the word "shall."

Mr. HUNGATE. Perhaps a fallback authority, if he didn't act in a certain length of time, somebody else would do it. I missed a pay raise once because the President didn't appoint the commission.

Are there any further questions?

Let me again thank you, Mr. Spann and Mr. Miller, for your patience and your assistance here today. This is certainly a most important area. The time for some action has come. We hope in cooperation with our colleagues in the Senate that we can perhaps even improve the product we have.

Mr. SPANN. We thank you very much for inviting us and permitting us to be with you. And we are certainly endorsing the idea that the time has come, and we hope that you can move—I hesitate to use the Supreme Court's version—with all deliberate speed.

Thank you, gentlemen.

Mr. HUNGATE. The last scheduled witness is Mr. Charles Morgan, Jr., former director, Washington office, American Civil Liberties Union.

Do you have a prepared statement?

TESTIMONY OF CHARLES MORGAN, JR., FORMER DIRECTOR, WASHINGTON OFFICE, AMERICAN CIVIL LIBERTIES UNION

Mr. MORGAN. No.

Mr. HUNGATE. You may proceed as you see fit.

Mr. MORGAN. I appear for the American Civil Liberties Union, and in support of Senate bill 495.

You stated, Congressman Hungate, that your committee had waited for a better bill, your subcommittee had. The bill is here. I have a few problems with the better bill. But they primarily do not relate to the Special Prosecutor aspect of it. It does seem to me that if Members of Congress are to obtain free legal counsel, that those who are impecunious who may be cited by the Congress for contempt of the Congress might also be entitled to that free legal counsel.

Mr. HUNGATE. Permit me to interrupt a moment. Now, as I understand the hieroglyphics of assignments here jurisdictionally, we al-

most certainly have the Special Prosecutor provision before us. The Senate bill I think is in three parts, like Gaul. And the second part is a congressional Legal Counsel. And the third part is some sort of a financial disclosure provision. And I would anticipate with no authority that the financial disclosure might go to Mr. Flower's subcommittee of the Judiciary. And I have heard the discussion that the part to which you alluded on congressional Legal Counsel might go to Government Operations.

Mr. MORGAN. I just want to make sure that the Special Prosecutor aspect is the only aspect that we are supposed to be here on. And with respect to that I would like to go forward.

Mr. HUNGATE. Yes sir.

Mr. MORGAN. The ACLU has long supported motions with respect to Government, with respect to ombudsmen, the independent prosecutor and the special prosecutor, of course in the Watergate case. It is because of the Watergate experience that we are now confronted with this—that brings us to this bill. The President of the United States, at the time of Watergate, was stated by counsel and by others to be "the chief law enforcement officer" of the United States. Discussion of the Attorney General as though he is the first officer who enforces the law is remiss in the light of the fact that the President of the United States in fact is the Nation's chief law enforcement officer. And the President is charged with the duty of enforcing the Federal criminal law. He in that capacity has certain political considerations. They render unto him, as Caesar, certain rights beyond those of an average citizen.

What the Senate bill purports to do is to place for a fixed 3-year term a Special Prosecutor in office to investigate the President and other ranking public officials. I believe that the people of the United States have rightfully learned that their Government is a government of privilege, that equal protection of the law in Washington, D.C., means protection for politicians. I believe that the Senate bill will go a long way toward elimination of that standard. I particularly am interested in Congressman Wiggins' comment to my good friend Mr. Spann. He commented on, "depend on the U.S. Senate to take care of the problem." I recall well the way the U.S. Senate took care of the problem when Attorney General Kleindienst lied to the Senate under oath. As I recall, 40 percent of the last five Attorneys General were sentenced in one degree or another for the commission of offenses against the people of this land.

The principal problem to me is the basic, latent underlying corruption of the Department of Justice with respect to certain types of cases. An example: Before a congressional subcommittee an agreement was revealed between the Central Intelligence Agency and the Justice Department. It existed from 1954 to 1975. It says that the CIA would decide who was to be prosecutor for offenses it committed. Anything that we do to remove that sort of power from those who command great power in the Government is a step in the right direction.

Mr. HUNGATE. Will you permit me to interject that most of the CIA and FBI are not politicians, unless the term is defined another way.

Mr. MORGAN. I disagree with you—as a great American politician once stated before he backed down on it—"1,000 percent."

Now, the reason that the CIA are politicians is that their work in other lands is political. Howard Hunt did not come to us from a vacuum, he came from a political office. His job was to put out political propaganda, topple governments, influence political campaigns. The same is true for whole sections of the Intelligence Agency. And I consider J. Edgar Hoover as one of the classic politicians of all time, certainly since Caligula.

Mr. HUNGATE. When I think of politicians I think of those who run for office. But I know there is a difference.

Mr. MORGAN. There is a great difference in Washington, D.C., Mr. Chairman, as we all know.

The Special Prosecutor, I believe, should also be limited with respect to his staff on the term of office the staff can serve. It strikes me that in Washington in my brief experience here that a great number of people grow inured to the process and become very experienced. I don't think I would allow any lawyer to work in that office for more than 4 years. And as far as the American Bar Association's interest and desires, Congressman Wiggins rightfully pointed out that many Congressmen come from the ranks and membership of the ABA. I think it is far better that we start looking to disqualifications which lead to independence and the administration of justice and equal protection of the law. So, it is fitting that from this room the President of the United States with much pressure upon him, retired to San Clemente, pardoned by the present President whom he appointed. I think the people are entitled to better than that. And the Senate bill gives them something better than that.

Mr. HUNGATE. Thank you.

Mr. WIGGINS. Well, welcome back.

Mr. MORGAN. It is always good to see you, Mr. Wiggins.

Mr. WIGGINS. I listened with interest to your definition of politics. And it is true that politicians are not confined to elective office. And I want to welcome you to the ranks of politicians, because you are a most effective one, as nearly everyone in the room and in Washington, D.C., knows.

Mr. MORGAN. Thank you very much. I consider that quite a high compliment.

Mr. WIGGINS. It is intended as a compliment. Because I still do not regard the word politician as some people do.

Mr. MORGAN. Nor do I.

Mr. WIGGINS. Do you have any trouble as a lawyer with implicit limitations on the President's power to nominate which is contained in the Senate bill?

Mr. MORGAN. No. I think the Congress has arrogated unto itself those qualifications quite regularly and often with regard to administrative agencies and other agencies of Government.

Second, I think the Congress can establish or disestablish the Office of Attorney General, period.

Third, the Attorney General's Office initially started with one person more than 100 years ago. And from that office we had a person who became the President's counsel and adviser. And from there it has become the largest law firm in the world. It dominates the District of Columbia Bar and sets the standard for it.

Mr. WIGGINS. I think on balance I am inclined to agree with you. But it is important to raise the questions for the record. Because there has been some consideration at least by the academic community of whether or not the bills before us for consideration unconstitutionally erode the power to appoint and remove which is historically vested in the President.

There are a couple of aspects of the Senate bill which troubled me a little bit, and I didn't get to ask the Attorney General a particular question. But your observations would be helpful.

The Special Prosecutor receives complaints, apparently from the public or referred to him by U.S. attorneys or others of the official apparatus. Under certain circumstances the Special Prosecutor has the discretion to decline these referrals. And one of the bases for which the Special Prosecutor may decline a referral is if he, the Special Prosecutor, thinks that the matter referred to him can better be handled by other departments of the Department of Justice. Well, I am a little bit troubled as to whether the Special Prosecutor ought to be making that kind of administrative decision. I realize that it goes the other way, and the Attorney General makes that decision. We have some problems. But I see some problems on this side, too. Do you have any observations about that?

Mr. MORGAN. Yes; I do see some problems. I think that your primary way to combat that would be under section 592(b) of the Senate bill. I would add as the final words at the end of that section "copies shall be included in the Special Prosecutor's annual report to the committees." In other words, I think full disclosure should be made in the case where he has declined jurisdiction.

Mr. WIGGINS. I believe we are both looking at the same page of the Congressional Record right now.

Mr. MORGAN. Yes, sir.

Mr. WIGGINS. And in that column under section 593 entitled Authorities, subsection (a) (7) thereunder, the following appears under the authority of the Special Prosecutor:

Make application to any Federal court for a grant of immunity to any witness consistent with applicable statutory requirements, or for warrants, subpoenas or other court orders. And for purposes of sections 603, 4 and 5 of title 18 as amended, the special prosecutor may exercise the authority vested in the U.S. Attorney or the Attorney General.

I do not have instant recall as to what those sections are, but perhaps you do. Does this give the Special Prosecutor the right to make those decisions which would otherwise be vested in the Attorney General personally concerning wiretap authority?

Mr. MORGAN. I do not have an immediate recollection of 4 and 5. It is my belief that they relate to use immunity. If that is correct, I never would allow the Special Prosecutor to exercise the grant of use immunity. Use immunity is of course a matter to which the ACLU would be opposed with respect to the Special Prosecutor and other agencies of the Federal Government. It opposes the coercion of testimony through grant of immunity or otherwise.

Mr. WIGGINS. On the question of wiretaps which under certain circumstances are permitted pursuant to court order, but require, as I understand it, the personal approval of the Attorney General, given the assumed targets of the investigation, it could be the Attorney Gen-

eral himself, or the Director of the FBI, the President and the Vice President, would you be repealing existing laws to that extent and giving authority to the Special Prosecutor?

Mr. MORGAN. Would the ACLU favor repealing the use immunity provisions?

Mr. WIGGINS. No; in the case of an authorized wiretap?

Mr. MORGAN. Yes; the ACLU would favor no wiretaps whatsoever, we favor repeal of all wiretaps. And I personally do also.

Mr. WIGGINS. All right. Now, let's go to the world which is. And wiretaps under court authority are permissible under certain circumstances.

Mr. MORGAN. Wiretaps without court authority are permissible under certain circumstances.

Mr. WIGGINS. I don't wish to debate that, I wish to say that it is my understanding of the law that the Attorney General must play a personal role in approving even the application of court order for such wiretaps. That is my understanding of the law. And I am wondering if that provision of the law, if indeed it exists, should be modified to give that personal authority to the Special Prosecutor where presumably the target of the investigation is the Attorney General himself?

Mr. MORGAN. No.

Mr. WIGGINS. That is an answer. Thank you.

Mr. HUNGATE. Ms. Holtzman.

Ms. HOLTZMAN. Thank you, Mr. Chairman.

Mr. Morgan, I think that it is extremely important to insure that those who administer justice with respect to high officials, maintain an appearance of credibility and evenhandedness, so that the American people can be confident that everyone stands equal before the bar of justice. Taking a look at some of the past practices with respect to the Special Prosecutor, I am not sure that the American people can have that confidence. Let's take two separate instances. First, with respect to the Watergate break-in, the crime that gave rise to the whole Watergate investigation, despite over 2 years of operation of a Special Prosecutor and several Special Prosecutors, nobody has been prosecuted for ordering the break-in into the Watergate Hotel, nor does the American public know who is the highest official who ordered it and what the burglars were looking for. We don't know whether the failure to prosecute higher ups for the break-in was because the culprits had already been prosecuted and there was a policy against multiple prosecution. We don't know whether the culprits were ever found. We don't even know whether the prosecutor ever looked. It seems to me that with respect to the central occurrence which gave rise to the Watergate case surely the American public, after 3 years, ought to know the status of that investigation, and how thorough it was. In considering new Special Prosecutor legislation, how are we going to assure the American people that in fact a thorough investigation will be conducted?

There is a second problem that occurred with respect to the Special Prosecutor and occurred in my judgment with respect to the Department of Justice in terms of its enforcing laws against a Vice President and against a President. It seemed to me that the Department of Justice, in investigating and prosecuting alleged crimes against the

Vice President, was satisfied to have as its final objective his resignation from office. The same occurred with respect to President Nixon. I question whether that is the appropriate objective of the Office of Special Prosecutor when dealing with the highest officials of the land. Is the appropriate objective to enforce the law or to remove officials from the offices they hold?

I am troubled about whether we will have a repetition of these problems in the future with respect to a special prosecutor. I think that neither of these problems is addressed in this legislation. I wonder if you could comment on that.

Mr. MORGAN. Your second question first. With respect to the Vice President and the President of the United States, both departed from office, and both were disbarred.

And I think we cannot blame the Special Prosecutor any more than we can blame the House of Representatives of the United States. In each instance they were satisfied, the official bodies of Government, to be "shed of them," to use the southern phrase. What the prosecutor did in the deal that was made by Attorney General Richardson, subject then to President Nixon, was to allow Spiro T. Agnew to cop a plea, to plead nolo contendere to the kind of charge that the average citizen would have stood in the dock and been sentenced to jail for. By the same token, the House of Representatives did not impeach, nor did the Senate try, either Mr. Agnew or Mr. Nixon. I, as a citizen, am rather well convinced that a deal was made all the way around with respect to Mr. Nixon's departure. And he now is pardoned. And that is an example, I believe, that people will cite as they go to the polls this fall, and will continue to cite in this election regarding public officials.

Second, with respect to the Watergate case, and whether or not that should lend us great hope that a Special Prosecutor would do his job. As you know, I represented the victims, the actual victims of that crime at the first trial and thereafter. The ones who talked on the working wiretap. They urged the Special Prosecutor to move to indict for the original crime, the break in itself. The Special Prosecutor declined to do so. No reasons were given. The declaration was abrupt. And one of my clients at least felt rather offended by the fact that there was no explanation to the victim of the crime as to why those higher ups charged with covering up the crime or others were never indicted for the crime itself. The first seven only were charged with the break-in and the wiretap.

Now, those of us who are familiar with that case have grown familiar with coverups. Some of us have come to the harsh conclusion that it is not merely the Special Prosecutor who covered up. And not merely the Department of Justice which covered up. It is also the Congress and most people in Washington in high public posts who found items of interest which touched upon our national security. I come from the South. I have seen a great deal of covering up on matters that involved our southern way of life. Since I have come to Washington I have found the two phrases to have the same affect.

Mr. HUNGATE. Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman.

Mr. Morgan, when I find the ACLU in agreement with the Ford administration and the ABA I become disappointed or suspicious or both.

Mr. MORGAN. Well founded.

Mr. DRINAN. I wonder if the ACLU has had a consistent position on this since the question surfaced in the fall of 1973?

Mr. MORGAN. The ACLU favored the appointment of a Special Prosecutor in the Watergate case.

Mr. DRINAN. Under what circumstances? Has the ACLU in its highest deliberations said that the President should appoint, or that the court should appoint? Has it studied this, and are there documents and papers and all?

Mr. MORGAN. Yes. The last ACLU references to a Special Prosecutor, which was official board action, was restricted to a Special Prosecutor to prosecute the crimes of the intelligence community. The prosecutor must have a short term. The prosecutor was to be appointed—regardless of our preferences—as I recall it, by the President. That follows from the campaign finance decision of the Supreme Court, *Buckley v. Valeo*, which generally outlawed appointments by the Congress or another branch of the Government. But the ACLU would prefer to have the maximum amount of independence in the prosecutor.

Now, as a part of that policy the ACLU also proposed: Federal criminal statute, against nonelected public officials, ranking public officials, lying to the people, with the same penalties as those for income tax evasion.

Second, the ACLU would require protection for those in Government who inform upon Government officials and tell of their crimes. As it now stands the Government has informers against the people, but the people have no informers against the Government.

Third, make it a crime for a Government official not to disclose in the nature of misprision.

And fourth, to abolish every covert activity and covert acts of the Government.

And fifth, to have a Special Prosecutor for those offenses that arise from intelligence and intelligence activities.

Mr. DRINAN. But the tribunal is the Senate Intelligence Committee—

Mr. MORGAN. It doesn't appoint Special Prosecutors.

Mr. DRINAN [continuing]. Unless you are making more than \$44,000 a year.

Mr. MORGAN. That is right. You never know in the intelligence community. They may all make \$150 for all I know.

The last line, you go down on section 591(e)—and I don't know if you have a copy of the Congressional Record—

Mr. DRINAN. I do.

Mr. MORGAN. If you go up four lines there you find different language there than you do when you move over to the next page, 596(b). Now, it relates to the kinds of cases declined, the types and numbers of matters under which you decline jurisdiction. I notice that the Senate language is "include any information which might impair"—he doesn't have to include any information which "might impair or

compromise an ongoing matter." When you are dealing with lower officials, it certainly would impair an ongoing matter. And then after the invasion of personal privacy, the Senate version says "or other improper disclosure." I trust that that is just a recodification of language to authorize a Special Prosecutor to enter into some sort of a deal with the secret forces of our Government. To not disclose "sources" or "methods" for instance. I think a period should come in this piece of legislation. The House should put a period after the words "personal privacy" in the last line of section 591(e), and strike the words "or other improper disclosure."

Mr. DRINAN. Let me just close on this. I wonder if we could have the benefit of a detailed brief from the ACLU lawyers on the bill passed by the Senate. That would be very helpful to us. I would assume that there is a time element here, because there is a certain pressure to report the Watergate reform bill. Who could be against that? The detailed observation of the ACLU would be very helpful to me.

Mr. MORGAN. I think I could give you the policy positions that the ACLU took with respect to that and the papers under which those policies were made. I could provide that.

Mr. DRINAN. Thank you very much.

Mr. HUNGATE. Thank you.

Are there any further questions?

Thank you for your attendance and advice here. And I think Mr. Drinan's suggestions are useful. If there are any particular briefs on some of these issues the subcommittee would like to have them as soon as possible. We will have at least one further day of hearings, but we would like to conclude these hearings by August 10. I give that to you as a date, so that if there are any papers which you want us to have we can have them before that date.

Mr. MORGAN. I think I will get the papers to you this afternoon. We don't want to slow down this bill at all.

[The materials referred to above follow:]

WATERGATE AND CIVIL LIBERTIES—JULY 11, 1973

Question. Should the prosecution of the Watergate defendants take precedence over the Senate Watergate investigation?

Answer. Both the prosecution and the Senate investigation serve constitutionally distinct and proper purposes. The Senate investigation serves a legislative and informing function. The prosecution serves the public interest in punishing malefactors. The ACLU does not urge that either the Senate investigation or the prosecution take precedence over the other.

It should be noted that if the original prosecution had been prompt and properly wide in scope the Senate Watergate investigation might never have been necessary. However, the prosecution was delayed and, thereby, prevented information from emerging which might have influenced the 1972 elections. Moreover, when it finally took place, the prosecution was restricted to persons on the lower levels of those involved. That is why the Senate investigation came about. Under the pressure of the Senate investigation, an independent prosecutor was appointed. ACLU supported the appointment of an independent prosecutor with an independent staff. However, by then, it was too late to be able to guard against the problem of prejudicial publicity. The limitations of the original prosecution had left it to the press to ferret out the Watergate story, and thereby, created the problem of prejudicial publicity which cannot now be eliminated.

STATEMENT OF CHARLES MORGAN, JR., DIRECTOR, WASHINGTON NATIONAL OFFICE, AMERICAN CIVIL LIBERTIES UNION BEFORE THE COMMITTEE ON THE JUDICIARY, U.S. SENATE ON CONFIRMATION OF ELLIOTT RICHARDSON AND APPOINTMENT OF A SPECIAL PROSECUTOR—TUESDAY, MAY 15, 1973

My name is Charles Morgan, Jr. I am the Director of the Washington National Office of the American Civil Liberties Union.

The American Civil Liberties Union has supported independent civilian review boards for the investigation of governmental misconduct at its lowest level, the ombudsman concept, the right of newsmen to protect their sources and the absolute independence of an impartial judiciary. The underlying rationale for these policies is a recognition that men do not—indeed, cannot and probably should not even attempt to—investigate crimes allegedly committed by their friends or their employer. That principle is no less applicable when the friend and employer is the President of the United States. Here, both the search for the truth and the preservation of public confidence in that search cry out in a demand for total investigative and prosecutorial independence.

I also appear on behalf of the Association of State Democratic Chairmen whose telephone was the only one successfully tapped by the convicted Watergate defendants and their cohorts. While the people and their confidence in the constitutional system have been severely injured by the constant and continuing cover-up of the Watergate affair; my clients were the primary victims of the crime—it was their personal conversations which were overheard. Their interest demands, as does the interest of every victim of every crime, that those responsible for the crime be brought to justice, even if one of those persons may be the President of the United States.

I also appear here in my own right, as a lawyer who has spent his working life in literally scores of lawsuits instituted to include those traditionally excluded—blacks, women and poor whites—from our system of justice. These legal actions have been brought not only to acquire rights for the citizenry, but also to make our system of government work and in that manner to cause excluded groups to have faith in it. I have worked to secure for all an equal right to vote. This experience has ranged from *Reynolds v. Simms*, 377 U.S. 533 (1964), where the Supreme Court enunciated the "one-person, one-vote" rule, to *Hadnott v. Amos*, 394 U.S. 358 (1969), where the Court ruled that the candidates of the Integrated National Democratic Party of Alabama had a right to run for public office despite state laws used to bar their candidacy.

These interests of my clients and my personal interest and experience merge as I urge you, as members of the Judiciary Committee, to refuse to participate in anything less than the selection of a truly independent prosecutor in the Watergate case.

The confirmation of Elliott Richardson, or for that matter anyone else, to be Attorney General of the United States should not take place until that has been done.

Mr. Richardson has testified that the special prosecutor will be ultimately responsible to him as Attorney General. This is not independence. And, of course, he remains responsible to President Nixon. That is not independence.

Gentlemen, whether anyone desires to say it out loud or not, Mr. Nixon is a suspect—a prime suspect—in this case. Under these circumstances, independence and common decency require that the special prosecutor have no responsibility to the Attorney General and that the Attorney General have no veto power over him, that there be a clean sweep of the present prosecution staff, that a complete review of the Grand Jury testimony be undertaken by him prior to the returning of indictments, if any, and that he have a staff directly responsible to him and to no one else.

No matter how articulate and well-qualified this or any other nominee for Attorney General may be, and no matter how eminent the special prosecutor he selects may be, that prosecutor will not be, and indeed cannot be and cannot appear to be, truly independent of Mr. Nixon. With this investigation focused on Mr. Nixon and his appointees and lawyers, the Attorney General, who is otherwise the President's chief lawyer, has upon assumption of his duties an inherent and fundamental conflict of interest. It is irrelevant whether the Attorney General or the special prosecutor in practice prefer the interests of potential defendants to those of the public which they are supposed to represent,

for the appearance of fairness is also vital to the preservation of the public's belief in our institutions. To insure against both the appearance and the reality of this conflict of interest, a truly independent special prosecutor is essential.

Lawyers and the ethical discharge of their legal duties have not fared well in this case. The nation's "leading" lawyer and the President's principal attorney, Attorney General Richard Kleindienst, has resigned; his predecessor, John N. Mitchell, has been indicted; his counsel, John D. Erlichman and John W. Dean III, are under investigation or seeking immunity from prosecution, as is his personal attorney, Herbert Kalmbach. L. Patrick Gray III, his lawyer-director nominee to run the Federal Bureau of Investigation, has resigned after admitting he burned files and destroyed evidence. Mr. Nixon himself is a lawyer, as is the lawyer for his Finance Committee described at the trial by the prosecutor as "the boss", George Gordon Liddy, who is now in jail.

You are now being asked to "reasonably" treat a "reasonable" man and advise and consent to the appointment into a conflict of interest position of another leading lawyer.

Today's statements should be viewed by you in the context of other statements from our recent past.

For example, Mr. Nixon on October 5, 1972, describing the thoroughness of the investigation:

THE PRESIDENT: I certainly feel that under the circumstances that we have to look at what has happened and to put the matter into perspective.

Now when we talk about a clean breast, let's look at what has happened. The FBI has assigned 133 agents to this investigation. It followed out 1,800 leads. It conducted 1,500 interviews.

Incidentally, I conducted the investigation of the Hiss case. I know that is a very unpopular subject to raise in some quarters, but I conducted it. It was successful. The FBI did a magnificent job, but that investigation involving the security of this country, was basically a Sunday school exercise compared to the amount of effort that was put into this.

I agree with the amount of effort that was put into it. I wanted every lead carried out to the end because I wanted to be sure that no member of the White House staff and no man or woman in a position of major responsibility in the Committee for Re-election had anything to do with this kind of reprehensible activity.

For example, Hugh W. Sloan under oath in deposition on October 7, 1973, testifying that he told the prosecutors about Jeb Magruder's attempt to persuade him to commit perjury *before* the prosecutors put Magruder on the stand as their witness in the trial:

Question. And before you went to the Grand Jury you went to the prosecutor's office, did you?

Answer. Yes, I did.

Question. Did you give them the same information that you testified to today relative to the cash which had been disbursed to Mr. Liddy?

Answer. Yes, I did.

Question. Did you give them the same information relative to the conversations [an attempt to have him commit perjury] which you had with Mr. LaRue and Mr. Magruder?

Answer. Yes, I did.

Mr. STONER. This is with the prosecutors?

Mr. DUNIE. With prosecutors.

By Mr. Dunie:

Question. Who were the prosecutors you discussed this with?

Answer. Mr. Silbert, Mr. Campbell, and Mr. Glanzer.

Question. Were all three present while you were being questioned?

Answer. Yes, sir.

Question. Was your attorney present?

Answer. Yes, he was.

Question. That was Mr. Stoner?

Answer. That is correct.

Question. And thereafter did you go before the Grand Jury?

Answer. Yes, I did.

Question. When you testified before the Grand Jury did you testify the same as you testified today?

Answer. I am not sure it covered all these points. The Magruder conversations took, I would say, about half my Grand Jury testimony. It was a somewhat narrower focus. I don't think all the information I had given to the prosecutors was covered in the Grand Jury itself.

For example, Elliott Richardson on May 9, 1973, confirming that the prosecution will remain subject to the Attorney General's control:

"My understanding of the law is that the Attorney General must retain ultimately responsibility for all matters falling under the jurisdiction of this department. I would expect to do that. Indeed, it would not seem to me to serve the primary purpose of my designation as Attorney General at this stage if I did not do so." Transcript, Hearing before Committee on the Judiciary, 11.

"In any event, from my own standpoint, the position of Attorney General mandatorily requires the acceptance of ultimate responsibility." *Id.* 12

If that be the law, then change the law. If that is not the law, then approve no one for Attorney General unless he agrees to totally remove himself from any semblance of control over the prosecution of this case.

As Mr. Justice Brandeis said long ago, dissenting in *Olmstead v. United States*, 277 U.S. 438 (1928):

"In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." 277 U.S. at 485.

Gentlemen, these questions transcend politics. They go to the very foundations of this Republic.

Here, before you, the rule of law is on trial. This concept has been wounded—martyred, if you please. And now you are called upon to take action to vindicate the rule of law itself, law above which no man can stand, around which no man can step, and under which democratic government can survive.

STATEMENT OF AMERICAN CIVIL LIBERTIES UNION, WASHINGTON OFFICE CONTROLLING THE INTELLIGENCE AGENCIES

Control of our government's intelligence agencies demands an end to tolerance of "national security" as grounds for the slightest departure from the constitutional restraints which limit government conduct in other areas. Preservation of the Bill of Rights as a meaningful limitation on government power demands no less. Government secrecy must be drastically curtailed while restoring citizens' freedom from governmental scrutiny of and interference in their lives. To end that secrecy, limit government surveillance, and create effective enforcement mechanisms the following measures should be adopted:

A. End Clandestine Government Cover-stories and Cover-ups

1. Prohibit the peacetime use of spies in the collection of foreign intelligence. Abolish clandestine organizations¹ for intelligence collection. Enact precisely drawn criminal sanctions against clandestine governmental relationships with citizens² and against the payments of public or private funds and other things of value, directly or indirectly, to citizens of our own and foreign nations for peacetime spying and espionage.
2. Make it a crime for intelligence agency officials or senior non-elected policy makers willfully to deceive Congress or the public regarding activities which violate the criminal law or limits to be imposed on intelligence agencies.
3. Make it a criminal offense for a federal official whose duties are other than ministerial willfully to fail to report evidence of criminal conduct or conduct in violation of these limits to the Special Prosecutor (see (d)).
4. Protect "whistle blowers" in order to encourage revelation of activities which violate the criminal law or these limitations to Congress and to the public.
5. Create a permanent and independent Office of Special Prosecutor to police the intelligence community. The mandate should be limited to the investigation and prosecution of crimes committed by officials involved in this area. There

¹A "clandestine organization" is one whose agents, officers, members, stockholders, or employees, or its activities, characteristics, functions, name, nature, or salaries are secret.
²"Citizen" includes individuals and associations, corporations, firms, partnerships, and other organizations.

should be time limits on the length of time the Special Prosecutor and his or her staff may serve. The Office should have a mandate to initiate probes of other government agencies to find violations, as well as to prosecute those alleged violators brought to its attention. It should have access to all intelligence community files, and be empowered to use any information necessary for successful prosecution of criminal offenses. If the information is used, it must be given to the defendant.

B. Drastic Reduction of Secrecy

1. Limit the authority of the Executive Branch to classify to three categories of information: technical details of weaponry, knowledge of which would be of benefit to another nation; technical details of tactical military operations in time of declared war; and defensive military contingency plans in response to attacks by foreign powers but not including plans of surveillance in respect to domestic activity.

2. Create a mandatory exemption from classification of any information relating to U.S. activities in violation of U.S. laws.

3. Limit executive privilege to the "advice" privilege, guaranteeing Congressional access to all other information no matter what its classification. Congress would also have access to "advice" when it has probable cause to believe it contains evidence of criminal wrongdoing or violation of the limits Congress imposed by statute or resolution on intelligence activities.

4. Make absolute the right of Congress to release unilaterally information classified by the Executive Branch. Individual members of Congress cannot be restrained by classification procedures from releasing information which contains evidence of criminal wrongdoing or violations of the statutory limits to be imposed on intelligence activities.

5. Define proper roles for intelligence agencies (see (c)) in public debate. Make the budgets for the various intelligence agencies public.

C. Public Determination of Agency's Activities

1. Create legislation charters for each major agency, all provisions of which are to be publicly known. These would provide that all activities not specifically authorized therein be prohibited. The details would be required to be spelled out in agency regulations which are subject to public comment and Congressional control.

2. Limit the terms of agency heads. Also increase the independence of general counsels and require their written opinion on the legality of any operations nearing the limits we establish.

3. Limit the CIA, under the new name of the Foreign Intelligence Agency, to collecting and evaluating foreign intelligence information. Abolish all covert and clandestine activities.

4. Restrict the FBI to criminal investigations by eliminating all COINTELPRO-type activity and all foreign and domestic intelligence investigations of groups or individuals unrelated to a specific criminal offense.

5. Limit the IRS to investigations of tax liability and tax crimes. IRS access to, or collection of, information on taxpayers' political views and activities should be barred.

6. Prohibit the National Security Agency from intercepting and recording international communications of Americans, whether via telecommunication, computer lines, or other means.

7. Prohibit the military from playing any role in civilian surveillance. No information on civilians and military personnel exercising constitutional rights should be collected.

8. Establish a separate agency to conduct security clearance investigations for federal employees, judgeships, and presidential appointees. Investigations should not take place without the applicant's authorization. Files should be kept separate and limited to the purpose of the security investigation. Exceptions in the 1974 Privacy Act which deny people access to their files should be repealed.

9. Flatly prohibit exchange of information between agencies, except for evidence of espionage and other crimes which may be sent to the agency responsible for investigating or prosecuting them. Existing government files on First Amendment political activities should be destroyed.

D. Limit Investigative Techniques

1. Prohibit entirely wiretaps, tapping of telecommunications, and burglaries.

2. Restrict mail openings, mail covers, inspection of bank records, and inspection of telephone records by requiring a warrant issued on probable cause to believe a crime has been committed.

3. Prohibit all domestic intelligence and political information-gathering. Only investigations of crimes which have been, are being, or are about to be committed may be conducted.

4. Prohibit the recording of and keeping of files on those attending political meetings or engaging in other peaceful political activities.

5. Make limitations public in regulations subject to public comment and Congressional control.

E. Enforcement

1. Make it a criminal offense for an official knowingly to order the violation of the above restrictions on both the scope of the agency's activity and its techniques.

2. It should also be a separate criminal offense to fail to report violation of the restrictions described in A, B, C, and D to the Special Prosecutor or to deceive Congress and the public about the same.

3. Establish a wide range of civil remedies for those whose rights have been violated by intelligence officials or organizations, patterned after those now available for victims of unauthorized wiretaps and violations of the Privacy Act. Such a statute should eliminate the present jurisdictional amount requirement; eliminate any need to prove actual damage or injury; declare certain practices to be injurious and provide liquidated damages for those aggrieved; provide for recovery of attorneys' fees and costs; and disallow a "good faith" defense.

F. Congressional Oversight

Create separate committees in each House with: jurisdiction over authorization of funds for CIA, NSA, and FBI; legislative authority on entire range of intelligence activities; oversight of all agencies engaging in intelligence activities; a special mandate to oversee and legislate with respect to: (a) compliance with sharply curtailed classification system, (b) new surveillance technology, and (c) all intelligence activities which might endanger individual rights; rotating membership for Committee members; and limits on the length of time any staff member may work for the Committee.

Adopted by ACLU National Board of Directors, December 6-7, 1975, and February 14-15, 1976.

There is a continual flow of federal and state regulations threatening a woman's right to abortion. Title XX funds may not cover abortions. We should mount a major litigation attack on these regulations. Margie Hames felt we should mount one test case rather than continually writing letters. She felt, however, that we had spent too much time on the issue of whether private hospitals receiving federal funds should be required to perform abortions.

Women's Rights Project

Suzy Post noted that the Women's Rights Project may soon be the largest funded project, and that the advisory committee to the Project had never met. She contrasted this with the advisory committee of the Prison Project which is actively involved with the Project. Arye responded that the Women's Rights Project committee was intended to be a letterhead rather than a functioning committee. When any of the Projects grows to the size of the Prison Project an advisory committee will be set up. (Office note: An advisory committee to the WRP was approved by the ACLU Foundation Board on January 10.)

INTELLIGENCE COMMUNITY ACTIVITIES

The Washington office presented a comprehensive outline of proposals to control intelligence agencies. The outline contained five basic elements: (1) a challenge to the secrecy which accompanies "national security" activities; (2) a redefinition in a more specific and limited way of the proper sphere of activity for the major known agencies which have been involved in presently known abuses; (3) the specific investigative techniques that should be prohibited or restricted; (4) statutes which would (a) make it a crime for senior non-elected government officials wilfully to deceive Congress and the public about activities which violate the above rules, and (b) would protect "whistle blowers" in the area of intelligence activities; (5) the appointment of a permanent Special

Prosecutor to investigate and prosecute violations in the intelligence area. To attempt to secure congressional oversight, it proposed separate House and Senate Committees with rotating membership and limits on the length of time elected official and staff members can serve. These committees would have authorization, oversight and legislative jurisdiction, with a special mandate to monitor and disclose infringements on civil liberties and new surveillance techniques.

In reviewing this proposal, the Board agreed that there were three items that were not covered by existing ACLU policy. These were: (1) whether there should be a permanent Special Prosecutor's office; (2) whether the ACLU should adopt a position that amounts to a misprison statute; and (3) whether existing ACLU policy on covert activities should be extended to include a prohibition against covert and clandestine activities related solely to gathering of foreign intelligence.

Although these issues had not been scheduled on the regular agenda, the Board felt that in light of the strategic importance of enabling the Washington legislative office to present a comprehensive reform package review of these policy questions should not be deferred. A special committee consisting of William Van Alstyne, David Carlner, Larry Spelser, David Isbell, Aryeh Neier, Hope Eastman and Chuck Morgan was formed to report back to the Board following the lunch break. Sheldon Ackley sat in on the committee meeting.

The following points were raised in the Board discussion on the Special Prosecutor issue:

The Special Prosecutor's office should be independent of the President and the Department of Justice. The relationship between Justice, the CIA, and the FBI is so incestuous that a special prosecutor appointed by Justice could not conduct independent investigations of these agencies. The appointment of the Watergate Special Prosecutor is an example of how this office can be used to further coverups.

The problem of secret agreements between agencies such as the entente between the Department of Justice and the CIA providing that criminal violations by the CIA would be referred back to the CIA rather than prosecuted by Justice would be better solved by statutes against such ententes than by the creation of a Special Prosecutor's office.

The Special Prosecutor's office would be tainted by problems of bureaucracy. The need for the Special Prosecutor's office exists. Once it is created we can worry about who gets the job and how it is carried out.

By a 24 to 14 vote the Board adopted this motion: "The ACLU favors the creation of a Special Prosecutor's office with respect to the intelligence community."

The following points and dissents were raised in the Board's discussion of the misprison issue:

The policy covers both elective and non-elective federal officials. Elective officials should not be exempt from criminal sanctions because such officials may be punished by losing reelection.

The Washington office would interpret a government official as someone holding higher than a G-6 classification. The misprison statute would not apply to persons in lower categories who were simply "standing around" or across whose desk the material may have travelled.

The penalty which the Washington office would propose for violation of the statute would be three years.

The ACLU should endorse the obligation of government officials to come forth with information rather than endorsing the expansion of criminal sanctions.

Misprison statutes raise the problem of denial of the Fifth Amendment privilege against self-incrimination.

The problem of failure to disclose such information can be dealt with under existing obstruction of justice, aid and abet, and intent to defraud statutes.

The standard of willfulness is not high enough. There should be specific intent; the person must know it's a crime and then specifically do it. Lacking this kind of standard, the statute can convert innocent behavior into a crime.

By a vote of 22 to 15, the Board adopted the following motion: "The ACLU endorses, in dealing with the problems created by the intelligence community, making it a criminal offense for a federal official whose duties are other than ministerial willfully to fail to report evidence of criminal conduct or conduct in violation of the limits to be placed by Congress on the activities of the intelligence agencies, to the Special Prosecutor or in the absence of a Special Prosecutor to such authority as may be designated by Congress."

The Washington office memorandum had proposed the abolishment of all covert and clandestine activities. Existing ACLU policy states that the government has the duty to disclose everything but covert activity relating to foreign intelligence.

The following points were raised in the Board's discussion of this issue:

We must define what we mean by covert action. Do we include covert intelligence gathering within covert action?

National security is tied in with covert intelligence gathering. The breaking of the Nazi and Japanese codes were useful and necessary. It is also important for people to be alert to violations of SALT agreements.

Covert action as it applies today is secret activity designed to overthrow or influence the policies of a government. It is completely separate from intelligence gathering. Therefore when we address covert action as it applies today, our policy should be extended since we have taken the position that an act of war requires constitutional action.

Covert action can mean giving economic assistance to an opposition party.

Covert action requires cover stories and is a euphemism for lies. The Glomar incident is a recent example of how many agencies of government, at all different levels are corrupted by covert action.

The Washington office position would eliminate all covert activity, including intelligence gathering. It would limit the collection and evaluation of foreign intelligence to other than covert or clandestine means.

A proviso should be added to existing ACLU policy stating that the fact information was obtained by covert or clandestine means does not mean that this information can be denied to the public.

By a vote of 23 to 6 the Board deferred resolution of the difference between these positions to the February meeting.

The Committee reported that in addition to the policy questions, there were several areas of the Washington office proposal that needed redrafting of language to conform with ACLU policy. The staff was instructed to make clear in its proposal that:

While government officials could not claim privacy and First Amendment protections in responding to Congressional committee requests for information, they would be protected from wiretapping.

Since the CIA (under this proposal) would be limited to collecting and evaluating foreign intelligence, the FBI would be permitted to transfer to the CIA information it had uncovered in its domestic investigations that would be relevant to foreign intelligence.

The government would be limited to investigation of crimes committed or about to be committed. General fishing expeditions would be prohibited.

Military Justice

A series of policies regarding the rights of individuals serving in the armed forces was adopted at the February, 1975 Board meeting including the position favoring abolition of the military justice system. At that time, however, the minority view of the special Board committee on military rights regarding the abolition of the military justice system was mistakenly omitted. The Board, therefore, decided to hear the minority position and to reconsider its policy.

Homer Moyer, a member of the special committee on military rights, presented the minority position. The minority felt that in light of significant procedural advancements in the military courts, and the existence of good justices on the Court of Military Appeals an individual would be better off in a court martial proceeding rather than a regular court, despite the problem of command influence in the military courts.

These points were stressed in the course of the discussion:

Brook Hart felt that the military courts were fairer with respect to sentencing and discovery procedures and that the quality of military defense counsels is at least equal, if not superior, to the quality of public defenders.

Carl Cohen responded that command influence infests the entire military court system.

(e) By a show of hands the Board defeated the following proposal:

"That the travel expenditures portion of the Biennial Conference budget for 1976, as proposed by the Biennial Conference Committee, be cut in half, and that the contributions to the Biennial budget from both the national and affiliate treasuries be reduced accordingly. Each affiliate should then decide for itself how it will accommodate to this reduction in travel subsidy. E.g., an affiliate

might decide to cut the size of its delegation in half, or ask each delegate to pay half-fare or make some subsidies out of its own budget, or find some other solution."

(f) By a vote of 21-13 the Board approved a motion that the \$250 contribution from the ACLU to the International League for the Rights of Man be continued in the 1976 budget.

The Board adopted the 1976 budget as amended by a vote of 46-2.

8. Proposed Legislation Concerning Reform of Intelligence Agencies

The Washington office proposed a comprehensive outline of proposals to control intelligence agencies which challenged the secrecy which accompanies "national security activities, seek to redefine in a specific and limited way the proper sphere of activity for the major known agencies which have been involved in abuses to date, prohibit or restrict some of the specific investigative techniques and limit the exchange of files and information between agencies.

To enforce these limitations, the Washington office proposed the appointment of a permanent Special Prosecutor to investigate and prosecute violations in the intelligence area. It also proposed clarification and expansion of criminal statutes, and creation of extensive civil remedies. To attempt to secure congressional oversight, it proposed separate House and Senate Committees with rotating membership and limits on the length of time elected official and staff members can serve. These committees would have authorization, oversight and legislative jurisdiction, with a special mandate to monitor and disclose infringements on civil liberties and new surveillance techniques.

With the exception of the issues dealt with below, in which new policy guidance is needed, the Board agreed that the Washington office memorandum was based on existing ACLU policies and could be used to implement these policies.

To provide the necessary new policy guidance the Board took the following actions. By a 24 to 14 vote the Board adopted this motion:

"The ACLU favors the creation of a Special Prosecutor's office with respect to the intelligence community."

In the Board discussion the staff was instructed to favor a Special Prosecutor independent of the President and the Department of Justice.

By a vote of 22 to 15 the Board adopted the following motion:

"The ACLU endorses, in dealing with the problems created by the intelligence community, making it a criminal offense for a federal official whose duties are other than ministerial wilfully to fail to report evidence of criminal conduct or conduct in violation of the limits to be placed by Congress on the activities of the intelligence agencies, to the Special Prosecutor or in the absence of a Special Prosecutor to such authority as may be designated by Congress."

On the question of covert activities, the Board deferred until their next meeting the question of whether covert and clandestine activities related solely to gathering of foreign intelligence should be prohibited. The Board agreed that the prohibition against all other covert and clandestine operations, as noted in the memorandum, presents the existing ACLU position, and should be included in any implementation of the Washington office outline.

The Board also agreed that several language changes should be made in the provisions dealing with the rights of government officials, the exclusion from FBI jurisdiction of other than criminal investigations, and the limits on exchange of data among agencies.

Crisis Area Fund

By a vote of 32-3, the Board approved the following motion:

"That the 4 percent assessment of affiliate income for the Crisis Area Fund be maintained until further action of the Board."

9. Recess

The Board approved the following motion by a voice vote:

"The December 7th meeting of the ACLU Board is recessed until February 14, 1976."

Mr. HUNGATE. Thank you very much, Mr. Morgan.

The subcommittee will stand adjourned.

[Whereupon, at 1:30 p.m., the subcommittee adjourned, subject to the call of the Chair.]

PROVISION FOR SPECIAL PROSECUTOR

THURSDAY, AUGUST 26, 1976

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIMINAL JUSTICE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:40 a.m., in room 2237, Rayburn House Office Building, Hon. William L. Hungate [chairman of the subcommittee] presiding.

Present: Representatives Hungate, Mann, Holtzman, Mezvinsky, Drinan, Wiggins, and Hyde.

Also present: Thomas W. Hutchison, counsel; Robert A. Lembo, assistant counsel; and Raymond V. Sinietanka, associate counsel.

Mr. HUNGATE. The subcommittee will be in order. The Chair has received a request to cover the hearing in whole or in part by tape recording. Is there any objection? Hearing no objection, the request is granted.

Today the Subcommittee on Criminal Justice continues its hearings on legislation to establish an Office of Special Prosecutor. Pending before the subcommittee is H.R. 14476, a bill that provides for the appointment of a temporary Special Prosecutor on a case-by-case basis with the Special Prosecutor independent of the Justice Department.

The appointment would be made by the Attorney General, with a special panel of judges able to review the appointment and, if necessary, name a different person as the Special Prosecutor.

The subcommittee also has under consideration title I of S. 495 as that bill was passed by the Senate last July. That bill calls for the establishment of a permanent Office of Special Prosecutor as a part of the Justice Department. The Special Prosecutor would be appointed by the President, by and with the advice and consent of the Senate, to serve a single 3-year term.

Persons appointed to serve as a Special Prosecutor could not have been involved at a high level in any campaign for Federal elective office in the past 5 years.

At our first hearing, the subcommittee received testimony from Senators Ribicoff, Kennedy, Javits, Percy, and Weicker, from Attorney General Levi, and from the ABA and ACLU.

The witnesses today include our colleague from Massachusetts, Representative Michael Harrington; a former counsel to the committee during the impeachment proceedings, Albert Jenner; and the former chief counsel to the Ervin Watergate Committee, Sam Dash.

Also we have Watergate Special Prosecutor Charles F. C. Ruff.

Without objection, your prepared statement and proposals, Mr. Harrington, will be made a part of the record and you may proceed.
 [The prepared statement and proposals of Hon. Michael Harrington follow:]

STATEMENT OF HON. MICHAEL J. HARRINGTON ON AMENDMENTS TO THE SPECIAL PROSECUTOR BILL, H.R. 14476

Mr. Chairman, I am pleased to appear before the subcommittee today and endorse both the form and the intent of the Special Prosecutor bill. I commend the chairman for introducing this title of the Watergate Reorganization and Reform Act into the House; H.R. 14476 is certainly a distinguished coda to a distinguished career in Congress, and an appropriate follow-up to your effort during the impeachment proceedings two years ago. I hope that this bill will win the rapid approval of our colleagues, and that we can also produce companion measures to the other, equally important titles of S. 405, providing legal counsel for the Congress and increased financial disclosure for the entire Federal Government.

My specific purpose in coming here today, however, is to urge that the subcommittee install two new sections in H.R. 14476, each of which addresses the critical problem of government lying and deception in this country. The first section would create a new criminal offense—that of making official, intentional false statements to Congress. The second section would prohibit reprisals against those federal employees who furnish information to Congress.

What we really need is an Executive-Legislative relationship based upon openness and candor, and I admit that legislative proposals by themselves cannot bring this situation about. However, a long history of Executive deception and Legislative passivity requires that a means be created to discourage the prevailing tendency to coverup and mislead. Thus, it is my belief that these new sections I am proposing today would add substantial weight to the structural reforms contained in the bill. Indeed, these provisions may very well be prerequisites to an effective Division of Government Crimes and Special Prosecutor because, as we have learned all too well these past ten years, false statements and secrecy forge the shield behind which government corruption and abuse of power occur. We must deter the potential liar and encourage the potential whistle-blower, or else most of the cases the new prosecutors should investigate will go unnoticed. The engine which H.R. 14476 constructs simply won't run without the fuel information provides.

I think most of us recognize by now the fundamental importance of reliable information to the operation of our government. We cannot have government by consent of the governed if we don't know what we are consenting to. Elected officials do not lead by misleading. As Walter Lippmann noted, "It is sophistry to pretend that in a free country a man has some sort of inalienable or Constitutional right to deceive his fellow men." After a generation of Executive sophistry, after Vietnam, Watergate, and the CIA, this nation and the Congress deserve and demand the truth from its public servants. And I do not think it is far-fetched to assume that if the American people do not get the truth—or if they believe they're not getting the truth—then our experiment in democratic rule will soon come to an end.

My proposal is based on this fundamental principle. It is also predicated on the belief that there exists a special, Constitutional responsibility on the part of federal officials or employees to provide accurate information when they appear before Congress. Clearly, the legislative branch cannot perform the duties assigned to it by Article I of the Constitution when it is deceived by the Executive branch. It cannot advise and consent on Presidential appointments, or oversee the agencies and programs it has devised, or design new laws to meet the needs of the American people unless it receives the facts, and the Executive branch remains the primary source for most of those facts. Lying, deception, and silence subvert the separation of powers doctrine, a cornerstone of our republic, by concentrating power in the hands of those who know more than their intended equals under the tripartite system. Unchecked, arbitrary power short-circuits the democratic process.

It should be obvious that the repercussions of secret Executive actions have ranged far beyond the abstract borders of democratic theory and constitutional law. We are continually learning about what one author calls the "underside"

of our recent history: an almost unbroken trail of attempted assassinations, bribes, burglaries, wiretaps and even entire wars which have been perpetrated in the American people's name without their knowledge or consent. Let me briefly cite two examples from this history.

In 1973 Senator Symington asked CIA director Richard Helms if his organization had tried to overthrow the Allende Government, if any money had been passed to the Chilean President's opponents, and if any attempt had been made to prevent his original election in 1970. Helms answered no to all three questions. Yet the 1975 Senate Select Committee on Intelligence report on covert action in Chile makes it unmistakably clear that Helms willfully deceived Senator Symington, his colleagues in Congress, and the public at large on this matter.

Lying to Congress and avoiding legal retribution has benefited Harry W. Shlaudeman, Deputy Chief of Mission in Chile at the time of the coup, in a more personal way. The only consequence he has suffered for giving me answers similar to those Helms gave Symington is a promotion to Assistant Secretary of State for Inter-American Affairs. We have thus sunk to the point where a public official actually reaps rewards for falsifying his account of serious misdeeds in which he participated to those charged with monitoring his actions.

The first section of my proposed amendment is aimed, therefore, at bringing a Helms or a Shlaudeman to justice and, like most criminal laws, at deterring future officials or employees from doing what they did. I am also seeking to achieve a better balance between the legislative and executive branches, and to restore a modicum of integrity to the national government as a whole. Since the stakes are high, the punishment is severe: five to ten years in prison. I regard the willful deception of Congress as a high crime, on a par with bribery or treason, and sufficient grounds for impeachment.

Prosecution for this crime should not be initiated easily, lest it become a tool for witchhunts and more subtle forms of harassment. Hence the class of potential offenders is limited to public officials and employees of the United States, those citizens who bear the extra responsibilities associated with the privileges of public power. The range of statements covered by this provision has been narrowed in two ways. First, the matter to which the statement relates must have been learned in the course of one's official duties, and second, such statement must bear the potential to affect the course or outcome of the Congressional proceeding at which it was made. These materiality tests, I believe will screen out trivial and personal matters from the purview of the statute.

The false statement offense includes a third test for prosecution, that the accused know, at the time the remark was made, of its falsity. This forestalls the possibility of prosecution if the witness or speaker is innocently confused or ambiguous. One should not have to be convinced of a statement's veracity before being allowed to express it before Congress, for opinion and speculation are invaluable aspects of the free exchange of ideas so essential to our political process. Indeed, it is with an eye toward preserving discourse to the fullest extent possible that the proposed statute cannot apply to press statements, interviews, conferences or other public appearances. The First Amendment welcomes rhetoric and hyperbole; to try and constrain free speech would be as unconscionable as it would be impractical. I should think, however, that opinion posing as fact could conceivably be termed a lie under the proposed statute if the person delivering it did so intentionally.

I have excluded one common requirement for prosecution from this section, namely, that the false statement be given under oath. The existing perjury laws, to be candid, have shown themselves insufficient to the task at hand. Furthermore, not all congressional bodies possess the power of subpoena or care to utilize it. If a civil servant doctors statistics in a written report to the House Merchant Marine and Fisheries Committee, or if the President of the United States does the same in a State of the Union address, Congress has been deliberately misled, and I can find no rationale to condone it.

The two most popular defenses of the right to lie revolve about the need to keep national security secrets, or pressure from a superior where one's job is at stake. Neither defense, in my view, outweighs the necessary and proper clause of the Constitution. Secrecy, on the rare occasion when it is justifiable, can be maintained by invoking the Fifth Amendment or in executive session. Obeying a superior's order is similarly inadequate; while lying to Congress does not approach the Nuremberg crimes in magnitude, the principle still holds. Yet I do recognize the intricate circumstances that can develop in such a situation, and this brings me to the second section of my proposal.

I shall only highlight the whistle-blowing portion of my amendment because it seems self-explanatory. It might well have been entitled the "Ernie Fitzgerald law", after the Air Force official who lost his job after he exposed the huge cost overruns of the C-5A project. A future Fitzgerald should be allowed another option besides submission or resignation in protest, and my proposal would enable him or her to recover relief in civil court at any time. Moreover, if such civil action were instituted within one year of the information disclosure, the burden would be on the superior to demonstrate that the adverse action was taken for a different reason. This law would only apply to those in the competitive service, as Members of Congress retain a legally sanctioned discretionary power over their employees.

I am sure the subcommittee will give these proposals the most serious consideration and I look forward to their further refinement. While I admit that legislation is in no way sufficient to deal with the problem of Executive branch misrepresentation of the facts before Congress, I believe the proposed amendments represent a long overdue first-step in addressing the problem of Executive deception.

SUMMARY OF CONGRESSMAN HARRINGTON'S PROPOSED AMENDMENT TO H.R. 14476

The amendment would add two new sections to H.R. 14476, the Special Prosecutor Act of 1976.

Offense of official false statement to Congress

The first section stipulates that any officer or employee of the United States, including the President and Vice-President, who makes a materially false statement to the Congress in session or committee shall be imprisoned for five to ten years. Such a false statement must have been learned in an official capacity and bear the potential to affect the course or outcome of the Congressional proceeding at which it was made. The accused must further have had reason to believe the statement was false; the amendment deals only with willful, as opposed to unintentional deception.

This proposed statute differs from existing perjury and false statement laws in the severity of punishment, the limited group of citizens to which it applies, and the absence of a required oath. The new Division of Government Crimes and/or Temporary Special Prosecutor would be the prosecuting agents for this crime.

Prohibiting reprisals against Federal employees who inform Congress

The second section, taken substantially from H.R. 5212, prohibits the taking of any adverse personnel action against an employee in the competitive service who discloses information to the Congress in session or committee. (Congressional employees are excluded from this provision, as they are wholly subject to the discretionary powers of the Members.) All competitive service employees are entitled under this section to seek civil relief. If the adverse action was taken within one year after the date of the disclosure, it is presumed the disclosure was the reason for the action.

A BILL To provide for a temporary special prosecutor in appropriate cases, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Special Prosecutor Act of 1976".

OFFENSE OF OFFICIAL FALSE STATEMENT TO CONGRESS

SEC. 2. (a) Chapter 93 of title 18, United States Code, is amended by adding at the end the following new section:

"§ 1924. Official false statement to Congress

"(a) Whoever makes a material false statement relating to matters such person learned of in the capacity of an officer or employee of the United States (including a President or Vice President) having reason to believe such statement is false, in an official proceeding or other matter before the Congress, or either House of the Congress, or before any committee, subcommittee, or joint committee of the Congress or of either House of the Congress, and does not retract that statement as provided under subsection (b), shall be imprisoned not less than five years and not more than ten years.

"(b) Retraction of a false statement by the accused is a defense to a prosecution under this section if such retraction is made before it becomes manifest to the accused that such false statement was material. It is not a defense to such a prosecution that the accused incorrectly believed such false statement was not material.

"(c) As used in this section, the term 'material' means having the potential to affect the course or outcome of the official proceeding or the disposition of of the matter in which the statement was made."

(b) The table of sections for chapter 93 of title 18, United States Code, is amended by adding at the end the following:

"1924. Official false statement to Congress."

PROHIBITING REPRISALS AGAINST FEDERAL EMPLOYEES WHO INFORM CONGRESS

SEC. 3. (a) Chapter 75 of title 5, United States Code, is amended by adding at the end the following:

"SUBCHAPTER V—REPRISALS FOR GIVING INFORMATION TO CONGRESS

"§ 7541. Reprisals for giving information to Congress prohibited

"No adverse personnel action shall be taken against an employee in the competitive service on account of such employee's disclosing any information to the Congress, to either House of the Congress, or to any joint committee, committee or subcommittee of the Congress or of either House of the Congress, or to any Member of Congress for the use of such Member in the official capacity of a Member of Congress.

"§ 7542. Civil action; presumption

"(a) Any employee against whom an adverse personnel action is taken in violation of section 7541 may recover appropriate relief in a civil action in the appropriate United States district court.

"(b) The district courts of the United States shall have jurisdiction of civil actions under this section without regard to the amount in controversy.

"(c) The taking of any adverse personnel action against an employee who discloses information to the Congress or to an entity within the Congress which is listed in subsection (a), if taken within one year after the date of such disclosure, creates the presumption in a civil action under this section that such adverse personnel action was taken on account of such disclosure.

"§ 7543. Definition of adverse personnel action for subchapter

"As used in this subchapter the term 'adverse personnel action' includes any deprivation of employment in the competitive service, and any other adverse action with respect to the terms, conditions, compensation, or other benefits of such employment."

(b) The table of contents for such chapter 75 is amended by adding at the end the following:

"SUBCHAPTER V—REPRISALS FOR GIVING INFORMATION TO CONGRESS

"7541. Reprisals for giving information to Congress prohibited.

"7542. Civil action; presumption.

"7543. Definition of adverse personnel action for subchapter."

DIVISION OF GOVERNMENT CRIMES

TEMPORARY SPECIAL PROSECUTOR

SEC. 4. (a) Title 28, United States Code, is amended by inserting immediately after chapter 37 the following new chapter: * * *

TESTIMONY OF HON. MICHAEL J. HARRINGTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. HARRINGTON. Mr. Chairman, I am pleased to appear before the subcommittee today and endorse both the form and the intent of

the Special Prosecutor bill. I commend the chairman for introducing this title of the Watergate Reorganization and Reform Act into the House; H.R. 14476 is certainly a distinguished coda to a distinguished career in Congress, and an appropriate followup to your effort during the impeachment proceedings 2 years ago.

I hope that this bill will win the rapid approval of our colleagues, and that we can also produce companion measures to the other, equally important titles of S. 495, providing legal counsel for the Congress and increased financial disclosure for the entire Federal Government.

My specific purpose in coming here today, however, is to urge that the subcommittee install two new sections in H.R. 14476, each of which addresses the critical problems of Government lying and deception in this country.

The first section would create a new criminal offense—that of making official, intentional false statements to Congress. The second section would prohibit reprisals against those Federal employees who furnish information to Congress.

What we really need is an executive-legislative relationship based upon openness and candor, and I admit that legislative proposals by themselves cannot bring this situation about. However, a long history of Executive deception and legislative passivity requires that a means be created to discourage the prevailing tendency to coverup and mislead.

Thus it is my belief that these new sections I am proposing today would add substantial weight to the structural reforms contained in the bill. Indeed, these provisions may very well be prerequisites to an effective division of Government crimes and Special Prosecutor because as we have learned all too well these past 10 years, false statements and secrecy forge the shield behind which Government corruption and abuse of power occur.

We must deter the potential liar and encourage the potential whistle blower or else most of the cases the new prosecutors should investigate will go unnoticed.

The engine which H.R. 14476 constructs simply will not run without the fuel information provides.

I think most of us recognize by now the fundamental importance of reliable information to the operation of our Government. We cannot have government by consent of the governed if we don't know what we are consenting to. Elected officials do not lead by misleading. As Walter Lippmann noted, "It is sophistry to pretend that in a free country a man has some sort of inalienable or constitutional right to deceive his fellow men."

Well, after a generation of executive sophistry, after Vietnam, Watergate, and the OIA, this Nation and the Congress deserve and demand the truth from its public servants. And I do not think it is far-fetched to assume that if the American people do not get the truth—or if they believe they are not getting the truth—then our experiment in democratic rule will soon come to an end.

My proposal is based on this fundamental principle. It is also predicated on the belief that there exists a special, constitutional responsibility on the part of Federal officials or employees to provide accurate information when they appear before Congress.

Clearly the legislative branch cannot perform the duties assigned to it by article I of the Constitution when it is deceived by the executive branch.

It cannot advise and consent on Presidential appointments, or oversee the agencies and programs it has devised, or design new laws to meet the needs of the American people unless it receives the facts, and the executive branch remains the primary source for most of those facts. Lying, deception, and silence subvert the separation of powers doctrine, a cornerstone of our Republic, by concentrating power in the hands of those who know more than their intended equals under the tripartite system. Unchecked, arbitrary power short circuits the democratic process.

It should be obvious that the repercussions of secret executive actions have ranged far beyond the abstract borders of democratic theory and constitutional law. We are continually learning about what one author calls the "underside" of our recent history; an almost unbroken trail of attempted assassinations, bribes, burglaries, wire-taps, and even entire wars which have been perpetrated in the American people's name without their knowledge or consent. Let me briefly describe two examples of this history.

In 1973 Senator Symington asked CIA Director Richard Helms, if his organization had tried to overthrow the Allende government, and if any money had been passed to the Chilean President's opponents and if any attempt had been made to prevent his original election in 1970. Helms answered no to all three questions. Yet the 1975 Senate Select Committee on Intelligence report on covert action in Chile makes it unmistakably clear that Helms willfully deceived Senator Symington, his colleagues in Congress, and the public at large on this matter.

Lying to Congress and avoiding legal recrimination has benefited Harry W. Shlaudeman, Deputy Chief of Mission in Chile at the time of the coup, in a more personal way. The only consequence he has suffered is a promotion to Assistant Secretary of State for Inter-American Affairs. We have thus sunk to the point where a public official actually reaps rewards for falsifying his account of serious misdeeds in which he participated to those charged with monitoring his actions.

The first section of my proposed amendment is aimed, therefore, at bringing a Helms or a Shlaudeman to justice and, like most criminal laws, at deterring future officials or employees from doing what they did. I am also seeking to achieve a better balance between the legislative and executive branches, and to restore a modicum of integrity to the National Government as a whole.

Since the stakes are high, the punishment is severe, 5 to 10 years in prison. I regard the willfull deception of Congress as a high crime, on a par with bribery or treason, and sufficient grounds for impeachment.

Prosecution of this crime should not be initiated easily, lest it becomes a tool for witch hunts and more subtle forms of harassment. Hence the class of potential offenders is limited to public officials and employees of the United States, those citizens who bear the extra responsibilities associated with the privileges of public power. The

range of statements covered by this provision has been narrowed in two ways.

First, the matter to which the statement relates must have been learned in the course of one's official duties, and second, such statement must bear the potential to affect the course or outcome of the congressional proceeding at which it was made.

These materiality tests, I believe will screen out trivial and personal matters from the purview of the statute.

The false statement offense includes a third test for prosecution, that the accused know, at the time the remark was made, of its falsity. This forestalls the possibility of prosecution if the witness or speaker is innocently confused or ambiguous.

One should not have to be convinced of a statement's veracity before being allowed to express it before Congress, for opinion and speculation are invaluable aspects of the free exchange of ideas so essential to our political process.

Indeed it is with an eye toward preserving discourse to the fullest extent possible that the proposed statutes cannot apply to press statements, interviews, conferences, or other public appearances.

The first amendment welcomes rhetoric and hyperbole; to try and constrain free speech would be as unconscionable as it would be impractical. I should think, however, that opinion posing as fact could conceivably be termed to lie under the proposed statute if the person delivering it did so intentionally.

I have excluded one common requirement for prosecution from this section, namely, that the false statement be given under oath. The existing perjury laws, to be candid, have shown themselves insufficient to the task at hand.

Furthermore, not all congressional bodies possess the power of subpoena or care to utilize it. If a civil servant doctors statistics in a written report to the House Merchant Marine and Fisheries Committee, or if the President of the United States does the same in a state of the Union address, Congress has been deliberately misled, and I can find no rationale to condone it.

The two most popular defenses of the right to lie revolve around the need to keep national security secrets, or pressure from a superior where one's job is at stake. Neither defense, in my view, outweighs the necessary and proper clause of the Constitution.

Secrecy, on the rare occasion when it is justifiable, can be maintained by invoking the fifth amendment or in executive sessions. Obeying a superior's order is similarly inadequate. While lying to Congress does not approach the Nuremberg crimes in magnitude, the principle still holds. Yet I do recognize the intricate circumstances that can develop in such a situation, and this brings me to the second section of my proposal.

I shall only highlight the whistle-blowing portion of my amendment because it seems self-explanatory. It might well have been entitled the "Ernie Fitzgerald law" after the Air Force official who lost his job after he exposed the huge cost overruns of the C-5A project.

A future Fitzgerald should be allowed another option besides submission or resignation in protest, and my proposal would enable him

or her to recover relief in civil court at any time. Moreover, if such civil action were instituted within 1 year of the information disclosure, the burden would be on the superior to demonstrate that the adverse action was taken for a different reason.

This law would only apply to those in the competitive service, as Members of Congress retain a legally sanctioned discretionary power over their employees.

I am sure the subcommittee will give these proposals the most serious consideration and I look forward to their further refinement. While I admit that legislation is in no way sufficient to deal with the problem of executive branch misrepresentations of the facts before Congress, I believe the proposed amendments represent a long overdue first step in addressing the problem of executive deception.

Mr. Chairman, I perhaps should add that I am pessimistic of any legislation I can conceive of being used as a substitute for what I believe should be a far more firm expression of congressional intent on these points.

This amendment does try to taper itself to the concerns of the first amendment. But it probably just at bottom expresses some sense of my exacerbation with the Congress as a body, our willingness to engage in avoidance and deliberately stay away from inquiring into areas where there is a strong public interest and right to know.

I don't think any of these things can be legislated. But I think if we try to show that we are conscious of what a relationship between the executive and legislative branches should be, we may very well be raising that concern to a greater level than we have done to date.

The pessimism I have runs to my own sense of how we operate day to day. It derives from our enforcement, in a very narrow way, of the requirement to disclose, under the Hughes-Ryan amendment to the foreign aid bill of 1974, secret CIA involvement in other countries designed to affect the military or political balance of those countries. Likewise it derives from the treatment by the Senate of serious instances of lying by Harry Shlaudeman, where there was little more than a murmur on the floor of the Senate. He was questioned, and responded falsely about the very area of the world in which he participated in the early 1970's, in a very negative way. I offer these examples to raise the question of what we do about official lying as a way of life and what we have done toward condonation of it by our silence. If we are going to have any effect at all on this issue, it is my hope that we make an effort, at least to raise the level of congressional concern and public visibility of this very serious problem.

I hope, really, that this amendment offers a push to get us to do a little bit more. I think we should feel comfortable to challenge the language often used by executive branch officials to avoid giving us the specifics we have a right to know about. That is my underlying concern and one that, based on past experience, I don't really have a great deal of optimism for.

But I urge the committee, given the record of the last dozen years of official efforts at evasion and avoiding responsibility, to focus its deliberations on this very serious problem.

Mr. HUNGATE. Thank you. We will proceed under the 5-minute rule. Mr. Wiggins?

Mr. WIGGINS. The thrust of your amendment is to propose a new crime. The crime would be to misrepresent to Congress or to a committee of the Congress by certain classes of people including the President and Vice President. Is the statute applicable to every witness before the Congress including yourself, for example?

The thrust of it is to punish lying. Normally lying is a knowing misstatement of a material fact but you do not include in your proposal the necessity of an oath being administered, is that correct?

Mr. HARRINGTON. That is correct.

Mr. WIGGINS. The word "knowing" does not appear. You used instead the words "having reason to believe" such statement is false. That reminds me of negligence; for example, a person having reason to believe something is true but does not believe it is true, he is negligent in failing to believe it is true.

I believe we might be punishing negligence by severe discriminations. Do you want to comment on that?

Mr. HARRINGTON. I am gaining increased appreciation for the nuances of language as a result of the spring primaries and the convention season, as recently as the convention of the American Legion dealing with the Vietnam war deserters.

Different people are able to extract different meanings from a choice of words and one should be very careful about what is intended in a statement.

To try to explain again what I seek to address—we are not trying to offer this amendment as an art form that has been perfected. What I am really looking for is to find a vehicle to come in here and ask the Congress, and the committee that has taken responsibility on this issue, to address the question of what we should do from the record of official deception we have seen develop.

People come in and deceive us, and we probably don't even need legislation when it comes to the question of taking them on once in awhile and demanding the truth. Absent that, I am trying to say, with the admitted imperfections, that one of the things that has soured the American people on the Congress is the systematic abuse we accept from the Executive, particularly on the right of the public and the Congress to be told the truth.

Not hyperbole, not avoidance, but something approximating a forthright effort at telling the Congress and the public what is actually going on—that is the goal. Whatever you do with the specifics of an amendment is fine with me, but I hope you will wrestle with it and I hope you appreciate what I consider to be the most serious of problems we face, a government which reserves to its own determination when to tell people a selected version of the facts.

Mr. WIGGINS. Do we have the bizarre situation of everyone not a Member of Congress being subject to criminal sanction because of an outright lie to the Congress but the Congressmen themselves are privileged to lie on the floor and in committee since their statements are not subject to being questioned?

Mr. HARRINGTON. I suppose we are going to have, as long as the human condition is prevailing, some negatives built into the system. In giving equity before the law, I find myself without any particular problem and would feel that any concerns about freedom of speech being preserved in that area should fall before the right to expect the truth from public servants.

Mr. WIGGINS. You do understand that your proposal would not apply to statements made by Members of Congress on the floor or before any congressional committee?

Mr. HARRINGTON. I understand there are inherent limitations imposed by the Constitution. I am not offering this amendment as a total answer and would welcome improvement. I ask the committee to address the problem of a tolerance of deception and a misuse of language in a premeditated way by the Executive, particularly over the last 12 to 15 years.

Mr. WIGGINS. If the problem is deception—and I agree it is a problem—is it necessary to have a new statute? Isn't it adequate that we swear the witness and once that witness is sworn, he is subject to the perjury statutes, whether it be the President of the United States or anyone else and can be prosecuted?

Mr. HARRINGTON. I could not agree with you more. I think if we use the powers we have, I don't think we need a new statute. Frankly if we use the confirmation power in the Senate with greater emphasis on reviewing the conduct of the individuals involved, as well as other existing tools to insure accountability, we could solve this without thinking about any new would-be criminal statute.

In the Shlaudeman incident in the summer of 1974 before an International Relations Subcommittee, I asked that Shlaudeman be sworn, and was told by the chairman that it was not the practice of the subcommittee to swear in witnesses.

I am really agreeing with you. There may be problems with the proposed language. In one sense, there is no need for anything more than what we have. It comes down to whether we are willing to confront this situation. Somehow or other, there should be recognition that there is some joint culpability: the Congress, by going along, and the Executive, by saying you can lie to congressional committees and get away with it.

Mr. HUNGATE. Mr. Drinan?

Mr. DRINAN. Thank you, Mr. Chairman. I have a personal interest in this matter because I despaired, like you, over the action of Mr. Helms when he, shall we say, misstated things in the Senate. I introduced a bill of impeachment since he still is the Ambassador to Iran. I have trouble with whether or not your bill would in fact have been sufficient for the Attorney General or a Special Prosecutor to have moved against Mr. Helms.

Mr. HARRINGTON. We are getting into an area that is not only legal but political. Should there be a predisposition on the part of the Attorney General, there is enough evidence to move against him with or without my bill. I don't think my bill would add or detract from that.

Mr. DRINAN. It says such a false statement must be learned in an official capacity and bear the potential to affect the course or outcome of the congressional proceeding.

I am not entirely certain that was fulfilled in the Helms incident. Do you have any problems with the bill filed by our distinguished chairman, Mr. Hungate? Are you satisfied that we should have a Special Prosecutor triggered by the events that the Hungate bill recommends?

Mr. HARRINGTON. Yes; I am. I testified to the Pike committee that I thought it was impossible to expect either branch to engage in self-evaluation.

Mr. DRINAN. You would be opposed to the subcommittee bill for a Special Prosecutor?

Mr. HARRINGTON. I would like to see an office permanently established. If we are talking about only the length of time that we would envision this existing, I would disagree with this bill.

Mr. DRINAN. The President appoints a Special Prosecutor. At our last hearing, five or six Senators came here and the Attorney General said that this, in effect, appoints a second Attorney General.

You are satisfied with the Special Prosecutor as triggered by the Hungate bill?

Mr. HARRINGTON. Yes.

Mr. DRINAN. I thank you for that. We will have some testimony about this later on. I won't take my full 5 minutes but I want to say now that I may have to go to another subcommittee where they need a quorum to mark up some bills. I welcome Mr. Ruff, the Watergate Special Prosecutor and my good friends, Albert Jenner and Sam Dash. I thank you for your contribution, Mr. Harrington.

Mr. HUNOATE. Mr. Hyde?

Mr. HYDE. Thank you.

Has Senator Symington or Senator Church submitted Mr. Helms' contradictory statement to the Justice Department for possible prosecution?

Mr. HARRINGTON. Material has been submitted and has been requested by the Justice Department.

Mr. HYDE. Have Senators Symington and Church submitted—

Mr. HARRINGTON. Taken the initiative, no.

Mr. HYDE. Why would they not be as outraged as you and seek some prosecution?

Mr. HARRINGTON. I don't know if I can put myself in a position to evaluate why a number of things happened.

Mr. HYDE. You are not accusing them of some lack of moral sensitivity, I take it?

Mr. HARRINGTON. I categorized it as a lack of stomach on the part of all of us to deal with this more firmly.

Mr. HYDE. You say we must deter the potential liar and encourage the potential whistle blower. I take it that is not an endorsement of the People's Bicentennial Commission to the wives of executives to blow the whistle on their husbands, is it?

Mr. HARRINGTON. I find myself somewhat sensitive to that, given an experience I had at the hands of a couple of other committees around here. It is designed not necessarily to engage in areas that are of the kind you describe, but matters that go to the basic question of life or death of people in this country and go to the core of whether or not this process that we have taken some pride in is going to be different at all.

Any scope you want to attribute to it is all right with me. There is something seriously wrong with our system when you need a code of conduct for people in public office instead of being candid.

Mr. HYDE. You said that there has been a pattern of deception over the last 12 or 13 years. Have you read the book Intrepid by William Stevenson?

Mr. HARRINGTON. I read a portion of the book.

Mr. HYDE. If you have read that book surely you realize that President Franklin Delano Roosevelt was the granddaddy of the executive deception, is that not true?

When it comes to murders by the British Intelligence—if it is 10 percent true, executive deception did not suddenly spring on the Washington scene 12 or 13 years ago, did it?

Mr. HARRINGTON. I have no problem in sharing your interpretation. The effort I have made in suggesting that theory was not, as I not very clearly indicated, to single out one party or the other, because I draw little distinction in conduct of a number of officeholders. When we take what I think is one of the most significant decades in the experience of this country's history, the origins of the war in Southeast Asia, we begin to see the decline in public confidence in the public officials.

Perhaps you are going back to the origins but I am trying to pick a relevant period.

Mr. HYDE. I think it is helpful for people to have a sense of history and put things in perspective. For the moral outrage to bubble to the surface following Watergate lacks a certain sense of history when this has been an unhappy aspect of the Government for many, many years and it seems to me a far greater degree on the part of Mr. Roosevelt.

Let me ask you this: In commenting on your two suggested amendments which I do think have merit, I would like you, if you could, to try and put your mind to coming up with some measures, maybe a third measure, that would assist in prosecuting congressional abuses as well as executive abuses.

Lately we have seen the tremendous potential for congressional abuses, campaign abuses, saying, taking \$900,000 in Presidential debts, compromising them for a nickel on the dollar and then permitting tax deductions for those people as bad debts.

Taking \$300,000 from a Presidential campaign, switching it to a Senatorial campaign and compromising the Presidential debt which may not be illegal, but this is part of the whole picture. I hope we can be just as sensitive to that as we are to executive abuses.

Mr. HARRINGTON. I appreciate your feeling.

Mr. HUNGATE. Mr. Mezvinsky?

Mr. MEZVINSKY. I want to thank you for your testimony.

I have one point on the proposal to prohibit reprisals against Federal employees who make information available to Congress. I notice the amendment seeks to protect those who disclose information to the Congress in session or committee. Why do you restrict it in that way, Mr. Harrington? What about the possible problems arising from people giving information to Members of Congress when we're not in session?

Mr. HARRINGTON. The problem we felt most serious was not the one of dropping a package by Jack Anderson's door or visiting quietly a Member but in the course of the somewhat more official and visible portion of congressional activity, where very little of this conduct has been a noticeable part of that life style.

It is designed to try to get at encouraging the hearing process to be something more than an irrelevant exercise when it comes to many of these committees getting useful information out of witnesses.

With or without this statute, information will get out to sources in the news media. Again I go back to my reaction to Mr. Wiggins' concern about some of the language.

I don't offer this as any definitive effort dealing with the problem. I am suggesting that you concern yourselves with it in the course of marking up this legislation.

Mr. MEZVINSKY. Yes. I agree that the whistle blower section deserves such attention because too many times officials go after the whistle blowers rather than those they blow the whistle on.

I thank you.

Mr. HUNGATE. Ms. Holtzman.

Ms. HOLTZMAN. Thank you, Mr. Chairman.

I think, Mr. Harrington, you point out some important areas where a Special Prosecutor ought to have jurisdiction and areas in which the public interest needs to be protected, for example, insuring that a President or a Vice President of the United States is not materially misleading Congress or the public and considering if there should be penalties for that.

One of the matters that concerns me a great deal is the fact that throughout the operations of the present Special Prosecutor's Office, there seems to have been very little attention paid to any matters connected with false statements that were made to the Congress, for example, during the Cambodia bombing. Official documents were tampered with, were changed, were falsely presented to the Congress. If you look at the report that was issued by the Watergate prosecutor in 1975, this does not seem to have been investigated.

Perhaps Special Prosecutors in the future may feel that this kind of lying to the Congress through tampering with the official records is an action that can be condoned. I don't believe it can be and I think it is a very serious matter. I would hope that any Special Prosecutor that is confronted with that kind of conduct would not say "This is a political matter and a President can always lie." It is important that you have suggested these amendments.

Mr. HARRINGTON. I am not trying to establish high marks for naivete about a matter which is essentially different. As I have said, I am trying to raise some interest in this problem. I don't offer this as an art form. I wanted a vehicle to come in and say we ought to concern ourselves with this problem, however you choose to, and to give this issue some weight.

The American public's negative feeling toward their Government is the result of the people's being deceived. They don't feel they can believe what the President is saying. I hope you give some weight to creating a situation which I think could be better dealt with without creating legislation, if only we had the will to deal with it.

I think this is something that ought not escape the attention of this committee. I still go back to the feeling that if we don't do it with some of the generals we have had before us, a couple of the privates would be the best thing in the world to get the message to the Executive.

I have not seen a willingness on the part of the Senate to do it.

Mr. HUNGATE. Mr. Harrington, how would your amendments or proposed amendments to the special prosecutor bill affect the Shlaudeman case?

Mr. HARRINGTON. We could have had prosecution from testimony heard in June 1974.

Mr. HUNGATE. You raise a very interesting question about state of the Union messages. I can't imagine them being under oath, but I can see your point that the public could be misled by it.

What about the word "knowing"? Would you have an objection to that word being inserted?

Mr. HARRINGTON. I would have no objection, if only you would deal with the problem.

Mr. HUNGATE. I take it—let me see if I have this straight—as a concept, you favor the existence of a Special Prosecutor, the provision for a Special Prosecutor?

Mr. HARRINGTON. Yes.

Mr. HUNGATE. Would you prefer that that office be permanent or that that office be temporary? On an ad hoc basis, for instance.

Mr. HARRINGTON. I expressed the preference for it being permanent but it might very well develop into a branch of its own. I would like to think of some less suggestive term than Special Prosecutor with the history it has had.

Mr. HUNGATE. The Senate bill proposes one term of 3 years duration to which you could not be reappointed. Would you agree with that concept or not?

Mr. HARRINGTON. I don't want another FBI situation, with a near-permanent director.

Mr. HUNGATE. Various types of appointments have been suggested: By the President, by the Attorney General, or by the courts. Would you have a preference in those areas as to how such an official should be selected?

Mr. HARRINGTON. I think the method worked out, given the fact that we had such pressures withstood, during the Cox-Jaworski period, coupled with the President making certain assurances, is satisfactory.

Mr. HUNGATE. Thank you.

Any further questions? Thank you very much, Mr. Harrington.

Mr. HARRINGTON. Thank you, Mr. Chairman.

Mr. HUNGATE. The next witness is Mr. Charles F. C. Ruff, Watergate Special Prosecutor. You have a prepared statement. Without objection, it will be made a part of the record at this point.

You may proceed as you see fit.

[The statement of Charles F. C. Ruff follows:]

STATEMENT OF CHARLES F. C. RUFF, SPECIAL PROSECUTOR, WATERGATE SPECIAL PROSECUTION FORCE

Mr. Chairman and Members of the Subcommittee: I very much appreciate the opportunity to appear before you in connection with your discussion of H.R. 14476. Recognizing that others have addressed in detail the complex constitutional issues raised by the various proposals which have been made for the creation of temporary and permanent special prosecutors, I will confine my remarks to those practical concerns that seem to me to require the consideration of the subcommittee.

I think it is fair to say that all who have labored to create a workable mechanism for the appointment of a special prosecutor have had in mind the importance of striking the appropriate balance between the need to insure the reality and appearance of impartiality in the enforcement of the criminal laws, on the one hand, and the need to insure the continued vitality of exist-

ing institutions of government on the other. Under the pressure of truly unique circumstances, existing structures did succeed in meeting the needs of the country in a period of crisis, albeit, in fact, through the creation of a new box in the organizational chart. A combination of senatorial pressure through the process of advising and consenting, congressional oversight, scrutiny by the press, and judicial resolution of sensitive constitutional questions enabled the Watergate Special Prosecutor to play his assigned role in the joint effort to resolve that crisis.

The question then is whether the temporary revision of the organizational chart should be made permanent as a safeguard against the recurrence of crisis or as a readily available mechanism for its resolution. The bill now before the subcommittee would answer that question by eschewing any permanent change in the existing structure but providing for continuing judicial and public supervision of the Attorney General's exercise of his prosecutorial discretion. S. 495 as passed by the Senate would answer the question by depriving the Attorney General of his discretion in certain defined areas. Although the process created by H.R. 14476 is, in some respects both unwieldy and unwise, the thesis of that bill is, I submit, far more consistent with our governmental structure and far less likely to damage the institution which will, for better or for worse, retain responsibility for day-to-day federal law enforcement.

H.R. 14476 would require, in cases other than those calling for automatic appointment of a special prosecutor, that the Attorney General report to the specially constituted court whenever a matter comes to his attention involving the appearance of a conflict of interest and thus subject his prosecutive judgment to judicial review under the extremely broad standards set out in section 504(c). If this bill did no more than require centralized decision-making in potentially sensitive cases and provide for some outside review of the prosecutive decision where there was a substantial risk of seeming partiality, I would support it, but I submit that it unnecessarily intervenes in situations where existing procedures already provide the required safeguards.

Abuse of prosecutorial discretion is not a problem unique to cases involving high-level government officials; it may occur in any case, and the courts have come to grips with it on numerous occasions. The one exercise of discretion which is generally not subject to scrutiny, however, is the decision not to prosecute, and it is to this type of decision that any legislation should be addressed.

If an Attorney General decides to bring an unwarranted prosecution against an individual out of partisan motivation, his decision is public and subject to correction by court or jury. Admittedly, the defendant will have suffered injury, but that evil, as great as it is, does not warrant the creation of a new institution of government. If the Attorney General immunizes one of several participants in a crime because of improper motives, that judicial review, the fact of its having been made will expose the Department of Justice to public and congressional criticism. The evil which cannot now be reached is the improperly motivated decision not to prosecute, or indeed not to investigate, which never becomes public.

It seems wholly legitimate to centralize the prosecutive decision, and thus responsibility, in the Attorney General in a defined class of cases where there is a risk of serious abuse and to require him to account to another authority where he decides not to go forward—that is, not to subject his decision to existing methods of review. As H.R. 14476 is now written, however, the Department of Justice will constantly be faced with the prospect of abandoning those cases which are most likely to call for the accumulated experience and skill its attorneys represent and with the need to justify the propriety of its conduct and to defend its ability to do its job in a professional manner. I submit that this prospect can have only a deleterious effect on the Department's ability to attract the best lawyers at all levels.

If the Department is to regain the confidence of the public in its ability to enforce the law fairly and competently, a goal which I see as the first importance, it must be perceived as handling both the easy cases and the hard cases with equal effectiveness.

On a secondary point, I find the proposal for triggering the reporting process by means of citizen's complaint extremely troublesome. As now drafted, the bill would permit any person to litigate the Attorney General's right to retain jurisdiction on only the flimsiest of allegations. My experience in this area would indicate that, even if the bill were amended to require some specificity in the

allegation, there would still be an extraordinary percentage of totally unfounded or improperly motivated charges. Further, the bill would provide a forum for these complaints in which illegitimate accusations could be aired in a context which would give them undeserved credibility. If any significant number of public corruption cases had been developed as the result of citizens' complaints, there might be some justification for the proposed procedure; unhappily, I know of none that have.

It seems entirely appropriate to legislate an efficient procedure for appointment of a temporary special prosecutor when one is needed, and to that extent a bill requiring such an appointment in the truly extraordinary case, one involving the highest officials of the Executive Branch or one in which any participation by the Department of Justice would give the appearance of impropriety, would perform an important service.

It seems possible, too, for such a bill to provide a mechanism for checking the most severe abuses of prosecutorial discretion without interfering unduly in the ongoing operations of the Department of Justice. With no particular pride of authorship but only to suggest one alternative formulation, I have attached a draft of a proposed revision of sections 594 and 595 of H.R. 14476 which I believe would meet the public's concern for insuring impartial law enforcement as well as the public's interest in preserving a strong and effective Department of Justice.

Implicit in my comments on H.R. 14476 is the belief that the creation of a permanent special prosecutor, as proposed in S. 495, would be counterproductive. Although nominally a part of the Department of Justice, the special prosecutor would, over a relatively wide range of matters, serve as an independent Attorney General, removable only for "extraordinary improprieties." The Report of the Watergate Special Prosecution Force, issued in October 1975, has set forth certain of the dangers inherent in such an independent office, and I will not repeat them here except to stress the substantial risk that there will be created a wholly separate body of law enforcement policy and the concomitant risk that similar cases will be treated in dissimilar fashion depending on the official status of the individual involved. This is not to say that existing departmental policies should be followed merely because they exist; to the contrary, on occasion the Watergate Special Prosecution Force has specifically adopted positions on issues of law or on the treatment of certain types of cases in direct conflict with positions taken by the Department. But these decisions should be taken only in the most unusual cases and only after thorough review of the basis for existing policy and the justification for rejecting it.

To illustrate my concern, under S. 495 the special prosecutor would have jurisdiction over all matters involving the President and Members of Congress, but the newly-formed Office of Government Crimes would have jurisdiction over campaign financing violations. Presumably, the largest number of such violations would involve candidates for the Congress or for the Presidency and would, therefore, fall within the purview of the special prosecutor, but who then would construct an integrated and consistent enforcement policy in this area?

S. 495 has the not considerable virtue of simplicity, at least when compared to the complexities of H.R. 14476, and I have no doubt that a permanent special prosecutor could function in the Department with sufficient independence depending, of course, on the quality of the persons appointed to that position and to the position of Attorney General. A separate budget, confirmation by the Senate, and, to some extent, the history of the Watergate Special Prosecutor's relationship with the Department make me confident that the mechanics of the proposal would work. I am less confident, however, that the long-term effects of such institutional restructuring would be beneficial to the public interest.

PROPOSED REVISION OF SECTIONS 594 AND 595

The following is a proposal for revising sections 594 and 595 of title 28, United States Code, as they are presently contained in H.R. 14476. The theory of the proposed revision is to require the appointment of a temporary special prosecutor in a very limited class of cases having the greatest potential for real or apparent partiality in the making of the prosecutive decision and to centralize in the Attorney General the responsibility for the prosecutive decision in a second class of cases subject to limited judicial review.

The proposed revision would retain the basic requirement that the Attorney General appoint a temporary special prosecutor whenever a conflict of interest exists but would make clear that such appointment would be necessary only in the event that disqualification of the Attorney General or other Department of Justice officers would be insufficient to eliminate the conflict. Where the President, Vice President, Director of the Federal Bureau of Investigation, or any cabinet officer is the subject of an investigation, appointment of a special prosecutor would be mandatory. Where a Member of Congress or federal judge is the subject, the Attorney General would be required to make the prosecutive decision on the recommendation of the Assistant Attorney General for the Division of Government Crimes [or the Director of the Office of Government Crimes under S. 495] and would be required to report to the specially-constituted court if he decided *not* to bring charges. Where the subject of investigation is an Executive Branch or congressional employee salaried at Executive Level V or above, the Attorney General would again make the prosecutive decision on the recommendation of the Assistant Attorney General but would report to the court only if he decided *not* to bring charges against the latter's recommendation.

On receipt of a report from the Attorney General, the court would be empowered to appoint a temporary special prosecutor only if it found that a conflict of interest existed that could not be cured by disqualification of one or more Department of Justice officers and that the Attorney General had clearly abused his discretion in deciding not to bring criminal charges.

Although this proposal would infringe to some extent on the usually unchecked prosecutive discretion of the executive, it would not pose problems of constitutional dimension since the temporary special prosecutor would be an officer of the Executive Branch and would be free to exercise his own discretion in deciding whether or not to prosecute.

The remainder of the proposed revision would set out the powers of the temporary special prosecutor (essentially those of the Attorney General); provide for his removal and for a challenge of that removal; and permit the assignment of new matters to an existing special prosecutor.

[Bracketed material refers to the provisions of S. 495.]

§594. Standard for appointment of temporary special prosecutor

(a) If the Attorney General, upon receiving information, allegations, or evidence of any federal criminal wrongdoing, determines that a conflict of interest as defined in subsection (h), or the appearance thereof, would exist if any officer or employee of the Department of Justice were to participate in any investigation or prosecution resulting from such information, allegations, or evidence, he shall appoint a temporary special prosecutor pursuant to the provisions of section 595.

(b) (1) For purposes of this section, a conflict of interest shall be deemed to exist if the subject of the information, allegations, or evidence is federal criminal wrongdoing by the President, Vice President, Director of the Federal Bureau of Investigation, any individual serving in a position compensated at level I of the Executive Schedule, under section 5312 of title 5, United States Code, or any individual who held any office or position described in this paragraph during the four years immediately preceding the receipt of the information, allegations, or evidence.

(2) A conflict of interest shall be deemed to exist in all cases other than those described in paragraph (1) of this subsection when—

(A) because of the relationship of the President or the Attorney General to the person concerning whom there has been received information, allegations, or evidence of federal criminal wrongdoing, there is an appearance of professional impropriety or an implication of partiality; or

(B) the President or the Attorney General has a direct and substantial personal, or partisan political, interest in the outcome of any proposed criminal investigation or prosecution; and

(C) the disqualification of the Attorney General or other officers or employees of the Department of Justice pursuant to section 596 [597] would be insufficient to eliminate any conflict of interest that would otherwise exist.

(c) Where information, allegations, or evidence, concerning any federal criminal wrongdoing by any person described below is received by the Department of Justice, the decision whether or not to bring criminal charges shall be made by the Attorney General on the recommendation of the Assistant Attorney General [Director of the Office of Government Crimes]:

- (1) any Member of Congress ;
- (2) any member of the Federal Judiciary ;
- (3) any officer or employee of the Executive Branch ;

or the Congress compensated at a rate equivalent to or greater than level V of the Executive Schedule under section 5316 of title 5, United States Code.

(d) (1) If the Attorney General decides not to bring criminal charges against any person named in subsections (c) (1) or (c) (2), where he has received information, allegations, or evidence concerning federal criminal wrongdoing by such person, he shall, within fifteen days of having made such decision, file a memorandum with the division of three judges of the United States Court of Appeals for the District of Columbia, as described in section 49 of this title (hereinafter referred to as the "court"), containing—

(A) a summary of the information, allegations, or evidence received and the results of any investigation together with any relevant documents, materials, memoranda, and transcripts of testimony; and

(B) a statement setting forth in detail the reasons for his decision not to bring charges; and

(C) a summary of any information relevant to determining whether a conflict of interest, or the appearance thereof, exists.

(2) If the Attorney General decides not to bring criminal charges against any person named in subsection (c) (3), where he has received information, allegations, or evidence concerning federal criminal wrongdoing by such person, and where the Assistant Attorney General [Director of the Office of Government Crimes] has recommended prosecution, he shall file with the court a memorandum as described in subsection (d) (1).

(3) Any submission to the court provided for in this section shall be sealed, and no disclosure of any kind concerning its content or the fact of its transmittal shall be made.

(e) (1) Upon receipt of a memorandum filed under subsection (d), the court shall review the memorandum and any additional materials it may require the Attorney General to submit, and shall determine—

(A) whether the Attorney General's decision not to file criminal charges was a clear abuse of his discretion; and

(B) whether there exists a conflict of interest as defined in subsection (h) (2), or the appearance thereof.

(2) If the court determines both that the Attorney General has clearly abused his discretion in deciding not to file criminal charges and that a conflict of interest, or the appearance thereof, exists, it shall appoint a temporary special prosecutor pursuant to section 595 and shall immediately notify the Attorney General in writing of that appointment.

(f) Upon the Attorney General's receipt of written notification from the court that it has appointed a temporary special prosecutor, the Attorney General and all officers and employees of the Department of Justice shall be disqualified from participating in the investigation or prosecution of any matter within the jurisdiction of the temporary special prosecutor except to the extent that he shall request their participation.

§ 595. Temporary special prosecutor

(a) (1) A temporary special prosecutor shall be appointed pursuant to this section—

(A) by the Attorney General, upon a determination that a conflict of interest as defined in section 594 (b), or the appearance thereof, exists; or

(B) by the court, upon a determination that the requirements of section 594 (e) have been met—to wit, that the Attorney General has clearly abused his discretion in deciding not to bring criminal charges and that a conflict of interest, as defined in section 594 (b), or the appearance thereof, exists.

(2) Whoever appoints a temporary special prosecutor under this section shall define in writing the matters over which such prosecutor is authorized to exercise jurisdiction. If a temporary special prosecutor is serving at a time when appointment of a second temporary special prosecutor in connection with any criminal investigation or prosecution is required under section 594, the then-serving temporary special prosecutor may, with his concurrence, be assigned jurisdiction over such investigation or prosecution.

(b) No person shall be appointed as a temporary special prosecutor if such person (1) is, at the time of his appointment, serving as an officer or employee of the Federal Government; (2) fails to meet the requirements of section 591 (h);

(3) has a relationship to the person who is the subject of any proposed investigation or prosecution within his jurisdiction which would create an appearance of professional impropriety; or (4) has a personal or partisan, political interest in the outcome of any such proposed investigation or prosecution.

(c) (1) Except as provided under paragraph (2), the authority and powers of any temporary special prosecutor shall terminate by agreement between such prosecutor and the Attorney General at such time as the special prosecutor shall certify to the Attorney General that all investigations under his jurisdiction, as set forth pursuant to subsection (a) (2), and any resulting prosecutions are either complete or so substantially complete that they may appropriately be transferred to the Assistant Attorney General for the Division of Government Crimes [Director of the Office of Government Crimes].

(2) Prior to the time at which the agreement referred to in paragraph (1) is consummated, a temporary special prosecutor may be removed from office by the Attorney General only for extraordinary improprieties. Immediately after removing a temporary special prosecutor under this subsection, the Attorney General shall submit to the court a written report specifying with particularity the cause for which such temporary special prosecutor was removed. The court shall make available to the public such report, except that the court may, if necessary to avoid prejudicing the rights of any individual, delete or postpone publishing portions of the report, or the whole report, or any name or other identifying details.

(3) A temporary special prosecutor removed under this subsection may bring an action in the court to challenge the action of the Attorney General in removing him by seeking reinstatement or any other appropriate relief. Appeal from the decision of the court shall lie directly to the Supreme Court of the United States, if notice of appeal is filed with the court within ten days, and the Supreme Court shall take all steps necessary to advance on the docket and insure expedited resolution of such appeal.

(4) If a temporary special prosecutor, whether appointed by the Attorney General or by the court, is removed pursuant to paragraph (2), the court shall appoint a new temporary special prosecutor to assume his duties subject to reinstatement of the original temporary special prosecutor pursuant to paragraph (3). If a temporary special prosecutor resigns or becomes incapable of performing his duties, a new temporary special prosecutor shall be appointed by the authority (either the Attorney General or the court) which appointed the original temporary special prosecutor.

(d) In carrying out his responsibilities for the conduct of investigation and prosecutions within his jurisdiction as defined pursuant to subsection (a) (2), the temporary special prosecutor shall have full power and independent authority—

(1) to conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings, which United States attorneys are authorized by law to conduct and to designate attorneys to conduct such legal proceedings;

(2) to conduct or supervise all Supreme Court cases, including appeals and petitions for and in opposition to certiorari, and to conduct or supervise appeals to all appellate courts, including petitions for rehearing en banc and for the issuance of extraordinary writs;

(3) to approve or disapprove the production or disclosure of information or files relating to matters within his jurisdiction in response to a subpoena, order, or other demand of a court or other authority;

(4) to frame and sign indictments or informations;

(5) to determine whether or not to contest the assertion of "Executive Privilege" or any other testimonial privilege;

(6) to exercise the authority of the Attorney General to approve requests for orders under sections 6003 and 6004 of title 18, United States Code, requiring an individual to give testimony or to apply for deferral of an order under section 6005 of title 18, United States Code;

(7) to exercise the authority of the Attorney General to approve requests for orders under section 2516 of title 18, United States Code, to authorize an application for an order approving the interception of wire or oral communications;

(8) to coordinate and direct the activities of all Department of Justice personnel, including agents of the Federal Bureau of Investigation and United States attorneys, and to request the assistance and support of any Government department or agency;

(9) to receive appropriate national security clearances and, if necessary, contest in court, any claim of privilege or attempt to withhold evidence on grounds of national security;

(10) to inspect, obtain, or use the original or copy of any tax return, in accordance with the applicable statutes and regulations, and for purposes of section 6103 of title 26, United States Code, as amended, and the regulations thereunder, to exercise the powers vested in the United States attorneys or the Attorney General;

(11) to communicate with, and appear before, and provide information to appropriate Congressional committees; and

(12) to exercise all other powers as to the conduct of criminal investigations and prosecutions which would otherwise be vested in the Attorney General under the provisions of chapters 31 and 35 of title 28, United States Code, as amended and the regulations thereunder.

(e) The temporary special prosecutor shall have the power to appoint, fix the compensation, and assign the duties of such employees as he deems necessary, including but not limited to investigators, attorneys, and part-time consultants, without regard to the provisions of title 5, United States Code, governing appointments in the competitive civil service, and without regard to chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, but at rates not in excess of the maximum rate for GS-18 of the General Schedule under section 5332 of such title. The Department of Justice shall provide assistance to the temporary special prosecutor which shall include, but not be limited to, affording to the temporary special prosecutor full access to any records, files, or other materials relevant to matters within his jurisdiction, and providing the temporary special prosecutor the resources and personnel required to perform his duties.

TESTIMONY OF CHARLES F. C. RUFF, WATERGATE SPECIAL PROSECUTOR

Mr. RUFF. Thank you, Mr. Chairman and members of the committee, for the invitation to appear here today. I did submit some prepared remarks and some supplementary material and with the chairman's permission, I will bypass that and summarize very briefly, if I can, the thrust of my remarks and then respond to whatever questions the committee may have.

I suppose my comments on the proposed legislation, both H.R. 14476 and S. 495, ought to be viewed in light of the fact that I spent 4 years as an attorney in the Criminal Division of the Department of Justice before going off into academic pursuits and spending 3 years in the Special Prosecutor's office.

I had then and retain now a respect for that institution, that is the Department of Justice and the people that serve in it. It necessarily colors my views on the legislation that you have before you. It seems to me that what we learned, if anything, from Watergate, really is not that we need a new institution of government, that we need a permanent Special Prosecutor or indeed I think what I believe to be the too complex mechanism, the temporary Special Prosecutor, but that the interest we ought to have is the securing of the existing institutions to insure that that Department is able to bear the vast majority of our day-to-day business and the vast majority of our country's business except in those very few highly unusual circumstances when the public need for confidence in the impartiality of law enforcement requires the appointment of a Special Prosecutor to deal with what I hope would be a very narrow problem.

It seems to me that the merits of the proposals for the creation of temporary or permanent Special Prosecutors really do rest on the

extent to which they permit the Department of Justice to grow as our principal institution of Federal law enforcement.

And yet to solve the country's needs that obviously we must recognize may arise in the future. I think that perhaps it could be—the legislation could be viewed as occupying both ends of a spectrum: S. 495 could be viewed as establishing a system which would in certain defined cases automatically take out of the hands of the Attorney General the cases which are susceptible to partiality.

At the other end of the spectrum, I would see H.R. 14476 as an effort to avoid the creation of this new institution with the risks I see that that holds for the continued vitality of the Department of Justice. I think, however, H.R. 14476 goes further than is necessary to solve the problem.

It seems to me that the one real issue that this subcommittee ought to confront, that the Congress ought to confront, is not the case in which the partial, politically partial, or personally partial decision to prosecute is made. That decision is subject to public and judicial scrutiny.

I don't think it is necessary to create a new institution to deal with that kind of problem. It seems to me that the problem that needs to be addressed, rather, is the one in which the secret decision is made that would not otherwise be subject to public or congressional scrutiny.

I would suggest that that is the issue that any proposal for a temporary Special Prosecutor ought to seek to meet. Without any pride of authorship, I have sought to suggest an alternative way to meet this need to insure effective and impartial law enforcement where the decision not to prosecute would normally not be subject to any form of congressional or public or social review—

Mr. HUNGATE. May I interrupt you?

You are addressing questions of prosecutorial discretion, aren't you?

Mr. RUFF. Yes.

Mr. HUNGATE. You probably are familiar with some articles in the American Journal of Criminal Law, on the subject of prosecutorial discretion. I think Prof. Kenneth Davis has done a lot of writing on it.

As the problem exists throughout our criminal justice system—and it may not be a problem—discretionary decisions are made by the police, the sheriff, the FBI, and then by the prosecutor's office and the ones that are least visible are perhaps the decisions not to prosecute.

Mr. RUFF. That is it exactly.

Mr. HUNGATE. This is a common thing. It is not new with Watergate. It is a common situation and it is perhaps even desirable to leave some discretion whether or not to prosecute in a given case. The suggestions that I have seen indicate that there might be certain factors, which might show how you decide not to prosecute. Might there be a checklist which could be published? You get into questions there.

If you say we have a 55-mile speed limit, but we are not going to prosecute until 58, that might be counterproductive. Within limits, factors established by the Attorney General could be promulgated in advance. They might even be made public.

When the decision is made, the prosecutor's office could be required to make this statement that we are relying on the following factors.

in determining not to prosecute and that would be available, in some sense, to the public.

Do you think this might tend to meet some of the problems we have here?

Mr. RUFF. Mr. Chairman, I think that anyone who has analyzed the business of prosecution would like to see the development of standards inside the organization, so that similar cases are treated similarly. Also anyone who has been in the prosecution business has that lingering feeling in the back of his head that if he publishes those standards he is asking for a defendant to come in and assert, that in fact that the prosecution did not meet those standards.

Mr. HUNGATE. Creating another layer of litigation?

Mr. RUFF. Exactly. But that fear is not so great that it ought to prevent any prosecutor from establishing standards so that the people who work under him know what it is that they are supposed to do.

That meets the day-to-day problem of prosecutorial discretion.

Mr. HUNGATE. And is it perhaps fair to say that treating each offense the same regardless of the type of defendant is not necessarily just?

Mr. RUFF. Clearly not. We would all, at least in our system, like to be able to temper the rigors of the criminal justice system with special treatment for those who deserve it.

The problem is to find those who in fact deserve it.

Mr. HUNGATE. And having some objectives so we are not just taking care of a brother-in-law. I apologize for interrupting you.

Mr. RUFF. Not at all.

Mr. HUNGATE. Mr. Wiggins?

Mr. WIGGINS. Mr. Ruff, thank you for your testimony and very helpful suggestions and perhaps an alternative. Frankly I am very troubled by the whole concept of a Special Prosecutor, permanent or temporary. One who voices his concerns in such an area runs a great political risk as being characterized as some coverup because he has these concerns.

The proposals generally are for either a permanent prosecutor, temporary Special Prosecutor, or for a Special Prosecutor. If the latter option is adopted, then we get into a triggering mechanism. I would like to think—well, I am satisfied that there has been in the past and there doubtless will occur in the future a need for a Special Prosecutor.

I would like to think that the need is limited to extraordinary cases rather than the routine cases which are processed through the Department of Justice.

Therefore, a permanent Special Prosecutor is somewhat offensive to me as being destructive of the morale of the Department of Justice, as creating an office which is somewhat beyond control on a continuing basis and which will, in my estimation, create cases for itself that normally could be handled without difficulty and without the appearance of impropriety by the Department of Justice.

So I don't tend to favor the concept of the permanent prosecutor. But I am very troubled with an appropriate and constitutional trigger for a Special Prosecutor. I don't know how firm in constitutional law we can say the notion is that the decision of a prosecutor to prosecute or not to prosecute is beyond judicial review, but there are cases that we have to consider and I think they still represent good law.

You attempt to avoid that problem by not interjecting the judiciary into the question of whether to prosecute but simply on the question of whether to appoint a Special Prosecutor and yield to that Special Prosecutor the ultimate executive decision of prosecution or not.

I am mindful of the statutory precedent for the appointment of U.S. attorneys in extraordinary cases, although I am a little bit concerned how that can be so without involving the judiciary in matters which are not judicial in nature.

Nevertheless it is in the statute and it is not questioned. I gather that it is your belief that that statutory precedent that has been condoned is adequate authority for an—a judicial appointment of a Special Prosecutor when a submission has been made to this special panel recommended by you. Is that correct?

Mr. RUFF. That is correct. I think that the appointment itself, so long as the judiciary does not involve itself in control over that prosecutor's conduct of his business would meet constitutional requirements.

Mr. WIGGINS. There is a trigger that has not been mentioned that I am sure is completely constitutional and I don't want to reject it out of hand without reflecting on it and that is the congressional trigger, simply the same trigger that we pulled in creating the office which you occupied.

The Congress observed an extraordinary situation and reacted to that by legislation to create an office of a Special Prosecutor. Now it is true that a President might veto such a piece of legislation and he might be the target of the inquiry. But this Congress and this committee has demonstrated that it is not up to him.

We are not without our own weapons if the President should exercise his admitted right to veto a bill which was designed to react to specific situations. I would like you to comment on the notion that perhaps we could deal with the problem, extraordinary case on an ad hoc basis by legislation.

Mr. RUFF. I think that there is no question that either formally or informally that this Congress could work its will to appoint such an individual. My problem would be with the logistics of Congress intervening in that kind of a case.

First, how would the Congress learn of a situation except in the truly most extraordinary and publicized cases. Second, would the Congress be able to act to deal with a situation which would very likely be rapidly developing. There is something to be said for the automatic triggering process, either the mandatory appointment of a Special Prosecutor in very limited cases or a more rapidly workable triggering device, such as is proposed in H.R. 14476. My only question would be whether in the typical crisis, if there is such a thing, Congress could really respond rapidly enough to address very practical problems of conducting an investigation or conducting prosecution.

Mr. WIGGINS. I appreciate that and I am mindful of the simple reality that the models of 1974 and 1973 will only work if there is a certain constitutional relationship between the Congress and the Executive.

If the two are in political tandem, the likelihood of that kind of response is negligible.

Mr. RUFF. That is likely. In the criticism that I have addressed to S. 495 and the bill pending before this subcommittee, I want to make

clear that I think it is extremely useful for the Congress to pass a system for appointment of a temporary Special Prosecutor when one is needed.

I think the only open issue is how we find out when one is needed and how we react on that occasion.

Mr. WIGGINS. I appreciate your help. I am going to reread your suggestion and your statement again. My attitude here is there is a problem and the problem should be solved. I want to do something but I don't wish to do any more than that which is necessary.

Many of the approaches are much too much to deal with the problem.

Mr. RUFF. I think that our viewpoints are not dissimilar.

Mr. HUNGATE. Congressman Wiggins raises some points that are quite relevant here. In many States, I believe the law to be and perhaps in some Federal circuits, that there is an absolute discretion in some cases. There may be some cases that indicate there is judicial power to control abuse of that discretion. I believe it is the previously existing campaign financing law under which there have been no prosecutions; that under such a case it might be fair to assume there had been people who have broken the law.

If we just prosecute black people from New York and nobody else ever got prosecuted, the courts could step in and say that is abuse.

Mr. RUFF. You will find that most of the judicial intervention in that area is where there is prosecution and it is challenged as being improperly motivated. The Supreme Court and other courts have addressed the problem of racial partiality.

Few courts are willing to address the problem of a decision not to prosecute. Recently Judge Hill in the northern district of Texas refused the Government's motion to dismiss an indictment on the grounds that it was not in the interests of justice.

The fifth circuit ultimately directed him to recant that decision.

Mr. HUNGATE. There is another element that does not exist in some States and that is the power to grant immunity. When you interject that, you change the picture.

Mr. RUFF. That is true.

Mr. WIGGINS. The Supreme Court of California, as I understand it, recently announced that a defendant accused of crimes is subject to having that prosecution dismissed on equal protection grounds if he can prove that it is selective prosecution.

That sounds pretty good as a general proposition but the implementation of that is a case in which I have some awareness involved about a 6-month series of pretrial trials of all of these alleged charges that were not prosecuted.

The court has to conduct a whole series of little minitrials to decide whether or not the prosecutor should or should not have filed other cases before they ever got to the merits of the principal case in chief. It certainly disrupted judicial processes.

Mr. RUFF. I think that is a serious problem and the Supreme Court has indicated that only in the most extraordinary case and on the most extraordinary showing of racial or political or other motivation will there even be inquiry into the question of selective prosecution.

Mr. HUNGATE. Ms. Holtzman?

Ms. HOLTZMAN. Thank you, Mr. Chairman.

Thank you, Mr. Ruff, for your very thoughtful testimony. The people have been focusing on the triggering mechanism for the creation of a Special Prosecutor and I would like you to focus on the accountability of the Special Prosecutor.

Since the Special Prosecutor is by definition and by intention independent, how is ultimately a judgment to be made and how is the public to be protected with respect to matters such as: Was the investigation complete, were decisions on plea bargaining approved? Were decisions not to prosecute justifiable? One of the ways that these problems are dealt with in the present Office of Special Prosecutor is the issuance of the final report.

You may recall that Mr. Cox, when he testified before the Senate, he said there would be a final report which would list the reasons for which the prosecutions were brought. Mr. Levi wrote a letter to Attorney General Saxbe in which he said the report was all encompassing.

A final report was issued by this Special Prosecution Office which was intended as a wrap-in report. It purported really to tell the story of what had happened up to the time the report was issued.

But that report, in most respects, was fairly skimpy discussing only in the most general terms the reasons for refusals to indict. It does not, except in most general terms, discuss plea bargaining conversations and the like.

Just yesterday, I believe, a book was published by Mr. Jaworski in which details are given that have not come to light before. These include details about plea bargaining, conversations with Mr. Ehrlichman, Mr. Haldeman's offer to plead guilty, justification for charging Mr. Kleindienst and Mr. Kalmbach with misdemeanors instead of felonies—details on the decision not to indict Richard Nixon, including interoffice memorandums. All of these details are very important to help the public understand how the Office of the Special Prosecutor operates and why certain decisions were made.

Do you think it is appropriate in terms of public accountability of the Special Prosecutor's Office for material such as this to come out in a private book subject to the vagaries of a single individual's memory, and editors, publishers and the like or do you think it is more appropriate for such material as this to come out in an official report?

Mr. RUFF. I don't think it is appropriate for that kind of material to come out in either form. I think that the issue you raise, the one of accountability is a crucial one and it is one of the considerations that leads me to oppose the creation of a permanent Special Prosecutor's Office.

Although we may seem permanent, we are not. I trust that one of these days we will all actually go out of business. One of the advantages of the temporary Special Prosecutor mechanism that has been proposed is that there would be limited jurisdiction in that temporary Special Prosecutor and hopefully the word "temporary" would be somewhat more accurate than it has been as applied to our office.

Therefore I think there would be less risk of there being a failure in accountability. In terms of how the permanent Special Prosecutor or indeed even the temporary Special Prosecutor would be accountable, that poses for me a most difficult question. I feel very strongly that the position taken in the October 1975 report of the Special Prosecu-

tor's Office was the right one in terms of the extent of disclosure that was contained therein.

I happen to believe that the role of the prosecutor is one that is defined for him and includes public dissemination of information only where that dissemination occurs in an appropriate judicial or other forum. It does not include in my judgment the dissemination of information that never rose to the level of indictment or trial.

Yes, that must mean that there will be questions unanswered. It must mean that to some extent there will be faith placed in the prosecutor to exercise his judgment. But I don't think that means there can be no accountability at all.

I think committees such as this and ones on the Senate side can exercise oversight responsibility. But I think even that oversight has to be balanced off against the rights of individuals who would necessarily be injured in their reputations by any disclosure of details and evidence that had been accumulated that had never risen to the level of indictment of a trial.

Ms. HOLTZMAN. I am not talking about evidence not used for indictment at trial. I am talking about material contained in Mr. Jaworski's book which described the basis on which prosecutorial decisions were made. For example, as appears in Mr. Jaworski's book, the reasons for which he decided not to bring indictment against President Nixon. There were two memorandums discussed which discussed legal issues in detail which have never been made public before.

There was a lengthy discussion about why a misdemeanor prosecution was brought against Mr. Kleindienst and the basis on which the decision not to prosecute him for a felony was made. This does not include evidentiary matters. I am asking you whether it is appropriate for this kind of material to be included in an official report so that the public can make a decision about the operation of the Special Prosecutor's Office or whether the public can expect to learn such matters only from the memoirs of former Special Prosecutors.

Mr. RUFF. You have the advantage on me because I have not read Mr. Jaworski's book and I don't know what is contained in it.

I think an effort was made in the October 1975 report to address those kinds of questions to the extent they could be addressed without violating confidentiality of information or discussions which had been held.

We may disagree over the place at which that line should be drawn, that is, for example, whether it is permissible for a prosecutor to say with respect to a particular case, "I took into consideration the following extraneous factors, the health of the individual, his family," the ability that you—he may have had to give us information about others. As you move along that spectrum, you move farther and farther toward a serious risk of disclosure of information which (a) is not going to help and (b) does have the potential for injuring others.

I agree that it is important for every prosecutor, certainly a Special Prosecutor, to address extensive issues of the kind that we addressed over the last 2 years and to indicate to the public the standards he applied without treading on that protected area.

We have different views of where that protected area starts and what the balance is. I am perfectly willing to concede that others may disagree with us also. But I don't think that realistically, for

example, it is possible to conceive of a situation in which the public would be satisfied that a particular investigation had explored every alternative before being closed or that a particular decision to immunize X in order to prosecute Y was certainly the right one because there are factors involved in those decisions which simply could not be made public in my judgment without running that serious risk which I am very concerned about of infringing on the privacy of others.

I am not sure that is responsive to your question except to say—

Ms. HOLTZMAN. My question is if privacy rights you discuss exist, is it appropriate to infringe on them after someone has left the Special Prosecutor's Office?

Mr. RUFF. No; it is not.

Ms. HOLTZMAN. If they are to be infringed on, it is equally appropriate to do it before someone has left office.

Mr. RUFF. That is correct.

Mr. HUNGATE. The gentleman from Illinois, Mr. Hyde?

Mr. HYDE. Thank you, Mr. Chairman. Very briefly I want to commend you on an excellent statement and I agree in large part with the concerns you express about a permanent Special Prosecutor. I am always troubled by giving the courts a function other than a strictly adjudicative one. I think we impose too many administrative duties on our courts now and particularly the sensitive ones of having them evaluate evidence in advance of anything to determine whether or not a Special Prosecutor ought to be appointed and then those same courts later adjudicating that evidence.

I am always troubled by that. We do it too much and I would like to see perhaps access to a grand jury by complainants or people who have a story to tell and have that grand jury hear the evidence and maybe make some kind of recommendation.

The administrative function does not bother me but the weighing of evidence by the judiciary who will later adjudicate that evidence, I am troubled by that. That is a statement, not a question.

I do agree with you again at your distress at Mr. Jaworski's book particularly since it appears to reveal some of the most private things that went on. It would seem to me this would have a chilling effect on people's wanting to cooperate with a Special Prosecutor knowing later on that these comments and the mode in which they were delivered are going to be spread on the public record for whatever commercial advantage.

I think it proves that even the most impeccable of counsel have difficulty resisting the temptation of maintaining celebrity status. I don't have any questions.

Mr. RUFF. If I could take the first statement as a question, the problem of imposing on the judiciary a role other than adjudicative is a serious problem. The extent that we do ask them in H.R. 14476 to engage in review of facts in early stages of investigation does involve asking them to perform a function that they ought not to perform.

My provision would limit the cases and the point in the investigation in which the judiciary would be involved. I think that is a principal concern the subcommittee ought to address.

Mr. HUNGATE. Mr. Mann?

Mr. MANN. No questions, Mr. Chairman.

Mr. HUNGATE. Mr. Mezvinsky?

Mr. MEZVINSKY. Mr. Ruff, can you tell me what you are doing now, what areas you are looking into?

Mr. RUFF. Well, in large measure—

Mr. HUNGATE. I hope the gentleman won't ask the Chair that question. [Laughter.]

Mr. RUFF. Congressman, a number of matters were involved in the public. We have some matters pending before the courts, a number of appeals.

Mr. MEZVINSKY. Just what areas specifically?

Mr. RUFF. Our principal involvement at this stage is in the area of campaign contributions activity. We are continuing some of the investigations which were done in that area during my predecessor's term. Beyond that, I find it difficult to go on without being unduly specific.

Mr. MEZVINSKY. What size staff do you have now?

Mr. RUFF. I have two full-time lawyers in addition to myself, a number of administrative and secretarial personnel and several attorneys who are on special employee status dealing with specific cases.

Mr. MEZVINSKY. Are you coordinating with the Justice Department with respect to the Bahamas, campaign contributions, and the Gulf Oil involvement there? Or are you going back into the \$100,000 matter with Rebozo?

Mr. RUFF. It has been a matter of public knowledge that our office is involved in the Gulf investigation and part of the matter centers on the Bahamas because that is where much of the money came from. We are not involved in the broad investigation of the tax haven case which is in the Justice Department.

Mr. MEZVINSKY. So basically you are investigating campaign contributions?

Mr. RUFF. That is correct.

Mr. MEZVINSKY. And, limiting it to events which occurred when?

Mr. RUFF. Our mandate was the 1972 Presidential election. A number of matters have been referred to us by the Attorney General that go back before 1972 that are connected with matters that fall within our prime jurisdiction.

We are looking into activity that goes back into the years prior to 1972. But if we are doing so, it is only because we are intimately connected with a matter that arose out of the 1972 Presidential campaign.

Mr. MEZVINSKY. Have you recommended prosecution in certain cases to the Justice Department?

Mr. RUFF. I have never been in that position.

Mr. MEZVINSKY. If you feel there has been abuse, what exactly is your course of action?

Mr. RUFF. If a prosecution is warranted, we will bring it ourselves. We retain the same powers and the same jurisdiction that our predecessors retained and if the investigation we are conducting develops into an offense which we think warrants indictment, we will ask the grand jury to return that indictment and pursue any trials and subsequent litigation.

Mr. MEZVINSKY. When do you hope to wrap up?

Mr. RUFF. When I took this part time, temporary job 10 months ago, I thought that I would not be here today as Special Prosecutor. But I would expect probably within 3 or 4 months.

Mr. MEZVINSKY. How many cases are pending?

Mr. RUFF. Well, we have a number of appeals pending, four or five.

Mr. MEZVINSKY. Which cases are those?

Mr. RUFF. We have the main Watergate case pending in the Court of Appeals in the District of Columbia. We have an appeal pending from the *United States v. Wild* case in the District of Columbia Court of Appeals. We have a case in the ninth circuit.

We have a case pending in the Supreme Court. I presume it will soon be pending, Mr. Ehrlichman and others.

Mr. MEZVINSKY. Do you foresee you will be prosecuting more cases in the next few months?

Mr. RUFF. I can't really foresee at this time except to say that we are conducting ourselves as though we had no termination date because I think that is the only way that we can really do our job.

Mr. MEZVINSKY. What about the Jacobson case?

Mr. RUFF. That matter is closed. Mr. Jacobson was sentenced last Friday here in the District of Columbia.

Mr. MEZVINSKY. I would like a reading on Mr. DeMarco's case. You are appealing that decision?

Mr. RUFF. That is right. One count was dismissed against him. We have taken an appeal to the ninth circuit. The case was argued a month ago and we are awaiting decision.

Mr. MEZVINSKY. In view of this past record, and assuming this bill is implemented, how would you recommend the Special Prosecutor's Office be set up as far as staffing? Also, how fast could the Special Prosecutor move on a particular case that may be brought to his attention?

Mr. RUFF. I don't understand your question.

Mr. MEZVINSKY. If this bill becomes law, how do you think it should be implemented? And how quickly could the Special Prosecutor provided for in this bill act on allegations, and begin investigations?

Mr. RUFF. If S. 495 were passed, our office would remain entirely separate, I take it. Indeed, it would be important that some language be included in whichever bill is ultimately passed separating out the pending jurisdiction of the Watergate Special Prosecutor Force.

If 14476 or something like it were passed, so that a temporary Special Prosecutor would be appointed on an ad hoc basis when needed, the experience of this office in May of 1973 would be that it would be possible to gear up an investigation, hire a staff and begin actively to become involved within a very few days.

Mr. MEZVINSKY. Mr. Chairman, one area I have been most concerned about is that of finances and campaign contributions.

I might say, Mr. Ruff, that I hope you take strong action in your remaining 3 months to prosecute violations of campaign contributions laws as well as tax violations.

Mr. RUFF. I appreciate your concern and let me assure you that the question of campaign financing is a matter of principal concern to our office.

Mr. HUNGATE. Ms. Holtzman?

Ms. HOLTZMAN. Thank you, Mr. Chairman.

Mr. Ruff, I have enormous regard for the integrity of Mr. Jaworski. I can't believe he committed any impropriety. I would like to ask you why material such as this did not appear in the report?

Mr. RUFF. I have the greatest respect for Mr. Jaworski. I have not read Mr. Jaworski's book. I don't know what he has in there. If you would like, I would be glad to read his book and respond to your question when I have had the opportunity to see what is in there.

Ms. HOLTZMAN. I would appreciate that.

Mr. HUNGATE. That brings up the problem of books published about people that are already dead. That always troubles me. It is so hard to give them equal time. But once after Manny Cellar made a speech a lady ran up and said "that was a wonderful speech, can I have a copy of it" and he said "I spoke extemporaneously." She then said "but can I have a copy of it?" He said "I spoke off the cuff." She said "it will be published, won't it?" He said "probably, posthumously." She said "good, I hope it will be soon."

[Laughter.]

I wondered if we might not see some areas, ininnical areas, where we could clear up the confusion. The Attorney General's office might say to a prosecutor why didn't you prosecute; that the elements of the offense were missing, for example. I wonder if we might get into that. The Attorney General might say that we were not really satisfied that we identified the person who committed the offense or that the evidence is insufficient. Then there is also the question of public policy. There are certain crimes, I think, that you might get convictions on but the cost to the people—they may be crimes on the books—but if you spent the money prosecuting all of these crimes it would require such a staff and take so much money, that the public really would not want you to do that.

If we prosecuted all the church bingo parties which are illegal, the public would let us know that they don't want that, so-called victimless crimes. Areas where the prosecutor's office acts as a bill collector, bad checks, nonsupport in some cases, where the public may not really want them to actively prosecute.

And then the overkill problem where you have two or three jurisdictions to prosecute an offense and the reason you are not going to do it is somebody else has got him in jail for 20 years.

There may be areas that decisions could be given for nonprosecution and maybe could be published to give the public a greater feeling that what is being done is being done properly and is open.

It may be just as proper but the openness would help it. If we have a policy that if the guy is 3 miles over the speed limit, we don't pick him up, if we publish that, we may encourage him to do it.

Do you have any comment?

Mr. RUFF. My only comment would be that the problem that is posed is that so much of what goes on in a prosecutor's office never becomes public even to the extent that the public would know that the prosecution is going on. If somebody is murdered at 14th and Pennsylvania Avenue, the public can say, "what has happened?"

What are you doing about that case? There would be some public disclosure about who is involved and what is the progress of that case. But in most cases where the Special Prosecutor is involved, there would not be that public act which everyone knows about.

The question then is, is it appropriate to say to the public you did not know about this, but we have in fact been investigating potential criminal conduct by X and we have decided not to do anything about it.

That very statement itself—

Mr. HUNGATE. That ruins X.

Mr. RUFF. That would be my concern about disclosure as a real vehicle for oversight.

Mr. HUNGATE. Mr. Drinan?

Mr. DRINAN. I am sorry. I have to go to two other committees for a markup. I commend you for your statement and thank you for it.

Mr. HUNGATE. Well, thank you. You have been very helpful.

Mr. RUFF. Thank you, Mr. Chairman. I appreciate the opportunity.

Mr. HUNGATE. We have a quorum call in progress. The chairman would suggest that we recess for that and reconvene as soon as possible after that.

The next witness will be Sam Dash, Director of the Georgetown University Law Center's Institute of Criminal Law and Procedure.

We stand in recess.

[Voting recess.]

Mr. HUNGATE. The subcommittee will be in order and we will resume our hearing. We will move ahead because the House is in session, and we are subject to interruptions to vote.

Our next witness is Mr. Sam Dash, director of the Georgetown University Law Center's Institute of Criminal Law and Procedure. We appreciate having you here.

You have a prepared statement. Without objection we will include it in the record.

[The prepared statement of Samuel Dash follows:]

STATEMENT OF SAMUEL DASH, DIRECTOR, INSTITUTE OF CRIMINAL LAW AND PROCEDURE, GEORGETOWN UNIVERSITY LAW CENTER

Mr. Chairman, I am pleased to appear at your invitation to give testimony in support of H.R. 14476 and in opposition to Title I of S. 495 as was finally approved by the United States Senate. My name is Samuel Dash. I am presently a professor of law and Director of the Institute of Criminal Law and Procedure of Georgetown University Law Center. From February 21, 1973 to September 27, 1974, I served as Chief Counsel and Staff Director of the Senate Select Committee on Presidential Campaign Activities—popularly known as the Senate Watergate Committee. The legislation presently before your committee, derives from the recommendations of the Senate Select Committee on Presidential Campaign Activities. Under contract with the Commonwealth of Pennsylvania, I am now engaged in making an evaluation of the office of special prosecutor of Philadelphia. Although it is premature for me to discuss the findings of this evaluation, there are some obvious lessons in the Philadelphia situation that are relevant to the legislation pending before this sub-committee.

I support the adoption of H.R. 14476 rather than Title I of S. 495 because the House Bill incorporates the original provisions that were included in S. 495 as it was voted out of the Senate Government Operations Committee. These provisions which have been fully endorsed by the American Bar Association and Common Cause, call for the appointment of a temporary special prosecutor in situations where a conflict exists on the part of the Attorney General in the investigation and prosecution of a high-executive branch official. This is the only time a special prosecutor should be appointed to replace the Attorney General of the United States in the enforcement of the law of the United States.

Unfortunately, the present administration was able to persuade the United States Senate on the eve of its passage of Title I of S. 495 to accept major alterations of the special prosecutor provision, calling for the creation of a

permanent special prosecutor, appointed by the President, with confirmation by the Senate and subject to dismissal by the President for "extraordinary improprieties" or criminal conduct committed by the special prosecutor. Though called an independent office, the special prosecutor under S. 495 is placed in the Department of Justice, which is in fact headed by the Attorney General; is given only a single 3 year term, and is authorized to investigate and prosecute illegal conduct on the part of federal judges and congressmen as well as high executive officials. In turn, S. 495 would permanently prevent the Attorney General of the United States (unless he has permission from the special prosecutor) from investigating and prosecuting illegal conduct on the part of federal judges, congressmen and high executive officials, even though no conflict of interest, real or apparent existed.

The Senate Watergate Committee had originally recommended a permanent office of "public attorney." It did not recommend a permanent special prosecutor. The office of public attorney would serve as an ombudsman to make inquiry of complaints against high executive officials. He would become a special prosecutor only by appointment of a court when he could show that the Attorney General of the United States failed to take action in an appropriate matter or where there was a real or apparent conflict of interest on the part of the Attorney General of the United States with regard to an investigation or prosecution of a high executive official. HR-14476 more closely follows the recommendation of the Senate Watergate Committee. Its provisions are especially responsive to the concern expressed by the Senate Watergate Committee in its final report that the special prosecutor should not be appointed by the President and be subject to dismissal by the President. HR-14476 provides for a special court which would appoint the special prosecutor, or if the special prosecutor is appointed by the Attorney General, would be available to review a report by the Attorney General explaining his dismissal of the special prosecutor. If dismissed, the temporary special prosecutor could bring an action in the United States District Court.

Although I am aware that constitutional questions have been raised concerning a court undertaking the role of appointing a special prosecutor, I have no doubt that the provisions of HR-14476 are constitutional under Article II, Section 2. The Senate Watergate Committee researched this area of the law and was fully satisfied that the appointment of a special prosecutor could be placed in the hands of the judiciary. I know that this sub-committee has received the views of a number of scholars consistent with this position. Some of them have been summarized for the sub-committee by my colleague and co-director of the Institute of Criminal Law and Procedure at Georgetown, Herbert S. Miller, in his memorandum to the sub-committee, dated July 23, 1976. I fully concur with that memorandum.

Title I of S. 495 as presently passed by the Senate emasculates the Office of Attorney General of the United States. It does not compensate for this weakening of the role of the highest law enforcement officer of the country by installing in the Department of Justice a permanent special prosecutor. Rather, the dividing on a permanent basis of the functions of the Attorney General can only lead to confusion and the failure to fix responsibility of normal law enforcement. The kinds of cases that a special prosecutor should only be concerned with cannot be expected to arise too frequently. A recognition of this fact must have been the basis for the broadening of the jurisdiction of the special prosecutor in S. 495 to include illegal acts on the part of federal judges and congressmen.

However, the investigation and prosecution of such illegal conduct have not in the past created the kinds of problems which required the appointment of a special prosecutor. The Attorney General of the United States can usually be expected to be willing and able to prosecute corrupt judges and congressmen. He becomes embarrassed and in an unacceptable conflict of interest, when he is confronted with the investigation and prosecution of corrupt high executive officials in his own administration.

No doubt unintentionally, the present administration has induced the Senate in S. 495 to provide for a permanent special prosecutor who can spend most of his time investigating members of Congress belonging to the opposite political party to the administration, leaving executive branch officials alone. His short term of office of three years, and his appointment by the President, may make this strategy a tempting one for a young ambitious special prosecutor counting on the rewards of a grateful President still in office when his short term of special prosecutor has expired.

The term of office is especially relevant to the question of the availability of men of stature and competence for such a position as special prosecutor. If the office is a temporary one, created to deal with a particular scandal or crises, then one can expect to find some outstanding lawyers in the country who would be willing to undertake the job for a short term. However, if the post is a regular permanent one, with no particular investigation upon which the country has focused, it is difficult to imagine top caliber trial lawyers being willing to undertake the assignment, unless it is en route to a judgeship—and that is exactly what we should be trying to avoid.

The fact that it is a regular office in the Department of Justice, independent though it may be called, requiring the occupant to find his own work to do, will make it attractive primarily to ambitious young lawyers on the make, or safe party loyalists. In quiet times there will be little need for a President to select a courageous idealist. And if a President should even want to, it would be difficult for him to find a taker because of the lack of tenure in the job to really tackle a tough investigation.

H.R. 14476 places the responsibility of enforcing the federal law against corrupt officials where it ought to be—with the Attorney General of the United States. He should not have to abdicate to a busy-body in his department called a special prosecutor who over the years will ultimately become a responsive agent for the Attorney General anyway. Of course, should the investigation of criminal conduct involve the President of the United States, the Vice President, a cabinet member or the Director of the Federal Bureau of Investigation, the Attorney General should step aside and bring in a special prosecutor of unquestioned competence and integrity to handle the matter. And if he fails to do so, a special court as defined in H.R. 14476 should appoint such a special prosecutor. This extraordinary suppression of the Attorney General's jurisdiction will occur very infrequently. This is as it should be and we should not make routine a procedure required only on rare occasions. For if we do, we will dilute that procedure and deprive it of its effectiveness and strength.

A particular omission I note in H.R. 14476 is the failure to fully provide the temporary special prosecutor with all the powers he will need to carry out his duties. This deficiency is not covered by § 595(e) which provides that the temporary special prosecutor shall only have the powers of the Assistant Attorney General for government crimes. That officer is supervised by the Attorney General. When it becomes necessary to appoint a temporary special prosecutor, he should have all the powers of the Attorney General. A model the sub-committee can use is § 593 of S. 495.

I recognize that the Attorney General has raised some concerns about H.R. 14476 that are not without merit. However, I believe they can be easily remedied. One for example, deals with the period of time the Attorney General is given to respond to a complaint. The period of 30 days provided by the Bill is too short for the Attorney General to make the necessary investigation and report. This can be easily corrected by extending the time to 60 or 90 days, or longer. However, I strongly urge this sub-committee to make whatever corrections that are necessary to strengthen the Bill and to report it out as quickly as possible so that the Watergate Reorganization and Reform Act of 1976, containing the language of H.R. 14476, will be passed by the Congress this year. The Senate Select Committee on Presidential Campaign Activities filed its final report on June 27, 1974. On August 9 of that same summer a President of the United States resigned his office as a consequence of the revelations of the Senate Select Committee; the impeachment inquiry of the House Judiciary Committee and the investigation of the Watergate Special Prosecutor. The American people had become sensitized to the issues of Watergate and believed that its institutions of government were working. The public confidence the Congress enjoyed two years ago can only be weakened if not lost when it takes so long to enact remedial legislation.

TESTIMONY OF SAMUEL DASH, DIRECTOR, GEORGETOWN UNIVERSITY LAW CENTER'S INSTITUTE OF CRIMINAL LAW AND PROCEDURE

Mr. DASH. Yes, Mr. Chairman. I have a prepared statement. I have been working out of the city under contract with the attorney general

of Pennsylvania, making an evaluation of the Special Prosecutor's office of Pennsylvania which has got its own problems which to some extent have relevance to what is before this subcommittee. It is premature to comment on it at this time. I did submit at the last moment a statement to the committee.

Mr. HUNGATE. We will make that a part of the record.

Mr. DASH. I would like to just summarize the statement and then answer any questions that the subcommittee may have. First, I would like to say that I did contact yesterday my chairman, Senator Ervin, of the former Senate Select Committee on Presidential Campaign Activities and Senator Ervin asked me to inform you, Mr. Chairman, and the subcommittee, that he regrets very much that he was not able to come before you and give his testimony, but that his prior commitments prevented it.

However, in a fairly lengthy discussion on the telephone, I reported to him what I was going to say before this subcommittee and he authorized me to tell you that he fully endorsed it and he would be sending a letter to you and to Chairman Rodino indicating that.

What he is endorsing, Chairman Hungate, is your bill and the provisions of your bill, because he is very much opposed to S. 495 as it was finally passed by the Senate. He did approve of the provisions of the bill that came out of the Committee on Government Operations.

I was very pleased that Senator Ervin felt that way because what is before you, the legislation before you, which is part of the Watergate Reorganization and Reform Act of 1976 really derives from recommendations of our committee.

We made those recommendations back in June of 1974 and the bills have been pending before the Congress and we think it is quite urgent that they be implemented. The issue of the Special Prosecutor which is what you are addressing, we felt to be a very vital one in terms of remedial legislation with regard to future Watergates or scandals of that kind.

We saw ourselves in making recommendations to the people of this country and to the Congress as not making recommendations of new criminal law. We felt we had enough criminal laws. What we felt was necessary was some institutional change.

One of the institutions that needed some change was in the checks and balances on the executive branch dealing with prosecution. Obviously we saw in Watergate the ineffectiveness of the Department of Justice to be able to deal as prosecutors with crimes committed by high public officials in the executive branch.

That is where the conflict was. As a matter of fact, the Attorney General himself happened to be one of those who was involved in the criminal activity and later was indicted and convicted and his conviction is on appeal.

So it is that situation where the Department of Justice is incapable of acting or appears to be incapable of acting we were concerned with. If the public believes that the Department of Justice can't really do the job and it is a serious appearance of conflict, then even an honest decision on the part of the Department of Justice not to proceed will lead to lack of public confidence in the system of justice and a good Attorney General should want to step back and say, "I am really too close to the situation. I think I can do the job but I am too close. The

persons involved are too high up in the administration. Somebody else really ought to be doing this job." I think that the bill, H.R. 14476, really deals with that problem very nicely.

Now you can't depend, we felt, on the normal practice of appointing a Special Prosecutor in the crisis situation. We address ourselves to this in our recommendations. I know one of the questions put, perhaps by Congressman Wiggins, to Special Prosecutor Rufell, was why have any legislation? And why not appoint a Special Prosecutor again next time when you have another crisis like Watergate?

Let me remind the subcommittee what some of the unusual and unique situations were at that time that brought about the appointment of this Special Prosecutor. By the way, it was not an act of the Congress. Congress had legislation before it to create the office, but that is not what did it.

It was a very unique situation. An Attorney General, Richard Kleindienst, recused himself, on the grounds that the former Attorney General, John Mitchell, was too close a friend and he did not think he could prosecute Mr. Mitchell. The President appointed Mr. Richardson. He had to come up for confirmation in the Senate. It was the eruption of information on the scandal and newspaper reporting through investigative reporters and pressure on the Congress on the confirmation procedure in the Senate Judiciary Committee that required Richardson to confront the issue of appointing a Special Prosecutor. Even a condition of his confirmation was would he agree to appoint a Special Prosecutor.

He said he would. To imagine in the future crisis that you would have an Attorney General before the Senate Judiciary Subcommittee for confirmation subject to the pressure of that kind of a commitment is really looking for chaos because you are depending upon the happenstance of some future event to bring about the creation of a necessary office.

What we were trying to do was to set up a system that would take care of a future scandal so that we would not have chaos. You would have a procedure by which such an important substitution for the role of Attorney General would take place.

I submit to the subcommittee that H.R. 14476 does deal with that matter as we saw it when we were recommending the procedures in our report.

Now the one thing that we did not want to see was a substitution of a permanent Special Prosecutor for the Attorney General of the United States. This is a complete emasculation of the Department of Justice and the office of Attorney General.

The Attorney General should be, under our system, the officer we should look to in a regular way to enforce the laws of the United States. We should count on him to do it. We should try as hard as we can to provide for the appointment of an Attorney General who will be non-political, who will enforce the law impartially and objectively and not in a political manner. However, there will be those situations that will occur where he himself will identify a conflict or if he does not identify the conflict or is unwilling to, a system should be provided which would permit others to identify the conflict and a court to appoint a Special Prosecutor.

It was our view that the appointment of a Special Prosecutor should not be inside the executive branch. It should be judicial. We did research the matter and we were satisfied that article II, section 2 of the Constitution permitted the judiciary to appoint inferior officers and that the temporary Special Prosecutor would be an inferior officer and could be constitutionally appointed by judges.

I think the ultimate handling of the matter as approved and even recommended by the American Bar Association and as provided for in H.R. 14476 where the Attorney General makes the determination of conflict of interest and he appoints a Special Prosecutor rather than the President, or if he doesn't, a special court does, is a very good substitute, because I think you may not be able to get the Congress to accept the appointment of a Special Prosecutor by a court alone in all cases.

I think that if we do in fact accomplish the creation of Attorneys General who are nonpolitical and who will act objectively, that the appointment of a Special Prosecutor, temporary in nature, by an objective and nonpolitical Attorney General, would in the first instance not be a bad thing. Especially is this true if you have the existence of the court called for by the bill and the Attorney General has to report to the court. If he dismisses the Special Prosecutor he would have to make a report as called for by the bill to the court and the temporary Special Prosecutor could in fact take a separate action in the U.S. district court.

The Senate in the final version of their bill, S. 495, in setting up the permanent Special Prosecutor not only emasculated the Office of Attorney General but in order to find something for this permanent Special Prosecutor to do, expanded his jurisdiction and instead of giving him jurisdiction only to look into areas of conflict of interest which would deal with high executive officials on matters dealing in the election area, it extended the jurisdiction of the Special Prosecutor to illegal acts by Federal judges and by Members of Congress.

I suggest to the subcommittee that the reason, the primary reason for that probably was to give a permanent Special Prosecutor something to do because he probably would not have much to do in answer to Congressman Mezvinsky's question to Mr. Ruff.

I am not sure what a Special Prosecutor would immediately start doing if he were appointed. There are pending allegations, although Mr. Ruff said he would like the pending ones to remain in the Watergate Special Prosecutor's domain.

Whether there are new scandals involved in the executive branch, I don't know. But there really has not been anything upon which a new Special Prosecutor could focus. I think it is quite dangerous to appoint in the Department of Justice the equivalent of an independent Special Prosecutor.

The Department of Justice is still headed by the Attorney General. S. 495 gives the Special Prosecutor a 3-year term. This falls short of a Presidential term. That person not being appointed at a time of crisis or at a time when the Nation is focused on a particular issue has to find, really, something to do and he becomes a busybody. Also S. 495 takes away from the Attorney General his duties of looking into corruption on the part of judges, Members of Congress, and so forth and turns these functions over to the Special Prosecutor.

I say in my prepared remarks that I think it would be tempting for a Special Prosecutor serving only a 3-year term appointed by the President of the United States to turn his direction on investigations of Members of Congress of the opposite party, counting on the rewards of a grateful President after he is through.

I wonder who might be interested in the job because I can't believe that for a short-term position of a regular nature, where there is not a particular need or crisis, you can get some of the prominent lawyers as we have had in the Special Prosecutor's office.

But on a regular basis with a succession of people every 3 years—a man goes out and another man gets appointed—who is going to be interested in that job? I suggest most likely young, ambitious lawyers on the make en route to a judgeship or some other office and with a chance to earn it since the appointment comes from the President.

It was our view on the Watergate Committee that the President should not make that appointment. The protections that I have indicated in my prepared remarks that S. 495 intends to give to the Special Prosecutor did not seem to protect Mr. Cox and I think in the future in a quiet situation when nobody is looking, when the country is not focusing on that office, a President or even an Attorney General will have much more influence on that office if it comes within the Department of Justice and is part of the executive branch.

I think that one area, Mr. Chairman, that the bill may be weak on is the definition of the powers of the Special Prosecutor if you feel the need of one. Since the temporary Special Prosecutor is only appointed when there is a determination of a conflict of interest and a determination that the Attorney General really cannot proceed on his own or should not proceed on his own, I suggest that what the bill does is under section 595(e) provide that the Special Prosecutor shall have the powers of the Assistant Attorney General for Government Crimes.

But when you look at this officer, you will see that he is supervised by the Attorney General and that an Assistant Attorney General does not have the power, for instance, to petition the court for immunity himself without authority of the Attorney General for particular witnesses. What I suggest is that when a temporary Special Prosecutor is in fact necessary in those rare occasions and I suggest it should be a rare occasion, he should have all the powers of the Attorney General.

He should not have to go to the Attorney General who by definition of the bill is in conflict of interest in the investigation and should not pass on any part of it. He should be able then himself to proceed with grand juries. He should be able to petition the court for immunity for witnesses.

The model for that I think in that case, S. 495, is an interesting model and by the way an interesting typographical error. If you look at section 593, they say the temporary Special Prosecutor should have the following authority, and I think that should be a model and because they list all the duties of a temporary Special Prosecutor even though they mean permanent Special Prosecutor. On those rare occasions when you need a temporary Special Prosecutor, he should act in lieu of the Attorney General.

I conclude by stating to the committee that I believe that whatever weaknesses may exist in the bill—and I understand that the Attorney

General has raised some concerning the amount of time, for instance, the Attorney General has to react to a complaint—I believe these can be corrected.

Mr. HUNGATE. If the gentleman will yield, I understand the original ABA bill was 6 months rather than 30 days.

Mr. DASH. I believe an Attorney General might properly complain that you are rushing something if he is only—he has only got 30 days to respond and if he does not act within that time he finds a Special Prosecutor on top of him. I think he should have a reasonable time, it could be 90 days.

Six months sounds too long. That can be remedied. Whatever remedies are necessary should be done and done quickly. But I do urge the committee to act and vote on the bill so that it can be reported out not as in the language of S. 495, but H.R. 14476, and joined with the Watergate Reorganization Reform Act of 1976 and passed by the Congress because the committee made its recommendations for this kind of legislation in June of 1974—and on August 9 of that same summer, a President of the United States resigned by reason of revelations of our committee, by reasons of the actions of the impeachment inquiry of the House Judiciary Committee and by reason of the investigating of the Special Prosecutor.

The American people were sensitized to the issue of Watergate. They believe that the institutions of government were working. The public confidence in Congress 2 years ago can be weakened if not lost if it takes so long to provide remedial legislation.

Thank you.

Mr. HUNGATE. Thank you, Mr. Dash. Before we turn to questions may I briefly summarize some of your testimony, as I understand you—and you discussed this matter with Senator Ervin at length yesterday on the telephone—the testimony would be in opposition to a permanent prosecutor. It would be your position and his position that you endorse H.R. 14476.

Is that generally a fair summation of your position and his as you discussed it with Senator Ervin?

Mr. DASH. That is right. His view was and he asked me to so state before the committee today that he thought that S. 495 as finally passed both missed and confused the original purposes of the need of a Special Prosecutor, did in fact emasculate the Office of Attorney General and expanded the jurisdiction in the area of the judiciary and the Congress where in the past there really haven't been any problems with the Attorney General getting into prosecutions of that kind.

Mr. HUNGATE. And one other point. You do urge that some legislation, temporary prosecutor legislation, as corrected, be enacted in this Congress?

Mr. DASH. We both felt it was urgent in order to keep up some confidence of the public that what we went through did not only produce the trauma we had and what I feel was the clean air we got out of it for a period of time but also something concrete and that is a mechanism to deal with a problem in the future that we all hope we won't have—but we know can occur.

Mr. HUNGATE. One other thing, in the early part of your testimony, addressing some remarks Mr. Wiggins said, the Special Prosecutor

was not really a product of congressional legislation but a series of unique events.

I appreciate that because I remember this subcommittee reported Special Prosecutor legislation and the full committee did and the Rules Committee did and we were importuned by certain reform elements to wait on the Senate.

Mr. DASH. I know. One brief comment on that again. To look to the Congress in a period of crisis to be the instrument to create a Special Prosecutor by legislation seems to be the worst possible way to do it. Legislation now to prepare for the future, but not legislation in a crisis because Congress will be accused of acting politically. You will be polarized in your positions and the thing will be so chaotic that no one will have confidence in what Congress does.

Mr. HUNGATE. Referring again to Mr. Wiggins' remarks, if you had them in the same political party, your chances will be changed.

May I start with Mr. Drinan?

Mr. DRINAN. Thank you, Mr. Chairman. Mr. Dash, realistically, the time element is pressing. I wonder whether or not we could get some consensus in the conference committee. You recommend we move forward with what is essentially Mr. Hungate's bill.

But what would your judgment be as to the possibility of getting the Senate to adopt an essentially different approach and having a conference committee come forth with something acceptable?

Mr. DASH. I think the answer is not that difficult. I think the Senate would have passed the original version of S. 495 which is Mr. Hungate's bill and went for the revision because at the last minute and frankly it was on the eve of the vote, President Ford changed his position on the bill and the revised version was presented to them and they went for it because they could get a bill passed.

I submit that the same Senate was in favor and would be in favor of a temporary Special Prosecutor as voted out by the Government Operations Committee of the Senate and I believe that President Ford would not veto such legislation if it were passed because I think that it would represent what was necessary as Watergate reform legislation.

We have already heard from Governor Carter on his position and his position clearly supports your bill. His position is for a temporary Special Prosecutor appointed by the courts under the special circumstances.

Mr. DRINAN. I hope you are right on that but we had five or six Senators come before us. I say the Senate had capitulated to the President's importuning. I hope you are right but I am not entirely certain because that legislation languished for months. Presumably they didn't have the votes until they capitulated to what the administration wanted.

I filed a bill to take care of intelligence and counterintelligence activities, that are not now being prosecuted, some months ago.

I wondered if you have any thoughts to extending the Hungate bill so we could not only reach the top echelon but also Government agents who engage in intelligence or counterintelligence activities and violate the fundamental civil and constitutional rights of people by illegal search or violation of the postal laws.

Mr. DASH. In situations where the Attorney General refuses to investigate that—in other words, I would leave that to the Attorney General but I would think that if a complainant came forward, that matters of such importance to the privacy of American citizens or importance involving the intelligence agencies of the country, that if you could establish—you would have the court and the structure—that the Attorney General refused to act on that matter, I would think a Special Prosecutor should be able to prosecute.

Mr. DRINAN. Under the Hungate bill, suppose the statute of limitations has run or the plaintiff can't get the documents, what would trigger further actions?

Mr. DASH. There is a question whether the statute of limitations runs when a law enforcement officer fails to act. It has been said that it does too often to the people and to the Congress. I don't think it does.

Mr. DRINAN. That is something else but suppose that the administration says that we have acted and they don't give any reasons. Under the Hungate bill, will the Special Prosecutor come into existence through action by the court?

Mr. DASH. The question is whether it fits the specific definitions. If they don't come high enough, the thought was the conflicts of interest would only occur when you are dealing with officials high enough in character.

But one I guess has to recognize that sometimes underlings act on the authority of higher officials and the ones prosecutable are the ones of lower official position.

Mr. DRINAN. The Hungate measure does not really reach it, in your opinion?

Mr. DASH. It probably does not. It is a difficult problem of how far you reach into the discretion of the Attorney General where he refuses to act in saying we will create a Special Prosecutor. I think that is a tough question because I do believe if you are going to say that the Attorney General should have the responsibility to enforce the laws of the United States, you do have to give him the discretion that most prosecutors have to have. It is not always when he takes a position that he will not prosecute that you would want a Special Prosecutor to supersede him.

To that extent, it would seem to me that one would have to find that the underlying basis for his failure is a conflict of interest and therefore that would seem to be where I would put the focus.

The conflict of interest comes about when you are dealing with higher officials because that is where he is embarrassed with the administration. I don't believe his failure to exercise his discretion to prosecute some lower official in the executive branch is based on a conflict of interest.

It may be based on some other decisions that we would not agree with. But being the Attorney General, he has a right to make them.

Mr. DRINAN. My time has expired. I thank you for your testimony.

Mr. HUNGATE. Mr. Hyde?

Mr. HYDE. Thank you, Mr. Chairman. I want to compliment you on a statement that I agree with almost totally. I am very concerned about the permanent office of a permanent Special Prosecutor. The

term busybody is very aptly made. I can see him on every Monday morning getting calls from the press, "who have you investigated this week?"

The caliber of legal talent that you want for this sensitive post, for a 3-year term at a \$44,000 salary, you are not going to get Jaworski or Cox or anybody like that.

That is a problem, too. I am troubled by the proviso in both of the bills. Take the Hungate bill. He would disqualify an individual for the appointment as an Assistant Attorney General if he has held a high level position of trust and responsibility while serving on the personal campaign staff or in an organization or political party working on behalf of the campaign of an individual who is elected to the office of President or Vice President.

I think that gives the form but not the substance of disqualifying a political partisan.

Mr. DASH. S. 495 actually would disqualify anybody like that.

Mr. HYDE. Any candidate for elected office is what 495 says. But I think your bill, Mr. Chairman, simply applies to the President and the Vice President. I think really those are meaningless, however they are phrased, because you are going to get political eunuchs, people who have not been active in any political campaign, too involved in the prosecution of law, perhaps.

But I think we almost have to trust the judgment of the appointing facility, whether it is the President or the court, plus the confirmation process by the Senate, to get people who, regardless of their activism or lack thereof, could be nonpartisan or nonpolitical in their conduct of this office.

Don't you agree?

Mr. DASH. I tend to agree. I think the purpose is to set forth a formula which is aspirational and to set forth a legislative idea in the House bill that the Assistant Attorney General for Government crimes should be apolitical, nonpolitical.

I think you are right, Congressman Hyde. It does not do it because if you just cut out that particular person who was active in that campaign, there are a lot of other people who are political in another way that don't fit in this type of description who may be worse as partisans.

Mr. HYDE. Gubernatorial candidates, for instance?

Mr. DASH. I don't think you could get legislative language other than the abstract language that would be apolitical. It is aspirational and it may be that the legislation ought to have some sort of aspiration. Provisions as introductory language to it but not put into the qualifications of the person himself.

I think we are in the ultimate analysis depending upon the appointive process and the confirming process and the picking of people who will do an honest job and an objective job.

Mr. HYDE. The real danger of a Presidential appointment is when the President and the Senate are both of the same political persuasion.

Then a Presidential appointment could be expected to be supported by his party. But if the President is of the other political persuasion, the Senate confirmation ought to act as a check and balance.

Mr. DASH. It might. It does not work in the situation where you had differing political persuasions. He was fired.

Mr. HYDE. We are talking about the appointment, not the firing. We are talking about the selection of an ideal person for the Special Prosecutor's office.

Mr. DASH. You might select them but you tie the selection and the hiring together. I think what you got in the Watergate period, the picking by the President, was the focusing by the Nation and the Congress on a particular crisis.

Everybody expected that somebody of an unusual stature was going to be picked. I think you have got to look to where this bill is going to be 10 years, 15 years, 20 years from now when the President has to be appointing every 3 years a new Special Prosecutor during periods when nobody is drumming up—there are no whistle blowers and nobody is worried about anything.

At least there is no crisis. There is no reason for the Senate not to refuse to confirm the Presidential appointment.

You either will get as I suggest a safe party loyalist or you will get some ambitious guy on the make. That is what I am worried about, the Presidential appointment and a permanent appointment. I think the best time to get it, even in a Presidential appointment, the finest appointment is in a time when there is special need, when there is focus on the crisis.

Then everybody is watching and I still believe that democracy works when the eyes of the people are on Government. Accountability and responsiveness still is what makes democracy work.

Mr. HYDE. I thank you and I agree completely with your statement.

Mr. HUNGATE. I think that is a good phrase, aspirational purpose.

The confirmation process did not keep us from getting John Mitchell on one side and getting Bobby Kennedy under another pressure.

Mr. HYDE. Well, we could argue that those factors which later developed would not be knowable to any appointive process.

Mr. HUNGATE. Mr. Mezvinsky.

Mr. MEZVINSKY. Mr. Dash, I appreciate your comments. What do you think are the deficiencies in the Special Prosecutor that we have now?

Mr. DASH. I think the Special Prosecutor we have now—

Mr. MEZVINSKY. I don't mean personalities. What are the deficiencies in the way the office is presently operating? I think your views are needed because whether it is temporary or permanent, no matter which way we go, we have to be aware of problems in the present set-up so we take them into account as we draft this particular piece of legislation.

Mr. DASH. I think one has to look at the office. I think that Professor Ruff who is not only a colleague of mine at Georgetown but for whom I have the highest respect, nevertheless is a caretaker Special Prosecutor holding an office which really is to wrap up the office.

It is true as he testified that his mandate is the same as Archibald Cox's mandate was. But I don't believe it was ever expected that he would start all over again and begin looking into what had been overlooked, say, by earlier Special Prosecutors. Obviously, that was not so because he defined what his staff is and it is a pretty thin staff.

Mr. MEZVINSKY. It is a very small staff that is to keep the office alive, to wrap up a few cases. I think as you posed your question he indicated he expects to be through in 3 months.

Mr. DASH. I had not known that that was so and 3 months I think would indicate that there probably is no expectation of serious indictments or prosecutions. I am not indicating, by the way, that he has reason to go forward with indictments or prosecutions. All I am saying is that I think that a decision has either been made by the Special Prosecutor's office that the office is not needed at the present time.

Mr. MEZVINSKY. Let me be more specific. From the perspective of your work with Senator Ervin and the Senate committee and your ideas as to what should have been done as far as possible violations of law and possible prosecutions, what deficiencies have you seen in the way the Special Prosecutor's office was handled?

Mr. DASH. Well, in part to your question, we thought as we left our duties when the term of office ended, our resolution expired and we turned over all our information to the Office of Special Prosecutor, that more would be done in some of the areas of campaign financing and some other areas.

However, it would be unfair on my part to indicate that more could be done. We had begun some investigations. We had turned over some facts which were up to the attorneys and the grand jury investigation that picked up and even followed on from us as to whether they were important.

I am not privy to the information that they gathered, whether they were able to get the information that was necessary to prosecute or the judgments they made. Therefore, I can't second guess them although I know that in areas we thought there should have been more productive prosecution, there was not.

Mr. MEZVINSKY. Campaign financing was one?

Mr. DASH. Yes; I believe that one might draw an inference that the Special Prosecutor's office did act very carefully in making decisions as to whether to prosecute. This of course could be—they should be given credit for that.

I don't think the Special Prosecutor's Office should go off wildly. One of the considerations that led the Special Prosecutor to act cautiously and carefully may be that it saw as its main function the indictment, trial and conviction of the major Watergate defendants.

Having accomplished that, I believe the Special Prosecutor's office saw its work done really. Again it did lose some important cases—and I put the term lose in quotes because every lawyer knows that the prosecutor does not lose a case just because a defendant it prosecutes is not found guilty.

It is not the job of a prosecutor to gain convictions in every case. But the John Connally case had traumatic impact on the Special Prosecutor's office, I believe. To bring John Connally to trial and to have an acquittal in that case had a debilitating effect on the decision-making on whether to go forward on other cases. I think a decision may have been made—I don't speak from knowledge given to me by the Special Prosecutor's office but I draw an inference from what I see—is that the Special Prosecutor's office had developed a great deal of respect on the part of the public, well earned and well deserved.

It had respect by the Congress and practically every part of the United States. To start bringing other cases and losing them before juries could dilute the Special Prosecutor's office.

Perhaps not going forward was a better decision than going forward with cases they may lose. They may come—have come to the decision that juries were not going to convict unless they had evidence like that they had in the Watergate cases such as tapes, which almost spoils juries.

Many pre-Watergate prosecutors got convictions by just an informer absent corroborating testimony or documents.

Mr. MEZVINSKY. My concern is that with limited staffing—maybe you can set up this one individual, call him a Special Prosecutor, but you don't have the investigative tools to do the job. My concern tends to be reinforced by your comments.

Thank you, Mr. Chairman.

Mr. HUNGATE. There is a vote on H.R. 14578, Federal Reclamation Projects Act of 1976, going on. Perhaps we should adjourn and resume as soon as this vote is completed.

We will stand in recess.

[Voting recess.]

Mr. HUNGATE. The subcommittee will resume. We probably have a short time. We hope we can conclude this testimony. We may then break for lunch depending on what the House does. We should have plenty of time in the afternoon.

Mr. Wiggins?

Mr. WIGGINS. Mr. Dash, I regret that I was not here during the statement of your testimony. Today is my mother's birthday and you call your mother on her birthday, right?

I have no questions other than to say that I read your testimony and I very much appreciate the objective, lawyer-like approach you take to an issue which can lend itself to emotionalism.

It would be a tragedy of enormous dimensions, I think, to do some institutional damage to the Department of Justice.

Mr. DASH. Thank you, Congressman Wiggins.

I think it is very important that we maintain our institutions of Government, that the Department of Justice and the Attorney General really constitutionally should be our instrument for enforcing the law and it should only be as you yourself said today, the rare occasion when you need the Special Prosecutor.

We need some procedure to anticipate. I am afraid that if we attempt to await each crisis, we may have some chaos and find ourselves in the midst of another situation which we just came out of which I don't think any of us want to do again.

Mr. WIGGINS. Thank you, sir, for your testimony.

Mr. HUNGATE. Ms. Holtzman?

Ms. HOLTZMAN. Thank you, Mr. Chairman.

Thank you, Mr. Dash. You have been helpful in illustrating the need for the bill and the need for some change in the present legislation. I want to direct your attention to your responses to Mr. Mezvinsky.

You were speculating as to the reasons for which prosecutions may not have been brought in the area of campaign prosecutions. You said

the Connally acquittal may have had a demoralizing effect. We don't know whether it was lack of staff, a demoralizing effect, a decision that you needed to have a certain degree of evidence, or a failure to find evidence.

For example, as I recall the Watergate Special Committee, it was created as a result of evidence developing from the break-in. We don't know why no prosecutions were ever brought with respect to the break-in. We don't know who ordered the break-in, whether it was the President or not.

The Special Prosecutor may close up shop and go out of business and we never will know. I am concerned because now it appears that some of the information with respect to why prosecutions were not brought and some of the information with respect to why certain pleas were entered into is appearing in at least private memoranda.

I wondered if we should be put in a position today of having to speculate as to why very important decisions were made by the Special Prosecutor and whether or not the public is entitled to know whether it was a lack of evidence or some other reason that led to the failure to bring prosecutions and other decisions.

I would like your comments because this affects what is going to happen with respect to any Special Prosecutor that is created in the future.

Mr. DASH. Well, these are important questions. I do want to say that it is dangerous to speculate, especially for a lawyer. In responding to your questions, it is not a matter of speculation. It is a matter of what is the best policy.

What is the responsibility of the Special Prosecutor to the Congress? What were the commitments made?

One, I guess, can have honest differences of opinion. I would like to qualify what I have to say by stating that the Special Prosecutor who was the Special Prosecutor at the time the report was written was Henry Ruth. I have known Henry Ruth for many years. I again have the highest regard for him—I don't make this as a pro forma statement or a statement for the record. I know him as a man of great ability, dedicated to law enforcement. I have no question in my mind of a man like Henry Ruth neglecting his duty.

Nevertheless, I personally differ with Henry Ruth in his concept of a prosecutor's report. I personally differ with Professor Ruff, who again, as I have indicated, I greatly respect both from the point of view of integrity and ability, and his concept of a prosecutor's report.

The Watergate investigation and Watergate itself was very unique in this country. It was a great crisis. I think it aided us to gain a new concept of what it means to have the constitutional system of the Government that we have and to gain new perspectives in a free society.

The whole country was aroused and sensitized to the issues of Watergate. This was not a normal prosecution. This involved ultimately a President of the United States and the unprecedented resignation of a President without reference to any partisan position one way or another. It obviously was an unprecedented situation in the history of this country.

That a Special Prosecutor had to be brought forth and who knew these matters was a great public moment, both from the point of view of Congress and from the point of view of the public. It was always

my view, and I understood that it may have been the view of earlier Special Prosecutors or the first Special Prosecutor, Mr. Cox, that the report that would be made to the Congress would be a complete report, would be a report that would tell the Congress everything that the prosecutor had done and the basis for his decisions.

It would seem to me this is necessary because just as it was necessary to supersede the Attorney General and the Department of Justice and create a Special Prosecutor because of distrust and lack of confidence, there would be the same questioning as to why the Special Prosecutor did not proceed in some areas by the public and the Congress and therefore all things should be made public.

Balancing obviously against that are the interests that Mr. Ruff raised and Henry Ruth has raised, the interests of the individuals who were being investigated, the rights of privacy, the rights of fair trial, the rights not to be prejudiced if prosecutions were not brought and not sufficient evidence produced.

There is, we all know, an instrument that prosecutors or grand juries use at times in some jurisdictions called presentments. They are used quite frequently in New York. New York by constitutional provisions changed its presentment provisions to require that if a grand jury was to issue a presentment against an individual which was short of an indictment, not indicting the individual, producing the next step a trial, but accusing the individual of wrongdoing and indicating there was not enough evidence to produce a trial or for policy reasons the Prosecutor does not want to go forward with trial, there should be a basis for the individual so accused to provide his answer, his response to the evidence that would be included in the presentment, a chance even to appear before the grand jury, give whatever testimony he wanted to give and what would be presented would not be a one-sided attack on that individual or a full presentment.

The issue was raised because of the constitutionality of presentments that did not provide for that. I think New York's procedure in presentments where they do make such accusations against public officials now provides for that kind of opportunity.

The committee may be well aware, by the way, of the Organized Crime Control Act of 1970 which permits special grand juries to make presentments in organized crime cases where it does provide for this procedure where a public official or a person involved in organized crime is given an opportunity to present his own position, appear before the grand jury and then when the grand jury's presentment is made public, you not only get the prosecutor's evidence, you get the target's evidence as well so you get a full story.

I put that background into the record as a basis for indicating that I think that the Special Prosecutor really did not give to the Congress or to the public a complete story as to, for instance, what was known about the former President.

In that instance, he was not even a person who had not been charged. He had been named as an indicted co-conspirator in an indictment. He should have been given full opportunity to give his side of any evidence he wanted to present.

And then the complete story would have been presented to the Congress and the public. Such a case would have ultimately been made out if there had been impeachment proceedings and a trial. That was

aborted by resignation. A trial was aborted or an indictment was aborted by the pardon.

There was a great feeling among many people in the country that the full facts have not come out. The feelings go two ways. There are many people who believe that the accusations against the former President were overstated.

Some believe that they are understated. This leads to all kinds of dissension and revisionist history that develops. What is really needed is an objective, complete report by the only agency that was given the power to investigate that area.

Ms. HOLTZMAN. Surely you agree, Mr. Dash, that if these materials can be published privately in memoranda of ex-Special Prosecutors that the same memoranda should be published as a whole in a report?

Mr. DASH. Published piecemeal, that loses some of their impact because they are obviously held back for some reason. Anything published in a book should be part of a report. I believe the report should have been complete. But as I said before, there can be honest differences of opinion and I do respect a prosecutor whose answer to me when I make that argument is that I believe that in fairness to those who are accused, I should not do it.

There are too many prosecutors in this country who don't concern themselves with fairness to accused persons. I like to think that there are some who do concern themselves with that.

Mr. HUNGATE. In a discussion of that presentment procedure under the Organized Crime Act, does the opportunity of the would be accused to tell his story occur prior or after the fact of the decision not to prosecute him?

Mr. DASH. No. It is usually after the fact. It is after a decision not to prosecute but a decision to make a presentment. In other words, the prosecutor and the grand jury—and we all know that grand juries are usually decisions of prosecutors who usually run grand juries—that a decision has been made that either there is not enough evidence or for policy reasons there will not be a prosecution.

Nevertheless, there will be a public presentment to inform the public what we know about X in a particular set of events. But constitutionally, the Supreme Court has discussed these issues and held that if you are going to do that and not give them a chance to respond, you have deprived him the right of response.

Now he has it under the Organized Crime Control Act in the New York procedure where he is given the opportunity to come forward, issue a written statement, and then the whole is presented.

It seems to me that the Special Prosecutor could have approached his report that way if he wanted to be fair about it.

Mr. HUNGATE. Further questions?

[No response.]

Mr. HUNGATE. Thank you very much, Professor Dash. You have been very helpful, you will certainly help expedite the work of the subcommittee. Please express my appreciation to Senator Ervin for his endorsement. We appreciate the support for the bill.

Mr. DASH. Thank you.

Mr. HUNGATE. Our next witness is Albert Jenner. Mr. Jenner is a longtime friend and was a coworker with us on impeachment. We are pleased to have you. You do not have a prepared statement?

Mr. JENNER. No. I would have prepared one but when you called all you said was to appear and testify. I did not prepare one. I would be pleased to do so. I could get it to you next week.

Mr. HUNGATE. If there are further remarks that you want to give us in prepared form, I think without objection the subcommittee would be glad to receive them. We should probably try to receive them by September 2 because whatever we do or don't do will happen soon.

You may proceed.

TESTIMONY OF ALBERT JENNER, ESQ., CHICAGO, ILL.

Mr. JENNER. Thank you, Mr. Chairman, and my good friends on this committee with whom I had the great privilege of working 2 years ago or 2½ years ago.

As I have listened to the discussions this morning including the queries of the distinguished members of the committee, I have fortified a judgment I had and have had for sometime that we should have no Special Prosecutor at all.

The existence of a Special Prosecutor, whether you call that person a Permanent Prosecutor—an Office of Permanent Prosecutor—or the appointment of the Special Prosecutor on an ad hoc basis for a particular instance it seems to me to raise the question that has been raised, especially by Mr. Dash. I am surprised at my good friend, Sam Dash, that he is so cynical as to the functioning of the Congress of the United States and of the Special Prosecutor's Office and of the Attorney General's Office during the past several years.

I appreciate he is an advocate for his position when he was counsel for the great Senate Select Committee investigating the matter of campaign contributions. They worked out a proposed—they had recommendations and as I said when he testified, your bill, Mr. Chairman, largely tracks those recommendations.

I would like to go back and say this in this connection. I have the feeling that the Special Prosecutor syndrome has failed to recognize the people themselves and confidence in the people. The greatest thrill in my life was when I served as counsel for the minority of the House Judiciary Committee conducting impeachment proceedings.

I have often said since, it was the third most important and significant event in the history of this country. The first was the drafting of the Constitution and the drafting and enactment of the Bill of Rights, the second being 1865 through 1869, the Civil War and the adoption of the 13th, 14th, and 15th amendments, and the third one being the impeachment proceedings. The people for the first time in the history of the Nation saw their immediate representatives—men and women, of ability, professional lawyers with integrity and a great deal of courage, debating as they did, and 95 million people saw them.

They regained confidence in their country. That is what it is, that the people closest to them, the Members of the House of Representatives functioning and debating. Those were great debates. It awakened them. They had become somewhat nebulous.

They had not pushed. They had come into a comfortable state of mind. That includes Members of Congress as individuals. They were awakened to their Government and how it needs to be policed by the people, especially through their immediate representatives, the Mem-

bers of the House of Representatives and then through their next level of representation, the Members of the Senate, who are not as close to the people as the Members of the House of Representatives are. They come from districts and they know them.

They are now alert, especially the young and the young inherit the Earth. And so I urge upon you, ladies and gentlemen, that there is a measure of overreaction. The people are alert. They love their Government.

They now love it more than they have ever loved it before and as the young, they will touch their young and they will become the majority of voters in this Nation.

They are looking to what? They are looking to election of people of character and integrity and ability. In my judgment, that is what this present election is primarily all about. They are looking more deeply at Members, candidates for membership in the U.S. Congress on the House and Senate side and especially on the executive side.

The people are also concerned, as you are as their representatives, about bureaucracies. It is my judgment they will have some concern about creating another bureaucracy, be it a permanent Special Prosecutor or the device of the House bill for the appointment ad hoc of Special Prosecutors.

What do they want? They want to be reinvested with confidence in the Department of Justice, in other departments in the other divisions of the executive department. They have confidence in their courts. The court's performance in impeachment and in the Watergate proceedings was just absolutely splendid.

What the people expected, they received. Now I don't think they have lack of confidence in the Department of Justice as such and in the constitutional Office of the Attorney General.

What they are concerned about is individuals occupying those offices. They feel a little outside because the Attorney General is appointed rather than elected which is as it should be because I don't think the people as a body would be able to exercise any sound judgment with respect to a particular individual to occupy the Office of Attorney General.

What I am concerned about with respect to a Special Prosecutor, and I must say to you, Mr. Chairman, and ladies and gentlemen, that as I see the atmosphere, the odds are that a bill, whether it be the House bill, the Senate bill, or a combination, is likely to be passed by the Congress of the United States before a sine die adjournment, so what I have said up to the moment I am afraid is sort of whistling in the wind.

But I did want to get it off my chest and get it on this record. I have confidence in the people. I have confidence in all of you. I have confidence in the members of the subcommittee. I have confidence, tremendous confidence, in Edward Levi, one of the true, great, splendid Attorneys General of the United States.

He is the kind of man that the people want in that office. Frankly, I don't know what my good friend Edward Levi's politics are, whether he is a Democrat or a Republican.

I doubt if the people in Chicago know either way. But he is an objective man and the people have that same feeling. That is the kind of person they want in that office.

If they have that feeling with respect to a method and means whereby you obtain that kind of person, the people will be happy. That kind of person will appoint a Special Prosecutor. The Attorney General of the United States has power to appoint a Special Prosecutor.

That has been done a good many times. Here I don't know what Archie Cox's judgment is on this subject matter, nor, do I know what Leon Jaworski's judgment is. I saw Leon Jaworski at the American Bar Association convention but I did not open the subject.

I have not seen Archie Cox now for almost 8 months. I would like to turn to the two bills and just pick out the things that concern me the most about the two bills. As to the House bill, with the appointment, ad hoc, of the Special Prosecutor to deal with a particular situation and as the bill now stands, that particular prosecutor, if and when appointed, may not receive any other ad hoc appointments, I think that as pointed out to you by the Attorney General, there are now situations in the Department of Justice that would bring about under the functioning of that bill, the appointment of maybe two, three, or four or five Special Prosecutors right off the bat.

Assuming that should take place, and it is possible, if not probable under the House bill, you would have three distinct individuals with different viewpoints as to the administration of criminal justice dealing with a single assignment.

As I think all of you, or certainly Congressman Hyde knows, I have defended criminal cases for a good many years. At one time, I was assistant State prosecutor in my early days. I have always worried about the appointment of a Special Prosecutor to prosecute a particular matter.

He has a feeling, he or she—thank goodness, she in these days—has to bring about a prosecution under the assignment made him. But as far as the administration of justice is concerned, if you have several of those ad hoc appointees under the House bill, each has a different experience in the law.

Each has a difference of experience with respect to the use of immunity, plea bargaining and all that sort of thing and each will exercise a different level of prosecutorial discretion.

I think that terribly diffuse thing would make the administration of justice in the so-called special cases very difficult. Now Mr. Dash whom I know and admire tremendously and have known him for quite a good many years, has said to you that the Special Prosecutor will be appointed on the ad hoc basis only in instances where there is a very, very special need. I assume he is harkening back to the Watergate circumstance. In my judgment, Watergate was an aberration and it is very much unlikely ever to occur again or arise again in this Nation with the people. These were enormous abuses of power. It boggles the mind.

The members of the House Judiciary Committee have assembled that in the House Judiciary report. The people were disappointed. They were unhappy. They were frustrated and they did not know what to do until your committee acted and published that report.

Now Professor Dash said that if you have these ad hoc appointments, you will get back men or women to serve as Special Prosecutors. My view is that you will get better men or women if you have the 2-year provision, for example, of the Senate bill.

The caliber of Special Prosecutors—I will limit myself, not to denigrate anybody else, Leon Jaworski and Archie Cox and I will include John Doar as chief counsel of the House Judiciary Committee—those men had no consideration for compensation.

If compensation was an element, no one of the three of them would ever have served. It has to be an event of national importance and concern, one that involves their country and its legal institutions under a threat of serious abuses of those legal institutions and their Constitution, in addition.

Now if Professor Dash is correct, I posture to all of you that what he is saying is we should not have a Special Prosecutor because we should not have machinery provided for with somebody in the office to anticipate the possible serious situation.

Also, it seems to me it demeans the Congress of the United States and the Department of Justice. Professor Dash has said, well, it came about this way or that way, largely out of the confirmation proceedings of Elliot Richardson with the promises extracted from him by the Senate committee in the confirmation proceedings with respect to how he would operate the Office of Attorney General.

Well, those commitments may be made under the Senate bill because there has to be confirmation by the Senate. May I say as an aside that in any event as to the Special Prosecutor, it is my conviction that confirmation should be by both the House and the Senate and not merely the Senate.

I feel that the closest body to the people is the House of Representatives and the reflection of that viewpoint should be incorporated in either bill or in both bills or any revision or combination of the two of the bills.

As Professor Dash says, if this process becomes effective, it will be one of terrible great concern to the country and the people and the people should have both of their groups of representatives pass upon the quality of the Special Prosecutor. Now another thing does trouble me with respect to the House bill. I think it is of substance. You provide in the House bill for complaints to be filed with the special panel of the Court of Appeals of the District of Columbia and any citizen may undertake to file one.

They are public. It seems to me that that will be an absolute thicket, an absolute can of worms to do that, to have citizens with wild charges against Members of Congress, against judges, against high officials in the country wholly unsupported, at least at the outset, and names mentioned in these communications to the special panel and, in my judgment, an invasion of the privacy of the individuals accused.

Because at least in the present administration of justice by the Department of Justice and our State Department as well, you do keep an investigation of the possible witnesses and persons secret. My work with your committee in the House of Representatives was about the fifth instance in my life in which I have engaged in investigation.

One way to kill an investigation, and one way seriously to injure people, is to have persons investigated and possible witnesses under investigation to be revealed and disclosed.

I had one unfortunate instance when I was attorney general of Illinois that a reporter in Springfield who thought that I was investigat-

ing him and despite my assurances I was not when I talked to the chairman of the committee that was conducting the investigation, this young man went out and drowned himself in Lake Springfield.

I don't know whether Congressman Hyde recalls that or not. But that interferes with the conducting of investigations thoroughly.

Isn't it possible to take some look at the Attorney General's Office, and provide in these bills for a particular office in the Attorney General's Office? That is a great improvement, in my judgment. I share that very much. Of course, he cannot go about at large, he has to report to the Attorney General but only to the Attorney General.

He is not in the same position as the head of the antitrust division or the criminal division of the Department of Justice or other divisions.

Now you report to the Deputy Attorney General or someone else before they report to the Attorney General. Professor Dash properly referred to the 30-day provision in the House bill. My experience in investigations both on the prosecution side and the defense side in the criminal field is that no good, sound Attorney General and prosecutor can undertake in most instances, especially on the kind of accusations that you are considering to go to the ad hoc Special Prosecutor, really make up his mind and get the evidence in 30 days to make the kind of high level report that is anticipated in the House bill. Professor Dash has suggested and I gather that the committee is thinking seriously of extending that time at least.

I am very much concerned about the reports that have to be filed by the Special Prosecutor with the special court.

Mr. HUNGATE. Pardon me. That is the second bell. We are having a vote on H.R. 8603, Postal Reorganization. It is a vote of whether to go to conference. We better recess at this point.

Mr. JENNER. Mr. Chairman, as I reported to you, up until 5 o'clock this afternoon, I am at your disposal.

Mr. HUNGATE. Unless there is objection, we will recess until 2 p.m. to give us a chance to get some lunch and then resume and begin questioning shortly thereafter.

[Whereupon, at 1:10 p.m., the subcommittee recessed, to reconvene at 2 p.m.]

AFTER RECESS

[The subcommittee reconvened at 2:10 p.m., Hon. William L. Hungate presiding.]

Mr. HUNGATE. The subcommittee will be in order. There are several subcommittees meeting so we will proceed.

Mr. JENNER. I will try and close as quickly as possible, Mr. Chairman, and ladies and gentlemen. I will speculate as to where I was at the time of adjournment but I would like to say if I have not already said it that what troubles me, among the other things that I have said, is that a Special Prosecutor whether of the character under the House bill or under the Senate bill either one in my judgment denigrates the Congress of the United States in that when you go back and consider Watergate and the impeachment, that the Congress of the United States in my judgment was the major factor and force in exposing and bringing about—exposing to the people and bringing

about the select report and the impeachment proceedings and the results that followed from the House Judiciary report.

People now have confidence not only in you—Members of the House personally—Members of the House of Representatives and the Judiciary Committee—but they now have confidence that their system of government now almost 200 years old, because it really did not come into existence until the Bill of Rights was adopted in 1791, that the people do have confidence that their representatives will work out some way in a cataclysm of the character that faced all of you and the character that I think Professor Dash was talking about.

He said he would like to have some kind of a standby there for the cataclysmic situation when it arises. You don't think and the people don't think but what the Congress of the United States and the mechanism of the Government will provide a means whereby to meet those serious problems that Professor Dash has in mind and which certainly concern this committee and all of the entirety of the House of Representatives.

I was, I think, commenting on some provisions of both bills, first talking about the House bill. I mentioned the 30-day provision which pretty clearly is insufficient.

Then the bill requires the Attorney General to make a finding that the particular matter referred to him is clearly frivolous. That is a terribly heavy burden to put on any man or woman, should we have a woman Attorney General. What is clearly frivolous?

Clearly frivolous presents a terrible burden. Trying to personalize it, if I were in that situation I would have difficulty making the decisions as to what was clearly frivolous or even frivolous as the case might be.

Mr. HUNGATE. What language do you think might be more appropriate, if any, if you had to have such language?

Mr. JENNER. Well, let me just guess a little bit, that the Attorney General make a finding that in his judgment the matter should not be further pursued from a prosecutor's and Attorney General's standpoint. That will give him greater breadth. The agony of saying any charge is frivolous is very difficult and seriously burdens the Attorney General.

Now that finding under your bill is final. It is not subject to review. But the bill provides that if there is additional allegations, it may again be asserted by the individual who made the associations in—the assertions in the first place.

You have a recurrence. I know you have received letters. You respond to them politely and directly and it does not satisfy the person making the complaint. They come back with another letter.

It is a never ending process. But your bill provides for that process. The court, the special court, will have to take those additional allegations of those individuals and that special court takes me now to the constitutional problem.

The special court, I have an absolute anathema toward a special court. The greatest courts are the broad courts. You will cull out of the courts three judges who will perform an administrative function.

These courts will be supervising the Attorney General, will be second guessing him, will be appointing people in the executive de-

partment and in my judgment, that violates the separation of powers, clearly.

Professor Dash did say to you, and he is a scholar, that he is confident that it is constitutional but I doubt it very seriously.

Mr. HUNGATE. Let me interrupt just a minute. I think Mr. Drinan has to go to a markup. Could we let him question?

Mr. DRINAN. Thank you very much, Mr. Chairman. Mr. Jenner, as usual, you have a very persuasive viewpoint. Until you spoke today I was persuaded that perhaps the American Bar Association in this instance joined by the ACLU, were correct in supporting a temporary Special Prosecutor.

But now you have altered my mind or blown my mind as some would say. I would like to take that position and say that in the face of all criticisms that might come, we just don't need this type of Special Prosecutor. I agree with you that somehow we did succeed in the impeachment inquiry. But what about corruption at a lower level? Corruption that does exist, I suppose, men being men. In some cases, and I mentioned one this morning, such as with the CIA, intelligence and counterintelligence programs, and the FBI, we did not reach that.

How would you say that the people can get a remedy for something for which we have not received a remedy?

Mr. JENNER. Well, Father Drinan, let me answer that this way. Neither bill goes to the lower level. Truly, neither bill goes to the lower level that I think you have in mind.

Mr. DRINAN. At least I think Mr. Hungate's bill specifically mentions the Director of the FBI. At least somebody would be accountable.

Mr. JENNER. At least that specific department of the Department of Justice is specifically mentioned in the House bill.

Mr. DRINAN. Absent that, Mr. Jenner, how can we expect any Attorney General, if he does not have a special mandate, a special triggering device, how can we expect that they will do better in the future than they have done in the past?

Mr. JENNER. Well, as I said idealistically this morning, I think they will do better because I think the people are altered. They really feel and know their Government. Where can they complain? They can complain to the Congress of the United States. I think there ought to be different standards than we now have for the selection of the Attorney General of the United States.

I understand the Senate bill was amended with respect to the appointment of the Attorney General, that he cannot have been campaign manager or something of that character. That is a step in the right direction to what you are talking about.

If we do have something that would pick up some of the language in these bills that nobody may be appointed Special Prosecutor who had an active or high level activity in the campaign for election of certain Federal officers, and naming them, but have a bill that provides that with respect to the selection, and appointment, and confirmation of the Attorney General.

As I said this morning, Mr. Chairman, I believe—I don't know whether we can do it constitutionally—but I think the House of Representatives ought to function in the confirmation area even as to the Attorney General.

I have not thought that through constitutionally. But certainly as to the Special Prosecutor, I think it should be both. In both bills, you provide for a special office in the Office of the Attorney General.

I think that is an excellent idea, very excellent idea and the head of that office under both bills is given as much autonomy constitutionally as is possible to give him; I think a little more in the Senate bill than in the House bill.

The House bill does not define the head—the jurisdiction of the head of that office whereas the Senate bill does.

In that fashion, then, you will have a policeman in the Department of Justice that is doing several things and this is also coupled with the excellent provisions of the two bills that you are going to have a summer office in the Congress of the United States.

I think that is a very good idea, also.

Mr. DRINAN. Assume we are persuaded by your approach and your very persuasive argument that we feel we should not get into this. Suppose politically or for other reasons, a majority of the committee wants to go forward with some type of bill. What, in your judgment, would be the less damaging bill, the Senate bill or the bill that Mr. Hungate has proposed—the Special Prosecutor appointed in certain circumstances by the court?

If we have to choose between evils from your point of view?

Mr. JENNER. When I am asked a question, I answer it even though it be embarrassing to me or to those who hear my answer. I truly believe that the Senate bill is a better bill. I further believe that the two bills, if we worked, would be still better than both the Senate bill and the House bill.

But to me, the key here is the special office in the Attorney General's Office to assure the people that there is a policeman there. Now I would add to both bills that that special officer in the Attorney General's Office also be subject to confirmation or some kind of preliminary oversight of the process by both Houses of Congress.

That will assure the people that in the selection process, in the confirmation process, both Houses of Congress participated. Then you will have as you did with Mr. Richardson and subsequently with Mr. Jaworski, that a committee of the Senate and in my judgment committees of both Houses, will have questioned that person and said what is your jurisdiction, what do you contemplate doing?

That person then has a record made under oath, which is also important, under oath, as to his intentions and his understandings as the case may be. Now that special office in the Attorney General's Office would do the very things that you have in mind, Father Drinan.

If you define the jurisdiction, which the House bill does not now do, have that particular head, the office and not the head of the office, it is possible to accomplish what you have in mind.

Mr. DRINAN. Thank you very much. I think my time has expired. Your testimony has been exceptionally helpful and valuable to me and I hope to the committee.

Thank you.

Mr. HUNGATE. I first would like to recognize our colleague on the committee, Mr. Fish, who is here and at whose instance we invited our distinguished witness today and who is particularly interested

that we have your views as we weigh the problems before us on the Special Prosecutor.

Mr. Wiggins has the same problem Mr. Drinan has with another committee meeting in markup.

Mr. JENNER. It is a very difficult choice.

Mr. HUNGATE. Mae West said that when you had to choose between two evils, she chose one she had not tried before. [Laughter.]

Mr. JENNER. I very much appreciate your affording me the opportunity of seeing you all again and to testify.

Mr. HUNGATE. Mr. Wiggins?

Mr. WIGGINS. I think I understand your position fully as a result of your testimony and the responses to the questions of my colleagues. If you had your druthers, I think you would not urge the enactment of either one of these bills.

Mr. JENNER. I hope I made that clear.

Mr. WIGGINS. Let's suppose we follow your advice and we have no permanent or temporary Special Prosecutor and a crisis develops involving the highest levels of Government, let's say the Vice President. What should the response be in that case?

Mr. JENNER. Having in mind what I think you have in mind, something similar to what occurred in 1972, 1973, and 1974. There would be appointment of a Special Prosecutor and he may be appointed by the Attorney General himself, and I would expect the kind of Attorney General I have in mind to do that.

But if he does not then the Congress itself will do it.

Mr. WIGGINS. The Congress would be the ultimate trigger.

Mr. JENNER. It is the people.

Mr. WIGGINS. If for some reason the Congress does not have the availability, something would happen.

Mr. JENNER. That is right. Something would happen. There would be a machinery created. It would not take long to create the Special Prosecutor machinery.

Mr. WIGGINS. That is a scenario which appeals to me but I am not certain that it would happen if the administration and the Congress were of the same party. What do you think?

Mr. JENNER. I am sorry, sir.

Mr. WIGGINS. The scenario you maintain is appealing to me because it maintains institutional integrity intact. But it may not happen as we saw it happen if the Congress and the administration were of the same party.

Is that a justifiable fear?

Mr. JENNER. That is a justifiable concern.

Mr. WIGGINS. Is that of sufficient magnitude to legislate a mechanism perhaps involving the best of the two bills before us?

Mr. JENNER. I would think not, sir, because I am troubled about there being in existence an office. Somebody is in it. At the time that somebody is appointed, no real cataclysm exists of the type that we faced.

The type of person is not directed toward the catastrophe. But for instance under the House bill, you will have a number of Special Prosecutors. While Professor Dash said this will not be used very often, I think he is dead wrong from a practical standpoint and from my experience of 46 years of practicing law.

These things will be referred. They are unable to be resisted. It is an easy thing to do. If you have the so-called permanent-temporary one, permanent in the sense that the office exists but temporary with respect to its enactment and I believe in that and that it should be cut down to 2 years instead of the 3 and that 3 is a little dangerous, gradually it will become a mechanism to refer things to that prosecutor of the nature of things that we don't have in mind today and that Mr. Dash did not have in mind.

Mr. WIGGINS. I am always happy to see you here.

I hope you will come back and share your wisdom with us. I have the same problem that Father Drinan has. I now have another problem. Father Drinan is there and I am not.

[Laughter.]

Mr. WIGGINS. Thank you very much.

Mr. HUNGATE. The Chair will recognize Mr. Hyde for 5 minutes.

Mr. HYDE. Thank you, Mr. Chairman. I really have no searching insightful questions other than to comment first of all that it is my pleasure in having Mr. Jenner here to testify.

I did not have the privilege of serving on this committee during the glorious days of the impeachment. But I know Mr. Jenner very well from being a fellow member of the Illinois Bar.

He is one of the most distinguished lawyers in Illinois. My other comment would be, I hope his views are given the widest possible dissemination. I don't think they will be, unfortunately. But those of us who share his view that we are creating something out of a reaction to a situation that is an aberration will be viewed, I am sure, as in favor of covering up corruption, and actually we are concerned about due process and and the orderly processes of government and criminal prosecutions.

So Mr. Jenner's views are important, and I would hope that those of us who join him in sharing his views are noted for the illustrious company we keep.

Thank you.

Mr. HUNGATE. I think anyone suggesting that Mr. Jenner would take part in covering up corruption would get into some stiff arguments. The Chair would also note that, as presently constituted, the subcommittee and the witness would probably agree on the unusual prominence of the Illinois Bar.

Mr. JENNER. We at least have two votes.

Mr. HUNGATE. Three. You alluded to the problems that we might have constitutionally on the confirmation question. We have the 25th amendment for the confirmation of the Vice President, but that is a constitutional amendment because of the great importance of the subject involved.

I am very sympathetic to the proposal.

Mr. JENNER. The people of this country, in my judgment, would welcome it.

Mr. HUNGATE. The House certainly is close to the people at all times—too close, sometimes. But there is probably a constitutional problem there.

Mr. JENNER. As to the Attorney General, yes.

Mr. HUNGATE. Well, as to Special Prosecutors.

Mr. JENNER. I don't think there is any problem there at all.

Mr. HUNGATE. You don't see a problem if you had House confirmation? You would, first, prefer not to see any Special Prosecutor? And second, you would just as soon see a permanent Special Prosecutor?

Mr. JENNER. The temporary one is fraught with more danger than the permanent one.

Mr. HUNGATE. As to your view of past history, people and representatives rise to the occasion, and perhaps the way it is now is the way it will continue to be.

Mr. JENNER. You are providing for a policeman in the Department of Justice and then you have your special office in the Congress of the United States. Those are the things that people want. Is there somebody who is looking at these things?

Mr. HUNGATE. I have confidence in the people, tempered every 2 years by elections, but I still have some concern as to whether, under all circumstances, we could repeat the somewhat successful performance—I am back on “if men were angels, no laws would be necessary.”

I can't get it straight, the one about “because of human nature, governmental controls are necessary.” There is some saying like that. I wondered if we would always come up with the right answer.

Mr. JENNER. Mr. Chairman, this is a representative form of government in which the people elect their representatives to help them govern themselves. When a situation of the character of the Watergate, or even less than Watergate, an aberration, an abuse of power, say, in a single department arises, the people will see through you, their representatives in Congress, a means and method of treating that situation.

If it has to be a Special Prosecutor then appointed, that will be appointed. I personally have no doubt about it. From the time I left Washington on October 15, 1974, and even today on the airplane, I have had many, just hundreds of people all over the United States speak to me about how their Government works and they saw that debate, 95 million people, a third of whom were 25 years of age and less and are 27 years of age or less.

They remember it. They were reinstalled with this as a self-governing society and they will see that it works. I have no doubt about it.

Mr. HYDE. Mr. Chairman?

Mr. HUNGATE. Mr. Hyde?

Mr. HYDE. May we go off the record?

Mr. HUNGATE. Off the record.

[Discussion off the record.]

Mr. HUNGATE. Let us return to the record.

I still have concerns over this issue of prosecutorial discretion and the discretion that resides in the Attorney General and the Department of Justice and what effect any legislation such as this might have on it. Whether in the absence, however, of any legislation such as this, it might not be worthwhile in this day of sunshine and higher ethics, and that is in quotes, that perhaps the unfettered exercise of discretion in the prosecutor's office may not be totally desirable.

Mr. JENNER. It is not, in my judgment.

Mr. HUNGATE. We are talking about whether we remove political considerations as we seek to root out Government corruption. Those

of us who are in public office recognize also, I think, that there are political pressures on anybody that is elected.

Some of that is conducive to responsiveness to the public. All elected prosecutors, and mostly they are at the State level, they may make mistakes, but they are subject at all times to public reaction, public opinion, and so on.

Now, when we go to the Federal level and take people out of politics, however, I wondered if we may not need more information about the factors they employ when they decide to file 1 charge or 10, file a felony or a misdemeanor, not to file at all, et cetera.

It seems to me that is a very difficult area in which to move, because you can actually promote crime by publishing guidelines in some cases. But at the same time I would expect resistance, because if I am in a job with an area in which nobody has anything to say but myself, I am going to regard any move toward it as very poorly planned.

But I would hope and, I think, maybe there might even be some very limited area where perhaps through the Department of Justice and the Congress, we can come to some agreement without destroying the fabric or encouraging crime, and it could be made more public so the public will have more confidence.

Mr. JENNER. I would share that. I was thinking, as you were talking, that maybe a mechanism could be triggered by the Congress. That is better than having it triggered by the U.S. Court of Appeals in the District of Columbia.

I am confident, you could have a mechanism whereby the Congress could trigger the appointment of the Special Prosecutor.

Mr. HUNGATE. Any further questions?

[No response.]

Mr. HUNGATE. Anything further you want to say?

Mr. JENNER. No. It is just great to see you all again and discuss this.

Mr. HUNGATE. This is almost like alumni week. We are very pleased to have you with us. Again, on behalf of the subcommittee and the Congress, we express appreciation for your work here and your work previously for the country.

The next meeting of the subcommittee on this same issue will be September 1, at 9:30 a.m., in room 2141.

The subcommittee will be adjourned.

[Whereupon, at 2:50 p.m., the subcommittee adjourned, to reconvene at 9:30 a.m., Wednesday, September 1, 1976.]

PROVISION FOR SPECIAL PROSECUTOR

WEDNESDAY, SEPTEMBER 1, 1976

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIMINAL JUSTICE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:40 a.m., in room 2141, Rayburn House Office Building, the Honorable William L. Hungate [chairman of the subcommittee] presiding.

Present: Representatives Hungate, Mann, Holtzman, Drinan, Wiggins, Hyde, and Rodino [chairman of the full committee].

Also present: Thomas W. Hutchison, counsel; Toni Lawson and Robert A. Lembo, assistant counsel; and Raymond V. Smietanka, associate counsel.

Mr. HUNGATE. The subcommittee will be in order.

Today's hearing on legislation to establish an Office of Special Prosecutor is a continuation of a matter the subcommittee has had under consideration since 1973. At previous hearings we have heard from a broad range of witnesses, several Senators, Members of Congress, the Attorney General, the current Special Prosecutor, from the American Bar Association, the American Civil Liberties Union, and prominent members of the Bench and Bar.

Some of these witnesses have testified in support of title I of S. 495, as that bill passed the Senate. The provisions of that bill set up a permanent Office of Special Prosecutor as a part of the Justice Department. The President would appoint the Special Prosecutor like an official of the Justice Department. The President would appoint the Special Prosecutor, by and with the advice and consent of the Senate, but the President could not select someone who held a high level position in any campaign for Federal elective office. The Special Prosecutor would be able to serve only one 3-year term.

Other witnesses have testified in support of H.R. 14476. That bill is virtually identical to title I of S. 495, as that bill was reported by the Senate Government Operations Committee. H.R. 14476 establishes a mechanism for the appointment of a Special Prosecutor on a case-by-case basis. The Attorney General would make the appointment, but his decision would be reviewable by a special panel of judges. This panel of judges would, if necessary, appoint the Special Prosecutor. The Special Prosecutor would serve until the completion of the case he was appointed to handle.

It has also been suggested to the subcommittee by one of its witnesses that no legislation is necessary, in the belief that both the approaches of the pending legislation endanger the vitality of the Jus-

tice Department in its law enforcement role. Others have opposed a permanent prosecutor, but support a temporary prosecutor subject to proper triggering and appointment procedures.

Today's witnesses will, I am sure, prove to be helpful. Their views as to the proper course of action will assist the members in trying to resolve which course of action may be appropriate.

We are pleased to have our chairman as the first witness.

TESTIMONY OF HON. PETER W. RODINO, JR., CHAIRMAN, HOUSE JUDICIARY COMMITTEE

Chairman RODINO. Thank you very much, Mr. Chairman and members of the subcommittee.

First of all I would like to commend the chairman and this subcommittee in particular for its efforts in this area. This committee has been working for a long period of time in trying to develop a new constitutional perspective in regard to matters that I think are at the base of our system of criminal justice. I think the extensive work that this subcommittee undertook in 1973 contributed mightily to the resolution of our recent constitutional crisis, and I am sure the American people are deeply indebted for the work you have done.

With regard to the legislation before us, legislation which is presently being considered by the committee, providing for the appointment of a Special Prosecutor, Mr. Chairman, I have a prepared statement, and I would like to ask unanimous consent to insert that at this point, together with some editorials and other matters that I think are of informational interest to the subcommittee, commenting on the legislation.

Mr. HUNGATE. Without objection, it is so ordered.

[The statement of the Honorable Peter W. Rodino, Jr. follows:]

STATEMENT OF HON. PETER W. RODINO, JR., CHAIRMAN, HOUSE JUDICIARY COMMITTEE

Mr. Chairman and members of the subcommittee, I am pleased to be here this morning to comment, very generally, on the legislation providing for the appointment of a Special Prosecutor.

Under your leadership, Chairman Hungate, the Subcommittee on Criminal Justice has developed a unique constitutional perspective and expertise regarding these issues. The extensive work this subcommittee first undertook in 1973 contributed mightily to the resolution of our recent constitutional crisis, and the American people, I know, can look again to your hearing and mark-up process with great confidence.

At the outset, I would like to state that I question the wisdom of reporting legislation creating a permanent office of Special Prosecutor, such as is embodied in Senate Bill 495. No one cares more deeply than I for the integrity and sensitivity of our law enforcement institutions, but I fear the dangers inherent in providing for a permanent office outweigh the safeguards that such an office is intended to provide. I am all for providing the mechanisms to insure the availability of Special Prosecutors in the unusual circumstances that demand it, but I would not wish to dilute their effectiveness by making permanent their office.

First, the need for a special prosecutor only arises in those extraordinary situations when a conflict of interest develops respecting the Attorney General's investigations and prosecutions of high-level executive branch officials so that he is unable to discharge his responsibilities properly. Despite our recent crisis, I think there is little doubt that historically such situations occur only infrequently. The creation of a permanent special prosecutor would, I fear, invite special prosecutors to engage in widespread fishing expeditions that

could become witch hunts, seriously endangering dearly held civil liberties. This danger exists not because these Federal officials will inevitably abuse power, but because they will naturally wish to justify the existence of their office.

I believe it only fair to say that the Office of Attorney General has traditionally functioned well in fulfilling its responsibility of enforcing the laws of the United States. The crimes and grave abuses of office are still fresh in our minds, and it must be our objective to restore the American people's faith in government. But this can and should be accomplished in ways which will not unduly and unnecessarily undermine the legitimate and necessary powers of an already weakened Office of Attorney General. We must be vigilant, we must be prepared, but we must not over-react.

In addition, as I have suggested, the very impact of the Office of Special Prosecutor would be steadily diminished by its permanency.

I think it far preferable, therefore, to provide for a *temporary* special prosecutor in appropriate circumstances. This approach would, in my judgment, lend more significance to the office and has, as we know, worked well in the past. Appointments would be made only in those instances where a need for this "extraordinary remedy" becomes manifest. The attention and energies of the appointees would then be necessarily confined to the particular matters at issue.

Finally, let me comment on the confirmation of appointments to the Office of Special Prosecutor. It is my feeling that with respect to this most important office, both Houses of Congress should participate in the confirmation process. I believe there is no constitutional proscription against providing for confirmation by both the House and the Senate. And, as you are all aware, the House of Representatives is the first body to act on impeachment matters. The House therefore has a substantial interest in assuring that those persons appointed demonstrate those qualities that make for an impartial, thorough, competent and committed exercise of the functions delegated to the Office of Special Prosecutor.

Mr. Chairman and members of the subcommittee, I know of your long and deep interest in the administration of justice. And, I know too, very personally, of the dedication of our Judiciary Committee members in preserving the rule of law. I am confident that the result of your deliberation, whatever it may be, will be a step forward in achieving the kind of Federal law enforcement the constitution envisions.

Chairman RODINO. I would like to say very generally—and I will state it briefly because you have two witnesses here who will, I believe, because of their wisdom and experience and expertise in this field, be able to contribute greatly to the outcome of this legislation, and it is important that you have the benefit of their views. I would not want to impose on their time, I know some of them are under a time constraint.

I would like to say very generally, however, that this legislation creating a permanent Office of Special Prosecutor, bothers me greatly. I believe that such an Office of Permanent Special Prosecutor questions the ability of our present institutions to meet situations that might develop from time to time. Experience has shown, however, that our system has been so set up that, even when there have been great crises, we have been able to deal with those problems that developed.

I think that for us to act at this time and create the Office of Special Prosecutor on a permanent basis would fly in the face of all reason and experience. I believe that there is a need to closely scrutinize the legislation that is before us. I believe that this committee has the responsibility to assure that whatever legislation is reported out—if indeed there is any legislation reported out in this session of the Congress—does meet the circumstances that we have in mind.

I think the circumstances that are contemplated are unusual circumstances, which I think arise because of unusual events, and there-

fore would require us to act in an extraordinary manner. I do not believe that setting up the Office of Permanent Special Prosecutor would meet that kind of an exigency. I believe, therefore, that we have got to recognize the changes that are inherent in providing for a permanent Office of Special Prosecutor.

I would like to say, Mr. Chairman, that the two gentlemen who are here today will greatly help the committee's deliberations. Mr. Archibald Cox, who served in the Office of Special Prosecutor at a time when our country was confronted with a constitutional crisis, has a wealth of experience, expertise, and certainly wisdom to bring to the committee and is very welcome here. I am of course also pleased to see the man who served with the committee on the Judiciary at a time when this country was engaged in weighing the grave question concerning the Office of the Presidency of the United States, John Doar, who served as special counsel to the committee during the impeachment inquiry. I am sure that he was intimately acquainted with the circumstances that developed at that time, and certainly he can bring views which the committee would consider very seriously.

I would think therefore, Mr. Chairman, without imposing on the time of the committee, that I would defer to those gentlemen. I would be pleased, of course, at any time hereafter—since I have more opportunities to discuss these matters with the subcommittee and the full committee—to discuss these matters and to answer any questions at a later time.

Therefore, I conclude my statement at this time.

Mr. HUNGATE. I thank the chairman for his statement and assistance to the subcommittee. Am I to understand that you have several commitments this morning?

Chairman RODINO. Yes; I will try to return, Mr. Chairman, but at the present time I think I would rather give way to Mr. Cox and Mr. Doar. I know they have come here at your special request.

Mr. HUNGATE. If it pleases the subcommittee, we will proceed in that manner. Thank you again Mr. Chairman, and we will move along.

Professor Cox, please. We welcome you here and thank you for interrupting your schedule and taking the time to be with us to help us to study this rather knotty problem.

TESTIMONY OF ARCHIBALD COX, WILLISTON PROFESSOR OF LAW, HARVARD UNIVERSITY, AND FORMER SPECIAL PROSECUTOR

Mr. Cox. Thank you, Mr. Chairman. May I say that I appreciate the opportunity to appear before you and your fellow members of the subcommittee, and to present such views as I have, and whatever help I can give on the matter before the committee.

Mr. DRINAN. Mr. Chairman?

Mr. HUNGATE. The gentleman from Massachusetts.

Mr. DRINAN. In view of the fact that this distinguished gentleman is a constituent of mine in Massachusetts, I want to especially welcome him as both a distinguished lawyer and a great public servant.

Mr. HUNGATE. Thank you, Mr. Drinan.

Mr. Cox. I appreciate Father Drinan's words, and also the chairman's.

For the record, my name is Archibald Cox, I am a professor at Harvard University and live in Wayland, Mass.

I would like first to stress what I take to be the importance of congressional action at this session to raise the standards of conduct expected of public officials, to increase their accountability, and to insure the full, vigorous, and impartial investigation, and, if necessary, prosecution, where there is reason to suspect that wrongdoing, or a breach of public trust has occurred.

In saying that I fully recognize that there are no guarantees. In the end, we have to rely upon the integrity of men, particularly on the integrity of the Attorney General and of the lawyers in the Department of Justice; and I am convinced that on the whole and over the years they have proved fully worthy of that trust.

Indeed, I think one can go somewhat too far in attempting to substitute laws for character. The Senate bill seems to me to go much too far in excluding men who have made political speeches in support of a Presidential candidate from being considered for Attorney General.

There is no guarantee beyond that of the good sense of the people in choosing as their officials men of honor and integrity. Still, since we are all human, men do from time to time—happily rarely but nevertheless from time to time—fall prey to weakness. We can, I think, increase the ability of the system to work itself clean.

It seems to me that the people want assurance and need assurance, to rebuild their confidence in the political system, that those steps have been taken, and I think they are also looking for evidence that those who have power in the present political system are interested in accountability and enforcing high standards of honor and integrity.

Second, I am opposed to the provisions for appointing a permanent Special Prosecutor, such as are found in the bill that passed the Senate. I am in favor of putting in place a mechanism by which a Special Prosecutor may be appointed if unhappily the situation arises in which we cannot, because of the very unusual and heavy pressures, rely upon the integrity of any Attorney General who may be under conflict of loyalty or interest.

In explaining my reasons for that view, I will talk about the bills referred to by the chairman: S. 495 as reported, which is virtually the same in the respects before us as the Hungate bill, H.R. 14476, and the Senate bill as it was passed.

As I understand the Hungate bill and S. 495, as reported to the floor of the Senate, there were essentially two main thrusts. One was to establish a division in the Department of Justice that would investigate and prosecute, if necessary, the alleged crimes of Government officials on a rather broad scale. That seems to me to be a sound and desirable provision, although perhaps not of great importance because I think any Attorney General would take those steps, or essentially those steps, on his own under present conditions.

And then the theory of the Senate bill as reported was that there may be a few extraordinary situations like the Teapot Dome scandal, or like the Watergate affair, in which it is not fair to ask any Attorney General to be responsible for the investigation and prosecution because so much is at stake; and while many of them no doubt would

act with complete honor and integrity, questions would be raised about full public confidence. As I understand it, the original conception was that this would be truly a very narrow class of exceptional cases.

The faults were that the triggering device was too broad, and other objections of that kind. Instead, in the Senate bill as passed, provision is made for the appointment of a permanent Special Prosecutor with a rather broad jurisdiction to investigate, and if necessary prosecute, any violation of any Federal law by the President, Vice President, Attorney General, the Director of the FBI, anyone in the Cabinet, subcabinet, any Member of Congress, or any member of the Federal judiciary—this is really quite embracing.

I think that the last proposal is a mistake, essentially for three reasons.

First, I think it is very unlikely that anyone could be found for this position under normal circumstances who would have both the proven capacity and the degree of public confidence necessary in some real crisis. When I think back, I just don't see an Owen Roberts, or a Senator Pomerene who prosecuted the Teapot Dome inquiry, taking the position, under normal circumstances, of a permanent Special Prosecutor. I don't think there would be enough of real interest to challenge, to attract a vigorous and topnotch lawyer.

Furthermore, one has to bear in mind that a man's suitability to be Special Prosecutor in a given crisis depends very much on the circumstances of that crisis. To put it in personal terms—if you will forgive me—it is the first illustration to come to mind—assume that, I was suited to the position during the Watergate affair. If the matter had arisen during the Kennedy administration, I would hope that I would have behaved with integrity; but I don't think I or anyone else would have thought that I was suited to that position. I think this is inherent in human relationships, particularly the human relationships of anyone who has taken a part in public affairs, or in government. It is not the question of their personal honor or integrity, or their courage; it is simply to say that we all get involved in relationships that affect the degree of public confidence that we will command.

I don't quite see how one could find a man who you would be sure would be the right man to be Special Prosecutor if, unhappily, as I say, a critical situation should develop during the next 3 years. If you did, I think he almost by definition would have to be so remote from previous contacts with government and public affairs that he would not have the knowledgeability which would enable him to perform the job successfully.

My second reason for opposing the position of a permanent Special Prosecutor is that I think that the jurisdiction is broad enough so that staff positions would have to be filled on an ongoing basis. And yet, I think that the men who filled those positions would be unlikely to be men of the ability that were attracted to the subcommittee's staff, both on the majority and minority side, during the impeachment investigation hearings, or to my staff when I was Special Watergate Prosecutor.

My third objection is a more technical one, but I think it is worth mentioning. The Senate bill would provide for a 3-year term and

prohibit reappointment. Now, I suggest that the probabilities are very strong that, if one of these major cases occurred, the Special Prosecutor who started on it would not be able to finish it. You know, it takes a year or more to go through one of these things. There is at least one chance in three that any matter that came before him would come up during the last year of his term. I cannot do the mathematics, but I think you can see what in principle I am getting at.

I turn now to the Hungate bill, or the Senate bill as reported. As I said earlier, it seems to me that the essence of those two bills was first to recognize the importance of the investigation and prosecution of crimes by Government officers, but to declare the confidence of the Congress in the Attorney General and the Department of Justice on a continuing basis by putting the special division to deal with such crimes under the Attorney General and in the Department—and I think that is entirely sound.

Then, the theory was that there was a narrow category of cases, or might be a narrow category of cases in which too much was at stake politically, and loyalties are likely to be too close and too strong, to expect any man, any Attorney General—any man—not to suffer under the conflict between his duties to be impartial and rigorous in the investigation and his ties to his President, political party, and conceivably his own political interests.

I think that is a sound conception, as I said. The fault—and indeed, I should make it clear, I wrote to Senator Ribicoff endorsing the bill as it was reported, and I still think that the gist of it is entirely sound.

It has been criticized, as I understand it, for catching up too many cases. It is said that today we would have Special Prosecutors running out of our ears. It is also said that the publicity of the Attorney General's filing a memorandum with the Court of Appeals for the District of Columbia judges, and perhaps litigation over whether he should have appointed a Special Prosecutor, would be unfair to those under investigation.

Did I say something confusing? Mr. Chairman, I thought that I had confused you in some way.

Mr. HUNGATE. That is my normal condition.

Mr. Cox. And the third criticism that was offered was that the Senate bill as introduced invited litigation over the Attorney General's decisions to appoint or not appoint a Special Prosecutor, and that that litigation over his sensitivity to alleged conflicts of interest would sometimes lead to embarrassment and loss of confidence in the department.

On the whole, while I have some skepticism as to whether the number of cases can be as large as the figures I have heard bandied about, from 12 to 20 to 30, I cannot argue with them because I do not know what cases the Attorney General and Assistant Attorneys General have in mind. I do think that the triggering device could be improved. I am inclined to think that it probably is too broad. On rethinking the matter I find other provisions in it which I think are unfortunate.

I would suggest that the provision be quite fundamentally redrafted along these lines, and then I will fill in a few details.

First, I would have all appointments of the Special Prosecutor made by the court—by the court I mean the Court of Appeals for the Dis-

strict of Columbia Circuit, or a panel of it. It seems quite clear to me that that is constitutional, indeed article II speaks of vesting the power to appoint inferior officers of the United States in the courts. It seems to me that it is consonant with judicial duty.

There are many instances where both by statute and by tradition judges—either in the Federal system or the States²—have appointed prosecutors for one occasion or another. And I think that if the conflict calls for the appointment of a Special Prosecutor if it is so intense that no Attorney General could command public confidence if the department continued to press the investigation, then I doubt whether the Attorney General ought to be the one to choose the man who will press it. Again, I emphasize that it is not just a matter of whether he would do it right; it is also a matter of whether the public would feel that he could be counted on to do it right.

Second, I would greatly narrow the category of cases where the Attorney General has a legal duty to apply to the court for the appointment of a Special Prosecutor. I would limit it, as I shall fill out in just a minute, by listing the individuals, that is to say, the limited type of officers, to which the machinery would apply; and I would also limit it by the type of crime to which the charges related.

I was running through the Criminal Code on the plane coming down this morning. There are a lot of crimes by government officials that do not even involve any kind of criminal intent; they may really be not only honest mistakes, but even not negligent mistakes. If an officer of the United States expends salaries that have lapsed, he is guilty of a crime; but whether the salary has or has not lapsed may not always be clear. If he makes a contract in excess of an appropriation, he commits a crime. Again there may be a problem whether money is available for that purpose, which he has tried to answer honestly, but the Comptroller General has disagreed with him. And of course there is the provision you are all familiar with, that is subject to all kinds of disputes and interpretations, that prohibits using public funds for the purpose of lobbying any Member of Congress.

In other words, I think that thought ought to be given to confining the arrangement that is put in place, the triggering device, if you prefer, to those crimes which we all really have in mind.

Third, I would set up a considerably broader—broader than my first category—considerably broader category of cases in which the Attorney General would have the discretion to apply for the appointment of a Special Prosecutor; but no legal duty to make the application; the decision would rest in his hands.

Now, the reason I would set up this special category—the reasons are two:

My first category would be very narrow. It may well be that in drafting it I or you would not have foreseen some type of situation that might develop, that really did cry out for the appointment of a Special Prosecutor.

I think if the machinery was set up for filing an application and the Attorney General were given the discretion, one could in a somewhat broader and harder to identify class of cases—if indeed it exists—rely on the pressure of political and public opinion to cause him to exercise it. After all, if there is a real basis for saying that there is conflict

of interest, danger or divided loyalty in an important matter where you could not rely on men of integrity and where they really ask you not to rely on them, it would be awfully hard, if you got the authority to set the machinery in motion, not to do it. I think that is a sufficient safeguard against any instance that I have overlooked with respect to the narrower category.

Now, I have tried my hand at this last evening, and I would be glad to hand my rough draft to the staff. Perhaps it would be helpful if I were to outline what it is for you and for the purpose of the record now; but if that is too much detail, I would be glad to leave it with the staff.

Mr. HUNGATE. I would be glad if you could outline it.

Mr. COX. All right.

Mr. HUNGATE. If you can define it, fine.

Mr. COX. Remember, there are two provisions, as I see it. The first, the one I describe as the narrower one, would provide, "Upon receiving information, allegations, or evidence that . . ." a given class of officials—and I put in the class, going back to the language—"the President, Vice President, any individual serving in a position compensated at level 1 of the executive schedule"—that's the Cabinet—"or working in the Executive Office of the President and compensated at a grade not less than level V of the executive schedule; any individual who held such position during the incumbency of the President, or an immediate predecessor of the same political party; or"—and these are people not taken care of in any of the present legislation, I believe—"any individual who was national campaign manager or chairman of any national campaign committee, seeking the election or re-election of the President or Vice President . . ." Those are the people I would name.

Now, going back to the draft—"Upon receiving information, allegations, or evidence that . . ." any of that class of people "has authorized or engaged in any Federal criminal wrongdoing involving the willful or knowing abuse of the powers of his office" notice that specific intent would be required "or has authorized or engaged in any willful violation of any Federal criminal law regulating the financing or conduct of elections or election campaigns; or violated any Federal criminal law relating to the obstruction of justice, conspiracy to defraud the United States, or perjury" and I would include perjury before a Congressional committee. And if the Attorney General gets information charging any of those persons with any offense in those three categories, "the Attorney General shall conduct such investigation as may be required to ascertain whether the charges are frivolous for a period not to exceed 60 days. If the Attorney General finds that the charges are not frivolous, or if 60 days elapsed without a finding that the charges are frivolous, the Attorney General shall forthwith apply to the United States Court of Appeals for the District of Columbia Circuit for appointment of a Special Prosecutor."

I would go on, "The application shall be made under seal, and shall include a summary . . ."—and I did not copy the language—of the material that would be in his file, and such other information as may be necessary to assist the court to select a Special Prosecutor and define his jurisdiction.

Then I would say—and this goes to the point of publicity—“The application shall be granted and the name and jurisdiction of the Special Prosecutor published in the order of the court, unless the court finds that the case is not covered by this section.”

It would seem to me, in the first place, if we are in a case of this category, there probably will have been publicity; but it would seem to me it is not inappropriate simply to know who this prosecutor is and what jurisdiction he had been given. That would mean that it would be known that some identifiable person or persons were under investigation. That is not unusual in the case of a grand jury inquiry, and it seems to me not unfair to a public official, if affairs have reached this pass, because remember, frivolous cases are excluded.

Now, my other provision, which would be the discretionary one, would read something like this: “If in the course of a criminal investigation actually or potentially involving any person who holds, or at the time of the possible violation held office—and then I have a somewhat broader class—“as President, Vice President, Member of Congress, or judge of any court of the United States; or held any position compensated at a rate greater than executive level V . . .” if in the course of investigating a person holding any of those positions—“ . . . the Attorney General determines that the continued pursuit of the investigation or prosecution, or its outcome, may so directly and substantially affect the political interests of the President, of his party, or of the Attorney General as to raise serious doubts concerning the ability of the Department of Justice to conduct the investigation and any subsequent prosecution uninfluenced by political fears or political loyalties, and with the full confidence of the public, he may apply to the appropriate division of the United States Court of Appeals, District of Columbia Circuit, for the appointment of a Special Prosecutor.”

I would then go on with language that said what should be included under seal with the application, and would provide that the appointment should be made, unless the court found that there was not reasonable basis for doubting the ability of the Department to proceed without conflict of loyalty or full confidence of the public. I explained the rationale earlier, so I won't go back to repeat it.

There are just three more points, Mr. Chairman.

First, I think any legislation, should provide that the legal duties created by the first of my two proposed sections would be enforceable by mandamus only by the House and Senate Judiciary Committees. I think it is a great mistake to give any member of the public the power to set in motion litigation that involves disclosure of the facts of an investigation; I don't think it is necessary.

Second, I think any legislation could certainly provide that any man may be named Special Prosecutor to conduct a number of investigations, if necessary. This would at least reduce the number in the unhappy event that a number were called for, which I surely would hope would not occur.

And finally, just as I suggest that the appointment should be made by the court and not by the Attorney General, I think the removal should be accomplished by the court, for the limited kind of causes set forth in the bill.

Well, that is my suggestion. I guess my feeling is biased because it is my own draft. I think it is an improvement over the previously suggested triggering devices, but undoubtedly needs further work before it would be perfect. That completes my statement, Mr. Chairman.

Mr. HUNGATE. Thank you very much, Mr. Cox. You have obviously given this careful consideration, based on pragmatic experiences, too. So, it is of particular and peculiar benefit to the subcommittee.

Mr. Wiggins?

Mr. WIGGINS. Thank you.

Professor Cox, would the temporary Special Prosecutor appointed by the court under that formula be subject to Senate confirmation?

Mr. Cox. No.

Mr. WIGGINS. Is that wise?

Mr. Cox. I think that if the appointment is made as a judicial matter, the separation of powers would make it inappropriate to have the legislative branch involved.

Mr. WIGGINS. All right, I will take that under advisement.

Professor, I want to compliment you for what I think is a balanced approach you bring to this issue. It appeals to me because it largely coincides with my own point of view. But I am troubled about almost the threshold question, whether to do anything at all.

The testimony you have offered, was offered by our chairman, and will soon be offered by Mr. Doar reflects justified confidence in the ability of our institutions to respond to problems, and particularly in moments of crisis. I strongly agree with that proposition.

The most recent experience resulted in the appointment of a Special Prosecutor without any underlying statutory mandate for doing so. The initiative of the President to send your name down was obviously made under some considerable pressure on his part, but the point is, he did it, and the standards which governed you were imposed by the Senate, this confirmation process.

Now, I would like for you to respond to this, do you feel that it is necessary to amend the law at all to permit our institutions to respond to a crisis of the magnitude which this legislation contemplates?

Mr. Cox. I think it is important to enact legislation in this area for two reasons, Mr. Wiggins. May I say first that I, too, think there is an excellent chance that our institutions, as they stand, will respond in one way or another. But despite that I think action is important. I think that putting in place machinery of the kind that I have outlined, for this narrow classification, would give all of us, the public, greater assurance that when something rotten occurs, our Government and our political system can work itself clean as quickly and smoothly, and efficiently as possible.

I think that having this machinery increases the degree of assurance, and would alleviate all the problems of whether there will or will not be a response to a particular crisis.

I would point out in that connection that one cannot be sure that the Attorney General will leave office in the middle of an outcry for a special investigation, and that the new Attorney General in order to get confirmed will be under heavy pressure to take the step of appointing a Special Prosecutor. It was he, not I, who was in form, at least, confirmed by the Senate Judiciary Committee.

Second, it is perhaps presumptuous for me to suggest to Members of the subcommittee or any other Members of the Congress what the public feeling is; but I think, as I listen to people, read, talk to them, that they want assurance, pretty visible assurance, that those who are in positions of power in the present political system really are concerned with enabling the system to work itself clean, with raising the operating standards of conduct in public life, and with full vigorous investigation, and if necessary prosecution, of those who do wrong, regardless of whose ox is gored—and I underscore the latter.

Mr. WIGGINS. I understand that point, Professor, and appreciate the importance of it. The only problem that I foresee in the possible scenario of doing nothing is, if the Congress and the administration are of one political party, there might not be the zeal to expose and enforce executive action as we have seen in the last Congress, that is a possibility that might occur in the future. And yet, I really have confidence that even the minority and the public can drive a reluctant President into doing that which the public interest requires.

But I think it is important that if the President responds and selects a Special Prosecutor, that that individual come down to the Senate and be confirmed. This would provide a public forum for the minority to make the very point which I think can be made with greater force and greater visibility than it would be made in the chambers of the three-judge panel making that ultimate decision as to whether or not the Special Prosecutor nominee is the appropriate one.

The political forces can be brought to bear with maximum effectiveness in a political forum, such as the Senate of the United States, rather than a judicial forum. Would you respond to that?

Mr. COX. Well, it is a matter of judgment. My judgment is very strong that a judicial appointment would be seen as removing any possible taint of political partisanship, whether it was hostile partisanship, or a danger of excessive friendliness; and I think the Court of Appeals of the District of Columbia, the three-judge panel, commands enough confidence and has judges with enough experience and ability so that one could be confident of their appointment.

Mr. WIGGINS. Well, only among the legal and judicial fraternity. Out in my district they have never heard of the Court of Appeals of the District of Columbia. I have the greatest respect for that body and perhaps would be greatly impressed by their selection. But if the issue is the public perception of objectivity, I wonder if a judicial selection is going to get at that issue.

I don't ask you to respond to that, that is a judgment call. Thank you very much for your testimony, Professor.

Mr. HUNGATE. The gentleman's time has expired. Chairman Rodino?

Chairman RODINO. Mr. Cox, first of all, again, let me welcome you here. I am very happy that you found the time to be able to come and give us the benefit of your views on what I consider to be very important legislation.

Mr. Cox, in view of your experience and looking back with hindsight on those developments, if S. 495 had been in effect and there had been a permanent special prosecutor, would such a Special Prosecutor have been able to deal with that set of circumstances?

Mr. Cox. Well, my fear and my judgment is that it is highly unlikely that the man who would have occupied that position at that time

would have had the proven capacity and the public confidence in his impartiality and integrity that would make him the most suitable man for the job.

Now, that is a matter of probabilities. Of course, it might have been that he would have turned out very well. But I think the odds are against it, and that is why I think selecting the man on these occasions is a much better way to proceed.

Chairman RODINO. Does it not seem appropriate to say that we are attempting to deal with a situation through this legislation similar to those circumstances that occurred during Watergate, and that those were circumstances and events that were so unusual and so extraordinary at that time, that we would have to envision an unusual type of situation, as well, for the creation of this office.

What I am thinking of is that the activities of the individuals involved in those events at that time, which were finally brought to light by the public, by the Congress, and I think just by the force of events, were such that they call to mind such abuses of power, such criminal actions that the institutions then set up were unable to deal with only because there were certain political circumstances; and because many of the individuals involved were individuals who committed such actions that fell short, in many cases, of impeachable offenses. And because they fell short of impeachable offenses, some of these individuals could not be dealt with.

It would seem to me that we are thinking, then, of the kinds of extraordinary events and extraordinary circumstances which would suggest that we have an extraordinary type of individual who would deal with that situation set up through a kind of standby authority which would be in place, so that the President and the other institutions of the Government could act. I think that in that kind of a light we could better deal with the situation we are considering here.

I do not believe, very frankly, that looking back at Watergate, and if indeed this is supposed to be an effort at Watergate reform, that setting up a permanent Special Prosecutor would work. It falls far short and it seems to me that your statement suggests that you agree. It seems you also prefer legislation that would provide for a temporary Special Prosecutor, an individual who could be set up under certain circumstances with the kind of triggering mechanism that you have outlined. I commend that kind of a suggestion.

Mr. COX. Thank you, Mr. Chairman.

Mr. HUNGATE. Mr. Drinan?

Mr. DRINAN. Thank you, Mr. Chairman, and Professor Cox, I want to thank you for a very fine statement.

I have some worry about bringing Federal judges into this situation. In the unfortunate case of Otto Kerner the ordinary system worked well.

Would you feel some Attorney General might feel that a case of alleged wrongdoing by a Federal judge would be so political, would be so difficult that he would call for a special prosecutor even though he felt he could, and his office could, handle the matter in due course?

Mr. COX. I think, Father Drinan, it would be a very, very rare case where he felt he must call for a Special Prosecutor in a case involving the Federal judiciary. You will note that I put that in the provision

where he merely would be given the power, as I did indeed in the case of Members of Congress.

As I run my mind back—and I did think about this a little before coming down—I did not think of any case involving a Federal judge who has been investigated and prosecuted in the past, where I would think that the Attorney General would have felt these pressures that were too intensely conflicting for him to handle the case. But, well, I guess I could imagine such a thing developing. I would say the same thing in the unhappy event that there were an investigation of some Member of Congress for offenses of this kind.

I would have confidence that if such an unhappy event occurred, the Attorney General would normally go forward and do his duty like a man. But one can, again, imagine situations in which the vote of a particular chairman is intensely important, or where a particular chairman or other Member of Congress has been very closely tied in to the whole situation of the parties.

I guess I thought if I was putting one in that category to some extent, I also ought to put the other in.

Mr. DRINAN. Well, Professor Cox, how would you react to the suggestion that we simply drop Federal judges because of the independence of the judiciary, and because of the added complication that the judges themselves, the court of appeals, would be appointing a Special Prosecutor to sit in judgment over one of their brothers. What harm would happen if we just excised that and did not mention Federal judges?

Mr. Cox. I would not think it was any great loss. May I say just one thing more at this point? I hope some day that the Judiciary Committee will consider whether the United States should not copy the State of California and some other States, and set up machinery for hearing charges against Federal judges, not simply charges of crime, but of other conduct which makes their continuance, or continuance without a reprimand unsuitable. I think this is a gap in our system.

I say it is a gap not because of any lack of confidence in the Federal judiciary, but because the existence of such a forum, where it has been established, builds the confidence of the public, people have a place to go with their grievances; and there is a way that does no discredit to the judge of dealing with a man who unfortunately has become incapable of carrying on his office, yet to impeach him carries connotations of guilt that nobody would wish to impose.

Forgive me for including that, but that is very much on my mind.

Mr. DRINAN. I think that was in my mind too, that we should do something about that; and it is within the mandate of Congress to do it.

On a different point, Professor Cox, do you feel that the Special Prosecutor, as you see him, would have the power to be a self-starter? In the Senate bill, as Mr. Doar is going to bring out later in his testimony, the permanent prosecutor appointed there is a self-starter, and as the Attorney General mentioned when he testified before us, this is in some ways a second Attorney General.

Now, if the Special Prosecutor, as envisioned by your fine testimony, did, in fact, uncover crimes somewhat related to the crimes over which

He has jurisdiction, could he investigate them without talking to the Attorney General?

Mr. COX. I think that is an excellent suggestion that I did not cover. I think that the way of dealing with it would fit in with the plan I was attempting to outline to include a provision authorizing him to apply to the court of appeals for the broadening of his jurisdiction, and he would apply under seal. The court would grant the application—

Mr. DRINAN. Without the Attorney General being heard?

Mr. COX. Either way, I think. It might depend on the circumstances. The court might be given a choice in the matter. One could think of cases where the Attorney General should not know about it. I did not tell my good friend, the Attorney General, while I was Special Prosecutor, everything I was doing.

There may be other cases where consultation really would be in order because the Special Prosecutor might not know what the Department of Justice was engaged in doing.

Mr. DRINAN. At the same time some ambitious person who had been designated Special Prosecutor might like his job, the publicity he gets, and then he might go from one thing to another and the Attorney General, and even the succeeding Attorney General would have such a political "hot potato" that he would not be able to petition the court to terminate it and allow this to revert to the Department of Justice.

Mr. COX. Well, I think I would be willing to take such risk as there is, bearing in mind that the types of cases, the people subject to investigation to whom the statute would apply, are very limited, the types of crimes are limited; and bearing in mind that the court of appeals would have some discretion.

Now, I must say I have not obviously and visibly thought through the details of just what would be the relationship to the Attorney General and broadening any authority of the special prosecutor. I am offhand inclined to think that ought to be quite flexible.

Mr. DRINAN. My time has expired; thank you very much.

Mr. HUNGATE. The gentleman from Illinois, Mr. Hyde.

Mr. HYDE. I have no questions.

Mr. HUNGATE. Mr. Mann?

Mr. MANN. Professor Cox, I am sorry that I missed part of your testimony.

In the category of the Attorney General's request, in which he may apply, is there really any limit at all to that category? When we refer to that category we are talking about judges, but we could talk about campaign committees, about all kinds of things that do not fit under any category except a very, very broad category that might be termed political, or that might be termed infectious of his objectivity. But is there any reason to limit in any way his discretionary power to ask the court for a Special Prosecutor?

Mr. COX. Well, I would favor limiting it for this reason, I should dislike to say to the Attorney General and the Department of Justice, or to the public that in every case where there might be some conflict of interest you should consider the appointment of a Special Prosecutor. What we rely on in instances where there is any personal conflict

is that the Attorney General disqualify himself; and we rely on the spirit of professionalism among the lawyers in the Department, for those who do feel the pressures to take themselves out, to stand aside.

Therefore, I would not like to say, "Now, you must think pretty carefully about appointing a Special Prosecutor" unless the case involves at least potentially a situation where the type of loyalty that might make it difficult for him to go on is a very strong one.

Mr. MANN. Do you contemplate that upon an application by the Attorney General, that the court can refuse?

Mr. Cox. I didn't understand.

Mr. MANN. Do you permit the court to refuse the application of the Attorney General?

Mr. Cox. I permit the court to refuse it if the court says in effect, "Don't be so hypersensitive, you can properly do this." But unless the court feels it can say that, my provision would require the court, following the law, to go ahead and make the appointment. You know, there is some danger in scrupulosity or hypersensitivity on the part of the Attorney General, and I don't want to encourage him to be that way, or to say to the public, there are very few times that you can count on the Attorney General or the Department.

Mr. MANN. Well, going back to my first question, I guess the court can be counted upon to act as a determinant of whether or not he was oversensitive, if he strayed from the categories that we otherwise refer to. But at the same time I agree with you that a very sensitive Attorney General might keep the court busy deciding whether or not he needs a Special Prosecutor.

Mr. Cox. May I add one further thought? Of course, it is always available to the Attorney General to appoint what in effect is a Special Prosecutor by naming a special assistant from outside the Department, to handle particular litigation, sometimes civil litigation, where there is a question as to whether the Department of Justice would be under political pressure not to do a good, professional job.

The case that comes to my mind because a friend of mine was named special assistant was the antitrust case against the Associated Press during World War II, when it involved the Chicago Tribune, and you may recall that President Roosevelt had been at sword's point with the Chicago Tribune, and it was felt that a total outsider should be appointed, and a prominent attorney of the other political party was named. That is always open to the Attorney General, one does not need special statutory authority.

And I think even my second category of case therefore says, "Well, look, here are some situations where we completely trust your judgment, but you ought to look at them a little more closely than you otherwise would." If you get that too broad it either does no good or it throws too much doubt on him and he is doing it all the time. That is why I do think some definition is preferable.

Mr. MANN. Thank you very much.

Mr. HUNGATE. Miss Holtzman?

Ms. HOLTZMAN. Thank you very much, Mr. Chairman.

Professor Cox, I appreciate very much the thoughtful suggestions you made respecting a Special Prosecutor. I tend to agree with your

own conclusions that an ad hoc appointive mechanism is by far the best.

I wanted, however, to discuss with you not so much the mechanism for appointment of a Special Prosecutor, but rather what happens when the work of the Special Prosecutor is completed, and the accountability of the Special Prosecutor to the appointive mechanism, to the Congress, and to the public.

When you were appointed Special Prosecutor, during Secretary Richardson's confirmation hearings, one of the mechanisms that was viewed as assuring accountability was the final report that was to be made. I recall your testimony before the Senate that "... it is important not only that prosecutions be brought where there is a proper basis for prosecution, but that the reasons for not bringing other prosecutions or reason for not indicting other figures, the exculpatory facts, if there were any, about other figures—that all those things be included certainly in the final report—conceivably in an earlier report—depending on the circumstances." That was a quote.

I am troubled by the precedent that is being set by the present Special Prosecutor's report. What is going to happen with regard to final reports under any Special Prosecutor bill?

In October 1975, the Special Prosecutor issued a report, summarizing the work of the office until that time, which was fairly general and in many respects quite superficial. Just last week the former Special Prosecutor, Mr. Jaworski, published a book in which certain information was set forth which was not contained in the final report.

For example, Mr. Jaworski recounts that there was an offer to plead guilty from Mr. Haldeman. He gives the details of the basis on which a misdemeanor plea was accepted from Mr. Kleindienst, details regarding the acceptance of a misdemeanor plea from Mr. Kalmbach, details of conversations between the Special Prosecutor and Mr. Ehrlichman, and staff memorandums on which a decision was made not to prosecute Mr. Nixon. All this information was never published before.

I am concerned that we are going to find out about the work of the present Special Prosecutor's Office in a piecemeal fashion, well after the fact, and in a manner subject to the vagaries of what particular editors think belongs in a bestseller, rather than having this information published in an official document, reasonably close to the time of the event, and subject to the scrutiny, memory and assistance of other persons working for the Special Prosecutor.

What does this augur for the future in terms of having the public understand, to the extent consistent with the privacy due process rights of the people involved, the bases on which crucial decisions were made?

Perhaps you wish to comment on that.

Mr. Cox. Well, I will say first that I have neither the intent nor the desire to publish a book on the subject, bestseller or otherwise. I would think it is quite plain that a Special Prosecutor who is preparing a report during, or at the conclusion of his work, could appropriately put in it anything which he could appropriately put in a book that he wrote about the subject. And I would think it is quite clear that anything that can appropriately be published should be included in a Special Prosecutor's report.

Second, I think it has to be recognized that under our system of justice those who conduct grand jury proceedings, or otherwise conduct investigations, are under some inhibition as to what they could make public. And when I say that is part of our system of justice, I think it is a very commendable part of our system of justice.

Exactly how these inhibitions work out in any particular case, I am afraid necessarily will depend not only on the facts, but also on the judgment of the man who is charged with making or not making the report. And of course Mr. Jaworski was no longer Special Prosecutor at the time the final report was made. Had he been making the report I would have thought that he would think it appropriate to put in the Government document anything he thought appropriate to put in his book—certainly I would.

I would think it was absolutely essential that the account you give of yourself to any official bodies and through them to the public, should have everything that you feel you could say with justice to the people who may be involved.

Well, does that sufficiently answer your question?

MS. HOLTZMAN. In any case, my time has run out.

MR. COX. Well, I'm afraid I took all your time, that was hardly fair.

MR. HUNGATE. Mr. Hyde has waived his time earlier, and he asked to be recognized for two questions.

MR. HYDE. Well, just this, Professor Cox. I, too, am very troubled by the Jaworski book, perhaps not for the reason that Miss Holtzman has enunciated, but, do you think that the details of plea bargaining should ever be made a matter of public record; doesn't this, to use a favorite word, have a chilling effect on negotiations with the Special Prosecutors? Does everyone who falls within the investigative purview of this office, whether permanent or ad hoc, lose their right to privacy; are all the most intimate details of conversations, weeping on the phone—aren't we, in the last analysis, thrown back to reliance on the integrity of this Special Prosecutor and his judgment?

This may be a rather disjointed question, but I am very troubled about revealing, whether for commercial reasons or others, details of plea bargaining because there just won't be a lot of that if they are going to be made public, it seems to me.

MR. COX. I would rather answer and speak for myself, rather than commenting on anyone else's problems.

MR. HYDE. Sure.

MR. COX. If you were to ask me to reveal all the negotiations I had with counsel for persons under investigation, I would press upon you that you really didn't wish to insist on the question, and I would certainly dig my heels in to the limits of disrespect—and while there would be no personal disrespect in any case, I might even go farther. In other words, I would not, even in a situation where I thought there was the strongest obligation on me to speak, be willing to disclose such conversations.

MR. HYDE. Thank you.

MR. HUNGATE. Well, there goes my book. [Laughter.]

I want to thank you, and I just have a few thoughts. I certainly appreciate your comment that in times of calm it may be a different sort of person we are looking for than the kind we want as Special

Prosecutor, who functions in times of heavy stress. We may not exactly want someone who is totally neutral, and if we get a partisan, whereas you may have been an excellent choice in the Nixon study, had it been Kennedy, it might certainly have been someone else who had been a better choice because of those intangible reasons we are familiar with.

I guess it is the question of how much is the cow worth, and whether you are the insurance adjuster or the tax assessor, we all have this problem.

One thing that concerns me about the public pressure producing it, as it certainly functioned very effectively in your situation, would be those cases where perhaps there were no tapes, or where there is no known conflict, the public has no chance, perhaps, to see it and become aroused. That is why I think maybe we are well off to have a statute that if I knew it, I would have a duty to reveal it, so that if I do not I am in trouble, and public pressure could function.

I take it you are concerned about the level of officer we would have as a Special Prosecutor, I don't mean to derogate it, I may be there 6 months from now—but this should not be a police court job, that is something that rises to a very high level of concern.

I understand your testimony to be that the statute be drafted in such a way—if there is to be a statute—No. 1, you oppose the permanent Special Prosecutor, but you would support a temporary Special Prosecutor under limited circumstances.

Mr. Cox. And I would, under carefully defined circumstances, require, put on the Attorney General the legal duty to make the appointment if he knows certain facts. I would rely on public pressure only under the somewhat broader category of cases.

Mr. HUNGATE. I think your suggestion—if I read it right—is eliminating a number of more petty, or less serious offenses, by enumerating the more serious ones we are concerned with, which certainly will be a help as we get into this problem.

As a lawyer, I guess I always want a residuary clause. I wonder if there is some area that we could leave open in case the mind of man invents some serious offense that we did not enumerate.

You suggest, I think, a time in which the Attorney General determines whether the complaint is frivolous or beneath the dignity of the action. I think you said 60 days. In any event, I think 30 days is too short, we generally heard that.

Mr. Cox. It seems too short.

Mr. HUNGATE. I think one witness said 90 days, and some of them said as long as 6 months. But you would think 60 days, perhaps 90, in that area?

Mr. Cox. Well, I would think if we are dealing with something of the importance my first category is limited to, that he ought to be able to determine whether it is frivolous within 60 days.

Mr. HUNGATE. In that length of time? I wonder if he gets as much "nut mail" as I do. [Laughter.]

Regarding the political disqualifications, whether you are a campaign manager, would you tend to make that a national campaign figure, if they are to be disqualified on that ground? Maybe I misread you, maybe you don't disqualify them, campaign managers.

Mr. Cox. May I ask, disqualified from what?

Mr. HUNGATE. Well, let's say Attorney General.

Mr. Cox. I would disqualify those who have been in major positions, in the management or financing of the campaign. I guess national committee positions, or national treasurer would be that. The thing that I think is too broad is disqualifying anyone who has made speeches in support of a candidate. For example, I would suppose that it was to be expected that senior officers of the Justice Department would defend the work of the Justice Department and the programs of the Justice Department in the course of a Presidential campaign. It seems to me quite proper that they would be required and encouraged to do it. I do not think that makes them unfit to hold the position.

Well, I think if that is true in the case of incumbents, it is equally true of those who make similar speeches attacking the programs. I think this is something where the exclusion by law must be very limited. The principle that the Attorney General is not a political position and should not to go to a political manager is a very important one. But for the most part that principle has to be established by conduct and tradition. There are very few things you can rule out by law.

Mr. HUNGATE. I was interested in your suggestion that mandamus might be a remedy. There is a recent American Criminal Law Review volume on this whole area of prosecutorial discretion, and I somehow assume this is really what we are addressing, the nature, the appropriateness of prosecutorial discretion, particularly in declining to act.

Mr. Cox. But remember, all I am talking about is enforcement of a rather narrow, and rather sharply defined legal obligation to make an application to the court of appeals, in my first category of cases. I find it hard to believe that any Attorney General would not act in those cases. But it seems to me somebody might say, "Well, shouldn't there be some enforcement." Well, I don't think any citizen ought to be able to bring an investigation into the public domain by instituting litigation. So, I suggested the Judiciary Committees be given standing to apply for mandamus to enforce what is virtually a ministerial duty.

Mr. HUNGATE. To give a remedy, but seek to prevent its abuse.

Mr. Cox. It would simply be, you see, to compel the application to be put in front of the court of appeals.

Mr. HUNGATE. Well, thank you again, and particularly for your drafting. I do want our staff, if they have not picked it up yet, to get the benefit of that.

If there are no further questions, that will conclude the witness' testimony. Thank you again.

Mr. Cox. Thank you again, Mr. Chairman.

Mr. HUNGATE. Mr. John Doar, we appreciate having you back again with us. I will now yield to Chairman Rodino.

Chairman RODINO. Mr. Chairman, I am especially pleased that we have the privilege of welcoming today the man who served the Judiciary Committee at a time when it met a great and grave responsibility. Mr. John Doar, as special counsel to the committee during the impeachment inquiry, served us well.

I know that during the course of our debate, which at that time was nationally televised, I had occasion, as did others, to say some words

that were complimentary of Mr. Doar. I know that Mr. Doar is the kind of individual who suffers embarrassment when he is being lauded, but I think, John Doar, that the country owes you a special debt of gratitude for the excellent judgment you demonstrated at that time; for an objectivity and professionalism that I think is really exemplary. I believe that history will record that you provided a great service.

I know that the members of this committee at that time may have been somewhat apprehensive, but, as they went on they learned that you were a man devoted to the institution that did work. I can recall one of the statements which we collaborated on, which I think will be long remembered. I think the statement was really a product of your thinking, and I recall it very well and quote it many times, where you stated that the real security of this Nation lies in the integrity of its institutions, and the trust and informed confidence of its people.

I noted that statement many times and deliberated over it many times, and I find that even today, as we are considering this important legislation, I think we have to seriously question whether our institutions can meet the kinds of situations that we are trying to deal with.

I want to applaud the statement that you have presented here. I am delighted that you did find the time out of a now busy schedule, and your own professional way, to come here and give us the benefit of your views. I am afraid I am not going to be here to question you after your statement, but I have read it; and I think, again, it is really thought provoking and suggest to this committee that we pause to consider before we hastily adopt a piece of legislation I have grave reservations about.

I think your statement provokes many questions and supplies some thoughtful suggestions.

John, I want to again express my personal thanks to you. I am pleased that you are here, doing so well, and looking so well; and I am pleased to see your children with you.

Mr. DOAR. Thank you very much, Mr. Chairman.

Mr. HUNGATE. Glad to have you John.

Mr. DOAR. Mr. Chairman, for the record, my name is John Doar. I am a practicing attorney in the State of New York. I have prepared a statement which I have submitted to the committee. Rather than going through it, I would like, if you agree, to just summarize some of the points.

Mr. HUNGATE. You have a prepared statement. Without objection, it will be made a part of the record at this point. You may proceed as you see fit.

[The prepared statement of John Doar follows:]

STATEMENT OF JOHN DOAR, FORMER SPECIAL COUNSEL, COMMITTEE ON THE JUDICIARY

I appreciate the opportunity to testify in opposition to Title I of S. 495. Title I would establish a permanent special prosecutor with authority to investigate and prosecute possible violations of federal criminal law by specified high level elected and constitutionally appointed United States Government officials, including the President and Vice-President, the Cabinet, the Congress and the federal judiciary.

The need for this legislation, it is said, is Watergate. I disagree. There, the country was faced with an extraordinary law enforcement problem—the possible criminal involvement of the President of the United States and his closest associates for whose conduct the President was responsible.

It was that circumstance that caused the appointment of a temporary special prosecutor independent of the Department of Justice and not responsible to the elected President of the United States. The temporary special prosecutor was given a specific law enforcement assignment.

Title I of S. 495 puts about 1,000 high federal officials into a special category of American citizens, all of whom, of course, are subject to the criminal law. There has been no adequate showing that there is a need for this. There are some who might say that this Committee should consider whether it is necessary and proper to classify these public officials into a special category to be targeted for special law enforcement attention.

I know of no precedent for a statute that targets a particular group of American citizens for special attention by federal law enforcement authority. S. 495 is not the same as a Congressional or Executive policy that directs investigations and prosecutorial attention at a particular subject matter—such as with federal civil rights or antitrust enforcement.

In such circumstances it is appropriate to give a particular area of law enforcement special attention. But this statute sweeps almost 1,000 public men and women into a category only because they hold particular offices. It seems to me that there are fundamental problems of unfairness when the laws picks out any group of people for such concentrated attention.

But this idea would be wrong even if the law enforcement target were defined by subject matter. This is because of the extraordinary grant of power contained in the statute.

This grant of power is inconsistent with our traditions. Under 592(a) the permanent special prosecutor is a self-starter. The Attorney General has confirmed this. There are times where certain Divisions of the Department of Justice have been self-starters (subject to the control of the Attorney General), but not always. In federal criminal income cases, the practice has been that no U.S. attorney can undertake an investigation nor prosecution without approval of the Assistant Attorney General for the Counsel of the IRS. Because of the power involved, the tradition has been for a careful division of responsibility between the IRS and the Department of Justice. Of course, we must start with the assumption that the lawyer selected will be possessed of considerable rectitude, and that he will unilaterally adopt these regulations and traditions of the Department of Justice that are a part of the administration of justice. I would expect this to happen.

There is no such check on this federal prosecutor. Even more awesome, this prosecutor is authorized to freely hire his own investigators and independent consultants, and he is not accountable.

With this amount and allocation of power, the operation of this permanent law enforcement office will be unworkable and could be potentially dangerous.

Burke Marshall has questioned the wisdom of creating a permanent office. He has warned of problems of waste, of jurisdiction, of conflict with regular law enforcement functions of the Department of Justice, of the degree of co-operation the special prosecutor could obtain from the FBI and other agencies of the Executive branch, of inefficiency, of bad management. I share those concerns.

In addition, this grant of power is susceptible of abuse. With the whole criminal code at his disposal, the permanent special prosecutor could embark on a self-defined crusade for all sorts of reasons including making a name for himself. The idea that any federal official, appointed not elected, should have the uncontrolled power to thumb through the entire federal criminal code as a basis for investigating a targeted group of public officials is an anathema to me.

The method of appointment and term of office are bound to be uselessly distracting from the real business of government. The length of the permanent special prosecutor's term is a mischievous provision. Under this proposal, the first special prosecutor will presumably be appointed during the first year of the next President's term. The second during the 4th year; the third during the 3rd year; the fourth during the 2nd year. During every three Presidential terms, a permanent special prosecutor will be appointed on 4 occasions.

In the next 24 years the American people could be treated to 8 media events—with comment by the press and many others that the outgoing special prosecutor has done either too much or too little. We need no such unnecessary distraction.

By my main reason for opposition is that Title I of S. 495 says the wrong thing about our system of government. Our Constitutional system rests on a delegation

of trust to our chosen public officials as well as on a delegation of limited institutional power. It can only work if the foundation of that trust is safeguarded. Throughout our history this has been done by firm and fearless action when that foundation was under stress. It was not done by creating a different foundation wholly detached from the constitutional structure of our government. It has not been done by undermining the constitutional principle that the President of the United States shall take care that the laws be faithfully executed. It is not done by inferring, whether intended or not, that high level Executive Branch officials, Members of Congress and federal judges are more likely to be corrupt than other American citizens or that the Attorney General of the United States can't be trusted to act straightforwardly when faced with a difficult responsibility to enforce the law.

Furthermore, this legislation suggests the wrong thing about the House of Representatives.

Other have said, and I agree, that a good part of the responsibility for preserving trust and confidence in our constitutional system of government rests with the Congress of the United States. This statute undercuts that concept.

I recognize that we don't want to invite another Watergate. I respect your responsibility to consider alternatives. I want to try to be constructive—not critical. I suggest that the history of the Impeachment Inquiry may provide an answer.

Although I am not sure that it is necessary, I suggest a statute that would provide sturdy authority for the Attorney General to appoint a special independent prosecutor with carefully defined authority limited to a specific law enforcement problem whenever he believes it is required because a conflict of interest or apparent conflict of interest makes it unlikely that the Department can properly administer justice.

The legislation might provide that the Attorney General should consider as presumptive evidence of the need for a special prosecutor, a Resolution by the House of Representatives calling for such an appointment and defining the prosecutor's authority. Should the Attorney General ignore the Resolution, the House could then take other appropriate action.

I have confidence that the House would do this. For the fact of the matter is that the House of Representatives and a temporary special prosecutor did meet their responsibility in a most extreme circumstance—a President who would not enforce the federal criminal laws against himself—in a way that was satisfactory to the great majority of the American people.

TESTIMONY OF JOHN DOAR, FORMER SPECIAL COUNSEL, COMMITTEE ON THE JUDICIARY

Mr. Doar. There are several things about title I of S. 495 that cause me a great deal of concern. First—and without going back into the history of Watergate—it is said that the reason for this statute was Watergate. In my judgment during Watergate the country was faced with an extraordinary law enforcement problem, the possible criminal involvement of the President of the United States and his closest associates, for whose conduct the President was responsible. The President was not willing to enforce the law against himself.

I do not believe that this statute really deals with that particular problem. Rather, I was amazed to find that this statute puts about a thousand public officials, elected and appointed officials, into a special category, and authorizes the appointment of an independent Special Prosecutor, accountable to no one, almost, to enforce the Federal criminal law against those individuals. There is no narrowly defined scope of authority, but rather the statute places the whole range of the Federal criminal law at the disposal of the Special Prosecutor.

The idea that any Federal official, appointed, not elected, should be able to thumb through the entire Federal criminal code to target for

special criminal law enforcement a particular group of individuals is anathema to me. I know of no precedent for it. It is true that because of a particular law enforcement problem, you might focus on a particular subject matter, such as civil rights or antitrust or organized crime; but to select people, and to put them in a category merely because they hold a particular office seems to me to be contrary to the way our system has worked, and contrary to our tradition of fair law enforcement, and equal law enforcement against all the citizens of the United States.

Second, I am bothered about the enormous grant of power that this statute, S. 495, gives to the permanent Special Prosecutor. I find it difficult to rationalize the abuses of power with this solution that grants so very much power.

I concede that in all probability the persons selected for this position, appointed to this position, would be lawyers with considerable rectitude, but there is still no safeguard to check upon the way he administers his office. Without enumerating all of the things that concern me, the fact that he can hire his own investigators and have his own consultants and the fact he is not necessarily bound by the same regulations and traditions of the Department of Justice with respect to criminal income tax investigations and prosecutions, I find this to be very troublesome.

I think the method of appointment and the procedure for appointment is a mischievous provision. There will be four occasions during each three Presidential terms when a Special Prosecutor will be appointed, the first coming during the first year of a President's term, the second during the fourth year, and the third year, and then the second year. This can only work out to become a media event and be unnecessarily distracting from the business of government.

But the thing that I am most bothered about and most troubled about in this proposed legislation is that it says the wrong things about our system of government.

Our people believe that our Government was based on a philosophy of limited constitutional power, but also a basic trust in the individual persons that would administer this power. And if the foundation of this trust is affected by some act or action of a particular public official, the way to deal with that, it seems to me, is by firm and fearless action against the particular wrongdoer. It does not make sense to deal with it by setting up another kind of an institution, operating in a more or less independent sphere, and undermining, I think, the constitutional principle that it is the President who has the responsibility to take care that the laws are being faithfully executed; and it is the Attorney General who has the responsibility of enforcing the criminal laws of the United States.

Now, I did not come here, members of the committee, to be critical and negative. I would hope I could offer a constructive alternative, and therefore I wish to just make a few statements with respect to the matters that Mr. Cox discussed with respect to the temporary Special Prosecutor.

With respect to the categories of individuals who would be subject to the Attorney General's discretionary authority to designate a Special Prosecutor, I do not really think there is any need for that

because I think the Attorney General at the present time has that authority and has exercised it many times.

I remember when I was in the Civil Rights Division of the Department of Justice, that the Attorney General appointed Mr. Jaworski to serve as a special counsel for the Department of Justice in the case against the Governor of Mississippi.

Where I differ with Mr. Cox is with the manner of appointment of the temporary Special Prosecutor to deal with those cases where the Attorney General would have a legal duty to have the Special Prosecutor appointed.

His recommendation is that it should be the court of appeals to whom the Attorney General should go, and it is the court of appeals that should make that appointment.

As much as I respect Mr. Cox's judgment and experience, I must disagree with him. My experience tells me something different. My experience tells me that too often in the past we have placed too much emphasis in what courts can do for us. I began to sense that first when I was serving in the Department of Justice in the Civil Rights Division, and it was not until the Congress of the United States, passing the great civil rights legislation in the 1960's, and particularly the legislation with which I was most familiar, the Voting Rights Act of 1965, that this country began to correct grave injustices with respect to a minority of our people.

During the impeachment inquiry—and the members will remember as well as I do the many discussions we had with respect to whether this committee should apply to the court or not apply to the court in particular matters; and this was contrary to my thinking as a lawyer, trained to respect courts, trained to trust courts, trained to go to the court, trained to think in terms that the courts are the solution to our problems—I began to believe and to come to see this House of Representatives as being a very, very valuable and important, and necessary part of our institutions with respect to creating trust and confidence among our people.

Since I left this committee, I want to say to the members—and of course I am only one person and can only reflect one person's judgment on the attitude of the public with respect to the Watergate crisis—but there is an enormous respect for the House of Representatives through this country, just an enormous respect. And the action of the whole House, not just this committee, but the whole House, beginning with the resolution of the whole House by a 410 to 4 vote, authorizing and directing this committee to investigate whether or not President Nixon should be impeached, had an enormous impact on the people of the United States.

And so, while I still have great faith in our courts, I do not want our courts to do everything. Therefore, I would favor, if this committee and the Congress in its wisdom decided to establish a standby authority for the appointment of the Special Prosecutor, I would favor leaving it with the Attorney General to make that appointment, subject to the power of the House of Representatives by resolution to urge the appointment, and subject to the power of the House of Representatives to take whatever action was appropriate to insure that that appointee was a person that had the trust and confidence of the American people.

Thank you, Mr. Chairman.

Mr. HUNGATE. Thank you, Mr. Doar, you have given very valuable help to the committee, as you have done in the past.

Mr. Wiggins?

Mr. WIGGINS. John, thank you for coming and finally shedding a little commonsense on this complex problem. I do not disparage the observations of others because undoubtedly they have given a lot of thought to the complex problem; but we are becoming slaves to form, rather than substance here.

We are so concerned with cosmetology that we are willing to potentially do great violence to our institutions which ought to be the goal that we seek to serve.

So, you are proposing, I guess, what could be characterized as limited new statutory authority, doing the least violence possible to the existing institutions, particularly the Department of Justice. But you precede that advice with these cautionary words, "Although I am not sure it is necessary."

Would you share with me the reason why you cautioned that this might not be necessary?

Mr. DOAR. Well, I don't think it is necessary because I don't think it's necessary so long as the House of Representatives sits. So long as this body sits, and so long as it has the grant of power that it has had from the days when the Constitution was written, I do not believe—and my experience during the proceedings strongly influenced me—that any legislation is really necessary.

Mr. WIGGINS. John, there are a couple of circumstances that others have mentioned, that might make your suggestions unworkable. One, a scandal which has not come to public attention, it is known only within the Department of Justice. The argument goes that there would be no public pressure for exposure, since a successful cover-up may be going on within the Department of Justice.

I reject that, I think government is much too porous for anything of any real magnitude to remain secret for very long, without coming to public attention. I don't put great stock in that argument.

But I notice there is nothing in the statute that mandates that any Special Prosecutor come before the Senate. The Attorney General has authority, statutory authority, to appoint Special Prosecutors. But I think if the prosecutor's jurisdiction is intended to reach cases of the kind of magnitude which we have discussed, that it is rather important to run that man past the Senate for the kind of public examination which would occur in the Senate. I make that suggestion because of the possibility of having the Congress in tandem with the President and being less aggressive in urging that he take certain appropriate action.

But I think the minority can make its case publicly if there is some mandatory duty to submit a name to the Senate for confirmation.

Would you consider that to be wise, that the Special Prosecutor be subject to confirmation?

Mr. DOAR. Yes; I would.

Mr. WIGGINS. Now, your suggestion involves a resolution of the House of Representatives being the trigger, although it is not a mandatory trigger, it simply recommends. Should it be limited to the House of Representatives?

Mr. DOAR. No; that is not the trigger. The trigger would be the fact that the statute would define when the Attorney General would have the duty if he had found that circumstances existed where he should have a responsibility to meet that duty, that would trigger it. But the House of Representatives, if there was delay, if there were a great crisis in the country, if the Attorney General was not moving, then the House of Representatives could—and I believe would—by resolution urge him.

Mr. WIGGINS. Well, I believe it would, whether it was in the statute or not, in the right case. I believe the Senate would do the same, whether it was in the statute or not. It is just that I read your language here that the legislation might provide the Attorney General should consider as presumptive evidence the need, pursuant to a resolution from the House of Representatives.

I think whether that is in the statute or not, the Congress would make its wishes known loudly and in public, and this would be instrumental in causing the executive branch to move in a case where it should move.

Well, John, I have no more questions. Your approach has great appeal to me because it does not overreact to an emotional situation. A great many reforms have been proposed in the name of Watergate, and this is an area where we should make haste very slowly. I think, when these reforms affect the very institutions which Watergate really was all about. I think your modest suggestions are worthy of serious comment. Thank you.

Mr. DOAR. Thank you.

Mr. HUNGATE. Thank you. Mr. Mann?

Mr. MANN. Mr. Doar, I share your confidence in the House of Representatives, and I agree with Mr. Wiggins' suggestion that writing the resolution of the House into the bill might cause the Attorney General to rely upon the House of Representatives, rather than to exercise his own initiative.

Professor Cox testified that the Attorney General now has the power to appoint special assistants for a variety of purposes. I recognize that that does not necessarily carry with it the independence nor the staffing that is contemplated. It is probably contemplated by your suggestion here that that may be the best solution. In your experience in the Department of Justice, did you ever see that process used, and what are its shortcomings insofar as this type of authority is concerned?

Mr. DOAR. I did see that process used, as I said, in the case of *United States v. the Governor of Mississippi*, where the Department appointed Leon Jaworski.

Its shortcomings are that the Special Prosecutor has to rely on the tools within the Department of Justice to prepare his case. On the other hand, I am not so sure that that is so much of a shortcoming. That is to say that he has to rely on the lawyers in the division of the Department that are familiar with the case, if it is a case where it is an ongoing circumstance: and he has to rely upon—just as the lawyers in the Department do—the Federal Bureau of Investigation to conduct an investigation for him with respect to the case.

But any lawyer who had the experience in litigation in preparing cases would have no difficulty. Mr. Jaworski had no great difficulty,

no difficulty, in getting what he wanted and doing what he wanted with respect to the way that case was handled. That is the only experience I have had with a Special Prosecutor.

Mr. MANN. I share your confidence in the integrity and objectivity of the lawyers who are in the Department, subject to the direction of a distinguished attorney from outside the Department for public impact cases. I wish the public shared our confidence in lawyers to the same degree.

Well, I think you have brought in a breath of fresh air to this question, and I am delighted to see you again.

Mr. DOAR. Thank you.

Mr. MANN. To welcome you back in your same chair. Does it feel the same?

Mr. DOAR. Yes. Thank you very much.

Mr. HUNGATE. Thank you. Mr. Hyde?

Mr. HYDE. Mr. Doar, I, too, join my colleagues on commending you on your statement, I think it is untainted by the need to legislate which all of us feel, now that the election is approaching and we must prove ourselves to be purer than Caesar's wife.

I think that in setting up this prosecutor, whether it is an ad hoc or permanent office, there is going to be great pressure for that person to do something. I think that is unfortunate and will be a further discouragement of people, qualified people seeking public office.

On a more specific point, some of the legislation. It seems to me that putting all of the disqualifications down for this paragon of legal virtue, prosecutorial virtue, by saying he may not have been a campaign manager for the President, et cetera, all of those are meaningless. I believe because what you want to do is a partisan, you want to avoid someone who is going to seek political indictments, or use his office to politically bludgeon somebody over the head.

If this person, this Special Prosecutor, is going to be appointed by the Attorney General and a confirmation hearing is held, it seems to me that is all that is required. The partisanship of this person, if any, will certainly be brought out at a confirmation hearing by other parties, the minority party and the media would publicize this. I think this would serve as a deterrent to the Attorney General from appointing someone who is obviously a partisan.

So, spelling out disqualifications is rather an empty gesture, do you not agree?

Mr. DOAR. Well, I do agree. I really do not have any confidence in the exclusion of any man that can be confirmed by the Senate, the President having the right to choose that man to be Attorney General.

You know, the appointment process will not work perfectly if these high campaign officials are excluded, if you have a President who does not want to take care that the laws be faithfully executed because that person can always find someone who he knows, but who no one else knows. I have seen that type of mechanism, or operation work with respect to the appointment of Federal judges. So, I have no confidence in this exclusion.

Mr. HYDE. Thank you. I have no further questions.

Mr. HUNGATE. Thank you. Ms. Holtzman?

Ms. HOLTZMAN. Thank you, Mr. Doar, for coming, and welcome back.

Mr. DOAR. Thank you.

Ms. HOLTZMAN. I am not so convinced, I must tell you in all frankness, that relying on the House of Representatives is an adequate solution. In the end, I do believe, the House of Representatives probably can come through, as it did in the past with respect to the Nixon matter, but it took a very long time for the House of Representatives to act. You will recall, of course, that part of the coverup involved successfully blocking an investigation of the break-in and coverup by the Banking and Currency Committee. As a consequence of that successful blockage of House action, it was not until the Senate confirmation of Elliot Richardson that the Congress—taking the House and Senate together—was able to inject a fresh, objective, nonpartisan phase into the prosecution of this matter.

And so, from June 17, 1972 until April 1973—I believe it was April—we had to await the appointment of the Special Prosecutor; and if it had not been for John Mitchell's resignation there might not have been any vehicle for obtaining a Special Prosecutor.

Remember, for House action to be successful, it requires the acquiescence of the President. He must sign the legislation. How do you get legislation signed if the President himself knows he will be subject to the consequences of the selection of a Special Prosecutor?

So, I am not as certain as you are that relying on the House of Representatives alone will be a solution. I think it is important to have a mechanism for selecting a Special Prosecutor at appropriate times. I think there are many troubles with the mechanism imposed, but I think that some mechanism that would provide for the appointment of a temporary Special Prosecutor would be very useful. If we had had such a mechanism in place, we might have had a different result in the 1972 election. We might have spared the country the agony of having a President who had committed high crimes remain in office for a year and a half.

Perhaps you can respond to these views that I have set forth.

Mr. DOAR. Well, I have great respect for your views, Ms. Holtzman, and I understand and appreciate the point of view you express. It is possible that under different circumstances and with a different mechanism in place the results might have been different and better, faster, clearer; but you never know. I think the idea of having some kind of a mechanism in place, I don't disagree with that, for a temporary Special Prosecutor.

I am just concerned about leaving it to the court of appeals to make the appointment; that is what bothers me.

Ms. HOLTZMAN. Perhaps I misunderstood you. You are not objecting to having a mechanism in place that would apply automatically in certain circumstances in the future.

Mr. DOAR. No, I am not. But my personal view is, as I said to Congressman Wiggins, I have very great reservations whether it is necessary.

Ms. HOLTZMAN. Well, let's get back to the example I raised here with respect to the Nixon administration when a House investigative activity was successfully blocked and no action took place until the Senate committee started. There were many efforts, as we all know, to stone wall and obstruct the efforts of that committee. It was not

really until a good deal of time after the break-in itself that the Congress was able to take effective action.

Mr. DOAR. Well, I agree with that, Ms. Holtzman. I agree with that situation.

Ms. HOLTZMAN. It is possible for that kind of thing to happen again, don't you think?

Mr. DOAR. It is possible, but I come back to the point I tried to make earlier, that the action, the statement of setting up a temporary mechanism, and certainly the statement of doing anything more says something to the people, says something to the country that is contrary to what I would like the country to hear; and that is that we believe most Presidents are honest; we believe that most public officials are honest; we have a system of limited power, but we start with the premise that people who have public office will respect their oath. That is what my concern is.

I concede to you that under your proposal and under a system like this we might have been far better off, I cannot quarrel with that.

Ms. HOLTZMAN. Thank you, Mr. Chairman.

Mr. HUNGATE. Thank you.

Mr. Doar, I am impressed with the fact you point out that we have not directed this toward a subject matter or area, but toward a certain class of individuals, or we would be doing so in this legislation. Is this the price paid for public prominence? I can't think of any reason to do that. I guess we do it to some extent. I thought your argument was very good, that it is a novel concept that we should have one class who are, because of the job they hold, subject to all the criminal laws, plus a few more investigations.

Would you think that such legislation as passed the Senate, title I of S. 495, which we have under consideration in the House, or enactment of such legislation for either a permanent or temporary Special Prosecutor, would be in some means an infringement on the prosecutorial discretion that resides in the Attorney General and the Department of Justice?

Mr. DOAR. Yes, it would.

Mr. HUNGATE. And I also found the point interesting that you raised, that it would put us in the situation that we would perhaps have in 24 years eight media events commenting on how much the Special Prosecutor had done, and how much he had not done, that those distractions might not be helpful to the purposes for which our Government functions. I think no one raised that before, but I think it is worthy of study.

Mr. DOAR. Thank you.

Mr. HUNGATE. Are there any more questions? Thank you very much.

Mr. DOAR. Thank you, Mr. Chairman.

Mr. HUNGATE. It was nice to have you back here.

Next we hear Lloyd Cutler, of the law firm of Wilmer, Cutler & Pickering. You may please take a seat at the table, Mr. Cutler.

We welcome you, Mr. Cutler. You have a prepared statement.

Mr. CUTLER. Yes, I have, Mr. Chairman; as the other witnesses did, I would simply like to file that for the record, if I could.

Mr. HUNGATE. Without objection, it will be made part of the record at this point. If you will give us your address for the record you may then proceed as you choose, sir.

[The statement of Lloyd N. Cutler follows:]

STATEMENT OF LLOYD N. CUTLER, MEMBER, DISTRICT OF COLUMBIA BAR

Mr. Chairman, my name is Lloyd N. Cutler of the District of Columbia Bar. I am testifying today because the Special Prosecutor provisions of Title I of S. 495, as passed by the Senate, appear to show a strong family resemblance to a suggestion I advanced in 1973. A later version of that proposal became the basis of S. 9652, introduced by Senator Ervin in the last Congress, and I testified about it before the Senate Judiciary Committee on Apr. 2, 1974, and the Senate Government Operations Committee on December 3, 1975.

I will confine my testimony this morning to the differences between S. 495 as passed by the Senate and the prior version that was based on the American Bar Association's recommendations, which are also embodied in H.R. 14476 now being studied by your Committee. I shall also propose a possible compromise that may preserve the best features and eliminate the worst features of both.

Mr. Chairman, I believe that the experience of Watergate justifies a new statutory procedure for entrusting to a nonpolitical Special Prosecutor cases involving breaches of trust by high government officials, because of the strong possibility that in such cases the elected President and his appointed Attorney General may have or appear to have a partisan political conflict of interest. The critical issues are whether the nonpolitical Special Prosecutor should perform a continuing or an occasional function, and whether he should be appointed by the President with the advice and consent of the Senate or whether instead he should be appointed by the judiciary. S. 495 calls for a continuing function and Presidential appointment; the ABA and H.R. 14476 call for an occasional function and judicial appointment.

Both of these approaches present problems. If I had to choose between one or the other, I would join Attorney General Levi in preferring S. 495. I prefer it because I believe that the problem of dealing with partisan political conflicts of interest in cases involving election campaigns and official breaches of public trust is truly a continuing one—not limited to once-in-fifty year events such as Teapot Dome and Watergate, not limited to acts of misbehavior at the Presidential level, and not limited to the periods—themselves all too frequent—when we have an unheroic Attorney General.

We have several examples of this even today, when we have an Attorney General of unquestioned non-partisanship and personal integrity. We have the cases of Congressman Wayne Hays and the alleged false expense vouchers of Congressman Clay of Missouri. We have Mr. Calloway and his ski resort. We have all the charges and countercharges of violations of the campaign financing laws that are likely to arise during the coming presidential campaign, in which the incumbent President is himself a candidate. Mr. Levi has testified there are at least "40 recent or current cases in which it is necessary to determine whether the President or the Attorney General have, or appear to have a substantial partisan or personal interest."

I call your particular attention to the problem of the *appearance* of conflict, and to our traditional methods of dealing with conflict or its appearance. We believe that to maintain public faith in our legal system, it is essential not only that justice be done but also that it appear to be done.

We do not stop to ask whether a judge or lawyer has a conflict in fact; it is enough that it may appear so to a reasonable man. We do not stop to ask whether the judge or lawyer has the personal capacity to do justice despite a conflict (as is very often the case); it is enough that it may not appear so to a reasonable man. We deal with conflict or its appearance not by a process of overcoming temptation, because we are not all saints; we deal with it by a process of abstention, because we are human.

We must not overlook this fundamental principle just because our Constitution vests the power to execute the laws in the President, and because the President delegates this power to his appointed Attorney General. The Constitution was not written on the theory that Presidents and Attorneys General are saints, and it does not abolish the basic principle that they like others in positions of public or private trust should abstain when they have or appear to have a conflict of interest.

The trouble with the ABA proposal is that it assumes this salutary principle only needs to be applied in great crises like Watergate, and that no occasion

for applying it arises the rest of the time. But both common sense and the Attorney General tell us that occasions for applying it happen many times each year, not just twice a century.

When the Attorney General disqualifies himself in an antitrust investigation today because he owns a few shares of the target company, he can usually rely on the Deputy Attorney General to be free of conflict and to act in his place.

Whether the President also has a conflict is usually academic, despite his power to order or forbid the prosecution, because Presidents rarely interest themselves in such matters. But in the case of a campaign financing investigation or one of a high-level official breach of public trust, the President, the Attorney General and the Deputy Attorney General may all have an active interest and have or appear to have a partisan political conflict. There may be no high-level Department official, confirmed by the Senate, who is both free of such a conflict and capable of making what the public will accept as an impartial decision. That is why a special prosecutor is needed on a continuing basis, in my view, to fill this gap on the fairly frequent occasions when a partisan political conflict or its appearance may reasonably be thought to exist.

Because of its erroneous assumption that a special prosecutor is needed only on rare occasions, the ABA proposal provides for judicial selection of the prosecutor, on the theory that after a major official scandal has already blown up the President or the Attorney General have too much of a conflict to be trusted with the appointment himself. But this objection disappears if a continuing special prosecutor is appointed before such a scandal has occurred. Before such an event the President can be trusted to make the appointment, subject to Senate confirmation, as impartially as he appoints members of the judiciary today. Judicial appointment of a special prosecutor—especially if preceded by a litigated judicial determination of whether or not the President and the Attorney General have or appear to have a conflict of interest—raises constitutional questions that will not be definitively decided until after some indictment he obtains is appealed to the Supreme Court.

It seems imprudent to risk the validity of such indictments after the event, when the conventional method of Presidential appointment and Senate confirmation can be safely employed well before the President and Attorney General are in a position of conflict because a major scandal has already arisen.

Mr. Chairman, if I understand the ABA position correctly, the ABA would not object to Presidential appointment of a continuing special prosecutor before a major scandal blows up, but is concerned that a continuing special prosecutor would not have enough to do, and that a man of the stature to perform the function in time of crisis would not accept it on a continuing basis. The Attorney General's testimony and what I have already said should establish that a continuing special prosecutor would have more than enough to do, and my own view is that a lawyer of the highest stature would accept the appointment on the terms outlined in S. 495.

But should there be doubt on either of these points, I have a compromise to suggest between S. 495 and the ABA position. Under this compromise, the President would appoint the Special Prosecutor as in S. 495. But instead of making him a full time Government employee, he would stay a private citizen with the status of a part-time or Special Government Employee under 18 U.S.C. § 202 until such time as he has spent more than 135 out of a consecutive 365 days on his Government duties. He would not have automatic jurisdiction in any case, but the Attorney General would advise him of every case now covered by Section 592(a)(1), and of every case the Attorney General proposed to refer to him under Section 592(a)(2).

The Special Prosecutor would have discretion to take jurisdiction over any such matter if he determined that because of a conflict of interest or its appearance it would not be appropriate for any qualified Presidential appointee in the Department of Justice to handle the matter. If he thought the Department could properly handle the case, he would decline it but, as in S. 495, he would be kept informed of its progress and have the right to take over at any time. All other provisions of Title I of S. 495, including the Special Prosecutor's duty to report to the Senate and House, would remain as they now stand.

Under this compromise, Mr. Chairman, the President would appoint a Special Prosecutor of high stature now. The appointee would remain in private life, spending only such time on Government duties as needed to inform himself of matters coming within his potential jurisdiction. Only if the Special Prosecutor

found it inappropriate for the Department's other high-level officers to assume jurisdiction over a matter would he himself exercise jurisdiction. With the aid of a capable staff, perhaps including some full time attorneys, the Special Prosecutor should be able to combine a normal term of office (one between Watergates) with another non-conflicting assignment such as law school teaching or law practice in matters not involving the Federal Government as a party. At the same time, he would be continually available to perform the same function of independently reviewing the existence of conflict or its appearance that the ABA proposal would commit to the more cumbersome and constitutionally more doubtful process of resolution by the courts. He could do so without fanfare and without dragging sensational charges against individuals into public view before full investigation and indictment.

Mr. Chairman, S. 495 as it now stands is in my view the best of the institutional reform proposals for resolving the conflict problems illustrated by but in no sense confined to Watergate. If a continuing function for the Special Prosecutor is thought unwise and a more occasional role for his function is preferred, then the compromise I have outlined would in my judgment be far preferable to the ABA proposal. A draft of the amendments needed to effect this compromise is attached to my statement.

POSSIBLE AMENDMENTS TO S. 495

"§ 591. Special Prosecutor; appointment and removal

"(b) The Special Prosecutor shall be appointed for a term of three years and shall be compensated pursuant to level II of the Executive Schedule, section 5313 of title 5, United States Code. No person shall serve as Special Prosecutor for more than a single term. *The Special Prosecutor shall be deemed to be a 'special Government employee' within the meaning of Title 18 U.S.C. Section 202 so long as he continues to meet the time requirements of that Section.*

"§ 592. Jurisdiction

"(a) (1) The Special Prosecutor [shall have] *may exercise* jurisdiction to investigate and prosecute possible violations of Federal criminal law by a person who holds or who at the time of such possible violation held any of the following positions in the Federal Government: (i) President, Vice President, Attorney General, or Director of the Federal Bureau of Investigation; (ii) any position compensated at a rate equal to or greater than level I or level II of the Executive Schedule under sections 5312 or 5313 of title 5, United States Code, (iii) Member of Congress, or (iv) any member of the Federal judiciary. *The Special Prosecutor may also exercise jurisdiction in other matters described in the second sentence of paragraph (2).*

"(2) The Attorney General shall promptly [refer to] *advise* the Special Prosecutor [for investigation and, if warranted, prosecution] of any information, allegations or complaints relating to any violation specified in paragraph (1). In addition, the Attorney General shall promptly [refer to] *advise* the Special Prosecutor [for investigation and if warranted prosecution] of any matter where the Attorney General determines that in the interest of the administration of justice it would be inappropriate for the Department of Justice (other than the Office of Special Prosecutor) to conduct such investigation or prosecution.

"(b) The Special Prosecutor may in his discretion *exercise or decline to* [accept referrals under subsection (a) (2) of this section. The Special Prosecutor may decline to assert jurisdiction under subsection (a) (1) of this section when the matter over which he has jurisdiction is a peripheral or incidental part of an investigation or prosecution already being conducted elsewhere in the Department of Justice, or when for some other reason] *exercise jurisdiction in any matter described in paragraph (a). In exercising such discretion he shall take into account whether other appropriate officers of the Department not disqualified under Section 597 are available to exercise such jurisdiction and whether he determines it would be [in] more appropriate in the interest of justice [to permit] for the matter to be handled by the Special Prosecutor or elsewhere in the Department: Provided however, That any such declination shall be accompanied by the establishment of such procedures as the Special Prosecutor considers necessary and appropriate to keep him informed of the progress of the investigation or prosecution as it relates to such matter: And provided further,*

That the Special Prosecutor may at any time assume responsibility for investigation and prosecution of such matter. [If the Special Prosecutor declines to accept a referral under subsection (a) (2) or declines to assert jurisdiction under subsection (a) (1) he] *The Special Prosecutor shall submit his reasons in writing to the Attorney General for taking [such action] or declining jurisdiction in any matter.*

"§ 593. Authority

"(a) The temporary Special Prosecutor shall have, within the jurisdiction specified by section 592 over matters which he has assumed [responsibility,] jurisdiction, full power and independent authority, subject only to the power of the President under section 591 (a) to—

"§ 595. Jurisdiction

"(a) The Attorney General shall, except as to matters [referred to] over which the Special Prosecutor elects to exercise jurisdiction pursuant to section 592 of this chapter, delegate to the Office on Government Crimes jurisdiction of (1) . . ."

TESTIMONY OF LLOYD N. CUTLER, MEMBER OF THE DISTRICT OF COLUMBIA BAR

Mr. CUTLER. My name is Lloyd Cutler, Mr. Chairman, and I am a member of the District of Columbia bar.

I, of course, cannot claim anything approaching the stature and experience of Mr. Cox and John Doar on this subject; and I want to join Chairman Rodino and Chairman Hungate and the other members of the committee in paying tribute to both of them for what they have done over the last few years, they certainly are lawyer-statesmen in every classic sense of that term.

I am here because the provisions of title I of S. 495, as they finally were passed by the Senate on the recommendation of Attorney General Levi, at least preferable to the ABA proposals embodied in the House bill, appears to show a strong family resemblance to a proposal that I first made in 1973, and in view of all of the opposition and doubt that such a proposal engendered, I thought I ought to say a few words in its defense.

I would certainly agree that for the kind of case represented by Watergate, or by Teapot Dome, that an occasional Special Prosecutor, appointed at the time under a machinery that might be set up now by the Congress is, if anything, a preferable and adequate solution for those once-in-50-year problems; and I would join in everything that Mr. Cox said today about how such a bill might be worded, except that I would agree with Mr. Wiggins, that rather than have the Special Prosecutor in those circumstances appointed by the judiciary, it would be preferable to go through the mechanism of Presidential appointment, subject to Senate confirmation.

The problem is to me that these once-in-50-year events like Watergate and Teapot Dome are only a part of the difficulty we face. You will notice that all of these bills are based on a principle of partisan political conflict of interest on the part of the Attorney General and the President, a standard that no one has challenged; everyone agrees that in the case of partisan political conflict of interest the Attorney General should disqualify, and the President, in the sense of being responsible for executing the law should disqualify.

The trouble is that those cases do not come up just once every 50 years, they come up all the time. Attorney General Levi testified before you, I believe, that on the standard of partisan political con-

flict of interest he has some 40 cases before him right now. He did not say anything about the quality of these cases, and many of them may very well be crank letters, but there are 40 cases today that would raise some question about the existence of partisan political conflict of interest. That is the part of this problem that I do not think we have addressed in any of the legislation that has been considered.

It may well be that we need a two-pronged kind of legislation, an occasional Special Prosecutor selected at the moment for the Watergate or Teapot Dome kind of case, and some continuing officer, or some continuing mechanism that would assist the Attorney General in giving him a standard for disqualifying himself and placing the task of prosecution of the non-Watergate type of cases, which still raise partisan political conflicts of interest in a nonpolitical prosecutor, duly appointed by the President and confirmed by the Senate; the point that has not been addressed, and that I try to deal with in my statement.

The Attorney General's figure of 40 cases may, as Mr. Cox said, be somewhat overstated, some of these cases may be flimsy cases, but from what he has said and from what you know as a matter of your own commonsense, I would think, we know these cases are going to come up all the time, the simple matter of violations, or alleged violations of campaign financing laws in a Presidential campaign in which the incumbent President is a candidate, as one example. There are many other examples, cases involving Congressmen, cases like Mr. Callaway's case and his ski resort where it can truly be said that the Attorney General may have or appear to have—and I emphasize the word "appear"—a partisan political conflict.

Now, our normal method for dealing with conflicts of interest is not to overcome temptations and rise above them, and decide the matter honestly because we are not all saints. It may very well be that the present Attorney General, or most Attorneys General could decide those matters despite the appearance of a partisan political conflict in a perfectly objective way. But perhaps it may appear to the reasonable man on the street that perhaps he is not deciding it in a perfectly objective way, he should disqualify. Our normal solution to overcome conflict of interest is not to overcome it and do the right thing, but to abstain.

Now, it is perfectly true, as both Mr. Cox and Mr. Doar stated—

Mr. HUNGATE. Would the gentleman yield at that point?

Mr. CUTLER. Sure.

Mr. HUNGATE. Although I do understand, do I not, that in Federal courts, if you allege prejudice, the judge decides himself if he is prejudiced?

Mr. CUTLER. The judge is given standards, and the judicial disqualification statute which you enacted just a couple of years ago, which require him to disqualify in certain cases on a pro se basis. For example, if he has one share of stock of the Ford Motor Company, it may very well not affect his judgment at all, and yet, he is required by the qualification statute to abstain.

Mr. HUNGATE. If an allegation of prejudice is made against a judge, who determines that?

Mr. CUTLER. He determines that himself, unless he determines to step aside, and I believe he could let another judge determine it. But there are some pro se disqualifications, Chairman Hungate.

It is a very good example, and another good example, of course, is, if the Attorney General owns a few shares of stock in a company that is under an antitrust investigation, he disqualifies as a matter of course. Now, in that case he will—although we all have no doubt that he could decide the matter perfectly objectively—but as a matter of appearances we require him to disqualify.

In that kind of a case the chances are the Deputy Attorney General will not own stock in that company and he can perform the Attorney General's function.

When we get to this matter, though, of a partisan political conflict of interest, for example a charge, let us say, in November or October that the Carter campaign or the Ford campaign has violated the new campaign financing statute, clearly the Attorney General appointed by one of the candidates has a partisan political conflict of interest, or the appearance of it, no matter how upright and able, and capable he is of ignoring that conflict in deciding the matter.

Mr. HUNGATE. You would think propriety, or something, would certainly require someone else to make that decision.

Mr. CUTLER. That is what I would think. It may be in that kind of a circumstance that every Presidentially appointed officer in the Department of Justice capable of acting in the matter—let us say the head of the Criminal Division, for instance—would have a similar conflict.

Mr. HUNGATE. Does this not tie into something Mr. Wiggins has alluded to a time or two, that in the particular Watergate problem we may have been fortunate that we had a President of one party and a Congress of the other? Suppose we have a Congress, a 2 to 1 majority, and the President in the same party, would that perhaps cause you to think again that we need standards ahead of time that are going to cause the triggering of a Special Prosecutor?

Mr. CUTLER. Right. I think it would be very helpful, Mr. Chairman, if we did have some standards. The problem the Attorney General had with the ABA proposal for the House bill—or in fact the Senate bill before he made his suggestion—was that by the standard of partisan political conflict of interest set forth there, which is a perfectly fair standard that no one has quarreled with, he would have to disqualify and probably he should disqualify a substantial number of times every single year. They are not Watergate-type crises, but they are cases where as a matter of maintaining public confidence in our institutions someone not appointed by the President, someone not involved in the maintenance of the party in office ought to be the man who makes the decision.

That is perhaps what we need a mechanism for, not the mechanism to deal with the future Watergate, but to deal with that rather humdrum every year problem. Believe me, it comes up every single year.

It is true, I think, under existing procedures the Attorney General might be able to do all of that himself. Indeed, if you looked at title I of S. 495 as passed by the Senate, he could do every bit of that by administrative order within his own department himself today, except only that a man he would appoint for that function would not be subject to Senate confirmation; and also that he would have the power of removal of that man without the standards that are set forth in these various bills for removal.

There may be a good deal to be said for Senate confirmation and Presidential appointment of this man, and also for imposing standards of removal. In view of the clear lack of consensus as to what we ought to do, it does seem to me, Mr. Chairman, it being this late in the session, that the greater wisdom may well be not to legislate this year, but to encourage the Attorney General to go ahead by himself to set up mechanisms within the Department of Justice to deal with these what I would call more or less routine partisan political conflicts of interest, see how that works for the next year or so, and based on that experience decide whether some legislation both for the standby Watergate problem of the future, and to formalize the processing of the more routine day-by-day conflicts would be in order.

Thank you very much.

Mr. HUNGATE. Thank you very much, Mr. Wiggins?

Mr. WIGGINS. Mr. Cutler, I appreciate the ongoing nature of investigations of individuals where there is at least the appearance of a conflict, but I do not wish to overreact to that if the Department of Justice has a record of being able to handle them with propriety.

I am hard put to think of a case of a routine nature where the Department has been reluctant to move fairly, notwithstanding the public figure under investigation. There seems to be a willingness at the present time to investigate alleged campaign violations. Maybe it is because there is a Special Prosecutor, it might be argued.

I tell you, my question goes to whether there is a real need, or a desire to change the law to give the appearance of objectivity.

Mr. CUTLER. I think that is a question only the Congress can answer out of its perception of the degree of public trust that exists today in the enforcement institutions. We all know that for some 40 years of campaign financing laws being on the books, the Department of Justice has brought hardly a single case. I would imagine the degree of public cynicism about the enforcement of the campaign financing laws against the members of the incumbent party, or indeed the members of the other party because of the noblesse oblige involved in a revolving government. I would imagine that that degree of cynicism is rather high.

I do not doubt that this Department of Justice under its present leadership can call everyone absolutely straight. But if the Attorney General feels it necessary to disqualify himself in any antitrust investigation where he owns a few shares of stock, is it not equally necessary to maintain public confidence by suggesting that he disqualify himself in a campaign financing violation involving the current Presidential campaign?

Mr. WIGGINS. Yes, I think we might fashion some language amending section 510 of title 28, which may achieve this purpose.

What I am currently troubled about, Mr. Cutler, is the issue of getting the matter to the Senate. I really feel quite strongly that there ought to be some public review of the qualifications, almost on an ad hoc basis, given the magnitude of the wrong and the political realities of the time. I would rather have the Attorney General make the designation of a Special Prosecutor than the President. Given those two choices, I think we will have a better, less political choice made by the Attorney General.

But of course Attorney General nominations are not subject to advice and consent, it is only Presidential appointments which are subject

to advice and consent. So, the problem is, how do you get it in the Senate?

We could say nothing and rely on the continuing oversight responsibilities of the Senate Judiciary Committee or this House Judiciary Committee. But if you postulate a President of one party, 300 Members in Congress of that party, there is liable to be some reluctance to hold a hearing in the first place, in order to give the minority Members an opportunity to have their shots.

Do you think it would be permissible by statute—presuming we could enact such a thing politically—by statute to bind a future Congress to the necessity of holding some sort of review with respect to an Attorney General's designation of a Special Prosecutor?

Mr. CUTLER. I would think that you could, Mr. Wiggins, require that whenever the Attorney General thought it necessary because of the appearance of a partisan political conflict of interest, to appoint someone, or even to designate another existing officer of the department to handle that matter, that you could require by statute, or even by administrative practice—I am sure this committee could simply request it—you could get notification from the Attorney General of his actions and the reasons therefor. And while you would not have the technical confirmation power, you would certainly have the power to ventilate the issue and his judgment in the selection of the man he picks.

Mr. WIGGINS. And get the chairman to hold a hearing. I am sensitive to this as a member of the minority party, but let's hope that there is no scandal in a future administration.

But, let's suppose Jimmy Carter is elected, and let's suppose he designates an Attorney General—and he would of course—and let's suppose 300 Democrats are elected. Now, getting a hearing before this House Judiciary Committee or the Senate Judiciary Committee where I can raise hell about something is pretty tough. I can hold a press conference, of course; but beyond that the minority is impotent.

Mr. CUTLER. I suppose you could require by the same statute which created the future Watergate mechanism that whenever the Attorney General disqualified himself and transferred authority to a new appointee, or another man in the Justice Department, you could require by statute that there be a hearing or a report to the two Judiciary Committees in which that action was explained.

Mr. WIGGINS. That is my question, whether we might mandate a future Congress by statute to do something which would normally be a discretionary act. I will think about that.

The issue is raised because of the fact we are not dealing with a Presidential appointment, subject to the normal confirmation process, but rather a designee by a lesser official.

Mr. CUTLER. I do want to emphasize that, saving only the problems of Senate confirmation and limitations on the Attorney General's right of removal, everything necessary to handle what I call the routine kind of disqualification for political conflict of interest could be done by the Attorney General himself while you are examining the matter, and we could get a year or two of experience to see how that operates, and what kinds of men are given the job.

Mr. WIGGINS. There is an effort now in the Department of Justice, as you know, with respect to their new Division of Government Crimes, or whatever it is called.

Mr. CUTLER. Yes, and the Attorney General has found a number of matters, as I understand, he would like to refer to the Special Prosecutor, which are not Watergate matters, but which he thinks could be better handled outside the Department. He is having jurisdictional difficulties with that because of the Watergate Special Prosecutor's charter, which I suppose could be corrected by some further administrative action on his part, with your concurrence.

Mr. WIGGINS. Thank you, Mr. Cutler.

Mr. HUNGATE. Mr. Mann?

Mr. MANN. No questions.

Mr. HUNGATE. Mr. Hyde?

Mr. HYDE. I have no questions, except to commend Mr. Cutler for an innovative approach to a very difficult problem. Mr. Cutler is known for that. I have read with great interest, and I am still studying his remarks on regulatory reform submitted to the other body. So, I appreciate your being here and the opportunity to listen to you.

Mr. CUTLER. Thank you very much, Mr. Hyde.

Mr. HUNGATE. Mr. Cutler, in your judgment, would it be possible in a statute establishing a provision for a Special Prosecutor to require confirmation by the Senate, or by the Senate and the House?

Mr. CUTLER. Of an Attorney General's appointee?

Mr. HUNGATE. Yes.

Mr. CUTLER. I have not thought about it. I suppose this raises a constitutional issue, but I have no doubt you could get to the same place, Mr. Chairman, by requiring that he report to the Senate and House Judiciary Committees, and perhaps wait a certain number of days before he made the appointment.

Mr. HUNGATE. That the Attorney General report the person?

Mr. CUTLER. That he sees the need to appoint somebody, to disqualify himself, and to put either the deputy in charge, or some new special assistant he is appointing for that purpose.

Or he might very well—as I think he does want to do—institutionalize the problem by creating this Office of Government Crimes, which he would supervise in most cases, but from the supervision of which he might disqualify himself where there was truly a partisan political conflict of interest.

Mr. HUNGATE. Now, I am not sure I accept your disclaimer of prominence, Mr. Cutler, you are well known and respected. It has been very helpful for the subcommittee to have you here.

Mr. CUTLER. Thank you, sir. On this subject you would be very well advised to heed Professor Cox and Mr. Doar, in addition to myself.

Mr. HUNGATE. Thank you for your help.

We have statements from our colleagues, John Heinz and Bella Abzug submitted for the record, and a letter from Senator Tom Eagleton. If there is no objection, we will place them in the record at this point.

[The statements of Hon. John Heinz and Hon. Bella Abzug, and a letter from Senator Tom Eagleton follow:]

STATEMENT OF HON. H. JOHN HEINZ III, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. Chairman, over the course of the last several years, and particularly in the light of recent events, the American people have become increasingly alarmed and outraged over the reported abuses, improprieties and conflicts of interests among members of the Executive Branch, Congress and their employees.

This is why I am pleased that the Senate version of the Special Prosecutor legislation grants the holder of that office the authority to investigate and prosecute senior level employees of all three branches of our Government. This power is certainly needed, but it may not go far enough, particularly in the case of Congress. We are holders of a special trust, the Government officials in most frequent and direct contact with the American people. I believe this special trust demands special efforts to safeguard the confidence of our citizens in Congress. I believe we need a watchdog to monitor solely the activities of Congress and to help restore the public trust which has been so sorely lacking of late.

The allegations concerning the payroll abuses and the improprieties of Congressmen have subjected Members and employees of this body to unparalleled attack and cynicism. We presumably have been elected to uphold the public trust, yet there is virtually no group in this country trusted less than our own.

Our system of government is based upon respect for law and the democratic process. How can we expect our society of laws to stand when some of our most prominent lawmakers are also our most flagrant lawbreakers? The people of this country have the right to expect that Congressmen who establish a high standard of public morality also meet the same high standard for private conduct as well. It is essential that we take immediate steps to restore public confidence.

The best means of achieving this restoration is through the creation of a totally independent and impartial office to investigate alleged violations of ethical standards by Members of Congress and their employees. I have proposed legislation declaring it to be the sense of Congress that there shall be created an Office of Independent Auditor within the GAO with the power to fully investigate and publicly report facts and recommendations concerning alleged violations of ethical codes by Members of Congress and their employees.

While supporting the concept of a Special Prosecutor, I believe the unique nature of Congress in the public's perception requires a special office to help establish and maintain complete trust and confidence in our activities. An Independent Auditor can effectively restore public confidence in the integrity of Congress, and in the willingness of its members to act quickly to insure that the high ethical standards of conduct which we have adopted are maintained.

I hope that my legislation will receive the serious consideration and support of the members of the Committee.

STATEMENT OF HON. BELLA S. ABZUO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. Chairman and Members of the Subcommittee, I regret that prior commitments prevent me from appearing before you this morning. I think that the bills before you represent one of the most important issues that we in the Congress will consider this year and I wish to offer a few observations and suggestions regarding them.

The single most important motivation behind the proposals for a special prosecutor is the Watergate affair, followed by the recent revelations of gross abuses by our intelligence agencies. In both instances, the Department of Justice proved unwilling and unable to carry out its prosecutorial functions under the Constitution and the laws.

In the case of Watergate—fortunately for the republic—a special prosecutor was appointed and, together with your full committee, the Ervin Committee in the other body, did the job that the Justice Department did not do.

In the case of the intelligence abuses, we have not been so fortunate. Despite the oft-repeated claims of the Department of Justice that various abuses are "under investigation", the statutes of limitations run out one by one without any prosecutions being brought.

I think that the need for a special prosecutor is plain. The questions that remain to be answered involve his or her appointment, powers, protections, and so forth.

1. *I believe that a permanent special prosecutor should be appointed to investigate and prosecute high federal officials.*—The prosecutor should be appointed by the President with the advice and consent of the Senate, rather than by the judiciary as suggested by the Hungate bill now before you. First, the President and Members of the Senate are directly accountable to the public at election time

while the Federal judges are appointed for life. Second, the fact that approval by both the President and Senate would be necessary would serve as a check on each other as to the quality and stature of the appointee.

2. *The term should be limited to three years with a provision for reappointment to another three-year term.*—A three-year term would avoid the abuse of power inherent in the office of a special prosecutor who is largely immune from the accountability that prosecutors and other public officials constantly face. Although the Senate bill, S. 495, expressly prohibits reappointment after three years, I would not be averse to a single reappointment of another three years, subject to Senate confirmation, in order to allow the prosecutor the time which I believe may realistically be necessary, to conduct in-depth investigations and to complete prosecutions.

3. *The special prosecutor should not be subject to removal by the President except for extraordinary improprieties.*—I would prefer that such a removal be subject to the approval of both Houses of Congress, or at least of the Senate, but there are serious questions as to the constitutionality of such a procedure. I am inclined to go along with the Senate bill, S. 495, which provides that the removal of the special prosecutor is subject to review in the U.S. District Court for the District of Columbia. When Special Prosecutor Archibald Cox was discharged in the "Saturday Night Massacre" in October 1973, I joined with several other plaintiffs in a lawsuit challenging the removal. The District Court held that I had standing to bring the action and that the discharge had been illegal. I think that we should err on the side of safety by providing for judicial review expressly according standing to Members of Congress. It goes without saying that the special prosecutor, as a member of the executive branch, would be subject to impeachment in the normal manner.

4. *The Special Prosecutor should be authorized to request funding directly from Congress rather than having to go through OMB or the Justice Department.*

5. *Congressional Legal Counsel is needed.*—Title II of S. 495 provides for the establishment of a Congressional Legal Counsel, whose duties would include defending lawsuits against Congress or its Members in their official capacity and bringing court actions to enforce congressional subpoenas. I am generally in favor of the establishment of such an office. I regret that it is not provided for in any of the House bills before you and hope that you will decide to include in the legislation that you finally report.

I do have one serious criticism of title II as passed by the Senate: the section providing for district court jurisdiction over actions to enforce congressional subpoenas expressly excludes subpoenas addressed to officers of the Executive branch. If history is any indication, these are precisely the kind of subpoenas for which judicial enforcement is most needed, and the exception should be stricken from the bill.

Title III of the Senate bill provides for financial disclosure for high officials of all three branches of the Federal government. While I realize that there may be legitimate privacy questions involved here, I have concluded that the special nature of the positions in question requires that there be disclosure. Accordingly, I hope that you will include such provisions in your reported bill.

6. *A separate temporary special prosecutor should be appointed as well to investigate and prosecute Federal crimes committed by any Federal employee or agent arising out of intelligence or counterintelligence activities.*—There is now irrefutable and overwhelming evidence that over a long period of time senior officers of the intelligence agencies of our government were involved in activities which violated statutory law and the constitutional rights of American citizens. At the same time, however, the relationship between the intelligence and law enforcement agencies of the Federal government has raised serious questions concerning the ability and the desire of the Department of Justice to impartially investigate such crimes. The 20-year agreement between the Justice Department and the CIA in which Justice agreed to allow the CIA to police itself is but one example of the complicity between the agencies brought out in hearings before my subcommittee on Government Information and Individual Rights.

Finally, the appointments to the office of special prosecutor should be made without consideration as to race, color, religion, national origin, sex or marital status.

Washington, D.C., September 2, 1976.

HON. WILLIAM HUNOATE,
U.S. House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: I am writing to express my opposition to particular provisions of S. 495, the Watergate Reorganization and Reform Act of 1976, which passed the Senate on July 21 and is now pending before your subcommittee.

The bill does contain provisions that can properly be called reforms—complete public financial disclosure by federal elected officials and high-level employees, and establishment of a new Office of Government Crimes in the Justice Department fit this category—but I believe that the measure's centerpiece, the creation of an independent, permanent office of special prosecutor within the Executive Branch, is likely to make more mischief than progress. The broad range of prosecutorial authority conferred upon the special prosecutor by the bill, taken together with the near-immunity from removal during his three-year term create an extraordinary potential for the abuse of power. It violates the traditional principle of our government that those exercising the vast powers conferred on the public prosecutor must be accountable in some fashion to the people or the people's representatives.

When S. 495 was being developed by the Senate Government Operations Committee, there was testimony from a number of individuals with first-hand experience in investigation of the Watergate scandals and the operations of the Special Prosecutor's Office created to prosecute offenses arising out of Watergate. While the witnesses were not unanimous on this score, there was a substantial body of opinion that opposed the establishment of a permanent special prosecutor, including two of the men who held the post of Watergate Special Prosecutor, Leon Jaworski and Harry S. Ruth, Jr. Further, it should be noted that Archibald Cox is categorically opposed to the creation of a permanent special prosecutor.

Ruth, the incumbent at the time of the committee hearings on this bill, said: "As special prosecutor now, I take directions from no one, I report directly on ongoing investigations to no one, and I could easily abuse my power with little chance of detection."

Samuel Dash, the Georgetown University law professor who served as chief counsel to the Senate Watergate Committee, said ". . . the bill gives too much discretionary power to the public attorney." The American Bar Association took a position against the creation of an office of special prosecutor on a permanent basis.

These were some of the reasons that led the committee to decide against the creation of a permanent special prosecutor's office, in favor of a temporary special prosecutor to be appointed whenever circumstances so required. While the appointment machinery embodied in the committee bill was somewhat cumbersome and involved the Court of Appeals in the process in a manner that verged on violation of the separation of powers principle, it had the great virtue of providing for the temporary appointment of an individual to prosecute a distinct case or group of cases.

As you may know, after debate on the bill had begun on the Senate floor, the Administration changed its position and agreed to the enactment of legislation establishing a special prosecutor's office. An unprinted amendment which changed the office from a temporary to a permanent one was offered and adopted by a voice vote. Thereafter, the bill as amended was passed by an overwhelming vote. From the tenor of their comments it is clear that a number of Senators were under the impression that the bill as passed was essentially the same as that developed by the committee. Certainly that was my belief.

Mr. Chairman, the office of Permanent Special Prosecutor, created in S. 495, is an invitation to an unprincipled officeholder to advance his political career without any of the traditional checks that we have employed on the arbitrary exercise of prosecutorial powers. Even for the most principled individual, the roving commission given him, combined with the public expectation that some actions will be taken during his three-year term, virtually compel him to seek indictments and undertake prosecutions even though they be in the most marginal cases or cases in which the ordinary processes of the law can properly be exercised.

I urge that your subcommittee reject the Senate version of Title I and replace it with provisions similar to those contained in the Senate Committee bill. Per-

haps the best comment on the risk that accompanied legislation of this kind was made in the final report of the Watergate Special Prosecutor as follows:

"Men with unchecked power and unchallenged trust too often come to believe that their own perceptions of priorities and the common good coincide with the national will. There is no reason to believe that, in the long run, an independent special prosecutor's office would be immune from the rigidity that comes over most organizations after the initial period."

Yours very truly,

THOMAS F. EAGLETON,
U.S. Senator.

Mr. HUNGATE. Our final witness for today is Sanford Watzman, administrative assistant to Congressman James V. Stanton. Would you please come forward and have a seat, Mr. Watzman?

You have a prepared statement, and unless there is objection, it will be made part of the record at this point.

[The statement of Sanford Watzman follows:]

STATEMENT OF SANFORD WATZMAN, ADMINISTRATIVE ASSISTANT TO HON. JAMES V. STANTON

Mr. Chairman, I deeply appreciate your affording me an opportunity to appear here today. Before the Watergate incident occurred, I had become interested in the matter that is now before this Subcommittee—whether we can establish in the federal government some institutional mechanism to assure the American people appropriate action will be taken against executive, legislative and judicial officials who violate the public trust.

I became interested when I was an investigative reporter and Washington correspondent for the Cleveland Plain Dealer, and I wrote a book which concluded with some suggestions for dealing with this problem. Respectfully, I submit that these proposals might be helpful today to your Subcommittee, which is considering whether there ought to be a "Watergate" prosecutor in the Justice Department and, if so, how that office ought to be structured and how much authority the incumbent should have. I happen to believe, Mr. Chairman, it is possible to take a different route to the goal all of us are seeking—that we can adopt a strategy giving us most of the benefits of an independent prosecutor while avoiding many of the pitfalls that are inherent in the proposals already before you.

It is proper to ask first, I suppose, whether it is advisable for the Congress to take any action at all. Given the nature of human beings and of government, won't there always be a Watergate somewhere on the horizon, and—as a practical matter—can we really avert the more frequent mini-Watergates that historically have been part of our day-to-day political environment? And, besides, do we not have a system that has already proved itself to be self-cleansing? Have we not deposed both a President and a Vice President, and a few years earlier, a Justice of the Supreme Court—and, more recently, certain leaders of this Congress?

These of course are leading questions, and I think it behooves us to be careful. For the indicated answers, however valid, simply are not going to be acceptable to the American people. Americans never have adhered to the proposition that official wrongdoing is inevitable—that they are indeed fortunate when it is held to some putative irreducible minimum. If in every generation the media keep erupting with stories about government scandals, obviously this is because Americans continue to care; they think something ought to be done about the wrongdoing. In fact, they have been conditioned to believe it is possible to enact laws forcing public officials into an ethical straitjacket.

The conditioning stems from the admiration we hold for our Founding Fathers. We have been taught that they were not fools. As historian Richard Hofstadter put it: "To them, a human being was an atom of self-interest. They did not believe in man, but they did believe in the power of a good political constitution to control him." The men who prompted the most worry, of course, were those who were about to be granted powers over the rest of us. So a good nontrusting Constitution was adopted, with checks and balances and a separation of powers. But

if, even then, we have become preoccupied over these last 200 years with adding still more controls, this is because our education has programmed us to go on with the task—not to be satisfied with slow progress, however steady it might be.

Rather, we continue to take our cue—and our goal—from that passage in the Federalist Papers which states: "The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess the most wisdom to discern, and most virtue to pursue, the common good of society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust." All of this was summed up by Mr. Dooley, Finley Peter Dunne's political commentator, when he said: "Trust everyone—but cut the cards."

I submit, Mr. Chairman, that as I see it there is an overriding reason why this task still remains to be completed after 200 years. It is this: Contrary to the spirit of our Constitution, we have settled into a rut where in every decade we deal only reactively with incidents of malfeasance. If and when we are finally moved to lift a finger we keep putting it in the dike. We have never seized the problem with both hands, as it were, in an attempt to master it preemptively and comprehensively. In this area, and in my opinion for self-serving reasons, the government officials who say they are interested in reform march only to the border where they find a separation of powers—and then they declare there can be no crossing.

The result is that a system of ethical surveillance has evolved which, by and large, finds each branch of the government looking after itself—drafting general rules of conduct for its personnel and then deciding when to enforce or not to enforce them. This has brought us not only disparity between the branches but internal disorder as well as in all three.

In the judiciary, conflict-of-interest rules are promulgated by a Judicial Conference with dubious enforcement powers; some judges of the lower courts reject its authority, and the Conference itself acknowledges it has no jurisdiction over the nine justices of the Supreme Court. In the Congress, there is one code for the Senate and another for the House, with no ongoing program in either chamber to verify the completeness or accuracy of Members' disclosure statements. In the executive branch, the situation has not changed much since a detailed study in 1960 concluded: "Regardless of the administration in office, the Presidency has not provided central leadership for the executive branch as a whole. . . . Administration of conflict-of-interest restraints can be observed only on a fragmented basis—department by department, agency by agency."

No wonder the citizen loses patience. Mr. Chairman, no wonder there is a growing distrust of government. For however we might differentiate ourselves here in Washington, we of the three branches are seen by the people as part of a single government establishment, resting on a single tax base. For their money, it is about time that the people were provided with a cop on the beat in Washington—some anti-corruption machinery in the government that is free wheeling, having no place in the driver's seat for the politicians who are being policed.

But where would we put this enforcement unit? Certainly not in the Congress or the courts, which are not in the enforcement business; not equipped to take on this responsibility; and not, in any event, structured to speak with one authoritative voice because each judge, each Senator and each Congressman is—and ought to be—a sovereign individual. Nor is it advisable, as I see it, to vest the enforcement power in an independent board or commission—or in a special office such as that of the Comptroller General—because these are bureaucratic entities with no great visibility, no popular constituency and therefore lacking public confidence and support.

Obviously, then, this is an operation that should be established in the executive branch of government, and to do so would of course preserve and follow the lines of authority set forth in the Constitution. But now we come to the question: Where in the executive branch? The only appropriate agency, at first glance, appears to be the Justice Department. Here we have two choices. We could entrust the task to a separate government crimes division reporting directly to the Attorney General, or we could rely on an autonomous figure—a special Watergate-type prosecutor.

The first alternative has, for openers, the advantage of tampering the least with an existing system which periodically puts officials out of office—and some-

times in jail, to boot—without disrupting our form of government. Another advantage is that it keeps responsibility where it belongs, putting pressure on the Attorney General, and ultimately the President, to perform their Constitutional duties. The salutary effect of all this on Justice Department morale perhaps should not be underestimated. Yet the weakness of the status quo, beyond which this approach hardly takes us, is evident. To say it did not spare us Watergate is to understate the case against it; neither has it spared us the lesser but recurring scandals that have plagued us throughout our history. In our political world it is a fact of life that the work of the Justice Department, from time to time, is subverted when someone under investigation is able to reach an influential official—perhaps, but not necessarily, the President himself. In any event this strategy does not help us out of the predicament we started with: How can the President really convince the people that self-monitoring will guarantee his own good behavior? Or that of his appointees in the executive branch? Or of his friends in the courts or in the Congress—personages who gate-type prosecutor seems to overcome these difficulties. After all, during can make or break a President's programs?

The second alternative of surrendering all responsibility to a special Watergate-type prosecutor seems to overcome these difficulties. After all, during Watergate it worked. What better justification do we need for keeping an independent prosecutor in the line-up? Would it not be ill-advised at this time, in view of the exceedingly skeptical mood of the electorate, to bench the prosecutor, and to try to justify this with a declaration that probity in officialdom is back to "normal"?

I submit, Mr. Chairman, that we certainly ought to bench the special prosecutor, but that there are valid and more credible reasons for doing so. Among these reasons, three stand out.

First, instead of making it clear to the American people where the buck stops (President Truman took pride in advertising that it stopped on his desk), establishing an office of independent prosecutor would cause the buck to be passed back and forth—or to stop short of the White House. I doubt that we would want to allow our chief enforcement officer the political luxury, when it suits him, of ducking the responsibility we have vested in him. Confusion would arise as to who is really responsible—the see-no-evil, hear-no-evil President or the special prosecutor who, while appointed by the President, operates autonomously on a turf where the boundaries cannot be precisely defined.

Second, the prosecutor at times might have to pay too dearly for his putative independence if he pushes it too far. He could be denied the full cooperation of the expert, well-staffed enforcement agencies that form part of the President's administration. This foot-dragging by other officials would not always be provable by the prosecutor or even visible to him, let alone to the people. But he might suspect it, and then be tempted to make a quiet accommodation rather than bear the public sting of losing his case. As to any open clash with the President or chiefs of the Congress, the prosecutor would have to start with the handicap of having no popular constituency. The voters might not side with him because they do not really know him. They could be persuaded by the politicians to whom they entrusted their vote that he was acting in his own interest rather than in the public interest. A determined prosecutor would then have to reach for his ultimate weapon—the threat to resign. But martyrdom might not become him or his cause as it did Archibald Cox. It was strictly the uncommon notoriety of Watergate that finally produced a victory for Cox. Yet, Mr. Chairman, we ought not to be worrying just about the Watergates; our primary concern should be day-to-day honesty in government. Battles have to be fought regularly inside the bureaucracy, where entrenched officials have the advantage. In these ever-recurring, convoluted little wars the special prosecutor would constantly be forced to play David against the governmental Goliath. Such odds, Mr. Chairman, will ultimately wear a David down.

Third, we ought to be wary of any prosecutor so resourceful and strong that he overcomes such odds. His success would be no guarantee of his virtue. This official, to the extent that he is truly independent, would be operating outside the constraints that normally bind other appointees. Though no one had elected him, he could become a power in his own right. And a menacing one at that. If he is a zealot, he could discover trivial misbehavior and launch "crusades" that disrupt the legitimate business of government agencies.

If he is a charlatan, he could embark on McCarthyite persecution of wholly dedicated public servants. If he is politically ambitious he could become a free-

wheeling rival to the President in his own house. And if he is venal, he could use confidential information to blackmail public officials. We had no such problems with Cox or Leon Jaworski or Henry Ruth. But the point is that they themselves, not knowing who their successor might be, have warned us to be alert. These men, who ought to know, would feel more comfortable if a special prosecutor were weighted down with some of the same checks and balances that keep other officials in line. Yet to put a leash on an independent prosecutor would seem to destroy his *raison d'être*.

So we come to an apparent dilemma, Mr. Chairman. If we agree that a new institutional arrangement is needed to restore and sustain public trust in our federal officials; if we must reject all governmental entities except the executive branch as the locus for this powerful new instrumentality; if we contemplate putting it in the Justice Department but then conclude that simply fitting such a unit into the existing structure there would prove ineffectual; if we ponder the establishment thereof a special and autonomous prosecuting office, only to hold back because doing so would blur lines of responsibility, or because this strategy would seem to promise more than it could deliver, or because we fear that we might create a Frankenstein monster—then what possibility remains?

In my opinion, Mr. Chairman, what remains is the best possible arrangement we could devise. It is innovative, but it requires no drastic overhaul of our government. It is in accord with the Constitution, and therefore it need not bring into play the slow, cumbersome process of amending it. It is likely to work, because it is based on the same premises about human nature and intragovernmental relationships that have accorded longevity to our Constitution.

My proposal, Mr. Chairman—and, with your leave, I will need a while longer to explain it—is to establish a federal board of ethics at the White House level, and to put the President in charge of the board as its chairman. He could of course function through a surrogate, but the latter would act in the name of the President.

The interaction between the President and the board, and the separate and shared responsibilities of each of them, would be such as to afford us maximum assurance that they could accomplish their mission—without any abuses of power—while operating at the highest level of visibility. The voters, looking on, would be witnesses to the fact that they finally do have a couple of tough cops on the beat and, furthermore, that the two cops are watching each other.

Why should the President be in charge? Our first answer must be that, in any enforcement operation under our Constitution, he already is—and ought to be. Normally, this responsibility is delegated to an agency such as the Justice Department, but we have already reviewed what is likely to come of this. The issue of governmental integrity is so important to the American people that it would please them, for a change, to have the responsibility for it elevated to the White House level. Moreover, with the board exercising oversight with respect to the President's peers in the legislative and judicial branches, nothing less than a Presidential presence on it would seem to be appropriate.

Is there, after all, anyone else in our federal government big enough to take on this job? As Woodrow Wilson said of the Chief Executive: "His is the only national voice in affairs. . . . His position takes the imagination of the country. He is the representative of no constituency, but of the whole people. When he speaks in his true character, he speaks for no special interest."

Moreover, is there anyone else who is accountable to all the voters? Or anyone in government who is better known—or more closely watched? If the President were to be given this assignment by law, it would become politically impossible for him to make light of it. His performance in this one area could well become the measure of his Presidency.

It is through the mechanism of the board that the President could act on his own initiative or be prodded into acting; or restrained from acting, when his motivation might be self-aggrandizement. Watergate has alerted us to two perils stemming from a President's direct involvement in law enforcement. First, without really wanting to act, he might pretend to do so, by creating a distraction (the John Dean "investigation"). Second, he might use his powers to thwart justice by covering up for himself or others (John Mitchell, H. R. Haldeman, John Ehrlichman), or by misusing a governmental agency he controls (the CIA, the IRS). But under the proposal I present here, Mr. Chairman, the President would be a Stamese twin of a board whose members could tug him in the opposite direction. His being conjoined with the board means that the members would be looking over his shoulder, tending to inhibit any malfeasance by him. For com-

fort's sake, the President would quickly learn that, first, he must march, and second, that this would be painful unless he were in step with the board.

The board would be an independent body divorced from the rest of the executive bureaucracy. Its members—two Democrats and two Republicans—would be appointed by the President with the advice and consent of the Senate. As a guarantee of their independence, the board members would need lifetime appointments, in the manner of the federal judiciary. A member appointed to a fixed term could be confronted with the need to make a particularly sensitive decision on the brink of the expiration of his term; he might then vote—or be suspected of voting—in a way to best assure reappointment by the President. In exchange for indefinite terms that could be ended only by impeachment, the board members would be disqualified from ever holding another office should they step down. This would prevent the board from being used as a launching pad by members with political ambitions. And it would assure the public of the integrity of board decisions.

Since most board members would survive a President who appointed them and since, in any event, he could not oust them, we could be confident that the White House connection would not compromise their independence. With no stake in any program administered by the executive branch, and sharing none of the institutional or personal loyalties that develop in the bureaucratic principalities, the board members would have no reason to gloss over an incident merely to protect an official, his agency or its mission. Having no concern, either, about who is elected or re-elected to the Congress, the board need not feel inhibited about taking on a member of the House or Senate. And having no role in the selection of judges, the board would have no reason to indulge those who betrayed that office.

We could take steps to preclude either the President, acting alone, or his two party members, acting with him, from manipulating the board for partisan ends. First, we could require that at least four members constitute a quorum. Second, we could stipulate that the President could vote only to join in a unanimous decision of the board or to break a tie. Should it ever become necessary for him to cast a tie-breaking vote, maximum public attention would be focused on him and he would have to answer convincingly for his action. But it is evident that in most cases he would wield little control because he would not be participating in board actions as a voting member. Yet the board would have the clout that comes from functioning in his name, and the President would be under an obligation, too, to exercise leadership.

A McCarthyite board need not be feared. Extremist action could not be mounted by one aberrant member; he would need the concurrence of his colleagues. Besides, we could expect the President to exercise a restraining influence, if it came to that. Also, the courts would be watching from a distance and Congress could disestablish any such board, writing it off as an unsuccessful experiment in ethical enforcement.

To needle the President, as required, the board would have the power of subpoena and authority to conduct public hearings. But we ought not to overlook the fact that a well-motivated President might actually welcome the help of the board. An observer of presidents has noted that bureaucrats chronically fail to report anything to their superiors that might reflect badly on their agencies or the programs they administer. He concluded: "A President doesn't get much straight talk from his subordinates."

However, the board—by maintaining its distance from all three branches—would be strategically situated to receive information on a confidential basis. Civil servants would not have to worry that their tip about an agency would reach the boss himself; they could feel confident that their information would be investigated, rather than brushed aside. In fact, there could develop a symbiotic relationship between the President and the board. The board would need the President to enforce its decisions; the President would need the board to feed him information. The board would have the advantage of being on the White House stage, while the President could retreat behind the board when his friends or allies are under assault.

No such board could operate without a large staff—its own built-in bureaucracy. But because I believe that the people need another agency like they need more corruption, I propose that in establishing the board we disestablish the Federal Elections Commission, which even today is not known to the average American, and where the leadership lacks a popular following. The board would

necessarily operate anyway on the Commission's turf. In addition, we could reduce the size of some other governmental entities—such as the Civil Service Commission—to the extent that we cause them to cede to the board some of their authority. As the central clearinghouse for ethical concerns in the government, the board could work with Congress in helping to anticipate and solve problems. For instance, it could recommend a single standard as to what constitutes a conflict of interest, applicable to all three branches. I submit, Mr. Chairman, that the taxpayers would not begrudge payment for this type of service.

Thank you Mr. Chairman, I would be happy to answer any questions you might have—orally now, or later in writing. It has been a pleasure to appear before this distinguished panel.

TESTIMONY OF SANFORD WATZMAN, ADMINISTRATIVE ASSISTANT TO HON. JAMES V. STANTON

Mr. WATZMAN. Mr. Chairman, thank you. My name is Sanford Watzman. I am the administrative assistant to Congressman James V. Stanton at 103 in the Canuon Building, here in the House of Representatives.

Mr. Chairman, I deeply appreciate your affording me an opportunity to appear here today. Before the Watergate incident occurred, I had become interested in the matter that is now before the subcommittee—whether we can establish in the Federal Government some institutional mechanism to assure the American people appropriate action will be taken against executive, legislative, and judicial officials who violate the public trust.

I became interested when I was an investigative reporter and Washington correspondent for the Cleveland Plain Dealer, and I wrote a book which concluded with some suggestions for dealing with this problem. Respectfully, I submit that these proposals might be helpful today to your subcommittee, which is considering whether there ought to be a Watergate prosecutor in the Justice Department and, if so, how that office ought to be structured and how much authority the incumbent should have. I happen to believe, Mr. Chairman, it is possible to take a different route to the goal all of us are seeking—that we can adopt a strategy giving us most of the benefits of an independent prosecutor while avoiding many of the pitfalls that are inherent in the proposals already before you.

It is proper to ask first, I suppose, whether it is advisable for the Congress to take any action at all. Given the nature of human beings and of government, won't there always be a Watergate somewhere on the horizon, and—as a practical matter—can we really avert the more frequent mini-Watergates that historically have been part of our day-to-day political environment? And, besides, do we not have a system that has already proved itself to be self-cleansing? Have we not deposed both a President and a Vice President, and a few years earlier, a Justice of the Supreme Court—and, more recently, certain leaders of this Congress?

These, of course, are leading questions, and I think it behooves us to be careful. For the indicated answers, however valid, simply are not

going to be acceptable to the American people. Americans never have adhered to the proposition that official wrongdoing is inevitable—that they are indeed fortunate when it is held to some putative irreducible minimum. If in every generation the media keep erupting with stories about Government scandals, obviously this is because Americans continue to care; they think something ought to be done about the wrongdoing. In fact, they have been conditioned to believe it is possible to enact laws forcing public officials into an ethical straitjacket.

The conditioning stems from the admiration we hold for our Founding Fathers. We have been taught that they were not fools. As historian Richard Hofstadter put it: "To them, a human being was an atom of self-interest. They did not believe in man, but they did believe in the power of a good political constitution to control him."

The men who prompted the most worry, of course, were those who were about to be granted powers over the rest of us. So, a good non-trusting Constitution was adopted, with checks and balances and a separation of powers. But if, even then, we have become preoccupied over these last 200 years with adding still more controls, this is because our education has programed us to go on with the task—not to be satisfied with slow progress, however steady it might be. Rather, we continue to take our cue—and our goal—from that passage in the Federalist papers which states:

The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess the most wisdom to discern, and most virtue to pursue, the common good of society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.

I submit, Mr. Chairman, that as I see it there is an overriding reason why this task still remains to be completed after 200 years. It is this: Contrary to the spirit of our Constitution, we have settled into a rut where in every decade we deal only reactively with incidents of malfeasance. If and when we are finally moved to lift a finger, we keep putting it in the dike. We have never seized the problem with both hands, as it were, in an attempt to master it preemptively and comprehensively. In this area, and in my opinion for self-serving reasons, the Government officials who say they are interested in reform march only to the border where they find a separation of powers—and then they declare there can be no crossing.

The result is that a system of ethical surveillance has evolved which, by and large, finds each branch of the Government looking after itself—drafting general rules of conduct for its personnel and then deciding when to enforce or not to enforce them. This has brought us not only disparity between the branches, but internal disorder as well in all three. In the judiciary conflict-of-interest rules are promulgated by a judicial conference with dubious enforcement powers; some judges of the lower courts reject its authority, and the conference itself acknowledges it has no jurisdiction over the Supreme Court.

Mr. HUNGATE. That is the second call on the quorum, so, we will have to recess, and then we will conclude this as soon as we can return from the quorum.

[Whereupon, a short recess was taken.]

Mr. HUNGATE. The subcommittee will resume. We will shortly be joined by Mr. Hyde again. If you will, you may resume reading your prepared statement, sir.

Mr. WATZMAN. Thank you, Mr. Chairman.

In the judiciary conflict-of-interest rules are promulgated by a judicial conference with dubious enforcement powers; some judges of the lower courts reject its authority, and the conference itself acknowledges it has no jurisdiction over the Supreme Court.

In the Congress, there is one code for the Senate and another for the House, with no ongoing program in either Chamber to verify the completeness or accuracy of Members' disclosure statements.

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No wonder the citizen loses patience, Mr. Chairman. No wonder there is a growing distrust of Government. For however we might differentiate ourselves here in Washington, we of the three branches are seen by the people as part of a single governmental establishment, resting on a single tax base. For their money, it is about time that the people were provided with a cop on the beat in Washington—some anticorruption machinery in the Government that is freewheeling, having no place in the driver's seat for the politicians who are being policed.

But where would we put this enforcement unit? Certainly not in the Congress or the courts, which are not in the enforcement business; not equipped to take on this responsibility; and not, in any event, structured to speak with one authoritative voice because each judge, each Senator and each Congressman is—and ought to be—a sovereign individual. Nor is it advisable, as I see it, to vest the enforcement power in an independent board or commission—or in a special office such as that of the Comptroller General—because these are bureaucratic entities with no great visibility, no popular constituency and therefore lacking public confidence and support.

Obviously, then, this is an operation that should be established in the executive branch of Government, and to do so would of course preserve and follow the lines of authority set forth in the Constitution. But now we come to the question: Where in the executive branch? The only appropriate agency, at first glance, appears to be the Justice Department. Here we have two choices. We could entrust the task to a separate Government crimes division reporting directly to the Attorney General, or we could rely on an autonomous figure—a special Watergate-type prosecutor.

The first alternative has, for openers, the advantage of tampering the least with an existing system which periodically puts officials out of office—and sometimes in jail, to boot—without disrupting our form of Government. Another advantage is that it keeps responsibility

where it belongs, putting pressure on the Attorney General, and ultimately the President, to perform their Constitutional duties. The salutary effect of all this on Justice Department morale perhaps should not be underestimated. Yet the weakness of the status quo, beyond which this approach hardly takes us, is evident. To say it did not spare us Watergate is to understate the case against it; neither has it spared us the lesser but recurring scandals that have plagued us throughout our history. In our political world it is a fact of life that the work of the Justice Department, from time to time, is subverted when someone under investigation is able to reach an influential official—perhaps, but not necessarily, the President himself. In any event this strategy does not help us out of the predicament we started with: How can the President really convince the people that self-monitoring will guarantee his own good behavior?

The second alternative of surrendering all responsibility to a special Watergate-type prosecutor seems to overcome these difficulties. After all, during Watergate it worked. What better justification do we need for keeping an independent prosecutor in the lineup? Would it not be ill advised at this time, in view of the exceedingly skeptical mood of the electorate, to bench the prosecutor, and to try to justify this with a declaration that probity in officialdom is back to normal?

I submit, Mr. Chairman, that we certainly ought to bench the Special Prosecutor, but that there are valid and more credible reasons for doing so. Among these reasons, three stand out.

First, instead of making it clear to the American people where the buck stops—President Truman, Mr. Chairman, of your great State, took pride in advertising that it stopped on his desk—establishing an office of independent prosecutor would cause the buck to be passed back and forth—or to stop short of the White House. I doubt that we would want to allow our chief enforcement officer the political luxury, when it suits him, of ducking the responsibility we have vested in him. Confusion would arise as to who is really responsible—the see-no-evil, hear-no-evil President or the Special Prosecutor who, while appointed by the President, operates autonomously on a turf where the boundaries cannot be precisely defined.

Second, the prosecutor at times might have to pay too dearly for his putative independence if he pushes it too far. He could be denied the full cooperation of the expert, well-staffed enforcement agencies and investigative agencies that form part of the President's administration.

This foot-dragging by other officials would not always be provable by the prosecutor or even visible to him, let alone to the people. But he might suspect it, and then be tempted to make a quiet accommodation rather than bear the public sting of losing his case. As to any open clash with the President or leaders in the Congress, the prosecutor would have to start with the handicap of having no popular constituency. The voters might not side with him because they do not really know him. They could be persuaded by the politicians to whom they entrusted their vote that he was acting in his own interest rather than in the public interest.

A determined prosecutor would then have to reach for his ultimate weapon—the threat to resign. But martyrdom might not become him

of his cause as it did Archibald Cox. It was strictly the uncommon economy of Watergate that finally produced a victory for Cox. Yet, Mr. Chairman, we ought not to be worrying just about the Water-gate; our primary concern should be day-to-day honesty in government. Battles have to be fought regularly inside the bureaucracy, where entrenched officials have the advantage. In these ever-recurring convoluted little wars the Special Prosecutor would constantly be forced to play David against the governmental Goliath. Such odds, Mr. Chairman, will ultimately wear a David down.

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So, we come to an apparent dilemma, Mr. Chairman. If we agree that a new institutional arrangement is needed to restore and sustain public trust in our Federal officials; if we must reject all governmental entities except the executive branch as the locus for this powerful new instrumentality; if we contemplate putting it in the Justice Department but then conclude that simply fitting such a unit into the existing structure there would prove ineffectual; if we ponder the establishment there of a special autonomous prosecuting office, only to hold back because doing so would blur lines of responsibility, or because this strategy would seem to promise more than it could deliver, or because we fear that we might create a Frankenstein monster—then what possibility remains?

In my opinion, Mr. Chairman, what remains is the best possible arrangement we could devise. It is innovative, but it requires no drastic overhaul of our Government. It is in accord with the Constitution, and therefore it need not bring into play the slow, cumbersome process of amending it. It is likely to work, in my opinion, because it is based on the same premises about human nature and inter-governmental relationships that have accorded longevity to our Constitution.

My proposal, Mr. Chairman, is to establish a Federal board of ethics at the White House level, and to put the President in charge of the board as its chairman. He could, of course, on a day-to-day basis function through a surrogate, but the latter would act in the name of the

President. The interaction between the President and the board, and the separate and shared responsibilities of each of them, would be such as to afford us maximum assurance that they could accomplish their mission—without any abuses of power—while operating at the highest level of visibility. The voters, looking on, would be witness to the fact that they finally do have a couple of tough cops on the beat and, furthermore, that the two cops are watching each other.

Mr. HYDE. May I interrupt, sir? I read your statement, I read it last night. As a matter of fact, I want to commend you for making it available to us in advance, so we could read it—we do not always have that benefit.

I assume, Mr. Chairman, you have read the statement. Would it not be more expeditious, rather than putting Mr. Watzman through the onerous task of reading the remaining four pages, if we got to the questions. Counsel, you have the statement, have you not?

Wouldn't that save time and get us to the questions? You don't have any objection, do you?

Mr. WATZMAN. No, no objection.

Mr. HYDE. We all have read your statement, it is excellent.

Mr. WATZMAN. If you have any questions, I will be happy to try to answer them.

Mr. HUNGATE. Mr. Hyde?

Mr. HYDE. Thank you. I am a little bit curious about the life tenure for this board. I understand the reason that we want that, we do that for Supreme Court Justices, but we also sometimes get into some problems with that. Justice Douglas could have been a problem—fortunately it did not work out that way.

Don't you think it is good to have some mechanism, though, for terminating members of this board of ethics, should something happen later on that would make him unable to fulfill his functions?

Mr. WATZMAN. Congressman, of course, giving them life tenure does not solve all the problems, and inherent in that are some problems, which I do appreciate. However, anything less than life tenure, considering the enormous powers this board would have over officials of all three branches of Government, would bring these officials into politics, would color the character of their decisions, and would probably undermine the confidence the public might otherwise have in the decisions of this board. So, I think that we would want to keep them out of the political process for the same reasons that we do want to keep Federal judges out; knowing at the same time that we do have a Justice Fortas from time to time who will abuse that trust. The remedy of impeachment remains, of course.

Mr. HYDE. In the State legislature in Illinois this problem was being grappled with, and I came up with what I thought was a bright idea, putting together a board of ethics, legislative ethics, and peopling it on a rotating basis with the deans of the eight major law schools in Illinois on the theory that these are men that are committed to the rule of law, due process of law, and being academicians who would not be in the political mainstream.

They would have almost total authority in a closed hearing to interview a legislator, look at his income tax returns, interrogate; and their only power, as I envisioned it, would be to issue a report, a public

report, listing their findings if a conflict of interest was there, and even recommending prosecution.

But the member, the legislator, would also have the right to subpoena and to bring his or her witnesses into the same board, and to issue a report contemporaneous with theirs, meeting the allegations.

As I was developing this idea I circulated it among the deans of the law schools, and seven of them declined with thanks to serve. One thought it was a great idea.

But I do think this is a very interesting approach that may well be a useful solution. I have no further questions, Mr. Chairman.

Mr. HUNGATE. Thank you.

I, too, commend you on offering us another arrow here to direct to this target. I think you suggest doing away with the Federal Election Commission, which some of us might enthusiastically do; but would we not in our present circumstance have to devolve those duties to someone else? I think they have gotten to be a rather fundamental part of the political process right now.

Mr. WATZMAN. Yes, Mr. Chairman. As I see the duties of the Federal Election Commission, they would devolve on this new board.

Mr. HUNGATE. Well, would you have a problem—some of us would think you would have a problem—with the President as the chairman of it? In fact, some of us were disappointed in the Supreme Court's decision that they could not be confirmed or run through the House because they certainly sit on the election of the House. The President appoints them, and even now he appoints them and they sit on his election. Do you see what I mean?

I have a little trouble as to why the House cannot have an input as to who is on that committee when they regulate our elections, all the Members, every 2 years. Yet, the Senate can have an input with an election every 6 years, a third of them. And the President, he appointed all of them and faces it only every 4 years—I have lots of trouble with that. But, that is why that is the Supreme Court and I am reading the opinions.

But I wonder if you would not have a lot of trouble if you had the Election Commission and the President as chairman of it.

Mr. WATZMAN. Well, Mr. Chairman, obviously that is frightening to contemplate if the President were to have powers that were unlimited with respect to this new board, that he could influence who would be elected to the Congress, let alone to the White House. Perhaps there is a risk there that we would not want to take.

But, I was aware of that at the time I constructed this proposal; and I think, Mr. Chairman, that we have a lot to gain by centering responsibility in one place where everybody sees it and knows exactly where it is. On the other hand, we have in the way this board is structured, we have the President really almost incapable of functioning, except under very special circumstances, almost incapable of functioning as a voting member of the board. So, while the board would act in the President's name, the real decisions would be made by the board itself which would not be beholden to the President.

Mr. HUNGATE. Well, certainly, fresh thinking is needed in all places, and especially here. It is an innovative idea.

Mr. Hyde?

Mr. HYDE. Mr. Chairman, I am particularly attracted to the fact that there would be two Democrats and two Republicans on this ethics board, which is in sharp contrast to the 2-to-1 plus 1, which we have in all other committees—I am very attracted to that.

Mr. HUNGATE. Although the current Federal Election Commission, if you are talking about changing that, is a three and three split, it is equally divided on party lines. I am not enamoured with that idea either, I like to put responsibility somewhere.

But, this would put responsibility somewhere. I do not know whether it would negate it because whatever party the President belonged to would have a majority.

Mr. WATZMAN. Would have a majority, yes.

Mr. HUNGATE. You don't know how Gene McCarthy would use it. Did you have any alternative ideas—when we talk about the life tenure, again? Like Mr. Hyde, I see some of the reasons for it, and I also see some problems. Had you contemplated that?

Mr. WATZMAN. Congressman Hyde's suggestion sounded like a possible alternative to me. I think that could possibly work and perhaps overcome some of the objections that both you and he have about life tenure.

I think Congressman Hyde's suggestion might work to the extent that terms ended automatically and inexorably without anything being able to be done about it, where we knew that a new person was coming on and the old person could not stay.

Mr. HUNGATE. Let me follow you and see if I track it right. As to the legislation before us, the Senate bill with the permanent prosecutor; you are opposed to that?

Mr. WATZMAN. Yes.

Mr. HUNGATE. The proposed House legislation with a temporary Special Prosecutor, you in fact oppose that also.

Mr. WATZMAN. Yes.

Mr. HUNGATE. You would prefer a totally different approach with a Federal ethics board, you might say.

Mr. WATZMAN. Yes.

Mr. HUNGATE. That's fine.

Mr. HYDE. I have no further questions.

Mr. HUNGATE. Thank you for your patience in waiting here. We value your testimony, it has been helpful.

Mr. WATZMAN. Thank you, Mr. Chairman.

Mr. HUNGATE. The record on this legislation will remain open for the receipt of statements until 1 week from today, September 8.

The subcommittee stands adjourned.

[Wherenpon, at 12:50 p.m., the subcommittee adjourned, subject to the call of the Chair.]

APPENDIX

[Copies of H.R. 8039, 8281, 11357, 11999, 14476, 15634, and S. 495 follow:]

94TH CONGRESS
1ST SESSION

H. R. 8039

IN THE HOUSE OF REPRESENTATIVES

JUNE 19, 1975

Mr. MILFORD introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

For the appointment of special prosecutors.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That chapter 35 of title 28, United States Code, is hereby
4 amended by the addition of a new section as follows:
5 **“§ 551. Special prosecutor; appointment; term of service,**
6 **compensation, and staff**

7 “(a) In a criminal proceeding when, after an indict-
8 ment is returned and signed by, or a criminal information
9 is filed by, the United States attorney, his authorized as-
10 sistant, or other prosecuting official authorized by the De-
11 partment of Justice, a United States district judge does not

1 accept a recommendation by such prosecutor, or prosecutors,
2 of a dismissal of all or a part of the charges contained in
3 such indictment or information; or, when in a criminal pro-
4 ceeding, after an indictment is returned and signed by, or
5 a criminal information is filed by the United States attor-
6 ney, his authorized assistant, or other prosecuting official
7 authorized by the Department of Justice, the prosecutor
8 or prosecutors refuse to proceed with the prosecution of all
9 or a part of such charges, one or more special prosecutors
10 may be appointed as provided in paragraph (b) of this
11 section to prosecute such offense or offenses, and to handle all
12 matters relating to the prosecution.

13 “(b) A judge who refuses to dismiss such charges or
14 refuses to accept a refusal to proceed, as described in para-
15 graph (a) of this section, shall notify the chief judge of the
16 circuit of the district of the judge’s refusal and the chief judge
17 shall designate another district judge to promptly appoint one
18 or more special prosecutors. The district judge making the
19 appointment and the district judge making the notification
20 shall be disqualified from thereafter participating in the
21 criminal proceeding in which a special prosecutor is
22 appointed. The appointing judge may at any time and
23 upon good cause shown remove a special prosecutor from
24 office.

25 “(c) The appointing judge shall fix the compensation of

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1 the special prosecutor without regard to the provisions of
2 title 5, United States Code, governing appointments in the
3 competitive service, and without regard to chapter 51 and
4 subchapter III of chapter 53 of such title (relating to
5 classification and General Schedule pay rates), but at rates
6 not to exceed the maximum rate for GS-16 of the General
7 Schedule under section 5332 of title 5, United States Code.
8 A special prosecutor may employ members of his staff
9 subject to approval of the appointing judge.

10 “(d) Subject to approval by the appointing judge, the
11 special prosecutor may procure personal services of experts
12 and consultants, as authorized by section 3109 of title 5,
13 United States Code, at rates not to exceed the per diem
14 equivalent of the rate of GS-15 of the General Schedule
15 established by section 5332 of title 5, United States Code.

16 “(e) For the purposes of subchapter III of chapter 73
17 of title 5, United States Code, a special prosecutor and any
18 personnel appointed on his staff shall be deemed employees
19 in an executive agency.

20 “(f) In the event the position of special prosecutor be-
21 comes vacant or the services of a special prosecutor are
22 terminated for any reason, all investigations, prosecutions,
23 cases, litigation, and other proceedings initiated by such
24 special prosecutor appointed under this section may be
25 continued by a successor special prosecutor to be appointed

1 pursuant to paragraph (b) of this section. Such successor
2 special prosecutor shall become successor counsel for the
3 United States in all of the proceedings for which the original
4 special prosecutor was appointed.

5 “(g) All files, records, documents, and other materials
6 in the possession or control of the United States attorney
7 or the Department of Justice or any other department or
8 agency of the Government which relate to matters within
9 the particular jurisdiction of a special prosecutor appointed
10 under this section are transferred to the special prosecutor
11 as of the date of the order of the court appointing such
12 prosecutor. A special prosecutor is authorized to request
13 from any department or agency of Government any investiga-
14 tion which a United States attorney could request in the
15 prosecution of a criminal indictment and is authorized to
16 request from any department or agency of Government any
17 additional files, records, documents, or other materials which
18 may be deemed necessary or appropriate to the conduct of
19 such special prosecutors duties, functions and responsibilities
20 under this section, and each department or agency shall make
21 such investigation and furnish such materials to the special
22 prosecutor expeditiously, unless a court of competent juris-
23 diction shall order otherwise. A special prosecutor shall keep
24 inviolate and safeguard from unwarranted disclosure all

1 files, records, documents, physical evidence, and other
2 materials obtained or prepared by him.

3 “(h) The Administrator of General Services shall fur-
4 nish a special prosecutor with necessary office space, equip-
5 ment, supplies, and services as are authorized to be furnished
6 to any agency or instrumentality of the United States.

7 “(i) The appointment and authorization of a special
8 prosecutor shall terminate upon the completion of proceed-
9 ings in the criminal case for which he is appointed, and
10 upon that completion the special prosecutor shall make as
11 full and complete a report of his activities of his office as
12 is appropriate to the appointing judge and to the Attorney
13 General. All files, records, documents, and other materials
14 in the possession of the special prosecutor shall be delivered
15 to the Attorney General or such other agency as he may
16 direct.

17 “(j) There are authorized to be appropriated such
18 sums as are necessary to carry out the purposes of this
19 section.”.

20 **SEC. 2.** The section analysis of chapter 35 of title 28,
21 United States Code, is amended by inserting the following
22 item at the end thereof:

“551. Special prosecutor; appointment; term of service; compensation,
support, and staff.”.

H. R. 8281

IN THE HOUSE OF REPRESENTATIVES

JUNE 24, 1975

Mr. BARNETT introduced the following bill, which was referred to the Committee on the Judiciary

A BILL

To provide for, and assure the independence of, a Special Prosecutor, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SHORT TITLE**

4 **SECTION 1.** This Act may be cited as the "Special Prose-
5 cutor Act of 1975".

6 **APPOINTMENT OF SPECIAL PROSECUTOR**

7 **SEC. 2.** (a) The United States District Court for the
8 District of Columbia, sitting en banc, shall appoint a panel of
9 three of its members, hereinafter in this Act referred to as
10 "panel". Any vacancy on the panel shall be filled in the same
11 manner as the original appointment.

2

1 (b) The panel is empowered to and shall promptly
2 appoint a Special Prosecutor, who shall head an Office of
3 Special Prosecutor, and to fill any vacancy which may
4 occur in the position of Special Prosecutor.

5 (c) Participation in the selection of the panel shall not
6 in and of itself disqualify a judge in any proceeding in which
7 the Office of Special Prosecutor is involved. However, a
8 judge who serves on the panel is disqualified from partici-
9 pating in any proceeding in which the Office of Special
10 Prosecutor is involved.

11 COMPENSATION AND STAFFING

12 SEC. 3. (a) The Special Prosecutor shall be compen-
13 sated at the rate provided for level IV of the Executive
14 Schedule under section 5315 of title 5, United States Code.

15 (b) The Special Prosecutor may employ and fix the
16 compensation of personnel in the Office of Special Prosecutor
17 as he reasonably determines to be necessary, without re-
18 gard to the provisions of title 5, United States Code, gov-
19 erning appointments in the competitive service, and with-
20 out regard to chapter 51 and subchapter III of chapter 53
21 of such title (relating to classification and General Schedule
22 pay rates), but at rates not to exceed the maximum rate
23 for GS-18 of the General Schedule under section 5332 of
24 title 5, United States Code.

25 (c) The Special Prosecutor may procure personal serv-

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1 ices of experts and consultants, as authorized by section 3109
2 of title 5, United States Code, at rates not to exceed the
3 per diem equivalent of the rate for GS-18 of the General
4 Schedule established by section 5332 of title 5, United States
5 Code.

6 (d) Every department or agency of the Federal Gov-
7 ernment is authorized to make available to the Special Prose-
8 cutor, on a reimbursable basis, any personnel the Special
9 Prosecutor may request. Requested personnel shall be de-
10 tailed within one week after the date of the request unless
11 the Special Prosecutor designates a later date. An indi-
12 vidual's position and grade in his department or agency
13 shall not be prejudiced by his being detailed to the Special
14 Prosecutor. No person shall be detailed to the Special Prose-
15 cutor without his consent.

16 (e) For the purposes of subchapter III of chapter 73
17 of title 5, United States Code, the Special Prosecutor and
18 the personnel of the Office of Special Prosecutor shall be
19 deemed employees in an executive agency.

20 JURISDICTION AND AUTHORITY OF THE SPECIAL
21 PROSECUTOR

22 SEC. 4. (a) The Special Prosecutor has exclusive juris-
23 diction to investigate and to prosecute in the name of the
24 United States—

25 (1) all offenses or allegations of offenses arising out

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1 of the conduct of domestic intelligence or counterintelli-
2 gence activities and the operation of any other activities
3 within the United States by the Central Intelligence
4 Agency or any other intelligence or law enforcement
5 agency of the Federal Government;

6 (2) all violations or suspected violations of any
7 Federal statute by any intelligence or law enforcement
8 agency of the Federal Government or by any persons
9 by or on behalf of any intelligence or law enforcement
10 agency of the Federal Government including but not
11 limited to surreptitious entries, surveillance, wiretaps, or
12 illegal opening or monitoring of the United States mail;
13 and

14 (3) such related matters which he consents to have
15 assigned to him by the Attorney General of the United
16 States.

17 (b) The Special Prosecutor is authorized to take any
18 action necessary and proper to perform his functions and
19 carry out the purposes of this Act, including—

20 (1) issuing instructions to the Federal Bureau of
21 Investigation and other domestic investigative agencies
22 of the United States for the collection and delivery solely
23 to the Office of Special Prosecutor of information and
24 evidence bearing on matters within the jurisdiction of
25 the Special Prosecutor, and for safeguarding the integ-

1 rity and inviolability of all files, records, documents,
2 physical evidence, and other materials obtained or pre-
3 pared by the Special Prosecutor;

4 (2) conducting proceedings before grand juries;

5 (3) framing and signing indictments;

6 (4) signing and filing informations;

7 (5) contesting the assertion of executive privilege
8 or any other testimonial or evidentiary privilege;

9 (6) conducting and arguing appeals in the United
10 States Supreme Court, notwithstanding the provisions
11 of section 518 of title 28, United States Code;

12 (7) instituting, defending, and conducting civil and
13 criminal litigation in any court; and

14 (8) exclusively performing the functions conferred
15 upon the Attorney General of the United States under
16 part V of title 18, United States Code (relating to im-
17 munity of witnesses), with respect to any matter within
18 his exclusive jurisdiction.

19 DELEGATION

20 SEC. 5. The Special Prosecutor is authorized to dele-
21 gate any of his functions to personnel of the Office of Spe-
22 cial Prosecutor, and to experts and consultants retained
23 pursuant to section 3 (c).

24 TRANSFER AND ACQUISITION OF FILES AND INFORMATION

25 SEC. 6. (a) All files, records, documents, and other ma-

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1 materials in the possession or control of the Department of
2 Justice, or any other department or agency of Government,
3 which relate to matters within the exclusive jurisdiction of
4 the Special Prosecutor appointed under this Act, are trans-
5 ferred to the Special Prosecutor as of the date on which he
6 takes office.

7 (b) The Special Prosecutor is authorized to request
8 from any department or agency of the Federal Govern-
9 ment any additional files, records, documents, or other ma-
10 terials which he may deem necessary or appropriate to the
11 conduct of his duties, functions, and responsibilities under
12 this Act, and each department or agency shall furnish
13 such materials to him expeditiously, unless a court of com-
14 petent jurisdiction shall order otherwise.

15 (c) The Special Prosecutor shall keep inviolate and safe-
16 guard from unwarranted disclosure all files, records, docu-
17 ments, physical evidence, and other materials obtained or
18 prepared by the Office of Special Prosecutor.

19 GENERAL SERVICES ADMINISTRATION

20 SEC. 7. The Administrator of General Services shall fur-
21 nish the Special Prosecutor with such offices, equipment,
22 supplies, and services as are authorized to be furnished to
23 any agency or instrumentality of the United States.

24 SPECIAL PROSECUTOR'S TERM OF OFFICE

25 SEC. 8. (a) The Office of Special Prosecutor shall termi-

1 nate three years after the date the panel first appoints a
2 Special Prosecutor.

3 (b) Notwithstanding the provisions of subsection (a),
4 the Office of Special Prosecutor is authorized to carry to con-
5 elusion litigation pending on the date such office would other-
6 wise expire.

7

REPORTS

8 SEC. 9. The Special Prosecutor shall make as full
9 and complete a report of the activities of his office as is
10 appropriate to the panel, to the Attorney General of the
11 United States, and to the Congress, on the first and second
12 anniversaries of his taking office and not later than thirty
13 days after the termination of the Office of Special Prosecutor.

14

REMOVAL OF SPECIAL PROSECUTOR

15 SEC. 10. The panel has the sole and exclusive power to
16 remove the Special Prosecutor. The only grounds for removal
17 are gross dereliction of duty, gross impropriety, or physical
18 or mental inability to discharge the powers and duties of
19 his office.

20

EXPEDITED REVIEW PROCEDURE

21 SEC. 11. (a) The sole and exclusive procedure for the
22 review of the validity of any provision of this Act shall be
23 as follows:

24

25 (1) Any defendant who challenges the validity of
this Act in a criminal case or proceeding shall file a mo-

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1 tion to discuss not later than fifteen days after service
2 of the indictment or information. Such motion shall be
3 heard and determined by a district court of three judges,
4 convened pursuant to section 2284 of title 28, United
5 States Code, as soon as possible but in no case later than
6 twenty days after the filing of the motion.

7 (2) Any person who challenges the validity of this
8 Act in connection with a civil action or proceeding
9 shall do so by motion filed with the appropriate United
10 States district court. The district court shall immediately
11 certify such motion to be heard and determined by a
12 district court of three judges convened pursuant to sec-
13 tion 2284 of title 28, United States Code, as soon as
14 possible but in no case later than twenty days after the
15 filing of the motion.

16 (3) Not later than fifteen days after the determina-
17 tion of the district court of three judges under paragraph
18 (1) or (2) of this section, any party may file an appeal
19 from that determination in the United States Supreme
20 Court. The Supreme Court shall expedite to the greatest
21 extent possible its decision on such appeal.

22 (b) The expedited review procedure of this section shall
23 not apply to any challenge to the validity of any provision
24 of this Act insofar as any question presented shall have been
25 previously determined by the Supreme Court, notwithstand-

1 ing that the previous determination occurred in litigation
2 involving other parties.

3

FUNDING

4 SEC. 12. There are authorized to be appropriated such
5 sums as are necessary to carry out the purposes of this Act,
6 and, notwithstanding any other provision of law, the Special
7 Prosecutor shall submit directly to the Congress requests
8 for such funds as he considers necessary to carry out his
9 responsibilities under this Act.

10

SEVERABILITY

11 SEC. 13. If the provisions of any part of this Act, or
12 the application thereof to any person or circumstances, are
13 held invalid, the provisions of other parts and their ap-
14 plication to other persons or circumstances shall not be
15 affected thereby.

94TH CONGRESS
2D SESSION

H. R. 11357

IN THE HOUSE OF REPRESENTATIVES

JANUARY 19, 1976

Mr. DRINAN introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To provide for a special prosecutor for Federal criminal offenses related to security functions and intelligence gathering.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SHORT TITLE**

4 **SECTION 1.** This Act may be cited as the "Special
5 Prosecutor Act of 1976".

6 **APPOINTMENT AND REMOVAL**

7 **SEC. 2.** The President, by and with the advice and con-
8 sent of the Senate, shall appoint a Special Prosecutor, who
9 shall head an Office of Special Prosecution.

I

1 JURISDICTION AND AUTHORITY OF SPECIAL PROSECUTOR

2 SEC. 3. (a) The Special Prosecutor has exclusive juris-
3 diction to investigate and prosecute in the name of the
4 United States all offenses against the United States which
5 the Special Prosecutor determines were committed by any
6 Federal officer, employee, or agent in connection with or
7 arising out of intelligence or counterintelligence activities
8 or operations. Such offenses may include deprivation of civil
9 or constitutional rights, illegal searches, obstruction of jus-
10 tice, violations of the postal laws, unlawful surveillance, de-
11 struction of public records, perjury, making false statements,
12 and conspiracy to commit any of these acts, as well as
13 other offenses.

14 (b) The Special Prosecutor is authorized to take any
15 action necessary and proper to perform the functions of the
16 Office of Special Prosecution and carry out the purposes of
17 this Act, including—

18 (1) issuing instructions to the Federal Bureau of
19 Investigation and other domestic investigative agencies
20 of the United States for the collection and delivery solely
21 to the Office of Special Prosecution of information and
22 evidence bearing on matters within the jurisdiction of the
23 Special Prosecutor, and for safeguarding the integrity
24 and inviolability of all files, records, documents, physi-

- 1 cal evidence, and other materials obtained or prepared
2 by the Special Prosecutor;
- 3 (2) conducting proceedings before grand juries;
4 (3) framing and signing indictments;
5 (4) signing and filing informations;
6 (5) contesting the assertion of executive privilege
7 or any other testimonial or evidentiary privilege;
8 (6) conducting and arguing appeals in the United
9 States Supreme Court, notwithstanding the provisions of
10 section 518 of title 28, United States Code;
11 (7) instituting, defending, and conducting civil and
12 criminal litigation in any court;
13 (8) exclusively performing the functions conferred
14 upon the Attorney General of the United States under
15 part V of title 18, United States Code (relating to im-
16 munity of witnesses), with respect to any matter within
17 his exclusive jurisdiction; and
18 (9) referring any information indicating a violation
19 of State or local laws to the appropriate State or local
20 authorities for prosecution or other action.
- 21 (c) The Special Prosecutor may institute, in the name
22 of the United States, any civil action for any claim arising
23 out of or in connection with an offense or course of conduct

1 the Special Prosecutor is authorized to investigate or prosecute under this Act.

3 COMPENSATION AND STAFFING

4 SEC. 4. (a) The Special Prosecutor shall be compensated at the rate provided for level IV of the Executive Schedule under section 5315 of title 5, United States Code.

7 (b) The Special Prosecutor may employ and fix the compensation of personnel in the Office of Special Prosecution as he reasonably determines to be necessary, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and without regard to chapter 51 and subchapter III of chapter 53 of such title (relating to classification and General Schedule pay rates), but at rates not to exceed the maximum rate for GS-18 of the General Schedule under section 5332 of title 5, United States Code.

17 (c) The Special Prosecutor may procure personal services of experts and consultants, as authorized by section 3109 of title 5, United States Code, at rates not to exceed the per diem equivalent of the rate for GS-18 of the General Schedule established by section 5332 of title 5, United States Code.

23 (d) Every department or agency of the Federal or District of Columbia government is authorized to make available to the Special Prosecutor, on a reimbursable basis, any

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1 personnel the Special Prosecutor may request. Requested
2 personnel shall be detailed within one week after the date
3 of the request unless the Special Prosecutor designates a
4 later date. An individual's position and grade in his depart-
5 ment or agency shall not be prejudiced by his being detailed
6 to the Special Prosecutor. No person shall be detailed to
7 the Special Prosecutor without his consent.

8 (e) For the purposes of subchapter III of chapter 73
9 of title 5, United States Code, the Special Prosecutor and the
10 personnel of the Office of Special Prosecution shall be deemed
11 employees in an executive agency.

12

DELEGATION

13 SEC. 5. The Special Prosecutor is authorized to dele-
14 gate any of his functions to personnel of the Office of Special
15 Prosecution, and to experts and consultants retained pursu-
16 ant to section 4 (c).

17 TRANSFER AND ACQUISITION OF FILES AND INFORMATION

18 SEC. 6. (a) All files, records, documents, and other
19 materials in the possession or control of the Department of
20 Justice, any previous special prosecutor, or any other de-
21 partment or agency of Government, which relate to mat-
22 ters within the exclusive jurisdiction of the Special Prose-
23 cutor appointed under this Act, are transferred to the Special
24 Prosecutor as of the date on which he takes office.

6

1 (b) The Special Prosecutor is authorized to request
2 from any department or agency of Government any addi-
3 tional files, records, documents, or other materials which he
4 may deem necessary or appropriate to the conduct of his
5 duties, functions, and responsibilities under this Act, and
6 each department or agency shall furnish such materials to
7 him expeditiously, unless a court of competent jurisdiction
8 shall order otherwise.

9 (c) The Special Prosecutor shall keep inviolate and
10 safeguard from unwarranted disclosure all files, records, doc-
11 uments, physical evidence, and other materials obtained or
12 prepared by the Office of Special Prosecution.

13 GENERAL SERVICES ADMINISTRATION

14 SEC. 7. The Administrator of General Services shall fur-
15 nish the Special Prosecutor with such offices, equipment,
16 supplies, and services as are authorized to be furnished to
17 any agency or instrumentality of the United States.

18 SPECIAL PROSECUTOR'S TERM OF OFFICE

19 SEC. 8. (a) The Office of Special Prosecution shall
20 terminate three years after the date the President first
21 appoints a Special Prosecutor under this Act.

22 (b) Notwithstanding the provisions of subsection (a),
23 the Office of Special Prosecution is authorized to carry to
24 conclusion litigation pending on the date such office would
25 otherwise expire.

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REPORTS

2 SEC. 9. (a) The Special Prosecutor shall make as full
3 and complete a report of the activities of his office as is
4 appropriate to the President of the United States and to the
5 Congress, on the first and second anniversaries of taking
6 office and not later than thirty days after the termination
7 of the Office of Special Prosecution.

8 (b) The Special Prosecutor shall make immediate and
9 full report to the Congress at any time of a failure or refusal
10 of a Federal agency, officer, employee, or agent to comply
11 with the request or demand of the Special Prosecutor for
12 information, if the Special Prosecutor determines that such
13 failure or refusal jeopardizes an investigation or prosecu-
14 tion conducted under this Act.

15

AUTHORIZATION OF APPROPRIATIONS

16 SEC. 10. There are authorized to be appropriated such
17 sums as are necessary to carry out the purposes of this Act,
18 and, notwithstanding any other provision of law, the Spe-
19 cial Prosecutor shall submit directly to the Congress re-
20 quests for such sums as are necessary to carry out the re-
21 sponsibilities of the Office of Special Prosecution under this
22 Act.

94TH CONGRESS
2D SESSION

H. R. 11999

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 19, 1976

Mr. DRINAN (for himself, Mr. SCHEUER, Mr. OBERSTAR, Mr. LONG of Maryland, Mr. MITCHELL of Maryland, Mr. METCALFE, and Mr. WAXMAN) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To provide for a special prosecutor for Federal criminal offenses related to security functions and intelligence gathering.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 SHORT TITLE

4 SECTION 1. This Act may be cited as the "Special
5 Prosecutor Act of 1976".

6 APPOINTMENT

7 SEC. 2. The President, by and with the advice and con-
8 sent of the Senate, shall appoint a Special Prosecutor, who
9 shall head an Office of Special Prosecution.

I—O

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1 JURISDICTION AND AUTHORITY OF SPECIAL PROSECUTOR

2 SEC. 3. (a) The Special Prosecutor has exclusive juris-
3 diction to investigate and prosecute in the name of the
4 United States all offenses against the United States which
5 the Special Prosecutor determines were committed by any
6 Federal officer, employee, or agent in connection with or
7 arising out of intelligence or counterintelligence activities
8 or operations. Such offenses may include deprivation of civil
9 or constitutional rights, illegal searches, obstruction of jus-
10 tice, violations of the postal laws, unlawful surveillance, de-
11 struction of public records, perjury, making false statements,
12 and conspiracy to commit any of these acts, as well as
13 other offenses.

14 (b) The Special Prosecutor is authorized to take any
15 action necessary and proper to perform the functions of the
16 Office of Special Prosecution and carry out the purposes of
17 this Act, including—

18 (1) issuing instructions to the Federal Bureau of
19 Investigation and other domestic investigative agencies
20 of the United States for the collection and delivery solely
21 to the Office of Special Prosecution of information and
22 evidence bearing on matters within the jurisdiction of the
23 Special Prosecutor, and for safeguarding the integrity
24 and inviolability of all files, records, documents, physi-

1 cal evidence, and other materials obtained or prepared
2 by the Special Prosecutor;

3 (2) conducting proceedings before grand juries;

4 (3) framing and signing indictments;

5 (4) signing and filing informations;

6 (5) contesting the assertion of executive privilege
7 or any other testimonial or evidentiary privilege;

8 (6) conducting and arguing appeals in the United
9 States Supreme Court, notwithstanding the provisions of
10 section 518 of title 28, United States Code;

11 (7) instituting, defending, and conducting civil and
12 criminal litigation in any court;

13 (8) exclusively performing the functions conferred
14 upon the Attorney General of the United States under
15 part V of title 18, United States Code (relating to im-
16 munity of witnesses), with respect to any matter within
17 his exclusive jurisdiction; and

18 (9) referring any information indicating a violation
19 of State or local laws to the appropriate State or local
20 authorities for prosecution or other action.

21 (c) The Special Prosecutor may institute, in the name
22 of the United States, any civil action for any claim arising
23 out of or in connection with an offense or course of conduct

4

1 the Special Prosecutor is authorized to investigate or prose-
2 cute under this Act.

3 COMPENSATION AND STAFFING

4 SEC. 4. (a) The Special Prosecutor shall be compen-
5 sated at the rate provided for level IV of the Executive
6 Schedule under section 5315 of title 5, United States Code.

7 (b) The Special Prosecutor may employ and fix the
8 compensation of personnel in the Office of Special Prosecu-
9 tion as he reasonably determines to be necessary, without
10 regard to the provisions of title 5, United States Code, gov-
11 erning appointments in the competitive service, and with-
12 out regard to chapter 51 and subchapter III of chapter 53
13 of such title (relating to classification and General Schedule
14 pay rates), but at rates not to exceed the maximum rate
15 for GS-18 of the General Schedule under section 5332 of
16 title 5, United States Code.

17 (c) The Special Prosecutor may procure personal
18 services of experts and consultants, as authorized by section
19 3109 of title 5, United States Code, at rates not to exceed
20 the per diem equivalent of the rate for GS-18 of the Gen-
21 eral Schedule established by section 5332 of title 5, United
22 States Code.

23 (d) Every department or agency of the Federal or
24 District of Columbia government is authorized to make avail-
25 able to the Special Prosecutor, on a reimbursable basis, any

5

1 personnel the Special Prosecutor may request. Requested
2 personnel shall be detailed within one week after the date
3 of the request unless the Special Prosecutor designates a
4 later date. An individual's position and grade in his depart-
5 ment or agency shall not be prejudiced by his being detailed
6 to the Special Prosecutor. No person shall be detailed to
7 the Special Prosecutor without his consent.

8 (e) For the purposes of subchapter III of chapter 73
9 of title 5, United States Code, the Special Prosecutor and the
10 personnel of the Office of Special Prosecution shall be deemed
11 employees in an executive agency.

12

DELEGATION

13 SEC. 5. The Special Prosecutor is authorized to dele-
14 gate any of his functions to personnel of the Office of Special
15 Prosecution, and to experts and consultants retained pursu-
16 ant to section 4 (c).

17 TRANSFER AND ACQUISITION OF FILES AND INFORMATION

18 SEC. 6. (a) All files, records, documents, and other
19 materials in the possession or control of the Department of
20 Justice, any previous special prosecutor, or any other de-
21 partment or agency of Government, which relate to mat-
22 ters within the exclusive jurisdiction of the Special Prose-
23 cutor appointed under this Act, are transferred to the Special
24 Prosecutor as of the date on which he takes office.

6

1 (b) The Special Prosecutor is authorized to request
2 from any department or agency of Government any addi-
3 tional files, records, documents, or other materials which he
4 may deem necessary or appropriate to the conduct of his
5 duties, functions, and responsibilities under this Act, and
6 each department or agency shall furnish such materials to
7 him expeditiously, unless a court of competent jurisdiction
8 shall order otherwise.

9 (c) The Special Prosecutor shall keep inviolate and
10 safeguard from unwarranted disclosure all files, records, doc-
11 uments, physical evidence, and other materials obtained or
12 prepared by the Office of Special Prosecution.

13 GENERAL SERVICES ADMINISTRATION

14 SEC. 7. The Administrator of General Services shall fur-
15 nish the Special Prosecutor with such offices, equipment,
16 supplies, and services as are authorized to be furnished to
17 any agency or instrumentality of the United States.

18 SPECIAL PROSECUTOR'S TERM OF OFFICE

19 SEC. 8. (a) The Office of Special Prosecution shall
20 terminate three years after the date the President first
21 appoints a Special Prosecutor under this Act.

22 (b) Notwithstanding the provisions of subsection (a),
23 the Office of Special Prosecution is authorized to carry to
24 conclusion litigation pending on the date such office would
25 otherwise expire.

7

REPORTS

1

2 SEC. 9. (a) The Special Prosecutor shall make as full
3 and complete a report of the activities of his office as is
4 appropriate to the President of the United States and to the
5 Congress, on the first and second anniversaries of taking
6 office and not later than thirty days after the termination
7 of the Office of Special Prosecution.

8 (b) The Special Prosecutor shall make immediate and
9 full report to the Congress at any time of a failure or refusal
10 of a Federal agency, officer, employee, or agent to comply
11 with the request or demand of the Special Prosecutor for
12 information, if the Special Prosecutor determines that such
13 failure or refusal jeopardizes an investigation or prosecu-
14 tion conducted under this Act.

15

AUTHORIZATION OF APPROPRIATIONS

16 SEC. 10. There are authorized to be appropriated such
17 sums as are necessary to carry out the purposes of this Act,
18 and, notwithstanding any other provision of law, the Spe-
19 cial Prosecutor shall submit directly to the Congress re-
20 quests for such sums as are necessary to carry out the re-
21 sponsibilities of the Office of Special Prosecution under this
22 Act.

94TH CONGRESS
2D SESSION

H. R. 14476

IN THE HOUSE OF REPRESENTATIVES

JUNE 21, 1976

Mr. HUNGATE introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To provide for a temporary special prosecutor in appropriate cases, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Special Prosecutor Act
4 of 1976".

5 DIVISION OF GOVERNMENT CRIMES

6 TEMPORARY SPECIAL PROSECUTOR

7 SEC. 2. (a) Title 28, United States Code, is amended
8 by inserting immediately after chapter 37 the following new
9 chapter:

I

1 **“Chapter 39—DIVISION OF GOVERNMENT CRIMES**
 2 **AND APPOINTMENT OF TEMPORARY SPECIAL**
 3 **PROSECUTOR**

“Sec.

“591. Establishment of Division of Government Crimes.

“592. Jurisdiction.

“593. Final decision by the Attorney General.

“594. Standard for appointment of temporary special prosecutor.

“595. Temporary special prosecutor.

“596. Disqualification of officers and employees of the Department of Justice.

“597. Expedited judicial review.

4 **“§ 591. Establishment of Division of Government Crimes**

5 “(a) There is established within the Department of Jus-
 6 tice the Division of Government Crimes which shall be
 7 headed by the Assistant Attorney General for Government
 8 Crimes (hereinafter referred to in this chapter as the ‘Assist-
 9 ant Attorney General’) who shall be appointed by the
 10 President, by and with the advice and consent of the Senate,
 11 for a term coterminous with that of the President making the
 12 appointment.

13 “(b) An individual shall not be appointed Assistant At-
 14 torney General if such individual has, during the five years
 15 preceding such appointment, held a high-level position of
 16 trust and responsibility while serving on the personal cam-
 17 paign staff or in an organization or political party working
 18 on behalf of the campaign of an individual who was elected
 19 to the office of President or Vice President.

20 “(c) The confirmation by the Senate of a Presidential

1 appointment of the Assistant Attorney General shall con-
2 stitute a final determination that such officer meets the re-
3 quirements under subsection (b).

4 “(d) While serving as Assistant Attorney General, an
5 individual shall not engage in any other business, vocation,
6 or employment.

7 “(e) The Attorney General, at the beginning of each
8 regular session of the Congress, shall report to the Congress
9 on the activities and operation of the Division of Govern-
10 ment Crimes for the last preceding fiscal year, and on any
11 other matters pertaining to the Division which he considers
12 proper, including a listing of the number, type, and nature of
13 the investigations and prosecutions conducted by such Divi-
14 sion and the disposition thereof, and any proposals for new
15 legislation which the Attorney General may recommend.
16 Such report shall be made public except that the Committee
17 on the Judiciary of the House of Representatives or the Com-
18 mittee on the Judiciary of the Senate may on its own initia-
19 tive, or upon the request of the Attorney General, seal por-
20 tions of the report related to uncompleted and ongoing
21 investigations.

22 **“§ 592. Jurisdiction**

23 “(a) The Attorney General shall, subject to the provi-
24 sions of section 595, delegate to the Assistant Attorney Gen-
25 eral jurisdiction of (1) criminal violations of Federal law

1 committed by any elected or appointed Federal Government
2 officer or employee who is serving or has served at any time
3 during the preceding six years in a position compensated at
4 a rate equivalent to or greater than level III of the Executive
5 Schedule under section 5314 of title 5, United States Code;
6 (2) criminal violations of Federal law committed by any
7 elected or appointed Federal Government officer or employee,
8 other than those described in paragraph (1), who is serving
9 or has served at any time during the preceding six years, if
10 such violation is directly or indirectly related to the official
11 Government work or compensation of such officer or employee;
12 (3) criminal violations of Federal law committed by a spe-
13 cial Federal Government employee, as defined under section
14 202 of title 18, United States Code, in the course of his
15 employment by the Government, who is serving or has served
16 at any time during the preceding six years; (4) criminal vio-
17 lations of Federal laws relating to lobbying, campaigns, and
18 election to public office committed by any person; and (5)
19 any other matter which the Attorney General refers to the
20 Assistant Attorney General. Any jurisdictional grant of au-
21 thority which is inconsistent with this paragraph is hereby
22 superseded.

23 “(b) For the purpose of subsection (a) of this section,
24 the six-year period referred to shall be computed from the
25 date on which (1) the Assistant Attorney General makes a

1 reasonable effort to notify an individual described in such
2 subsection in writing that such individual is the subject of an
3 investigation of a possible violation of a Federal law, or
4 (2) such individual is informed of his indictment, whichever
5 is earlier.

6 “(c) Any information, allegation, or complaint received
7 by any officer or employee of any branch of Government
8 relating to any violation specified in subsection (a) of this
9 section shall be expeditiously reported to a local United
10 States Attorney or to the Attorney General. Such United
11 States Attorney shall expeditiously inform the Attorney
12 General in writing of the receipt and content of such infor-
13 mation, allegation, or complaint.

14 **“§ 593. Final decision by the Attorney General**

15 “The Attorney General shall supervise the Assistant
16 Attorney General in the discharge of his duties.

17 **“§ 594. Standard for appointment of temporary special
18 prosecutor**

19 “(a) If the Attorney General, upon receiving informa-
20 tion, allegations, or evidence of any Federal criminal wrong-
21 doing, determines that a conflict of interest as defined in
22 subsection (c), or the appearance thereof, may exist if he
23 participates in any investigation or prosecution resulting
24 from such information, allegations, or evidence, the At-
25 torney General within thirty days after the receipt thereof

1 shall file a memorandum with the division of three judges
2 of the United States Court of Appeals for the District of
3 Columbia, as described in section 49 of this title (hereinafter
4 in this chapter referred to as the 'court') containing—

5 “(1) a summary of the information, allegations, and
6 evidence received and the results of a preliminary in-
7 vestigation or evaluation thereof by any Federal in-
8 vestigative agency;

9 “(2) a summary of the information relevant to
10 determining whether a conflict of interest, or the appear-
11 ance thereof, exists;

12 “(3) a finding by the Attorney General, based upon
13 all information known to the Department of Justice, as to
14 whether the information, allegations, and evidence sum-
15 marized as required under paragraph (1) are clearly
16 frivolous, and therefore, do not justify any further inves-
17 tigation or prosecution, and any other comments or rec-
18 ommendations by the Attorney General; and

19 “(4) a decision, if any, by the Attorney General
20 to disqualify himself and to appoint a temporary spe-
21 cial prosecutor under section 595.

22 “(b) Not sooner than thirty days after first notifying the
23 Attorney General of the information, allegations, or evidence
24 in his possession of possible criminal wrongdoing, any indi-
25 vidual may make a request to the court to decide whether the

1 Attorney General should disqualify himself with respect to a
2 particular investigation by submitting in writing to the court
3 and the Attorney General such information, allegations, or
4 evidence and a summary of the information relevant to deter-
5 mine whether a conflict of interest exists. The Attorney Gen-
6 eral shall have fifteen days from his receipt thereof to file a
7 memorandum with the court containing the information de-
8 scribed in subsection (a) if the Attorney General has not
9 already done so.

10 “(c) (1) In determining whether a conflict of interest or
11 the appearance thereof exists, the court and the Attorney
12 General shall consider whether the President or the Attorney
13 General has a direct and substantial personal or partisan
14 political interest in the outcome of the proposed criminal in-
15 vestigation or prosecution.

16 “(2) For the purposes of this section, a conflict of
17 interest, or the appearance thereof, is deemed to exist if the
18 subject of a criminal investigation or prosecution is the Pres-
19 ident, Vice President, Director of the Federal Bureau of
20 Investigation, any individual serving in a position com-
21 pensated at level I of the Executive Schedule under section
22 5312 of title 5, United States Code, any individual working
23 in the Executive Office of the President compensated at a rate
24 equivalent to or greater than level V of the Executive Sched-
25 ule under section 5316 of title 5, United States Code, or any

1 individual who held any office or position described in this
2 paragraph at any time during the four years immediately
3 preceding the investigation or prosecution.

4 “(d) (1) If (A) the Attorney General files a memoran-
5 dum as provided under subsection (a) or (b) which does
6 not include a decision to disqualify himself, or a finding pur-
7 suant to subsection (a) (3) that the information, allegations
8 and evidence are clearly frivolous, or (B) the Attorney Gen-
9 eral fails to make a timely reply as required under subsection
10 (b), the court shall determine whether a conflict of interest,
11 or the appearance thereof exists. If the court finds such a
12 conflict, or the appearance thereof, it shall appoint a tem-
13 porary special prosecutor pursuant to section 595, and upon
14 notification in writing of such an appointment the Attorney
15 General shall disqualify himself.

16 “(2) Upon request of the court, the Attorney General
17 or any other individual shall make available to the court all
18 documents, materials, and memoranda as the court finds
19 necessary to carry out its duties under this section. The court
20 may request participation or argument from a party other
21 than the Attorney General or may appoint any individual to
22 perform the function described in this subsection.

23 “(e) If, after finding under subsection (a) (3) that
24 the information, allegations, and evidence of possible criminal
25 wrongdoing are clearly frivolous, the Attorney General re-

1 ceives additional information, allegations, or evidence which,
2 in his opinion, justify further investigation or prosecution,
3 the Attorney General shall within fifteen days after receiving
4 the information, allegations, or evidence, file a memorandum
5 with the court in accordance with subsection (a).

6 **“§ 595. Temporary special prosecutor**

7 “(a) (1) A temporary special prosecutor shall be ap-
8 pointed pursuant to this section—

9 “(A) by the Attorney General, upon a decision to
10 disqualify himself pursuant to section 594 (a) (4); or

11 “(B) by the court, upon a finding of a conflict of
12 interest, or the appearance thereof, pursuant to section
13 594 (d) (1).

14 “(2) The court shall notify the Attorney General in
15 writing of any decision under paragraph (1) (B). Any
16 action of the court under this section shall supersede any
17 actions by the Attorney General which are in conflict
18 therewith.

19 “(3) Whoever appoints a temporary special prosecutor
20 under this section shall specify in writing the matters which
21 such prosecutor is authorized to investigate and prosecute.

22 “(b) An individual shall not be appointed temporary
23 special prosecutor unless such individual (1) is not serving
24 as an officer or employee of the Federal Government, and
25 (2) meets the requirements of section 591 (b).

1 “(c) The court shall review each appointment of a tem-
2 porary special prosecutor by the Attorney General under
3 this section to determine whether—

4 “(1) the individual appointed temporary special
5 prosecutor (A) has a conflict of interest, or the appear-
6 ance thereof, in accordance with section 594 (c) ; or (B)
7 fails to meet the requirements of subsection (b) ; or

8 “(2) the jurisdiction defined by the Attorney Gen-
9 eral is not sufficiently broad to enable the temporary
10 special prosecutor to carry out the purposes of this
11 chapter.

12 If the court finds that the appointment is deficient under
13 paragraph (1) or (2), the court shall appoint a temporary
14 special prosecutor pursuant to this section.

15 “(d) (1) Except as provided under paragraph (2), the
16 authority and powers of any temporary special prosecutor
17 shall terminate upon the submission to the Attorney General
18 of a report stating that the investigation of all matters which
19 the temporary special prosecutor is authorized to investigate,
20 as set forth pursuant to subsection (a) (3), and any result-
21 ing prosecutions have been completed.

22 “(2) Prior to his submission of the report under para-
23 graph (1), a temporary special prosecutor may be removed
24 from office by the Attorney General only for extraordinary
25 improprieties. Immediately after removing a temporary spe-

1 cial prosecutor under this subsection, the Attorney General
2 shall submit to the court a written report specifying with
3 particularity the cause for which such temporary special
4 prosecutor was removed. The court shall make available to
5 the public such report, except that the court may, if necessary
6 to avoid prejudicing the rights under Federal law of any
7 individual, delete or postpone publishing such portions of the
8 report, or the whole report, or any name or other identifying
9 details.

10 “(3) A temporary special prosecutor or any aggrieved
11 person may bring an action in the United States District
12 Court for the District of Columbia to challenge the action of
13 the Attorney General under paragraph (2) by seeking re-
14 instatement or any other appropriate relief. In any hearing
15 of any such action, the court shall proceed de novo.

16 “(e) In carrying out the provisions of this section, a
17 temporary special prosecutor shall have, within the jurisdic-
18 tion specified by the Attorney General or the court in accord-
19 ance with subsection (a) (3), the same power as the Assist-
20 ant Attorney General for Government Crimes to act on be-
21 half of the United States, except that the temporary special
22 prosecutor shall have the authority to appeal any decision of
23 a court in a proceeding in which he is a party without the ap-
24 proval of the Solicitor General or the Attorney General. The
25 Attorney General shall make available to the temporary

1 special prosecutor all documents, materials, and memoranda
2 necessary to carry out his duties under this section.

3 “(f) Upon request by a temporary special prosecutor,
4 the Attorney General shall make available to him the re-
5 sources and personnel necessary to carry out his duties under
6 this section. If a temporary special prosecutor does not receive
7 the resources and personnel required to perform his duties,
8 said temporary special prosecutor shall inform the Commit-
9 tee on the Judiciary of the House of Representatives and the
10 Committee on the Judiciary of the Senate.

11 **“§ 596. Disqualification of officers and employees of the**
12 **Department of Justice**

13 “The Attorney General shall promulgate rules and regu-
14 lations which require any officer or employee of the Depart-
15 ment of Justice, including a United States attorney or a mem-
16 ber of his staff, to disqualify himself from participation in a
17 particular investigation or prosecution if such participation
18 may result in a personal, financial, or partisan political con-
19 flict of interest, or the appearance thereof. Such rules and
20 regulations may provide that a willful violation of any pro-
21 vision thereof shall result in removal from office.

22 **“§ 597. Expedited judicial review**

23 “(a) (1) Any objection on constitutional grounds by a
24 person who is the subject of an indictment or information
25 to the authority of a temporary special prosecutor appointed

1 under this chapter to frame and sign indictments or informa-
2 tions or to prosecute offenses in the name of the United States
3 shall be raised, if at all, by motion to dismiss the indictment
4 or information. Each such motion shall be made within
5 twenty days of notice of the indictment or information and
6 shall not preclude the making of any other motion under the
7 Federal Rules of Criminal Procedure.

8 “(2) The district court shall immediately certify any
9 motion under paragraph (1) of this subsection to the United
10 States court of appeals for that circuit, which shall hear the
11 motion sitting en banc.

12 “(3) Notwithstanding any other provision of law, any
13 determination on the motion shall be reviewable by appeal
14 directly to the Supreme Court of the United States, if such
15 appeal is filed within ten days after such determination.

16 “(4) Except as provided in this section, no court shall
17 have jurisdiction to consider any objection to the validity of
18 an indictment or information or a conviction based on the
19 lack of authority under the Constitution of a temporary spe-
20 cial prosecutor to frame and sign indictments and informa-
21 tions and to prosecute offenses in the name of the United
22 States.

23 “(5) Notwithstanding any subsequent judicial determi-
24 nation regarding his authority to frame and to sign indict-
25 ments and informations and to prosecute offenses in the name

1 of the United States, an individual who is appointed as a
2 temporary special prosecutor and anyone acting on his behalf
3 shall be deemed a person authorized to be present during ses-
4 sions of a grand jury.

5 “(b) (1) Any person aggrieved by an official act of a
6 temporary special prosecutor may bring an action or file an
7 appropriate motion challenging his constitutional authority
8 under this chapter seeking appropriate relief. Such an action
9 or motion shall be filed within twenty days after the ag-
10 grieved person has notice of the act to which he objects.
11 The district court shall immediately certify all questions of
12 the constitutionality of this chapter to the United States
13 court of appeals for that circuit, which shall hear the matter
14 sitting en banc.

15 “(2) Notwithstanding any other provision of law, any
16 decision on a matter certified under paragraph (1) of this
17 subsection shall be reviewable by appeal directly to the
18 Supreme Court of the United States, if such appeal is
19 brought within ten days of the decision of the court of
20 appeals.

21 “(c) (1) It shall be the duty of the court of appeals and
22 of the United States Supreme Court to advance on the
23 docket and to expedite to the greatest possible extent the dis-
24 position of any motion filed under subsection (a).(1), or
25 any question certified under subsection (b) (1).

1 “(2) The expedited review procedures of this section
 2 shall not apply to any challenge to the constitutionality of
 3 any provision of this chapter insofar as any question pre-
 4 sented shall have been previously determined by the Supreme
 5 Court of the United States notwithstanding that the pre-
 6 vious determination occurred in litigation involving other
 7 parties.”.

8 (b) The tables of chapters for title 28, United States
 9 Code, and for part II of title 28, United States Code, are
 10 each amended by adding after the item relating to chapter
 11 37 the following new item:

“39. Division of Government Crimes and Appointment of Tempo-
 rary Special Prosecutor..... 501”.

12 (c) (1) Section 5315 of title 5, United States Code, is
 13 amended by striking out “(9)” in item (19) and inserting
 14 in lieu thereof “(10)”.

15 (2) A temporary special prosecutor shall receive com-
 16 pensation at a per diem rate equal to the rate of basic pay
 17 for level V of the Executive Schedule under section 5316 of
 18 title 5, United States Code.

19 ASSIGNMENT OF JUDGES TO DIVISION TO APPOINT

20 TEMPORARY SPECIAL PROSECUTORS

21 SEC. 3. (a) Chapter 3 of title 28, United States Code,
 22 is amended by adding at the end thereof the following new
 23 section:

1 **“§ 49. Assignment of judges to division to appoint tempo-**
2 **rary special prosecutors**

3 “(a) The chief judge of the United States Court of Ap-
4 peals for the District of Columbia shall every two years as-
5 sign three judges to a division of the United States Court of
6 Appeals for the District of Columbia to determine all mat-
7 ters arising under sections 594 and 595 of this title.

8 “(b) Except as provided under subsection (f), assign-
9 ment to the division established in subsection (a) shall not be
10 a bar to other judicial assignments during the term of such
11 division.

12 “(c) In assigning judges or justices to sit on the division
13 established in subsection (a), priority shall be given to senior
14 retired circuit judges and senior retired justices.

15 “(d) The chief judge of the United States Court of
16 Appeals for the District of Columbia may make a request
17 to the Chief Justice of the United States, without presenting
18 a certificate of necessity, to designate and assign, in accord-
19 ance with section 294 of this title, retired circuit court judges
20 of another circuit or retired justices to the division established
21 under subsection (a).

22 “(e) Any vacancy in the division established under
23 subsection (a) shall be filled only for the remainder of the
24 two-year period in which such vacancy occurs and in the

1 same manner as initial assignments to the division were
2 made.

3 “(f) No judge or justice who as a member of the divi-
4 sion established in subsection (a) participated in a decision
5 of a matter under section 594 or 595 of this title involving
6 a temporary special prosecutor shall be eligible to partici-
7 pate on a circuit court panel deciding a matter which in-
8 volves such temporary special prosecutor while such tem-
9 porary special prosecutor is serving in that office or which
10 involves the exercise of the temporary special prosecutor’s
11 official duties, regardless of whether he is still serving in that
12 office.”.

13 (b) The table of sections of chapter 3 of title 28, United
14 States Code, is amended by adding at the end thereof the
15 following:

“49. Assignment of judges to division to appoint temporary special
prosecutors.”.

16 AUTHORIZATION OF APPROPRIATIONS

17 SEC. 4. There are authorized to be appropriated for
18 each fiscal year through the fiscal year ending September 30,
19 1981, such sums as may be necessary to carry out the pro-
20 visions of this Act.

94TH CONGRESS
2D SESSION

H. R. 15634¹

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 20, 1976

Mr. HUNGATE (for himself, Mr. MANN, Ms. HOLTZMAN, Mr. MEZVINSKY, Mr. DRINAN, and Mr. HYDE) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 28 of the United States Code to provide for the appointment of a special prosecutor in appropriate cases, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 SHORT TITLE

4 SECTION 1. This Act may be cited as the "Special
5 Prosecutor Act".

6 SPECIAL PROSECUTOR

7 SEC. 2. (a) Title 28 of the United States Code is
8 amended by inserting immediately after chapter 37 the fol-
9 lowing new chapter:

I

¹ H.R. 15634 was reported by the subcommittee on September 20, 1976. The bill was pending on the full committee calendar when Congress adjourned.

1 "Chapter 39—SPECIAL PROSECUTOR

"Sec.

"591. Appointment.

"592. Prosecutorial jurisdiction; authority.

"593. Removal or termination.

"594. Final report; congressional oversight.

"595. Presentations by Attorney General and Solicitor General.

"596. Special panel of the court.

"597. Termination of effect of chapter.

2 "§ 591. Appointment

3 "(a) Upon receiving any specific information that any
4 of the persons described in subsection (b) of this section
5 has—

6 "(1) knowingly authorized or engaged in any Fed-
7 eral criminal act or omission involving the abuse of
8 Federal office;

9 "(2) knowingly authorized or engaged in any act
10 or omission constituting a violation of any Federal
11 criminal law regulating the financing or conduct of elec-
12 tions or election campaigns; or

13 "(3) violated any Federal criminal law relating to
14 the obstruction of justice or perjury, or conspired to
15 violate any such Federal criminal law or to defraud the
16 United States;

17 the Attorney General shall conduct, for a period not to
18 exceed sixty days, such preliminary investigation as the
19 Attorney General deems appropriate to ascertain whether
20 the matter under investigation is so unsubstantiated that no
21 further investigation or prosecution is warranted.

3

1 “(b) The persons referred to in subsection (a) of this
2 section are as follows:

3 “(1) The President or Vice President.

4 “(2) Any individual serving in a position compen-
5 sated at level I of the Executive Schedule under section
6 5312 of title 5 of the United States Code.

7 “(3) Any individual working in the Executive
8 Office of the President and compensated at a rate not
9 less than the rate provided for level IV of the Executive
10 Schedule under section 5315 of title 5 of the United
11 States Code.

12 “(4) The Director of the Federal Bureau of In-
13 vestigation or the Director of Central Intelligence.

14 “(5) Any individual who held any office or position
15 described in any of paragraphs (1) through (4) of this
16 subsection during the incumbency of the President or
17 during the period the last preceding President held
18 office, if such preceding President was of the same
19 political party as the incumbent President.

20 “(6) A national campaign manager or chairman of
21 any national campaign committee seeking the election
22 or reelection of the President.

23 “(c) If the Attorney General finds the matter subject
24 to preliminary investigation in accordance with subsection
25 (a) of this section is so unsubstantiated that no further

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1 investigation or prosecution is warranted, the Attorney
2 General shall file a memorandum with the special panel of
3 the court. Such memorandum shall contain a summary of
4 the information received and the results of any preliminary
5 investigation.

6 “(d) If, after the filing of a memorandum under sub-
7 section (c) of this section, the Attorney General receives
8 additional specific information about the matter to which
9 such memorandum related, which information, in the judg-
10 ment of the Attorney General, warrants further investigation
11 or prosecution, the Attorney General shall, not later than
12 thirty days after receiving such additional information, apply
13 to the special panel of the court for the appointment of
14 a special prosecutor.

15 “(e) If the Attorney General finds the matter subject
16 to preliminary investigation in accordance with subsection
17 (a) of this section warrants further investigation or prosecu-
18 tion, or if sixty days elapse from the receipt of the informa-
19 tion and the Attorney General has not yet determined that
20 the matter is so unsubstantiated that the matter does not
21 warrant further investigation, then the Attorney General
22 shall apply to the special panel of the court for the appoint-
23 ment of a special prosecutor.

24 “(f) If, in the course of any Federal criminal investiga-
25 tion, the Attorney General determines that the continuation

1 of the investigation or of a resulting prosecution or the out-
2 come of such investigation or prosecution may so directly
3 and substantially affect the political interests of the President,
4 of the President's political party, or of the Attorney Gen-
5 eral as to make it inappropriate in the interest of the admin-
6 istration of justice for the Department of Justice to conduct
7 such investigation, then the Attorney General shall apply
8 to the special panel of the court for the appointment of
9 a special prosecutor.

10 “(g) Any memorandum or application filed under this
11 section with the special panel of the court shall not be
12 revealed to any third party without leave of the court. In
13 the case of any such application, the application shall con-
14 tain sufficient information to assist the special panel of the
15 court to select a special prosecutor and to define that special
16 prosecutor's prosecutorial jurisdiction.

17 “(h) Upon the receipt of an application under this sec-
18 tion, the special panel of the court shall appoint an appropri-
19 ate special prosecutor and shall inform the Attorney General
20 and the Congress of, and make public, the name of such
21 special prosecutor.

22 “(i) The Attorney General may request that the court
23 assign new matters to an existing special prosecutor or that
24 the prosecutorial jurisdiction of such a special prosecutor
25 be expanded, and the special panel of the court may make

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1 appropriate orders for such assignment or expansion. A
2 special prosecutor may accept a referral of a matter by the
3 Attorney General, if the matter relates to a matter within
4 the prosecutorial jurisdiction established by the special panel
5 of the court.

6 “(j) A judiciary committee of either House of the
7 Congress may request that the Attorney General apply for
8 the appointment of a special prosecutor under this section.
9 Not later than thirty days after the receipt of such a request,
10 the Attorney General shall notify the committee making the
11 request in writing of any action the Attorney General has
12 taken under this section; and, if no application has been made
13 to the special panel of the court under this section, why such
14 application was not made. Such written notification shall not
15 be revealed to any third party except that the committee
16 may, either on its own initiative or upon the request of the
17 Attorney General, make public such portion or portions of
18 such notification as will not in the committee’s judgment
19 prejudice the rights of any individual.

20 “(k) Upon application of a majority of majority party
21 members or a majority of all nonmajority-party members
22 of a judiciary committee of either House of the Congress, the
23 United States District Court for the District of Columbia
24 may issue any appropriate order (including an order in the

1 nature of a writ of mandamus) commanding the Attorney
2 General to comply with any provision of this chapter.

3 **“§ 592. Prosecutorial jurisdiction; authority**

4 “(a) Notwithstanding any other provision of law, a
5 special prosecutor appointed under this chapter shall
6 have, with respect to all matters in such special prosecu-
7 tor’s prosecutorial jurisdiction established under this chapter,
8 all the investigative and prosecutorial functions and powers
9 of the Department of Justice, the Attorney General, and any
10 other officer or employee of the Department of Justice.

11 “(b) A special prosecutor appointed under this chapter
12 shall receive compensation at a per diem rate equal to the
13 rate of basic pay for level IV of the Executive Schedule
14 under section 5315 of title 5 of the United States Code. For
15 the purposes of carrying out the duties of the office of
16 special prosecutor, such special prosecutor shall have power
17 to appoint, fix the compensation, and assign the duties of
18 such employees as such special prosecutor deems necessary
19 (including investigators, attorneys, and part-time consult-
20 ants). The positions of all such employees are exempted
21 from the competitive service. No such employee may be
22 compensated at a rate exceeding the maximum rate provided
23 for GS-18 of the General Schedule under section 5332 of title
24 5 of the United States Code.

1 “(c) A special prosecutor appointed under this chapter
2 may make public from time to time and shall send to the
3 Congress at least annually such statements or reports as
4 such special prosecutor deems appropriate.

5 “(d) There are authorized to be appropriated for each
6 fiscal year such sums as may be necessary, to be held by
7 the Department of Justice as a contingent fund for the use
8 of any special prosecutors in the carrying out of this chapter.

9 **“§ 593. Removal or termination**

10 “(a) A special prosecutor appointed under this chapter
11 may be removed from office, other than by impeachment and
12 conviction, only by the special panel of the court and
13 only for extraordinary impropriety, or such incapacitation
14 or other condition as substantially impairs the performance
15 of such special prosecutor’s duties.

16 “(b) The office of a special prosecutor shall terminate
17 upon the submission by such special prosecutor of notifica-
18 tion to the Attorney General that the investigation of all
19 matters within the prosecutorial jurisdiction of such special
20 prosecutor, and any resulting prosecutions, have been com-
21 pleted or so substantially completed that it would be
22 appropriate for the Department of Justice to complete such
23 matters. No such submission shall be effective to terminate
24 such office until after the completion and filing of the report
25 required under section 594 of this title.

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1 “(c) The special panel of the court may, either on
2 such panel’s own motion or upon suggestion of the Attorney
3 General, terminate the office of special prosecutor at any
4 time, on the grounds that the investigation of all matters
5 within the prosecutorial jurisdiction of the special prosecutor,
6 and any resulting prosecutions, have been completed or so
7 substantially completed that it would be appropriate for the
8 Department of Justice to complete such matters.

9 **“§ 594. Final report; congressional oversight**

10 “(a) (1) In addition to any reports made under section
11 592 of this title, a special prosecutor appointed under this
12 chapter shall, at the conclusion of such special prosecutor’s
13 duties, submit to the special panel of the court a report under
14 this section.

15 “(2) A report under this section shall set forth fully
16 and completely a description of the work of the special prose-
17 cutor, including the disposition of all cases brought, and the
18 reasons for not prosecuting any matter within the prose-
19 cutorial jurisdiction of such special prosecutor which was not
20 prosecuted. The report shall be in sufficient detail to allow
21 determination of whether the special prosecutor’s investiga-
22 tion was thoroughly and fairly completed.

23 “(3) The special panel of the court may release to the
24 Congress, the public, or to any appropriate person, such
25 portion of a report made under this section as the special

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1 panel deems appropriate. The special panel of the court shall
2 make such orders as are appropriate to protect the rights
3 of any individual named in such report and prevent undue
4 interference with any pending prosecution. The special panel
5 of the court may make any portion of a report under this
6 section available to any individual named in such report for
7 the purposes of receiving within a time limit set by the special
8 panel any comments or factual information that such in-
9 dividual may submit. Such comments and factual information,
10 in whole or in part, may in the discretion of such special
11 panel be included as an appendix to such report.

12 “(4) A special prosecutor, where appropriate, shall
13 promptly advise the chairman and ranking minority member
14 of the House committee having jurisdiction over impeach-
15 ments of any substantial and credible information which such
16 special prosecutor receives that may constitute grounds for an
17 impeachment. Nothing in this chapter shall prevent the
18 Congress or either House thereof from obtaining information
19 in the course of an impeachment proceeding.

20 “(b) The appropriate committees of the Congress shall
21 have oversight jurisdiction with respect to the official con-
22 duct of any special prosecutor appointed under this chapter,
23 and such special prosecutor shall have the duty to cooperate
24 with the exercise of such oversight jurisdiction.

1 **“§ 595. Presentations by Attorney General and Solicitor**
2 **General**

3 “Nothing in this chapter shall prevent the making by
4 the Attorney General or the Solicitor General of a presen-
5 tation to any court as to issues of law raised by any case
6 or appeal.

7 **“§ 596. Special panel of the court**

8 “The special panel of the court to which functions are
9 given by this chapter is the division established under section
10 49 of this title.

11 **“§ 597. Termination of effect of chapter**

12 “This chapter shall cease to have effect five years after
13 the date on which it takes effect, except as to the completion
14 of then-pending matters, which in the judgment of the special
15 panel of the court require its continuance in effect, with
16 respect to which matters it shall continue in effect until such
17 special panel determines that such matters have been
18 completed.”

19 (b) The tables of chapters for title 28 of the United
20 States Code and for part II of such title 28 are each
21 amended by inserting immediately after the item relating
22 to chapter 37 the following new item:

“39. Special prosecutor.”

1 **ASSIGNMENT OF JUDGES TO DIVISION TO APPOINT SPECIAL**
2 **PROSECUTORS**

3 **SEC. 3. (a)** Chapter 3 of title 28 of the United States
4 Code is amended by adding at the end the following new
5 section:

6 **“§ 49. Assignment of judges to division to appoint special**
7 **prosecutors**

8 “(a) Beginning with the two-year period commencing
9 on the date this section takes effect, the chief judge of the
10 United States Court of Appeals for the District of Columbia
11 shall assign three persons who are judges or justices for
12 each successive two-year period to a division of the United
13 States Court of Appeals for the District of Columbia to be
14 the special panel of the court for the purposes of chapter 39
15 of this title.

16 “(b) Except as provided under subsection (f) of this
17 section, assignment to the division established in subsection
18 (a) of this section shall not be a bar to other judicial assign-
19 ments during the term of such division.

20 “(c) In assigning judges or justices to sit on the divi-
21 sion established in subsection (a) of this section, priority
22 shall be given to senior retired circuit judges and senior
23 retired justices.

24 “(d) The chief judge of the United States Court of
25 Appeals for the District of Columbia may make a request

1 to the Chief Justice of the United States, without presenting
2 a certificate of necessity, to designate and assign, in accord-
3 ance with section 294 of this title, retired circuit court judges
4 of another circuit or retired justices to the division established
5 under subsection (a) of this section.

6 “(e) Any vacancy in the division established under
7 subsection (a) of this section shall be filled only for the
8 remainder of the two-year period in which such vacancy
9 occurs and in the same manner as initial assignments to the
10 division were made.

11 “(f) No judge or justice who as a member of the di-
12 vision established in subsection (a) of this section partici-
13 pated in a function conferred on the division under chapter
14 39 of this title involving a special prosecutor shall be eligible
15 to participate in any judicial proceeding involving a matter
16 which involves such special prosecutor while such special
17 prosecutor is serving in that office or which involves the
18 exercise of such special prosecutor’s official duties, regardless
19 of whether such special prosecutor is still serving in that
20 office.”

21 (b) The table of sections for chapter 3 of title 28 of
22 the United States Code is amended by adding at the end
23 the following item:

“49. Assignment of judges to division to appoint special prosecutors.”

1 DISQUALIFICATION OF OFFICERS AND EMPLOYEES OF THE
2 DEPARTMENT OF JUSTICE

3 SEC. 4. (a) Chapter 31 of title 28 of the United States
4 Code is amended by adding at the end the following:

5 **“§ 528. Disqualification of officers and employees of the**
6 **Department of Justice**

7 “The Attorney General shall promulgate rules and regu-
8 lations which require any officer or employee of the Depart-
9 ment of Justice, including a United States attorney or a
10 member of his staff, to disqualify himself from participation
11 in a particular investigation or prosecution if such partici-
12 pation may result in a personal, financial, or political conflict
13 of interest, or the appearance thereof. Such rules and regula-
14 tions may provide that a willful violation of any provision
15 thereof shall result in removal from office.”.

16 (b) The table of sections for chapter 31 of title 28 of
17 the United States Code is amended by adding at the end the
18 following:

“528. Disqualification of officers and employees of the Department of
Justice.”

1 **“Chapter 39—OFFICE OF SPECIAL PROSECUTOR**
 2 **AND OFFICE OF GOVERNMENT CRIMES AND**
 3 **OFFICE OF PROFESSIONAL RESPONSIBILITY**

“Sec.

“591. Special Prosecutor: appointment and removal.

“592. Jurisdiction.

“593. Authority.

“594. Office of Government Crimes.

“595. Jurisdiction.

“596. Reporting.

“597. Disqualification of officers and employees of the Department of Justice.

“598. Office of Professional Responsibility.

4 **“§ 591. Special Prosecutor; appointment and removal**

5 “(a) There is established within the Department of
 6 Justice an independent Office of Special Prosecutor which
 7 shall be headed by a Special Prosecutor appointed by the
 8 President, by and with the advice and consent of the Senate.

9 “(b) The Special Prosecutor shall be appointed for a
 10 term of three years and shall be compensated pursuant to
 11 level II of the Executive Schedule, section 5313 of title 5,
 12 United States Code. No person shall serve as Special Prose-
 13 cutor for more than a single term.

14 “(c) A person shall not be appointed Special Prosecu-
 15 tor if he has at any time during the five years preceding
 16 such appointment held a high level position of trust and
 17 responsibility on the personal campaign staff of, or in an
 18 organization or political party working on behalf of, a candi-
 19 date for any elective Federal office. The confirmation by the
 20 Senate of a Presidential nomination of a Special Prosecutor

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1 shall constitute a final determination that such officer meets
2 the requirements of this subsection.

3 “(d) A Special Prosecutor shall only be removed by the
4 President for extraordinary improprieties, for malfeasance in
5 office, for willful neglect of duty, for permanent incapacita-
6 tion, or for any conduct constituting a felony. An action may
7 be brought in the United States District Court for the Dis-
8 trict of Columbia to challenge the action of the President
9 under this subsection by seeking reinstatement or other
10 appropriate relief. In the event of any removal, the Presi-
11 dent shall promptly submit to the Committee on the Judi-
12 ciary of the Senate and the Committee on the Judiciary of
13 the House of Representatives a report describing with par-
14 ticularity the grounds for such action. The committees shall
15 make available to the public such report, except that each
16 committee may, if necessary to avoid prejudicing the legal
17 rights of any individual, delete or postpone publishing such
18 portions of the report, or the whole report, or any name or
19 other identifying details.

20 “(e) The Special Prosecutor shall report no less than
21 annually to the Committee on the Judiciary of the Senate
22 and the Committee on the Judiciary of the House of Repre-
23 sentatives and shall include in such reports information con-
24 cerning his relationship with the Attorney General, United
25 States Attorneys, other agencies of Government, the degree

1 of independence exercised under section 593, the types and
2 numbers of matters of which he has declined jurisdiction
3 under section 592 (b) and such other matters as he deems
4 appropriate. However, the report shall not include any
5 information which might impair or compromise an ongoing
6 matter, or which the Special Prosecutor determines would
7 constitute an improper invasion of personal privacy or other
8 improper disclosure.

9 **“§592. Jurisdiction**

10 “(a) (1) The Special Prosecutor shall have jurisdiction
11 to investigate and prosecute possible violations of Federal
12 criminal law by a person who holds or who at the time of
13 such possible violation held any of the following positions in
14 the Federal Government: (i) President, Vice President,
15 Attorney General, or Director of the Federal Bureau of
16 Investigation; (ii) any position compensated at a rate equal
17 to or greater than level I or level II of the Executive Sched-
18 ule under sections 5312 or 5313 of title 5, United States
19 Code, (iii) Member of Congress, or (iv) any member of
20 the Federal judiciary.

21 “(2) The Attorney General shall promptly refer to
22 the Special Prosecutor for investigation and, if warranted,
23 prosecution any information, allegations or complaints relat-
24 ing to any violation specified in paragraph (1). In addition,
25 the Attorney General shall promptly refer to the Special

1 Prosecutor for investigation and if warranted prosecution
2 any matter where the Attorney General determines that in
3 the interest of the administration of justice it would be in-
4 appropriate for the Department of Justice (other than the
5 Office of Special Prosecutor) to conduct such investigation
6 or prosecution.

7 “(b) The Special Prosecutor may in his discretion de-
8 cline to accept referrals under subsection (a) (2) of this
9 section. The Special Prosecutor may decline to assert juris-
10 diction under subsection (a) (1) of this section when the
11 matter over which he has jurisdiction is a peripheral or
12 incidental part of an investigation or prosecution already
13 being conducted elsewhere in the Department of Justice, or
14 when for some other reason he determines it would be in
15 the interest of the administration of justice to permit the
16 matter to be handled elsewhere in the Department: *Provided,*
17 *however,* That any such declination shall be accompanied by
18 the establishment of such procedures as the Special Prosecu-
19 tor considers necessary and appropriate to keep him informed
20 of the progress of the investigation or prosecution as it
21 relates to such matter: *And provided further,* That the
22 Special Prosecutor may at any time assume responsibility for
23 investigation and prosecution of such matter. If the Special
24 Prosecutor declines to accept a referral under subsection (a)
25 (2) or declines to assert jurisdiction under subsection (a)

1 (1) he shall submit his reasons for taking such action in
2 writing to the Attorney General.

3 **“§ 593. Authority**

4 “(a) The temporary Special Prosecutor shall have,
5 within the jurisdiction specified by section 592 over matters
6 which he has assumed responsibility, full power and in-
7 dependent authority, subject only to the power of the Pres-
8 ident under section 591 (d) to—

9 “(1) conduct proceedings before grand juries and
10 other investigations;

11 “(2) participate in court proceedings and engage
12 in any litigation, including civil and criminal matters,
13 as he deems necessary;

14 “(3) appeal any decision of a court in which he is
15 a party;

16 “(4) review all documentary evidence available
17 from any source;

18 “(5) determine whether or not to contest the as-
19 sertion of any testimonial privilege;

20 “(6) receive appropriate national security clear-
21 ances and, if necessary contest in court, including where
22 appropriate participation in in camera proceedings, any
23 claim of privilege or attempt to withhold evidence on
24 grounds of national security;

25 “(7) make applications to any Federal court for a

1 grant of immunity to any witness, consistent with ap-
2 plicable statutory requirements, or for warrants, sub-
3 penas, or other court orders, and for purposes of sections
4 6003, 6004, and 6005, of title 18, United States Code,
5 as amended, the Special Prosecutor may exercise the
6 authority vested in a United States Attorney, or the
7 Attorney General;

8 “(8) inspect, obtain, or use the original or copy of
9 any tax return, in accordance with the applicable stat-
10 utes and regulations, and for purposes of section 6103,
11 of title 26, United States Code, as amended, and the
12 regulations thereunder, a Special Prosecutor may exer-
13 cise the powers vested in a United States Attorney or
14 the Attorney General;

15 “(9) initiate and conduct prosecutions in any court
16 of competent jurisdiction, frame and sign indictments,
17 file information, and handle all aspects of any case in the
18 name of the United States;

19 “(10) communicate with, and appear before, and
20 provide information to, appropriate Congressional com-
21 mittees;

22 “(11) exercise all other powers as to the conduct
23 of criminal investigations and prosecutions which would
24 otherwise be vested in the Attorney General or the
25 United States Attorneys under the provisions of chapters

1 31 and 35 of title 28 of the United States Code, as
2 amended, and the regulations thereunder, coordinate and
3 direct the activities of all Department of Justice person-
4 nel, including United States Attorneys, and act as attor-
5 ney for the Government in such investigations and prose-
6 cutions except that the Attorney General shall exercise
7 direction or control as to those matters that specifically
8 require the Attorney General's personal action under
9 section 2516 of title 18, United States Code.

10 “(b) The Special Prosecutor shall have power to ap-
11 point, fix the compensation, and assign the duties of such
12 employees as he deems necessary, including but not limited
13 to investigators, attorneys, and part-time consultants, with-
14 out regard to the provisions of title 5, United States Code,
15 governing appointments in the competitive civil service, and
16 without regard to chapter 51 and subchapter III of chapter
17 53 of such title relating to classification and General Schedule
18 pay rates, but at rates not in excess of the maximum rate for
19 GS-18 of the General Schedule under section 5332 of such
20 title. The Department of Justice shall provide assistance to
21 the Special Prosecutor which shall include but not be limited
22 to, affording to the Special Prosecutor full access to any
23 records, files, or other materials relevant to matters within
24 his jurisdiction, providing to the Special Prosecutor the
25 resources and personnel required to perform his duties,

1 and use by the Special Prosecutor of the investigative and
2 other services of the Federal Bureau of Investigation.

3 “(c) The Special Prosecutor may from time to time
4 make public such statements or reports as he deems appro-
5 priate. The Special Prosecutor may present reports, state-
6 ments, or recommendations to the Congress, the President
7 or the Attorney General.

8 “(d) Nothing in this chapter shall prevent the Attorney
9 General or the Solicitor General from making presentations
10 to any court as to issues of law raised by any case or appeal.

11 **“§ 594. Office of Government Crimes**

12 “(a) There is established within the Department of
13 Justice an Office of Government Crimes, which shall be
14 headed by a Director appointed by the President, by and
15 with the advice and consent of the Senate. The Director shall
16 report directly to the Attorney General on a regular basis
17 and when he deems it necessary and shall report to any
18 other person the Attorney General directs. The Attorney
19 General shall determine the organizational placement of the
20 office within the department.

21 “(b) A person shall not be appointed director of the
22 Office of Government Crimes if he has at any time during
23 the five years preceding such appointment held a high
24 level position of trust and responsibility on the personal
25 campaign staff of, or in an organization or political party

1 working on behalf of, a candidate for any elective Federal
2 office. The confirmation by the Senate of a Presidential
3 nomination of a director shall constitute a final determination
4 that such officer meets the requirements of this subsection.

5 “(e) An individual who has played a leading partisan
6 role in the election of a President shall not be appointed
7 Attorney General or Deputy Attorney General. Individuals
8 holding the position of national campaign manager, national
9 chairman of the finance committee, chairman of the national
10 political party, or other comparable high level campaign role
11 involved in electing the President should be those considered
12 to have played a leading partisan role.

13 **“§ 595. Jurisdiction**

14 “(a) The Attorney General shall, except as to matters
15 referred to the Special Prosecutor pursuant to section 592 of
16 this chapter, delegate to the Office on Government Crimes
17 jurisdiction of (1) criminal violations of Federal law related
18 directly or indirectly to his Government position, employ-
19 ment, or compensation, by any individual who holds or who
20 at the time of such possible violation held a position as an
21 elected or appointed Federal Government officer, employee
22 or special employee; (2) criminal violations of Federal laws
23 relating to lobbying, conflicts of interest, campaigns, and
24 election to public office committed by any person except in-
25 sofar as such violations relate to matters involving discrimi-

1 nation or intimidation on the grounds of race, color, religion
2 or national origin; (3) the supervision of investigations and
3 prosecutions of criminal violations of Federal law involving
4 State or local government officials or employees; and (4)
5 such other matters as the Attorney General may deem
6 appropriate.

7 “(b) Jurisdiction delegated to the Office of Govern-
8 ment Crimes pursuant to subsection (a) of this subsection
9 may be concurrently delegated by the Attorney General to,
10 or concurrently reside in, the United States attorneys or
11 other units of the Department of Justice. In the event of
12 such concurrent delegation, the Director shall supervise the
13 United States attorneys or other units in the performance of
14 such duties. This section shall not limit any authority con-
15 ferred upon the Attorney General, the Federal Bureau of
16 Investigation, or any other department or agency of govern-
17 ment to investigate any matter.

18 **“§ 596. Reporting**

19 “(a) At the beginning of each regular session of the
20 Congress, the Attorney General shall report to the Congress
21 on the activities and operation of the Office of Government
22 Crimes for the preceding fiscal year.

23 “(b) Such report shall specify the number and type of
24 investigations and prosecutions subject to the jurisdiction of
25 such unit and the disposition thereof but shall not include any

1 information which would impair an ongoing investigation,
2 prosecution, or proceeding, or which the Attorney General
3 determines would constitute an improper invasion of per-
4 sonal privacy.

5 **“§ 597. Disqualification of officers and employees of the**
6 **Department of Justice**

7 “The Attorney General shall promulgate rules and
8 regulations which require any officer or employee of the
9 Department of Justice, including a United States attorney
10 or a member of his staff, to disqualify himself from participa-
11 tion in a particular investigation or prosecution if such
12 participation may result in a personal, financial, or partisan
13 political conflict of interest, or the appearance thereof. Such
14 rules and regulations may provide that a willful violation of
15 any provision thereof shall result in removal from office.

16 **“§ 598. Office of Professional Responsibility**

17 “(a) There is established within the Department of
18 Justice an Office of Professional Responsibility, which shall
19 be headed by a Counsel on Special Responsibility appointed
20 by the Attorney General. The counsel shall be subject to the
21 general supervision and direction of the Attorney General,
22 and shall report directly to the Attorney General or, in appro-
23 priate cases, to the Deputy Attorney General or the
24 Solicitor General.

25 “(b) Except as to matters which are to be referred

1 to the Special Prosecutor under section 592 of this chapter,
2 the Counsel on Professional Responsibility shall be respon-
3 sible for reviewing any information or allegation presented
4 to him concerning conduct by an employee of the Depart-
5 ment of Justice that may be in violation of law, of depart-
6 ment regulations or orders, or of applicable standards of
7 conduct, and shall undertake a preliminary investigation to
8 determine what further steps should be taken. On the basis of
9 such investigation the counsel shall refer the matter to the
10 appropriate unit within the department or shall recommend
11 to the Attorney General or, in appropriate cases, to the
12 Deputy Attorney General or Solicitor General, what other
13 action, if any should be taken. The counsel shall undertake
14 such other responsibilities as the Attorney General may
15 direct.

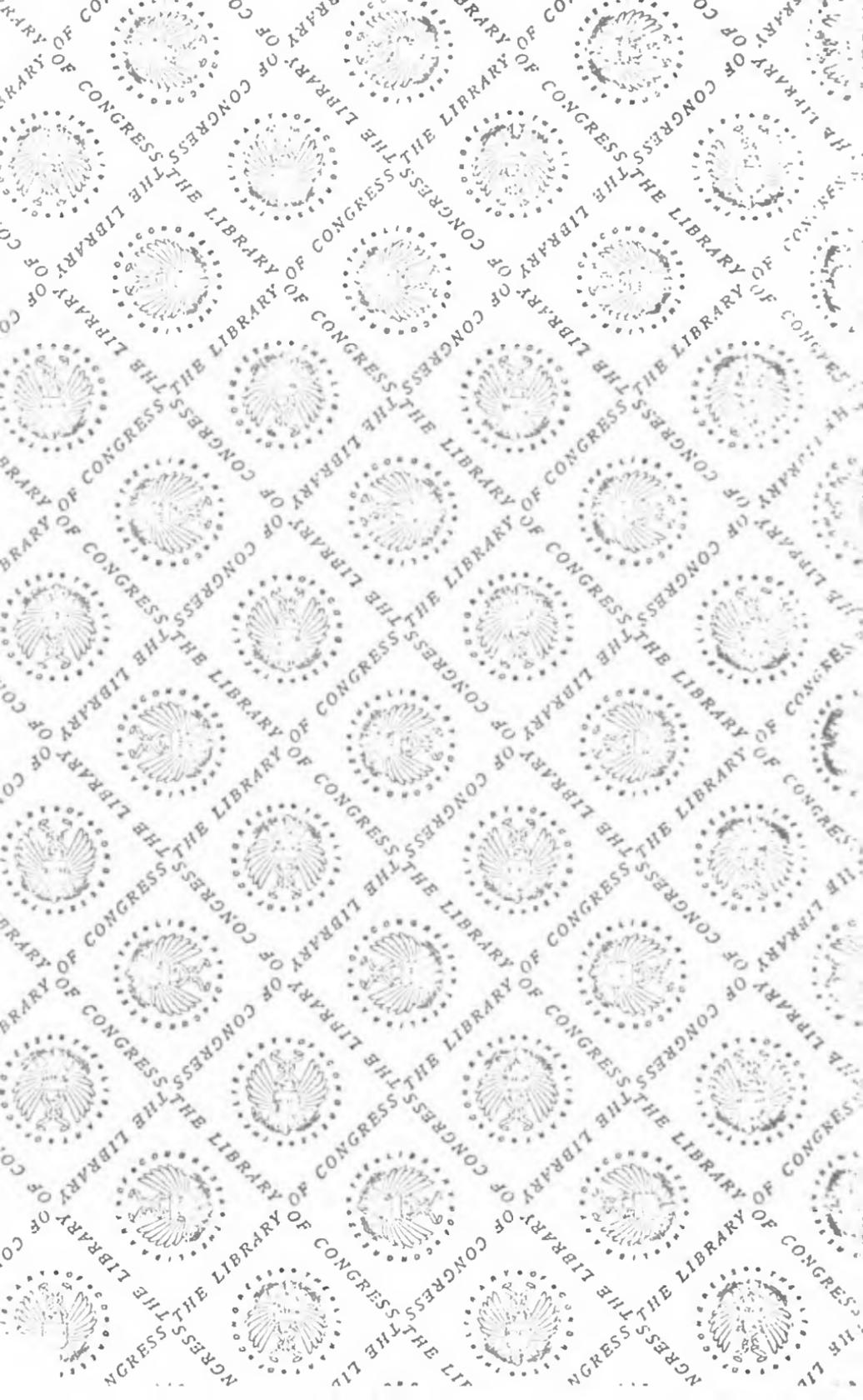
16 “(c) Nothing in this section shall derogate from the
17 authority of internal inspection units of the Department of
18 Justice and the heads of other units to receive, investigate
19 and act upon information or allegations concerning unlawful
20 or improper conduct.”.

21 (b) The analysis of part II of title 28, United States
22 Code, is amended by adding after the item following chapter
23 37 the following new item :

“39. Office of Special Prosecutor, Office of Government Crimes,
and Office of Professional Responsibility----- 591”.









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