The original documents are located in Box 31, folder "Watergate Reorganization and Reform Act of 1975" of the Ron Nessen Papers at the Gerald R. Ford Presidential Library.

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).

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

Mr. Chairman and Members of the Committee:

I am pleased to have the opportunity to present the views of the Department of Justice on S. 495, the "Watergate Reorganization and Reform Act of 1975", and certain related amendments and bills. Because of time limitations, the Department has not been able to analyze in detail the several bills (S. 181, S. 192, S. 2092, and S. 2295) relating to financial disclosure. Pursuant to discussions with Committee staff, Mr. Chairman, the Department would be happy to submit its written views on any matters not covered today, or, if the Committee prefers, return to testify at a later time.

Similarly, Mr. Chairman, with respect to the Percy-Baker Amendment No. 495 dealing with wiretaps and electronic surveillance, the Attorney General respectfully requests that the Department be permitted to defer commenting until a later time. As the Committee is aware, there are a number of bills now pending before various committees in both Houses on this extremely complex subject and the Department is still in the process of formulating its views. Some idea of the scope of the problem may be had by an examination of the testimony recently presented by the Attorney General before the Senate Select Committee on Intelligence (November 6, 1975), a copy of which I would request be included in the record at the conclusion of my remarks.

TITLE I. ESTABLISHMENT OF GOVERNMENT OFFICES

1. Office of Public Attorney (Sec. 101; pp. 1-12 of the bill).

The Proposal. Under Section 101 of S. 495, title 28 of the United States Code would be amended by adding a new chapter creating a permanent Office of Public Attorney, independent of the Department of Justice and entire executive branch, which would have the exclusive responsibility for investigating and prosecuting allegations of corruption in the administration of laws by the executive branch, conflict of interest cases referred by the Attorney General, criminal cases referred by the Federal Election Commission, and allegations of violations of Federal campaign and election laws.

Three retired courts of appeals judges, selected for the purpose by the Chief Justice of the United States, would appoint the Public Attorney, by and with the advice and consent of the Senate. He would serve five years and could be appointed for one additional term of five years. A vacancy in the Office would be filled in the manner of an original appointment. In order to qualify, an appointee would have to agree not to occupy or discharge the duties of any Federal elective office, or to accept any other Federal employment, for a period of five years after the conclusion of his tenure as Public Attorney.

The Public Attorney would be required to notify the Attorney General of the initiation and termination of

investigations or proceedings within his jurisdiction. During the pendency of any such investigation or proceeding the Attorney General would be obliged to direct the Department of Justice not to conduct any investigation or prosecution, or to take any related action, with respect to the same subject matter, or any related or overlapping matter, except with prior written approval of the Public Attorney. In addition, at any time the Attorney General believed or had reason to believe that an investigation conducted under his supervision involved or might likely involve a conflict of interest or matter otherwise within the jurisdiction of the Public Attorney, the Attorney General would be obliged promptly to notify the Public Attorney thereof. In any such event the Public Attorney would, at his discretion, either defer to the Attorney General's investigation, take over the investigation solely on his own responsibility, or participate with the Attorney General in the further conduct of the investigation.

If the Attorney General disapproved of the filing of any indictment or information, or of any subsequent action or position taken by the Public Attorney in the resulting judicial proceeding, the Attorney General would be entitled to appear and present his views amicus curiae to the court before which the proceeding was pending.

With regard to matters within his jurisdiction, the Public Attorney would be vested essentially with all the same powers the Attorney General (and United States Attorneys) now enjoy over such matters. Included would be the authority to direct Federal investigative agencies to collect evidence, to prosecute criminal cases from inception through the appellate processes, and to conduct civil proceedings to enforce, or to obtain remedies for violations of, the laws he is charged with enforcing.

The Public Attorney would also be authorized to establish a staff and exercise appropriate administrative controls, including the making of rules and regulations to carry out his duties and functions. His offices would be maintained physically apart from offices of the Department of Justice. All Federal departments and agencies would be obliged to make available to the Public Attorney, at his request, its services, equipment, personnel, facilities, and information, to the greatest extent practicable, consistent with law.

Discussion. In analyzing the Office of Public Attorney intended to be created by S. 495, we think three key questions should be answered: (1) Would the Public Attorney be performing executive functions? (2) Can executive functions be assigned to a non-executive agency? (3) Can an executive agency have a head appointed by someone other than the President?

(1) At the very core of "executive functions" is litigation to enforce a criminal law. In distributing the powers of the three branches of government, the Constitution's only reference to prosecutorial powers is in Article II, Section 3, which states that the President "shall take care that the laws be faithfully executed". Section 101 of S. 495 expressly provides that the Public Attorney shall "investigate and prosecute" -- that is, he shall perform executive functions. See Ponzi v. Fessenden, 258 U.S. 254 (1922); United States v. Cox, 342 F. 2d 167 (5th Cir. 1956), cert. denied, 381 U.S. 935. In the latter case, decided en banc, Judge Wisdom, who concurred specially, noted:

> The prosecution of offenses against the United States is an executive function within the exclusive prerogative of the Attorney General. 342 F. 2d at 190.

Judge Wisdom's understanding is fully in accord with the understanding of the Framers as articulated by James Madison during the Removal Debate in the First Congress:

> I conceive that if any power whatsoever is in the nature of the executive it is the power of appointing, overseeing, and controlling those who execute the laws. (Annals of Congress, pp. 481-82, 1789)

(2) The law is clear that exclusively executive functions cannot be validly assigned to an exclusively non-executive agency. In Springer v. Phillipine Islands, 277 U.S. 189 (1927),

the Court held that the legislative branch could have no hand in the appointment of the board of directors of a public corporation. The activities of public corporations are surely more remote from the heart of executive power than the power to enforce the law, yet the Supreme Court would not permit even so limited a divestiture of executive power by the legislative branch. It seems clear on the basis of Springer that the Court would not permit divestiture of control over criminal law enforcement power.

The case of Humphrey's Executor v. U.S., 295 U.S. 602 (1935), is readily distinguishable. The Court there upheld the power of Congress to qualify the President's power of removal as to officers of certain administrative bodies created by Congress to carry out delegated legislative policies. But the holding of Humphrey's Executor is distinguished precisely by the "quasi-legislative" and "quasi-judicial" character of the agencies in question. The Public Attorney envisioned by S. 495 would not perform legislative or judicial functions; his sole function would be to enforce the law. As such, we do not believe that the argument of Humphrey's Executor lends any support to the constitutionality of §101 of the bill. Indeed, Mr. Justice Sutherland, who wrote the Court's opinion in Humphrey's, also authored the decision in Springer, where he stated that:

> legislative power, as distinguished from executive power, is the authority to make

> laws but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions.

(3) If the Public Attorney would and must be a part of the executive branch, then he is an officer of the United States who must be appointed by either the President, the heads of departments, or the courts of law as provided in Article II, Section 2, Clause 2 of the Constitution. This provision is explained in United States v. Germaine, 99 U.S. 508, 509-510 (1878), as follows:

> The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when offices become numerous, and sudden removals necessary, this mode may be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments. That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt.

The proposed legislation does not employ either of the prescribed methods for the appointment of executive officers, purporting instead to vest appointment of the Public Attorney in three judges, who are not a "court of law" in any event. Assuming for the sake of argument that the Public Attorney could be considered an "inferior officer" in the Constitutional

sense, and even assuming that three judges are a "court", a serious question still arises whether the task of making permanent appointments could properly be given to a court. A portion of the executive branch would thereby be placed under the control of the judiciary, which is no more acceptable than having it placed under the control of Congress. Springer unequivocally states the Court's refusal to allow the legislature to exercise either executive or judicial power or the judiciary to exercise executive or legislative power. Likewise, the Court in Humphrey's Executor repeatedly emphasized that the FTC members are appointed by the President, and also stated that it would be absolutely intolerable to have the functions of one branch under the control of either of the other two branches.

The "inferior officer" clause (Art. II, §2, cl. 2), in short, must be read within the broader context of the separation of powers doctrine. It is that understanding which has informed Court rulings on the subject, as for example, In the Matter of Hennen (38 U.S. 230), where the Court stated that the appointment power under Art. II, §2, cl. 2 "was, no doubt, intended to be exercised by the department of the Government to which the officer appointed most appropriately belonged". Ex parte Siebold, relied on by the proponents of §101 as sufficient authority to sustain the manner of the public attorney's appointment, sustains rather than qualifies the

principle laid down in Hennen. What makes Siebold attractive to the proponents is less the legal argument of the case than a factual assumption, namely, that the appointees in question (election supervisors) were unqualifiedly "executive" in character. We believe that that assumption is, given the special facts underlying Siebold, open to serious doubt, and therefore, do not believe that the case controls the radical departure proposed in §101 of S. 495.

It is true that Rule 42 of the Federal Rules of Criminal Procedure allows a court to appoint an attorney to prosecute a criminal contempt. Such an appointment is temporary, and serves the limited purpose of enabling a court to ensure propriety of behavior in proceedings before it. This is in contrast to S. 495 where the appointment is permanent (that is, for a term of years), and where the Public Attorney's function is unrelated to an inherently judicial interest. The Constitution is clear that permanent appointment to carry out exclusively executive functions is to be made by the Executive with the advice and consent of the Senate (unless it is an "inferior" officer). Similarly, Title 28, U.S.C. §346 provides that a district court may appoint a United States Attorney to fill a vacancy "until the vacancy is filled" -- again, a temporary appointment over which the President retains the authority of removal by virtue of 28 U.S.C. 541(c).

Congress by legislation may define criminal offenses and legislate in many other areas of concern to the Department

or Justice. But once Congress has acted in these respects, it is difficult to imagine a function more clearly executive than the enforcement of the Federal criminal laws. To suppose that Congress can take that function or a large part of it and lodge it in an officer who is not subject to appointment or removal by the President when such action is required in furtherance of his constitutional duty to execute the law, would alter the fundamental distribution of powers laid down by the Constitution.

If there is a valid constitutional basis under S. 495 for withdrawing from the Attorney General substantial areas of his authority and placing them in the hands of the Public Attorney (who will not be appointed or removable at the pleasure of the President), then the door is open to turn the entire enforcement of Federal criminal laws over to the same Public Attorney on the same basis.

This has never been, and simply is not, our form of Government. It would prevent the President from carrying out the duty expressed in the Constitution of taking care that the laws be faithfully executed; it would be at odds with the doctrine of separation of powers inherent in the Constitution.

Even if the constitutional defects we perceive were in some way to be remedied, the Department would still question the wisdom of establishing a permanent special prosecutor. The unity of administration and decision-making, which was of course one of the distinctive virtues of the Executive branch in the eyes of the Framers, would be severely undermined. The

unique powers and jurisdiction proposed to be conferred by S. 495 upon the Public Attorney would make him in many respects a second Attorney General. Indeed, in some respects, the Attorney General's role is expressly subordinated to that of the Public Attorney. S. 495 seems to assume that jurisdictional authority granted to the Public Attorney will be self-defining, but experience suggests that on a permanent basis such jurisdictional lines will inevitably cross, thereby inviting unseemly disputes the occurrence of which could undermine the confidence of the public, not to mention the morale and efficiency of attorneys in both the Department and the Office of Public Attorney. Uniformity of policy in the enforcement of Federal law, the achievement of which is difficult enough even under ideal circumstances, requires a single authority capable of exercising a final decision.

Secondly, we would underscore questions raised by by former Special Prosecutor Henry Ruth concerning the possible dangers attendant upon the creation of a wholly independent and permanent Office of Public Attorney. It is not at all clear under S. 495 whether the Public Attorney would be answerable to anyone but himself. Neither Congress, the President, nor, we believe, the Courts would be able to call him to account. In this regard, we think it notable that S. 495 makes no provision for his removal. Nor does the bill provide us with any indication as to what sort of checks would be imposed upon him short of removal.

Finally, we would respectfully urge the Committee to consider whether §101 is not in fact an overreaction to the events of the recent past. Experience suggests, we believe, that where the need is evident, special means, fully compatible with the Constitution and the orderly administration of justice, can be accommodated to the task.

2. Congressional Legal Counsel (Sec. 102)

The Proposal. Under Section 102 of S. 495, a Congressional Legal Service would be established under the direction and control of a Congressional Legal Counsel. The Counsel would be appointed by the Speaker of the House of Representatives and the President pro tempore of the Senate from among recommendations submitted by the majority and minority leaders of both Houses.

Upon the request of either House of Congress, a joint committee of Congress, any committee of either House, at least three Senators, or twelve members of the House of Representatives, the Counsel would be required: (1) to render legal advise about questions arising under the Constitution or Federal laws (such as whether denial of a request under the Freedom of Information Act was proper, whether nominations or international agreements should have been submitted to the Senate for its advise and consent, whether executive privilege is properly asserted, whether acts or omissions by executive branch officials were lawful, and whether deferrals of budget authority were proper) and to institute civil actions to require executive officials to act in accordance with law as interpreted by the Counsel; (2) to advise, consult, and cooperate with private litigants in suits against executive branch officers or employees respecting their execution of the laws; and (3) to intervene or appear as amicus curiae, as a matter of right, on behalf of those making an

appropriate request in any Federal, State or local proceeding involving an issue as to the constitutionality, interpretation or validity of any Federal law, proceeding, or official action, including actions taken by the House or committees of Congress.

Furthermore, the Congressional Legal Counsel would be required, upon request, to represent either House of Congress, a joint or other committee of Congress, a Member, or any officer, employee, or agency of the Congress in any legal action to which it is a party and the validity of its action is placed in issue. Upon written notice by the Congressional Legal Counsel, the Attorney General would be relieved of responsibility and would have "no authority to perform such service in such action or proceeding except at the request or with the approval of the. . . Counsel".

Discussion. Taking into account both the letter and spirit of the Constitution, the Department believes that §102 suffers from a number of fatal defects. These constitutional concerns touch everything from the mode of the Counsel's appointment to the nature of his powers of intervention in the courts. The criticisms which are outlined below may be viewed by some as merely the self-regarding concerns of the Department in its role as an advocate for the Executive branch. As we hope will be apparent, however, the Department's concern extends as well to the adverse impact §102 will have on the principles underlying

the separation of powers in general, and on the Judicial branch in particular, and perhaps even on Congress itself.

We would submit, Mr. Chairman, that to the extent the Congressional Counsel can participate as a party in judicial proceedings, it would be attempting to enforce the law. Enforcement of the law, as we have discussed with regard to the Public Attorney, is an Executive function forbidden by the Constitution to a Congressional agency.

We would suggest that section 102 would also impair the doctrine of separation of powers by attempting to confer jurisdiction on the Federal Courts to decide matters which do not involve "cases or controversies" as required by Article III of the Constitution.

Section 102(c)(1)(B) authorizes the Counsel to advise private parties bringing suit against the executive branch; to intervene or appear as amicus curiae on behalf of private parties in any action pending in a federal or state court in which there is placed in issue the constitutionality or interpretation of any federal law, or the validity of any official action taken by either House of Congress, its committees, or officers and employees.

A. Encroachment on the Executive.

The notion that Congress should be represented in these legal activities is probably based on the theory that since Congress makes the laws it may also supervise the manner in which they are enforced and interpreted. This line of reasoning is faulty. The principle of the separation of powers deliberately

restricts Congress to the enactment of legislation and vests the functions of executing and interpreting the laws in the other two branches of the Government which are coequal to and independent of Congress. The interpretation of the laws is basically entrusted to the judicial branch. An invasion by Congress of the area of interpreting and enforcing the Constitution and statutes would therefore constitute a serious encroachment upon both the executive and judicial branches. While there is, of course, no direct judicial precedent, we are satisfied that the provisions in S. 495 authorizing the Congressional Legal Counsel to participate in judicial proceedings violate the separation of powers doctrine. In Springer v. Phillipine Islands, supra, the Supreme Court notes:

> Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions.***
>
> Not having the power of appointment unless expressly granted or incidental to its powers, the legislature cannot engraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection; ***

In 1967, hearings were held on S. 1384, a bill with similar provisions and objectives. In his testimony on that bill, the late Professor Alexander M. Bickel of the Yale University Law School, said:

To be sure, appearances as amicus in behalf of Congress, such as are provided for by section 2(a) (4) in the version of the bill that I have seen, 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, as provided also by section 3(a).

Enforcement of the law is part of its execution, and litigating its constitutionality or interpretation is part of its enforcement. I do not think Congress can take over or, as of right, share these functions. Section 2(a)(5) and 3(b) in the version that I have seen, providing that the Legislative Attorney General 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. 1/

What Congress does sorely need, it seems to me, by the name of Legislative Attorney General or any other name, 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

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

> 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-making authority of Congress.

The Department of Justice concurs with Professor Bickel that a Congressional Legal Counsel could be of great use to Congress by providing a central clearing house of analysis and for recommending legislative responses to rulings of the courts and administrative bodies. We would defer to Congress, of course, on how the functions of such an office would square with the functions now performed by counsel for the various committees of both Houses.

B. Encroachment on the Judiciary.

We also have serious problems with Section 102(d)(1), (2) of S. 495 which does away with the requirement of "standing" where the Congressional Legal Counsel intervenes or appears as amicus curiae, or when he institutes a civil action on behalf of Congress to compel executive action (in which event "standing" is not required by the bill "where an actual case or controversy exists"). The problem is that the question of "standing" and the question of whether a "case or controversy" exists are fused questions. "Standing" is more than a judicially imposed rule; it is an element in determining whether judicial power may be properly involved. Association of Data Processing Service Organization, Inc. v. Camp, 397 U.S. 150 (1970); Sierra Club v.

Morton, 405 U.S. 727 (1972); Flast v. Cohen, 392 U.S. 83 (1968). Congress may have "standing" to the extent the executive tried to deny Congress its constitutional power to make laws. (See Kennedy v. Sampson). We do not think that one or more Congressmen (and, by implication, Congress itself or a surrogate) would have standing to challenge the execution of the laws, because they do not have a personal stake in the outcome of the controversy. The duties of Congress do not include the execution of the laws and allegedly defective execution by executive agencies therefore does not impinge upon the reserved powers of Congress as such.

C. Impact on Congress.

We wonder whether the position of the Congress as a deliberative body might not be jeopardized under this Congressional Legal Counsel proposal. Historically the Congressional contribution to the body fixed the content of federal law has been the enactment, amendment, or repeal of legislation. Members or committees of Congress triggering action by the Congressional Legal Counsel will be in some degree identified with that particular litigation; and, if the Legal Counsel loses the argument and remedial legislation is proposed, will those opposing the legislation in Congress receive the same kind of hearing as when members of committees have not become so directly involved?

Problems in the nature of conflict of interest would abound under this proposal. For example, after an appropriate Congressional request, the Congressional Legal Counsel would be obliged to advise, consult, and cooperate with private litigants in suits against executive agencies or officials regarding the execution of Federal laws; but such litigation can be multi-party or involve a series or number of suits. If, for example, the issue was whether an executive officer's action was ultra vires, one private suitor could be interested in the affirmative and another in the negative, and the United States could be a litigant denying the authority of its own officer. The legislation does not show clearly whether the Counsel must always advocate against the executive, or in support of Congress as the issues may require, or as his best judgment dictates; but in litigation, the Congressional Legal Counsel could serve only one side in any case or series or groupings of cases. Embroiled in litigation involving an apparent conflict in the provisions of two or more Federal statutes, the question might arise whether the Counsel was more devoted to the private litigant or to an element of the Congress.

We would also note that section 102(c)(1)(B)(ii) would permit the Counsel to intervene or appear as amicus curiae in any action in which there is placed in issue the validity "of any law of the United States". It is unclear from this language whether it authorizes representation by the Counsel

of members and officers of the Congress in criminal proceedings arising out of their official duties. We would question the propriety of spending public funds in defense, for example, of a member or official of the Congress, who is the subject of a prosecution for bribery, election, fraud or filing false information. See e.g., Burton v. United States, 202 U.S. 344 (1906); United States v. Brewster, 408 U.S. 501 (1972); United States v. Johnson, 383 U.S. 169 (1966).

TITLE II - GOVERNMENT PERSONNEL

1. Financial Disclosure Requirements for President and Vice President (Sec. 201).

The Proposal. Under Section 201 of S. 495, summarized briefly, the President and Vice President of the United States would be required to file annual reports with the Comptroller General, containing a full and complete statement concerning such financial matters (including those in which a spouse is joined) as the amount of any Federal, state or local income or property taxes paid, the amount and source of all items of income and reimbursements for expenditures, the amount of gifts received other than from the immediate family, the identity of all assets held, all transactions in securities and commodities (including those made by any person acting on his behalf or pursuant to his direction), and purchases and sales of real estate other than personal residences. It is provided, for the most part, that matters involving less than a certain

amount of money need not be reported; but the President and Vice President would be required to report, without any limitation at all, "any expenditure made by another individual for the personal benefit of him or his spouse." The reports filed with the Comptroller General would be made public records.

Discussion. No President or Vice President could properly be expected to account for every hospitality shown him. Also, the provision for reporting securities transactions made on the official's behalf could prevent any future use of a "blind trust" arrangement by a President or Vice President. The provision for making the reports public may be contrasted with the provision of the Senate Rules that the financial statements be submitted to the Comptroller General in sealed envelopes to be opened only by order of the Select Committee on Standards and Conduct in the event of an investigation for an alleged violation of the rules. Sen. Doc. No. 93-1, 93rd Cong., 1st Sess., Rule XLIV, pp. 64-66. Such questions as the extent to which, and the circumstances under which, public officials should enjoy a right to privacy, and a number of other questions, we believe, need to be thought through completely, and any resulting legislation rationalized from the standpoint of the public interest, fairness to the individual, and the existence of comparable (although not necessarily identical or statutory) requirements for all branches of government. The Department is opposed to this segment of S. 495 in its present form.

2. Prohibition Campaign Solicitations by Appointees Confirmed by the Senate and by Executive Office Personnel (Sec. 202).

The Proposal. Under Section 202 of S. 495, Section 7323 of title 5 of the United States Code would be amended, primarily by the addition of a new paragraph (b) under which any employee in an executive agency who is appointed by the President, by and with the advice and consent of the Senate, or is paid from the appropriation for the Executive Office of the President, would be prohibited from requesting or receiving from anyone a thing of value for political purposes at any time while so employed and for one year immediately after each time he is no longer so employed. An employee violating 5 U.S.C. 9323 would be removed from the service. Also, under Section 202 of S. 495, Section 602 of title 18 of the United States Code would be amended so that its criminal penalties would be applicable to violations of the new paragraph (b) of 5 U.S.C. 7323.

Discussion. This seems to us in many respoects a wise provision. When heads of departments approach individuals for contributions, the individuals never know whether rejection of the request will adversely affect them or their businesses or other interests. We see no reason, however, for preventing such persons from soliciting contributions for one year after leaving office. We think this part of the provision would have the undesirable and probably unconstitutional effect of preventing Presidential appointees from running for elective office for

one year after leaving office. This would be particularly unfortunate, for example, in the case of those Executive branch officers who distinguished themselves precisely by exposing or prosecuting acts of political corruption.

3. Application of the Hatch Act to the Department of Justice (Sec. 203).

The Proposal. Under Section 203 of S. 495, Section 7324 of title 5 of the United States Code would be amended to remove an existing exception and thereby to make the restrictions of the Hatch Act upon political activity apply to the Attorney General, Deputy Attorney General, and Assistant Attorneys General.

Discussion. We have no quarrel with the thrust of and evident purpose underlying this proposed legislation. However, in our view more attention needs to be given to potential problems connected with the scope of the proposal. For example, if the restriction in the Hatch Act against active involvement in political campaigning is to be extended to apply to officials at the highest level of this Department, the Congress should at the same time, in some general way, exempt activities that may be deemed, in a broad sense, to be included in the concept of political campaigning but that should not be prevented, as, for example, defending in a public forum Departmental policies that have become major issues in a campaign.

4. Intelligence Activities by Personnel of the Executive Office of the President (Sec. 204).

The Proposal. Under Section 204 of S. 495, a new section would be added at the end of chapter 2 of title 2 of the United States Code, which would provide that any person employed by or detailed to any agency of the Executive Office of the President (including the White House Office), who is compensated from appropriated funds, shall not, directly or indirectly, engage in any investigative or intelligence gathering activity concerning national or domestic security unless specifically authorized to do so by statute.

Discussion. This provision would seem to require the President to either personally review and supervise investigative and intelligence gathering activities, or to rely upon officials outside the Executive Office to lend any desired assistance. This provision is both too broad and too vague. It might, for example, be read in such a way as to interfere with legitimate functions now performed, for example, by the National Security Council. It is doubtful, of course, whether the law can be faithfully executed unless subordinates to the President possess information relevant to their tasks. Beyond this, it need only be remarked that this matter is now the subject of extensive Congressional scrutiny. The Department would therefore respectfully suggest that the Committee defer action until the work of other committees is completed.

TITLE III - CONGRESSIONAL ACTIVITIES

1. Jurisdiction to Hear Certain Civil Actions Brought by the Congress (Sec. 301).

The Proposal. Under Section 301 of S. 495, chapter 85 of title 28 of the United States Code would be amended by adding a new section that would give the District Court for the District of Columbia, regardless of the sum or value of the matte in controversy, original jurisdiction over any civil action brought by either House of Congress, any committee of either House, or any joint committee, to enforce or secure a declaratic concerning the validity of any subpoena or order issued by such House or committee, or by any Congressional subcommittee, to the President, Vice President, or any officer or employee of the executive branch to secure the production of information, documents, or materials. Ancillary provisions in the new section would authorize the suit to be brought by the House or committee in its own name or in the name of the United States and by such attorneys as it might designate.

Discussion. The effect of this proposal is to involve the courts in resolving the many sensitive problems that can arise between the Congress and the Chief Executive over claims of executive privilege and related matters. The key in our view to a proper consideration of this proposal lies in an appreciation of the difficult, not to say delicate, constitutional

and practical problems that arise when the judicial power is involved to resolve disputes between Congress and the Executive.

That there is implicitly rooted in the Constitution of the United States an executive privilege of confidentiality, "fundamental to the operation of government and inextricably rooted in the separation of powers", was recently recognized by the Supreme Court in United States v. Nixon, 418 U.S. 683, 708 (1974). Yet the Court held in the case that the need for demonstrably relevant and material evidence in a criminal proceeding prevailed over an assertion of a generalized interest in confidentiality. The Court emphasized that the executive privilege is "weighty indeed and entitled to great respect" (id at 712) and pointed out that the case before it involved only a particular conflict; the Court was not concerned with weighing and balancing the competing interests in other contexts, as for example, in civil litigation generally, or in the face of Congressionally demanded information.

To ask the courts to weigh the competing interests of the executive and legislative branches when executive privilege is asserted in response to a Congressional subpoena would put the courts in an uncomfortable and perhaps impossible situation. It is significant, we think, that, while procedents for the exercise of executive privilege go back to the presidency of George Washington, no formal institutional mechanism of the sort proposed here has ever been established. Nor does the Department believe it should be now. The current informal, ad hoc, and admittedly political method of resolving disputes of this character between Congress and the Executive no doubt displeases those who believe that all constitutional controversies can be boxed into neat, definitional packages for presentation to the courts. But such a penchant for tidiness, we believe, can be bought only at a very high price. The current system, despite its want of tidiness, at least has the virtue of flexibility -- which, in a Constitution we revere for its capacity to accommodate itself to changing circumstance, is not a small consideration. We would respectfully call the Committee's attention to the remarks made by Attorney General Levi in addressing the Association of the Bar of the City of New York on April 28, 1975:

> In many governments, the question of which governmental body shall have the authority to determine the proper scope of the confidentiality interest poses no problem. Under our Constitution, however, the answer is complicated by the tripartite nature of the federal government and the doctrine of the separation of powers. But history, I believe, has charted

> the course. For the most part, we have entrusted to each branch of government the decision as to whether, and under what circumstances, information properly within its possession should be disclosed to the other branches and to the public.
>
> Competing claims among the branches for information have been resolved mainly by the forces of political persuasion and accommodation. We have placed our trust that each branch will exercise its right of confidentiality in a responsible fashion, with the people as the ultimate judge of their conduct.

Taking the above further, we recommend to the Committee a law review article written by Professor Paul A. Freund of Harvard Law School as a forward to a survey of the decisions of the Supreme Court during its 1973 term. The forward is entitled, "On Presidential Privilege," and we quote extensively from it, at 88 Harv. L. Rev. 13, 36-39 (with underscoring added):

> The issue of executive privilege is one aspect of a reexamination by Congress of the larger subject of relations between Congress and the President. A rationalization of congressional procedures, long overdue, has been seen as a necessary element in congressional oversight. The purse and the aword are the instruments of national policy that have been of most acute concern to Congress, and in each of these fields new legislative controls have been devised...
>
> Similar procedures for dealing with executive privilege are under active consideration. In general, the proposals would require an executive department to furnish any information or records within thirty days of receipt of a request from a House or committee of Congress, unless the department can supply a statement signed by the President explaining why the material is privileged. Some of the proposals would detail the grounds which the President could legitimately advance for nondisclosure: the need to withhold, for example, military secrets, other information whose disclosure might create grave and irreparable harm to the vital interests of the United States, and advice and opinions concerning policy in relation to legitimate functions of government. Provision

for limited disclosure, as in executive session, might further narrow the scope of the privilege, just as such a provision might warrant a request for otherwise privileged investigatory files in connection with appointments and removals.

All such efforts to provide standards and procedures are laudable, though experience with the Freedom of Information Act, applicable to private demands for information, cautions against seeking clear and distinct solutions by codification. The efforts are nonetheless praiseworthy because they compel closer attention to standards which serve the public interest, recognize the need for restraint both in the demand for information and in the assertion of privilege, encourage rational communication between the two branches, and furnish a basis for more informed public judgment if in the end confrontation occurs.

The more troublesome question is whether, if an impasse does develop, resort should be had to the courts. Given the widespread and appreciative acceptance of the court's role in resolving the contest over production of the tapes (United States v. Nixon, 418 U.S. 683 (1974)), it seems natural enough to turn to the judiciary for settlement of congressional-presidential disputes as well. There are, however, significant differences that counsel against an easy transference of judicial review. The tapes case arose in the setting of a criminal proceeding. That factor gives rise to three distinctive characteristics that bear on the appropriateness of judicial review. In the first place, there was a conventional case already lodged in the court, not a plenary proceeding between two branches of government. Second, and related to the first characteristic, is the fact that private interests of the most acute kind -- the potential loss of liberty of the defendants -- were at stake. Third, the weighing of the need for disclosure is more congruent with the judicial function, and more comfortably performed, in a criminal case than in a legislative investigation: relevance and materiality are more focused in the search for defined facts than in a wide-ranging inquiry either to furnich a basis for legislation or to probe into maladministration.

If a prosecution were brought against an exeuctive officer for contempt of Congress, in refusing to give evidence or produce records, or if a House itself committed an officer to custody on that ground, a court ought not to refrain from deciding the issue; basic personal rights would have been put in jeopardy by a solemn act of the legislative body. Short of that kind of collision, at the very least there ought to be a considered resolution of the full House before a legislative committee would seek, and a court would provide, judicial review. But adoption of such legislation at this time may be premature. The whole subject of executive privilege is under close scrutiny; executive cooperation is likely to be more forthcoming, and Congress, for its part, is sensitive to criticisms of past excesses of some of its committees.

A pattern of communication and better understanding, together with the force of public opinion, ought to be allowed to have its day. Routine resort to the courts could stunt these promising developments, draw the judiciary into intragovernmental controversies in their raw, politically-tinged state, and expose the courts to the risk of rendering unsatisfactory judgements on matters where the judicial tough is likely to be unsure. Here, as elsewhere in our constitutional order, when personel rights are not in jeopardy, it is well to give scope for a "frank and candid co-operation for the general good". The vision may be too ideal, the hope misplaced. But in the freer and healtheir atmosphere into which we are emerging the vision and the hope deserve a trial.

TITLE IV - FEDERAL ELECTION CAMPAIGN ACTIVITIES, CONTRIBUTIONS, AND CRIMINAL SANCTIONS

1. Penalty for Illegal Campaign Contributions (Sec. 402).

The Proposal. Under Section 402 of S. 495, Section 610 of Title 18 of the United States Code would make various changes in the scheme of penalties now imposed against those convicted of giving or receiving illegal campaign contributions or expenditures made by corporations or labor unions. At present, 18 U.S.C. 610 distinguishes between willful and non-willful violations, treating willful violations as felonies (punishable at the maximum by a $10,000 fine and imprisonment for two years) and non-willful violations as misdemeanors (punishable at the maximum by $1,000 fine and imprisonment for one year). The amendment would do away with such a distinction. Under the amendment any official of a corporation or labor organization who consented to the illegal campaign contribution or expenditure, and any person who accepted or received the illegal contribution, would be punishable upon conviction, at the maximum, by a $50,000 fine and imprisonment for two years.

Discussion. In the view of this Department, the ends of justice are well served by treating non-willful violations of 18 U.S.C. 610 as misdemeanors. While an increase in the available fines might be appropriate, the Department would otherwise prefer that the section not be amended as proposed.

2. Criminal Sanctions Generally (Sec. 404).

The Proposal. Under Section 404 of S. 495, chapter 29

of title 18 of the United States Code would be amended by adding five new criminal provisions.

a. Use of funds to finance violation of provisions of Federal election laws (p. 34). Summarized briefly, it would be made a felony under a new section for any person to compensate another for violating Federal election laws or for engaging in any activity which the person giving the compensation knows, or has reason to know, will probably result in any such violation.

Discussion. The Department believes that any case that might successfully be prosecuted under this new provision could be successfully prosecuted under existing law. The person compensating the actual perpetrator would be punishable as a principal under 18 U.S.C. 2 and might also be punishable for conspiracy under 18 U.S.C. 371. Under the new provision, depending upon the substantive offense involved, a higher fine might be authorized than is presently available, but basically there is no reason for enacting the new provision.

b. Contributions by certain other recipients of Federal funds (p. 34). Summarized briefly, it would be made a felony under a new section for any person receiving a Federal grant, loan, or subsidy of more than $5,000 in any calendar year to make a contribution during that year to any other person for any political purpose, and it would also be made a felony for anyone to solicit a contribution from a person who is receiving a Federal grant, loan, or subsidy and is therefore prohibited from making a contribution. Each officer and director of a corporation receiving such grants, loans, or subsidies

would be considered to have received the entire amount received by the corporation during the calendar year.

Discussion. The Supreme Court of the United States has said, although in a different context, that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be narrowly achieved". Shelton v. Tucker, 364 U.S. 479, 488 (1960). In our view, this proposal is too expansive. It would broadly prohibit persons who are the recipients of federal monies from contributing to political causes. No attempt is made to establish a nexus between the proferring of the contribution and the receipt of a federal grant, contract, or benefit. As a result, a number of undesirable and perhaps unintended consequences could arise. For example, many corporate officers and directors would be effectively forbidden to make personal contributions to political causes, since they would be regarded under the law as personally receiving the totality of any Federal grants, loans, or subsidies received by the corporation. To pick yet another example, professors and students who happen to be the recipient of federal monies in excess of $5,000 would be forbidden to make political contributions. Furthermore, there being no state of mind requisite to a violation of the provision, a person could solicit political contributions only at great personal risk; he would be in violation merely by seeking a contribution from a person who, without his knowledge,

was the recipient of a Federal grant, loan, or subsidy of more than $5,000. We think this proposal as written is of doubtful constitutionality, and would in any event be enforceable only with the greatest legal and practical difficulties.

c. Misrepresentation of a candidate for elective office (p. 35). Summarized briefly, it would be made a felony under a new section for any person willfully to misrepresent himself as being a representative of a candidate for Federal elective office for the purpose of interfering with the election.

Discussion. This provision is similar to the recently enacted Section 617 of title 18 (Public Law 93-433; 88 Stat. 1268). If this proposal is not obviated by the new statute, the better course would be to consider amending the new statute.

d. Crimes affecting elections (p. 36). Summarized briefly, there would be a separate felony created under a new section whenever a person committed (1) any felony in violation of the provisions of title 18 exclusive of chapter 29, for the purpose of interfering with, or affecting the outcome of, an election; or (2) any felony violation of State law for the purpose of interfering with, or affecting the outcome of, an election. The broad definition of "election" appearing in 18 U.S.C. 591(a) would be applicable to this new section.

Discussion. The proposal is similar to Section 1513 of S. 1, the proposed Criminal Justice Reform Act of 1975.

The proposal in S. 1 is, however, limited to elections involving candidates for Federal office and would not apply to a purely State election. The Department supports the more limited scope of the offense in S. 1.

The Percy-Baker Amendment No. 813 (to S. 495)

The Proposal. A new chapter would be added to title 28 of the United States Code to create within the Department of Justic a Division of Government Crimes, which would be directed by an Assistant Attorney General who, together with a Deputy Assistant Attorney General, would be appointed by the President, by and with the advice and consent of the Senate. The new Division would take cognizance of : (1) apparent violations of Federal la by Government officers or employees, whether elected or appointed (2) cases referred by the Attorney General because of actual or potential conflicts of interest; (3) criminal cases referred by the Federal Election Commission; and (4) alleged violations of Federal laws relating to campaigns and elections for elective office. Within this jurisdiction the Assistant Attorney General for Government Crimes would have the same power to act as the Attorney General (except for the power of the Attorney General under chapter 119 of title 18 with regard to interceptions of wire or oral communications). The Attorney General or the Assistant Attorney General could waive the jurisdiction of the new division and refer matters to appropriate law enforcement

authorities. The Attorney General would be empowered to overrule the Assistant Attorney General for Government Crimes on any matter, but he would then be required to report the decision promptly in writing to the Congress.

The proposal would create a duty in the Assistant Attorney General to report to the Congress any matter as to which he had reasonable cause to believe involved evidence of an impeachable offense.

If the President removed either the Assistant Attorney General or the Deputy Assistant Attorney General for Government Crimes, the President would be required to report to Congress in writing and with precision the cause for such removal.

Discussion. It is noted, first, that the proposed amendment is a substitute for the provisions of S. 495 that would create an Office of Public Attorney. The proposal reflects a reasoned effort to meet the constitutional objections to the creation of an independent Public Attorney outside the Executive branch. But a number of serious difficulties remain. Amendment No. 813, while clearly an improvement over §101 of S. 495, shares with the parent bill a presumption extrapolated from the Watergate offenses that criminal actions against Federal employees can be impartially and thoroughly prosecuted only through a permanent prosecutor outside the control of the Justice Department. We respectfully submit that this is not so. While the Department fully appreciates and indeed supports the sponsors' desire to prevent future corruption of the sort revealed by "Watergate", we respectfully submit that a new Government Crimes Division within the Department is both unnecessary and undesirable. As emphasized in the Report of the Special Watergate Prosecution force, there is no denying that the Department's proceeding against administration or other political figures can at times be difficult. It is, however, by no means so difficult as it is sometimes thought to be. The United States Attorneys and the Department have been able

to handle official corruption cases. With respect to campaign and election laws, after Congress provided us with an enforceable statute in 1971, the Department's record, we believe, has been impressive. The Attorney General remains accountable for enforci these and all other Federal laws. He enjoys authority under present law to appoint special attorneys or otherwise make special arrangements in unusual situations. And the experience with Watergate itself will serve as a sad, if salutary, reminder of the need to be vigilant. Indeed, prompted by recent experience, the Department now has under active consideration a number of proposals for the reorganization of the Criminal Division which, if implemented, would substantially achieve the larger purposes addressed by Amendment No. 813 and by §101 of S. 495. As these proposals are still in draft form and have not yet been reviewed by the Attorney General, it would be inappropriate for me to discuss them in any detail. I can say, however, that they are far-reaching and creative and that the special difficulties experienced by the Office of Special Prosecutor are rather fully taken into account. With these proposals in mind, one of our principal concerns with both the original §101 and proposed Amendment No. 813 is the adverse impact that the creation of a wholly separate Division would have on our extant resources. A new Government Crimes Division would of necessity cannibalize the Criminal Division and, we fear, diminish the efficiency of both. It is one thing to draw jurisdictional lines on paper,

and quite another to implement such divisions in practice. Certain statutes would unavoidably have to be enforced by both the Criminal and Government Crimes Divisions, and the personnel most familiar with the special difficulties (they are invariably present) of particular statutes may be housed wholly in one or the other Division or scattered in both. This, in turn, raises the spectre of a conflict of interpretation between Divisions and a possible inconsistency in application. There are other problems of a related sort that need not be dealt with here, but let me indicate by way of summary the Department's very strong belief that the administrative problems associated with the creation of a separate Division would be both major and, we fear, counterproductive.

Three other provisions of Amendment No. 813 deserve special comment. The first is the requirement that the President report to Congress "in writing and with precision" his reasons for removing the proposed Assistant Attorney General or his Deputy. Inasmuch as these officers would be purely executive in nature, such a requirement may run afoul of Myers v. United States, supra which lays down the principle that such officials are removable solely at the pleasure of the President.

The provision requiring the Attorney General to report in writing to Congress any decision of his overruling the Assistant Attorney General would, we believe, introduce an undesirable

arrangement that, despite its obvious good intentions, cannot but war with the Attorney General's otherwise unfettered stewardship of the Department. Moreover, the great bulk of those differences which are likely to arise between the Attorney General and the proposed Assistant Attorney General will no doubt turn on matters of judgment or discretion, i.e., matters on which the most devoted and public spirited prosecutors differ every day. Unless one operates on the assumption that any given Attorney General is likely to be venal or narrowly political in his motives, such an extraordinary device must surely be considered unnecessary. Nor should it be presumed in those rare occasions when corrupt motives may in fact be present in an Attorney General, that an Assistant Attorney General for Government Crimes would necessarily be without other means to make that fact know.

Finally, as to the provision requiring the Assistant Attorney General for Government Crimes to report to Congress respecting any matter as to which he has reasonable cause to believe may be evidence of an impeachable offense, we perceive two difficulties. First, it has not been determined as yet whether every Government official is subject to impeachment, or only those who are technically civil officers of the United States. Second, the scope of the constitutional term "high crimes and misdemeanors" has not as yet been determined, i.e., whether it covers every serious statutory offense, or only political offenses whether or not of a statutory nature. If

Congress does not wish the Assistant Attorney General to report to Congress every time a clerical or custodial employee commits a crime more serious than a petty offense, that point should be made clear. Finally, Congress may want to consider the advisability of inviting an executive officer to participate in the determination of what constitutes an impeachable offense.

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

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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 over~~. 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.

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.

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 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 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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