The original documents are located in Box 66, folder "Watergate Reorganization and Reform Act -Memoranda and Correspondence (1)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

Hold File

THE WHITE HOUSE

WASHINGTON

April 15, 1976

MEMORANDUM FOR: KEN LAZARUS

FROM: PHIL BUCHEN

Attached is a news item concerning legislation on the appointment of a Special Prosecutor.

Are we keeping abreast of developments in this area?

Attachment

UNITED PRESS INTERNATIONAL

A288
R W

AM-WATERGATE 4-8
BY CHERYL ARVIDSON

WASHINGTON (UPI) -- THE SENATE GOVERNMENT OPERATIONS COMMITTEE TENTATIVELY AGREED THURSDAY ON A SYSTEM FOR APPOINTMENT OF A SPECIAL PROSECUTOR TO INVESTIGATE ANY OUTBREAK OF OFFICIAL MISBEHAVIOR SUCH AS WATERGATE.

THE PROVISION IS PART OF A BILL CARRYING GOVERNMENTAL REFORMS DESIGNED TO HEAD OFF SCANDALS OF THE SORT THAT DROVE PRESIDENT NIXON FROM OFFICE.

THE COMMITTEE ALSO APPROVED A SECTION CALLING FOR CREATION OF A NEW DIVISION OF GOVERNMENT CRIMES IN THE JUSTICE DEPARTMENT. BOTH PROVISIONS ARE SUBJECT TO FINAL COMMITTEE ACTION EXPECTED FRIDAY.

THE NEW JUSTICE DEPARTMENT DIVISION WOULD INVESTIGATE ALLEGED CRIMINAL ACTS BY GOVERNMENT OFFICIALS AND VIOLATIONS OF FEDERAL LOBBYING AND CAMPAIGN LAWS. IT WOULD BE HEADED BY AN ASSISTANT ATTORNEY GENERAL NAMED BY THE PRESIDENT AND CONFIRMED BY THE SENATE.

NO PERSON COULD SERVE IN THAT JOB WHO HAD, DURING THE PREVIOUS FIVE YEARS, SERVED IN A "HIGH LEVEL POSITION OF TRUST AND RESPONSIBILITY" ON THE CAMPAIGN STAFF OF AN INDIVIDUAL ELECTED PRESIDENT OR VICE PRESIDENT.

"IT'S AN OUTGROWTH OF THE JOHN MITCHELL MATTER," SAID SEN. CHARLES PERCY, R-ILL., IN REFERENCE TO NIXON'S FORMER ATTORNEY GENERAL AND CAMPAIGN MANAGER WHO WAS CONVICTED IN CONNECTION WITH THE WATERGATE COVER-UP.

THE SPECIAL PROSECUTOR PROVISION, VIRTUALLY IDENTICAL TO A RECOMMENDATION BY THE AMERICAN BAR ASSOCIATION, WOULD AUTHORIZE A PANEL OF THREE FEDERAL JUDGES TO REVIEW CASES OF POTENTIAL CONFLICT OF INTEREST AND DECIDE WHETHER AN INDEPENDENT PROSECUTOR WAS NEEDED.

IT WAS DESCRIBED AS COVERING "THAT ONE IN A MILLION SITUATION WHERE THE WHOLE JUSTICE DEPARTMENT IS CONSIDERED TO BE IN CONFLICT."

THE ATTORNEY GENERAL WOULD BE OBLIGATED TO REFER TO THE PANEL ANY MATTER IN WHICH EITHER THE ATTORNEY GENERAL OR THE PRESIDENT HAD "A DIRECT AND SUBSTANTIAL PERSONAL OR PARTISAN POLITICAL INTEREST," OR IN WHICH THE INVESTIGATION INVOLVED THE PRESIDENT, VICE PRESIDENT, FBI DIRECTOR, CABINET MEMBER OR ANY OF THE PRESIDENT'S TOP EXECUTIVE BRANCH ADVISERS.

THE JUDGES COULD OVERRULE ANY FINDING BY THE ATTORNEY GENERAL THAT NO SPECIAL PROSECUTOR WAS WARRANTED. THE BILL ALSO WOULD ALLOW THE ATTORNEY GENERAL AND THE COURTS TO REVIEW A PUBLIC REQUEST FOR A SPECIAL PROSECUTOR.

"UNLESS ANYBODY WANTS TO SEE 'ALL THE PRESIDENT'S MEN II,' WE'D BETTER GET ABOUT THIS BUSINESS," SAID SEN. LOWELL WEICKER, R-CONN., WHO WAS A MEMBER OF THE SENATE WATERGATE COMMITTEE, REFERRING TO THE JUST-RELEASED MOVIE ABOUT WATERGATE.

DUPLICATE TO B-WIRE POINTS
UPI 04-08 08:21 PES

[5/20/76]

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 West 44th Street, New York, N.Y. 10036

Intelligence Agency Abuses: The Need For a Temporary Special Prosecutor

By THE COMMITTEE ON CIVIL RIGHTS

I. *INTRODUCTION*

There is now substantial evidence that over a long period of time senior officials in the intelligence agencies of our Federal Government were involved in activities which violated statutory law and the constitutional rights of American citizens. There is also evidence that some of those violations may have constituted crimes. At the same time, however, the relationship between the intelligence and law enforcement agencies of the Federal Government has raised questions concerning the ability of the Department of Justice impartially to investigate such activities and prosecute such crimes.

Recently, a number of prominent citizens, members of Congress, and the Chairman of the Senate Select Committee on Intelligence Activities have called for the appointment of a temporary special prosecutor, independent of the Department of Justice, who would be charged with the duty to investigate and, if necessary, to prosecute crimes committed by individuals employed in such intelligence agencies.[1] This report considers the need for such a temporary special prosecutor.

In 1974, the Committee on Federal Legislation of this Association issued a report on a subject which is related but different from the one addressed here. In its Report that Committee endorsed the suggestion that a *permanent* Special Prosecutor's office be created.[2] The only subject discussed in this report is the establishment of such an office for a limited purpose and limited period of time. Such an office would be similar to the "Watergate Special Prosecutor" in its limited scope and tenure.

II. *SUMMARY*

This report concludes:

A. A considerable amount of evidence exists in the public record of criminal activity by employees of intelligence agencies of the Federal government, including the Federal Bureau of Investigation, the Central Intelligence Agency, Department of Defense, Treasury Department and Department of Justice. It is the view of this Committee that such evidence is sufficient to justify a full, fair and impartial investigation.

B. 1. A conflict of interest and the appearance of partiality exists in the

investigation and prosecution by the Attorney General of possible perpetrators of such crimes.

2. Additional facts concerning actual practices of the Department of Justice and other intelligence agencies reinforce the conclusion that such a conflict of interest exists.

C. The recommendations made herein are not necessarily premised upon any criticism of the Attorney General nor of the Department of Justice. Instead, they are premised upon the belief that because of such conflict and appearance of partiality neither the Attorney General nor said Department should make the investigation required.

D. Such an impartial investigation requires a prosecutor who will feel no improper pressure to prosecute or not to prosecute. Accordingly, the establishment of an office of a temporary special prosecutor to investigate and, if necessary, prosecute such crimes is recommended. The prosecutor would be appointed either by the Attorney General under the Watergate precedent[3] or by the President, subject to the advice and consent of the Senate, under legislation enacted by Congress establishing an intelligence agency prosecutorial force.[4] The rationale for this conclusion is identical to that offered by the Federal Legislation Committee in its 1974 report recommending a permanent special prosecutor: it is the only way to "eliminate the conflicts of interest which inevitably arise when an Administration is called upon to investigate and prosecute wrongdoing by its own officials."[5]

III. *DISCUSSION*

A. *The Standard*

While the standard for creating a special prosecutor is an evolving one, certain minimal criteria have emerged in the various studies and commentaries on the issue.[6] First, there must be evidence of possible criminal conduct by high government officials. Second, there must be evidence that the normal prosecutorial machinery cannot go forward with independence and fairness because of partiality, conflict or impropriety. The words partiality, conflict and impropriety are, as an American Bar Association Committee Report on this subject notes, words of art.[7] As such, they are subject to different interpretations. In the context of the matters here discussed, however, we believe they clearly require the application of the following guidelines:

1. No prosecutor should investigate if he may in any way be implicated in the crimes under investigation.

2. No prosecutor should investigate his superiors.

3. No prosecutor should investigate persons with whom he has had a close personal or working relationship.

4. No prosecutor should carry out an investigation which could give the *appearance* of partiality, conflict or impropriety. As required by the American Bar Association's Standards Relating to the Prosecution Function and Defense Function, a prosecutor should "avoid the appearance or reality of a conflict with respect to his official duties." The commentary on this standard further states:

> "It is of the utmost importance that the prosecutor avoid participation in a case in circumstances where any implication of partiality may cast a shadow over the integrity of his office."[8]

With these standards in mind, the facts and circumstances surrounding possible criminal conduct by intelligence agency officials may be reviewed.

B. *Evidence of Possible Criminal Conduct*

The Rockefeller Commission on the CIA,[9] the House Select Intelligence Committee,[10] and the Senate Select Committee on Intelligence Activities[11] have spent more than a year and a half investigating the intelligence agencies. Those investigations establish that agency officials engaged in numerous improper programs and activities, some of which may have constituted crimes:[12]

> —Section 241 of Title 18 of the United States Code (18 U.S.C. § 241) makes a crime any conspiracy "to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same. . . ." Section 242 of Title 18 of the United States Code (18 U.S.C. § 242) provides for the punishment of anyone who, under color of law, "wilfully subjects any inhabitant of any State, Territory or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . ."

> —From 1956 to 1971, the FBI conducted at least five covert action programs (COINTELPROs) against a variety of domestic organizations, some of which were involved only in peaceful protest. Among these latter organizations were the Southern Christian Leadership Conference, many black student groups, and various anti-war groups.[13] The Senate Select Committee on Intelligence Activities found that the actions taken by the FBI in connection with such programs "interfered with the First Amendment rights of citizens. They were explicitly intended to deter citizens from joining groups, 'neutralize' those who were already members, and prevent or inhibit the expression of ideas."[14] Actions taken by the FBI included tactics designed to break up marriages, terminate funding or employment, encourage gang warfare among violent rival groups, disrupt political campaigns, and deter the expression of ideas which the FBI considered dangerous.[15] More than 2000 proposals for action were approved and carried out.[16]

> —From 1963 until his death in 1968, the late Dr. Martin Luther King, Jr., was the target of an FBI operation designed to neutralize him as an effective Negro leader. His phones were tapped and his hotel rooms and offices were bugged. He was also placed under physical and photographic surveillance. Efforts were made by the

FBI to discredit him with Executive Branch officials, leaders of Congress, religious leaders, universities and the press. Shortly before he was to receive the Nobel Peace Prize, the FBI anonymously mailed to him a tape and an unsigned letter which associates of King said he interpreted as an effort to induce him to commit suicide.[17]

—In 1969, the Internal Revenue Service established a Special Services Staff to target groups and individuals for tax examinations because of their political and ideological beliefs and activities. IRS requested the FBI to provide information of organizations of "predominantly dissident or extremist nature" and people identified with them, and the FBI did so.[18] The Staff maintained intelligence files on more than 11,000 individuals and groups until it was abolished in 1973 by the new IRS Commissioner when he discovered its functions were not tax related.[19]

—In violation of its charter prohibiting it from exercising internal security functions, the CIA developed a program—Operation CHAOS—to explore the extent of foreign influence on domestic dissidents. CIA agents, while in the United States, provided substantial information about lawful domestic activities of dissident American groups. The CIA in connection with this program accumulated more than 13,000 files, including 7,200 on American citizens and an index of more than 300,000 names. Ostensibly to protect CIA personnel and installations, the CIA also infiltrated Washington-based peace groups and Black activist groups and collected general information about radical groups across the country. In 1966, the CIA and FBI entered into an informal agreement regarding CIA's claudestine activity in the United States.[20]

—The Army carried on a nationwide intelligence surveillance program, creating files on some 100,000 Americans and a large number of domestic organizations, encompassing virtually every group seeking peaceful change in the United States, including the Urban League, the National Organization of Women, the NAACP, and the Anti-Defamation League of B'nai Brith. Although Army collection plans, which were circulated to the Justice Department, did not mention techniques of collection, the information described could have been collected only by covert surveillance. The Justice Department never objected.[21]

—Section 1702 of Title 18 of the Code (18 U.S.C. § 1702) prohibits the taking of mail with "design to obstruct the correspondence, or to pry into the business or secrets of another . . ." Both the CIA and the FBI conducted mail opening programs over periods of many years which were directed at mail sent or received by U.S. citizens on watch lists designed to monitor international mail. The Rockefeller Commission concluded that the CIA mail opening programs were "unlawful." The FBI terminated its program in 1966 but continued its use of the CIA program and submitted the names of domestic dissidents to the CIA for its watch list. More than 300,000 first class letters were opened, including the mail of the Federation of American Scientists, John Steinbeck, Senators Kennedy and Church and numerous American peace groups such as the American Friends Service Committee and Women's Strike for Peace.[22]

—State and local laws prohibit burglary and Section 2236 of Title 18 (18 U.S.C. § 2236) prohibits searches without judicial warrant except in certain very limited cases. Over a period of years, the FBI and CIA conducted hundreds of break-ins or "black-bag jobs," without judicial warrant, many of which were against American citizens. In some cases break-ins were to install microphones, in other cases to steal such items as membership lists.[23]

—Section 2511 of Title 18 (18 U.S.C. 2510) prohibits, generally, electronic surveillance without judicial warrant. Over many years, the National Security Agency intercepted millions of private messages transmitted by electronic means to or from the United States. Under one program, NSA obtained essentially all cables to or from this country. From the early 1960's to 1973, NSA compiled a list of individuals and organizations, including 1200 American citizens and domestic groups, whose communications were intercepted, transcribed and frequently disseminated to other agencies for "intelligence purposes."[24] "The Americans on this list, many of whom were active in the anti-war and civil rights movements, were placed there by the FBI, CIA, Secret Service, Defense Department and NSA itself without prior judicial warrant. . . ."[25] The FBI carried out in this country over a period of many years warrantless electronic surveillance of numerous individuals and domestic groups.[26]

—Section 1905 of Title 18 (18 U.S.C. § 1905) makes it a crime for a government official to permit any income tax return to be seen by any person except as provided by law. Until 1968 the FBI obtained tax returns from the IRS surreptitiously without filing applications with the IRS Disclosure Branch as required by regulations. After 1968, apparently, the FBI followed the required application procedures but the CIA continued to receive tax return information without filing requests. Even after formal requests were required, the IRS, which is required to release tax information only when necessary, accepted the Justice Department's undocumented assertions that the requested tax information was "necessary." Most FBI requests for tax information were for targets of various COINTELPRO operations.[27]

This is not meant to constitute an exhaustive list of the possible violations of criminal law by federal intelligence agencies. Various CIA officials may

have violated provisions of the federal criminal code[28] in view of the findings of the Church Committee that United States officials instigated, aided, abetted or acquiesced in plots to assassinate at least five foreign leaders.[29] The CIA and its officials may also have violated statutes prohibiting the destruction of public records (18 U.S.C. 2071) when they destroyed files on drug testing programs,[30] and Richard Helms, the former Director of the CIA, may have committed perjury before Congressional committees (18 U.S.C. 1001) in testifying about the CIA role in Chile and Watergate.[31]

C. *Because the Justice Department Must Investigate Itself, There is Potential Conflict and the Appearance of Conflict*

Under federal law, the Justice Department is responsible for prosecuting cases arising under the laws of the United States.[32] The FBI, which is a unit of the Justice Department, is the principal investigative arm of the Department.[33] In view of this fact, the issue is whether the Department can perform an investigation of alleged abuses by officials of the Bureau with thoroughness and impartiality.

The record shows that in a great many instances, officials inside the Justice Department either initiated, carried out, or participated in the possibly criminal conduct. The FBI is implicated in COINTELPRO, mail openings, burglary, illegal wiretapping, and the NSA intercept program. The FBI contributed and received information from the CIA's CHAOS operation and aided the IRS Special Services project.[34] There is evidence that officials high in the Department's chain of command had knowledge of at least some aspects of COINTELPRO, the King wiretap, and other programs.[35]

Obviously, this creates the potential for direct conflicts: for example, it is possible that (1) officials in the Department will investigate their own alleged wrongdoing, or, (2) they will investigate alleged wrongdoing of present or former associates in the Bureau and the Department with whom they have shared long working relationships.

This possibility has already surfaced: The House Intelligence Committee in its investigation uncovered the possibility that high FBI officials may have purchased electronic surveillance equipment from "friendly" dealers at considerable markups. An FBI internal investigation was ordered. Recently the FBI produced its report which Mr. Levi is reported to have concluded was a "whitewash." Another investigation has been ordered by the Attorney General.[36]

Although the Attorney General may exercise diligence, the appearance of conflict and partiality is inevitable and unavoidable. Even if he orders investigations of possible violations—as he did in this instance concerning the purchase of electronic equipment—the push and pull of conflicting loyalties (loyalties within the Department, between the Department and the FBI, etc.) make it difficult if not impossible for an observer to conclude that the investigation will be thorough with all leads exhausted. The crucial point is that this will be true even if the investigation *is* thorough and impartial.

There may be insufficient evidence to prosecute anyone, but the apparent

conflict makes such a finding by the Justice Department less credible. If some prosecutions result, there will still be the suspicion that there should have been more. As long as the Department is in the position of investigating itself or its own "principal investigative arm," suspicion of whitewash and coverup will remain.

It was for such reasons, among others, that the original Watergate prosecution team was replaced by a Special Prosecutor.[37] Today there are again grounds for such suspicions:

—Although the existence of COINTELPRO was made public in 1971, the Justice Department did not investigate the matter until 1974 when Attorney General Saxbe directed Assistant Attorney General Henry Petersen to form a committee to make a "complete study" and prepare a report. That committee submitted a report which, according to Attorney General Saxbe, described "fully" the activities involved in each of the COINTELPRO programs and disclosed that "in a small number of instances, some of these programs involved what we consider today to be improper activities."[38] Mr. Petersen recommended against any criminal prosecutions, giving as reasons, among others, that violations of "statutory constitutional rights" was a very murky area of the law and subject to great change over the period of time the program was in existence, that it was a program directed by the Director of the FBI and that "it would be somewhat incongruous to single out those few instances that are perhaps all under the statute of limitation and single out relatively few individuals for criminal prosecution for following the orders of their superiors."[39] The recommendation suggested that the committee had full knowledge regarding the program, but the Report of the Senate Select Committee on Intelligence Activities states that Mr. Petersen's committee agreed in its inquiry to use only summaries of documents prepared by the FBI instead of examining the documents themselves, and that although spot-checks of the underlying files were made in an attempt to assure accuracy, such summaries were often extremely misleading.[40]

—On March 28 of this year, it was revealed that the FBI had conducted at least 92 burglaries against the Socialist Workers Party and affiliated organizations. Prior to that time, Department of Justice civil attorneys representing the FBI in civil litigation brought by the Socialist Workers Party had been asserting that the Party had never been the target of burglaries by Federal agents.[41] The revelation of the burglaries led the *N.Y. Times* to charge in an editorial on April 1: "The Story of these raids, moreover, provides insight into the corrosive effect of such violations on the integrity of government far beyond the agency directly involved. . . . The Justice Department helped to cover up the very violations it was allegedly investigating."[42]

—Both the President and the Attorney General are opposed to the appointment of an independent special prosecutor.[43] Yet, although the precise facts are not clear, it appears that at least one high-ranking official within the Department may have urged an independent inquiry outside the Justice Department to review the facts concerning the assassination of Dr. Martin Luther King. According to a news story on March 25, 1976,[44] the official, Assistant Attorney General J. Stanley Pottinger of the Civil Rights Division, was pre-

pared to make such a recommendation to the Attorney General. (It should be noted that Pottinger's report was also reported to have concluded that the FBI and other government agencies were not involved in the murder.) Although the Department of Justice announced informally that Pottinger's report was furnished to the Attorney General, this Committee is advised that its contents (including the possible recommendation for a special, extra-Departmental inquiry) are classified and have not been released. Instead, a Justice Department news release was issued on April 29, 1976, stating that the Attorney General had directed an office *within* the Department to review the King case.[45]

D. *The Justice Department Cannot Investigate Other Intelligence Agency Officials Without Potential Conflict or the Appearance of Conflict*

Because not all officials involved in intelligence agency abuses are employees or former employees of the Justice Department, the question arises as to whether the Justice Department can conduct a thorough and impartial investigation of alleged illegal activities of other intelligence agencies and their officials. Three reasons suggest that the Justice Department cannot conduct such investigations thoroughly and fairly.

1. *Joint Operations:* To investigate other intelligence agencies, the Justice Department must still, in many cases, investigate itself. There is evidence that Justice Department officials knew about and participated in other intelligence agency programs. According to the Rockefeller Report, the FBI was a beneficiary of the CIA Mail Opening Program and exchanged information with the CIA Special Operations Group (CHAOS) set up by the CIA to monitor anti-war activists.[46] According to testimony by National Security Agency Director, Lieutenant General Lew Allen, Jr., the FBI furnished the Agency, which monitored the international message and cable traffic of American citizens, with watchlists containing the names "of about 1000 U.S. persons and groups. . . ."[47] According to the Report of the Senate Select Committee on Intelligence Activities, the IRS collected much of its information on dissidents from the FBI, and the FBI used information developed by the IRS for its own intelligence and counterintelligence operations.[48] In numerous cases where other agencies were involved in alleged illegal activities, there is evidence that the FBI had knowledge of, or participated in, such activities. Thus the issues of conflict and appearance of conflict apply to Justice Department investigations of other agencies as well.

2. *The Twenty-One Year Agreement with CIA:* Complicating the issue of achieving an impartial investigation by the Justice Department is the fact that for 21 years (from 1954 until 1975), the Justice Department and the CIA maintained a secret agreement under which the Justice Department delegated to the CIA its statutory duty to investigate and determine whether or not to prosecute crimes on behalf of the United States.[49] Under the agreement, if it appeared to the CIA that prosecution would be precluded by the

need to reveal sensitive information, it was not required to refer such cases to the Justice Department. During the period covered by the Agreement, twenty cases were referred to the Justice Department by the CIA.[50] The majority of said cases involved thefts of government property or embezzlement of government funds; none of said cases involved abuses discussed in this report.

Not only does this agreement raise legal questions in itself, but it casts doubt on whether officials in the Justice Department can now pursue possible past crimes by employees of the CIA with "clean hands" and impartiality.

3. *Defending the Agencies:* The Justice Department is also involved in potential conflict and the appearance of conflict since it is representing, or has represented, agency officials named as defendants in civil litigation arising out of the programs heretofore discussed. For example, the Justice Department is representing, or has represented, employees of the FBI in suits brought as a result of COINTELPRO and employees of the CIA and FBI in suits brought against the mail opening program.[51]

In some instances,[52] the Department has hired private counsel, at government expense, to represent some defendants in their individual capacities.[53]

The Justice Department's own rationale for retaining such outside counsel, according to a *New York Times* report, was offered by Deputy Attorney General Harold R. Tyler: a conflict of interest in defending persons whom the Department may decide to prosecute under the criminal laws.[54]

As correct as the Department may be in perceiving this question of conflict in the *Socialist Workers Party* case, it cannot undo what has been done. Namely, the Department has *already* defended individuals whom it will, perhaps, be prosecuting and is, therefore, already in an irrevocable position of conflict.

Several factors argue strongly that the Department is committed to a course of defending rather than prosecuting. First, as mentioned above, is the fact that the Department has embarked on a course of defending agents already sued civilly. Second, the protracted nature of such civil litigation may jeopardize the Department's ability to bring criminal proceedings because statutes of limitations are running on the criminal charges and are not tolled by the civil suits. Third, is the combined effect of Canon 4 of the *ABA Code of Professional Responsibility* ("A lawyer should preserve the confidence and secrets of a client.") along with Ethical Consideration 4–5 ("A lawyer should not use information acquired in the course of representation of a client to the disadvantage of the client . . .") and Ethical Consideration 4–6 ("The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment . . ."). All these ethical principles suggest that the Department of Justice, now in a position of having represented certain individuals and having acquired knowledge of certain matters in connection with such representation, cannot ethically prosecute such individuals.

In our view, there is here a plain conflict of interest, and the solution is the appointment of a temporary special prosecutor to investigate and, if necessary, prosecute any crimes which have been committed.

E. *The Attorney General Is Not in a Position to Avoid Conflict and the Appearance of Conflict*

One of the arguments against a temporary special prosecutor turns primarily on public faith in the integrity and dedication of the present Attorney General. However, to call for a special prosecutor is not necessarily to criticize the Attorney General personally or professionally. The problem is his relationship as Attorney General to the President and to the Department of Justice. The Attorney General is not only the chief law enforcement officer of the United States. He is also the President's appointee, a member of the Cabinet, and the Administrator of the Justice Department.[55] While we agree that generally the nation's principal law enforcement officers should be directly responsive to policy decisions made through the political process,[56] the general rule must fall when the appearance of conflict and partiality is as strong as it is here. These dual roles of the Attorney General are particularly in conflict in the case of the abuses which are the subject of this report and clearly restrict his ability to act as an impartial prosecutor. He is placed in a position that, regardless of intention or deed, will give the public the impression that he has not overseen a thorough investigation. Two points make this clear.

First, the Attorney General is operating under at least implicit limitations imposed by the President. Whatever the Attorney General's intentions and desires might be, the policy of the President is not to appoint an independent special prosecutor.[57] Furthermore, it seems not to be the President's intention to investigate all of the past abuses of the agencies. He provided some insight on his reasons in the statement he made on February 18, 1976, when he announced his intelligence agency reorganization:

> "For over a year, the nation has engaged in exhaustive investigations into the activity of the CIA and other intelligence units of our government. Facts, hearsay, and closely held secrets—all have been spread out on the public record. We have learned many lessons from this experience but we *must not become obsessed with the deeds of the past. We must act for the future. . . .*" (Emphasis supplied.)[58]

Of course, this is a general statement, but it can hardly be considered a call for full and complete enforcement of the criminal laws against such officeholders who may have broken such laws.

Secondly, the Attorney General faces considerable friction from his subordinates within the Department and from persons in the FBI when he attempts to act in what may be the public interest but is perceived as being against the interest of the Bureau and Department employees. For example, a recent article entitled "Erosion of Morale is Seen Among FBI Rank and File"[59] explains how two issues are dividing the Bureau: (1) Justice's investigation of possible impropriety in financial dealings by the Bureau, and (2) Attorney General Levi's decision to notify past targets of FBI harassment.

This article is particularly instructive for it demonstrates the pressures from within which operate against the Attorney General. No administrator

can function effectively and be insensitive to such serious division within his own command. As much as one may agree with the Attorney General on the two issues described above, clearly they have generated mounting pressure against his continuing to act in a way which seems to divide his subordinates and erode morale. The Attorney General, any Attorney General, must be sensitive to such "inside" political pressures.

Another example illustrates the conflict arising from the relationship between the Attorney General and the President. The Attorney General cannot both investigate and prosecute employees of the National Security Agency and, at the same time, obey the President's wish that he invoke "Executive Privilege" with respect to that agency's secrets before Congress and the courts.[60]

To call for a special prosecutor is not, then, to impugn the integrity of the Attorney General but to recognize the constraints upon him. When Congress forced Elliot Richardson to appoint a special prosecutor to investigate Watergate as a condition of his confirmation, Congress was not questioning his integrity but seeking independence and impartiality in the investigation of Watergate. The same independence and impartiality are required to investigate abuses by the intelligence agencies.

IV. *A TEMPORARY SPECIAL PROSECUTOR DOES NOT POSE SERIOUS INSTITUTIONAL QUESTIONS*

Most objections to the concept of a special prosecutor have been raised in the context of a debate over whether to institutionalize a permanent Special Prosecutor to investigate official crime. In its Report, the Watergate Special Prosecution Force raised the critical objections:

> "WSPF is opposed to the idea of extending the special prosecutor concept on a permanent basis. Central to the question is the fact that such a public officer would be largely immune from the accountability that prosecutors and other public officials constantly face. Lack of accountability of an official on a permanent basis carries a potential for abuse of power that far exceeds any enforcement gains that might ensue. An independent prosecutor reports directly on ongoing investigations to no one, takes directions from no one and could easily abuse his power with little chance of detection. Although matters that reach court obviously invoke court control over a prosecutor's public conduct, the discretionary process of initiating and conducting investigations bears great potential for hidden actions that are unfair, arbitrary, dishonest, or subjectively biased."[61]

The Report also pointed out that a permanent special prosecutor's office might become bureaucratically ossified and that different enforcement policies by the Department of Justice and the special prosecutor might lead to "unequal justice."[62]

These are serious questions but they do not apply to a temporary special

prosecutor appointed to look into intelligence agency abuses. He would have a clearly defined scope of authority, would cease to function once his investigation and any prosecutions were concluded, and could be held accountable through removal procedures to ensure that he does not violate his mandate.

Because a temporary special prosecutor would be limited in function and duration, the Watergate Special Prosecutor Force endorsed this approach:

> "[T]he absence of a permanent, independent prosecutor need not dispel the idea that an independent prosecution office can be appointed in the future when activities by the executive, legislative or judicial branches of Government show the necessity of a temporary office similar to WSPF.
>
> "Congress has the power to enact a statute requiring the President or Attorney General to appoint such a prosecutor, with appropriate safeguards of his jurisdiction and independence, and two-thirds majorities of both Houses have the power to override a Presidential veto of such legislation if necessary. . . . Congress can similarly use its power to appropriate funds and the Senate can use its confirmation power to force such action if necessary."[63]

Because this report recommends a temporary special prosecutor, with a mandate only to investigate and prosecute criminal offenses by individuals in the intelligence agencies, it does not raise the same issues of accountability, potential abuse, and definition of function involved in the debate over the wisdom of institutionalizing a permanent special prosecutor.

V. *CONCLUSION*

A temporary special prosecutor to investigate and, if necessary, prosecute crimes committed by employees of intelligence agencies of the Federal government should be appointed forthwith.

Respectfully submitted,

May 20, 1976

COMMITTEE ON CIVIL RIGHTS

GEORGE M. HASEN, *Chairman*

PAUL H. BLAUSTEIN	DAVID L. KATSKY
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CONRAD K. HARPER	JERRY SLATER
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CECIL WRAY, JR.

FOOTNOTES

1 Letter to Senators Frank Church and Walter F. Mondale, of the Senate Select Committee on Intelligence Activities from Henry Steele Commager, C. Vann Woodward, Norman Dorsen, and Morris Abram, March 19, 1976; Statement by Congressman Robert Drinan, introducing Special Prosecutor Act of 1976, H.R. 11357, Congressional Record, H-47, January 19, 1976; Statement by Senator Frank Church, "Government Adherence To the Law: A Call for a Temporary Special Prosecutor on Intelligence Abuses," February 5, 1976; Berman, Jerry J. and Halperin, Morton H., "For a Special Prosecutor on Intelligence-Agency Abuses," *New York Times*, December 29, 1975, at 25.

2 Report of the Committee on Federal Legislation, *The Department of Justice as an Independent Establishment*, 29 Record of the Association of the Bar of the City of New York 486 (May/June, 1974).

3 *See* 28 C.F.R. §§ 0.37 and 0.38 (1973), Subpart G-1, "Office of Watergate Special Prosecution Force" and appendix thereto: "Duties and Responsibilities of the Special Prosecutor." Reprinted in *Hearings before the Committee on the Judiciary, United States Senate, 93rd Cong., 1st Sess., on Special Prosecutor (1973)*, (hereinafter "Special Prosecutor Hearings") at 261–63.

4 *See, e.g.*, H.R. 11357, 94th Cong., 1st Sess. (1976), introduced by Congressman Robert Drinan.

5 Report of the Committee on Federal Legislation, *supra* note 2, at 496.

6 *E.g.*, A Report of the American Bar Association Special Committee to Study Federal Law Enforcement Agencies, *Preventing Improper Influence on Federal Law Enforcement Agencies* (1976) (hereinafter "ABA Study"), at 81–110; *Select Committee on Presidential Campaign Activities, Final Report, United States Senate, 93rd Cong., 2nd Sess. (1974)*, at 96–7; Report of the Committee on Federal Legislation, *supra* note 2; *Hearings before the Subcommittee on Separation of Powers of the Committee on the Judiciary, United States Senate, 93rd Cong., 2nd Sess., on S.2803 and S.2978* (1974).

7 ABA Study, *supra* note 6, at 110.

8 *Id.* at 91.

9 *Report to the President by the Commission on CIA Activities Within the United States (June, 1975)* (hereinafter, "Rockefeller Commission Report").

10 *Hearings before the Select Committee on Intelligence, United States House of Representatives, 94th Cong., 1st Sess. (1975)*, Parts 1–6; and *see* "The CIA Report the President Doesn't Want You to Read." *Village Voice* (February 16 and 23, 1976).

11 *Final Report of the Select Committee to Study Governmental Operations with respect to Intelligence Activities, United States Senate, 94th Cong., 2nd Sess. (1976)*, Book I of which is entitled "Foreign and Military Intelligence" and Book II of which is entitled "Intelligence Activities and the Rights of Americans" (hereinafter, "Book II").

12 The complex statute of limitations problems which would be presented by prosecutions of some of the possibly criminal acts (particularly those involving criminal conspiracy) discussed *infra* are not addressed by this report. For the same reason that a temporary special prosecutor should be appointed, this official should make an independent determination whether particular prosecutions are barred by the applicable statute of limitations.

13 Book II, *supra* note 11, at 211–23.

14 *Id.* at 214–15.

15 *Id.* at 216–19, 247–49. The Senate Select Committee states in its Report at 139 that the abusive techniques used by the FBI in COINTELPRO programs included

violations of both federal and state statutes prohibiting mail fraud, wire fraud, incitement to violence, sending obscene material through the mail and extortion.

16 *Hearing before the Civil Rights and Constitutional Rights Subcommittee of the Committee on the Judiciary, House of Representatives, 93rd Cong., 2nd Sess., on FBI Counterintelligence Programs (1974)* (hereinafter "Cointelpro Hearing"), at 12. *See also* Berman Jerry J., and Halperin, Morton H., (eds.), *The Abuses of the Intelligence Agencies* (Washington, D.C., Center for National Security Studies, 1975), at 24–31. That report, which contains a chapter on possible violations of law at 156–173, and Mr. Berman, one of its editors, were of great assistance to our Committee in the preparation of this report.

17 Book II, *supra* note 11, at 11, 219–23. The Senate Select Committee has found that officials in the White House and Justice Department knew that the FBI was taking steps to discredit Dr. King, although they did not know the full extent of the Bureau's effort. Book II, at 159 and 275.

18 *Id.* at 94–5.

19 Book II, *supra* note 11, at 6–7, 96; Rockefeller Commission Report, *supra* note 9, at 130–59.

20 Book II, *supra* note 11, at 96–103. This Committee, with the Committee on International Human Rights, has concluded that CIA surveillance within the United States of any person who is not an employee of the CIA and the maintenance and dissemination of information concerning individuals in this country with no clear and direct involvement with a foreign power are proscribed by the CIA charter and hence unlawful and have a serious potential for infringement of First Amendment rights. The Committee on Civil Rights and The Committee on International Human Rights, *The Central Intelligence Agency: Oversight and Accountability*, 30 The Record of the Association of the Bar of the City of New York 255, 288 (April, 1975).

21 Book II, *supra* note 11, at 84–85, 167. In 1973, this Committee concluded that the surveillance and data collection activities of the Army in respect of American civilians violated or seriously jeopardized the constitutional rights of such persons. The Committee on Civil Rights, *Military Surveillance of Civilian Political Activities: Report and Recommendations for Congressional Action*, 28 The Record of the Association of the Bar of the City of New York 651, 669 (October, 1973).

22 Book II, *supra* note 11, at 6, 12, 107, 139, 142–3, 168; Rockefeller Commission Report, *supra* note 9, at 115.

23 *Id.* at 13, 139, 142, 204.

24 *Id.* at 6, 104, 169, 189.

25 *Id.* at 189.

26 *Id.* at 12–13, 121–22, 198–201, 206–8, 231.

27 *Id.* at 93–4.

28 *E.g.*, 18 U.S.C. § 371 (criminal conspiracy); 18 U.S.C. § 956 (conspiracy to injure property of foreign government); 18 U.S.C. § 958 (commission to serve against friendly nation); 19 U.S.C. § 960 (expedition against friendly nation). In 1972, 18 U.S.C. §1116 (first and second degree murder of foreign officials) and 18 U.S.C. § 1117 (conspiracy to commit such murders) were enacted, but such homicides must occur while the foreign official is "in the United States," 18 U.S.C.A. §1116(b) (1) (1975 supp.). Similarly, the general federal murder statute, 18 U.S.C.A., 1111 (1966) applies only "[w]ithin the special maritime and territorial jurisdiction of the United States."

29 *Select Senate Committee to Study Governmental Operations with respect to Intelligence Activities, Interim Report: Alleged Assassination Plots Involving Foreign Leaders, S. Rep. No. 94–465, 94th Cong., 1st Sess. (1975).* The Senate Select

Committee found that United States officials were involved in plots to assassinate Patrice Lumumba, Fidel Castro, Rafael Trujillo, Ngo Dinh Diem and Rene Schneider, that planning and preparation for these assassinations and attempted assassinations occurred within the United States (*Id.* at 4–5) that "ranking Government officials discussed, and may have authorized, the establishment within the CIA of a generalized assassination capability." *Id.* at 5).

30 "Destruction of LSD Data Laid to CIA Aide in '73." *New York Times*, July 18, 1975, at 1.

31 Halperin, Morton H., "Did Richard Helms Commit Perjury?", *The New Republic*, March 6, 1976, at 14.

32 28 U.S.C. §§ 515, 516.

33 28 U.S.C. § 531; *Report to the House Committee on the Judiciary by the Comptroller General of the United States, FBI Domestic Intelligence Operations—Their Purpose and Scope: Issues that Need to be Resolved (February 24, 1976)*, at 7.

34 Book II, *supra* note 11, at 93, 95, 181; Rockefeller Commission Report, *supra* note 9, at 130.

35 *See*, Book II, *supra* note 11, at 121–25, 157–63, 270–84; Cointelpro Hearing, *supra* note 14, at 12.

36 "Levi Order Probe of 3 Top FBI Aides," *Washington Post*, March 21, 1976, at A1.

37 *See*, generally, Special Prosecutor Hearings, *supra* note 3; ABA Study, *supra* note 6, at 90–91.

38 Cointelpro Hearing, *supra* note 14, at 9.

39 *Id.* at 26.

40 Book II, *supra* note 11, at 131 and 271.

41 "FBI Burglarized Leftist Offices Here 92 Times in 1960–66, Official Files Show," N.Y. Times, March 29, 1976, at 1.

42 "F.B.I. As Burglars," N.Y. Times, April 1, 1976, at 30.

43 "A Special Inquiry on C.I.A. and F.B.I. Urged by Church," *New York Times*, February 6, 1976, at 1.

44 "Independent Probe on King Proposed," *Washington Post*, March 25, 1976, at A1.

45 News Release, *Justice Department*, April 29, 1976.

46 Rockefeller Commission Report, *supra* note 9, at 105–06, 133–44. *See* also Book II, *supra* note 11, at 96–7.

47 *Hearings before the Select Committee to Study Governmental Operations with respect to Intelligence Activities, United States Senate, 94th Cong., 1st Sess., The National Security Agency and Fourth Amendment Rights (1975)*, Volume 5, at 21. *See* also Book II, *supra* note 11, at 189.

48 Book II, *supra* note 11, at 93–5.

49 *Id.* at 103, 273–74.

50 Letter dated July 21, 1975, from John S. Warner, CIA General Counsel, to Deputy Assistant Attorney General Kevin Maroney.

51 *See, e.g., Socialist Workers Party, et al.* v. *Attorney General et al.* 73 Civ. 3160 (S.D.N.Y.); *Kenyatta* v. *Gray*, 71 Civ. 2595 (E.D.Pa.); *Driver et al.* v. *Helms et al.* 75 Civ. 0224 (D.R.I.).

52 *E.g., Socialist Workers Party et al.* v. *Attorney General et al., supra* note 51.

53 "U.S. Won't Defend 2 Agents of F.B.I.," *New York Times*, May 13, 1976, at 10.

54 *Id.*

55 *See generally*, ABA Study, *supra* note 6, at 33–35.

56 *See* Report of the Committee on Federal Legislation, *supra* note 2, at 493.

57 See note 43, *supra*.

[58] "Ford: 'First Major Reconstruction Since 1947,'" *Washington Post*, February 19, 1976, at A1.

[59] "Erosion of Morale Is Seen Among FBI Rank and File," *Washington Post*, April 18, 1976, at A1.

[60] On February 25, 1976 the Subcommittee on Civil and Constitutional Rights of the House Government Operations Committee held hearings on the NSA's cable intercept program. One NSA official and three current and one former Justice Department officials invoked Executive Privilege. The subcommittee, which is chaired by Congresswoman Bella Abzug, recommended that the five be cited for contempt. *See* "Panel Votes To Cite 5 in Cable Probe," *Washington Post*, February 26, 1976, at A1.

[61] *Watergate Special Prosecution Force, Report (October, 1975)*, p. 138.

[62] *Id.* at 139.

[63] *Id.* at 140.

Department of Justice

STATEMENT

OF

HAROLD R. TYLER, JR.
DEPUTY ATTORNEY GENERAL

BEFORE

THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

concerning

S. 495 - THE WATERGATE REFORM ACT

ON

MAY 26, 1976

TESTIMONY OF THE DEPUTY ATTORNEY GENERAL
BEFORE THE SENATE COMMITTEE ON THE JUDICIARY
CONCERNING S.495 AMENDED, THE WATERGATE REORGANIZATION
AND REFORM ACT OF 1976

I appreciate this opportunity to appear before you today to give the views of the Department of Justice on S.495 Amended, the Watergate Reorganization and Reform Act of 1976.

Let me say first that the Department fully shares this Committee's concern for effective investigation of wrongdoing and conflict of interest by government officials. It is precisely because of this concern that the Department has already undertaken some reforms which are similar in intent to those proposed in S.495 Amended. The Department has, for example, created a Public Integrity Section within the Criminal Division which has assumed jurisidiction over all federal offenses involving public and institutional corruption. This jurisdiction had previously been divided among a number of sections in the Criminal Division. The Department has also created an Office of Professional Responsibility to receive complaints about and to investigate alleged wrongdoing by Department of Justice personnel. In evaluating the desirability of the proposals embodied in S.495 Amended, I hope that this Committee will consider the extent to which reforms already undertaken by the Department remove the reason for this legislation. We

in the Department of Justice have taken seriously our responsibility to put our own house in order.

Let me now comment on the specific proposals in Title I of S.495 Amended.

Title I would, first, create a Division of Government Crimes within the Department of Justice. The Department considers this proposal unnecessary and unwise.

The reasons given in the Report of the Committee on Government Operations to support this proposal (Senate Report 94-823, pages 4-5) are legitimate ones. The Department should be able to concentrate sufficient resources to actively monitor possible abuses of office by government officials. It is equally clear that the person responsible for such prosecutions should have exceptional integrity.

The Department believes, however, that these goals have already been achieved by the recent creation of a Public Integrity Section within the Criminal Division of the Department. This reform offers the concentration of Departmental resources which is necessary for an effective prosecution program. Congress can assure the continued integrity of those responsible for such prosecutions through its power to withhold confirmation from the Attorney General, the Deputy Attorney General, and the Assistant Attorney General in charge of the Criminal Division. Moreover, Congress can ensure an adequate commitment of resources to the task through its appropriations authority over the budget of both the Department and the Criminal Division. I do not see how the effectiveness of these oversight mechanisms would be significantly improved if prosecutive authority were given to a division rather than a section within a division.

In our view, the creation of a new division has a number of distinct disadvantages. The creation of a separate division would, for example, make it difficult to adopt and maintain uniform prosecutive policies. This would be particularly difficult with regard to grand jury presentations, use of electronic surveillance techniques, grants of testimonial immunity, and conduct of searches and seizures. Further, the bill would positively invite

jurisdictional conflicts between the Criminal and proposed Government Crimes divisions. Such a splintering of criminal law enforcement responsibilities would lead to much duplication of effort, make more onerous the already difficult problem of coordinating activities between Departmental units, and reduce the pool of resources available during periods of increased activity.

The importance of centrally coordinated criminal law enforcement responsibility has already been demonstrated in cases concerning organized crime and racketeering. Such matters -- which consistently require a greater concentration and coordination of resources than corruption by federal officials is ever likely to require -- have been most effectively handled by an Organized Crime and Racketeering Section within the Criminal Division.

The second proposal of Title I would provide a statutory mechanism for creation of an independent special prosecutor in certain statutorily defined instances. As set forth in S. 495 Amended, the proposal is less objectionable from a constitutional point of view than its precursors. But it remains, I believe, constitutionally inappropriate, administratively unworkable, and unnecessary.

It is true that the current bill appears to place the special prosecutor within the Department of Justice and under the direction of the Attorney General. The provisions

of the bill make clear, however, that the special prosecutor cannot in practice or in theory be considered a part of the Executive Branch, or subject to the control of the Executive. Indeed, I assume that the only reason for attempting to create a special prosecutor is to achieve such independence.

The special prosecutor's authority would not only parallel that of the Attorney General; in many instances, it would supersede it. Under the proposal, the office of the Special Prosecutor may be created, define its own jurisdiction, investigate and try any case, take any appeal, and thereby take any legal position in the name of the government, without the consent of the Solicitor General, the Attorney General, or the President. Unlike any other officer of the Executive Branch, his removal would be beyond the discretion of the President. He may be removed from office only "for extraordinary improprieties." And if he were so removed, the Attorney General would be required to submit to a court a detailed report justifying such action.

While such a special prosecutor would clearly exercise Executive Branch functions, he would be a member of the Executive Branch in name only. The constitutionality of such a nominal association with the Executive Branch is at least questionable. The Department's view, which we have expressed on a number of occasions, is that the power to enforce the laws has been committed by the Constitution to the Executive Branch and, therefore, all Federal prosecutorial officers must be accountable to the Attorney General or the President.

Let me first consider the constitutionality of the bill's proposal that a court be empowered to create and oversee an office of a special prosecutor. Under the proposal, the Attorney General is required to report to the court certain information when he determines that a conflict of interest "or the appearance thereof" exists (Sec. 594(a)); "any individual" making an allegation of criminal wrongdoing to the Attorney General may "request the Court to decide" whether the Attorney General should disqualify himself from the investigation of that allegation (Sec. 594(b)); the court may appoint a Special Prosecutor with consequent statutory disqualification of the Attorney General (Sec. 594(d)(1)); the court reviews each appointment by the Attorney General of a Special Prosecutor (Sec. 595(c)); the Attorney General must submit to the court a report justifying his actions if he dismisses the Special Prosecutor and the court is directed, with certain exceptions, to make the report public (Sec. 595(d)(2)); and finally, the court may set the jurisdiction of the Special Prosecutor (Sec. 595(a)(2) and (c)(2)). These are largely non-judicial functions which, in our view, cannot constitutionally be given to a court.

Article II, Section 2, of the Constitution authorizes the Congress to vest the appointment of "inferior Officers" either in the President alone, the Courts of Law, or the Heads of

Departments. The proponents of S. 495 appear to read this Section of the Constitution as granting power to Congress to vest general appointment authority for "inferior"executive officers in the courts, and appointment authority for "inferior" judicial officers in the Heads of Departments. Such a reading of Article II, Section 2 cannot be squared with the fundamental design of the Constitution, for it would, in effect, permit Congress to interfere with the independence and power of the Executive and Judicial branches.

During the hearings in 1973 on H.R. 11401 to appoint an independent Watergate special prosecutor, not one of the eminent legal scholars who testified was willing to endorse an interpretation of Article II, Section 2, that would support legislation generally vesting in courts the appointment of inferior executive officers. Rather, all the witnesses agreed that the Constitutional provision must be, and always has been, read in light of the doctrine of the separation of powers. This doctrine is implicit in other parts of the Constitution, notably Article II, Section 3, which enjoins the President to "take care that the Laws be faithfully executed." See H. Rep. No. 93-660, 93d Cong., 1st Sess. 19-26 (1973) (Additional Dissenting Views).

Proponents of the Bill try to draw support from 28 U.S.C. 546, under which courts may make interim appointments of United States Attorneys when vacancies exist. But this power

hardly constitutes precedent for the judicial creation of an independent prosecutor, since the interim appointee under 28 U.S.C . 546 may be dismissed by the President and serves, like all other United States Attorneys, within the Department of Justice and subject to the direct authority of the Attorney General. United States v. Solomon, 216 F. Supp. 835 (S.D.N.Y. 1963).

Appointment by a court of officers whose duties were not judicial was also sustained in Ex Parte Siebold, 100 U.S. 371 (1879). In its opinion, however, the Supreme Court there noted the cases in which judicial involvement had been held improper as being administrative rather than judicial in nature and merely stated that "in the present case there is no such incongruity in the duty required as to excuse the courts" from making the appointments. Id at 398. Title 1 of S. 495 Amended would involve the courts in the appointment of prosecutors not accountable to or removable by the President. As the Supreme Court stated in United States v. Nixon, 418 U.S. 683, at 693 (1974), the Executive Branch has "exclusive authority and absolute discretion" to decide whether to prosecute a criminal case. It is hard to imagine a clearer example of incongruity, as discussed in the Siebold case, than for a statute to impose upon a court the duty to appoint a special prosecutor, independent of the control of the President. This would be especially so where the case involves great public interest. Cf. United States v. Cowan, 524 F.2d 504 (5th Cir. 1975).

The constitutional incongruities thrust upon the judiciary by S. 495 Amended are not limited to matters involving the appointment power. It should be noted that the bill would authorize the courts to divest the Attorney General of his office in particular cases, to review any appointment by him of a special prosecutor, and to receive and make public a report explaining a special prosecutor's dismissal. The bill, in short, purports to do more than vest appointment authority in the courts; it would require the courts to make determinations which by their very nature would involve the judiciary in prosecutive and administrative acts. Federal courts under our Constitution, however, are limited to the distinctively judicial role of deciding "cases or controversies." The powers and responsibilities proposed by this bill to be vested in the judiciary go far beyond the framework envisioned by the Constitution.

Even if one were to disregard these grave constitutional concerns, I submit that the scheme of S. 495 Amended is unworkable as a practical matter. Consider, if you will, that <u>any</u> allegation of wrongdoing by a government official, however absurd, can trigger an enormously complicated and expensive procedural process. Within 30 days after receiving such an allegation, the Attorney General would be required to file a detailed memorandum with a special division of the U.S. Court of Appeals for the District of Columbia.

This memorandum must include a summary of the information, allegations, and evidence, and the results of any investigation or evaluation made by the Department or other agencies. In addition, it must contain information "relevant to determining whether a conflict of interest, or the appearance thereof" exists. With the exception of one limited class of employees, the phrase "conflict of interest or the appearance thereof" is nowhere defined in the bill. Further, the Attorney General's memorandum to the court must include a finding as to whether the allegations are "clearly frivolous" or whether further investigation is warranted. Finally, the Attorney General must determine in light of the foregoing whether he must recuse himself and appoint a temporary special prosecutor. All this, I reemphasize, must be done within 30 days after receiving any allegation of wrongdoing on the part of any government official made by anyone.

Nor is this all. Should the Attorney General fail to make the required filing within 30 days, a deadline which would surely be impossible to meet in most cases, "any individual" may petition the court to decide whether the Attorney General should disqualify himself, whereupon the Attorney General must make a responsive filing setting forth all the information described above. The court would then undertake to review the matter and could, under vague criteria, appoint and oversee a special prosecutor independent of the Executive Branch.

I believe that this scheme is a procedural nightmare that would be seen as unworkable by anyone familiar with the problems of criminal law enforcement. S. 495 Amended, requires the Attorney General, not to mention other parts of the Department and the judiciary, to jump through a series of procedural hoops every time anyone alleges wrongdoing by a government official; it makes no effort to distinguish the important from the trivial; and it assumes that virtually every allegation of wrongdoing by a federal official carries with it the potential of becoming another "Watergate". I believe that, as presently constituted, the Department can effectively investigate and prosecute wrongdoing by government officials. Should a conflict arise, as occasionally it will, there are adequate procedures in place to accommodate the eventuality. These procedures, of course, will not satisfy those who believe that the Department has a vested interest in hiding official corruption from public view, but I doubt that any procedure would serve that purpose.

Let me emphasize my agreement with the idea that officers and attorneys of the Department should disqualify themselves where a conflict of interest exists or appears to exist. Indeed, that part of the bill (§596) directing the Attorney General to promulgate rules and regulations under which officers and employees are to disqualify themselves when a conflict of interest, or an appearance of

it, exists has been rendered unnecessary. These rules are already part of the Department's Standards of Conduct and appear in Title 28 of the Code of Federal Regulations (section 45.735-4).

Decisions regarding disqualification, and the appointment of a special prosecutor and his jurisdiction are, in my opinion, for Executive Branch officials to make and to be held accountable for. Judicial usurpation of such executive authority would undermine public confidence in the Department and the Executive, and would reduce the Executive's accountability to that public.

Moreover, I believe that to the extent any officer or attorney of the Department is disqualified, including the Attorney General, the Department would still be able to carry out its responsibilities. The Department of Justice has an established record of prosecuting prominent political figures irrespective of party. Should a grievously exigent set of circumstances comparable to "Watergate" arise in the future, there is now an established precedent whereby an Attorney General can name a prosecutor of independence within the Executive Branch.

It is a truism, Mr. Chairman, that institutions cannot guarantee justice to a society which no longer thinks it important. If corruption is inevitable, a special prosecutor will not save us from it. If we have not reached those depths, however, as I do not think we have, the Justice Department is capable of handling whatever exigencies may arise.

Creation of a special prosecutor-in-waiting --, in waiting for the day when the Justice Department cannot carry out its sworn obligation to thoroughly enforce Federal law -- defeats our effort to restore public confidence in the Department. As the Watergate Special Prosecution Report recommends, rather than extending the special prosecutor concept on a permanent basis, "[t]his visible concentrated effort should be institutionalized within the Department of Justice." Report, p. 139.

TITLE II CONGRESSIONAL LEGAL COUNSEL

Section 201 of the bill would establish, as an arm of Congress, the office of Congressional Legal Counsel to be headed by a Congressional Legal Counsel and a Deputy Congressional Legal Counsel, each of whom would be appointed by the President pro tempore of the Senate and the Speaker of the House of Representatives.

The duties of the Congressional Legal Counsel appear to be threefold. First, at the direction of Congress or the appropriate House, the Congressional Legal Counsel would defend Congress or one of its constituent parts 1/ in any civil action pending in any Federal, state or local court in which such entity is a party defendant and in which the validity of an official Congressional action is placed in issue. This would include actions involving subpoenas or orders.

Second, the Congressional Legal Counsel, at the direction of Congress or the appropriate House, could bring a civil action to enforce a subpoena or order issued by Congress, a House of Congress, a committee, or subcommittee authorized to issue such subpoena or order. Section 213 of the bill would add a new section 1364 to title 28 of the United States Code giving the United States District Court for the District of Columbia

1/ These would include either House, an office or agency, Member, committee, subcommittee, officer or employee.

original jurisdiction over any civil action brought by Congress, or an entity thereof, to enforce any subpoena or order issued by Congress, a House of Congress, or a committee, subcommittee, or joint committee of Congress. This section would not apply, however, to an action to enforce a subpoena or order issued to an officer or employee of the Federal Government acting within his official capacity. Section 206 would authorize the Counsel to represent a House or committee in requesting grants of immunity from U. S. district courts pursuant to section 201(a) of the Organized Crime Control Act of 1970.

A third major duty of the Congressional Legal Counsel would be to intervene or to appear as amicus curiae, at the direction of Congress, in any legal action pending in any Federal, state or local court in which the constitutionality of a law of the United States is challenged, the United States is a party, and the constitutionality of that statute is not adequately defended by counsel for the United States. An intervention or appearance as amicus curiae may also be directed when the pending case concerns the powers and responsibilities of Congress under article I of the Constitution.

After the Supreme Court's pronouncement in Buckley v. Valeo, _____U.S._____, No. 75-436 (January 30, 1976), there can be little dispute over the proposition that to the extent

that the Congressional Legal Counsel may be engaged in the enforcement of the laws, he must be an officer of the United States, appointed pursuant to the Appointments Clause of the Constitution, Article II, section 2, clause 2. The Supreme Court in Buckley held, inter alia, that the "responsibility for conducting civil litigation in the courts of the United States for vindicating public rights" may only be discharged by "officers of the United States." With respect to defending Congress in suits, enforcing Congressional subpoenas and orders, intervening or appearing as amicus where Congress's Article I powers are placed in issue, and seeking immunity for witnesses before Congress, it might be argued that no "public right" is being vindicated, but rather only the private rights of Congress as a separate branch of government. Intervention or appearance as amicus merely because the constitutionality of a law is challenged, however, is inextricably intertwined with the vindication of public rights. The attempt to vest such intervention authority in a Congressional office would, I believe, run head on into the opinion of the Court in Buckley. In this general context, Mr. Chairman, I think it difficult to improve upon the testimony that the late Alexander Bickel offered before the Separation of Powers Subcommittee some years ago. In commenting on a previous version of the proposal now before us, he stated:

"To be sure, appearances as amicus in behalf

of Congress...have been fairly customary where an interest of the Congress separable from that of the Executive, and not subsumed in the Executive's duty to take care that the laws are faithfully executed, is present. But I think it is constitutionally very dubious, and in any event quite unwise, to have Congress represented, either as amicus or of right, by its own lawyer in any case in which the validity or interpretation of an act of Congress is involved....

"Enforcement of the law is part of its execution, and litigating its constitutionality is part of its enforcement. I do not think Congress can take over or, as of right, share these functions. [Sections] in the version that I have seen, providing that the [Congressional Legal Counsel] shall displace the Attorney General of the United States as counsel for any member or officer of either House of Congress in defending any official action seem to me perhaps constitutionally more supportable, but also of dubious wisdom."

Professor Bickel then went on to make a recommendation which would, if implemented, I believe, go a long way toward meeting the policy considerations which appear to underlie the proposal before us today--and would do so, I might add,

unencumbered by the sort of constitutional concerns I have raised today. "What Congress does sorely need...," Professor Bickel said, "is an officer whose duty it would be routinely to review actions of courts and of administrative agencies which lay bare, as they do by the dozen each year, points of policy either omitted or made insufficiently clear in existing legislation. Such an officer could take the initiative in starting up the legislative process to supply omissions in existing legislation, or to review questionable constructions of existing legislation. He could present Congress at each session with an agenda of necessary law revision. By thus systematically coordinating the work of Congress with that of the courts and of the administrative agencies, such an officer could vastly enhance the policy-working authority of Congress." 2/

Touching defense of Members of Congress, as you are aware, the Department of Justice has traditionally provided legal representation for Members and Officers of Congress. Barring some special circumstance, I see no reason to depart from that practice. I understand that only five times in the last five years did the Department decline a request for such representation. In such special circumstances, the employment of outside counsel would seem to be a better alternative that the creation of an Office of Congressional Legal Counsel.

2/ Hearings before the Subcommittee on Separation of Powers of the Committee on the Judiciary, U.S. Senate, 90th Cong., 1st Sess. 249 (1967).

TITLE III: FINANCIAL DISCLOSURE

Title III would require, under pain of a criminal penalty which could result in one year's imprisonment and a $10,000 fine, the annual filing of detailed financial reports by: (1) the President, Vice President, Members of Congress, justices or judges of the United States; (2) those not in office seeking election to Federal office; and (3) officers or employees of the United States who are paid at a rate euqal to or in excess of the minimum rate prescribed for grades GS-16 ~~or 0-6~~. The reports would include such items as (1) the amount of source of each item of income in excess of $100, (2) the fair market value and source of any item received with a fair market value in excess of $500, (3) the identity and value of each asset held during the year which has a value in excess of $1000, (4) the identity and amount of each liability owed which is in excess of $1000, (5) the identity, amount, and date of any securities or real estate transaction which is in excess of $1000. The reports would be filed with the Comptroller General and would be available to the public, although it would be unlawful for any person to use a copy of a report for any unlawful, commercial, or political or charitable solicitation purpose, or to determine the credit rating of any individual.

In our view, the proposals raise important questions of law and governmental policy, and, indeed, of practicality. To require so many differently situated governmental employees to make the identical, extremely broad public disclosures seems unjustified.

The most striking difficulty with this legislation arises from the requirements imposed upon governmental employees simply because they are paid $25,000 - $30,000 a year. There are certainly many such government employees whose duties are such that they cannot realistically become involved in conflict of interest situations. Unlike citizens in the private sector, these government employees would be forced, under criminal penalty, to make all such financial matters public, solely because of salary status and not to satisfy any governmental interest. This seems patently unjust and an unwise as a matter of government policy, since the requirement would no doubt inhibit qualified citizens from entering public service.

We would suggest an alternative approach to this subject of financial disclosure. Distinctive requirements should be fashioned for the different kinds of officials and employees. As regards most public employees to be brought under the scope of the legislation, the advisable way of handling the matter, in our view, would be by administrative regulation, in accordance with objectives and standards enunciated by the Congress. Federal agencies should be made largely

responsible for identifying the officials who should make disclosures and for requiring precisely the kinds of disclosures that are relevant, periodically or in connection with a particular assignment, so as to insure the integrity of the agency's operations. The reports would then serve a practical purpose and should be more acceptable to the government employee. By contrast, the reports that would be required under the proposed legislation would present an undifferentiated mass of particulars about the financial affairs of the employees to the Comptroller General and to the general public. The significance of these reports for governmental purposes would be highly speculative. We do not believe that the employees's right to privacy should be sacrificed for no discernible purpose.

We would invite the Committee's attention to existing financial disclosure regulations. As you know, Executive Order No. 11222 requires the Civil Service Commission to prescribe regulations which in turn require the submission of statements of financial interest by various employees of federal agencies (5 CFR 735-401 et seq). As a result of these requirements, rather extensive financial disclosure regulations presently exist for federal agencies. Enclosed is a copy of Part 45 of Title 28, CFR, containing Standards of Conduct regulations for this Department. Note that §45.735-22 and 23 require special government employees and employees occupying designated positions to file statements of employment and financial interests.

Within the judicial branch, similarly, there are regulations promulgated by the Judicial Conference of the United States in 1969 which require the lower federal court judges to file financial statements twice each year.

There may, of course, be special problem areas known to your Committee which demand additional legislation,and we would be pleased to work with the Committee to identify and solve these problems. We suggest, however, that particular problems should be dealt with particularly, rather than by the general, broad-brush approach of the subject bill.

[June 1976?]

HIGHLIGHTS OF COMMUNICATIONS BETWEEN DEPARTMENT OF JUSTICE AND SENATE COMMITTEE ON GOVERNMENT OPERATIONS RELATING TO S.495.

The following is a comparison of the chronology set forth by Senator Percy in his June 18, 1976 letter to the Attorney General, and that reflected in the Department's records.

Senator Percy	Department
2/13/75 - Committee sends S.495 to Department for comment.	Same.
	3/4/75 - OLA transmits S.495 to relevant divisions of Department for comment.
	5/8/75 - Criminal Division submits draft report to OLA, incorporating views of OLC, Civil, and FBI.
	5/8/75 - OLA is informed orally of Committee's desire to hold hearings at some time in future, "perhaps in July".
	[Mid-May 1975 precise date uncertain] - Solicitor General indicates desire to make certain changes in Department's proposed report. Agreed that meeting should be held among relevant sections of Department to discuss bill.
5/20/75 - Committee requests that AG testify "later during the year".	-- No record that the Department received such a letter. It is, of course, possible -- though unlikely, given the nature of the logging system for such letters -- that the letter was lost. Had that been the case, subsequent oral communication from Committee staff would in any event

quickly reveal the fact. Whether such a letter was or was not received, is, however, immaterial, as various phone conversations between Committee staff and Department during late May and early June clearly confirm that the Committee is uncertain as to hearing plans, but in no doubt as to where Department stands on the bill.

5/27/76 - Letter from Committee requesting Department views on Percy-Baker Amendment #495 (regarding electronic surveillance) to S.495.

6/5/75 - OLA circulates Percy-Baker electronic surveillance amendment for comment by relevant divisions of Departmen

6/13/75 - Meeting with DAG and others on Department's proposed report on S.495.

6/13/75 - DAAG McConnell informed by various Committee counsel that "passage of the bill in its present form unlikely". Ambassador Richardson's 5/12/75 letter to Committee, critical of the bill, said to be important in this regard. McConnell further informed (a) that "the question of hearings, both if and when" remains to be decided; (b) that "the Committee's delay is a function not only of its attempt to schedule a number of important witnesses, but of discomfort with its own bill"; and (c) that some co-sponsors of S.495 are considering a substitute which would "of course bring the prosecutor ba into the Justice Department".

-- Letter dated 7/10/75, received 7/16/75, from Committee requesting that AG testify on July 28.

7/16-7/21/75 - Various conversation within the Department and between Department and Committee staff. Conflicts in schedule preclude AG appearance in late July. Richard Wegman and John Childers so advised. Alternative witness is offered, Committee staff indicates preference for AG at later, unspecified time.

7/24/75 - Senator Percy introduces, on behalf of himself and Senator Baker, Amendment #813 to S.495. (Proposing a Division of Government Crimes.)

-- Letter dated 8/18, received 8/25/75 from Senator Percy enclosing his proposed amendments to Amendment #495 (on electronic surveillance) and asking for comments prior to anticipated September hearing.

8/26/75 - Mark Wolf is called by John Childers, minority counsel. S.495 is among matters discussed, Childers indicates Senator Percy's desire to have the AG testify at a future unspecified time on the bill.

8/28/75 - OLA transmits Senator Percy's 8/25 amendments to his Amendment to relevant divisions of Department.

[Early September, date uncertain, perhaps at AG meeting of 9/4/75 for which my own agenda notes show S.495 as one topic for discussion] AG indicates that schedule precludes a September appearance if one is asked for.

11/18/75 - Committee invites AG or representative to testify on S.495 on December 2.

Same, letter received on November 20. AG's office advises OLA that early December is quite out of the question. In various conversations between OLA and Committee staff 11/21, 11/24, and 11/25 it is agreed (a) that Uhlmann is the likely witness; (b) that electronic surveillance would not be convered; and (c) that testimony as to financial disclosure would be limited to the provisions of S.495, with written comments on other financ disclosure bills to be submitted later. Date of hearing is changed to December 3.

12/1-12/2/75 - Conversations with Wegmen and Schaeffer of Committee staff indicate that Committee would like to have a "preliminary mark-up session" prior to recess, but press of other business may preclude it. Wegman indicat that owing to activity in other Committees, serious consideratic of wiretap proposals by Government Operations unlikely. Schaeffer indicates that the Committee tends to share our view that the numerous financial disclosure bills are "exceedingl complex" and in some cases contradictory and for that reaso doubts whether anyone in Committ

wants to deal with the matter in any detail at this point. Even should a December mark-up occur, the Committee will not be in a position to "seriously consider" financial disclosure provisions "until the 2nd session". Submission of written views on electronic surveillance and financial disclosure "early in the next session" would be greatly appreciated.

12/3/75 - Uhlmann testifies, accom panied by DAAG's Waldman and Keeney.

12/ ? /75 - Department comments on electronic surveillance amendments and various financial disclosure bills submitted to OMB and White House for clearan

12/22/75 - Letter from Committee, received 12/24/75, asking for written comments on financial disclosure bills not previously covered, on electronic surveillance, and on plans to reorganized the Criminal Division.

1/2/76 - Committee staff informed that OMB and White House clearance pending on electronic surveillance and financial disclosure proposals, but that in view of Committee's immediate need, "bootleg" copies would be made available, it being understood that no major changes would be effected in the Department's position. These "bootleg" copies are delivered the following Monday, 1/6/76.

1/6/76 - Committee receives "unofficial views" of Department on financial disclosure portion "of S.495" and on various electronic surveillance amendments.	Note: Financial disclosure aspects "of S.495" were covered in testimony of 12/3/75.
1/29-2/2/76 - Committee receives "official" responses on above.	Note: The "official" responses are in haec verba identical to the "unofficial" responses received by the Committee on 1/6/76.
1/23/76 - Committee receives material explaining formation of Public Integrity Section.	Note: The general outlines of the reorganization of the Criminal Division had been explained to the Committee staffers Wegman and Schaeffer orally in December and again in January. They were neither surprised nor impressed. Formal transmittal of proposed changes could not be effected prior to mid-January when AG approved the reorganization.
"It should also be noted, that at those hearings Mr. Uhlmann was unprepared to respond to questions concerning certain aspects of S.495 which were then being considered by the Committee in preparation for a markup session."	Comment: The only subject excluded from discussion at the December hearing -- and that by prior agreement with the Committee -- was electronic surveillance.

Department of Justice

FOR RELEASE UPON DELIVERY
THURSDAY, JUNE 24, 1976

ADDRESS

BY

THE HONORABLE EDWARD H. LEVI
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

THE ANNUAL DINNER MEETING

OF

THE CHICAGO BAR ASSOCIATION

6:30 P.M.
THURSDAY, JUNE 24, 1976
RED LACQUER ROOM
THE PALMER HOUSE
CHICAGO, ILLINOIS

I am delighted to be here to participate in the installation of Kenneth Prince as President of the Chicago Bar Association. This is an important occasion for the legal profession, an occasion that recognizes this significant office and the man who is to assume it. I am very proud of this Association, which I regard as my association, and which includes so many lawyers with whom I have worked in many ways throughout the years. Kenneth Prince is fully worthy of his distinguished predecessors, and they have been outstanding--which is the mark of an association which has lived up to its responsibilities. My pleasure is enhanced, although I cannot play favorites among law schools and universities, that Kenneth was a near-classmate of mine both at the college of the University of Chicago and in its law school. He graduated one year behind me in the college and one year ahead of me in the law school, which I admit says something about his alacrity and brightness. But these are qualities well known to you.

Since I assume I have been invited to speak at this solemn occasion because I am temporarily in exile in a far off place, I thought it would not be amiss if I began by describing one of the amusing folkways I have encountered.

It occurred just last week as I began to prepare for a formal press conference.

Two days before I was scheduled to talk with the press, I received what is known in Washington as a "briefing book." This briefing book, prepared by the public information staff at the Department, in consultation with the various divisions, U.S. Attorneys and bureaus, includes questions that might be asked with some proposed answers. In these days the briefing book is by no means brief. One peculiar thing is that the hardest questions often have no proposed answers. I suppose this is based on the theory that peril is a stimulant to wit.

In some ways the briefing book is a necessity, and it is a most valuable tool for the head of an agency. The Department of Justice is not a large department, as cabinet departments go, but it has about 52,000 employees. And while the Department has many aspects which go beyond those which might be expected in a large law office, the Department has enormous litigating, law advice giving and related duties, which would qualify a part of the Department as a rather large, although segmented, law firm. The Department has about 3600 lawyers, functioning as lawyers, handling a caseload of about 76,000 cases, of which more than one third are criminal. As I have indicated, a great deal of the work

of the Department goes beyond these matters. The law office aspect itself suggests the difficulty and importance of keeping informed so that one can achieve, when necessary, a unified approach. We use many methods to try to achieve this. In my own view, a too segmented Department of Justice is undesirable; one has to achieve a balance between centralization and delegation--a balance in which the exchange of information is pivotal. But all that is the subject of another talk. Suffice it to say that the briefing books, of which I have had many, are themselves valuable tools for keeping informed. As the Attorney General moves around the country, or even when he is in Washington, he is supposed to know or be able to say something--or look as though he could say something even if he says "no comment"--on every case, investigation or other matter in which the Department may be involved and as to which there is some curiosity. This convention of total knowledge is bothersome. But the briefing book is a legitimate help. The briefing book, however, goes beyond such questions.

Before an important press conference, the briefing book in the Department of Justice is supplemented with a session in which one goes over the questions and supposed answers with members of the Department's public information office. This session is, I suppose, a perquisite of office.

I must admit that it has rather astonished me, This is one aspect of Department of Justice life which, before returning to the Department a year and half ago, I would never have imagined would greet me.

So let me take you to this session which occurred last week. I apologize that this recounting inevitably involves an apparent preoccupation with myself. I like to think it would have happened to anyone. I just happened to be there. The book did not begin gently.

"Question: A recent article about you in one of your hometown newspapers suggested you regard the press as a rabble, unable to comprehend complex matters. Is this really your view?"

I remembered having been advised that the jocular style of the press has a glorious tradition, and that it has been best described in a Chicago setting by Ben Hecht and Charles MacArthur. I knew that it was not the better part of wisdom to make light of heritage. Of course when the revival of the play, The Front Page, opened in Washington this year, the Post piously observed that this play's bawdiness characterized a press era well past and an image of newsmen that had been eradicated by noble victories of reporting. Even so, I figured that as an outsider to the media I would only get into trouble commenting on style and tradition. Instead I mumbled weakly, as I was told this attack would be made upon me, that I might answer, "Some of my best friends are newsmen." "That answer won't do at all," I was told.

Then I moved on to the second question: "Columnists Evans and Novak recently described your performance with respect to the Boston Busing case as 'hopelessly amateurish.' Notwithstanding the fact," the question went on, "that those who are aware of the background of this matter know differently, do you believe that unnamed White House aides are deprecating you in talks with reporters?" I suggested I might say that the busing decision perhaps seemed bad because it was not politically shrewd--indeed was not political--and in that sense was hopelessly amateurish. I was inwardly a little relieved by the kind suggestion of the Department employee who wrote the question that "those who are aware of the background of this matter know differently," but then I looked at the third question, and realized that he might have a reason other than just kindness for saying so.

The third question: "One characterization of you that has appeared in the press with some frequency is that you are thin-skinned and take strong umbrage to criticism. Is this a fair assessment?"

Frankly, that irritated me.

All of my attempts to answer this question before my colleagues failed as being hopelessly defensive, offensive, or too light hearted.

At this point, I was presented with a fourth question, concocted too late for inclusion in the book, but presented on an emergency basis.

The fourth question: "Various commentators in the press have characterized you as indecisive, vacillating and ineffective. Do you feel such comments are justified?" The suggested answer which was given to me began with the statement "No, I don't", and then proceeded to wobble along with a series of equivocating, indecisive, vacillating, ineffective and unpersuasive defenses. Realizing I couldn't use these, and by now feeling totally taunted and done in, I suggested I might answer that various commentators at different times had characterized foreign tyrants as great liberals, knaves as heroes and scholars as fools, and that a little indecision among commentators might have a salutary effect.

My colleagues were divided between those who thought the answer was too flippant and those who considered it insulting.

Next I ventured I might reply that commentators have to say something in order to make a living and that is all right with me. One of my colleagues, playing the role of a newsman with a follow-up question, asked whether my answer didn't indicate the kind of grating arrogance that had been attributed to me. As to any answers to this, I was advised

that I should be apologetic, but not so apologetic that anyone might think I was being thin-skinned. When I ventured a serious response as to how I thought reasoned decisions should be arrived at, the unanimous view was that I should not try anything so complicated and therefore evasive.

Now through all of this I felt what a student of Zen must feel when, asked by his master an unanswerable question, he tries honestly to unriddle it and receives a blow on the head for his efforts. I suppose the genius in this Zen master approach is to thicken the skin by scarring it.

Anyway the press conference came. I was livid with preparation for it. None of the questions was asked. It was all quite amicable. In fact it restored my spirits which had been drenched by the hazing. But I was ready. I was ready.

I suppose that this experience of office holding is a part of the era in which we find ourselves. As a people we have been fortunate enough to have had government abuses of the past 30 years revealed in a short period of time. It is a serious moment in our history, and it is the part of statesmanship to handle these revelations, not with a cycle of reaction, but rather as an experience to be brought within our system of governance, which after all has shown itself to be as strong as we had hoped it was. I think, by the way, that civility and trust have been reestablished during the Ford Administration--an achievement, gained through openness and the willingness to accept the vulnerability that openness always entails.

At the Department of Justice we have tried to draw upon the experience of our recent past to determine where institutional changes are needed. We have also tried to look further back into our history to find the mechanisms that will most effectively accomplish the change. Guidelines now in effect controlling the Federal Bureau of Investigation's domestic security and civil disturbance investigations are a result of this effort. They provide a series of legal standards that must be met before various investigative techniques may be used. They tie domestic security investigations closely to the enforcement of federal criminal statutes. And they set up a detailed process of review of investigations by the Attorney General and other Department officials who are not a part of the FBI. We have undertaken the establishment of guidelines in a spirit of cooperation with Congress, which, I have often said, should undertake legislative efforts to clarify the jurisdiction of the Bureau. I believe it is important to the well-being of the public to be vigilant about the operations of the FBI and also to give it the support it deserves and needs in order to continue as an effective and highly professional investigative agency. This requires a consistency of concern that goes beyond the perceived issues of the moment.

The Department of Justice also drafted and President Ford proposed legislation providing for a special kind of judicial warrant procedure to be used for electronic surveillance to obtain foreign intelligence and foreign counter-intelligence information. Electronic surveillance in this special and extremely important area has never involved a judicial warrant procedure. Suggestions that it could and should have never before been accepted--not for 35 years. The unprecedented legislation proposed by the Administration in this area promises to provide an assurance to the American people that the federal government is not abusing its powers.

There have also been movements in Congress to undertake statutory reforms in reaction to the revelation of past abuses. One recent example is "The Watergate Reform Act," currently being considered by the Senate. It is doubtless a sincere effort to prevent the recurrence of abuses, but it raises serious questions.

The bill would require compendious public financial disclosures by all federal employees who earn more than about $37,000 a year. I do not know whether this broadside public disclosure requirement will make it difficult for the government to attract from the private sector the high quality people that it needs. You are perhaps the best judges of this. The bill would also create a Congressional Legal Counsel who could, when Congress chooses, intervene or appear as amicus curiae in any litigation in which the United States is a party and in which the constitutionality of a

federal statute is challenged. Among its provisions the bill, as I read it, would also prohibit the Department of Justice from intervening in cases to challenge the constitutionality of federal statutes. The possible effect this would have upon the protection of constitutional rights is, I think, a matter which should be carefully considered.

I must say I am disturbed by the current provision in the bill to create a procedure by which a special prosecutor could be appointed by federal courts when certain allegations are made about a federal official. Tempting as it may be for an Attorney General to rid himself of controversial cases involving officials, I must say that the procedure in the bill is seriously flawed. When an allegation is made concerning a federal official in certain categories, it would be required that a special prosecutor be named unless within 30 days of the receipt of the allegation, the Attorney General certified that the allegation was clearly frivolous and that no further investigation was required. The time limit of 30 days is impractical. A thorough criminal investigation requires much longer. But worse is the certification the Attorney General must make. An Attorney General would be very unlikely to certify that an allegation is clearly frivolous. The consequence of the bill would be the appointment of numerous special prosecutors. I take it that it would remove U.S. Attorneys from any part in these cases. I also take it that an ongoing criminal investigation in which an allegation against certain federal officials is made might be required to be turned over to a special prosecutor to the exclusion

of the U.S. Attorney. I do not know what would be done if the allegation later turned out to be unfounded, but the procedure could result in a clumsy passing of the case back and fourth between the Department of Justice and special prosecutors. Such intricate cases are a reminder of the point that it is difficult to say whether an allegation is "clearly frivolous." Indeed, often the more outrageous the allegation the more it requires a careful and thorough investigation and review to evaluate. In addition the requirement that these allegations be reported publicly in court would result in the wide dissemination of all manner of malicious gossip and unfounded allegations. The provision of the Watergate Reform Act, designed as a reassurance, would have the effect of undermining the confidence of the people in the integrity of their government. Though I know it was not intended to do so, I fear that the bill would politicize justice.

Legal reforms based on our recent experience are certainly required. The Department of Justice has undertaken this effort. But the reforms must be carefully designed lest they create more problems than they solve. It is the duty of the legal profession to seize upon what is good and wise and abiding in the values we hold and the traditions we share as a people and to fashion from them the standards and procedures that will protect and nurture them. This duty is always with us. Organizations such as the Chicago Bar

Association and its new President, Kenneth Prince, play a significant part in meeting it. And the duty is most heavy upon us, I believe, at times such as this when legal reform is both a requirement and a danger, for it is an essential function of the bar to moderate the cycle of reaction and to remind us of the strength of our values.

6/29/76

S. 495: COMMENT

Q. What is the President's position on S. 495, as recently amended by the Senate Government Operations Committee, the so-called "Watergate Reorganization and Reform Act of 1976"?

A. The matter is being followed by the office of the Counsel to the President which has several concerns regarding the measure:

First, several features of the bill, i.e., Title I's authority for the creation of an independent Special Prosecutor and Title II's provision for enforcement of Congressional process and intervention or appearance by a congressional Legal Counsel in other litigation, are believed to be constitutionally inappropriate by the Department of Justice. In these instances, S. 495 could represent an unlawful encroachment upon the exclusive province of the Executive Branch.

Second, the provision of the bill calling for the creation of a Division of Government Crimes within the Department of Justice, is thought by the Attorney General to be administratively unworkable and unnecessary.

Third, although President Ford supports the concept of full public disclosure of personal finances by elected officials and senior personnel of the Federal government, a program carrying forward this concept would have to be mindful of relevant privacy concerns and provide a rational approach to public needs.

In closing, let me only note that the President strongly supports the Attorney General in the conduct of his office. In accordance with our usual policy, I am not prepared to comment at this time on the possibility of a veto of S. 495.

[July 1976?]

CHRONOLOGY

93rd Congress

1. October 29, 1973. S. 2612, a bill to establish an office of "independent" special prosecutor to be appointed by a panel of U. S. District Court judges, was introduced by Senator Bayh and others in the wake of the "Saturday Night Massacre".

2. November 5, 1973. Companion measure to S. 2612, opposed by then Acting Attorney General Robert Bork, before House Judiciary Committee.

3. July 13, 1974. Final Report of Senate Select Committee on Presidential Campaign Activities (see Draft, Part I, p. 212) recommended the creation of a permanent office of independent public attorney.

94th Congress

1. January 30, 1975. S. 495, introduced by Senators Ribicoff, Percy, Metcalf, Inouye, Montoya, Weicker and Mondale.

2. December 2, 1975. The Civil Service Commission filed a report with the Senate Government Operations Committee, opposing Title I (Special Prosecutor) of S. 495.

3. December 3, 1975. Assistant Attorney General Michael Uhlmann testified before the Senate Government Operations Committee in general opposition to S. 495 (copy attached).

4. May 12, 1976. S. 495 reported favorably by the Senate Government Operations Committee and referred to the Senate Judiciary Committee.

5. May 26, 1976. Deputy Attorney General Harold Tyler testified before the Senate Judiciary Committee in general opposition to S. 495 (copy attached).

6. June 10, 1976. CIA filed a report with the Senate Judiciary Committee in opposition to Title III (Financial Reports) of S. 495.

7. June 15, 1976. S. 495 referred to the Senate floor by the Senate Judiciary Committee.

Recent News Reports

1. June 28, 1976. News article by Martha Angle, p. 1, Washington Star.

2. June 29, 1976. Two Q & A's forwarded to Press Office by Counsel's Office (copies attached).

3. June 30, 1976. Nessen indicates President has not yet taken a position.

4. July 1, 1976. Third Q & A forwarded to Press Office by Counsel's Office (copy attached).

6/29/76 file

S. 495: CONTENT

Q. What would be provided by S. 495 as recently amended by the Senate Government Operations Committee, the so-called "Watergate Reorganization and Reform Act of 1976"?

A. The bill contains three titles:

Title I would create a Division of Government Crimes within the Department of Justice and also a statutory mechanism for the creation of an independent special prosecutor in certain defined instances.

Title II would establish as an arm of Congress the Office of Congressional Legal Counsel. The duties of this office would be threefold:

First, the Counsel would defend Congress in any civil action questioning the validity of official Congressional action.

Second, the Counsel could bring a civil action to enforce a Congressional subpoena or order.

Third, the Counsel could intervene or appear as amicus curiae in a pending action in which the constitutionality of a law of the U. S. is challenged, the U. S. is a party, and the constitutionality of the statute is not adequately defended by counsel for the U. S.

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[July 1976?] Mr. Buchen

[cover sheet only of Uhlmann and Tyler testimony — Ken has complete cy. — if needed

CHRONOLOGY

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Department of Justice

TESTIMONY

OF

MICHAEL M. UHLMANN
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGISLATIVE AFFAIRS

ON

S. 495

THE WATERGATE REORGANIZATION AND REFORM ACT OF 1975

BEFORE THE

SENATE GOVERNMENT OPERATIONS COMMITTEE

DECEMBER 3, 1975

Department of Justice

STATEMENT

OF

HAROLD R. TYLER, JR.
DEPUTY ATTORNEY GENERAL

BEFORE

THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

concerning

S. 495 - THE WATERGATE REFORM ACT

ON

MAY 26, 1976

S. 495: CONTENT

Q. What would be provided by S. 495 as recently amended by the Senate Government Operations Committee in the so-called "Watergate Reorganization and Reform Act of 1976"?

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Second, the Counsel could bring a civil action to enforce a Congressional subpoena or order.

Third, the Counsel could intervene or appear as amicus curiae in a pending action in which the constitutionality of a law of the U. S. is challenged, the U. S. is a party, and the constitutionality of the statute is not adequately defended by counsel for the U. S.

Title III would require, under pain of a criminal penalty which could result in one year's imprisonment and a $10,000 fine, the annual filing of detailed financial reports by: (1) the President, Vice President, Members of Congress, justices or judges of the United States; (2) those not in office seeking election to Federal office; and (3) officers or employees of the United States who are paid at a rate equal to or in excess of the minimum rate prescribed for grades GS-16. The reports would include such items as: (1) the amount & source of each item of income in excess of $100; (2) the fair market value and source of any item received with a fair market value in excess of $500; (3) the identity and value of each asset held during the year which has a value in excess of $1,000; and (4) the identity and amount of each liability owed which is in excess of $1,000.

S. 495 - COMMENT

Q. What is the President's position on S. 495, as amended by the Senate Committee on Government Operations, the so-called "Watergate Reorganization and Reform Act of 1975"?

A. The matter is being followed by the office of the Counsel to the President which has several concerns regarding the measure:

First, several features of the bill, i.e., Title I's authority for the creation of an independent Special Prosecutor and Title II's provision for enforcement of Congressional process and intervention or appearance by a congressional Legal Counsel in other litigation, are believed to be constitutionally inappropriate by the Department of Justice. In these instances, S. 495 could represent an unlawful encroachment upon the exclusive province of the Executive Branch.

Second, the provision of the bill calling for the creation of a Division of Government Crimes within the Department of Justice, is thought by the Attorney General to be administratively unworkable and unnecessary.

Third, although President Ford supports the concept of full public disclosure of personal finances by elected officials and senior personnel of the Federal government, a program carrying forward this concept would have to be mindful of relevant privacy concerns and provide a rational approach to public needs.

In closing, let me only note that the President strongly supports the Attorney General in the conduct of his office. In accordance with our usual policy, I am not prepared to comment at this time on the possibility of a veto of S. 495.

July 1, 1976

S. 495, THE "WATERGATE REORGANIZATION AND REFORM ACT OF 1976"

Q. Does the President have a firm position on S. 495, the so-called "Watergate Reorganization and Reform Act of 1976"?

A. As I indicated yesterday, the White House Counsel's Office will soon be presenting a briefing for the President on the background and current status and available options regarding this measure. This briefing will review the development of S. 495 over the course of the last year and the serious concerns which have been rather consistently expressed by various Departments, particularly the Department of Justice.

I would at this time, however, like to make three observations regarding the current controversy over S. 495. First, this is not a new proposal -- they key features of the bill have been kicking around the Hill in various forms for several years. Second, despite its rather fetching caption, most of the bill is really inapposite of the amalgam of abuses which have been termed "Watergate". Third, the concerns which have been consistently expressed by the Department of Justice are based in large measure upon fundamental Constitutional doctrine and not out of any lack of sensitivity over the need for public confidence in the institutions of government or the personal pique of the Attorney General.

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[July 1976?]

THE WHITE HOUSE

WASHINGTON

Dear Mr. President:

Dear Mr. Speaker:

From the beginning of my administration, I have acted to assure effective enforcement by the Justice Department of the laws affecting officers and employees in the Federal government and effective administration of requirements for high standards of conduct by officers and employees of the executive branch.

I am determined, as I believe the Congress is, to see to it that the public's confidence in the integrity of our government is not abused in any way.

The Senate is about to act on legislation to bring about needed improvements in the way in which allegations concerning key members of the government are received. The legislation also would establish, as an arm of the Congress, The Office of Congressional Legal Counsel, and provides for public financial disclosure of Senior members of the government.

While I strongly support the need to enact legislation to achieve these ends, I am concerned about three aspects of the legislation (S. 495) currently before the Senate:

The course of our history has shown that

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I am determined, as I believe the Congress is, to see to it that the public's confidence in the integrity of our government is not abused in any way.

The Senate is about to act on proposed legislation to ~~bring about needed improvements in the way in which~~ provide additional mechanisms for dealing with allegations ~~concerning~~ of wrongdoing by key members of the government. ~~are reviewed.~~ The proposed legislation also would establish, as an arm of the Congress, The Office of Congressional Legal Counsel, and provide for public financial disclosure ~~of senior members~~ by personnel of the government.

While I strongly support the ~~need to enact~~ enactment of legislation to achieve these ends, I am concerned about three aspects of the ~~legislation~~ bill (S. 495) currently before the Senate:

Title I in affect creates a permanent office of Special Prosecutor but provides for a series of different and multiple independent prosecutors in such a way as to raise serious Constitutional questions and to have unfortunate policy results.

Title II attempts to lodge in Congress law enforcement powers reserved to the President ~~in~~ by the Constitution.

Title III in requiring financial disclosure by numerous government officers and employees pays no heed to privacy rights and allows for certain undesirable loopholes.

To remedy these defects, while advancing the principles of accountability by officers and employees in all these branches of the Federal Government, I am submitting for the consideration of the Congress ~~the attached legis~~ proposed lation as a substitute for S. 495. I urge the Senate to consider my proposal at the same time it considers S. 495. I also urge the House Judiciary Committee to consider my proposal at the time of ~~their~~ its initial hearings on this matter later ~~in~~ this week.

The summary which follows contains the key highlights of my proposal.

[July 1976?]

THE WHITE HOUSE

WASHINGTON

Dear Mr. President:

From the beginning of my administration, I have acted to assure effective enforcement by the Justice Department of the laws affecting officers and employees in the Federal government and effective administration of requirements for high standards of conduct by officers and employees of the executive branch.

I am determined, as I believe the Congress is, to see to it that the public's confidence in the integrity of our government is not abused in any way.

The Senate is about to act on a bill to provide additional mechanisms for dealing with allegations of wrongdoing by key members of the government. The proposed legislation also would establish, as an arm of the Congress, The Office of Congressional Legal Counsel, and provide for public financial disclosure of personnel of the government.

While I strongly support the enactment of legislation to achieve these ends, I am concerned about three aspects of the bill (S. 495) currently before the Senate:

Title I in effect ~~creates a permanent office of Special Prosecutor but~~ provides for a series of different and multiple independent prosecutors Special in such a way as to raise serious Constitutional questions and to have unfortunate policy results. Also, this title in the Senate bill would not require direct referral to the Special Prosecutor of allegations of wrongdoing by most members of Congress, while requiring such referral for high level executive branch officials.

Title II attempts to lodge in Congress law enforcement powers reserved to the President by the Constitution.

Title III although requiring financial disclosure by numerous government officers and employees allows for certain ~~undesirable~~ loopholes.

To remedy these defects, while advancing the principles of accountability by officers and employees in all three branches of the Federal Government, I am transmitting today proposed legislation as a substitute for S. 495. I urge the Senate to consider my proposal at the same time it considers S. 495. I also urge the House Judiciary Committee to consider my proposal at the time of its initial hearings on this matter later this week.

The key highlights of my proposed legislation to maintain the public's confidence in the integrity of our government are as follows:

Title I -- Reorganization of the Department of Justice

During the course of our history when appointments of a Special Prosecutor to investigate allegations of criminal wrongdoing have become necessary, they have been made. The effort to institutionalize this practice can raise very serious problems and great care must be taken to comply with constitutional requirements and standards for the proper administration of justice. The proposal now being considered by the Senate is seriously deficient in this respect. To avoid these problems, my legislative 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. Individuals who hold a high level position of trust and responsibility on the personal campaign staff of, or in an organization or political party working on behalf of a candidate for any elective Federal office would be ineligible for appointment. The bill would sanction removal of the Special Prosecutor only for extraordinary improprieties and in the event of removal, the President would be required to submit to the Committees on the Judiciary a report describing with particularity the grounds for such action.

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. The Attorney General could 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 any allegation. In that event, the allegation would be investigated by the Department of Justice.

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's only recourse would be to present his differing position to the court before which the prosecution or appeal is lodged.

My proposal would also institutionalize, by statute, the investigation and prosecution of violations of law by government officials and employees which do not fall within the jurisdiction of the Special Prosecutor. Title I would establish a Government Crimes Unit and an Office of Professional Responsibility within the Department of Justice.

Title II -- Congressional Legal Counsel

I have also proposed a revised Title II that creates an Office of Congressional Legal Counsel and assigns the powers and duties of that Office. This proposal gives Congress all the legal assistance that it needs and provides as great a litigating role for the Congressional Legal Counsel as is consistent with the Constitution of the United States. Under my proposal, when the Attorney General certifies that he cannot represent Congress or a congressional entity, Congress or the appropriate House of Congress may direct the Congressional Legal Counsel to defend any legal action, enforce subpoenas, bring described civil actions, intervene in cases or appear as amicus curiae to defend the constitutionality of any law of the United States or the powers and responsibilities of Congress. Congressional Legal Counsel may request grants of immunity under the Organized Crime Control Act of 1970.

In addition, the Congressional Legal Counsel is given broad responsibilities for advising, consulting, and cooperating with a number of other persons, including Congress and congressional entities and the United States Attorney for the District of Columbia.

In all of these matters, my proposal provides for exclusive congressional control and direction of the activities of the Congressional Legal Counsel.

Title III -- Government Personnel; Financial Disclosure Requirements

My proposed bill recognizes and protects the public's right to be assured that public officials, regardless of which branch of government they serve in, disclose personal financial matters which could give rise to a conflict of interest in the performance of their official duties.

My proposal would require ~~all~~ Federal public officers and employees to file financial reports with a designated office in their branch of government. In addition, public disclosure would be made of the financial statements of (i) all elected officials, (ii) high ranking officers or employees appointed by such officials, (iii) significant policy making and confidential employees, and (iv) other employees compensated at the rate of GS 16 or above (but not those in competitive civil service or who, save for certain legal exemptions, would be in the competitive civil service). My proposed legislation would also give the Comptroller General oversight authority to audit such statements as well as the authority to make findings of a conflict of interest and if they are not resolved, to make public his findings. Thus, the public's right to have accountability from public officers and employees is doubly protected. First, by the Executive, Legislative or Judicial Branch office with which reports are filed and secondly by the Comptroller General.

In addition, my proposal would close certain loopholes contained in the current Senate bill. For example, the present proposal requires the reporting of any item received in kind whose fair market value "for such item" exceeds $500. Such provision would allow a series of gifts from the same ~~party~~ source, each valued at less than $500 per item, to go unreported. Under my proposed legislation such gifts would be aggregated and hence require reporting. Moreover, my proposal would make clear that while property owned for personal use, such as the family home, furniture, jewelry, the family car, etc., need not be inventoried in disclosure forms, property of a business or investment nature must be reported. Assets unknown to the individual because they are held in a bona fide "blind trust" need not be identified, but the trust interest must be disclosed.