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July 1976?

REORGANIZATION OF THE DEPARTMENT OF JUSTICE

SEC. 101(a) Title 28, United States Code, is amended by adding after chapter 37 the following new chapter:

Chapter 39 -- APPOINTMENT OF SPECIAL PROSECUTOR AND ESTABLISHMENT OF GOVERNMENT CRIMES SECTION AND OFFICE OF ~~SPECIAL~~ PROFESSIONAL

§591. Special Prosecutor: Appointment and Removal

(RESPONSIBILITY)

(a) There is established within the Department of Justice an Office of Special Prosecutor which shall be headed by a Special Prosecutor appointed by the President, by and with the advice and consent of the Senate.

(b) The Special Prosecutor shall be appointed for a term of three years. No person shall serve as Special Prosecutor for more than a single term.

(c) A person shall not be appointed Special Prosecutor if he has at any time during the five years preceding such appointment held a high level position of trust and responsibility on the personal campaign staff of, or in an organization or political party working on behalf of, a Candidate for any elective Federal office. This provision shall not, however, form the basis for any challenge of the legitimacy of a Special Prosecutor or the validity of any of his actions, once he has been appointed.

(d) The grounds for removal of a Special Prosecutor should be, and to the maximum extent permitted by the Constitution shall be, limited to those which constitute extraordinary impropriety. In the event of any removal or attempted removal, the President shall promptly submit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a report describing with particularity the grounds for such action.



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§ 592. Jurisdiction

(a) There shall be referred to the Special Prosecutor for investigation and, if warranted, prosecution all information, allegations or complaints indicating a possible violation of Federal criminal law by a person who holds or who at the time of such possible violation held any of the following positions in the Federal Government: (i) President, Vice President, Attorney General, or Director of the Federal Bureau of Investigation; (ii) any position compensated at a rate equal to level I or level II of the Executive Schedule under section 5312 of title 5, United States Code; ^{or} (iii) Member of Congress.

(b) When the Attorney General determines that it is in the interest of the administration of justice, he may refer any other matter which he deems appropriate to the Special Prosecutor for investigation and, if warranted, prosecution.

(c) The Special Prosecutor may in his discretion decline to accept referrals under subsection (b) of this section. The Special Prosecutor may decline to ~~accept referrals~~ ^{assert jurisdiction} under subsection (a) of this section. When the matter over which he has jurisdiction is a peripheral or incidental part of an investigation or prosecution already being conducted elsewhere in the Department of Justice, or when for some other reason he determines it would be in the interest of the administration of justice to permit the matter to be

handled elsewhere in the Department; provided, however, that any such declination shall be accompanied by the establishment of such ~~procedures~~ ^{cedures} as the Special Prosecutor considers necessary and appropriate to keep him informed of the progress of the investigation or prosecution as it relates to such matter; and provided further that the Special Prosecutor may at any time assume responsibility for investigation and prosecution of such matter.

§593. Authority

(a) As to the matters described in section 592 of this Chapter for which he has assumed responsibility, the Special Prosecutor shall have authority to (1) conduct proceedings before grand juries and other investigations he deems necessary; (2) review all documentary evidence available to the Department of Justice from any source, as to which he shall have full access; (3) determine whether or not to contest the assertion of Executive Privilege and any other testimonial privilege; (4) determine whether or not application should be made to any federal court for a grant of immunity to any witness, consistently with applicable statutory requirements, or for warrants, subpoenas, or other court orders; (5) decide whether or not to prosecute any individual, firm, corporation or group of individuals;

(6) initiate and conduct prosecutions, frame indictments, file information, and handle all aspects of any cases within his jurisdiction, including any appeals; (7) coordinate and direct the activities of all Department of Justice personnel, including United States Attorneys; (8) deal with, appear before, and provide information to Congressional committees having jurisdiction over any aspect of the above matters.

(b) In exercising his authority hereunder, the Special Prosecutor shall not be subject to the direction or control of the Attorney General, except as to those matters which by statute specifically require the Attorney General's personal action, approval, or concurrence; provided, however, that nothing in this chapter shall prevent the Attorney General or the Solicitor General from presenting to any court views of the United States as to issues of law raised by any case or appeal.

§594. Section on Government Crimes

(a) There is established within the Criminal Division of the Department of Justice a **S**ection on Government Crimes, which shall be headed by a Director appointed by the Attorney General. The Director shall be subordinate to the Assistant Attorney General for the Civil Division, but shall also report directly to the Attorney General on a regular basis and when he deems it necessary.

(b) A person shall not be appointed Director of the Section on Government Crimes if he has at any time during the five years

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preceding such appointment held a high level position of trust and responsibility on the personal campaign staff of, or in an organization or political party working on behalf of, a candidate for any elective Federal office. This provision shall not, however, form the basis for any challenge of the legitimacy of a Director or the validity of any of his actions, once he has been appointed.

§595. Jurisdiction

(a) The Attorney General shall, except as to matters referred to the Special Prosecutor pursuant to section 592 of this Chapter, delegate to the ^{Section on} Government Crimes ~~jurisdiction~~ of (1) criminal violations of Federal law committed by any elected or appointed Federal Government officer, employee or special employee (other than members of the military) related directly or indirectly to his government position, employment, or compensation; (2) criminal violations of Federal laws relating to lobbying, campaigns, and election to public office committed by any person except insofar as such violations relate to matters involving discrimination or intimidation on the grounds of race, color, religion or national origin; and (3) such other matters as the Attorney General may deem appropriate.

(b) Jurisdiction delegated to the ^{Section on} Government Crimes pursuant to subsection (a) of this subsection may be concurrently delegated by the Attorney General to, or concurrently

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reside in, the United States Attorneys or other units of the Department of Justice. This section shall not limit any authority conferred upon the Attorney General, the Federal Bureau of Investigation, or any other department or agency of government to investigate any matter.

§596. Reporting

At the beginning of each regular session of the Congress, the Attorney General shall report to the Congress on the Section on activities and operation of the Government Crimes for the preceding fiscal year.

Such report shall specify the number and type of investigations and prosecutions (subject to the jurisdiction of) ~~conducted by~~ such unit and the disposition thereof but shall not include any information which would impair an ongoing investigation, prosecution, or proceeding, or which the Attorney General determines would constitute an improper invasion of personal privacy.

§597. Office of Professional Responsibility

There is established within the Department of Justice an Office of Professional Responsibility, which shall be headed by a Counsel on Special Responsibility appointed by the Attorney General. The Counsel shall be subject to the general supervision and direction of the Attorney General, and shall report directly to the Attorney General or, in appropriate cases, to the Deputy Attorney General or the Solicitor General.

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§598. Functions

(a) Except as to matters which are to be referred to the Special Prosecutor under Section 592 of this Chapter, the Counsel on Professional Responsibility shall be responsible for reviewing any information or allegation presented to him concerning conduct by an employee of the Department of Justice that may be in violation of law, of Department Regulations or orders, or of applicable standards of conduct, and shall undertake a preliminary investigation to determine what further steps should be taken. On the basis of such investigation the Counsel shall refer the matter to the appropriate unit within the Department or shall recommend to the Attorney General or, in appropriate cases, to the Deputy Attorney General or Solicitor General, what other action, if any should be taken. The Counsel shall undertake such other responsibilities as the Attorney General may direct.

(b) Nothing in this section shall derogate from the authority of internal inspection units of the Department of Justice and the heads of other units to receive information or allegations concerning unlawful or improper conduct.

[July 1976?]

1. Appointment of Assistant Attorney General; Removal; Powers.

Title I of S.495 establishes a Division of Government Crimes within the Department of Justice. The Division is headed by an Assistant Attorney General appointed by the President and confirmed by the Senate for a term coterminous with that of the President, although the President retains the power to remove him at any time. No one who has held a high level position in a Presidential campaign in the preceding 5 years may be appointed to this position. Although not defined, the powers of the Assistant Attorney General for Government Crimes appear presumed to be comparable to those of other Assistant Attorneys General.



2. Jurisdiction of Division.

The Government Crimes Division is to be delegated jurisdiction for: (1) all Federal offenses committed by any elected or appointed Federal official, compensated at a rate of level III or above, or anyone who held such office in the preceding 6 years; Federal offenses relating to their employment committed by any other elected or appointed Federal employee, apparently including members of the military, or by anyone who held such a position in the preceding six years; (3) Federal offenses committed by anyone relating to lobbying, campaigns and election to public office, apparently including civil rights violations; (4) and any other matter which the Attorney General may refer to it.

The grant of jurisdiction to the Government Crimes Division

supersedes any inconsistent grant of authority except that of the Special Prosecutor. Language in the Committee report and some proponents of these provisions strongly suggest that the Division of Government Crimes is intended to remove substantially from the United States Attorneys the authority to pursue public integrity matters relating to Federal officials.

3. Report to Congress.

The Attorney General is required to report to Congress annually on the activities of the Government Crimes Division. The committee report suggests he is expected to include some information which could prejudice an ongoing investigation if publicly disclosed. Either House could publicly disclose such information.



Department of Justice Proposed Alternative

1. Government Crimes Unit.

The Department of Justice's proposed alternative provisions establish a Government Crimes Unit headed by a Special Assistant to the Attorney General, appointed by him. The Unit could be placed in a Division, presumably the Criminal Division, and the head of the Unit would report to both the Assistant Attorney General and the Attorney General. No one who held a high level position in a Presidential campaign in the preceding five years would be eligible to head the Unit.

2. Jurisdiction.

The Unit would be given jurisdiction comparable to that of S.495 except for military and election related civil rights offenses. It would also have jurisdiction over Federal offenses committed by non-Federal officials to eliminate the need for two units in Washington with responsibility for the same statutes. Its jurisdiction would be concurrent with that of the United States Attorneys and would not by law remove their authority to initiate or pursue public integrity cases involving Federal officials.

3. Report to Congress.

The Attorney General would report annually to Congress on the work of the Unit, but would not be required to include any information which might prejudice a continuing matter or invade personal privacy.

[July 1976?]

NOTES ON ALTERNATIVE PROPOSAL FOR SPECIAL PROSECUTOR

1. Office of Special Prosecutor:

The statute would create the Office of the Special Prosecutor in the Department of Justice.

2. Appointment and Term of Special Prosecutor:

The President would nominate and the Senate confirm the appointment of the Special Prosecutor who would serve as the head of the Office of the Special Prosecutor. The appointment would be for two years. He could be reappointed for an additional two years, but could not hold the office for more than four years. The Special Prosecutor would select a staff and appoint a Deputy. If the term of the Special Prosecutor expired during the investigation or prosecution of a case, the Deputy Special Prosecutor would assume responsibility until the appointment of a new Special Prosecutor.

3. Powers of the Special Prosecutor:

The Special Prosecutor would have all the powers to investigate, prosecute and appeal adverse rulings that are now vested in the current Watergate Special Prosecutor (which are probably the same powers that S. 495 intends to grant to him). At the appellate level, however, the Attorney General and the Solicitor General would be free to file a brief as to the position of the United States on legal issues.

4. Jurisdiction of the Special Prosecutor:

(a) Automatic referral -- All allegations concerning the President, the Vice President, any individual compensated



at Level I of the Executive Schedule or greater than Level II of the Executive Schedule if employed in the Executive Office of the President, the Director of the FBI, the Speaker and Minority Leader of the House of Representatives, and the Majority and Minority Leaders of the Senate, would be automatically referred to the Special Prosecutor for investigation and prosecution, if warranted. If the Special Prosecutor determines that the allegations are peripheral to another investigation being conducted by the Department of Justice, the Special Prosecutor could determine that the investigation should proceed in normal course in the Department of Justice (including U.S. Attorneys). In such cases, however, he would be kept informed of the progress of the investigation insofar as it relates to these allegations, and would have the right at any time to require that all or part of the investigation be transferred to him if in his view this was necessary.

(b) Discretionary referral -- The Attorney General would have the right to refer to the Special Prosecutor (and the Special Prosecutor would have the right to reject) allegations at any stage of an investigation which involve any member of the Congress, any elected official, any Presidential appointee, any person who held any of these offices for the prior four years, as well as any other person in cases where the Attorney General deems this is warranted in the public interest.

5. Resolution of Congress:

An expedited procedure could be created under which Congress could consider and pass a concurrent resolution expressing the sense of Congress that the Attorney General should refer to the Special Prosecutor matters falling within the discretionary referral jurisdiction of the Special Prosecutor. If the Attorney General determined after thirty days that he did not believe the referral to be in the best interest of the administration of justice, he would be required to transmit to the Congressional leadership (or the chairmen and ranking minority members of the Judiciary Committees) a written report stating his reasons as to why he declined to refer the case.

6. Removal of the Special Prosecutor:

The Attorney General could remove the Special Prosecutor but, upon removal, the Attorney General would be required to submit his reasons for his action to the Senate and House Judiciary Committees. The Special Prosecutor also would make a report to the Committees. Removal could be only "for cause." (S. 495 provides that a Special Prosecutor can be removed only upon a finding that the Special Prosecutor engaged in "extraordinary improprieties." The Solicitor General believes that the "extraordinary improprieties" restriction on the removal power certainly raises constitutional questions and that the "for cause" restriction may also raise the same questions.)

[July 1976?]

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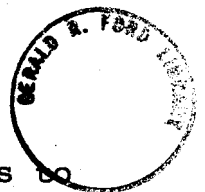
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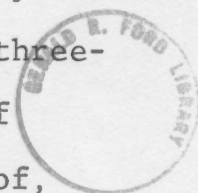
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[July 1976?]

Title I -- Reorganization of the Department of Justice

During the course of our history, appointments of a Special Prosecutor to investigate allegations of criminal wrongdoing have become necessary. ~~Typically, the appointment~~ *they have been made. The effort to institutionalize this practice can raise very serious problems and has occurred as a result of a crisis of confidence in the government. There are, however, serious costs in this ad hoc* ~~There are, however, serious costs in this ad hoc~~ *great care must be taken to comply with constitutional* ~~Requisities and standards for the proper approach. It requires the escalation of an event to extraordinary proportions before the appointment is made, thereby not only delaying the vigorous pursuit of criminal wrongdoing but also calling into question the ability of the government to enforce the law fairly and impartially.~~

To avoid these costs, I propose an amendment, in the nature of a substitute to Title I, which would establish a permanent Office of Special Prosecutor to investigate and prosecute criminal wrongdoing committed by high level government officials. The Special Prosecutor would be appointed by the President, by and with the advice and consent of the Senate, for a single three-year term. Individuals who hold a high level position of trust and responsibility on the personal campaign staff of, ~~or in an organization or political party working on behalf of,~~ or in an organization or political party working on behalf of a candidate for any elective Federal office would be ineligible ^{and} for appointment. The bill would sanction removal of the Special Prosecutor only for extraordinary improprieties and in the event of removal, the President would be required



(5) ~~The Comptroller General shall, whenever he~~ ^{the Comptroller General}
~~finds~~ ^{a report filed under section 304(a)(1) discloses the existence of}
~~believes that a conflict or potential Conflict of~~
~~Interest arises as a consequence of any matter re-~~
~~quired to be reported,~~ ^{he shall report his finding to} ~~advise~~ ^{the person with whom}
~~such report is required to be filed of said conflict~~ ^{has been} ~~individual who filed such report.~~ ^{or with a copy to the}
~~or potential conflict.~~ ^{individual who filed such report.} ~~In the event that said con-~~
~~flict or potential conflict is not resolved within~~
~~90 days the Comptroller General may publish such~~
~~report together with such comments on steps taken~~
~~to resolve the conflict as to him appear appropriate.~~

^{event on}
In the ^{event on} issue raised by such a report is not resolved
to the satisfaction of the Comptroller General,
he may, after the lapse of 90 days from
the date of his report, make public the
report filed under section 304(a)(1), together
with his finding and all comments made or
actions taken in respect of his finding.

for consideration

[July 1976?]

~~The, however, serious costs in the establishment of a~~
~~also, moreover, very serious costs in the establishment of a~~
~~permanent special provision, particularly are effectively~~
~~without supervision. However, Because Congress is~~
~~seriously considering a legislation a particularly dangerous~~
~~a disruptive proposal in the area, I have determined~~
to advance a proposal that has fewer ~~deficiencies~~
deficiencies. (however)

Of the ^{course} latter is to be chosen, great
care must be exercised to minimize
those adverse effects which can not
be entirely avoided.

Because Congress is seriously considering a
proposal which



[July 1976?]

Title I

During the course of our history, appointments of a Special Prosecutor to investigate allegations of criminal wrongdoing have become necessary. Typically, the appointment has occurred as a result of a crisis of confidence in the government. There are, however, serious costs in this ad hoc approach. It requires the escalation of an event to extraordinary proportions before the appointment is made thereby not only delaying the vigorous pursuit of criminal wrongdoing but also calling into question the ability of the government to enforce the law fairly and impartially.

To avoid these costs, I propose an amendment, in the nature of a substitute to Title I, which would establish a permanent Office of Special Prosecutor to investigate and prosecute criminal wrongdoing committed by high level government officials. The Special Prosecutor would be appointed by the President, by and with the advice and consent of the Senate, for a single three-year term. Individuals who hold a high level position of trust and responsibility on the personal campaign staff of, or in an organization or political party working on behalf of, ~~or in an organization or political party working on behalf of~~ a candidate for any elective Federal office would be ineligible for appointment. The bill would sanction removal of the Special Prosecutor only for extraordinary improprieties and in the event of removal, the President would be required



to submit to the Committees on the Judiciary a report describing with particularity the grounds for such action.

Any allegation of criminal wrongdoing concerning the President, Vice President, Members of Congress, or persons compensated at the rate of Level I or II of the Executive Schedule would be referred directly to the Special Prosecutor for investigation and, if warranted, prosecution. The Attorney General could refer to the Special Prosecutor any other allegation involving a violation of criminal law whenever he found that it was in the best interest of the administration of justice. The Special Prosecutor could, however, decline to accept the referral of any allegation. In that event, the allegation would be investigated by the Department of Justice in the normal course.

The Special Prosecutor would have plenary authority to investigate and prosecute matters within his jurisdiction, including the authority to appeal adverse judicial rulings. In the event of a disagreement with the Special Prosecutor on an issue of law, the Attorney General's only recourse would be to present his differing position to the court before which the prosecution or appeal is lodged.

To institutionalize, by statute the efforts of the Department of Justice to investigate and prosecute violations of law by government officials and employees which do not fall within the jurisdiction of the Special Prosecutor, Title I establishes a Government Crimes Unit and an Office of Professional Responsibility within the Department.

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The proposal that comes to the floor of the Senate is for a number of reasons substantially deficient. First, it adopts as the central mechanism for implementation of the law a device which is of highly questionable constitutionality and whose invalidation by the courts will essentially destroy the legislation. I refer to the establishment of a special court to review the ability of the Attorney General to investigate and prosecute, and to appoint a special prosecutor in some circumstances. It is doubtful whether such a role involves a "case or controversy" within the meaning of Article III of the Constitution; it is doubtful whether the special court constitutes a "court" within the meaning of Article II, section 2 of the Constitution authorizing the appointment of "inferior officers" by courts; and it is doubtful whether the special prosecutor constitutes ⁿan "inferior officer" within the meaning of this latter clause or whether the portion of the clause applicable to appointment by courts covers appointment of inferior officers who are not subordinate to the judiciary itself. In my view, the likelihood that this feature will be invalidated by the courts is substantially increased by the fact that it is poor public policy and contrary to our fundamental principles of separation of powers, to ~~have these~~ officers who are to present criminal indictments to the judges appointed by the judiciary itself.

provide on a
regular basis

S.495 is fundamentally unsound in its adoption of a procedure whereby a separate special prosecutor is to be appointed for each violation covered by a definition of jurisdiction ("conflict of interest") which is exceedingly vague. This process is certain to call public attention to each new investigation; and the fact that the person appointed special prosecutor is vested with jurisdiction only to pursue a single allegation places undue pressure upon him to seek and secure a conviction, distorting proper exercise of prosecutorial judgments. When there is added to this system the vigilante-like provision which would enable any private citizen making an allegation to seek judicial appointment of a special prosecutor, the potential for abuse is enormous.

The proponents of S.495 make much of the fact that it avoids a permanent special prosecutor. In practice, however, it creates something much worse, which is the permanent existence of numerous ad hoc special prosecutors, each of whom is only a temporary occupant of the office. The Department of Justice estimates that if S.495 were now law approximately half a dozen special prosecutors ^{would} ~~which~~ surely be appointed, and close to 50 other matters possibly requiring appointment would be under advisement by the courts. This adds to the disadvantages of a permanent prosecutor the much greater disadvantages of inconsistency and unevenness of action which the absence of both

continuity and higher level control render inevitable.

Finally, among this less than exhaustive list of deficiencies it should be noted that the vague standard for appointment contained in S.495 will in fact require greater rather than lesser White House involvement in the criminal process than now exists. In preparing a memorandum to the court on whether a conflict of interest exists with respect to the President, the Attorney General will ^{regularly} be required to consult officials at the White House *with respect to specific criminal matters, a practice which of course does not now obtain.*

[July 1976?]

TITLE II

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

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

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



I have advanced this new proposal because Title II of S.495, as it now stands, is highly objectionable on both constitutional and policy grounds. The basic difficulty is that though the Congressional Legal Counsel is entirely an Officer of Congress and subject to the direction of that branch, the bill would give him significant law enforcement functions. This may not be done under Article II, Section 3, of the Constitution which assigns to the President the duty to "take care that the Laws be faithfully executed."

The impropriety and lack of wisdom of the bill is illustrated, in addition, by the fact that Congress would have the power to become involved in all constitutional litigation, often, it must be anticipated, with a litigating strategy and line of argument at variance with those of the Department of Justice. The result, aside from the serious constitutional objection to such a procedure, would be a government that speaks with two voices before the courts and a consequent loss of effectiveness and credibility.

Congress' version of this legislation purports to be founded on a concern for the vigorous defense of congressional prerogatives and the fact that in a limited number of cases Justice Department representation is precluded by a conflict of interest.

There is, as a practical matter, no need whatever for a measure creating the serious constitutional and policy

problems raised by Congress' bill. The responsibility for representing individual members of Congress and congressional entities in actions arising out of the discharge of official duties is vested in the Department of Justice.

In discharging this responsibility, the Department has vigorously asserted congressional prerogatives and has developed an important body of law sustaining these prerogatives. It is only in those cases where the Department has perceived conflicts of interest that congressional representation has been declined. Such cases have been very few, only five within the past five years.

Since non-representation is so rare, the Office of Congressional Legal Counsel should act only in those cases ~~where the problem exists~~ *enforcement of the law is not* which do not rise to the level of law enforcement, ~~and~~ where the institutional interests of Congress are at stake, and where the rare problem of non-representation actually exists.

[July 1976?]

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[July 1976?]

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.

1. Duties of the Congressional Legal Counsel.

(a). Defense of Congress in Civil Actions -- 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.

(b). Enforcement of Subpoenas -- 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

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



of the United States Code giving the United States District Court for the District of Columbia 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.

(c). Upholding the constitutionality of statutes --

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.

2. Comment:

(a). 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' 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 could run head on into the opinion of the Court in Buckley.

(b). With respect to defense of Members of Congress, the Department of Justice has traditionally provided legal representation for Members and Officers of Congress. Barring some special circumstance, there does not appear to be any reason to depart from that practice. To the best of our

knowledge, only five times in the last five years has the Department declined a request for such representation. In such special circumstances, the employment of outside counsel would seem to be a better alternative than the creation of a permanent Office of Congressional Legal Counsel.

(c). Section 212(a) provides that the intervention or appearance of the Congressional Legal Counsel shall be as "of right." We believe it improper for Congress in its attempt to vindicate its "private rights" to arrogate to itself a privilege of intervention or appearance greater than that enjoyed by anyone else. We have suggested, unsuccessfully, to the Committee that intervention or appearance by Congressional Legal Counsel in cases involving an issue of Congress' powers under Article I should be in accord with existing rules.

(d). The Committee Report states at page 55: "In no instance may the Counsel be directed to bring an action . . . to compel an officer of the Executive Branch to enforce the law. Similarly, the Counsel may not be authorized to bring an action to challenge a Presidential claim of Executive privilege.

(d). Section 211 provides that when the Congressional Legal Counsel defends Congress or its constituent parts for their actions, or against subpoenas or orders directed to them, the Attorney General shall be relieved of his representational duties. Committee staff has agreed that neither this section, nor any other section of the bill, should be

construed as affecting any other right of intervention or appearance the Attorney General might have, either on behalf of the President's powers or, more generally, on behalf of the United States. They agreed to add language which makes this unambiguously clear.

[July 1976]

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.

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[July 1976?]

My proposed bill recognizes and protects the public's right to be assured that public officials, regardless of which branch of government they serve in, disclose personal financial matters which could give rise to a conflict of interest in the performance of their official duties. Yet the fundamental privacy interests of career civil servants, which are clearly recognizable in the recently enacted Privacy Act, are also respected in my proposal, as they have not been in S. 495.

Section 304 requires that all public officers and employees compensated at the minimum rate of Grade GS 16 or its equivalent file financial reports with a designated office in their branch of government. Section 306 provides, that in addition to the filing requirements referred to above, public disclosure be made of the financial statements of (i) all elected officials, (ii) high ranking officers or employees appointed by such officials, (iii) significant policy making and confidential employees, and (iv) other employees compensated at the rate of GS 16 or above (but not those in competitive civil service or who, save for certain legal exemptions, would be in the competitive civil service). Section 306 also gives the Comptroller General oversight authority to audit such statements as well as the authority to make findings of a conflict of interest and if they are not resolved, to make public his findings. Thus, the public's right to have accountability from public officers and employees is doubly protected. First, by the Executive, Legislative or Judicial Branch office with which reports are filed and secondly by the Comptroller General.

In addition, ~~the attached bill closes certain loopholes contained in the present proposal.~~ ^{S. 495} For example, the present proposal requires the reporting of any item received in kind whose fair market value "for such item" exceeds \$500. Such provision would allow a series of gifts from the same party, each valued at less than \$500 per item, to go unreported. The attached bill would aggregate such gifts and hence require reporting. Moreover, the attached bill would make clear that while property owned for personal use, such as the family home, furniture, jewelry, the family car, etc., need not be inventoried in disclosure forms, property of a business or investment nature must be reported. Assets unknown to the individual because they are held in a bona fide "blind trust" need not be identified, but the trust interest must be disclosed.



[July 1976?]

The bill attached hereto recognizes and protects the public's right to be assured that all public officials, regardless of which Branch of Government they serve in, are not subject to a conflict or potential conflict of interest. The bill distinguishes between (a) those officials who are directly responsible to the public or who are appointed by those directly responsible to the public or who otherwise hold policy making positions requiring the confidence of such officials, and (b) those employees of the government whose immediate responsibility is to the Agency where they work. The fundamental privacy interests of those who have made the government service their career, which underlie the recently enacted Privacy Act, are not addressed in the present proposal. The attached bill, in my view, addresses this issue and appropriately harmonizes it with the public's right to know.

Section _____ requires that all public officers and employees compensated at the minimum rate of Grade GS 16 or its equivalent file financial reports with a designated office in their Branch of Government. It also gives the Comptroller General oversight authority to review such statements as well as the authority to see to it that conflicting holdings or holdings which create the potential for conflict of interest are divested. Thus, the public's right to have accountability from public officers and employees is doubly protected. First, by the Executive, Legislative or



Judicial Branch office with which reports are filed and secondly by the Comptroller General.

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In addition, the attached bill closes certain loopholes contained in the present proposal. For example, the present proposal requires the reporting of any item received in kind whose fair market value "for such item" exceeds \$500. Such provision would allow a series of gifts from the same party, each valued at less than \$500 per item, to go unreported. The attached bill would aggregate such gifts and hence require reporting. Moreover, the attached bill would make clear that while property owned for personal use, such as the family home, furniture, jewelry, the family car, etc., need not be inventoried in disclosure forms, property of a business or investment nature of which the public official has knowledge must be reported.

[July 1976?]

My proposed bill recognizes and protects the public's right to be assured that public officials, regardless of which branch of government they serve in, disclose personal financial matters which could give rise to a conflict of interest in the performance of their official duties. Yet the fundamental privacy interests of career civil servants, which are clearly recognizable in the recently enacted Privacy Act, are also respected in my proposal, as they have not been in S. 495.

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