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SPECIAL PROSECUTOR AND WATERGATE GRAND JURY LEGISLATION

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HEARINGS

BEFORE THE

SUBCOMMITTEE ON CRIMINAL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

NINETY-THIRD CONGRESS

FIRST SESSION

ON

H.J. Res. 784

A JOINT RESOLUTION TO PROVIDE FOR THE APPOINTMENT OF A SPECIAL PROSECUTOR, AND FOR OTHER PURPOSES; AND RELATED MEASURES

AND

H.R. 10937

A BILL TO EXTEND THE LIFE OF THE JUNE 5, 1972, GRAND JURY OF THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

OCTOBER 29, 31; NOVEMBER 1, 5, 7, AND 8, 1973

Serial No. 18



Printed for the use of the Committee on the Judiciary

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U.S. GOVERNMENT PRINTING OFFICE

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WATERGATE GRAND JURY LEGISLATION

MONDAY, OCTOBER 29, 1973

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

The subcommittee met, pursuant to notice, at 10 a.m. in room 2141, Rayburn House Office Building, Hon. William L. Hungate [chairman of the subcommittee] presiding.

Present: Representatives Hungate, Kastenmeier, Edwards, Dennis, and Hogan.

Also present: Herbert E. Hoffman, counsel; Thomas W. Hutchison, assistant counsel; Roger A. Pauley, associate counsel; and Stephen P. Lynch, research assistant.

Mr. HUNGATE. The committee will be in order. Some of the Members have been detained by traffic. We will recess and start at 10 after 10.

[A recess was taken.]

Mr. HUNGATE. The committee will be in order.

The subcommittee today opens its hearings on two matters of vital importance and urgency. Today we focus on H.R. 10937, legislation to extend the life of the Watergate Grand Jury in the District of Columbia.

On Wednesday, October 31, the subcommittee will begin to receive testimony on various legislative proposals sponsored by approximately 150 Members of the House, to establish an independent Special Prosecutor to continue the work of the former Special Prosecutor, Mr. Archibald Cox.

At this point, we will place in the record a copy of H.R. 10937, without objection, and a copy of the executive communication directed to the Speaker of the House by former Attorney General Elliot L. Richardson, requesting its introduction.

[A copy of H.R. 10937 and the executive communication follow:]

[H.R. 10937, 93d Cong., first sess.]

A BILL To extend the life of the June 5, 1972, grand jury of the United States District Court for the District of Columbia

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) notwithstanding any provision of rule 6(g) of the Federal Rules of Criminal Procedure, or any other law, rule, or regulation—

(1) the United States District Court for the District of Columbia is authorized to extend the term of the grand jury of that court which was impaneled on June 5, 1972, for an additional period of six months, if the court determines that the business of that grand jury has not been completed at the expiration of the term otherwise provided by law;

(2) the United States District Court for the District of Columbia is authorized further to extend the term of that grand jury for another additional period of six months, if the court determines that the business of that grand jury has not been completed at the end of the term as extended under paragraph (1); and

(3) during any period of extension under this Act, the grand jury shall have the powers and duties of a grand jury during its regular term.

(b) With respect to any failure to extend the term of the grand jury under this Act, the grand jury shall be considered a special grand jury, and the failure to extend shall be considered a failure to extend under section 3331(b) of title 18 of the United States Code.

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C.

The SPEAKER,
House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: On behalf of the Special Prosecutor, I am enclosing for your consideration and appropriate reference a legislative proposal to authorize the United States District Court for the District of Columbia to extend the life of the Watergate Grand Jury beyond December 4, 1973, when it will otherwise expire.

The Grand Jury hearing the Watergate case is a regular grand jury empaneled June 5, 1972. Under F.R.Crim.P.Rule 6(g) it cannot continue more than 18 months without a statutory extension.

The legislative proposal provides that if, at the expiration of the present term of the aforementioned Grand Jury, the District Court determines that the business of the Grand Jury has not been completed, the court may extend its term for an additional period of six months. Provision is also made for a further extension for a second six-month period after a determination that its business has not yet been completed. During any period of extension of its term, the Grand Jury shall have all the powers of a grand jury during its regular term.

The legislative proposal further provides that if the term of the Grand Jury is not extended under this Act, the Grand Jury shall be considered a special grand jury, and the failure to extend shall be considered a failure to extend under Section 3331(b) of title 18 of the United States Code.

The need for extension of the life of this Grand Jury arises from the inescapable expenditure of several months in litigating whether the President is obliged to furnish recordings, memoranda and other papers believed to contain evidence highly material to key issues. At the present time the constitutional issue is before the United States Court of Appeals for the District of Columbia Circuit. Although its decision is expected shortly, the case seems surely destined for the Supreme Court. A Supreme Court decision cannot reasonably be expected before mid-November. In the event of a ruling in favor of the Special Prosecutor, both legal and technical problems may consume further time before the evidence is actually available, resulting in insufficient time for the Grand Jury to receive the evidence, pursue any resulting leads, and determine what indictments are warranted before December 4th.

The present law does not permit judicial extension of the life of a general grand jury. I recognize that statutory extensions have usually been discouraged, but the present case seems sufficiently extraordinary to require an exception, not only because of the unusual constitutional litigation which could not have been commenced earlier, but also because of the character of the crimes, the potential defendants, and the questions of public confidence that they raise. Furthermore, analogous extensions for three 6-month periods are permitted under the Organized Crime Control Act of 1970, 18 U.S.C. 3331–3334, when a special grand jury has been empaneled and the usual 18-month period proves insufficient for it to complete its investigation.

Counsel to the President has asked me to emphasize that submission of this legislative proposal is not to be construed as an endorsement of the position of the Special Prosecutor in the aforementioned court action.

I urge prompt consideration and enactment of this legislation.

The Office of Management and Budget has advised that there is no objection to the submission of this proposal from the standpoint of the Administration's program.

Sincerely,

ELLIOT RICHARDSON,
Attorney General.

Mr. HUNGATE. Also, at this time, if there is no objection, we will place in the record a statement by the chairman of the full Committee on the Judiciary, who introduced the legislation at the request of Mr. Richardson.

[The statement of Hon. Peter W. Rodino, Jr., follows:]

STATEMENT OF HON. PETER W. RODINO, JR., IN SUPPORT OF H.R. 10937

Mr. Chairman: At the outset, Mr. Chairman, permit me to commend you and the Subcommittee for your expeditious scheduling of this hearing on my bill, H.R. 10937, to extend the life of the Watergate grand jury, and on the legisla-

tive proposals relating to the appointment of an independent special prosecutor. These matters are of great national importance and the utmost urgency.

In compliance with the Subcommittee's announced plan of procedure, I shall restrict my testimony to the grand jury legislation, H.R. 10937, which I introduced on October 16, 1973.

The grand jury in question was empaneled on June 5, 1972, and has been hearing testimony on the Watergate break-in and related matters for some 16 months. Because Rule 6(g) of the Rules of Criminal Procedure for the United States District Courts provides that "no grand jury may serve more than 18 months," this grand jury will expire on December 4th of this year unless extended by law.

The proceedings of a grand jury are secret, but it is no secret that this grand jury has heard many witnesses and received much evidence. To permit it to expire before it has had an opportunity to complete its work would be grossly inefficient and highly detrimental to the administration of justice.

As you well know, one of the predicates on which our petit jury system is based is that jurors should have an opportunity to observe and react to the demeanor of witnesses. Although this is not universally required with respect to grand juries, and a successor grand jury can be supplied with the written testimony of the witnesses who appeared before an expired grand jury, or given summaries or excerpts of that testimony, the advantages of personal observation cannot be overemphasized. In the instant case, the opportunity to have observed the witnesses would appear to be particularly important and critical.

Ordinarily, 18 months is an adequate period of time for a grand jury to conclude its work. But the work of and problems encountered by this grand jury are not ordinary. I will not belabor you with a recounting of the obstacles which have confronted the Office of the Special Prosecutor and this grand jury. We are all aware of these. Suffice it to say, there appears to be good reason why an extension is essential.

The need for H.R. 10937 was outlined to the Speaker in a letter from former Attorney General Elliot Richardson, dated October 11, 1973, transmitting the proposal. Recent events make the extension all the more necessary.

Mr. Chairman, I urge the Subcommittee to report H.R. 10937 promptly and favorably.

Mr. HUNGATE. Chairman Rodino in his statement restricts his testimony to the grand jury legislation which he introduced October 16, 1973, and states that the grand jury in question was empaneled on June 5, 1972, and has been hearing testimony on the Watergate break-in and related matters for some 16 months. Because rule 6(g) of the rules of criminal procedure for the U.S. district courts provides that "no grand jury may serve more than 18 months," this grand jury will expire on December 4 of this year unless extended by law.

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counting of the obstacles which have confronted the Office of the Special Prosecutor and this grand jury. We are all aware of these. Suffice it to say, there appears to be good reason why an extension is essential.

The need for H.R. 10937 was outlined to the Speaker in a letter from former Attorney General Elliot Richardson, dated October 11, 1973, transmitting the proposal.

Does Mr. Kastenmeier or any other member have an opening statement?

Mr. KASTENMEIER. I do not.

Mr. HUNGATE. Mr. Dennis, any opening statement?

Mr. DENNIS. I think not, Mr. Chairman. Let us proceed with the business.

Mr. HUNGATE. The subcommittee is pleased to welcome the representative from the Justice Department, Philip A. Lacovara, Counsel to the Special Prosecutor.

Mr. Lacovara, we express our appreciation for your presence and ask for the record that you identify the gentlemen with you.

Mr. LACOVARA. Thank you, Mr. Chairman. With me this morning are Mr. Henry S. Ruth, Deputy Special Prosecutor, on my left, and Mr. Richard Ben-Veniste, who is in charge of the Watergate Task Force of the Watergate Special Prosecution Force. Mr. Ben-Veniste is on my right.

Mr. HUNGATE. Do you have a prepared statement which has been furnished to the committee?

Mr. LACOVARA. I do, Mr. Chairman.

Mr. HUNGATE. Without objection, it may be made a part of the record at this point and you may proceed as you wish.

Mr. LACOVARA. Thank you.

TESTIMONY OF PHILIP A. LACOVARA, COUNSEL TO THE SPECIAL PROSECUTOR, ACCOMPANIED BY HENRY S. RUTH, JR., DEPUTY SPECIAL PROSECUTOR, AND RICHARD BEN-VENISTE, ASSISTANT SPECIAL PROSECUTOR

Mr. Chairman, I am pleased to appear before this committee to testify on H.R. 10937, a bill to provide for extension of the life of the June 5, 1972, grand jury of the U.S. District Court for the District of Columbia, the grand jury that is investigating the Watergate break-in and the possible obstruction of justice and other offenses following that incident. The purpose of the legislation is to enable this grand jury to continue and complete its investigation after resolution of the current litigation arising out of the grand jury's subpenaing of tape recordings and other documents in the White House. Mr. Ruth, Mr. Ben-Veniste, and I are appearing on behalf of the Department of Justice which has requested introduction and enactment of this legislation. And with the subcommittee's permission, I would like Mr. Ruth to explain the current status of the Watergate Special Prosecution Force before I continue with my testimony about this bill.

Mr. HUNGATE. Mr. Ruth.

Mr. RUTH. Thank you, Mr. Chairman.

As you all know, as of Friday, October 19, we were the Watergate Special Prosecution Force operating under guidelines of independence

between then Attorney General Richardson and the Special Prosecutor Mr. Cox.

Saturday night that arrangement was abolished and when we came to work on Monday, the Watergate Special Prosecution Force was reconstituted by Acting Attorney General Bork in the Criminal Division of the U.S. Department of Justice and the new head of the Special Prosecution Force was Mr. Henry Petersen, Assistant Attorney General of the Criminal Division of the Department.

We were instructed by Mr. Bork and Mr. Petersen to proceed with full, fair, and thorough investigation as we had previously; and so on Tuesday morning, after the Federal holiday, we did just that.

We have two grand juries operating. They operated all last week. The staff is intact. We are operating under the directions of Mr. Bork and Mr. Petersen to proceed thoroughly ahead and we are here this morning testifying for the Department on the Grand Jury Extension Act.

Mr. HUNGATE. Thank you, sir.

Mr. LACOVARA. The Department has sought extension of the term of the grand jury that has been investigating the complex Watergate matter over the past 16 months in order to avoid the delay and possible prejudice to the Government, to witnesses, and to the general public that would result if its term were allowed to expire before the completion of its investigation, thus necessitating presentation of great masses of evidence to a new grand jury.

Under existing law, which is set forth in rule 6(g) of the Federal Rules of Criminal Procedure, a regular grand jury may not serve more than 18 months. The June 5, 1972, grand jury is a regular grand jury and its term, accordingly, would ordinarily expire on December 4, 1973. It is no longer unusual or exceptional, however, for grand juries to sit longer than 18 months. In title I, section 101(a) of the Organized Crime Control Act of 1970, 18 U.S.C. § 3331–3334, Congress provided for the summoning of special grand juries to investigate criminal activity and to serve for 18 months. However, if at the end of that term "the district court determines the business of the grand jury has not been completed," the court may enter orders extending the term of the grand jury for additional 6-month periods, up to a maximum term of 36 months (and, in certain circumstances, beyond that period when it is necessary to hear additional testimony in connection with the preparation of the grand jury's report). Such special grand juries are now regularly called in each of the largest Federal judicial districts and in other districts where the Attorney General certifies that "a special grand jury is necessary because of criminal activity in the district."

Legislation authorizing extension of the life of the June 5, 1972 grand jury of the District of Columbia was proposed because of the time being consumed in litigating important constitutional issue involving the grand jury's subpenaing of White House tapes and documents, which the grand jury believes are highly important to its investigation. The President's decision to produce the subpenaed evidence for in camera inspection, in accordance with the orders of the court of appeals and the district court, has not obviated the need for this legislation. While it is true that those orders will not now be presented for time-consuming review by the Supreme Court, the proce-

dures delineated by the court of appeals decision may lead to substantial delay before it is finally determined what evidence will be presented to the grand jury. Those procedures contemplate three distinct steps, each of which may lead to further appellate review.

First, the President initially may excise from the recordings and documents produced to the court any matters relating to the "national defense" or "foreign relations". The Department of Justice is authorized by the court's decision to contest the basis for such withholdings. If the district judge overrules the claim of privilege based upon state secrets and directs that those portions as well be submitted for judicial review, the President's counsel will immediately have a right to appeal that decision. Similarly, if the court upholds the claim, the Department of Justice may appeal.

Second, the district judge may seek aid from the Watergate Special Prosecution Force in determining whether specific items are relevant to the grand jury's investigation, and in doing so may grant access to those portions of the materials as to which privilege is claimed. Before the judge allows access to any recordings or documents, however, he must permit counsel for the President the opportunity to take an appeal.

Third, and finally, either party will be able to appeal from the judge's determination as to what evidence shall be presented to the grand jury. It is entirely possible, then, that the procedures for in camera inspection will consume several weeks if not months, although we would hope that a responsible, cooperative attitude by all parties concerned would allow the courts to proceed with dispatch.

Thus, Mr. Chairman, without enactment of the proposed extension act, it is virtually certain that this grand jury will not have access to significant evidence in this highly important investigation by the expiration of its term. Furthermore, even after the evidence is presented, the grand jury must have some additional time to pursue related areas of inquiry disclosed by the evidence and to engage in careful deliberation before voting to indict or not to indict.

The alleged criminal activity in connection with the Watergate break-in and subsequent events, involving as it does public confidence in the integrity of Government and the administration of justice, makes it highly appropriate for Congress to authorize the district court to extend the life of the grand jury that has been involved in this matter for well over a year. While it would be possible to allow the Watergate grand jury to expire and to turn this entire matter over to a new grand jury, such a course would result in further delays while the new grand jury reconsiders the evidence. There can be no legitimate interest in undue protraction of this investigation. In addition, referral to a new grand jury would require either the recall of numerous witnesses, many of whom have already testified several times, or the submission of a large volume of hearsay evidence. In an investigation where the credibility of so many witnesses is so important, it is clearly desirable for the grand jury to exercise its constitutional responsibilities after hearing the witnesses themselves. But the additional delay, substantial inconvenience, and considerable expense inherent in that course—while public speculation about possible criminal charges continues—militate against that alternative as well.

For these reasons we propose the enactment of H.R. 10937, as submitted. The bill is modeled on the relevant provisions of the Organized Crime Control Act of 1970, and would authorize the court to extend the life of the present Watergate grand jury, for a limited period, to allow it to complete its important business. The bill, as submitted, would authorize the district court to extend the life of the grand jury for an additional 6-month period upon the court's determination that the grand jury has been unable to complete its business within the first 6-month extension. (Parenthetically, I note that the 1970 act provides for as many as three 6-month extensions.) We believe it most likely that the Watergate investigation will be completed and the appropriate action taken by the grand jury well before the first extension period expires. Nevertheless, given the possibilities of delay inherent in the procedures established by the court of appeals, we submit that the wisest practical course is to provide for that contingency at this time, by authorizing a second 6-month extension if necessary. The bill also includes the same provision for judicial review of any failure to extend the term that is contained in the 1970 act.

In conclusion, Mr. Chairman, enactment of this legislation by the Congress would measurably promote the ability of the courts to deal with the criminal offenses surrounding the Watergate affair. The legislation would also serve the public interest in the efficient and effective administration of criminal justice. We, therefore, urge the prompt passage of this bill.

Thank you.

Mr. HUNGATE. Thank you very much, Mr. Lacovara. Does that conclude your statement and the statements of your associates at this time?

Mr. LACOVARA. Yes, sir.

Mr. HUNGATE. Insofar as practicable we will follow the 5-minute rule in questioning and if we are not done, we will come back a second time.

Mr. Kastenmeier.

Mr. KASTENMEIER. Thank you, Mr. Chairman.

It would appear that your statement is clear and unambiguous but I would like to ask you, Mr. Lacovara, is there any opposition whatsoever that you are aware of to this legislation within the Justice Department, within the administrtion, or outside of Government?

Mr. LACOVARA. Not that I am aware of, Congressman Kastenmeier. The submission of the legislation over former Attorney General Richardson's signature followed approval by the Office of Management and Budget. Counsel for the President in the litigation which is still underway asked that the Attorney General include in the Speaker's letter a paragraph stating that executive branch approval of the submission of the legislation did not necessarily indicate approval by White House counsel of the position being taken by the Special Prosecutor on the constitutional issues in litigation. But apart from that I am not aware of any reluctance or reservation or objection from any other quarter.

Mr. KASTENMEIER. I noticed your reference to that issue and it would appear to be germane to me only insofar as it was causal as far as the delay is concerned. That is why the grand jury had not completed its work or will not as of the expiration of 18 months, and in part it

appears that the constitutional issues involved, that is to say, the administration's, the White House's reluctance to comply with the Special Prosecutor's demands, was a part of the reason for the delay and the inability to complete the investigation presentation. Is that not correct?

Mr. LACOVARA. I would have to say that is correct.

Mr. KASTENMEIER. In other words, had the President complied at the outset, you might well have finished on time.

Mr. LACOVARA. I think that is also fair to say.

Mr. KASTENMEIER. And I assume because Mr. Richardson sent us this letter when he did that we cannot, however, attribute this request in the context of the resignation and dismissals of a week ago Saturday. Is that correct?

Mr. LACOVARA. Well, we have been advised as recently as several days ago that Acting Attorney General Bork has reaffirmed the Department of Justice's support for this legislation. To the extent that your question sought information whether Mr. Richardson's resignation was somehow related to a dispute over extending the grand jury, my answer, I think, would be no.

Mr. KASTENMEIER. The question was meant to inquire whether there might be an additional delay because of the mere fact of the dismissal of the Special Prosecutor and the resignation and dismissal of the Attorney General and Deputy Attorney General.

Mr. LACOVARA. I am sorry. I misinterpreted the question. I think the answer to that question as well would be "yes." Although we have been proceeding in the past week since the resignation of Attorney General Richardson and the discharge of Mr. Cox, matters are unquestionably uncertain and the President's statement the other night that he will ask the Acting Attorney General to appoint a new Special Prosecutor and congressional movement toward establishing an independent statutory Special Prosecutor no doubt will lead to some further delays until the actual responsibility for this investigation is picked up.

Mr. KASTENMEIER. You appear to be confident that you can complete your work within the next 6-month period following December 4, is that correct?

Mr. LACOVARA. Yes. Our projection, Congressman Kastenmeier, would be that, unless unforeseen and unforeseeable developments occur, we will be able to present to the grand jury the basic evidence that it does need to complete its investigation.

Mr. KASTENMEIER. And I ask you that notwithstanding the fact that you are unsure of the access you might have to certain important evidence, whether it is in the White House or elsewhere, that may be important.

Mr. RUTH. Congressman Kastenmeier, if I may, the grand jury that is involved in this particular act is the one considering the Watergate break-in and coverup. The act does not extend to the second grand jury with which we are dealing which was convened just this past August and thus has 16 months left in its own term. That second grand jury is dealing with all the other investigative matters that the special prosecution force is dealing with. So this particular grand jury at issue today is just the Watergate break-in and coverup.

Mr. KASTENMEIER. I appreciate the clarification.

Mr. LACOVARA. And I should also point out in the bill as submitted we have asked that modeled on the 1970 Organized Crime Control Act the district court be given authority to grant a further 6-month extension if in June of 1974, after the first 6-month extension expires, the grand jury has not yet completed its business, that it be allowed to continue for another 6 months.

Mr. KASTENMEIER. Let me just further ask, to what extent is that particular request—does it have precedents? That is to say, going to the question of whether the Congress ought to extend you 6 months or 6 months plus an addition 6 months if you so request, do you have—is there any reference you can make to other legislation or other actions which suggest as a model the request herein contained?

Mr. LACOVARA. Well, the only legislative precedent that I am aware of is the 1970 Organized Crime Control Act. It had been the general practice before rule 6(g) was promulgated for grand juries to serve for the length of the term of the court. The court, however, could extend the grand jury, I believe, beyond that term as an exercise of its inherent power. Rule 6(g) was designed to eliminate the term provision which was much shorter than 18 months and to fix a reasonably practical outside limit of 18 months. Congress in 1970 found that that was not in the organized crime area, at least, a practical outside limit and built in this flexibility and that is the flexibility that we suggest would be appropriate here.

Mr. KASTENMEIER. Well, I appreciate the answer. I have just one quick, final question. That is, to what extent are the grand jurors themselves affected? Whether it is 18 months of their lives or 24 or 30 months of their lives—it is a question that affects a small number of people but affects them profoundly. Do you feel that this is a reasonable request to make of those grand jurors?

Mr. LACOVARA. Mr. Kastenmeier, I would, without breaching the rules of grand jury secrecy, state that on the basis of my contacts with the grand jurors, their consensus is that they do not want to leave this work unfinished. I would like Mr. Ben-Veniste who has worked more closely with the grand jury to address himself to that as well.

Mr. BEN-VENISTE. I feel that that adequately summarizes it, sir. They have invested a great deal of time in this. They are vitally interested in the outcome and I believe on balance they are willing to make the sacrifices necessitated by a prolonged term in order to complete their work.

Mr. KASTENMEIER. I appreciate the answer.

Thank you, Mr. Chairman.

Mr. HUNGATE. The gentleman's time has expired.

Mr. Dennis.

Mr. DENNIS. Thank you, Mr. Chairman.

Mr. Lacovara, as I read the bill here, we first authorize the U.S. district court to extend the term of the grand jury for 6 months and then we further authorize the court to extend it for an additional 6 months. Your testimony is, as I understand you, that you think you will be able to get your business done in the first 6 months. Is that correct?

Mr. LACOVARA. Yes, sir.

Mr. DENNIS. Am I also correct that, under section (b) on page 2 of the bill which refers to section 3331(b) of the United States Code, if

the district court fails to extend the grand jury at any time, the grand jury itself can go to the chief judge of the court of appeals and get an extension up to 36 months?

Mr. LACOVARA. Well, under 3331(b) of title 18 the grand jury could seek extensions up to 36 months. Under this bill as we understand it, there would be the opportunity for the grand jury only to seek the number of extensions that are authorized in this legislation. So it would be simply two periods of extension or a maximum of 30 months from the date was originally empaneled.

Mr. DENNIS. Well, it says:

> With respect to any failure to extend, the grand jury shall be considered a Special Grand Jury and failure to extend shall be considered a failure to extend under Section 3331(b).

Now, let us say Judge Sirica extended the grand jury 6 months and then he refused to extend it a second 6 months. I would think the grand jury could go in and get another 12 months.

Mr. LACOVARA. No. Under 3331(b) the extensions must be in 6-month lots. That is clear, I believe.

Mr. DENNIS. Well, the total, though, could be 12 months.

Mr. LACOVARA. No, sir. I respectfully disagree. The trigger language in subsection (b) of the bill before the subcommittee says:

> With respect to any failure to extend the term of the grand jury under this Act.

And the act provides only for two applications to the district court to extend the grand jury for 6-month periods. And, therefore, it would seem to us that there would not be room to argue and certainly neither we nor the grand jury, I believe, would be interested in arguing that this authorizes an application by the grand jury to the chief judge of the circuit for an extension period that the district court declined to grant because the statute itself did not authorize him to grant it. That is, he would be authorized under this bill to grant a 6-month extension. If the grand jury asked at the end of that period for further 6 months because it had not yet completed its business, he could grant another extension. If at the end of that time the grand jury has not completed its business, under this statute there would be no further judicial recourse either by the district court or by the chief judge of the circuit.

Mr. DENNIS. You are saying, then, that all the grand jury could do under section (b) would be to get the 6-month extension that the court might have granted if the court failed to do so.

Mr. LACOVARA. Yes, sir. This, as in the Organized Crime Act, is simply a judicial review mechanism. If the grand jurors believe that the district court has not perceived their problem soundly, they have an opportunity to seek judicial review from the chief judge of the circuit. It is not a grant of an additional extension authority.

Mr. DENNIS. Well, I am glad to get your view on that. I must confess it is not the way that I read it, at least at first, because when you say "considered a failure to extend under section 3331(b)" and then you read 3331(b), it seems to me that that gives the grand jurors a right to ask for a longer extension. And if you do not really mean to do that, I am not sure but what section (b) needs some revision in the drafting.

Mr. LACOVARA. Well, we certainly welcome any revisions that will help clarify the language. We thought that this proposed subsection

(b) adequately tied in the bill before the subcommittee to existing legislation which I believe might be susceptible of the same difficulties that you refer to, if it were construed as granting carte blanche to the chief judge to extend the life of the grand jury indefinitely upon the grand jury's application. So far as I know that has not been understood to be the meaning of the subsection.

Mr. DENNIS. What would really be wrong with just omitting section (b) and authorizing the court to extend it 6 months and an additional 6 months?

Mr. LACOVARA. Well, in this climate of justifiable reliance on procedures for judicial review, we thought it sound to model the proposed legislation on the legislation enacted by Congress in 1970 and provide that if the grand jury believes the district judge has improperly interfered with its constitutional responsibilities by declining to extend its life, the grand jury should have an opportunity to seek judicial review from the chief judge of the circuit.

Mr. DENNIS. Do you think there is any likelihood that Judge Sirica will not grant whatever extension is needed to conclude this matter?

Mr. LACOVARA. I would hope not, but one thing I have learned in my relatively brief career at the bar, sir, is not to predict what judges may do even when things seem clear to me.

Mr. DENNIS. That is a sound general observation, I think. However, you feel you can finish in 6 months. Under the bill without section (b) you probably have got a year. And you can always come back here and make fairly sure, although you cannot tell about Congress either, that in this particular matter we would give you an extension if you made a decent showing of need.

Mr. LACOVARA. We have given considerable thought to that question whether we should ask simply for a single 6-month period. I should say we also considered whether we should model the bill precisely on the 1970 legislation and provide for up to three 6-month periods. So many of these factors are beyond our control, including the possibility of appeals that would be taken, not by us but by White House counsel, that could conceivably draw these proceedings out for a long period. We thought that although, as I stated in my testimony, it is likely that we can complete the investigation within 6 months, it would be desirable for Congress to act now to provide a safety valve rather than to go on record now and say the 6 months is enough and then perhaps to require that we come back next spring and put the Congress to having to make this choice all over again. We think the issue is ripe for legislative consideration and we do not see, frankly, where the harm would be in providing that if the court determines the business has not been completed, the court may extend the grand jury's term for that additional 6-month period.

Mr. DENNIS. You would certainly have adequate time for anything you can foresee, more than adequate time if you simply gave the court the option to extend another 6 months for a total of 18; would you not?

Mr. LACOVARA. Eighteen months?

Mr. DENNIS. Well, in other words, instead of section (b), as you were suggesting a minute ago, you could authorize the court to give another 6-month period which would make a total of 18 in the bill, 6 months, 6 months, and 6 months, rather than going down to the grand jury extension.

Mr. LACOVARA. Yes; I think that is true.

Mr. DENNIS. So really, if you did that, the only reason for putting section (b) in there would be to give the grand jury some freewheeling power other than what you gave the court.

Mr. LACOVARA. This is the same provision that is in the Organized Crime Control Act.

Mr. DENNIS. I do not dispute that, but I am just talking about what you need right here. You modeled it on the act, I understand.

Mr. LACOVARA. I think this legislation, and it has been our experience with this investigation, reflects the role of the grand jury in the system of criminal justice, Mr. Dennis. The grand jury has a dignified status as the representative of the ordinary people, and for that reason we are not reluctant at all to copy the model that Congress established in 1970 to give the grand jury some voice in its fate.

Mr. DENNIS. Well, I think I see your position. I am not sure I agree with your interpretation of section (b), but I appreciate your testimony.

Thank you.

Mr. LACOVARA. Thank you, sir.

Mr. HUNGATE. Mr. Edwards, please.

Mr. EDWARDS. Thank you, Mr. Chairman.

Mr. Lacovara, the only communication we have from the head of the Justice Department is dated October 11 and that is from former Attorney General Elliot Richardson who writes us in approval of the bill. Do you have also the views of the Acting Attorney General, Mr. Bork, that he also, and the Department as a whole, is in favor of this legislation?

Mr. LACOVARA. Yes, sir. I have discussed this with Mr. Bork specifically and he said he also supported the bill and that the Department's official position continues to be that it favors enactment of the legislation as submitted.

Mr. EDWARDS. I have no further questions, Mr. Chairman.

Mr. HUNGATE. Thank you, Mr. Edwards.

Mr. Hogan.

Mr. HOGAN. Yes.

Mr. Lacovara, I would like to go back to the point that Mr. Kastenmeier brought up about the possible inconvenience of the grand jurors themselves.

My recollection is that the grand jury can consist of 16 to 23 members. Does it in any way breach its security to know that there are a sufficient number so that if there is great inconvenience to any of the individuals who might be called upon to serve an extra year that he could be excused?

Mr. LACOVARA. My opinion on that, Mr. Hogan, is "yes." I would like Mr. Ben-Veniste to respond more fully to the question if I might.

Mr. BEN-VENISTE. Sir, there are presently 22 grand jurors regularly sitting. One grand juror is seriously ill. So that I would think that the answer to your question is "Yes," that with the cushion of 6, we could make arrangements if anyone has a particular problem requiring extended excuse.

Mr. HOGAN. Can we assume that the grand jurors will be advised of this option?

Mr. BEN-VENISTE. Yes, sir.

Mr. HOGAN. Because I can foresee tremendous personal and career difficulties that this extended service would create.

Mr. BEN-VENISTE. As you understand, of course, the decision as to whether to excuse a grand juror from service would be one for the district judge to make.

Mr. LACOVARA. Mr. Hogan, I think I can appropriately point out that the idea of extending this grand jury originated not with the Special Prosecutor but with the grand jury itself. That possibility was raised as the apparent consensus of the grand jurors.

Mr. HOGAN. Well, I can understand that, except that there may be one among them who has very special problems that are not applicable to all.

Mr. LACOVARA. Yes. We are sensitive to that and I believe the court would certainly weigh very heavily any request by a grand juror to be excused and as Mr. Ben-Veniste stated, we do have fairly full attendance so that there could be several excusals and we would still have a sufficient quorum to act.

Mr. HOGAN. Going back to your conversation with Mr. Dennis, I am not sure I agree with your interpretation of what section (b) does because it seems to me from my reading of it that after the two 6-month extensions we then revert back to the language in the Organized Crime Act of 1970, which makes possible another 6-month extension, so if that is not the intention I agree with Mr. Dennis that I think we ought to clarify it.

Mr. LACOVARA. I certainly have no objection to any clarifying language that the subcommittee or the full House may believe is desirable. My response is based in the language of subsection (b) which talks of, and I quote "With respect to any failure to extend the term of the grand jury under this act," and since the act provides only for two applications for extensions, it would be hard, I think, for me as a lawyer arguing the contrary position to construct a——

Mr. HOGAN. Can I interrupt for a second? We are talking about two different animals. We are talking in the instant case before us about a general grand jury and the way I read this is that this grand jury, upon the occurrence of these events, ceases to be a general grand jury and becomes a special grand jury as provided for in the Organized Crime Act of 1970.

Mr. LACOVARA. Well, that would not be the intent of the language of the bill, and if there seems to be general difficulty with this language, it might be sufficient to use the model of section 3331 of title 18 which says "But in no event shall a special grand jury term exceed 36 months," and it might be sufficient to add to subsection (b) of the bill, "but in no event shall the term of the June 5, 1972, grand jury exceed 30 months."

Mr. HOGAN. I think that would be advisable and without belaboring the point any further, former Attorney General Richardson's letter of October 11 seems to indicate that he feels the same way.

Mr. Chairman, I have no further questions.

Mr. HUNGATE. Thank you, Mr. Hogan.

Let us see if I understand our consensus here. As I understand it, you would have no objection, in fact, it is the intention of the legislation, to add at the end of page 2 of section (b) "but in no case shall the term of this grand jury extend beyond 30 months."

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Mr. LACOVARA. Yes, sir, 30 months. That language would be similar to the last sentence of section 3331(a) of title 18 which provides "no special grand jury term so extended shall exceed 36 months." And this language would be ——

Mr. HUNGATE. Would be satisfactory, you would think.

Mr. LACOVARA. Yes, sir.

Mr. HUNGATE. Thank you.

Mr. Ruth, you stated in your remarks something concerning the special task force. What is the number of that force?

Mr. RUTH. Mr. Chairman, we have about 38 attorneys and about a like number of other professional and support personnel, for a total of 76 persons.

Mr. HUNGATE. They are on the payroll now?

Mr. RUTH. Yes, sir. We have had not one single resignation.

Mr. HUNGATE. That payroll is and was, or is it different from the Department of Justice's?

Mr. RUTH. We are attached for administrative purposes only, we were for administrative only, to the Department of Justice, yes, sir.

Mr. HUNGATE. But I would understand you still are.

Mr. RUTH. We are attached now for administrative and supervisory purposes.

Mr. HUNGATE. That is where the check comes from.

Mr. RUTH. Yes, sir. Every 2 weeks. Our total annual budget, sir, is $2.8 million.

Mr. HUNGATE. Thank you.

You stated, Mr. Lacovara, that there are two grand juries which are now working.

Mr. LACOVARA. Yes. The grand jury that this bill relates to is the so-called Watergate grand jury which was empaneled as an ordinary District of Columbia grand jury in June 1972 and routinely had the Watergate break-in committed to it. After the trial of or pleas of the seven original Watergate defendants, the grand jury resumed its investigation around March of this year and has been in regular session since then and has had, I understand, about 193 appearances. In August of this year, after our jurisdiction was established, we asked Chief Judge Sirica to empanel a new grand jury for our exclusive use in investigating the other matters under our jurisdiction—campaign contribution violations, the ITT matter, the activities of the so-called White House Plumbers, and the misuse of Government powers.

Mr. HUNGATE. Do you call it Watergate-related matters or what?

Mr. LACOVARA. The June 5, 1972, grand jury is considering only the Watergate break-in and coverup and related matters.

Mr. HUNGATE. That is the Watergate-related matters grand jury. Does the other one have any popular name?

Mr. LACOVARA. We just call it the other grand jury. It was empaneled on August 13, 1973, so it has about 15 months to run and we do not see any problem on that score.

Mr. HUNGATE. Under the Organized Crime Act, grand juries have power to get extensions without special legislation; is that correct?

Mr. LACOVARA. Special grand juries do; yes.

Mr. HUNGATE. This is not that type of grand jury. Is that why you are not using that act?

Mr. LACOVARA. That is correct.

Mr. HUNGATE. Has there been prior legislation of this nature to your knowledge?

Mr. LACOVARA. Apart from the Organized Crime Control Act I am not aware of any prior legislative instances of this type.

Mr. HUNGATE. However, you have no constitutional questions as to the ability of Congress to legislate here?

Mr. LACOVARA. I do not; no.

Mr. HUNGATE. On page 3 of your statement you say, "The President initially may exercise from the recordings and documents matters relating to national defense and foreign relations." The court order is so written; is that right?

Mr. LACOVARA. Yes, sir. The opinion of the court of appeals states that that is one of the procedures that is to be followed.

Mr. HUNGATE. Might the Department of Justice appeal? Would they have the right to appeal in that case?

Mr. LACOVARA. As the court of appeals has written its opinion, it says it would construe the sustaining of any claim of privilege as the suppression of the testimony of a witness under section 3731, the new Criminal Appeals Act as amended. That was the position that we had argued to the court of appeals, and apparently all of the judges accepted that proposition.

Mr. HUNGATE. In discussing this in response to one of the earlier questions, you said something about 6 months. I think you said December 5. Is it December 4 or 5?

Mr. LACOVARA. Well, December 4 would be the expiration date. December 5 would be the beginning of the extended term.

Mr. HUNGATE. Why is subsection 3 on page 2 necessary?

Mr. LACOVARA. We wanted to make clear that the grand jury, as extended, would continue to have all of the responsibilities, duties, and powers of a regular grand jury and would not be limited simply to receiving the evidence coming out of this litigation. That is, if it thought that it needed clarification and wanted to call certain other witnesses, it would have the power to subpena other witnesses.

Mr. HUNGATE. Thank you.

Mr. Kastenmeier, do you have another question?

Mr. KASTENMEIER. Mr. Chairman, as I think, the legislation has overwhelming support, but there has been a question or two raised by Mr. Dennis and Mr. Hogan. You indicated you might have asked for 6 months or you might have asked for 12 or 18, but you have asked for 6 and 6, and when I asked you how come and what precedents exist, you indicated statutory authority, but it was not that question really I was addressing myself to. It is, rather, a question as to what precedents for this particular request exist because if it is the first of its kind, it may indeed serve as a precedent to come. Indeed, the other grand jury itself might use that model, 6 plus 6. Or it may relate to an individual grand jury on an ad hoc basis. I do not know. But so that we can justify this particular term, with it in mind that it may serve as a precedent in the future, since there is no precedent in the past, what can you counsel us?

Mr. LACOVARA. Well, my response, Mr. Kastenmeier, is that this incident is, I hope, unique in American history. The need for the expedition that we believe would be served by extending the term of this grand jury is, I believe, unique in American history. We have made an admittedly ad hoc prediction of the time that it will take for this grand jury to continue and complete its investigation of the Watergate matter. The Department of Justice has regularly in the past declined to seek legislation to extend the term of particular grand juries, making the basic policy judgment that it is not in the interests of justice to come up with individual statutory exceptions, and generally it is more appropriate to wrap the matter up before a single grand jury or to present the case to a new grand jury.

In this situation, as the administration's support of the legislation would indicate, we are dealing with something that is without precedent, and I hope we will have no need for duplication in the future. The term that we selected was simply based on what we believe are the practical issues involved in this particular investigation.

Mr. KASTENMEIER. And so it is not meant to serve, in fact, as a precedent for the future, and you cite no particular case precedents for this request.

Mr. LACOVARA. Yes, sir, that is correct.

Mr. KASTENMEIER. Thank you.

Mr. HUNGATE. Mr. Dennis, do you have another question?

Mr. DENNIS. There seems to be no question but that the present grand jury needs some additional time. That being so, I am wondering why it is necessary to give any discretion to the court as to the first 6 months. Why do we not just extend it 6 months by statute?

Mr. LACOVARA. Well, we would not have any objection to that course either. We were trying in drafting this legislation to use an existing pattern that Congress had apparently found satisfactory which was to make this a judicial determination. The grand jury is an adjunct of the court, although the Congress, of course, regulates criminal procedure, and there is in my judgment, as I mentioned to the chairman, no constitutional doubt in my mind with congressional action in the field. But our submission was that just as in the 1970 act, this should be a matter that Congress should authorize the court to deal with.

Mr. DENNIS. If we did take the approach which I just suggested, of course, we could, after the first 6-month extension by statute, give the court authority to extend for another 6 months or for two additional 6-month periods if we wished. What would your reaction be to that?

Mr. LACOVARA. Those are alternative proposals and variations that are acceptable to us because they would serve the basic needs that we have addressed. And we defer to the Congress on how best to handle that, Mr. Dennis.

Mr. DENNIS. Thank you.

Mr. HUNGATE. Thank you, Mr. Dennis.

Do any other members have further questions? I have just a few, Mr. Lacovara.

As I understand it, we discussed subsection 3 on page 2. That provision does not exist in the Organized Crime Act. I do not think it would hurt us here but would it create a question as to the power of the grand juries under the Organized Crime Act?

Mr. LACOVARA. I would not think it would be read to imply that organized crime grand juries have lesser powers.

Mr. HUNGATE. That is certainly not the intention of the drafters.

Mr. LACOVARA. Certainly not the intention. In fact, one of the reasons that we did not in this legislation try to transform this grand jury into a special grand jury, is that special grand juries have more powers than regular grand juries. The basic purpose of the special grand jury legislation was to provide for extensive reports on public corruption, organized crime activity, and certain judicial proceedings relating to presentments made by special grand juries short of actual indictments.

Mr. HUNGATE. The Chair expresses appreciation to the members for their attendance and preciseness of their questions. We will try to finish this shortly and consider going into markup session after a recess.

What demands are made on the grand juries? Can you give me a sample? What does the grand jury do during the week, Mr. Ben-Veniste?

Mr. BEN-VENISTE. That would depend, of course, on a number of circumstances. Obviously, at this point of the investigation we are awaiting primarily the results of the subpenaed materials.

Mr. HUNGATE. Pardon me. Could you give me a sample for the first week you worked with the grand jury?

Mr. BEN-VENISTE. Understanding that I came on board the first week in July of this year, I would say at that time the grand jury was sitting 3 days a week.

Mr. HUNGATE. What were those days?

Mr. BEN-VENISTE. Tuesday, Wednesday, and Thursday, primarily. We would sit some days only in the mornings and some days morning and afternoon sessions, depending on our witness schedule. I would say that those days in that period of time required a more full schedule than they do now.

At this point we are awaiting primarily a review of the material which has been subpenaed.

Mr. HUNGATE. I appreciate that. At what hour do you go to work in the morning?

Mr. BEN-VENISTE. 10 o'clock.

Mr. HUNGATE. When do you recess for lunch?

Mr. BEN-VENISTE. Recess at 1, reconvene about 2, and normally sit through to 4:30 or 5 if it is a full day.

Mr. HUNGATE. Thank you very much.

I would like to refer to a letter sent to the Acting Attorney General—you have copies of it—on October 23, from the chairman of this committee, Mr. Rodino:

> It is my understanding that subsequent to the dismissal of the Special Prosecutor, Archibald Cox, steps have been taken to assure that none of the files in the office of the Special Prosecutor will be removed from their present location.
>
> So that the Committee can properly exercise its oversight responsibilities, I would very much appreciate it if you would inform me as soon as possible as to the security measures now in effect.

I am inquiring, because I understand the chairman has not had a reply to that matter. I do not know who to blame, the Post Office or the Justice Department. Can you check on that and respond?

Mr. LACOVARA. I can respond in an indirect way. We have obtained from Chief Judge Sirica a protective order which is designed, I believe, to achieve the same objective that Chairman Rodino was seeking to achieve. The protective order from the court establishes that all of our—virtually all of our files are to be considered in the custody of the court and prevents their removal from our offices by any person other than a staff attorney of our office or Assistant Attorney General Petersen.

Mr. HUNGATE. Thank you. I think what I am trying to say rather awkwardly is that the committee chairman would want to be advised directly. When he writes a letter, he should be answered directly. You appreciate that.

Mr. LACOVARA. Yes, sir.

Mr. HUNGATE. We are essentially a group and would like to know directly what is going on.

Mr. LACOVARA. I will bring the matter to the attention of Mr. Bork and ask him to respond.

Mr. HUNGATE. Unless there are further questions——

Mr. DENNIS. Mr. Chairman——

Mr. HUNGATE. Yes.

Mr. DENNIS. I might ask one question just in a general way. Do I take it correctly from the testimony of you gentlemen that you are of the opinion that the grand jury is a viable, useful, and necessary part of our system of administration of criminal justice?

Mr. LACOVARA. I have not seen anything that can substitute for it, sir.

Mr. DENNIS. Do you other gentlemen agree with that?

Mr. BEN-VENISTE. Unqualifiedly, sir.

Mr. RUTH. I agree with the way you stated it, Mr. Dennis, particularly for investigative purposes.

Mr. HUNGATE. That is the safest thing to do.

Mr. DENNIS. I thank you gentlemen and I am glad to have that on the record because we have had some rather strong assaults on the whole grand jury system in the last few months by various distinguished citizens including some who appear here. I was interested in the gentlemen's point of view.

Mr. HOGAN. Mr. Chairman, could I add a caveat to that? I am sure you also have some suggestions, however, for future hearings as to how the grand jury system could be improved.

Mr. LACOVARA. I think those of us who have had some contact with grand juries might suggest some improvements.

Mr. HOGAN. Thank you.

Mr. HUNGATE. Thank you, and I thank each of you gentlemen, Mr. Lacovara, Mr. Ben-Veniste, and Mr. Ruth, for your contribution. It has been most helpful.

Mr. LACOVARA. Thank you, sir.

Mr. HUNGATE. That concludes the testimony.

The committee is in receipt of a letter from Chesterfield Smith, president of the American Bar Association, which without objection, will be read into the record at this point:

Dear Chairman Rodino: At a special meeting of the American Bar Association's Board of Governors on October 27, the Board adopted the following resolution pertaining to the extension of the life of the grand jury in the so-called "Watergate affair":

RESOLVED, that the Association recommends to the Congress of the United States that it promptly extend the life of the existing grand jury in the District of Columbia, which has considered a portion of this matter, for a period of 6 months.

The Association adopted additional resolutions relating to the special prosecutor which would be conveyed to you at the time of hearings later in the week.

Unless there are further witnesses, that will conclude the hearings at this time. The committee will stand in recess until 11:30.

[Whereupon, at 11:10 a.m., the subcommittee went into executive session.]

Note: H.R. 10937 was favorably reported by the Subcommittee on Criminal Justice on October 29, 1973, with amendments. It was ordered reported by the full Committee on the Judiciary with the same amendments on October 30, 1973. On November 1, 1973, the bill was reported to the Committee of the Whole House on the State of the Union. The bill was passed by the House of Representatives with the same amendments, 378–1, on November 6, 1973. A copy of the bill and the report follow:

Union Calendar No. 269

93D CONGRESS
1ST SESSION

H. R. 10937

[Report No. 93–618]

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 16, 1973

Mr. RODINO introduced the following bill; which was referred to the Committee on the Judiciary

NOVEMBER 1, 1973

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To extend the life of the June 5, 1972, grand jury of the United States District Court for the District of Columbia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, ~~That (a) notwithstanding any provision of rule 6(g) of the Federal Rules of Criminal Procedure, or any other law, rule, or regulation—~~

~~(1) the United States District Court for the District of Columbia is authorized to extend the term of the grand jury of that court which was impaneled on June 5, 1972, for an additional period of six months, if the court determines that the business of that grand jury has not~~

~~been completed at the expiration of the term otherwise provided by law;~~

~~(2) the United States District Court for the District of Columbia is authorized further to extend the term of that grand jury for another additional period of six months, if the court determines that the business of that grand jury has not been completed at the end of the term as extended under paragraph (1); and~~

~~(3) during any period of extension under this Act, the grand jury shall have the powers and duties of a grand jury during its regular term.~~

~~(b) With respect to any failure to extend the term of the grand jury under this Act, the grand jury shall be considered a special grand jury, and the failure to extend shall be considered a failure to extend under section 3331(b) of title 18 of the United States Code.~~

That (a) notwithstanding rule 6(g) of the Federal Rules of Criminal Procedure, or any other law, rule, or regulation, the term of the grand jury of the United States District Court for the District of Columbia which was impaneled on June 5, 1972, is extended to June 4, 1974. If the United States District Court for the District of Columbia determines that the business of the grand jury will not be completed by that date, that court is authorized to extend its term for an additional six months.

(b) If the United States District Court for the District of Columbia fails to extend the term of the grand jury beyond the statutory extension period ending June 4, 1974, the Chief Judge of the United States Court of Appeals for the District of Columbia Circuit may extend its term for an additional six months on application by the grand jury upon the affirmative vote of a majority of its members that it has not completed its business. Upon the making of such an application by the grand jury, its term shall continue until the Chief Judge of the United States Court of Appeals for the District of Columbia Circuit enters an appropriate order. In no event shall the term of the grand jury extend beyond December 4, 1974.

93D CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 93-618

EXTENSION OF WATERGATE GRAND JURY

NOVEMBER 1, 1973.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. HUNGATE, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 10937]

The Committee on the Judiciary, to whom was referred the bill (H.R. 10937) to extend the life of the June 5, 1972 grand jury of the U.S. District Court for the District of Columbia. Having considered the same, report favorably thereon with amendment and recommend that the bill do pass.

The amendment is as follows: Strike out all after the enacting clause and insert the following:

That (a) notwithstanding Rule 6(g) of the Federal Rules of Criminal Procedure, or any other law, rule or regulation, the term of the grand jury of the United States District Court for the District of Columbia which was impaneled on June 5, 1972, is extended to June 4, 1974. If the United States District Court for the District of Columbia determines that the business of the grand jury will not be completed by that date, that Court is authorized to extend its term for an additional six months;

(b) if the United States District Court for the District of Columbia fails to extend the term of the grand jury beyond the statutory extension period ending June 4, 1974, the Chief Judge of the United States Court of Appeals for the District of Columbia Circuit may extend its term for an additional six months on application by the grand jury upon the affirmative vote of a majority of its members that it has not completed its business. Upon the making of such an application by the grand jury, its term shall continue until the Chief Judge of the United States Court of Appeals for the District of Columbia Circuit enters an appropriate order. In no event shall the term of the grand jury extend beyond December 4, 1974.

PURPOSE OF THE BILL

The purpose of this bill, as amended, is to extend the term of the June 5, 1972 grand jury of the U.S. District Court for the District of Columbia.

GENERAL INFORMATION

On October 16, 1973, H.R. 10937 was introduced at the request of the Attorney General. The bill was to extend the life of the June 5,

1972 grand jury of the District Court for the District of Columbia. This grand jury, the so-called "Watergate grand jury", is hearing evidence concerning the breakin at the Democratic National Committee Headquarters on June 17, 1972, and related matters. The term of this grand jury will expire on December 4, 1973, pursuant to Rule 6(g) of the Rules of Criminal Procedure for the U.S. district courts which provides that: "A grand jury shall serve until discharged by the court but no grand jury may serve more than 18 months."

BILL AS INTRODUCED

H.R. 10937, as introduced, would have given the U.S. District Court for the District of Columbia the authority to extend the term of the Watergate grand jury for two 6-month periods upon determining that the grand jury had not completed its business. If the District Court failed to extend the grand jury's term either at the end of the regular term or at the end of an extension, H.R. 10937 as introduced provided that the failure to extend would be considered a failure to extend under section 3331(b) of title 18, United States Code. Section 3331(b) provides that in the event of a failure to extend the term of a special grand jury, the grand jury itself may apply for an extension to the Chief Judge of the U.S. Court of Appeals of that Circuit. H.R. 10937, as introduced, further provided that "during any period of extension under this act the grand jury shall have the powers and the duties of the grand jury during its regular term."

BILL AS REPORTED

H.R. 10937 as reported provides for two 6-month extensions of the term of the grand jury. However, the bill as reported mandates the first extension rather than making it discretionary. There was uncontradicted testimony from Justice Department prosecutors responsible for conducting the investigations of the Watergate and other related matters that the business of the grand jury will not be completed by December 4, 1973. Therefore, the committee concluded that the necessity for the extension is so clear and compelling that there is no need to make the initial extension discretionary.

H.R. 10937 as reported gives the U.S. District Court for the District of Columbia the authority to extend the term of the grand jury for an additional 6 months if the court determines that the business of the grand jury will not be completed at the end of the legislatively authorized extension. The bill as reported specifies that in no event will the term of the grand jury continue beyond December 4, 1974. The Justice Department representatives were confident that the grand jury could conclude its work by that date.

H.R. 10937 as reported establishes an alternative procedure for extending the term of the grand jury that is the same as the procedure established by the bill as introduced. However, instead of referring to section 3331(b) of title 18, United States Code, the bill as reported spells out the alternative procedure that is available. This change conforms the provision to the previous change that legislatively mandates the first extension and clarifies its application.

The committee deleted from H.R. 10937 as reported the provision that, "During any period of extension under this act, the grand jury shall have the powers and duties of a grand jury during its regular term." This language was stricken because the committee concluded that it is unnecessary. None of the powers and duties of the grand jury is affected by this bill; rather, the bill is directed at only the length of the grand jury's term.

ESTIMATE OF COST

Pursuant to the requirements of clause 7 of Rule XIII of the Rules of the House of Representatives, the committee estimates that the execution of the provisions of this bill will not result in an increased Federal cost and will likely result in a Federal saving. If the term of the June 5, 1972 grand jury is not extended, the district court will have to empanel a new grand jury. That grand jury will have to receive testimony already received by the June 5, 1972 grand jury.

COMMITTEE RECOMMENDATION

The committee, after careful and detailed consideration of all the facts and circumstances involved in this legislation, is of the opinion that this bill should be enacted and accordingly recommends that H.R. 10937, as amended, do pass.

EXECUTIVE COMMUNICATION

An executive communication was submitted to Congress and reads as follows:

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., October 11, 1973.

THE SPEAKER,
House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: On behalf of the Special Prosecutor, I am enclosing for your consideration and appropriate reference a legislative proposal to authorize the U.S. District Court for the District of Columbia to extend the life of the Watergate grand jury beyond December 4, 1973, when it will otherwise expire.

The grand jury hearing the *Watergate* case is a regular grand jury empaneled June 5, 1972. Under F. R. Crim. P. Rule 6(g) it cannot continue more than 18 months without a statutory extension.

The legislative proposal provides that if, at the expiration of the present term of the aforementioned grand jury, the district court determines that the business of the grand jury has not been completed, the court may extend its term for an additional period of 6 months. Provision is also made for a further extension for a second 6-month period after a determination that its business has not yet been completed. During any period of extension of its term, the grand jury shall have all the powers of a grand jury during its regular term.

The legislative proposal further provides that if the term of the grand jury is not extended under this act, the grand jury shall be

considered a special grand jury, and the failure to extend shall be considered a failure to extend under section 3331(b) of title 18 of the United States Code.

The need for extension of the life of this grand jury arises from the inescapable expenditure of several months in litigating whether the President is obliged to furnish recordings, memoranda and other papers believed to contain evidence highly material to key issues. At the present time the constitutional issue is before the U.S. Court of Appeals for the District of Columbia Circuit. Although its decision is expected shortly, the case seems surely destined for the Supreme Court. A Supreme Court decision cannot reasonably be expected before mid-November. In the event of a ruling in favor of the Special Prosecutor, both legal and technical problems may consume further time before the evidence is actually available, resulting in insufficient time for the grand jury to receive the evidence, pursue any resulting leads, and determine what indictments are warranted before December 4.

The present law does not permit judicial extension of the life of a general grand jury. I recognize that statutory extensions have usually been discouraged, but the present case seems sufficiently extraordinary to require an exception, not only because of the unusual constitutional litigation which could not have been commenced earlier, but also because of the character of the crimes, the potential defendants, and the questions of public confidence that they raise. Furthermore, analogous extensions for three 6-month periods are permitted under the Organized Crime Control Act of 1970, 18 U.S.C. 3331–3334, when a special grand jury has been empaneled and the usual 18-month period proves insufficient for it to complete its investigation.

Counsel to the President has asked me to emphasize that submission of this legislative proposal is not to be construed as an endorsement of the position of the Special Prosecutor in the aforementioned court action.

I urge prompt consideration and enactment of this legislation.

The Office of Management and Budget has advised that there is no objection to the submission of this proposal from the standpoint of the Administration's program.

Sincerely,

ELLIOT RICHARDSON,
Attorney General.

SPECIAL PROSECUTOR LEGISLATION

WEDNESDAY, OCTOBER 31, 1973

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

The subcommittee met, pursuant to call, at 10:15 a.m., in Room 2141, Rayburn House Office Building, Hon. William L. Hungate [chairman of the subcommittee] presiding.

Present: Representatives Hungate, Kastenmeier, Edwards, Mann, Holtzman, Smith, Dennis, Mayne, and Hogan.

Also present: Herbert E. Hoffman, counsel; Thomas W. Hutchison, assistant counsel; Roger A. Pauley, associate counsel; and Stephen P. Lynch, research assistant.

Mr. HUNGATE. The subcommittee will be in order.

The Chair will first announce that we have had referred to us House Resolution 634 by Mr. McCloskey of California, with a proposal that some time this afternoon we consider that.

[H.J. Res. 784 and related bills follow:]

93D CONGRESS
1ST SESSION

H. J. RES. 784

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 23, 1973

Mr. CULVER (for himself, Ms. ABZUG, Mr. ADDABBO, Mr. ANDERSON of California, Mr. ASHLEY, Mr. ASPIN, Mr. BADILLO, Mr. BERGLAND, Mr. BINGHAM, Mr. BLATNIK, Mr. BOLAND, Mr. BROWN of California, Mr. BRADEMAS, Mr. BRECKINRIDGE, Mr. BURTON, Mr. CARNEY of Ohio, Mrs. CHISHOLM, Mr. CLAY, Mr. CONYERS, Mr. COTTER, Mr. DANIELSON, Mr. DELLUMS, Mr. ECKHARDT, Mr. EDWARDS of California, and Mr. EVANS of Colorado) introduced the following joint resolution; which was referred to the Committee on the Judiciary

JOINT RESOLUTION

To provide for the appointment of a Special Prosecutor, and for other purposes.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. This Act may be cited as the "Special Prosecution Conservancy Act of 1973".

SEC. 2. The Chief Judge of the United States District Court for the District of Columbia is vested with supervisory jurisdiction to issue and enforce all orders necessary and appropriate to insure the integrity and inviolability of all files, notes, correspondence, memoranda, documents, physical

evidence, and other records and work product compiled, obtained, or otherwise produced and maintained by the Office of Special Prosecutor from the date of assumption of that office on May 24, 1973, until the appointment of a successor Special Prosecutor pursuant to section 3 of this Act.

SEC. 3. The Chief Judge of the United States District Court for the District of Columbia is vested with authority to appoint a Special Prosecutor for the purposes and with the powers set forth in this Act, and to replace said officer only for extraordinary improprieties in the exercise of his responsibilities as an officer of the court.

SEC. 4. The Chief Judge of the United States District Court for the District of Columbia, after making an appointment or reappointment pursuant to section 3 of this Act, shall be expected to excuse himself from presiding over or otherwise participating in any prosecution or other judicial proceeding arising out of the exercise of responsibilities by a Special Prosecutor appointed by him.

SEC. 5. The Special Prosecutor appointed pursuant to this Act may, without regard to the laws relating to the competitive service, appoint or reappoint such permanent or temporary staff at such salaries (not to exceed the rate of $36,000 per annum) as may be necessary to assist in the exercise of his responsibilities, and may for that same purpose make use of necessary support services and facilities at Government expense. The United States Department of

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Justice is authorized and directed to pay the salaries and expenses of the Office of Special Prosecutor hereunder, including any that may have accrued and remain unpaid since October 20, 1973, all from its general funds including contingency funds. Notwithstanding any other provision of law, any impounding or withholding or other impediment to the provision of such funds shall be unlawful.

SEC. 6. Anything in the laws of the United States regarding the authority and responsibilities of the Attorney General or of the several United States attorneys to the contrary notwithstanding, the Special Prosecutor shall have exclusive authority and responsibility on behalf of the United States of America to conduct all grand jury presentments and all other criminal proceedings, including without limitation the initiation and conduct of prosecutions, the framing and signing of indictments and the filing of informations, and all pretrial and posttrial motions, orders, trials, appeals, petitions, and other processes (whether initiated before or after his assumption of duties) in all Federal courts including the Supreme Court of the United States, arising out of any or all of the following acts or transactions:

(1) all offenses arising out of the unauthorized entry into Democratic National Committee Headquarters at the Watergate;

(2) all offenses arising out of the 1972 Presidential

election for which the Special Prosecutor deems it necessary and appropriate to assume responsibility;

(3) allegations of criminal offenses involving the President, members of the White House staff, or other Presidential appointees;

(4) other matters previously being conducted by the Special Prosecutor who assumed office on May 24, 1973, whether on his own motion or on delegation from the Attorney General; and

(5) such new matters, bearing a proximate relation to the foregoing, as the Chief Judge of the United States District Court for the District of Columbia may deem appropriate for assignment to the Special Prosecutor, and which the Special Prosecutor consents to accept.

SEC. 7. The Special Prosecutor shall have full access to and use of the material described in section 2 of this Act, and shall have power throughout the territory of the United States to compel the production of testimonial and documentary or physical evidence relating to any or all of the subject matter described in section 6 of this Act. In particular, and without limiting the generality of the foregoing, the Special Prosecutor shall have full power to—

(1) determine whether and how far to contest the assertion of executive privilege or any other testimonial or evidentiary privilege;

(2) determine whether or not application should be made to any Federal court for a grant of total or partial immunity to any witness, consistently with applicable statutory standards, or for other warrants, subpenas, or other court orders including an order of contempt of court;

(3) issue instructions to the Federal Bureau of Investigation and other domestic investigative agencies for the collection and delivery solely to the Special Prosecutor of information and evidence bearing on matters within the jurisdiction of the Special Prosecutor, and for safeguarding the integrity and inviolability of all files, notes, correspondence, memoranda, documents, physical evidence, and other records and work product compiled, obtained, or otherwise produced and maintained by the Office of Special Prosecutor; and

(4) decide whether or not to prosecute any person and how to conduct and argue any appeals or petitions arising out of his prosecutorial activities.

SEC. 8. All offices, departments, and agencies of the Federal Government shall cooperate fully with all lawful requests by the Special Prosecutor for information and assistance. In particular, the Department of Justice shall assign to the temporary supervision and control of the Special Prosecutor such personnel as he may reasonably require.

SEC. 9. The Special Prosecutor shall have the authority and responsibility to deal with and appear before the congressional committees having jurisdiction over any aspect of the matters covered by this Act, and to provide such information, documents, and other evidence as may be necessary and appropriate to enable any such committee to exercise its authorized responsibilities.

SEC. 10. (a) Notwithstanding any provision of rule 6(g) of the Federal Rules of Criminal Procedure, or any other law, rule, or regulation—

(1) the United States District Court for the District of Columbia is authorized to extend the term of the grand jury of that court which was impaneled on June 5, 1972, for an additional period of six months, if the court determines that the business of that grand jury has not been completed at the expiration of the term otherwise provided by law;

(2) the United States District Court for the District of Columbia is authorized further to extend the term of that grand jury for additional periods of six months, if the court determines that the business of that grand jury has not been completed at the end of any six-month term as extended under this section, but the term shall not be extended more than thirty-six months under paragraphs (1) and (2); and

(3) during any period of extension under this Act, the grand jury shall have the powers and duties of a grand jury during its regular term.

(b) With respect to any failure to extend the term of the grand jury under this section, the grand jury shall be considered a special grand jury, and the failure to extend shall be considered a failure to extend under section 3331 (b) of title 18 of the United States Code.

SEC. 11. The Special Prosecutor may from time to time make public such statements or reports, not inconsistent with the rights of any accused or convicted persons, as he deems appropriate; and he shall upon completion of his assignment submit a final report to the chief judge of the United States District Court for the District of Columbia and to the Speaker of the House of Representatives and to the President pro tempore of the Senate.

SEC. 12. The Special Prosecutor shall carry out his responsibilities under this Act until such time as, in his judgment, he has completed them or until a date mutually agreed upon between the Chief Judge for the United States District Court for the District of Columbia and himself.

SEC. 13. There are authorized to be appropriated to the Office of Special Prosecutor hereunder such sums as may be necessary to carry out the purposes of this Act.

SEC. 14. The invalidity of any portion of this Act shall not affect any other portions thereof, which shall remain in full force and effect.

SEC. 15. The Congress declares that the faithful execution of the provisions and purposes of this Act, and the noninterference therewith, is a matter of the highest public trust.

93D CONGRESS
1ST SESSION

H. R. 11081

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 24, 1973

Mr. FUQUA introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To provide for the appointment of a Special Prosecutor to investigate and prosecute any offense with respect to the election in 1972 for the office of President.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Chief Judge of the United States District Court for the District of Columbia shall appoint a Special Prosecutor of the United States (hereinafter in this Act referred to as the "Special Prosecutor") to investigate and prosecute any offense against the United States arising out of any campaign with respect to the election in 1972 for the office of President.

SEC. 2. (a) The Special Prosecutor shall be compen-

sated at the rate provided for level II of the Executive Schedule under section 5313 of title 5, United States Code.

(b) The Special Prosecutor may appoint and fix the salaries of such staff as he deems necessary to assist him in carrying out his duties under this Act.

SEC. 3. The Special Prosecutor shall not be subject to the supervision or control of the President, except that the President may remove the Special Prosecutor from office for neglect of duty or malfeasance in office, but for no other cause.

93D CONGRESS
1ST SESSION

H. R. 11067

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 23, 1973

Mr. Moss (for himself and Mr. DINGELL) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To establish an Independent Office of Special Prosecutor, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Independent Office of Special Prosecutor Act."

FINDINGS AND PURPOSES

SEC. 2. (a) The Congress finds and declares that—

(1) allegations involving the President, members of the White House staff, Presidential appointees, and other officers or employees of the executive branch have arisen out of the unauthorized entry on June 17, 1972, into the offices of the Democratic National Committee

maintained at the Watergate office buildings located in the city of Washington, District of Columbia, and out of other activities and conduct related to the Presidential election of 1972;

(2) the maintenance of public trust in our democratic institutions and processes requires the vigorous and faithful investigation of any and all such allegations and the prosecution of offenses against the United States, found to have been committed;

(3) such public trust has been jeopardized by the compelled dismissal of the Special Prosecutor who had been appointed by the Attorney General in furtherance of a commitment made to the Senate and by the abolition of the Office of Watergate Special Prosecutor Force which had been created by order numbered 517-73 of the Attorney General, June 4, 1973; and that,

(4) the restoration of public trust demands the establishment of an Independent Office of Special Prosecutor to succeed to the functions, duties, and responsibilities of the Special Prosecutor formerly appointed by the Attorney General and the Office of Watergate Special Prosecutor Force.

(b) It is the purpose of this Act—

(1) to create an Independent Office of Special Prosecutor within the executive branch to exercise authority

and responsibility to investigate and prosecute offenses related to the unauthorized entry into the Watergate offices of the Democratic National Committee and related to the Presidential election of 1972 with the highest degree of independence that is consistent with the President's Constitutional accountability for the faithful execution of the laws of the United States;

(2) to assign to the Independent Office of Special Prosecutor exclusive authority and responsibility for investigating and prosecuting offenses against the United States arising out of unauthorized entry into the Watergate offices of the Democratic National Committee and arising out of other activities and conduct related to the Presidential election of 1972; and to

(3) provide for the transfer to such Independent Office of all files, memoranda, records, or other papers which, on October 20, 1973, had been in the possession of the Special Prosecutor or the Office of Special Watergate Prosecutor Force.

CREATION OF INDEPENDENT OFFICE OF SPECIAL PROSECUTOR

SEC. 3. (a) There is hereby established an Independent Office of Special Prosecutor to be administered by and act under the direction of a Special Prosecutor appointed by the Chief Judge of the Court of Appeals for the District of

Columbia Circuit, with the advise and consent of the Senate.

(b) The Independent Office of Special Prosecutor shall have full and exclusive authority and responsibility for investigating and prosecuting offenses against the United States by any person arising out of (i) the unauthorized entry on June 17, 1972, into offices maintained by the Democratic National Committee at the Watergate Office Building, in the city of Washington, District of Columbia, and (ii) other conduct and activities related to the Presidential election of 1972.

(c) With respect to the matters for which the Independent Office of Special Prosecutor is given full and exclusive authority and responsibility under subsection (b) or (c), the office shall have full and exclusive specific authority for:

(i) conducting proceedings before grand juries and any other investigations such office deems necessary;

(ii) reviewing all documentary evidence available from any source;

(iii) determining whether or not to contest the assertion of "executive privilege" or any other testimonial privilege;

(iv) determining whether or not application should be made to any Federal court for a grant of immunity to any witness, consistent with applicable statutory re-

quirements, or for warrants, subpenas, or other court orders;

(v) deciding whether or not to prosecute any individual, firm, corporation, group of individuals, or other persons;

(vi) initiating and conducting prosecutions, framing indictments, filing informations, and handling all aspects of any cases within such Office's authority and responsibility as defined in subsection (b) (whether initiated before or after the enactment of this Act) ; including any appeals; and

(vii) coordinating and directing the activities of all Department of Justice personnel, including United States attorneys;

except that, the Office of Special Prosecutor may agree to or permit the conduct of proceedings, investigations, and other functions relating to such Office's authority and responsibility to be conducted by the Attorney General and Department of Justice personnel including United States attorneys.

(d) For the purposes of this section, the term "full and exclusive" authority means the authority to act without countermand, impairment, or interference by the President, the Attorney General, or any other officer or employee of the executive branch and the authority to determine whether and to what extent to inform or consult with the President,

the Attorney General, or any other officer or employee of the executive branch about the conduct of the functions, duties, and responsibilities assigned under this Act.

(e) The Independent Office of Special Prosecutor shall, in addition to his authority and responsibilities assigned to him under subsection (b), have authority and the responsibility to investigate and prosecute offenses against the United States arising out of any other matter which he consents to have assigned to him by the President or the Attorney General.

(f) Notwithstanding any other provision of law, in the conduct of functions, duties, and responsibilities under this Act, the Independent Office of Special Prosecutor shall have authority to exercise all powers as to the conduct of criminal prosecutions within its jurisdiction which would otherwise be vested in and exercisable by the Attorney General and the United States Attorney under the provisions of chapters 31 and 35 of title 28, United States Code, and to act as the attorney on behalf of the United States under the Federal Rules of Criminal Procedure.

STAFFING AND RESOURCE SUPPORT

SEC. 4. (a) The Independent Office of Special Prosecutor is authorized to organize, select, and hire such attorneys, investigators, and supporting personnel, on a full- or part-time basis, in such numbers and with such qualifications as

such office may determine to be reasonably required, and fix the compensation therefor, without regard to the provisions of title 5, United States Code. Any Federal department or agency is authorized to make available, on a reimbursable basis, personnel requested by the Independent Office of Special Prosecutor: *Provided*, That any transfer of personnel be made with the consent of the affected individual and without prejudicing his position and rating in the Federal department or agency from which such individual may be transferred.

(b) The Independent Office of Special Prosecutor shall have authority to employ experts and consultants, as authorized by section 3109 of title 5, United States Code, for the performance of functions under this title, and individuals so employed may be compensated at rates not to exceed the per diem equivalent of the rate for GS–18 of the General Schedule established by section 5332 of title 5, United States Code. Such contracts may be renewed from time to time without limitation. Service of an individual as an expert or consultant under this section shall not be considered as employment or the holding of an office or position bringing such individual within the provisions of section 3323 (a) of title 5, United States Code, section 872 of the Foreign Service Act of 1946, or any other law limiting the reemployment of retired officers or employees.

TRANSFER OF FILES

SEC. 15. (a) There is hereby transferred to the Independent Office of Special Prosecutor all files, records, memorandums, or other materials which had, on October 20, 1973, been in the possession or control of the Special Prosecutor appointed by the Attorney General of the United States or in the possession or control of the Office of Watergate Special Prosecution Force created by Order 517–73 of the Attorney General on June 4, 1973.

(b) The Independent Office of Special Prosecutor is authorized to obtain from any Federal department or agency any and all files, records, memorandums, or other materials as such Office may deem necessary or appropriate to the conduct of its duties, functions, and responsibilities under this Act. Each such department or agency shall cooperate with the Independent Office of Special Prosecutor and furnish such materials to it as expeditiously as is practicable.

REMOVAL OF SPECIAL PROSECUTOR

SEC. 6. (a) The chief judge of the Court of Appeals for the District of Columbia Circuit shall have authority to remove the Special Prosecutor for neglect of duty or malfeasance in office, but for no other cause. In the case of a vacancy in the Office of the Special Prosecutor by reason of removal, death, resignation, or inability, the chief judge

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of such court may appoint a successor with the advise and consent of the Senate.

(b) If the President determines that actions or omissions to act by the Special Prosecutor prevent or materially impair the faithful execution of the laws of the United States he shall petition the chief judge of the Court of appeals for the District of Columbia Circuit for the removal of the Special Prosecutor setting forth, in detail, the basis of his determination. The chief judge, if he finds that the Special Prosecutor has, in fact, acted or failed to act in a manner which prevents or materially impairs the faithful execution of the laws of the United States, shall cause the removal of the Special Prosecutor for neglect of duty.

AUTHORIZATION OF APPROPRIATED FUNDS

SEC. 7. (a) Notwithstanding any other provisions of law, the Independent Office of Special Prosecutor shall promptly submit direct requests to the Congress for such funds as may be necessary to carry out the purposes of this Act. Such requests, upon receipt, shall be given the priority consideration of the Congress.

(b) Pending the appropriation of funds for the conduct of functions, duties, and responsibilities under this Act, and thereafter the Administrator of General Services shall furnish to the Independent Office of Special Prosecutor such office, equipment, supplies, and services as are appropriate to such

office needs and are authorized to be furnished to other agencies or instrumentalities of the United States.

TERMINATION AND REPORTING RESPONSIBILITY

SEC. 8. (a) The Special Prosecutor appointed under section 3 shall continue to serve until the completion of all investigations and prosecutions for which he has been assigned responsibility and, upon such completion, shall submit a final report to the President and the Congress on his activities, stating his findings, observations, conclusions, and recommendations.

(b) Upon the submission of the final report by the Special Prosecutor, the Independent Office of Special Prosecutor shall be abolished and all files, memorandums, records, or other matter in the possession of the Office shall be transmitted to the Department of Justice.

(c) The Special Prosecutor may make such interim reports or statements as he considers appropriate relating to the conduct of his authority and responsibility under this Act.

93D CONGRESS
1ST SESSION

S. 2611

IN THE SENATE OF THE UNITED STATES

OCTOBER 26, 1973

Mr. BAYH (for Mr. HART) (for himself, Mr. ERVIN, Mr. KENNEDY, Mr. BAYH, Mr. BURDICK, Mr. ROBERT C. BYRD, Mr. TUNNEY, Mr. MATHIAS, Mr. ABOUREZK, Mr. BIBLE, Mr. BIDEN, Mr. CASE, Mr. CHILES, Mr. CLARK, Mr. FULBRIGHT, Mr. GRAVEL, Mr. HASKELL, Mr. HATHAWAY, Mr. HATFIELD, Mr. HUMPHREY, Mr. INOUYE, Mr. JACKSON, Mr. JAVITS, Mr. MCGEE, Mr. MCGOVERN, Mr. MCINTYRE, Mr. MONDALE, Mr. MOSS, Mr. MUSKIE, Mr. PASTORE, Mr. PELL, Mr. RIBICOFF, Mr. SCHWEIKER, Mr. STEVENSON, Mr. TALMADGE, Mr. WEICKER, Mr. WILLIAMS, Mr. MONTOYA, Mr. PROXMIRE, Mr. SYMINGTON, Mr. CANNON, Mr. MAGNUSON, Mr. METCALF, Mr. RANDOLPH, Mr. EAGLETON, Mr. CRANSTON, Mr. NELSON, Mr. HUGHES, Mr. CHURCH, Mr. JOHNSTON, Mr. PACKWOOD, Mr. HUDDLESTON, and Mr. HARTKE) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To insure the enforcement of the criminal laws and the due administration of justice; establish an independent Special Prosecutor.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Independent Special Prosecutor Act of 1973".

SEC. 2. The Congress finds and declares that—

(a) Serious allegations of illegal acts of high officials of the executive branch of Government cannot under present extraordinary circumstances be fully and properly investigated and prosecuted by the executive branch itself.

(b) Public confidence in the integrity of the Nation's criminal justice system cannot be maintained if the investigation of such allegations and prosecution of illegal acts by high officials of the executive branch of Government are carried out under the authority of the executive branch itself.

(c) The establishment of a Special Prosecutor independent of the executive branch of Government is "necessary and proper" under article I, section 8 of the Constitution of the United States to insure the enforcement of the criminal laws and the due administration of justice through a complete investigation of such allegations and a vigorous and uncompromised prosecution of accused offenders.

(d) A Special Prosecutor independent of the executive branch of Government should properly be appointed by the judicial branch of Government, and article II, section 2 of the Constitution of the United States provides authority for Congress to vest such appointment "in the courts of law".

(e) The establishment of an independent Special Prosecutor is an appropriate exercise of the power under article I, section 8 of the Constitution of the United States to "exercise

exclusive legislation in all cases whatsoever" over the District of Columbia, in that many such activities are alleged to have occurred in the District.

SEC. 3. (a) The Chief Judge of the United States District Court for the District of Columbia (hereinafter referred to as the "Chief Judge") is authorized and directed to appoint a Special Prosecutor who shall have the duties and powers prescribed in this Act. The Chief Judge is further authorized and directed to appoint a Deputy Special Prosecutor, who shall assist the Special Prosecutor in the performance of his duties and who, in the event of the disability of the Special Prosecutor or vacancy in the office of Special Prosecutor, shall temporarily become Special Prosecutor until the Chief Judge appoints a Special Prosecutor in accordance with section 8 hereof.

(b) The Special Prosecutor is authorized and directed and shall have exclusive jurisdiction, to investigate, as he deems appropriate, and prosecute against and in the name of the United States:

(1) offenses arising out of the unauthorized entry into Democratic National Committee headquarters at the Watergate;

(2) other offenses arising out of the 1972 Presidential election;

(3) offenses alleged to have been committed by the

President, Presidential appointees, or members of the White House staff;

(4) all other matters heretofore referred to the former Special Prosecutor pursuant to regulations of the Attorney General (28 C.F.R. 0.37, rescinded October 24, 1973); and

(5) offenses relating to or arising out of any such matters.

SEC. 4. The Special Prosecutor shall have full power and authority with respect to the matters set forth in section 3 of this Act:

(1) to conduct proceedings before grand juries and other investigations he deems necessary;

(2) to review all documentary evidence available from any source;

(3) to determine whether or not to contest the assertion of Executive Privilege or any other testimonial privilege;

(4) to receive appropriate national security clearance and review all evidence sought to be withheld on grounds of national security and if necessary contest in court, including where appropriate through participation in in camera proceedings, any claim of privilege or attempt to withhold evidence on grounds of national security;

(5) to make application to any Federal court for a grant of immunity to any witness, consistent with applicable statutory requirements, or for warrants, subpenas, or other court orders;

(6) to initiate and conduct prosecutions in any court of competent jurisdiction, frame and sign indictments, file informations, and handle all aspects of any cases over which he has jurisdiction under this Act, in the name of the United States, and

(7) notwithstanding any other provision of law, to exercise all other powers as to the conduct or criminal investigations and prosecutions within his jurisdiction which would otherwise be vested in the Attorney General and the United States attorney under the provisions of chapters 31 and 35 of title 28, United States Code, and the provisions of section 301.6103(a)-1(q) title 26, Code of Federal Regulations, and act as the attorney for the Government in such investigations and prosecutions under the Federal Rules of Criminal Procedure.

SEC. 5. (a) All materials, tapes, documents, files, work in process, information, and all other property of whatever kind and description relevant to the duties enumerated in section 3 hereof, tangible or intangible, collected by, developed by, or in the possession of the former Special Prosecutor or his staff established pursuant to regulation by the

Attorney General (28 C.F.R. 0.37, rescinded October 24, 1973), shall be delivered into the possession of the Special Prosecutor appointed under this Act.

(b) All investigations, prosecutions, cases, litigation, and grand jury or other proceedings initiated by the former Special Prosecutor pursuant to regulations of the Attorney General (28 C.F.R. 0.37, rescinded October 24, 1973), shall be continued, as the Special Prosecutor deems appropriate, by him, and he shall become successor counsel for the United States in all such proceedings, notwithstanding any substitution of counsel made after October 20, 1973.

SEC. 6. The Special Prosecutor shall have power to appoint, fix the compensation, and assign the duties of such employees as he deems necessary, including but not limited to investigators, attorneys, and part-time consultants, without regard to the provision of title 5, United States Code, governing appointments in the competitive civil service, and without regard to chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, but at rates not in excess of the maximum rate for GS–18 of the General Schedule under section 5332 of such title. The Special Prosecutor is authorized to request any officer of the Department of Justice, or any other department or agency of the Federal or District of Columbia government, to provide on a reimbursable basis such assist-

ance as he deems necessary, and any such officer shall comply with such request. Assistance by the Department of Justice shall include but not be limited to, affording to the Special Prosecutor full access to any records, files, or other materials relevant to matters within his jurisdiction and use by the Special Prosecutor of the investigative and other services, on a priority basis, of the Federal Bureau of Investigation.

SEC. 7. The Administrator of General Services shall furnish the Special Prosecutor with such offices, equipment, supplies, and services as are authorized to be furnished to any other agency or instrumentality of the United States.

SEC. 8. Notwithstanding any other provisions of law, the Special Prosecutor shall submit to the Congress directly requests for such funds, facilities, and legislation as he shall consider necessary to carry out his responsibilities under this Act, and such requests shall receive priority consideration by the Congress.

SEC. 9. The Special Prosecutor shall carry out his duties under this Act within two years, except as necessary to complete trial or appellate action on indictments then pending.

SEC. 10. The Chief Judge is empowered to dismiss the Special Prosecutor or the Deputy Special Prosecutor if, in his discretion, he determines that the Special Prosecutor or the Deputy Special Prosecutor has willfully violated the provisions of this Act or committed other extraordinary

impropriettes, and for no other reason. In the case of the disability of the Special Prosecutor or Deputy Special Prosecutor, as determined by the Chief Judge, or the vacancy of either office, the Chief Judge shall be authorized to appoint a successor.

SEC. 11. The Special Prosecutor solely shall exercise the powers and perform the duties specified herein. Neither the Chief Judge or the President of the United States, nor any other officer of the United States shall have any authority to direct, countermand, or interfere with any action taken by the Special Prosecutor pursuant to this Act. Neither the President of the United States, nor any other officer of the United States, shall have any authority to remove the Special Prosecutor from office.

SEC. 12. The Special Prosecutor is authorized from time to time to make public such statements or reports as he deems appropriate and is authorized and directed upon completion of his duties to submit a final such statement or report to the Congress and the President.

SEC. 13. There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

93D CONGRESS
1ST SESSION

H. R. 11135

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 25, 1973

Mr. WHALEN introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To provide for the appointment of an independent Special Prosecutor to prosecute certain investigations into criminal activities.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby established an independent Office of the Special Prosecutor (hereinafter referred to as the "Office") for the purpose of investigating possible violations of Federal law occurring in connection with the 1972 Presidential primaries and general election and any campaign, canvass, or other activity related to such election.

SEC. 2. The Office shall be headed by a Special Prosecutor who shall be appointed by the Chief Judge of the United States District Court for the District of Columbia.

SEC. 3. The Special Prosecutor shall conduct all investigations, prosecutions, and civil actions on behalf of the United States to enforce all provisions of Federal law violated by any person in connection with the Presidential primaries and general election of 1972, and any campaign, canvass, or other activity related to such election.

SEC. 4. Notwithstanding any other provision of law, the Special Prosecutor is vested with all of the powers and duties of the Attorney General of the United States and of the United States attorney in any judicial district of the United States in which legal proceedings are or may be brought pursuant to this Act, insofar as such powers and duties are necessary to the performance of the duties of the Special Prosecutor under section 3. The powers granted under this section include, but are not limited to, the power to convene and conduct proceedings before grand juries (including special grand juries) of the United States, the power to subpena witnesses, the power to frame indictments, and the power to seek in court grants of immunity from prosecution for witnesses.

SEC. 5. The Special Prosecutor shall have power to appoint and fix the compensation of such attorneys and investigators as he deems necessary without regard to the provisions of title 5, United States Code, governing appointments in the competitive civil service, and without regard to chapter 51

and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, but at rates not in excess of the maximum rate for GS–18 of the General Schedule under section 5332 of such title. Any person so employed shall be answerable only to the Special Prosecutor.

SEC. 6. The Attorney General shall—

(a) to the maximum extent consistent with the performance of his other duties, permit the Special Prosecutor to utilize the personnel, facilities, and other resources of the Department of Justice in carrying out his duties under this Act; and

(b) cooperate with the Special Prosecutor to insure that he has exclusive control of all activities relating to any such investigation and prosecution resulting from such election.

SEC. 7. Each department, agency, and independent instrumentality of the Government shall cooperate with the Special Prosecutor.

SEC. 8. All personnel of the Office shall, upon request, appear before, consult with, and cooperate in other respects with all congressional committees having jurisdiction over any aspect of the Office's activities.

SEC. 9. The Office shall remain in existence until such time as the Special Prosecutor certifies to the Chief Judge of the United States District Court for the District of Co-

lumbia that all investigations and prosecutions conducted pursuant to this Act have been completed. The certification shall be accompanied by a full and complete report of all activities conducted by the Office.

SEC. 10. There are authorized to be appropriated such sums as may be necessary to carry out the purposes of this Act. Such funds shall remain available, without fiscal year limitation, until expended.

[H.R. 11145, 93d Cong., 1st sess.]

A BILL To provide for the appointment of a special prosecutor to investigate and prosecute certain criminal activities, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That until the appointment of a special prosecutor pursuant to section 2 of this Act, the Chief Judge of the United States District Court for the District of Columbia (hereinafter referred to in this Act as the "Chief Judge") is hereby vested with supervisory jurisdiction to issue and enforce all orders necessary and appropriate to insure the integrity and inviolability of all files, notes, correspondence, memoranda, documents, physical evidence, and other records and work product compiled, obtained, or otherwise produced or maintained, by the Office of Special Prosecutor established by the Attorney General of the United States in May 1973.

SEC. 2. Within 30 days after the date of the enactment of this Act, the Chief Judge shall appoint a special prosecutor for the United States (hereinafter referred to in this Act as "special prosecutor"), who shall be compensated at the rate provided for level II of the Executive Schedule under section 5313 of title 5, United States Code. The special prosecutor may be removed from office only by such Chief Judge, for extraordinary improprieties.

SEC. 3. It shall be the duty of the special prosecutor to investigate and prosecute any offense against the United States arising out of—

(1) the unauthorized entry into the Democratic National Committee headquarters at the Watergate;

(2) any campaign activity with respect to the election in 1972 for the office of President of the United States; and

(3) any activity of any member of the White House staff, any Presidential appointee, or any person acting on behalf of the President

SEC. 4. (a) The special prosecutor may undertake any act he deems necessary to carry out his duties under this Act.

(b) Notwithstanding any other provision of law, the special prosecutor shall have primary authority to prosecute offenses against the United States referred to in section 3 of this Act.

(c) The special prosecutor appointed under section 2 of this Act may, without regard to the laws relating to the competitive service, appoint or reappoint such permanent or temporary staff at such salaries (not to exceed the rate of $36,000 per annum) as may be necessary to assist in the exercise of his responsibilities, and may for that same purpose make use of necessary support services and facilities at Federal Government expense.

SEC. 5. (a) The Attorney General of the United States shall—

(1) to the maximum extent which is consistent with the performance of his other duties, permit the special prosecutor to utilize the personnel, facilities, and other resources of the Department of Justice in carrying out his duties under this Act; and

(2) cooperate with the special prosecutor to insure that he has exclusive control of all activities relating to any investigation or prosecution undertaken in carrying out such duties.

(b) Each department, agency, and independent instrumentality of the Federal Government shall cooperate fully with the special prosecutor.

SEC. 6. Upon the first appointment under section 2 of this Act, there is transferred to the special prosecutor so appointed all files, notes, correspondence, memoranda, documents, physical evidence, and other records, and work product over which the Chief Judge exercised supervisory jurisdiction pursuant to the first section of this Act.

SEC. 7. The special prosecutor and any of his staff shall, upon request, appear before, consult with, and cooperate in other respects with either House of Congress, or any committee thereof.

SEC. 8. The authority granted to the special prosecutor, and to the Chief Judge, under this act shall remain effective until such time as the special prosecutor certifies to such Chief Judge and to both Houses of Congress that all investigations and prosecutions conducted pursuant to this Act have been completed. The certification shall be accompanied by a full and complete report of all activities conducted by the special prosecutor.

SEC. 9. There are authorized to be appropriated such sums as may be necessary to carry out the purposes of this Act. Such funds shall remain available, without fiscal year limitation, until expended.

SEC. 10. The invalidity of any portion of this Act shall not affect any other portion thereof, which shall remain in full force and effect.

Mr. HUNGATE. Without objection, the Chair will enter a statement for Chairman Rodino at this point in the record.

[Statement of Hon. Peter W. Rodino, Jr., follows:]

STATEMENT OF HON. PETER W. RODINO, JR., CHAIRMAN, COMMITTEE ON THE JUDICIARY

This morning the Subcommittee on Criminal Justice opens hearings on a matter of grave importance to every citizen of this Republic. Recent events here in Washington have created a groundswell of Congressional activity and a mass outpouring of public opinion. The President's dismissal of Special Prosecutor Archibald Cox and the subsequent departure of the two top officials at the Department of Justice have worsened an already clouded situation.

The basic strength of the United States over some 197 years has been the faith of the citizenry in our system of government "of the people, by the people and for the people". Perhaps more than any other factor, justice has been the strongest pillar upholding that faith. Now, recent actions at the highest echelons of the federal government have caused the American people to question the quality of justice administered in this country.

Several months ago, the President himself said, "I want you to know beyond the shadow of a doubt that during my term as President, justice will be pursued fairly, fully and impartially, no matter who is involved." Later his nominee for Attorney General, Elliot Richardson, said, the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part . . ."

Today the office of the Special Prosecutor no longer exists, we have an acting Attorney General, and the people have grave doubts that the work of the Special Prosecutor will be pursued to a successful conclusion. The challenge to our system of justice is clear, and in response the Representatives of the people have offered various legislative proposals to immediately insure that a new Special Prosecutor will be named, a Prosecutor who will be free from any political influence and pressure so that he will be able to carry to a successful conclusion the work begun by Special Prosecutor Cox.

It is imperative that the Subcommittee find a way to restore public confidence in our system of justice. I know that you will give close and careful scrutiny to all the pending legislative proposals and the Constitutional questions they may raise. I urge you to report a bill that will provide for a Special Prosecutor who will have the maximum independence consistent with Constitutional restrictions. Unless the Special Prosecutor has enough independence to do the job free from political interference and pressure, the faith of our people to our system of justice will not be restored.

Mr. HUNGATE. This morning the Subcommittee on Criminal Justice begins the consideration of approximately 35 bills sponsored by 165 elected representatives of the people to provide for the appointment of an independent Special Prosecutor to investigate and take such action as may be indicated with respect to Watergate, the Presidential election campaign of 1972, and related matters.

The need for restoring public confidence in Government has never been greater. The urgency for action has never been more immediate. The very fact that over one-third of the Members of the House of Representatives and over one-half of the Members of the Senate—men and women of both parties, coming from all sections of the country—have offered legislation calling for a person independent of the executive branch demonstrates the compelling need for the Congress to promptly consider the alternatives offered and move forward with what appears to be the most viable solution.

The subcommittee has before it a variety of approaches—introduced since October 23—some bills provide for the appointment of a Special Prosecutor by the chief judge of the District Court of the Dis-

trict of Columbia; others provide for appointment by the chief judge of the Court of Appeals for the District of Columbia Circuit. Still others provide for appointment by majority vote in the Senate and the House. One approach calls for appointment by Chief Judge John J. Sirica of the District Court for the District of Columbia. And another calls for the appointment by the President with the advice and consent of the Senate. The bills vary not only with respect to the method of appointment of a Special Prosecutor, but with respect to the authority for removing him from office and the grounds on which he may be removed.

This subcommittee proposes to inquire carefully, expeditiously, and with an open mind into the questions raised by the proposals before us, with the goal of enacting legislation which will assist in bringing about a restoration of the Nation's faith in the administration of justice.

The Chair thinks that it might be appropriate, in light of some of the legal questions and problems that may be inherent here to refer briefly to Federalist Paper No. 47, written by James Madison.

[The Federalist Paper, No. 47, follows:]

In the "Federalist Papers," number 47, by Madison, it was stated:

One of the principal objections inculcated by the more respectable adversaries to the Constitution is its supposed violation of the political maxim that the legislative, executive, and judiciary departments ought to be separate and distinct. . . .

In order to form correct ideas on this important subject it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct.

The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. . . . Let us endeavor, in the first place, to ascertain his meaning on this point. . . .

This great political critic appears to have viewed the Constitution of England as the standard, or to use his own expression, as the mirror of political liberty; . . .

On the slightest view of the British Constitution, we must perceive that the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other. The executive magistrate forms an integral part of the legislative authority. He alone has the prerogative of making treaties with foreign sovereigns which, when made, have, under certain limitations, the force of legislative acts. All the members of the judiciary department are appointed by him, can be removed by him on the address of the two Houses of Parliament, and form, when he pleases to consult them, one of his constitutional councils. One branch of the legislative department forms also a great constitutional council to the executive chief, as, on another hand, it is the sole depositary of judicial power in cases of impeachment, and is invested with the supreme appellate jurisdiction in all other cases. The judges, again, are so far connected with the legislative department as often to attend and participate in its deliberations, though not admitted to a legislative vote.

From these facts, by which Montesquieu was guided, it may clearly be inferred that in saying "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted. . . . The magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law; nor administer justice in person, though

he has the appointment of those who do administer it. The judges can exercise no executive prerogative, though they are shoots from the executive stock; nor any legislative function, though they may be advised by the legislative councils. The entire legislature can perform no judiciary act, though by the joint act of two of its branches the judges may be removed from their offices, and though one of its branches is possessed of the judicial power in the last resort. . . .

If we look into the constitutions of the several States we find that, notwithstanding the emphatical and, in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct.

Mr. HUNGATE. Mr. Smith?

Mr. SMITH. Mr. Chairman, I do not have any remarks at the present time. Thank you.

Mr. HUNGATE. Any other members?

Mr. Culver will be our first witness.

TESTIMONY OF THE HONORABLE JOHN C. CULVER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IOWA

Mr. HUNGATE. You do have a prepared statement and, without objection, it will be made a part of the record at this point. You may proceed as you see fit.

Mr. CULVER. Thank you, Mr. Chairman.

(The prepared statement of Hon. John C. Culver follows:)

STATEMENT OF HON. JOHN C. CULVER

Mr. Chairman and members of the Subcommittee, I am most pleased to appear before you today to open your consideration of legislation to create an Office of Special Watergate Prosecutor independent of control by the President. The fact that you have moved so swiftly to begin these hearings testifies to a widely shared perception of the urgency and importance of this matter.

Mr. Chairman, the bill which I have introduced for myself and 109 colleagues attempts to respond responsibly and deliberately to the widely felt public conviction that the public interest demands a fair and untrammeled disposition of the Watergate affair and the related matters which have arisen from it. It would be the clear preference of all of us, I am sure, not to legislate in this field but rather to rely on a unity of purpose among the three branches of the Government. Some months ago, when Mr. Cox was appointed and assurances conveyed to the Congress and the public by Mr. Richardson and the President, it was our hope that the processes of justice could supersede the need for special enactments by the Congress. That trust was not met by the President, and public confidence has been sapped. It is only in that melancholy perspective that you undertake these urgent hearings and that so many members have proposed the establishment of a truly independent prosecutor.

All of us who have approached the task before us are well aware that there are no absolutely settled constitutional dogmas or perfect precedents for the situation before us. But there has also never been such an aroused widespread expression of public concern that justice be done or so powerful and spontaneous a public reaffirmation of commitment to our constitutional system of law. One fact is certain: the objective we seek is the highest degree constitutional: the vindication of a system of government which recognizes the rule of law and the need for restraints on the arbitrary exercise of power.

This bill addresses itself to that compelling requirement. It is wholly consonant with all elemental constitutional tests while at the same time recognizing that it is responsive to an unprecedented governmental crisis.

In my statement Mr. Chairman, I will center attention on three points: (1) the need for a Special Prosecutor independent of control either directly or indirectly by the President; (2) the Constitutional and policy considerations in favor of vesting the appointing authority for this Special Prosecutor in the courts; and (3) an elaboration of some of the principal provisions of my bill, H.J. Res. 784.

I. THE NEED FOR AN INDEPENDENT SPECIAL PROSECUTOR

Everyone now recognizes that a Special Prosecutor is needed to carry forward the investigation and prosecutions commenced by Archibald Cox. The President is on record to this effect, and this is not a matter of contention.

What the Congress must address is the need for this Prosecutor to be totally independent and free from control by the President, which further dictates an immunity from the President's removal power. Without that there are no guarantees of independence, as the public interest demands. The President of the American Bar Association, Chesterfield Smith, put it well in a speech he gave last Thursday:

"The substitution by the President of his own prosecutor, a man wholly dependent on the continued support of an Acting Attorney General who was wholly dependent on the continued support of the President represents an assault of wholly unprecendented dimension on the very heart of the administration of justice and a direct abortion of the established processes of justice".

This is a very firm assessment, but a fair one. It is the President that has created this situation, and it is the Congress that must remedy it.

The critical consideration on which our action must rest is the *demonstrated* conflict of interest between the President as chief executive and the President as a potential defendant and close associate of potential defendants.

It is perfectly understandable and altogether welcome that the proposal for an independent prosecutor undergo rigorous constitutional scrutiny. It is well that questions have been raised, in the first instance by Mr. Cox himself. But I believe also that close examination of the issues posed greatly reinforces the conviction that the type of bill which we have proposed will withstand constitutional objections. This is the conclusion which Mr. Cox himself has reached after he had an opportunity to canvas and study the full corpus of court decisions and legal writings. Not only is there a broad and unprecedented public interest involved. There is also a solid constitutional foundation.

Doubts most frequently expressed about the necessity for a statutorily independent prosecutor rest on the twin assumptions that the prosecution function is inherently executive and that in turn prosecutorial discretion is immune from judicial control. Our bill was written after the careful determination that neither proposition withstands close examination.

First, it is true that a prosecutor must exercise discretion but it must be his own independent discretion, not one guided by political concerns and certainly not one controlled by or in the interests of a potential defendant. *United States* v. *Cox* (5th Cir. 1965), the aptly titled case which is frequently cited to support prosecutorial discretion, merely serves to underscore this theme. The court there stated that: "The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause." Those matters of policy, however, cannot permissibly extend to protection of the prosecutor's own direct or indirect interests. The American Bar Association Standards for Criminal Justice provide unequivocally that the prosecuting officer may have no conflict of interest, or the appearance of a conflict of interest. And the Supreme Court of Missouri has put the case succinctly by declaring that prosecutorial discretion must be exercised "according to the dictates of his own judgment and conscience uncontrolled by the judgment and conscience of any other person." By barring Presidential control over the Special Prosecutor, we in Congress would be merely assuring that the prosecutor's discretion cannot be controlled by or in the interests of a potential defendant. It would still remain true that the courts could not control the prosecutor's discretion either, which is all that the *Cox* case held.

Prosecution is also not constitutionally or exclusively an executive function. No doubt it has executive attributes, but the prosecutor is an officer of the court. Many of our States empower their courts to name special prosecutors when a case involves a number of the Executive branch, and they do so even when the State constitution contains—as the U.S. Constitution does not—an explicit separation-of-powers guarantee. The Supreme Court of your state, Missouri, Mr. Chairman, has held that this is an inherent power of the courts, and the Supreme Court of my state, Iowa, has said that it would be a "burlesque upon the law" if crimes went unpunished for lack of power in the courts to appoint a special prosecutor. These authorities, and others relating to the separation of powers, are set forth in the legal memorandum we have submitted.

Under our Federal Constitution, it is the Congress that creates offices and that defines their powers and functions. This was held even in *Myers* v. *United States*, (1926), where the President was accorded a broad removal power that has since been sharply curtailed. In his separate opinion, which concurred with the majority on this point, Mr. Justice Holmes said that Congress can at any time take the appointment even of postmasters away from the President and "transfer the power to other hands".

Normally it is convenient to leave prosecutions to the control of the Attorney General and therefore ultimately to that of the President. But this cannot be done when the President is himself a party in interest. Therefore it is up to Congress to create a different method of appointing what the Cox case called "the attorney for the United States." He will succeed to whatever functions are by then being performed by the President's appointed prosecutor.

II. THE APPOINTING AUTHORITY

There are three possible ways in which a Special Prosecutor might be appointed. The first, Presidential appointment through the Acting Attorney General as with Archibald Cox, has already been disposed of. Congress can entirely supersede any such appointment by providing, as H.J. Res. 784 would do, that the statutorily appointed prosecutor shall have exclusive power and responsibility to act as the attorney for the United States in Watergate and related matters. Thus any appointment the President may make would constitute no legal obstacle.

Secondly, the Congress could by legislation authorize the President to appoint a Special Prosecutor by and with the advice and consent of the Senate, and could give him a fixed term—say, of three years—during which he could not be removed. This would be analogous to what was done in the Teapot Dome investigation. And it would probably be Constitutional for the Congress so to restrict the President's removal power, upon a Congressional finding of necessity for the independence of the Special Prosecutor. That is the teaching of *Humphrey's Executor* v. *United States*, (1935) where the Supreme Court held that the President could not dismiss a member of the Federal Trade Commission.

But the Teapot Dome precedent Mr. Chairman, as you are well aware, is only superficially analogous. The President who made that appointment, Calvin Coolidge, was not responsible for the wrongdoings committed during the tenure of his predecessor, and so he harbored no conflict of interest. Furthermore, the *Humphrey* case left open for future decision exactly what officers appointed by the President are immune to Presidential removal.

While I think the rationale of that case easily covers this one, the President is certain to disagree. He has already claimed publicly that he has unlimited Constitutional authority to remove anyone in the Executive branch. But the mere fact that we might as a practical matter be on shaky ground in assuring prosecutorial independence by this route should give us pause. And there are two further policy considerations that militate against it.

First, the President himself has indicated in his press conference last week that it is inappropriate to have "a suit filed by a special prosecutor within the Executive Branch against the President of the United States." I think the President is right on that point, and that the answer is to take the Special Prosecutor out of the Executive Branch.

Second, Senator Bayh for himself and 53 other Senators last week stated that Senatorial participation in the appointment and/or removal process would "have the unfortunate effect of injecting politics into an area which must be totally void of partisan consideration." I entirely agree with this observation, particularly as my own party controls the Congress. Again, the answer is to take appointment functions away from the Senate.

That then leaves only the approach that I have advocated along with 106 co-sponsors to date in the House, and 53 Senators have together co-sponsored in the Senate. This is to place the appointing authority in the courts. It is clear in my judgment that Congress has that power under Article II, section 2 and the "necessary and proper" clause of Article I of the Constitution. It is also clear that the removal authority goes with the appointing authority, so that a Special Prosecutor so appointed cannot constitutionally be removed by the President. These are not matters of personal surmise; they are rooted in law. The authorities that establish these propositions are set forth in the legal memorandum we have submitted.

III. THE PROVISIONS OF THE BILL

Mr. Chairman, what it would do, and what improvements and amendments might be considered in it and in comparison bills. At the outset I might say that I hope this committee will establish close and cooperative liaison with its Senate counterpart, to the end that we can not only report a bill out speedily but so that conference with the other body will be either unnecessary or very brief. You gentlemen know better than I what other momentous responsibilities lie before you, and how much undivided attention they will soon require. Time is of the essence to restore the badly shattered confidence of the country. This is a matter in which the Congress as a whole, together with the courts, must combine to interpose their authority.

First, the principal Senate Bill, S. 2611, begins with findings of fact and declarations of purpose. I think they are a good idea, if we can speedily agree on them, and the Senate language provides a good starting point. The findings and declarations should emphasize the President's conflict of interest, which is the basic jusitfication for this action, and the need for a fully independent and nonpartisan prosecutor. Some drafting suggestions are set forth in our legal memorandum.

Second, both H.J. Res. 784 and the Senate bill vest the appointing authority in the Chief Judge of the U.S. District Court for the District of Columbia. The American Bar Association Board of Governors has reportedly proposed that the authority be conferred on the District Court as a whole, and I believe this is worth careful consideration. We should certainly avoid putting Judge Sirica in a position where he might even appear to be taking on an adversary function or a conflict of interest. Though a District Court decision in 1968 suggests that this would present no Constitutional difficulty, we must as well be concerned with appearances in a matter of these wide dimensions. Nor is it certain that there would be no Constitutional difficulty. There is the practical concern that such judges might consider it necessary to excuse themselves from sitting on the case after making an appointment. Judge Gesell of the District Court has done just that in a closely similar case, described in the legal memorandum. And by statute, as you know, Congress has declared that "Any justice or judge shall disqualify himself in any case in which he . . . is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein." (28 U.S.C. 455.) For all of these reasons I have been drawn to an alternate proposal, which would empower Judge Sirica to empanel a three-judge committee which in turn would appoint the Special Prosecutor. No member of that committee could then sit in judgement on a case involving the Special Prosecutor, but this would leave it entirely open to Judge Sirica to continue as the sitting Judge.

Third, as to the scope of the Special Prosecutor's authority over subject matter, both H.J. Res. 784 and the Senate bill would incorporate Attorney General Richardson's guidelines and both would add whatever matters Mr. Cox was investigating at the time of his discharge. In addition both would allow the Special Prosecutor to take on additional matters that, in the words of my bill, are "proximately related". The Senate bill would leave the judgement of relationship entirely to the Special Prosecutor, whereas I would have him seek the agreement of the there-judge panel. This is preferable, I believe, to assure orderly conduct in what is after all the displacement of regular Justice Department jurisdiction. It will also tend to deflect any arguments that the Special Prosecutor is engaged in any fishing expeditions or political vendettas.

Fourth, as to scope of procedural authority, both my bill and the Senate bill again incorporate the Richardson guidelines, and both make explicit that the Special Prosecutor can sign as well as frame indictments. The Senate bill adds a useful provision that the Special Prosecutor shall receive security clearance to examine asserted national security information *in camera;* I believe the intention is clear that this would not be a precondition to his appointment or activity. My bill also makes it explicit that the Special Prosecutor shall have exclusive control over all appeals including any to the Supreme Court. It would be intolerable to have a Presidentially appointed Solicitor General take over at that stage.

Fifth, the question of the territorial reach of the Special Prosecutor's jurisdiction is treated similarly in both bills. It would be, as it must be, nationwide. But some question has been raised about the propriety of resting so wide-reaching a jurisdiction on the appointing authority of a District of Columbia Federal Court. I believe this should present us no special difficulty, and is again a matter that can be dealt with in the findings. There simply is no appointing authority

more aptly suited to the purpose, a factor identified as particularly significant in *Ex parte Siebold*, (1879). All or virtually all of the Watergate and related offenses bear a sufficiently close connection with the District of Columbia to warrant trial here. And it would be hopelessly disruptive to the orderly administration of justice to vest separate appointing authority in the Federal courts for other Districts where litigation within the scope of the Special Prosecutor's jurisdiction may be brought. That should be enough to justify our appointment mechanism. Some additional suggestions on this point appear in the legal memorandum, but I am not persuaded that anything further is necessary.

Sixth, both my bill and the Senate bill are concerned with criminal actions. An earlier bill submitted by Senator Stevenson on the same day as mine would have given the Special Prosecutor authority in civil actions as well. He has since joined as a co-sponsor of S. 2611, and I myself think that a general civil jurisdiction would be too broad. Action to recover back taxes, for example, should be *post hoc* as in the Agnew case. But a limited civil authority may be necessary for ancillary purposes—to pursue a civil contempt proceeding, for example, or to defend a civil challenge to the constitutionality of the bill. We have suggested some language for this purpose in our legal memorandum.

Mr. Chairman, I hope that this brief analysis and overview of H.J. Res. 784 has helped to set in profile the leading issues which face your committee in its deliberations and that the bill in its main outlines suggests both a point of departure as well as some end solutions. I can assure the committee that I stand ready to assist the committee in any further way that appears desirable.

I am confident that the approaches I and the co-sponsors have outlined are both workable and durable. And I am confident, too, that the House and Congress as a whole will find a wide consensus which will help to renew public confidence in the processes of justice and in the fabric of our governmental system. Precisely because we are responding to an unmistakable and deeply felt public determination to restore the full rule of law, we have a special responsibility to act with all possible dispatch and with a clear vision of the public interest.

Sometimes there is fear that Congress may merely respond to a transient mood, or hysteria, or a passing burst of public controversy. But in this instance we are asked to meet a much more fundamental and permanent constitutional responsibility. The need is clear. The record is clear. The public concern is clear. In that perspective our task is no less compellingly clear.

Mr. CULVER. Mr. Chairman, as I indicated in my statement, I am submitting to the committee an additional legal memorandum which I ask to have included in the record of these hearings. It elaborates on the principal contentions that I have made in this testimony, and suggests some perfecting and some harmonizing amendments which this committee may wish to consider. In its preparation, I have had the able counsel and assistance of Mr. Roland S. Homet, Jr., who is a former Supreme Court law clerk to Mr. Justice Frankfurter, and I certainly express my gratitude to him and commend the memorandum to the Members. And, also, Mr. Chairman, I would hope it might be appropriate to have him join me at this time at the counsel table to respond to legal, technical questions that you might have.

Mr. HUNGATE. Without objection, he may do so to help the committee.

[The memorandum referred to follows:]

OCTOBER 31, 1973.

MEMORANDUM FOR THE HOUSE JUDICIARY COMMITTEE

Re: *Independent Special Watergate Prosecutor*

This memorandum, prepared at the request of Representative John C. Culver, examines the Constitutionality of measures introduced by him in the House of Representatives on October 23, 1973 (H.J. Res. 784) and by Senator Birch Bayh in the Senate on October 26, 1973 (S. 2611). These bills would establish by statute an independent Special Prosecutor for defined purposes relating to the Watergate and similar offenses, such Special Prosecutor to be appointed by the United States District Court in the District of Columbia and to be immune from control or discharge by the President.

The two bills are marked more by similarity than by differences. Each exhibits the same purposes and essential mechanisms. There are some divergencies, however, as well as provisions that might appropriately be joined together.

The conclusions reached, based on review of the materials discussed in this memorandum, are, *first*, that the approach taken in the Culver-Bayh proposals is unembarrassed by any genuine or substantial Constitutional difficulty; *second*, that this approach is Constitutionally preferable to any other approach that might be taken to achieve the same purpose; and, *third*, that there are a few amendments to H.J. Res. 784 that might serve to perfect and harmonize the two proposals.

The balance of this memorandum will consider the question of Constitutionality under the following heads of discussion:

I. Prosecutorial Discretion in the Face of a Conflict of Interest
II. The Separation of Powers
III. Immunity of Presidential Appointees from Removal by the President
IV. Immunity of Court-Appointed Officers from Extraneous Control
V. Conflict of Functions and Due Process of Law
VI. The Territorial Reach of the Special Prosecutor's Jurisdiction

An appendix will contain some drafting suggestions for appropriate amendments.

Discussion

I. PROSECUTORIAL DISCRETION IN THE FACE OF A CONFLICT OF INTEREST

Despite the clear language of Article II, Section 2 of the Constitution—"the Congress may by law vest the appointment of such inferior Officers, as they think proper, . . . in the Courts of Law"—it is sometimes argued that judicial appointment of a Special Prosecutor would impermissibly intrude upon the discretionary power of the Prosecutor.[1] The case usually cited for this proposition is *United States* v. *Cox*, 342 F. 2d 167 (5th Cir. 1965), in which the Court of Appeals quite properly refused to uphold a District Judge's order that the attorney for the United States sign an indictment presented to him by a grand jury. Nothing in the bills introduced by Representative Culver or by Senator Bayh would in any way change that rule of law; indeed, the prosecutor's freedom from judicial control established by that rule assists in overcoming a different objection that might otherwise be raised to judicial appointment of the prosecutor. (See Part V, *infra*.)

The whole question of prosecutorial discretion as it bears on this legislation has been exhaustively researched and analyzed in an article published last Spring by the American Bar Association's Section of Criminal Law. Schneider, Greenspan & Anzalone. *The Special Prosecutor in the Federal System: A Proposal*, 11 American Criminal Law Review 577–638 (1973). It points out and fully documents that freedom from prosecutorial control by the courts is wholly compatible with freedom from prosecutorial control by or in the interests of potential parties defendant. Both are essential to the maintenance of the adversary process on which our system of justice is founded. As ABA President Chesterfield Smith put it in his speech on October 25, 1973, this is based upon ". . . the almost universally accepted proposition that only a prosecutor, independent and free from the dictates and controls of those whom he was to investigate, could satisfactorily resolve in the minds of the people the illegality of matters which he was to investigate." President Smith pointed to the ABA Standards for Criminal Justice, which provide that the prosecuting officer should have no conflict of interest, or the appearance of a conflict of interest. He concluded: "Thus, under that standard, it clearly was and is improper for an investigation of the Executive Branch of the government, of the Office of the President, or of the President himself or of his close associates, to be conducted by a prosecutor who is under the control

[1] Roger Cramton, the immediate past Legal Counsel in President Nixon's Administration, advanced this argument in the Outlook section of the *Washington Post* for Sunday, October 28, 1973, page C5.

and direction of either the President himself or some other person who himself is under the direction and control of the President."

This is so because: "It has never been suggested to my knowledge that the truth of opposing contentions could be fairly and equitably ascertained if one of the opposing parties before the court could determine what evidence and what contentions his opponent could present to the judge or jury for consideration." [2]

These propositions are so fundamental that they may themselves be considered of Constitutional dimension. The Supreme Court of Missouri has declared it essential that a prosecutor's discretion "be exercised in accordance with the established principles of law, . . . [and] according to the dictates of his own judgment and conscience and not that of any other person." *State* v. *Wallach*, 353 Mo. 312, 322–23, 182 S.W. 2d 313, 318–19 (1944). And the Supreme Court of the United States has held that it violates due process of law for a judge to have a pecuniary interest in the outcome of a case. *Tumey* v. *Ohio*, 273 U.S. 510 (1927). The same might properly be held of a prosecutor, sworn to see that justice is done, whose very job tenure is dependent upon the outcome of his efforts as regards his adversary.

Thus to bow to the arguments of "prosecutorial discretion" when a conflict of interest is present might very well be to condone a violation of -- -- -- -- ---- interest is present might very well be to condone a violation of due process of law. It may be contended that an honorable man, when and if presented with an actual conflict, would resign as Elliot Richardson and William Ruckleshaus have done. But that of course would not accomplish the prosecutorial purpose. And the Supreme Court in *Tumey* spoke to this point by declaring that "the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." (273 U.S., at 532.) As Representative Culver suggested when introducing his bill, in matters of public moment particularly, it is important that justice be not only done but be seen to be done.

An independent prosecutorial discretion, in other words, free from both the reality and appearance of a conflict of interest, would answer fully to the requirements of *United States* v. *Cox* within its established legal setting.

II. THE SEPARATION OF POWERS

The *Cox* case is also sometimes cited for a broader proposition, that prosecution of offenses is somehow an inherently executive function whose placement in any other branch would violate the Constitutional principle of separation of powers. What the Court of Appeals said is that the prosecutor is "an executive official of the Government. . . . It follows, as an incident of the Constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions." *United States* v. *Cox*, *supra*, 342 F. 2d at 171. But again, the Culver-Bayh legislation would not allow judicial interference; instead, it would create an authorization for a special "attorney for the United States" who would remain fully insulated from such judicial interference.

It is not the Separation of Powers, but due process of law as embodied in our adversary system of justice, that ensures freedom from judicial control. This question was met and disposed of in *United States*. v. *Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963), which is the only Federal case to have passed on a Constitutional challenge to judicial appointment of a prosecuting officer. The appointment was made pursuant to 28 U.S.C. § 546 (1970), authorizing the District Courts to fill vacancies in the office of United States attorney, and the court squarely held that this did not violate the doctrine of the separation of powers. Canvassing the literature from Montesqviev to Madison, and the federal practice since adoption of the Constitution, the court determined that there is nothing doctrinaire or rigid about separated powers but that, in Holdsworth's phrase, "it was the autonomy in the action and in the development of these divided, though not quite

[2] Address of Chesterfield Smith before the National Legal Aid and Defender Association, Coronado Beach, Calif., pp. 4, 5, 7.

separated powers, which, *by enabling them to check and balance one another*, was the guarantee of liberty." 10 Holdsworth, History of English Law 721 (1938) emphasis added) ; see also The Federalist, Nos. 47 and 48 (Madison) (Wright ed. 1961). The purpose of the Culver-Bayh legislation would appear precisely to be one of setting up checks and balances against Presidential over-reaching.

Separation of powers has never been considered a bar to judicial appointment of what would otherwise be considered executive officers. This is made evident by the long-standing practice of the States. The highly respected Chief Judge of the Supreme Court of New Jersey, Arthur T. Vanderbuilt, summarized the situation as follows:

> "The state legislatures have . . . long cast many nonjudicial duties on the judiciary. This has traditionally been the practice in England both at the county level and nationally, and it was carried over to the colonies and then to the states *despite statements in the constitutions of many states expressly setting up the principle of the separation of powers*. Dean Pound has catalogued a wide variety of the nonjudicial functions of an eighteenth-century judge: 'In Connecticut, the County Courts appointed Collectors of Excise. . . . In Pennsylvania, the Quarter Sessions licensed rangers to take up stray cattle. . . . So it was in Virginia, where those courts . . . for example, licensed ferry keepers. . . . In North Carolina, the justices of the peace . . . appointed road commissioners. . . . In South Carolina, the County and Precinct Courts, afterwards superseded by the General Court, had general administrative powers. So had the justices of the peace in Georgia.'
>
> "Throughout the country the situation has not changed. . . . A cursory examination of the laws of a single state [New Jersey] discloses that its judges are called upon to appoint county park commissioners, water commissioners, morgue keepers, commissioners to survey the boundaries between municipalities, and persons to examine maimed, sick, or disabled animals." Vanderbilt, The Doctrine of the Separation of Powers and Its Present-Day Significance 113–114 (1953) (citations omitted).

Nor is the case any different when it comes to appointment of prosecuting attorneys. Quite the contrary, either by statute or without it the courts of almost all States are authorized to appoint a special prosecutor whenever the regular district attorney is incapacitated, fails or refuses to perform his duty, *or is disqualified by conflict of interest*. The cases are collected and analyzed in the American Criminal Law Review article previously cited, pp. 579–82. Typical is the Illinois Statute, Ill. Rev. Stat., Ch. 14. Sec. 6:

"Whenever the Attorney General or State's attorney . . . is interested in any cause or proceeding, civil or criminal, which it is or may be his duty to prosecute or defend, the court in which the cause or proceeding is pending may appoint some competent attorney to prosecute or defend said cause or proceeding, and the attorney so appointed shall have the same power and authority in relation to such cause or proceeding as the Attorney General or State's Attorney would have had if present and attending the same. . . ."

It was pursuant to this statute that attorney Barnabas Sears was recently appointed to prosecute State's Attorney Edward Hanrahan in Chicago, see *People* v. *Sears*, 49 Ill. 2d 14, 273 N.E. 2d 380 (1971). The statute has furthermore been upheld against a separation-of-powers challenge, *Tearney* v. *Harding*, 166 N.E. 2d 526 (Ill. Sup. Ct. 1929) ; and this notwithstanding the explicit language of the 1870 Illinois Constitution, Art. 3 :

"The powers of the Government of this State are divided into three distinct departments—the Legislative, Executive, and Judicial; and no person, or collection of persons, being in one of these departments, shall exercise any power belonging to either of the others, except as hereinafter expressly directed or permitted."

There is of course no such separation of powers clause in the Federal Constitution (though if there were, Article II, Section 2 would still provide the requisite express direction or permission).

Some of the State special prosecutors have gained fame, notably Thomas E. Dewey who made impressive discoveries of official corruption in New York

in the 1930's. See, *e.g.*, Wilkes, *A History Making Grand Jury*, 13 The Panel 1 (1935). Others have labored in more routine fashion, but the very routineness of their appointments is what is noteworthy here. Set out below in footnote are a representative sampling of decisions in three States which by statute or court ruling or both provide for judicial appointment of special prosecutors in conflict of interest situations.[3] Perhaps the aptest commentary on all such activity was provided by the Maryland Supreme Court, which is 1860 declared:

"We are not prepared to admit that the power of appointment to office is a function intrinsically executive, in the sense in which we understand the position to have been taken; namely that it is inherent in, and necessarily belongs to, the executive department. Under some forms of government it may be so regarded, but the reason does not apply to our system of checks and balances in the distribution of powers, where the people are the source and fountain of government, exerting their will after the manner, and by instrumentalities provided in, the Constitution." *Mayor of Baltimore* v. *State*, 15 Md. 376, 455 (1860).

Under the Federal Constitution, of course, it is the Congress that creates offices and that regulates their powers and duties. Congress need not have created a Department of Justice at all, or made it fully subject to the President's control. Normally it is more convenient to do so, but perceptions of convenience can change as for example when conflict of interest is involved. For any such case, Congress may at any time take the appointment power away from the President and "transfer the power to other hands." *Myers* v. *United States*, 272 U.S. 52, 177 (1926) (separate opinion of Holmes, J., concurring with the majority on this point, cf. 272 U.S., at 160). No case can be found in which the contrary has been held.

The notion of intrinsic Executive authority, insofar as it extends to creation or regulation of governmental offices, is antithetical to the Constitution. Arcticle II, Section 2 demonstrates that ours is a government not of rigidly separated but of blended powers. In Professor Kenneth Davis' well-chosen phrase, "we have learned that danger of tyranny or injustice lurks in unchecked power, not in blended power." [4]

III. IMMUNITY OF PRESIDENTIAL APPOINTEES FROM REMOVAL BY THE PRESIDENT

Suggestions have been heard that, instead of vesting the appointing authority in the courts, Congress might better follow the more habitual route of allowing the President to appoint a Special Prosecutor by and with the advice and consent of the Senate. The independence of the prosecutor, it is contended, could be assured by prohibiting or severely restricting the President's right to remove him from office.

This is of course the route that was followed by the Reconstruction Congress in the various Tenure of Office Acts, and it provoked the controversy that culminated in the impeachment (but not conviction) of President Andrew Johnson. Many years later, in *Myers* v. *United States*, 272 U.S. 52 (1926), the Supreme Court struck down the Tenure of Office Acts as unconstitutional. Of course that opinion itself was over-broad, and it was substantially whittled down just nine years later in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935). But *Myers* has never been over-ruled, and it remains as at least something of a threat to the independence of any Presidentially appointed Special Prosecutor.

To assure independence, the case would have to conform very closely to that of *Humphrey's Executor*. There are respectable grounds for believing this could be done. *Myers* had involved a postmaster, which the Court described as "an

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[3] Indiana: Ind. Ann. Stat., Sec. 49–2515–16 (1964), afterwards repealed but held constitutional in *Hendricks* v. *State*, 245 Ind. 43, 196 N.E. 2d 66 (1964); see also *Williams* v. *State*, 188 Ind. 283, 301–02, 123 N.E. 2d 209, 215 (1919). Iowa: *White* v. *Polk* County, 17 Iowa 413, 414 (1864). Missouri: *State* v. *Jones*, 306 Mo. 437, 445, 268 S.W. 83, 85 (1924).

[4] Davis, Administrative Law, Sec. 1.09, at 30 (1972).

executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power." (295 U.S., at 627.) *Humphrey's Executor* by contrast involved a member of the Federal Trade Commission, an agency with quasi-judicial as well as quasi-legislative responsibilities and one whose independence the Congress had been at pains to establish. "The commission is to be nonpartisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with enforcement of no policy except the policy of the law." (At 624.) The Court accordingly rejected the President's claim of power to remove a Commissioner before the end of his statutory seven-year term. And it suggested that the test for removability in such cases should turn on whether the officer in question is but a policy *alter ego* for the President; whether "their acts are his acts" and the President's will therefore controls. (At 631, citing *Marbury* v. *Madison*, 1 Cranch 137.)

There is much in the *Humphrey's Executor* opinion that is readily adaptable to a Congressionally created office of Special Prosecutor. Certainly the intent could be made clear that the Special Prosecutor was not to be the President's *alter ego*, that he was to enjoy independence, and that he should carry out his judicially related responsibilities with entire impartiality and pursuant to no policy but that of the law. Yet all that *Humphrey's Executor* actually decided, as the Court made plain, is that a postmaster can be fired whereas an FTC Commissioner can not; other cases between these two, the Court said, would have to be decided as they arose. And the language of the opinion is no sure guide to how they may be decided. Supreme Court Justice Stanley Reed was fond of recalling how his staff assured him that, based on the expansive opinion in *Myers*, he could not possibly lose the first case he argued as Solicitor General. Yet he lost the *Humphrey's Executor* argument nine votes to nothing.

We conclude that, even with the advice and consent of the Senate a Presidentially appointed Special Prosecutor is less certain of achieving secure and independent tenure than one appointed by the courts.

IV. IMMUNITY OF COURT-APPOINTED OFFICERS FROM EXTRANEOUS CONTROL

A. *Appointing Authority.* (*1*) *Article II Section 2* of the Constitution expressly allows the Congress to vest the appointment of "such inferior officers, as they think proper" in the courts of law. It is plain from the language, in context, that "inferior officers" may include any that are not mentioned in the Constitution; anyone, that is, but the President and Vice President themselves, Ambassadors and other chief diplomatic officers, the Justices of the Supreme Court, and very likely the heads of the Cabinet departments. That still leaves what Justice Story described as "probably . . . ninety-nine out of a hundred of the lucrative offices in government" free to be appointed as the Congress deems best. 2 Story, Constitution § 1544, cited in *Myers* v. *United States*, *supra*, 272 U.S. at 150.

It is also plain from the language, "as they think proper", that Congress' discretion is Constitutionally unlimited. Story's commentaries again provide an amplifying key: "The propriety of the discretionary power in Congress, to some extent cannot well be questioned. If any discretion should be allowed, its limits could hardly admit of being exactly defined; and it might fairly be left to Congress to act according to the lights of experience." This is exactly what was thereafter decided in *Ex parte Siebold*, 100 U.S. 371, 397–98) (1979), rejecting an argument that the appointing authority of the courts must be limited to court clerks or other strickly judicial officers. The Court pointed out that marshals are habitually appointed by the President and perform executive functions in the strictest possible sense, but that they might just as logically be appointed by the courts and that the courts in fact had (and still have, 28 U.S.C. § 565) statutory authority to fill vacancies in the office of U.S. Marshal. The parallel with 28 U.S. § 546 (U.S. Attorneys) could scarcely be more striking.

It is hard to find fault, then, with the recent conclusion by the U.S. District Court for the District of Columbia that "Article II is couched in terms of discretion; and Congress has not considered it can empower judges to appoint only

officers concerned with the administration of justice. . . ." *Hobson* v. *Hansen*, 265 F. Supp. 902 (1968) (three-judge court). To be sure, there is language in *Ex parte Siebold* that the appointment must not be incongruent with the performance of regular judicial functions. But on any fair reading this must be taken to refer to the conflict-of-functions problem, considered in the next Part of this memorandum. At all events, *Siebold* approved judicial appointment of Congressional election supervisors, while *Hobson* approved similar appointment of a school board. The activities of a Special Prosecutor, who is after all an officer of the court, will be far more congruent with the regular administration of justice. Certainly the long-established law and practice of the state courts on this matter should suffice to demonstrate any requisite congruence.

(2) *Article I, Section 8* of the Constitution is also in point and supports the legislation. It provides that the Congress shall have power over a wide scope of subject matter, and also "to make all laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Offices thereof."

If the prosecution of criminal offenses is claimed to be an inherent power of the President, or of the Department of Justice, and they are disabled by conflict of interest from exercising those powers as intended, then Congress under the plain language of this clause has full authority to take remedial legislative action to correct the disability. The power is to "make all laws", which should disabuse any argument that the sole Congressional remedy is impeachment. As Chief Justice Marshall put it in *McCulloch* v. *Maryland* 4 Wheat. 316, 415 (1910), the "necessary and proper clause" is a provision "made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."

(3) *Article I, Section 8* also gives the Congress plenary regulatory jurisdiction over the District of Columbia; and this is recited as additional Constitutional authority in Section 2(e) of the Senate bill (S. 2611). That is a more dubious proposition. In *Glidden Co.* v. *Zdanok*, 370 U.S. 530 580–81 (1962), Justice Harlan set forth the following considered dictum:

"It is true that *O'Donoghue* [v. *United States*, 289 U.S. 516, 545–81] upheld the authority of Congress to invest the Federal courts for the District of Columbia with certain administrative responsibilities—such as that of revising the rates of public utilities—but only such as were related to the government of the Dstrict. [Citations omitted.] To extend that holding to the wholly nationwide jurisdiction of courts whose seat is in the District of Columbia would be to ignore the special importance attached in the *O'Donoghue* opinion to the need there for an independent national judiciary.

". . . The national courts here may perform any of the *local* functions elsewhere performed by State courts." (Emphasis added.)[5]

Presidential accountability is of course not a local but a national matter. For this reason, it would appear that this Constitutional reference might as well be dropped.

B. *Immunity from Presidential Removal.* It is well-settled law that the power of removal goes with the power of appointment. In *Ex parte Hennen*, 13 Pet (38 U.S.) 225 (1839), the Court so held with respect to a court-appointed clerk, and its opinion has controlled the law from that day to this. See., *e.g.*, *Myers* v. *United States*, 272 U.S. 52, 119 (1926); *Hobson* v. *Hansen*, *supra*, 265 F. Supp. at 913 n. 13. The relevant passage appears at 13 Pet. 258—60.

where the tenure is not fixed. . . .

". . . In the absence of all constitutional provision, or statutory regulation, it would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment.

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[5] Footnote 54 then recites the probate and divorce jurisdiction of the U.S. District Court, and distinguishes "the appointing authority given judges of this District Court to select members of the Board of Education and of the Commission on Mental Health, . . . [which] *is probably traceable to Article II, § 2 of the Constitution.* . . ." (Emphasis added.)

". . . [T]he Constitution has authorized Congress, in certain cases, to vest this [appointment] power in the President alone, in the courts of law, or in the heads of department; and all inferior officers appointed under each, by authority of law, must hold their office at the discretion of the appointing power. Such is the settled usage and practical construction of the Constitution and laws, under which these offices are held."

It follows that the President cannot claim any authority whatever to remove judicially appointed officers. And since the judges of the federal courts hold their offices for life under Article III of the Constitution, the President cannot do indirectly what he did with Archibald Cox by issuing instructions to remove the Special Prosecutor. Any such instructions would have absolutely no force or effect.

C. *Statutory Regulation of Tenure.* The *Hennen* rule applies as stated only "where the tenure is not fixed" by "statutory regulation." Where Congress has spoken, "the tenure of the office is determined by the meaning and intention of the statute." (13 Pet., at 260.) Employment by Congress of the Article II, Section 2 excepting authority entitles it to regulate the right of removal and restrict it. See *Myers* v. *United States, supra,* 272 U.S. at 160, quoting from and approving *United States* v. *Perkins,* in which it was held that a naval officer could not be removed by the Secretary of the Navy without a court martial, since the statute so specified:

"The head of a Department [or court] has no constitutional prerogative of appointment to offices independently of the legislation by Congress, and by such legislation he must be governed, not only in making appointments but in all that is incident thereto."

The Culver-Bayh legislative proposals in fact do make the Special Prosecutor removable from office by the District Court, for "extraordinary improprieties." This is not only Constitutionally permissible but also highly desirable, to make sure of preserving the "inferior officer" status which might be jeopardized if the Special Prosecutor were not removable at all save by impeachment.

D. *Judicial Interference.* Apart from the causes specified in the legislation—as to which a hearing would have to be afforded, pursuant to the Administrative Procedure Act—the judges of the District Court would have no right to interfere with the discretion of the Special Prosecutor. This follows from the cases just considered, as well as the *Cox* decision previously cited. It is an essential element of the adversary process.

Judicial satisfaction that the prosecutor is in fact independent should actually help to assure that any trials are conducted with entire impartiality. It is when a judge suspects that a prosecutor is "pulling his punches" that he is most tempted to intervene and take over the questioning of witnesses. This risks prejudicing the jury or otherwise producing a judgment that is reversible on appeal. See *The Special Prosecutor in the Federal System: A Proposal,* 11 American Criminal Law Review 577, 628–29 (1973), and cases there cited. Thus judicial appointment of the Special Prosecutor should enhance the prospects of attaining due process of law.

V. CONFLICT OF FUNCTIONS AND DUE PROCESS OF LAW

In *Ex parte Siebold, supra,* 100 U.S., at 397–98, the Supreme Court held that there was "no such incongruity in the [appointment] duty required as to excuse the courts from its performance, or to render their acts void." In *Hobson* v. *Hansen, supra,* 265 F. Supp., at 916, the court similarly declared that appointment of a prosecuting attorney would cause no due-process difficulties. And in *Tumey* v. *Ohio,* 273 U.S. 510, 534 (1927), where the judge was also the mayor of the village, the Court said that "the mere union of the executive power and the judicial power in him can not be said to violate due process of law."

Notwithstanding these pronouncements, however, Constitutional and ethical policy considerations may counsel against vesting the appointing authority in the

judge who will also sit in judgment on cases brought by his appointee. The judge might appear to the public or to himself to have acquired an adversary interest which would conflict with his impartiality. In *Tumey* v. *Ohio*, *supra*, 273 U.S., at 532, the Court stated that "every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." On grounds such as these, the Congress has itself adopted a broad disqualification statute (28 U.S.C. Sec. 455 (1970)):

"Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

In a recent case which bears considerable similarity to the present one, Judge Gerhard Gesell of the District Court here in fact did recuse himself from sitting in judgment on an indictment which, over the objection of the U.S. Attorney, he had refused to dismiss. See *The Special Prosecutor in the Federal System: A Proposal*, 11 American Criminal Law Review 577,597–98 § nn. 119–21 (1973).

What this all comes down to is, *first*, that court appointment of a Special Prosecutor would not itself void any convictions or other judgments that might later be returned by that court; but, *second*, that a single appointing judge might feel compelled to disqualify himself from sitting on such cases. Representative Culver's bill indeed anticipates such a contingency in its Section 4. If it is desired to avoid this difficulty, so as to conserve the knowledge of past proceedings held by Judge Sirica, the simplest way would be to amend the bill, authorize creation of a three-judge panel to perform the appointing function, and provide that no member of this panel may participate in cases brought by an appointee.

VI. THE TERRITORIAL REACH OF THE SPECIAL PROSECUTOR'S JURISDICTION

H.J. Res. 784, Section 7, provides that the Special Prosecutor's powers to collect evidence shall extend "throughout the territory of the United States," and Section 6 authorizes him to proceed "in all Federal Courts . . . of the United States." S. 2611 would go further and specify in its Section 4(6) that the Special Prosecutor may initiate and conduct prosecutions "in any court of competent jurisdiction" (which could include the courts of the States, 18 U.S.C. § 3231, paragraph 2.) Some question may be raised about the propriety of vesting so nationwide a jurisdiction in an officer appointed only by the District Court for the District of Columbia.

In *Ex parte Siebold*, *supra*, the Supreme Court ruled that considerations of convenience could guide the Congress' determination with respect to location of the appointing authority. In the present case, no other authority would be so convenient as the D.C. District Court. It is presiding over the two grand juries thus far empaneled to look into Watergate, the so-called "cover-up," and campaign finance offenses.[6] The Office of the Special Prosecutor is here, as is the Office of the President. Furthermore, all or most of the offenses covered by the Culver-Bayh legislation (Watergate, Presidential election, Presidential entourage) bear sufficient connection with the District of Columbia to be triable here. Crimes must be tried under the Constitution in the State and district where committed (Article III, Section 2: the Sixth Amendment)—but "any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed." 18 U.S.C. § 3237 (1970).

[6] The Court of Appeals is more removed, and does not enjoy the precedential benefits of the temporary appointment statute, 28 U.S.C. § 546. The United States Supreme Court should be held entirely detached from the matter.

If it were thought desirable to resolve this question with absolute clarity, it might be in order to provide that the jurisdiction and venue for all proceedings brought by the Special Prosecutor shall be in the District of Columbia federal courts. There would be some risk, however, that some aspects of some cases could not be Constitutionally tried here. Furthermore, this could put an excessive burden both on the District Court and on the Special Prosecutor. Compulsory process may occasionally be more conveniently enforced in other parts of the country. The same may be true of the initiation of certain criminal cases, such as the prosecution of John Mitchell and Maurice Stans in the Southern District of New York. And alteration of the jurisdiction and venue provisions of the U.S. Code, which have been carefully considered and balanced over the years, is an uncertain venture.

For these various reasons, it appears preferable to authorize the Special Prosecutor to appear in all federal courts of competent jurisdiction[7] and perhaps to provide (on burden-sharing grounds) that the U.S. Attorneys in other districts shall be subject to his supervision and control for this purpose. This would also assist in the disposition of any ancillary civil business the Special Prosecutor may be given. (See Appendix.)

The only other alternative, that of giving each U.S. District Court a separate appointing authority, is too confusing to contemplate. Certainly there is nothing in the Constitution or cases construing it that would compel the Congress to adopt so unwieldy an instrument. Independent prosecution of the Watergate, etc. offenses can be conducted effectively only if it is under unitary management and control. This can be appropriately reflected in the findings and declarations of the legislation.

ROLAND S. HOMET, Jr.

APPENDIX:

SOME DRAFTING SUGGESTIONS

1. *Title:* [Reconcile the name differences between H.J. Res. 784 and S. 2611.]

2. *Findings and Declarations:* (a) Under the adversary system of justice established in this country, the truth of opposing contentions is ascertained in an impartial court of law with each party free from control or restriction by his opponent in determining what evidence and arguments to bring forward.

(b) Recent serious allegations of improper and illegal activities involving former high officials and advisers of the President of the United States require for their investigation and resolution the services of a Special Prosecutor who will be independent and non-partisan and engaged in enforcement of no policy but the policy of law, and who for this purpose will be free from either the appointment or removal power of both the President and of the Congress as well as of anyone who is subject to removal by them.

(c) Under Article II, Section 2 of the Constitution, the appointment and removal authority for such a Special Prosecutor may be vested by Congress "in the courts of law"; and the exercise of this power by statute is "necessary and proper" under Article I, section 8 of the Constitution to assure the due and proper administration of justice.

(d) The court best qualified by location and jurisdiction to receive and exercise such authority is the United States District Court for the District of Columbia.

3. *Protection of Files.* [Section 2 of H.J. Res. 784 confirms the protective authority over Mr. Cox's files and records that Judge Sirica has already reportedly exercised. It would help to ensure that such protection is maintained until the appointment of a new Special Prosecutor. There is no comparable provision in S. 2611.]

4. *Appointment.* (a) The United States District Court for the District of Columbia shall appoint a Special Prosecutor for the purposes and with the powers

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[7] There is of course no conflict-of-interest justification for going into the province of state district attorneys.

and duties prescribed in this Act, and shall replace said officer only for extraordinary improprieties in the exercise of his responsibilities as an officer of the court, or in the event the office becomes vacant. [Similar language may be added for a Deputy Special Prosecutor if desired.]

(b) The authority conferred on the District Court by subsection (a) of this Section shall be exercised by a panel of three judges who are members of that Court, said panel to be convened by the Chief Judge thereof. Any vacancies occurring in said panel shall be filled through appointment by the then Chief Judge.

(c) No judge who is a member of the panel convened pursuant to subsection (b) of this Section shall thereafter preside over or otherwise participate in any judicial proceeding conducted by or in behalf of a Special Prosecutor [or Deputy Special Prosecutor] appointed by that panel.

5. *Special Prosecutor: Jurisdiction.* [Section 6 of H.J. Res. 784 covers the subjects in Section 3(b) and Section 4 (6) and (7) of S. 2611. The following are suggested harmonizing amendments to Section 6 of H.J. Res. 784]:

Anything in the statutes or *rules* of the United States . . . including the Supreme Court of the United States, *involving* any or all of the following *matters:*

(a) . . .

(b) all offenses arising out of the 1972 Presidential election;

(c) offenses alleged to have been committed by the President, present or former members of his White House staff, or other present or former Presidential appointees;

(d) all other matters heretofore referred to the former Special Prosecutor pursuant to regulations of the Attorney General (28 C.F.R. § 0.37, rescinded October 24, 1973);

(e) perjury or other offenses arising out of previous or future investigation of such matters; and

(f) such other matters certified by the Special Prosecutor *in camera* to the three-judge panel convened under Section 4(b) of this Act and determined by it to bear a proximate relation to any of the foregoing matters.

6. *Special Prosecutor: Powers.* [Section 7 of the Culver bill covers subjects addressed in sections 4 (2)–(5), (7) and 5(a) of the Bayh bill. The following would amend Culver § 7]:

The Special Prosecutor . . . material described in Section *3* of this Act . . . subject matter described in Section *5* of this Act. . . . full power to:

(a) . . .

(b) [insert Section 4(4) of Bayh bill]

(c) [relettered Culver (b), as amended]: *make application to* any Federal Court . . .

"(d) . . .; *and*

(e) notwithstanding any other provision of law, to exercise all other powers as to the conduct of criminal investigations and prosecutions within his jurisdiction, including supervision of the United States Attorneys, which would otherwise be vested in the Attorney General or the United States Attorney under the provisions of Chapters 31 and 35 of Title 28, United States Code, and . . . **[balance of Bayh Section 4 (7)].**

7. *Civil Actions.* The Special Prosecutor shall have exclusive authority and responsibility to conduct in the courts of the United States any civil action that **is ancillary to the exercise of his responsibilities** under this Act, or that challenges its Constitutionality. [*Note:* this is adopted from Senator Stevenson's bill, introduced October 23, 1973, but narrowed so as to encompass such "ancillary" matters as civil contempt, habeas corpus, or a Constitutional challenge.]

8. *Succession.* (a) All material of the character described in Section 3 of this Act, and all information relating thereto, which may have been collected, produced or otherwise obtained after October 20, 1973 by the Attorney General or any other person designated by him to assume responsibility for the investiga-

tion of any of the matters described in Section 5 of this Act, shall be delivered into the possession of the Special Prosecutor appointed under this Act.

(b) [Insert Bayh Section 5 (b).]

9. *Staff and assistance.* [Insert Bayh Section 6, with the insert of a new second sentence]: . . . The Special Prosecutor shall receive a salary equivalent to the current rate payable to positions at Level 5 of the Executive Schedule, under Section 5316 of Title 5, United States Code.

10. *Office, supplies, and services.* [Bayh Section 7.]

11. *Budgetary authority.* [Congress must reconcile Culver Section 5, last sentence, with Bayh Section 8.]

12. *Disclosure of information.* [Culver Section 8, first sentence. The committee might wish to add, if it sees fit, language along the following lines:] Any evidentiary privilege asserted as a bar to a formal request, signed by the Special Prosecutor, for such information or assistance shall be submitted by motion to the United States District Court for the District of Columbia within seven days from the date of such formal request; otherwise, the privilege shall be deemed to have been waived.

13. *Appearances before Congress.* [Culver Section 9, but insert, after the word "evidence"]: . . . , not inconsistent with the rights of any accused or convicted persons, . . .

14. *Public reports.* [Culver Section 11.]

15. *Limitations of Powers.* [Bayh Section 11, perhaps revisiting the first sentence for clarity to read]: The Special Prosecutor shall exercise only those powers and perform those duties specified herein. . . .

16. *Duration of office.* [Congress must reconcile Culver Section 12 and Bayh Section 9.]

17. *Funding.* [Culver and Bayh Sections 13, with the following addition]: Such funds shall remain available without fiscal year limitation until expended. All funds appropriated to the Watergate Special Prosecution Task Force pursuant to the Departments of State, Justice, and Commerce Appropriations Act for Fiscal Year 1974 and not previously expended, shall by virtue of the enactment of this Act, be transferred to the account of the Special Prosecutor appointed hereunder.

18. *Public trust.* [Finish with Section 15 of the Culver bill, H. J. Res. 784.]

Mr. HUNGATE. Let me take this opportunity, Mr. Culver, to express the committee's appreciation to you for the thoughtful preparation and obviously the large amount of work and time you have put into this most important matter.

Mr. Kastenmeier?

Mr. KASTENMEIER. Thank you, Mr. Chairman. I, too, would like to express my appreciation and compliment the gentleman from Iowa and his collaborators on the work they have done in connection with this very serious issue. One of the problems, of course, is that time is of the essence. Yet, at the same time, we must fully view every aspect of the legislation, particularly if it has some difficulties, which are suggested by the fact that on October 23, you introduced this resolution but by your memorandum of today, October 31, you already suggest some statutory or some changes in language, modifications, and even in the resolution as you propose it. Is that not correct?

Mr. CULVER. Yes, that is true, Mr. Kastenmeier. I might say, more as a tribute to some capable staff work in 48 hours, that the changes are relatively minor, that they are felt to be perfecting in nature, specifically, the one with regard to the appointing authority and the empowering of the three-judge panel for that purpose, which is perhaps one of the most significant. But the basic and fundamental provisions in the legislation have remained intact and certainly survived a full week's scrutiny. But, I think that is the whole purpose of this hearing process and I know that the able members of this committee and your own staff are going to, undoubtedly and properly, have your

own recommendations to make in this area. I would hope we have provided a useful starting point.

Mr. KASTENMEIER. I take it you are absolutely sanguine about the constitutionality of the appointment of a Special Prosecutor outside of the executive branch? You have obviously researched that question very thoroughly.

Mr. CULVER. Well, Mr. Kastenmeier, I am certainly as sanguine as one can ever be about the constitutionality of any area of law which has not enjoyed constitutional precedents that are all that clear. I think that one of the most important aspects of this particular problem is, as evidenced by the statements of Mr. Cox himself, that we are talking here about an unprecedented situation, and we are talking about a problem which calls upon us to plumb the flexibility of our constitutional system. And at first blush, I think it is the natural impulse of constitutional authorities, in the absence of any precedent, to have understandably a cloud raised as to the constitutionality of a given action. The thing that I find reassuring as these events have forced constitutional scholars to search and review what precedents are available and applicable to this problem and this point, this situation, they seem to come forward rather uniformly with the conviction that this has constitutional basis and validity and would withstand court challenge. I think, of course, the best example is perhaps the demonstrated evolution of Mr. Cox's own reflections in this regard. But, I wonder if I might defer to Mr. Homet to perhaps elaborate on this point.

Mr. HOMET. I can say, Mr. Kastenmeier, if I might, because I am not sure the committee's record includes it, but I came across, yesterday, after finishing our own separate and independent research, a letter addressed to the majority leader, Hon. Thomas P. O'Neill, by Prof. Paul Freund, at the Harvard Law School, which comes out unequivocally in favor of the constitutionality of this approach. And it might be proper for the committee to take this into its record and give it the appropriate consideration as well.

Mr. KASTENMEIER. If you have such a letter, I would request our chairman to receive that into evidence.

Mr. HUNGATE. Without objection, it will be made a part of the record at this point.

[The letter referred to follows:]

LAW SCHOOL OF HARVARD UNIVERSITY,
Cambridge, Mass., October 25, 1973.

Hon. THOMAS P. O'NEILL,
House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN O'NEILL: Questions have been raised concerning the constitutional authority of the Congress to vest in a court the appointment of a Special Prosecutor in succession to Professor Cox. Having given some thought to the problem, I am venturing to express my opinion that such authority does exist. In this conclusion I am in agreement with the statement issued several days ago by law school Deans.

The Constitutional text is clear. Article II, section 2, provides:

". . . but the Congress may by law vest the Appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Any limitation on this express power must arise from implications of the Constitution. There appears to be no case holding invalid an appointing power vested in the courts, though a variety of appointments have been so vested, ranging from marshals of the courts and temporary United States Attorneys to

supervisors of federal elections and members of the board of education of the District of Columbia. See *Hobson* v. *Hansen*, 265 F. Supp. 902, 911 et seq. (D. Col. 1967), per Fahy, J.

The challenges that have been advanced and rejected in cases of judicial appointments have invoked the doctrine of separation of powers,—more specifically, that the appointing power vested in courts should relate only to offices concerned with the administration of justice. In the leading case of *Ex parte Siebold*, 100 U.S. 371 (1879), the Supreme Court refused to place this limitation on Article II, section 2, and upheld the vesting of authority in the circuit courts to appoint supervisors of federal elections. The duties of such officers appear to be less germane to the judicial branch, and more naturally thought of as "executive," than the duties of a special prosecutor charged with investigation and prosecution of offenses within the higher reaches of the executive department itself.

Refusing to fetter the Congressional choice of the appointing authority, the Supreme Court put to one side cases involving the performance of non-judicial duties by judges themselves. The appointing power is specifically authorized by the Constitution, the Court observed, and Congress will decide where it may be most appropriately vested, unless there is manifest "incongruity" in the judicial appointment. The relevant passage follows (100 U.S. at 397–398):

"The Constitution declares that 'the Congress may, by law, vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law, or in the heads of departments.' It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution; and, if there were, it would be difficult in many cases to determine to which department an office properly belonged. . . .

"But as the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress. And, looking at the subject in a practical light, it is perhaps better that it should rest there, than that the country should be harassed by the endless controversies to which a more specific direction on this subject might have given rise. The observation in the case of Hennen, to which reference is made (13 Pet. 258), that the appointing power in the clause referred to 'was no doubt intended to be exercised by the department of the government to which the official to be appointed most appropriately belonged,' was not intended to define the constitutional power of Congress in this regard, but rather to express the law or rule by which it should be governed. The cases in which the courts have declined to exercise certain duties imposed by Congress, stand upon a different consideration from that which applies in the present case. The law of 1792, which required the circuit courts to examine claims to revolutionary pensions, and the law of 1849, authorizing the district judge of Florida to examine and adjudicate upon claims for injuries suffered by the inhabitants of Florida from the American army in 1812, were rightfully held to impose upon the courts powers not judicial, and were, therefore, void. But the duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts; and in the present case there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void. It cannot be affirmed that the appointment of the officers in question could, with any greater propriety, and certainly not with equal regard to convenience, have been assigned to any other depositary of official power capable of exercising it. Neither the President, nor any head of department, could have been equally competent to the task."

From the standpoint of "propriety" or "congruity" the judicial appointment of a Special Prosecutor in the present circumstances rests on a firmer footing than a similar appointment of election supervisors or of United States Attorneys while a vacancy exists. Though limited in tenure until the President and Senate agree on an appointee, a United States Attorney appointed by the court assumes all the powers of the office, regardless of subject matter. The limitation of subject matter in the case of a Special Prosecutor even more clearly satisfies the criterion that the appointment not be "incongrous." Indeed, it could with reason be thought that in all the circumstances incongruity would inhere in an executive appointment.

The Special Prosecutor would be as independent as it was originally contemplated he should be. To this end, it might be appropriate to vest his appointment in no single judge but in the judges of the District Court. Moreover, he

would be removable only for specified cause, such as "extraordinary improprieties," again as originally contemplated.

Provision for removal by the body that appointed him would raise no further problems. The power of removal (aside from impeachment) is not dealt with in the Constitution. It has been assumed that the power to appoint carries with it the power to remove, save that where the office requires a measure of independence Congress may protect the functioning of the appointee by placing qualifications on his removal. Compare *Humphrey's Executor* v. *U.S.*, 295 U.S. 602 (1935) (Federal Trade Commissioner) with *Myers* v. *U.S.*, 272 U.S. 52 (1926) (postmaster). The same considerations that support judicial appointment apply to judicial removal, subject to the specifications of grounds for removal in the interest of independence.

The power conferred on Congress in Article II is reinforced by the power conferred in Article I, section 8, "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." That justice shall be done and shall be seen to be done is a paramount and legitimate concern of the Congress. That concern requires no extra-constitutional powers. It does serve to caution against raising barriers to the exercise of the power expressly granted by Article II.

In the present state of affairs it may not be amiss to recall the classic words of Chief Justice Marshall, which Justice Frankfurter used to describe as the single most important utterance on constitutional interpretation: "This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adopted to the various crises of human affairs." (*McCulloch* v. *Maryland*, 4 Wheat. 316, 415 (1819)).

Sincerely yours,

PAUL A. FREUND.

Mr. KASTENMEIER. I would only comment that if you are not right, we have a flaw in the constitutional system of checks and balances. Therefore, one is disposed to believe you are right, and that this procedure is constitutional.

Mr. HOMET. Mr. Kastenmeier, again Professor Freund's letter gives the appropriate quotation. I think we are dealing not only with article II, section 2, but also with the necessary and proper clause, and his last paragraph of the letter says:

> In the present state of affairs it may not be amiss to recall the classic words of Chief Justice Marshall, which Justice Frankfurter used to describe as the single most important utterance on constitutional interpretation: "This provision is made in a Constitution intended to endure for ages to come and, consequently, to be adapted to the various crises of human affairs."

And that, of course, is from *McCulloch* v. *Maryland*.

Mr. KASTENMEIER. I appreciate that statement. It is of great help to us.

One last question, Mr. Chairman, that I have. You mentioned such words as "enduring" and, Congressman Culver, your closing words about the fundamental and permanent constitutional responsibility, yet the suggested language here is designed for this particular case, and I guess my question to you, is, ought we not to institutionalize a Special Prosecutor outside of the executive branch to pursue such matters in the future on a more permanent basis, or are you satisfied that we need only respond on this ad hoc basis?

Mr. CULVER. Well, Mr. Kastenmeier, of course I am familiar with that suggestion that has been proposed. I think at first blush, it has a great deal to commend it in terms of the likelihood of having an ongoing, independent, public-interest Prosecutor of this type established. My own judgment is that, in view of 200 years of institutional experience in this country where it has not proven to be necessary to date, that it is a matter to which we should give very serious consideration

and full exploration, in terms of weighing its value, and its needs and its desirability. But, at the same time, I think that the nature of our immediate circumstances dictates that we should not, in any way, delay in acting independently on this Special Prosecutor for this special set of circumstances.

Mr. KASTENMEIER. I appreciate my friend's reply.

Thank you, Mr. Chairman.

Mr. HUNGATE. Yes. Mr. Smith?

Mr. SMITH. Mr. Culver, I want to thank you, too, for the effort that has gone into preparing the bill and the background and the legal research that you have submitted here, particularly, since it was done in a relatively short space of time. I wondered about the following question and, that is: Does your bill propose any specific time limitation for the appointment of a Special Prosecutor?

Mr. CULVER. Mr. Smith, I think we leave that open ended upon the mutual determination of the Special Prosecutor and the three-judge impaneling group that would be called to make his appointment. We would rather envision an ongoing relationship there of sorts. We have given that relationship the additional burden, for example, of fleshing out other areas of possible investigation upon a mutual agreement and direction from the court and, also, in terms of the life of the prosecution. It would be open ended to the extent to which time was necessary to complete its charter.

Do you wish to comment on that, Mr. Homet?

Mr. HOMET. If I may just add, Mr. Smith?

Mr. SMITH. Yes, Mr. Homet.

Mr. HOMET. The Senate bill referred to, S. 2611, does take a different approach, which I would submit might well be considered also by the committee, of a 2-year termination date, except for trials and appeals still in process. Those are the two major proposals before the Congress now on that subject.

Mr. SMITH. Well, Mr. Culver, in your proposed bill, would the three-judge appointing panel also have the power of termination of the Special Prosecutor?

Mr. CULVER. Yes, sir.

Mr. SMITH. Either that panel or a similar one, I suppose, appointed by the chief judge of the district court.

Mr. CULVER. Yes, sir.

Mr. SMITH. One other question, Mr. Culver. On page 8 of your statement under "Scope of the procedural authority" you say that:

> The Senate Bill adds a useful provision that the Special Prosecutor shall receive security clearance to examine asserted national security information *in camera*. I believe the intention is clear that this would not be a pre-condition to his appointment of activity.

Would it be your idea that if this provision were incorporated in the bill, this would come, possibly, after the appointment of the Special Prosecutor, and that then would you think he would be able to examine such material prior to his receiving security clearance?

Mr. CULVER. No. No, Mr. Smith. I think you should not be able to. One of the problems I think that we perceive in this kind of situation is the problem of having, in effect, the executive branch effectively veto a possible nominee for that position. Perhaps that is being too cynical and unduly precautionary. I think it is absolutely essential

that anyone who serves in that critically responsible capacity satisfy the most rigid national security standards in terms of his clearance and his background.

Do you want to add to that?

Mr. HOMET. Yes. I think the purpose would be that the security clearance would relate only to his access to asserted national security information. If he did not receive it, he still would be the Special Prosecutor, and we would merely lose that particular additional assistance to the court, such as was provided in the court of appeals formula, whereby Mr. Cox was to go into court with Judge Sirica and examine the tapes together. They could examine the tapes, including national security information, in this way. If he does not have a national security clearance, he cannot look at the security information, but he still could follow the court of appeals mandate in other respects.

Mr. SMITH. All right. Thank you very much, Mr. Culver.

Mr. HUNGATE. Mr. Edwards?

Mr. EDWARDS. Thank you, Mr. Chairman.

I join my colleagues in thanking Mr. Culver very much for an excellent statement.

Mr. Culver, even though this might be constitutional, do you not feel that you are stretching the Constitution by this resolution? In other words, are you not setting up under this bill a fourth branch of Government?

Mr. CULVER. No, Mr. Edwards. I have heard it suggested that in certain comments following the discharge of Mr. Cox, that he was purporting to conduct himself in such a way as to suggest the existence of a fourth branch of Government. First, I think that in fairness, we have always had somewhat of a fourth branch of Government existing in the independent regulatory agencies themselves, the whole scaffolding of regulatory——

Mr. EDWARDS. But they do not deal with criminal conduct. Is that not the difference between the regulatory agencies and this?

Mr. CULVER. Well, in some instances they are dealing with——

Mr. EDWARDS. Prosecutorial authority is not vested in the regulatory agencies.

Mr. CULVER. But I did want to perhaps, you know, deal with that particular suggestion on its merits.

Second, I do think, as I tried to indicate in my statement, that we are talking about a very unique and unprecedented situation, both in terms of the demands and the special nature of the requirements of due process of law, and in the special context we find ourselves in, we are dealing with a Constitution that has always demonstrated flexible capacity to adapt to the necessities of time. And I think that this is the kind of situation where the language of the Constitution is once again being called upon to be sufficiently flexible and compatible with past precedents to deal with this problem, as suggested by Mr. Homet in terms of the necessary and proper steps taken legislatively by Congress.

Mr. EDWARDS. You mentioned in your statement, Mr. Culver the *Cox* case, *United States* v. *Cox*, where the Department of Justice just refused to go ahead with the suggestion of the Federal Grand Jury. Now, this would not be the case if this Special Prosecutor is appointed by the court. How could he bring any proceedings to a successful

conclusion, if he does not have independence from the executive branch.

Mr. CULVER. Mr. Homet, perhaps, would want to distinguish the case here?

Mr. HOMET. Yes. I think you have to keep in mind the difference between the statutory setup that we do have and what the Constitution requires. Of course, under chapter 31 of title 28 of the United States Code, the Attorney General is in charge of the Department of Justice and he controls the U.S. attorneys. They respond to him. The legislation submitted to you would change that. It would substitute new legislation, that for the limited purposes set forth in the subject matter provisions of the bill, the Special Prosecutor would have supervision of the litigation either directly or through his staff or through U.S. attorneys who would respond to him, so that if you substitute in these unique and special, and carefully limited circumstances, as they are in the bill, the word "Special Prosecutor" for "Attorney General," you come out with the *United States* v. *Cox* result: namely, the Special Prosecutor goes into court, or—check that—if the grand jury becomes a runaway grand jury, and returns an indictment improperly against one of the potential defendants and, if in the Special Prosecutor's judgment, the evidence does not amount to probable cause, so that he refuses to sign the indictment, under this legislation, just exactly as in *United States* v. *Cox*, the court could not force him to do so, and that criminal proceeding would not go forward.

Mr. EDWARDS. Well, thank you. You make a very strong case. However, do we not have to be careful that if we move too fast in something like this and we are, really, by enacting this legislation, establishing a very important precedent. We have found historically that once we establish a way of doing things, supported by Congress, there is a tendency to use it over and over again. And how do we know that next year or the year after, someone would not say, well, we had the Special Prosecutor that time, and we are just going to have to follow that precedent?

Mr. CULVER. Mr. Edwards, I really do not see any genuine danger in the situation you pose. If the nature of the circumstances today dictates both the desirability and the necessity for the creation and the establishment of a Special Prosecutor and, as I have indicated this morning, I feel very strongly that it does, then I think that if it is good for this time, at some future date, if ever a precedent of this nature is desirable in the public interest to reestablish confidence and due process and to have available an approach and a mechanism, by which we can eliminate any doubt as to the integrity of the judicial system, or at least the administration of justice, and the needs of due process, and avoid the inherent conflict of interest situation, which is unique right in this context which has never been experienced in the prior history of this Republic, then and only then should we pursue this approach. And I think that again is why the Founding Fathers evidenced such genius, in the remarkable flexibility that was incorporated in that constitutional document.

Mr. EDWARDS. Well, I know my time is up, Mr. Chairman. I would like to make one other observation, however, that I am sure we are going to face further along the line. That is, wherever you are talking

about corruption or possible corruption in the executive branch, you are really talking about the executive branch investigating the executive branch. It is like a police department. If you have corruption in the police department, the police department investigates the police department. It seems clear to me that we are surely going to run into that argument down the road.

Mr. CULVER. I think the only way in which I might distinguish the situation now is both in terms of the massive nature of the problem, the pervasive problem that is represented within the current administration; and, second, frankly, the potential, the potentiality of the President, himself, being a defendant, as well as some of his closest associates.

Mr. EDWARDS. I thank you.

Mr. HUNGATE. Thank you, Mr. Edwards.

If I might make an aside at this point. We certainly welcome our friends from the media. Those in the electronics branch, if you have instruments that beep, squeak, or whine, please eliminate the noises as soon as possible. We want to conduct the public's business in public. It would be even more appropriate to do it without any unnecessary distractions.

Mr. Dennis?

Mr. DENNIS. Mr. Culver, I, too, would like to compliment you on a good, professional performance. Like you, I see the desirability of an independent prosecutor here, and I recognize the anomaly of the executive branch investigating itself. But, I also think that you will agree with me that there are pretty serious constitutional problems in your approach. I have your memorandum here which I shall read. I have not had a chance to yet. I have three or four other learned memoranda from competent counsel who come to an opposite conclusion. So, obviously, in your approach we are building in a constitutional question to begin with. That is true, is it not?

Mr. CULVER. Well, I think, as I have indicated, Mr. Dennis, we are dealing in somewhat uncharted constitutional waters, and we have to rely upon available precedents and their interpretation and legal scholarship in the context of the unique situation that is presented here today. I think that has to be acknowledged.

Mr. DENNIS. Now, the approach of an Executive appointment, subject to senatorial confirmation, whatever its other objections may be, is constitutionally sound. Would you agree with that?

Mr. CULVER. Well, I do not think that one would anticipate any constitutional questions being raised, if that were the formula adopted. Mr. Homet may wish to comment on that because there are arguments that this approach would, in part, possibly raise some constitutional problems that would be even more significant than the ones that possibly are suggested in our approach.

Mr. DENNIS. Well, I would certainly be glad to hear Mr. Homet's comments, but I also would like him to address himself to the question of whether or not there may be constitutional questions raised, and there almost can be constitutional questions raised about anything. But would you agree that certainly they are far less severe than in your approach, because that is a well-recognized method that we use all of the time?

Mr. HOMET. Well, Mr. Dennis, if I may?

Mr. DENNIS. Yes.

Mr. HOMET. I am afraid I cannot agree to that and I will tell you why. It will take just a moment.

Mr. DENNIS. All right.

Mr. HOMET. If it is clear that the Presidential appointment, with the advice and consent route, is constitutional, it must be in the first instance because that method of appointment is provided for in article II, section 2. But article II, section 2 is also the provision wherein the express words say that:

> The Congress may by law vest the appointment of such inferior officers as they think proper in the courts of law.

Now, inferior officers in this context, clearly excludes only those persons named in the Constitution; that is, the President, Vice President, and the Chief Justice, or rather the Justices of the Supreme Court, chief diplomatic officers, and probably the heads of the departments. But, as Mr. Justice Story said in a commentary we have cited in our memorandum, that still leaves 99 out of 100 of the lucrative positions in Government. So, we start with the clear constitutional language, and you really have to look around for some reason to rebut it. The burden to find some reason is on those who would say there is no power. We have tried to address all of the arguments we know of in this memorandum.

I would just say that in your own State, sir, of Indiana, there has been, both by statute and by court rule, as is true of most of the States, a practice of appointing special prosecutors in circumstances of conflict of interest, having the courts do that and upholding the constitutionality of that, even though there is an explicit separation of powers clause in the State constitution, which we do not have in the U.S. Constitution. So, I will admit this to you, sir, which is certainly true: That, on the Federal level only, this would be a case of first impression. I think it is the hope of the sponsors of the bill that it would also be a case of last impression.

Mr. DENNIS. Well, I am familiar with the part of article II that you referred to. Whether the kind of special prosecuting attorney we are now talking about, who will take the law enforcement function of the Federal Government into his hands in these very important matters, is actually an inferior officer within the meaning of that clause, which is, generally speaking, applied to such people as election commissioners and court clerks, U.S. marshals, bailiff, and people like that, is certainly debatable and I would still say, without necessarily opposing your measure, that a frank appraisal would have to say that the Presidential appointment, and a senatorial confirmation, and I set aside these other objections, is certainly far more impervious to constitutional attacks than your proposal. That is, of course, a matter of opinion, I suppose, but I feel that way strongly.

Mr. HOMET. You would not have almost 200 years of practice.

Mr. DENNIS. Right.

Mr. HOMET. And, again, I think the sponsors would say, thank goodness, we have not. But, I would just like to point out one other problem that your alternative would have, that is of constitutional dimension, that this approach would not have; and, that is, that under Representative Culver's bill it would be crystal clear and there could

be no argument that the President could not remove that officer. That is, we have cited the cases for that which make that very clear.

Mr. DENNIS. Well that, of course, is the great difficulty under Myers against the United States with the other approach.

Mr. HOMET. That is the point, yes, sir.

Mr. DENNIS. And I agree to that.

Mr. HOMET. That is the point.

Mr. DENNIS. Of course, if Mr. Culver is correct, and I have to look at the *Humphrey*'s executor case, and I am not sure he is right about how much it cuts down Myers, but if he is correct about that, the *Humphrey*'s decision would, to a considerable extent, remove that objection.

Mr. HOMET. About all I can say to you, sir, after 120 hours or so of examining this question, is that given the argument in a *Myers* type situation, it would be much more difficult to predict the outcome than it would be to predict the outcome of this bill. That is my judgment as I said.

Mr. DENNIS. What do you say to Mr. Biester's proposal that the removal power be hedged by a civil service finding of probable cause?

Mr. HOMET. If the *Myers* case is applicable, then the hedging would be unconstitutional and the President could still fire the Special Prosecutor.

Mr. DENNIS. There, again, of course, we have an unresolved question.

Mr. HOMET. That is correct.

Mr. DENNIS. It would seem to me that might be an approach. It strikes me, however, that your entire legal position, which is very well presented here, depends on a narrow reading of *Cox* v. *United States*. In other words, if I understand you, you are saying that all that case holds is that a Federal judge cannot tell a Federal prosecutor he has to sign an indictment. I would question that when you look at the language in the case. Of course, that is the actual holding in the case, that he could not. But, nevertheless, the court said in their opinion, as giving the reasons, the Attorney General is the hand of the President in taking care that the laws of the United States in legal proceedings and in the prosecution of offenses be faithfully executed which, of course, is an Executive function. A discretionary power of the Attorney for the United States in determining whether a prosecution shall be commenced, may well depend on matters of policy, wholly apart from any question of probable cause. The Attorney for the United States, the court said, is an executive official of the Government, and it is as an officer of the executive department that he exercises the discretion as to whether there shall be a prosecution. It follows in an incident of the separation of powers that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in the control over criminal prosecutions.

Now, it seems to me that that language goes far beyond the actual holding of the court. I might also call your attention to *Springer* v. *United States*, the facts of which are not particularly relevant, but which is a Supreme Court decision, where in dictum they said the legislative power as distinguished from executive power, is the authority to make laws but not to enforce them, or to appoint the agents

charged with the duty of such enforcement. The latter are executive functions.

Now, it seems to me that the *Cox* case and that language in the Supreme Court case goes far beyond your narrow view that it holds nothing other than the fact that the district judge cannot tell the Prosecutor to sign the indictment.

Mr. HOMET. Mr. Dennis, if you take it at full strength, that quotation, which is always dragged out, that it is an incident of the constitutional separation of powers * * * I might say parenthetically that of the cases cited in the footnote, none of them support that proposition, and there is no other case that has ever so held. But in any case, even if it were true, all it says is that the court cannot control the discretion of the attorney. It does not say that the court cannot appoint the attorney and, indeed, it could not say that because the Constitution explicitly says that it can.

Mr. DENNIS. Well, that was not in issue in the case, of course, whether he could appoint the attorney. But, they certainly do treat him as an executive officer.

Mr. HOMET. Yes; and he is an executive officer because the Congress has so made him under chapter 31 of title 28. But, you can change that statute. You can read the same quotation to say that it follows as an incident of the separation of powers that the courts cannot interfere with the discretion of a Special Prosecutor. I might say I think it is really a due process question, preserving the adversary process, and is not at all dependent on the separation of powers.

Mr. DENNIS. That gets in here, too. That is another question. You are trying to hedge it about with your proposals and you may have done so successfully, but it is an anomalous idea to have the court, which is going to try the case, appointing the Prosecutor also.

Mr. HOMET. I would say we devote a great deal of this memorandum to exactly those points, which I recognize as genuine, and we hope that you will examine those, the cases and considerations that we have assembled.

Mr. DENNIS. Well, I do not want to take up too much more time. I just want to throw out one further suggestion. This is an unusual situation, and you have inescapable problems here, and that is why it seems to me that if you can do what I think we all want, without raising any unnecessary constitutional problems, which are certainly going to be raised by all defense counsel, we ought to try to do it. And I wonder how much relevance, under the circumstances, the removal power really has—it has an appeal, of course, but what practical strength has it really got? Does anybody think that if a Prosecutor were appointed now, a high-class Prosecutor, confirmed by the Senate, that the President of the United States actually would have the courage to fire him again, unless there were obvious good grounds for it?

Mr. CULVER. Well, Mr. Dennis, I guess I could envision a situation where the alternative to firing him under a given set of circumstances would be preferable.

Mr. DENNIS. I am sorry?

Mr. CULVER. I can envision a set of circumstances where the President might find himself in a situation where the alternative to not firing him would be less desirable.

Mr. DENNIS. Well, I would just have to say to you on that, and I am certainly not advocating it, but if you actually got down to that situation, I would suggest to you that the constitutional remedy is impeachment.

Mr. CULVER. Well, I have little doubt that that would follow. But I just think that we have been through an experience here in one instance already which in the judgment of officials within the administration, constituted a breach of faith in terms of the obligation of the President, in terms of the circumstances which could legitimately give rise to his discharge. And I think having had that experience once and in terms of the problems that are now being suggested that have been recently encountered in terms of the freedom of access through appropriate legal procedures and means, has already suggested the inherent problems here.

Mr. DENNIS. Well, I think maybe I have used up sufficient time.

Mr. HOMET. With the Chair's indulgence, if I could just have one further comment?

Mr. HUNGATE. We ought to charge admission here with you two arguing law. Go ahead, Mr. Homet.

Mr. HOMET. I apologize, but it does seem to me that Mr. Dennis raises one of the fundamental points here that the committee will want to consider. I would just like to draw attention here to the fact that we have dealt with the question you just raised on page 14 of the legal memorandum where we point out that the necessary and proper clause is written very broadly to say that the Congress has power "to make all laws necessary and proper." It does not say it has to resort to impeachment. It has power to make all laws necessary and proper for carrying into execution the powers vested by this Constitution in the Government of the United States.

Now, let me suppose, which I do not happen to believe the cases will support, that the prosecution is inherently an executive function. Let us suppose that prosecutorial discretion means everything the proponents claim it does. Still, the "necessary and proper" clause vests in Congress the power to do what is necessary and proper to bring those powers into proper execution. And if, as in this circumstance, that is barred and inhibited by a demonstrated case of conflict of interest, then, and in those circumstances, which is all that the bill addresses, the Congress has power, not only to impeach but to make laws.

Mr. DENNIS. Well, that is certainly an ably put argument. But, I still wonder if in your efforts to reach the situation, you are not really trying to, by legislation, change the whole constitutional framework.

Mr. HUNGATE. Thank you, Mr. Dennis.

The Chair will state that we do have one Senator and two Congressmen waiting to testify. I apologize for starting somewhat late this morning. With an abundance of optimism, we have scheduled eight or so Congressmen for today. Mr. Culver, being the principal sponsor, we do want to give him adequate time.

And that was not said to slow you down, Mr. Mann.

Mr. MANN. Thank you, Mr. Chairman.

Other than to express admiration for the professional presentation of both of the witnesses, and to acknowledge that they will inspire me to "hit the books," I have no other questions.

Mr. HUNGATE. There is a very seasoned questioner.

Mr. Mayne, please?

Mr. MAYNE. Thank you, Mr. Chairman. I want to congratulate my colleague from Iowa for his very carefully prepared formal statement, and also for the expert way in which he, and is it pronounced Homet?

Mr. HOMET. Homet.

Mr. MAYNE. Fine, you have been answering the questions of the committee. I very strongly favor having a Special Prosecutor carry out the prosecution of the Watergate matter, but like other members of the subcommittee, we also want this office of such Special Prosecutor to be set up in such a way that it will have at least a reasonable chance of meeting constitutional requirements. It really would not accomplish very much just to have a Special Prosecutor and then have the indictments or convictions which would be obtained by such a Prosecutor thrown out on appeal.

Now, I am grateful to you for this 26-page memorandum, which was handed to me as you were about to take the stand. I am sure that that will be very helpful. I have not had an opportunity to review it yet.

Do I understand correctly that this memorandum supports the revised version of the bill that you have?

Mr. CULVER. It is geared to the new bill, Mr. Mayne.

Mr. MAYNE. I think, as Mr. Kastenmeier pointed out, that this does indicate that the first version that was introduced on the 23d was really done rather precipitously, before you had had time to give it the careful research which I am sure has now gone into the memorandum.

Mr. CULVER. Mr. Mayne, could I answer on that point?

Mr. MAYNE. Surely.

Mr. CULVER. It is much more a compliment to the energies and abilities of the staff and our legal consultant and to the sponsor of the legislation that in actual fairness and fact, the modifications that we have recommended in my prepared statement today are really remarkably modest in their nature, with the single exception of the appointing authority formulation that we have suggested, which really has been an effort not to adjust it to any fundamental defect in the original proposition but rather to accommodate some of the expressed concerns of others who were desirous of cosponsoring but have raised this as a particular area of concern to them, largely, based on an issue of personality rather than procedure as far as the basic provisions of the legislation are concerned.

Now, I only say that because I am extremely pleased at the efforts that went in on the House of Representatives side to take the leadership, at least in having before the Congress, as a workable starting point, an approach that is basically sound. And I think, perhaps, the best testimony to that is the fact that the other body had a week to work on their legislation and really came up with a measure that essentially mirrored this approach. And I do not say that in any way critically of anyone else. It is a tribute, I think, to the effort that went into it. But, I would be remiss if I allowed to stand without challenge the suggestion that a week's additional research has suddenly raised fundamentally constitutional defective aspects to this approach. That has not been the case.

Mr. MAYNE. Well, I would certainly agree with you that such speedy action, as I understand the timetable, in getting something on file the

very first day, and within about the first hour that the House was in session after the discharge of Mr. Cox, would be very effective and was very effective in dramatizing the need for a Special Prosecutor. But, I cannot believe that it was conducive to thorough research or careful draftsmanship, and I am glad to see that time has been taken in this presentation to give the committee the kind of careful consideration that we hope to give to the bill.

You can correct me if I am wrong, but as I recall the timetable, it was Saturday evening, October 20, when Mr. Cox was discharged and the following day was a Sunday, and the following day was Veterans Day, a holiday, with many Members of the Congress out of the city in their districts. And then the next morning, as I recall, in midmorning the wire services carried a report that the Democratic study group had agreed upon a bill, and then during the 1-minute speech time, you announced your intention of shortly filing the bill. That really did not give very much time for careful deliberation, did it?

Mr. CULVER. Well, I would only say this, Mr. Chairman, that Sunday and Monday were not holidays for either me or my assistants, and what we were attempting to do, given the crisis of the moment, in terms of the public outrage over the events of that Saturday evening, to give some suggestion that there was going to be immediately before the Congress some viable constitutional alternative to a condition in this Nation that raised such fundamental and fearful doubts of the Americans all over the country as to whether or not we were going to continue to have a system of government that was dedicated and premised on a system of law and a rule of law.

Now, this is one formulation and I did not come here with any suggestion that this represents any utopian scheme or any final perfection. But, again, I think the best testimony to the basic integrity of the scholarship that went into the initial presentation, and the enormous amount of effort expended in 48 hours, I think the best testimony to the quality of that work is the fact that the other body has had a week, that the other constitutional scholars have had the ensuing time, and that any other approaches or any other modifications to this approach are relatively modest. I would only say that and it is much more a tribute to our advisers certainly, than to the author of the legislation.

Mr. MAYNE. Now, I assume, and perhaps it goes without saying, but I assume that the bill which you did introduce was the one approved by the Democratic study group?

Mr. CULVER. It was not approved by the Democratic study group at all. I happen to be the chairman of the Democratic study group. There were certain staff people on the Democratic study group with whom I was in immediate contact on Sunday morning and suggested as part of the appropriate discharge of my own responsibilities here in the Congress, that I felt we had a clear obligation to come forward promptly with some suggestions as to how the House could reasonably deal with this problem.

As you know, the Democratic study group enjoys a membership of about 175 Democratic Members of the House.

Now, on Tuesday morning, every week, we have a Democratic study group executive committee meeting, and I felt that I certainly would be obliged on that occasion, to make some suggestions as to an appropriate course I felt, in part, we should be proceeding on in view of the

situation of the previous weekend. And one of the clear things that was obvious to me Sunday morning, following the shock of the previous Saturday night, was that at a minimum, this Congress was obligated to come forward with a suggestion, and the proposal for the creation of a special independent prosecutor who would not experience the same fate, and could be insulated from the same kinds of pressure that denied him an opportunity to pursue a vigilant search for the truth, given the scandals that currently plague this Nation, was one approach that obviously had merit. Other approaches were outright impeachment on the floor, as you also heard them being presented. Now, I think this is clearly a first step in terms of any reasonable dealing with this situation that presented itself on that terrible weekend in the Nation's history, and that is it. The Democratic study group did not approve or disapprove. I suggested this and was quite amazed with the alacrity with which cosponsorship was experienced. We had 106 cosponsors by 5 o'clock that night.

We just felt that as a part of our own responsibility in the House, as a whole, and in the Congress, that we should come forward with some suggestion as to how we can deal with this problem. And, Mr. Mayne, no one in this Congress has a greater respect or appreciation of the capability of this committee, and its own staff, to review this one proposal and to make your own judgment as to the suitability, including its constitutionality. But, we hope that by some of these efforts we have been able to advance that whole process.

Mr. MAYNE. Well, I take it then that if you were immediately and very admirably in contact on Sunday morning with the staff of the Democratic study group, that they did contribute to the work product which you presented to the executive committee on Tuesday morning?

Mr. CULVER. They certainly did. I might add not as substantially as Mr. Homet did, who also was asked to participate in the draftsmanship of the original legislation.

Mr. MAYNE. As early as Sunday?

Mr. CULVER. Yes.

Mr. MAYNE. Well, now, this is, I know, one question that a lawyer should not ask, but I do think that the people of the country are entitled to know a little more about Mr. Homet than the mere fact that he was a clerk for Mr. Justice Frankfurter, which, after all, I am sure does not cover his entire professional career. And I know that he must have had a very distinguished career since then.

Mr. CULVER. Mr. Mayne——

Mr. MAYNE. But I would like him to just state briefly——

Mr. CULVER. I will be glad to do that but in fairness to Mr. Homet, I might suggest that the only thing I can think of really negative about him is that he happened to be an undergraduate classmate as well as law school classmate of Congressman Culver but, other than that——

Mr. MAYNE. Well, that gives him a good mark to start with, in my book, of course, but I am obviously ignorant of what he has been doing since he left Mr. Justice Frankfurter and perhaps he could tell us briefly about his subsequent experience.

Mr. HOMET. I would be glad to submit my curriculum vitae to the committee.

Mr. MAYNE. Nothing in detail. But, that is a long while ago when you were with the great Justice.

Mr. HOMET. Twelve years and in the interim, Mr. Mayne, I have been half of the time in the private practice of law here in Washington, D.C., as I am at the present time, and also serving as a legal consultant on this occasion to Senator—to Congressman Culver. That was a Freudian slip. And I have, in the interim period, also served in both Democratic and Republican administrations. The last time I appeared before the Congress it was with Secretary Shultz, who was at that time Chairman of President Nixon's Cabinet Task Force on Oil Import Controls, which I served as chief counsel.

Mr. MAYNE. Thank you.

I have just one other brief line of questioning, Mr. Chairman.

Mr. HUNGATE. Yes.

Mr. MAYNE. I would ask my colleague from Iowa if it is not true that, from what I heard of former Special Prosecutor Cox's statement on the television panel program last Sunday that he, himself, has very serious reservations about the constitutionality of your approach?

Mr. CULVER. I happened to hear that program, Mr. Mayne, and I think an accurate presentation of what Mr. Cox said on that occasion was that while he recognized and acknowledged there were certain constitutional questions raised by such an approach, that he was persuaded that, on balance, given the circumstances today, it would be found to be constitutional. Now, I think subsequent to that appearance on "Meet the Press" and his appearance before the Senate, earlier this week, I think that he also suggested by way of strengthening that view, that in the interim he has had more opportunity to review the relevant cases and legal materials and he is convinced that it would be constitutional, this approach.

Mr. MAYNE. Well, he is quoted in the Washington Post of October 29, and that was the day following his appearance on the show, as having said, and I quote: "But I have to say in honesty, that there is room for argument on the other side, and the Congress will have to consider whether it is worth running the risk of passing it." He is referring to the Bayh Bill, I believe, which is very similar to yours.

Continuing the quote: "Because if it is unconstitutional there would be the further risk that indictments will be thrown out and justice would never be done."

Now, it seems to me that is the thing that is causing this subcommittee to be cautious and deliberate. We want very much to have a workable system, something that will not invite an overthrow of the Special Prosecutor on constitutional grounds. Now, if he has changed his mind, that is in the last couple of days, why well and good, but he seems to be pretty clear on the record from the television statement that he sees very serious constitutional problems.

Mr. CULVER. Well, he suggested, Mr. Mayne, that there were constitutional arguments and we certainly fully acknowledge that there are constitutional arguments. And, secondly, he indicated as recently as yesterday, I think, and I wish I had available both the transcript of that earlier appearance, you know, as well as yesterday's because I think it is quite clear that while fully acknowledging these constitutional arguments that on balance, he felt that this was a legislatively sound approach constitutionally and that he favored it. He is in favor of it.

Mr. MAYNE. Well, I do want to commend you particularly for the change where you no longer ask to have Judge Sirica be the

appointing judge who would appoint the prosecutor because your bill, in its original version, also said that this would disqualify Judge Sirica from any further activities in the case. And I think it would be a great loss to have this man, with his great experience and familiarity and the Watergate matter, from the very beginning, removed in one swoop from any further participation in the case. And I certainly support your latter version over the former in that respect.

Thank you, Mr. Chairman.

Mr. HUNGATE. I am sorry I missed him. I wish they had had Mr. Cox on at the half-time show to get in that debate.

Ms. Holtzman, please?

Ms. HOLTZMAN. Thank you, Mr. Chairman. I wish to thank my colleague, Mr. Culver, and his colleague for the very excellent presentation they have made.

Turning from the constitutional question for a moment to the practical question: the reason for the hiring of Mr. Cox in the first place was because allegations of illegality and misconduct had reached the oval office itself and subsequently, the reason that Mr. Cox was fired, seems to be because he was trying to obtain access to Presidential papers. In fact, the President in his letter to Mr. Richardson said: "I am instructing you to direct Special Prosecutor, Archibald Cox, of the Watergate Special Prosecution Force, that he is to make no further attempts by judicial process to obtain tapes, notes, or memoranda of Presidential conversations."

In his news conference last Friday, the President indicated that while he would favor the appointment of a Special Prosecutor, that Special Prosecutor would not have the power or the right to obtain Presidential papers, whatever those may be. And earlier this week, Mr. Haig stated that if the presidentially appointed Special Prosecutor was the type that would feel encumbered by having to pledge not to seek additional White House documents, and I am quoting at this point: "He is perhaps not the man that we would want."

Now, is it conceivable that the President at this point would appoint as Special Prosecutor somebody who would vigorously pursue all of the evidence?

Mr. CULVER. Well, I think based on that history that you recited, that the likelihood is not there.

Ms. HOLTZMAN. And is it not possible that——

Mr. CULVER. Also, I think the problem is, the question is raised, who would take it? It seems to me that if one were to accept the responsibility of being an independent prosecutor, and implicit in that assignment, is necessarily the power through every appropriate legal means to pursue the pursuit of truth, and try to administer justice in his capacity, as he best judges that to be, he cannot be crippled and straitjacketed and denied access, through the proper legal processes for this material that he feels is essential in terms of dealing with the alleged criminal wrongdoing.

Now, it seems to me that if there is a real question, and I certainly respect the fact that there may well be in terms of any particular prosecutor's request for any particular document, then the appropriate way to resolve that question in contention is through the judicial process, where they, alone, are uniquely equipped and responsible for making those judgments. If we pursue a system to where one man in one position can unilaterally make those determinations and these

judgments, we have quickly moved from a situation under law to a rule by a man who purports to be above the law. It is just as simple as that.

Ms. HOLTZMAN. And can we not envisage that the President having taken the action that he has and having made the statement that he already has, and Mr. Haig as his chief advisor having made those statements, that we might have a stalemate in terms of the confirmation of the Special Prosecutor at the time that this Nation is demanding the quick implementation of the inquiry that the Watergate grand jury was undertaking?

Mr. CULVER. I certainly think this would be a likely consequence.

Ms. HOLTZMAN. And getting to the constitutional issue, can we not conceptually, at least, break it into two categories. One is the investigative category and, second, the decision whether or not to prosecute and how to try the cases. Is there any question in anybody's mind that the investigative function of a prosecutor handling the grand jury is not an executive function and that Congress would have complete authority, at least, with respect to the investigative power to create a court-appointed Special Prosecutor?

Has anybody challenged the constitutionality insofar as that is concerned?

Mr. HOMET. Ms. Holtzman, for that purpose, I do not believe legislation would even be necessary, although it might be desirable. It is an inherent power of the grand jury to conduct its own investigation and, if dissatisfied with the services of the U.S. Attorney, to appoint its own. The problem is that the grand jury may not know whether it is being misled or when information is being withheld from it. And the further problem is that without legislation, or with legislation that would only go that far, the vital power to sign indictments, which is what commences a criminal proceeding, and catapults it to the trial stage, would still be in the hands that, according to the purpose of the sponsors of this bill, are tied by conflict of interest.

Ms. HOLTZMAN. But to your mind, at least, and I gather from your testimony that, insofar as the Special Prosecutor was appointed by the court, through an act of this Congress, his activities in connection with the investigation undertaken by the grand jury would not be susceptible to constitutional attack?

Mr. HOMET. Quite right.

Ms. HOLTZMAN. I just have one question, Mr. Chairman, if I may, going to the matter of the exclusive jurisdiction that you have given in your bill to the Special Prosecutor.

Simply you say that he shall have exclusive jurisdiction over all of the matters arising out of the grand jury and in his jurisdiction, but what teeth do you provide for that provision, what ways do you provide to prevent, for example, the Department of Justice from perhaps settling those cases, or taking nolo contendere pleas from people whom the Watergate grand jury had indicted? And what could the Special Prosecutor do to prevent that from happening? What does your bill do to take that matter into account?

Mr. HOMET. If I may speak to that again, Ms. Holtzman, the first thing to notice is that the bill would give the Special Prosecutor the powers that otherwise would be held by the Attorney General or the U.S. attorneys. So, any action taken by them within the field of juris-

diction reserved by the Congress to the Special Prosecutor, would be a nullity as a matter of law.

Second, however, you do give me an opportunity to invite the committee's attention to an appendix of four pages that has been prepared and is incorporated at the close of the legal memorandum. This is an effort on our part to take the provisions of the Culver bill, compare them with the provisions of the Bayh bill, and join them together. There are certain provisions of the Senate bill that, for example, deal with the requirements of cooperation by other agencies in a more carefully carpentered fashion than was done in our bill, is Representative Culver's bill, and it seemed to us appropriate for consideration. So, we have made an initial effort to put together an 18-section coordinated Culver-Bayh bill, which we hope might be a starting point for consideration both in this committee and in the Senate Judiciary Committee.

Ms. HOLTZMAN. Thank you very much and thank you, Mr. Chairman.

Mr. HUNGATE. Yes.

Mr. Hogan?

Mr. HOGAN. I, too, would like to thank the two witnesses for their obvious labors in bringing this proposal before us. I think that we are in the possibly perilous situation of acting too quickly in order to respond to what is obviously a concern on the part of the public. One of the weaknesses of U.S. politicians is that we always feel compelled to instantly respond to public outrage with some kind of a legislative proposal, and I fear that that is what we are doing in this instance. A week's research or 48 hours over a holiday weekend of research I think is far from adequate when we are concerned with basic constitutional questions involved in this pioneering effort that we are now probing today. I share Congressman Edwards' concern that we may be setting up a separate branch of Government outside of the general, ordinary routine way of prosecuting. I also am deeply concerned that there are very serious constitutional questions involved, since for all of the arguments which you gentlemen have advanced, there are counterarguments utilizing the same precedent to come up with a different conclusion. And if our objective is to see that those guilty of wrongdoing are brought to justice as expeditiously as possible, I think that we might, in this endeavor, be impeding that because I can foresee the raising of a constitutional challenge to the Prosecutor himself. I think that is a very serious problem which we face.

Now, another subcommittee of the House Judiciary Committee intends to embark upon a reform of the grand jury system and I submit that in this instance we ought to perhaps be looking in that direction rather than to go outside of the Department of Justice, U.S. Attorney, Prosecutor function, and address ourselves to the grand jury where there is clearly a constitutional mandate in the area of criminal law. It has been observed by you gentlemen correctly on a number of occasions during the previous discussion that while the grand jury does have a clear mandate to investigate, it has absolutely no power to indict. It can only return a true bill, and without the approving signature of the U.S. Attorney, there is no indictment. Now, this is not true on the State level.

Now, it seems to me we might come closer to achieving what we all desire, and that is, a vigorous impartial prosecution of wrongdoing,

without any opportunity of those who might be guilty of wrongdoing to be able to impede the prosecutive process, if the grand jury had the right to actually indict and bring the matter before the courts. This would not create all of the constitutional questions which we have been discussing so far. I would like a comment on that.

Mr. HOMET. I believe, Mr. Hogan, it would be fair to say that who conducted the investigation would still be very important and also what motion practice associated with the pretrial and posttrial phases would be, the conduct of the trial itself, which, of course, was very much suspect at the time of the trial of the original Watergate defendants last January. And it was only because Judge Sirica was not satisfied that the prosecution was being carried forward with all of the relevant evidence at its command, that he took the unusual steps of suspending sentence upon proof of cooperation which began to produce information in this case. I think that the existence and unified administration of every step from the initiation of the investigation through the final appeal to the Supreme Court of the United States, must be lodged in the same hands or else the conflict of interest problem has not been overcome.

Mr. HOGAN. Well, one of the problems of going outside of the general and usual prosecutive channel is that we do not have the full resources available that the Department of Justice has available. For example, under your legislation, we are creating a special Prosecutor appointed by the U.S. District Court for the District of Columbia, and, yet, obviously some aspects of this investigation will be in California, or will be in New York, and is it not an infringement of the jurisdiction of those other circuits to impose upon them a prosecutor appointed by another circuit?

Mr. CULVER. I might, Mr. Hogan, just draw your attention, in the interest of time, to part VI of the legal memorandum that we have submitted to the committee, in which we deal rather extensively with that point and try to make the appropriate arguments in that regard.

Mr. HOGAN. You see, this is one of the unfortunate things. None of us saw the legal argument before the hearing began and in the interest of haste, I think we are not doing the kind of judicious job that it is our responsibility as a committee to do, with all due respect to the chairman of the committee. But to come in here and have a lengthy memorandum on complex legal questions, and then try to read that while listening to your testimony really poses an insurmountable problem as far as I am concerned.

Mr. CULVER. Well, what we tried to do, Mr. Hogan, and I just want to reassure you that our interest in appearing here at all today is in an effort to be of whatever possible modest assistance we can be to this committee and its staff in what we, if you will, recognize is an extremely challenging and complex responsibility. And we have done our best to prepare here, working late into the night and early in the morning, a memorandum citing the legal documentation and the appropriate precedents and materials which we hope would be helpful during the course of the deliberations by this committee of this admittedly and acknowledged very complex question.

Now, I wish we could have had that available earlier. We are already being reprimanded for getting it up too fast. We are trying to do the best we can based on the timetable assigned to us by the chairman, and we have come in here with nothing but the interest of good

faith and I want to emphasize once again that we are not coming here today to suggest that there are no constitutional questions implicit in this approach. I have tried to emphasize repeatedly here this morning that on the contrary, we recognize that at the outset we are talking about a pioneering problem and a pioneering situation, and God help us, we hope it is unique in the history of this Republic, not only in terms of the previous history of the country, but for the next 200 years, that we do not find ourselves required, given the unique and extraordinary circumstances that the Nation finds itself in, to have to look down into the reaches of our constitutional system and determine what are the available approaches and remedies that are constitutionally sound and deal reasonably and effectively with the national challenge that we are currently confronting. That is the issue and I certainly respect the capability and competence of this committee to review these terms, and we just very modestly hope that they perhaps are of some incremental value to you in reaching a deliberative judgment on these technical questions.

We are reassured by the fact, I might say, that this circumstance has required the examination of precedents and the review of all available materials on this point. And we have found as a result of that effort, that we are more persuaded, as far as the constitutional validity of this approach and the absence of infirmities in constitutional terms to this approach, than really we were at the time we were presented with the problem Sunday morning. And we are reassured that men of the distinguished stature in constitutional law of Mr. Freund of Harvard, has provided us with supportive positions as a result of his inquiries. Mr. Cox, also, in the time he has been afforded to review this has come increasingly and more strongly to the position even though he did not deviate at the outset, that it was constitutional, even though it has constitutional questions implicit in it. So that is all we are doing, and the whole reason we are here, and we do not expect you to vote on this, this afternoon on this proposal, but we do hope by our appearance here that in some way we have been of some value in trying to marshal and mobilize relevant documents, appropriate legal precedents for your careful and competent legal examination.

Mr. HOGAN. There is no question that you have made a very valuable contribution to the committee's work, and I in no way meant to minimize that. The only point that I tried to make is that because of the complex constitutional questions involved, I fear that by running ahead with such great haste, we might do a disservice to posterity as well as to those who might be involved in prosecutions in this case that brought this all to a head.

I have no further questions, Mr. Chairman.

Mr. HUNGATE. Thank you.

The Chair would state that we are proceeding as expeditiously as possible. We will sit until there is a call of the House.

The next witness will be Senator Bayh. Then we will hear from Mr. Biester, to whom the Chair owes an apology. He has been patiently waiting for us all day. If we do not get to him this morning, he will be the first witness this afternoon. We appreciate his courtesy to the committee.

Let me ask you a few brief questions, gentlemen. You say Mr. Cox is satisfied with the constitutionality of this. In which version is he satisfied with the constitutionality? Is it your appendix?

Mr. CULVER. I really think, Mr. Hungate, the only appropriate way obviously to ascertain Mr. Cox's views accurately on the constitutional validity of this approach is to have him here and to have him testify. I think that what he has been quoted as having general reference to in the press both in terms of his appearance before the Senate yesterday and in the "Meet the Press" context, was just the general notion of the establishment by congressional legislation of an independent prosecutor, and the specificity with which he was asked to comment on certain more detailed aspects of it, was just not even, you know, reviewed. So, I really do not know other than in general.

Mr. HUNGATE. I was seeking a preferred version. Mr. Cox and the Acting Attorney General are scheduled to appear before the subcommittee on Monday. We should get both of their views then.

Mr. Homet, do you have a comment?

Mr. HOMET. Just a brief practical suggestion in an effort to be useful to the committee and because we are first in the field, if you like, in having assembled what we think are the relevant documents and implications therefrom. It might be appropriate for the committee to furnish copies of our memorandum to the distinguished constitutional experts I understand you will be asking to testify, so that they would be prepared to answer any questions that we may have suggested to you.

Mr. HUNGATE. Thank you for your contribution.

Suppose the President appoints someone of the stature of Clarence Darrow, Tom Dewey, Homer Ferguson, or some other outstanding prosecutor, and this legislation were enacted? Do you see a fight between these two people over who does what? Who is handling what?

Mr. CULVER. It is my understanding, Mr. Chairman, that congressional action would certainly supersede and eliminate the legal effect of the earlier establishment by the President.

Mr. HUNGATE. You made reference to the Teapot Dome investigation. I understand that in that investigation there were two special prosecutors. It was a bipartisan arrangement. Do you have any comment on the advisability of that procedure?

Mr. HOMET. I think that the thrust of this bill with its court-appointment feature is to the maximum extent possible that the Special Prosecutor ought to be nonpartisan instead of bipartisan, and we have suggested some language to that effect in the draft findings and declarations in the appendix clause as an additional source of authority for constitutionality. Could you give us an example of a use that has been made, one or two uses of the necessary and proper clause? What have you been doing under that clause?

Mr. HOMET. I am afraid that I am here guilty of what most readers of *United States* v. *Cox* are guilty of, remembering the dicta and forgetting the facts of the case. But, I would start there.

Mr. HUNGATE. You would start with——

Mr. HOMET. *McCulloch* v. *Maryland*.

Mr. HUNGATE. In your statement on page 7, you say that:

> Though a district court decision in 1968 suggests that this would present no constitutional difficulty, we must as well be concerned with appearances in a matter of these wide dimensions. Nor is it certain that there would be no constitutional difficulty.

How should I interpret that?

Mr. HOMET. Well, that is a district court opinion Also, there is dicta in *Tumey* v. *Ohio*, which is cited in our brief. But I think the main thrust of the argument is on ethical, policy grounds regardless of constitutionality.

Mr. HUNGATE. Your bill would have Judge Sirica, by name, select the panel, or by title?

Mr. CULVER. He would be authorized to make that determination, the selection by title.

Mr. HUNGATE. By title, so if he resigned or something, someone else would be in his position?

Mr. CULVER. Yes, sir.

Mr. HUNGATE. The guidelines that have been incorporated in the Senate bill, do you think they are essential?

Mr. CULVER. I think they are, Mr. Chairman, and we have also offered the additional suggestion, which is different from the Bayh bill, as I understand it, whereby it would invite the Special Prosecutor, as he encountered new situations, to communicate his requests for additional authority to the three-judge panel, and they would make a determination as to his writ in that regard.

Mr. HUNGATE. It would be your view, I take it, that a grant of authority to bring civil action is provided, in the Stevenson bill, but that it might be too broad and you are not seeking that.

Mr. CULVER. No, sir.

Mr. HOMET. Just a limited civil jurisdiction for matters ancillary to the criminal process, so as not to miss habeas corpus, civil contempt and any civil actions challenging the constitutionality of the bill.

Mr. HUNGATE. Well, that is spelled out so that no reasonable man could doubt how far he could go?

Mr. HOMET. That is always a difficult job in judiciary legislation.

Mr. HUNGATE. A discussion was held on impeachment and the relative powers that could be granted here. But is it not the case that you might, in your investigation, find no grounds for impeachment, but find numerous other grounds, other parties that might require various prosecutions?

Mr. CULVER. Yes, sir. I agree, Mr. Chairman.

Mr. HUNGATE. Thank you very much. You have been most helpful and patient with the committee and we appreciate it very much.

Mr. CULVER. Thank you, Mr. Chairman.

Mr. HUNGATE. Senator Bayh, please?

TESTIMONY OF HON. BIRCH BAYH, A U.S. SENATOR FROM THE STATE OF INDIANA

Mr. HUNGATE. Senator, we appreciate your being with us. We look forward to your testimony.

Senator BAYH. Well, Mr. Chairman, I appreciate the thoughtfulness of your request. I come listening to the presentations and the interrogation and the answers thereto, and feeling that that was a very positive experience for this committee, which is my good fortune to have the opportunity to serve on the counterpart in the Senate, and to work with several of the members here, in various conference committees. I suppose I come with a great deal of modesty, just seeing what a member of

your body has been able to do in making a contribution and in explaining the legislation which is very similar to that which I will direct my attention to.

I suppose that inasmuch as I was on the Judiciary Committee, and many of my colleagues on the Judiciary Committee at the time of the Richardson nomination hearings, at the time the guidelines under which Archibald Cox was appointed and served, that these were put together and put in the Federal Register, that perhaps that would give me an opportunity to make a unique contribution, a similar contribution being possible from any other member of that committee.

So, out of respect for time, perhaps, if I could quickly go through the statement that I have prepared. We have a great proclivity in the Senate to extemporize a 15 or 10-minute statement and take a half an hour to do so, and I think if I can stick right to the point, and then yield to any questions that you gentlemen or Ms. Holtzman might care to direct my way, I would prefer it, if that is all right.

Mr. HUNGATE. That will be fine. Without objection, your statement will be made a part of the record, and you may proceed as you see fit.

Senator BAYH. Mr. Chairman and members of the subcommittee, I appreciate your courtesy in affording me this opportunity to appear here this morning. In order to save time I shall not review all of the important and valid points made by Congressman Culver. However, with your permission, I would like to include in the permanent hearing record, at the conclusion of my remarks, a copy of a statement I made on the floor of the Senate last Friday, when I introduced this legislation for Senator Hart, who has been ill and has been unable to participate in some of the debates on our side because of his illness, and more than half of the Senate, which parallels that introduced by Congressman Culver.

As you may know, 55 Senators have joined our bipartisan effort to require the U.S. District Court in the District of Columbia to appoint an independent prosecutor and deputy prosecutor to assume responsibilities for the Watergate and other cases which have been the jurisdiction of Archibald Cox prior to his dismissal as Special Prosecutor.

Our bill differs in certain aspects of its implementation from the House legislation but the intent, and essential ingredients of the bill are the same. It would not be difficult, in my judgment, either prior to the passage of this legislation in either House, or in the conference committee, to resolve the few differences between the two bills.

What I would like to discuss with you are the suggestions that the need for legislation has been removed by the President's announced willingness to have Acting Attorney General Bork appoint another Special Prosecutor. The fact is, it is entirely inadequate to re-create the circumstances which led to Mr. Cox's dismissal and the national trauma of the past 10 days.

Last spring, when the Senate Judiciary Committee was conducting hearings on the nomination of Elliot Richardson to be Attorney General, a number of us on the committee worked closely with Mr. Richardson in an effort to guarantee the independence of the prosecutor he would appoint. Mr. Richardson wanted that, the Senate committee wanted that, bipartisan unanimously. The President wanted that. After protracted and difficult negotiations, we agreed to a set of guidelines which, among other points, provided for dismissal of

the Special Prosecutor only by the Attorney General, and then only in the case of and I quote from the agreement:

"Extraordinary in propriety." Mr. Richardson was specifically asked whether the President would ever dismiss the Special Prosecutor and replied, and I quote: "It just will not happen." And I think it might be enlightening for all who really want to study the background which constitutes the foundation of the need for this legislation, and a new and unique and unfortunately necessary new approach to a prosecutiorial function, to look at what lies behind this need. And I invite your attention, gentlemen, to pages 71, 72, and 73, in the hearings in which Mr. Richardson, himself, when asked the questions about Presidential involvement said, in addition to: "It just will not happen" that "it is inconceivable." I would like also, if I might, to refer to the quotation of Senator Scott, which I might read to you right now because he is the minority leader and very much involved and very much concerned that something be done now. And Mr. Scott said, and I quote, if I may, Mr. Chairman?

Mr. HUNGATE. Yes, please do.

Senator BAYH [reading]:

> Now, the President this morning made it clear to me that he will in no way intervene in the selection of the Prosecutor, nor in the conduct of his office, nor in his final report; that the investigation must proceed without fear or favor to the full and complete truth and toward the final fixing of responsibility through the judicial process. That is not a quote but just a paraphrase. I agree with that, and I am sure that you agree with it. I feel that the Senate is being made so integrally a part of this whole proceeding that the American people are going to draw the conclusion that no one will permit the truth to be aborted, and that there is no conceivable way by which the development of the full truth can or should be prevented.

Now, Senator Scott is one of the most honorable and honest men I have had the good fortune to serve with in the Senate and I am sure he quotes and paraphrases the conversation with the President accurately. I only describe this foundation because all of us were convinced that given the unfortunate Watergate incident, which we cannot make disappear, the question is how to handle it, given all of those unfortunate instances, we had arrived at a set of carefully worked out agreements, agreed to by the President, the Special Prosecutor, Mr. Richardson, and the U.S. Senate, and that it was inconceivable "that it could not happen" to quote Mr. Richardson, that the President would.

Yet, Mr. Chairman, it did happen. And it seems to me we must learn from this experience. We cannot vest authority for investigating and prosecuting offenses in the executive branch in an individual or individuals who are agents of the executive branch and subject to the dismissal of the President. If we let that happen, if we settle for a special, not an independent prosecutor—there is the distinction, the difference between a special and an independent prosecutor—there will be no way to convince the American people that justice is being administered thoroughly and equitably.

Here again, we have a unique moment in history where the appearance of justice being done is an important as the fact. Moreover, if Congress does not pass legislation, such as that now before you, and thus by its inaction accedes to the appointment of a Special Prosecutor subject to Presidential dismissal, it will be the fifth time that the

executive branch has tried to investigate itself on Watergate and related cases.

Now, I point this out again as a basis for my belief that we have to use different circumstances than would otherwise be the case. First, there was the investigation by John Dean, counsel to the President, conducted from the White House, at the President's request. Second, John Ehrlichman took over the investigation at the President's behest, supposedly to confirm Mr. Dean's findings. Third, the Justice Department pursued the case under the overall direction of the then Attorney General Richard Kleindienst. Mr. Peterson, Mr. Silbert and others were involved in that stage of the prosecution. Fourth, the matter that I just referred to a moment ago.

Recognizing the inadequacy of all of the inhouse investigations which have been undertaken previously, the President agreed to let the Attorney General, Elliot Richardson, appoint the Special Prosecutor. It is important to emphasize here, that the President, by permitting Mr. Richardson's nomination to go forward after the selection of Mr. Cox, and after the guidelines for the Special Prosecutor had been worked out with the Senate Judiciary Committee, the President clearly gave his implicit consent to the appointment of Mr. Cox and the rules by which he would operate. This fact is substantiated further, in that the Federal Register now contains, as it did shortly after the implementation of the special agreements, and they are part of the regulations under which this Government is normally supposed to operate.

So we did have four investigations—have had to date—and in two of these instances, the persons charged with directing the investigation, Mr. Dean and Mr. Cox, were discharged by the President. In the other two cases, the persons charged with directing the investigations, Mr. Ehrlichman and Mr. Kleindienst, have resigned. How then, I ask, can we possibly expect to get speedy, thorough, and unbiased administration of justice by going to this dry well one more time? The responsibility for investigating and prosecuting Watergate and other alleged offenses within the executive branch must be removed from that branch of Government.

I would like to say, further, Mr. Chairman, it is as important, it seems to me, not to let the operation of the criminal justice system be contaminated by any intrusion of partisan consideration from other branches of Government. For this reason, the Congress must remain as uninvolved as possible in this process. The legislation before you, I am convinced, provides the best formula for both assuring that justice will be fully administered and that politics will not be permitted to encroach where it does not belong.

This is still another reason that demands that any Prosecutor charged with pursuing Watergate and related cases, have independence from the executive branch. As Mr. Cox has testified to the Senate Judiciary Committee, the White House has used the shield of executive privilege to withhold many documents, memorandums, and other information besides the famous tapes sought by the prosecution. It is true that in the absence of this material, a number of indictments have been handed down and some persons have already pleaded guilty before the indictment. Also, there is good reason to believe that many additional indictments, and probably some convictions, could be se-

cured without the information being withheld by the President under executive privilege.

However, there is a large, crucial caveat that I think will certainly be recognized by such an esteemed panel of lawyers as represented on this committee. As long as relevant evidence is withheld by the White House, the defendants may demand that such evidence be presented for their own defense. And if it is not forthcoming, these defendants may seek dismissal of the charges against them. Mr. Cox acknowledged just yesterday in answer to a question I posed to him, that under the law, I think the *Brady* precedent is the one we are talking about right here, that under the law, unless the White House cooperates in making relevant evidence available to the defense, it will be difficult to secure the conviction of many, if not all, of the indicted persons including the two former Cabinet officials indicted in the *Vesco* case. Most of the public attention, Mr. Chairman, and I emphasize this, has been directed at the need to get the tapes to see how we can convict, to get the evidence to be used by the prosecution. We have overlooked the fact, unfortunately, that as long as the prosecution—namely, the President—withholds evidence that can be demanded by the defense, the prosecution, the President, is giving a defense to those who have been indicted and convicted on evidence that is not contained in the tapes. Mr. Cox admitted the other day that this is the reason that the Government has had to ask for a delay in the *Vesco* case involving Mr. Stans and Mr. Mitchell, because they know that unless they can deal with that problem, that their case is going to be thrown out of court.

Now, the President last Friday reaffirmed his intention to adhere to the broadest possible interpretation of executive privilege, reserving for himself, the authority to make the judgment of what materials are privileged. This position is inconsistent with the traditional concept that courts should determine that materials are not privileged. And I might add one bit of information that has come out in our hearings with Mr. Cox, and that is that there has been a lot of talk about executive privilege. Now, the President, himself, relied on the precedent of the *Jefferson, Marshall, Aaron Burr* case. But, unfortunately, whoever had been advising the President, did not advise him properly and gave him the wrong facts. The historical facts are as follows, and I would just like the committee to have the benefit of this if you do not have it already.

The letter at issue was not from Jefferson but to him from Gen. James Wilkinson. President Jefferson did not refuse to cooperate in the matter. Indeed, he offered to be examined under oath in Washington. He did not withhold the letter and refused to give it even to a Federal court judge. He did not produce a mere summary of the letter. He gave the entire original letter to U.S. Attorney George Hay, who offered it to the court for copying, and the use of those parts which had a relationship to the cause. And Mr. Cox suggested that at the time, there was this bartering going on which was discussed about Senator Stennis that he had expressed a continued willingness to take this summary, the agreement, to the court and to see if the court was willing to accept this as the burden on the prosecution to get around the matter of the defense claiming evidence, and to keep the cases from being thrown out of court.

I think that is important because he had an obligation different from Senator Ervin and Senator Baker as legislators. Yet, in the absence of an independent prosecution, I am concerned, Mr. Chairman, it may not be possible to pursue appropriate legal channels as Mr. Cox has been seeking to do, to secure materials on which executive privilege has been evoked inappropriately. A truly independent Prosecutor, unless like a Special Prosecutor within the executive branch, would be free to take this issue through the courts without fear of dismissal or any implicit or explicit intimidation by the White House.

To tie this last point together and to close, Mr. Chairman, without legislation such as that which you are considering and we are considering, it is entirely possible that justice will never be achieved in the Watergate and a number of other cases. If this comes to pass, it will be exceedingly difficult, perhaps impossible, to ask the American people to continue to invest their faith in equality under the law and our entire system of justice.

It just seems to me, Mr. Chairman, that the Congress must not be to a strategy which permits the interaction of the rules of evidence and a reckless definition of executive privilege from becoming the basis for many defendants, several of them former high officials, to escape the full force of the law. I see no way by which we can divorce ourselves from this unfortunate chain of events other than the enactment of legislation creating a truly independent prosecutor appointed by the U.S. district court.

Now, Mr. Chairman, that is the end of my statement. I might just make one observation because I listened to the discussions very appropriately and I think the questions phrased by several members of the committee relative to the constitutionality. I think all of us who are lawyers know that part of the reason lawyers have a trade is that there are ambiguities within the Constitution. It was purposely framed that way so we can deal with unforeseen circumstances which our Founding Fathers really could not see the infinite detail of. We have tried in the Senate, and I am sure our colleagues in the House have to explore these the best we can. But, to any inference that the introduction of this legislation is a shot from the hip effort to take advantage of public opinion, let me say with all respect it is not so.

I am of the opinion that the purpose of the legislative process, which is what we are going through right now, is to test my thoughts, test yours, bring in constitutional experts, find the answers to some of these questions, find the weaknesses, to make a good bill a better bill or see that a bad bill does not pass. Although I think we can make the bill which 55 of us have introduced better, and I think we can make Congressman Culver's bill a little better, I want to suggest that the American Bar Association Board of Governors, unanimously endorsed the proposition of an independent prosecutor as being constitutional. That is the choice by a court of an independent prosecutor. And 21 law school deans of some of the most prestigious law schools in America have endorsed this proposition. Professor Freund wrote a letter which I would suggest, Mr. Chairman, be included in the record if it has not already been submitted.

Mr. HUNGATE. I believe it was submitted by Mr. Culver.

Senator BAYH. Very good. The City Bar of New York and Mr. Cox himself have endorsed this. I suggest that Mr. Dennis, Mr. Mayne,

and Mr. Hogan are referring to Mr. Cox's response over the weekend on that interview program. He said in his opening statement before the committee that he was sorry to have to admit this but he had made the statement before he had read the *Siebold* case which he had subsequently read, and before he had read the further definitive letter of Mr. Freund, and before he had had a chance to discuss this matter with several other legal scholars and they have laid to rest his doubt about the constitutionality of this and he is confident that it will be held constitutional. And on that I rest my case, Mr. Chairman.

[The prepared statement of Hon. Birch Bayh follows, including Senator Bayh's statement of Oct. 26, 1973, and a copy of the Richardson-Cox guidelines:]

STATEMENT OF HON. BIRCH BAYH, A U.S. SENATOR FROM THE STATE OF INDIANA

OCTOBER 31, 1973

Mr. Chairman and Members of the Subcommittee, thank you for your courtesy in affording me an opportunity to appear here this morning. In order to save time I shall not review all of the important and valid points made by Congressman Culver. However, with your permission, I would like to include in the permanent hearing record, at the conclusion of my remarks, a copy of a statement I made on the Floor of the Senate last Friday when I introduced legislation, for Senator Hart and more than half of the Senate, which parallels that introduced by Congressman Culver.

As you may know, 55 Senators have joined our bi-partisan effort to require the U.S. District Court to appoint an independent prosecutor and deputy prosecutor to assume responsibilities for Watergate and other cases which had been in the jurisdiction of Archibald Cox prior to his dismissal as Special Prosecutor. Our bill differs in certain aspects of its implementation from the House legislation, but the intent and assential ingredients of the bills are the same. It would not be difficult, either prior to passage or in Conference, to resolve the few differences between the two bills.

What I would like to discuss with you are the suggestions that the need for legislation has been removed by the President's announced willingness to have Acting Attorney General Bork appoint another special prosecutor. The fact is, it is entirely inadequate to recreate the circumstances which led to Mr. Cox's dismissal and the national trauma of the past 10 days.

Last spring, when the Senate Judiciary Committee was conducting hearings on the nomination of Elliot Richardson to be Attorney General, a number of us on the Committee worked closely with Mr. Richardson in an effort to guarantee the independence of the prosecutor he would appoint. After protracted and difficult negotiations, we agreed to a set of guidelines which, among other points, provided for dismissal of the special prosecutor only by the Attorney General and then only in the case of "extraordinary improprieties." Mr. Richardson was specifically asked whether the President would ever dismiss the special prosecutor and replied, "It just will not happen."

But it did happen, and we must learn from this experience. We cannot vest authority for investigating and prosecuting offenses in the Executive branch in an individual or individuals who are agents of the Executive Branch and subject to dismissal by the President. If we let this happen, if we settle for a special but not independent prosecutor, there will be no way to convince the American people that justice is being administered thoroughly and equitably.

Moreover, if Congress does not pass legislation such as that now before you, and thus by its inaction accedes to the appointment of a special prosecutor subject to Presidential dismissal, it will be the fifth time that the Executive branch has tried to investigate itself on Watergate and related cases.

First, there was the investigation by John Dean, Counsel to the President, conducted from the White House at the President's request.

Second, John Ehrlichman took over the investigation at the President's behest, supposedly to confirm Mr. Dean's findings.

Third, the Justice Department pursued the case under the overall direction of then-Attorney General Richard Kleindienst.

Fourth, recognizing the inadequacy of all the in-house investigations which had been undertaken, the President agreed to let Attorney General Richardson appoint a special prosecutor. It is important to emphasize here that the President, by permitting Mr. Richardson's nomination to go forward after the selection of Mr. Cox and after the guidelines for the special prosecutor had been worked out with the Senate Judiciary Committee, clearly gave his implicit consent to the appointment of Mr. Cox and the rules by which he would operate.

So we have had four investigations to date. In two of those instances the persons charged with directing the investigations—Mr. Dean and Mr. Cox—were fired by the President. In the other two cases the persons charged with directing the investigations—Mr. Ehrlichman and Mr. Kleindienst—resigned.

How then can we possibly expect to get speedy, thorough and unbiased administration of justice by going to this dry well one more time. The responsibility for investigating and prosecuting Watergate and other alleged offenses within the Executive branch must be removed from that branch of government.

But it is just as important not to let the operation of the criminal justice system be contaminated by any intrusion of partisan considerations from another branch of government. For this reason the Congress must remain as uninvolved as possible in this process. The legislation before you, I am convinced provides the best formula for both assuring that justice will be fully administered and that politics will not be permitted to encroach where it does not belong.

There is still another reason which demands that any prosecutor charged with pursuing Watergate and related cases have independence from the Executive branch. As Mr. Cox has testified to the Senate Judiciary Committee, the White House has used the shield of executive privilege to withhold many documents, memoranda and other information, besides the famous tapes, sought by the prosecution.

It is true that in the absence of this material a number of indictments have been handed down and some persons have already plead guilty before indictment. Also, there is good reason to believe that many additional indictments and probably some convictions could be secured without the information being withheld by the President under executive privilege.

However, there is a large and crucial caveat here. As long as relevant evidence is withheld by the White House, defendants may demand that such evidence be presented and, if it is not forthcoming, may seek dismissal of the charges against them. Mr. Cox acknowledged just yesterday, in answer to a question I posed to him, that under the law, unless the White House cooperates in making relevant evidence available it will be difficult to secure the convictions of many if not all of the indicted persons including the two former Cabinet officers indicted in the Vesco case. (*Brady v. Maryland*, 373 U.S. 83 (1963))

The President last Friday reaffirmed his intention to adhere to the broadest possible interpretation of executive privilege, reserving for himself the authority to make the judgment on what materials are privileged. This position is inconsistent with the traditional concept that the courts should determine what materials are and are not privileged.

Yet, in the absence of an independent prosecution it may not be possible to pursue appropriate legal channels, as Mr. Cox had been seeking to do, to secure materials on which executive privilege had been invoked inappropriately. A truly independent prosecutor, unlike a special prosecutor within the Executive branch, would be free to take this issue through the courts without fear of dismissal or any implicit or explicit intimidation by the White House.

To tie this last point together, without legislation such as that which you are considering, it is entirely possible that justice will never be achieved in the Watergate and a number of other cases. If this comes to pass it will be exceedingly difficult, perhaps impossible, to ask the American people to continue to vest their faith in equality under the law and our entire system of justice.

The Congress must not be party to a strategy which permits the interaction of the rules of evidence and a reckless definition of executive privilege from becoming the basis for many defendants, several of them former high officials, to escape the full force of the law. I see no way by which we can divorce ourselves from this unfortunate chain of events other than the enactment of legislation creating a truly independent prosecutor appointed by the U.S. District Court.

Mr. President, the very essence of democracy is that the people consent to be governed under a system in which they vest their faith and confidence. That system, and thus the strength of the government, are dependent on maintaining the public's faith and confidence.

Today, as never before in our history, that faith and confidence are shaken to such an extent that our system of government is facing a crisis of unprecedented proportions. If we are to govern effectively and responsively, the Congress must set out as its first order of business the difficult, but absolutely essential, goal of reestablishing the public faith and confidence from which all else proceeds in a democracy. And no amount of high-sounding lip service will do the necessary job; the need is for immediate, constructive action.

In determining the appropriate course of action, Mr. President, we need only to look at the source of the problem. The American people, with good cause, regard the President's dismissal of Special Prosecutor Archibald Cox, and the forced resignations of the top two officials at the Department of Justice, as sufficient evidence that equality under the law is not being maintained and that justice is not being served.

Thus, the one thing we can do here in the Congress to reverse this tidal erosion of confidence, is to enact speedily, legislation to create a new special prosecutor whose independence will be above reproach. That prosecutor must not answer to Congress, nor to the President. That prosecutor can answer only to the American people. Indeed, by the public outcry which has ensued since Mr. Cox was dismissed, it may be said that the public has demanded of us that we act in this regard.

To this end, I am today introducing for Senator Hart, myself, and 51 other Senators, legislation to require the Chief Judge of the U.S. District Court for the District of Columbia to appoint a special prosecutor and a deputy special prosecutor to take over the investigation and prosecution of the Watergate case and other matters which had been in Mr. Cox's jurisdiction.

These prosecutors would have full authority to proceed through the legal system so that justice can be served. They will have the necessary prosecutorial powers, staff, budget and essential freedom to determine when their assignment is completed. Consistent with guidelines under which Mr. Cox had been operating, they could be removed from office only by the Chief Judge of the District Court and only in the instance of "extraordinary improprieties."

I realize there are those who have called upon the President to appoint a new special prosecutor. But if that course is pursued we will again be in a situation in which a person, or persons, charged with investigation of the Executive Branch would be beholden to the Executive Branch and subject to dismissal by the President. One thing our system of government cannot withstand is another trauma such as that of the past week and I caution my colleagues not to fall prey to an approach fraught with such danger.

There are those who say confidently that it would be incredible to think that the President would follow the same path again. However, I cannot help but recall that Mr. Richardson and Mr. Cox, in testimony to the Senate Judiciary Committee last spring, both said it was unthinkable that the President would dismiss a special prosecutor appointed by the Attorney General. Since that unthinkable exercise has come to pass, let us not jump to the unsubstantiated conclusion that it could not happen again.

Moreover, since our overriding objective here is to find a means to the restoration of public confidence in government, elected officials and the impartial execution of justice, we must insist on the unquestioned and irrevocable independence of the prosecutors responsible for the Watergate and related cases. Were the President to appoint the prosecutor there would be no way to guarantee the independence which is the very key to the success of this effort.

We can perceive clearly the need for this independence if we are to adhere to the promise the President made to the American people on April 30. He said, at that time, "justice will be pursued fairly, fully, and impartially, no matter who is involved."

The inviolate independence of the prosecutors is the only way possible that the American people will be satisfied that fairness, thoroughness and impartiality are being observed. The public must know, without an iota of qualification, that the persons charged with the administration of justice are totally free from the inevitable constraint and possible dismissal which would result if they were appointed by the President.

The fact is that we must insist on both the reality and the appearance of independence for the persons charged with pursuing justice in Watergate. There has not been a time in my memory when cynicism and skepticism were so widespread among the public. And, sadly, given the events of recent months, it is becoming increasingly difficult to dissuade those skeptics and cynics. Can anyone doubt that reasonable men would conclude that cynics and skeptics have the evidence on their side?

Thus, even if the President were to appoint a respected, non-partisan independent prosecutor and give that person guarantees that the White House would not interfere in the investigation, we would still be without the appearance and ultimate reality of independence. Such a route will simply not reawake public faith in the pursuit of justice; nor provide the urgent impetus toward the restoration of confidence of which I spoke a moment ago. No one was better able to engender public confidence than Mr. Cox, and recreating his situation is simply not responsive to the new situation we are facing.

There have been suggestions that the President could appoint a special prosecutor to be confirmed by the Senate and perhaps, under some elaborate device, subject to dismissal only with the concurrence of the Senate. This approach would have the unfortunate effect of injecting politics into an area which must be totally void of partisan considerations. I do not want Congress, any more than I want the President, to be in the inappropriate position of being able to dismiss a prosecutor. How can we expect the American people to accept the validity of our claim to independence, impartiality and thoroughness if either the Executive or Legislative branches are in a position to infringe on the administration of justice.

I am gratified by the growing momentum which has developed in the Congress, the media, the legal community and among the public since Monday when I first announced my intention to introduce the legislation now being presented to the Senate. Indeed, the number of cosponsors of the bi-partisan legislation, including half the members of the Judiciary Committee, as well as the geographical balance of the sponsoring Senators, provides clear evidence of a wide national interest in this approach.

Permit me to review briefly the specifics of this legislation—the Independent Special Prosecutor Act of 1973.

In its findings and declarations the bill states that "Public confidence in the integrity of the nation's criminal justice system cannot be maintained if the investigation of allegations and prosecution of illegal acts of high officials of the Executive branch of government are carried out under the authority of the Executive branch itself."

The special prosecutor and deputy special prosecutor, to be appointed by the Chief Judge of the U.S. District Court for the District of Columbia, would be empowered to investigate:

(1) the Watergate break-in and attendant offenses;

(2) other offenses during the 1972 Presidential campaign;

(3) offenses alleged to have been committed by the President, Presidential appointees, or members of the White House staff; and

(4) all other matters which had been under investigation by former special prosecutor Archibald Cox, as well as those subjects which might evolve from the foregoing areas of jurisdiction.

The special prosecutor would have all necessary powers to pursue every legal path toward the fulfillment of his assignments and the full administration of justice.

In addition, all the material, evidence and information generated by the Special Watergate Prosecution Force under Mr. Cox would be available to the new independent special prosecutor and the new prosecutor would be empowered to continue all legal steps begun by Mr. Cox.

As a further step to help protect the independence of the new special prosecutor, the bill specifically states that funding for the special prosecutor's office not go through the White House Office of Management and Budget. Clearly such an arrangement is necessary, for otherwise the White House would be in a position where it could possibly use budget authority to limit the staffing and thoroughness of the investigation.

The special prosecutor and deputy special prosecutor could only be removed from office by the Chief Judge and then only in the instance of extraordinary improprieties. The special prosecutor is left the final determination as to how long he must remain in office so that the administration of justice will not only be fair and impartial, but thorough as well.

I would like to now turn to a discussion of the constitutionality of the mechanism we propose today. There have been some questions raised in this regard that I would like to put to rest. I might note, at this point, that some twenty-three of the Deans of the nation's most distinguished law schools have endorsed our proposal and are of the opinion that it is constitutionally sound. I ask unanimous consent, Mr. President, that the formal statement signed by these legal scholars be printed at the conclusion of my remarks.

Article II, Section 2 of the Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by Law;" *But* this clause then goes on to say, "The Congress may by Law vest the Appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

It is this last clause of Article II from which Congress derives its authority to name a Special Prosecutor who is appointed by the "Courts of Law." These clear words give Congress the discretion to authorize the judicial appointment of officers of the United States.

The Supreme Court's interpretation of this clause of the Constitution dates back to 1839 where the Court held in *Ex Parte Heinen* that this appointment power could be granted only to departments of the government "to which the officer to be appointed most appropriately belonged." Forty years later, the Court in *Ex Parte Seibold* somewhat qualified this language in upholding a statute which authorized judges to appoint election supervisors. The *Seibold* Court criticized the impracticality of a formalistic inquiry as to the department to which an officer "most appropriately" belonged, and indicated instead that Congressional grants of authority to the judicial branch would be upheld *unless* such authority, and this is a key point, was *incongruous* with the judicial function. Thus, for example, though Congress could not authorize the courts to appoint the Ambassador to the Hague, we could authorize the appointment by the courts of officers exercising judicial functions. That basic test is one of "congruity vs. incongruity."

The appointment of a special prosecutor would not produce incongruity with the normal judicial function because the court would not be involved in any continuing administration of prosecutions. The possibility that the Court or a particular judge of that Court might also sit in trial upon cases brought by the special prosecutors it appointed would not affect the validity of the appointment since Judges appoint defense counsel who routinely appear before them in trial, and more importantly, our present federal statutes provide that Federal District Judges may appoint officers to fill vacancies in the United States Attorney's office, lawyers who act as *prosecutors* for the government.

It is true that there is broad language in some cases which deal with the relation between judges and prosecutors to the effect that proper prosecutorial discretion is an inherent executive function, and that prosecutorial discretion must remain unfettered by the Courts. The most important of these cases is the opinion of the 5th Circuit in *Cox* v. *Katzenbach*. There the Attorney General refused to authorize the signing of grand jury indictment when ordered to do so by the District Judge. The Court of Appeals noted that "the functions of prosecutor and Judge are incompatible" The crucial distinction, however, is that this line of cases deals with attempts by grand juries, courts, or plaintiffs to compel an unwilling prosecutor to initiate or stop a specific prosecution. As one of our most distinguished jurists, Judge Minor Wisdom pointed out in the *Cox* case: "In the interest of justice and efficiency there should be *some* person able to prevent an unjust prosecution". As a branch of government charged with carrying out our national policy on law enforcement, the executive is the proper organ to make such a judgment. Executive discretion in this area is thus based on considerations of justice and efficiency, as well as upon the doctrine of separation of powers. In other words, where the issue is one of prosecutorial discretion, it is best exercised in its *legitimate* way by the executive. Legitimate meaning the traditional Anglo-American concept of measuring the punishment in individual cases to fit the crime. In present circumstances, however this legitimate prosecutorial discretion is not at issue since now we are faced with the issue of how the prosecutor or the executive branch can most fairly and objectively, prosecute itself.

The appointment of a special prosecutor by the Chief Judge of the District Court does not impinge on the critical area of prosecutorial discretion. No specific prosecutions are required in the statute, and the broad discretion contained in the charter for special prosecutor ensures that the very limited powers of removal will not be used to control him in the exercise of his discretion. Thus he will be fully able to prevent unjust prosecutions as well as to initiate those which are just. While these policies are usually best weighed by the executive, there is a clear danger that where the executive is investigating itself, such executive discretion could defeat the purposes of the investigation. These special circumstances transform the arguments based on discretion into arguments in favor of a prosecutor free from the control of the executive branch. This is all the more pertinent considering the confidence problem which exists in the country today.

Let us turn to the separation of powers arguments. The formal argument against a congressionally authorized, judicially appointed special prosecutor boils down to a simple assertion that such a procedure infringes upon the separation of powers. But the separation of powers is not a formal, rigid doctrine dividing our government into watertight compartments. As the Supreme Court said in the famous and important case *Humphrey's Executor vs. United States*, where the Court upheld the power of Congress to prevent the President from dismissing a member of the Federal Trade Commission, "Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause will depend upon the character of the office." The Congressional power to authorize District Judges to appoint prosecutors in certain circumstances has long been recognized, in the Federal statutes, as I have indicated. Although the District Court opinion which upheld the validity of this statute emphasized the temporary and provisional nature of such an appointment, it contained no suggestion that there is any inherent impropriety in such a procedure based on an improper mixing of functions. Many states whose constitutions adhere to the separation of powers doctrine grant similar and even broader powers of prosecutorial appointments to state judges.

The doctrine of separation of powers is a functional one, stemming from the basic concept that each of the separate powers is designed to serve as a check and balance on the others and that all powers should be subject to the scrutiny and restraint exercised by the other holders of power if arbitrary government is to be avoided. It would be anomalous if this notion of separation of powers could be used to allow the executive to exercise power in its own case unchecked and unscrutinized—and produce the ironic result of the executive branch investigating itself.

Mr. President, White House aides have publicly acknowledged the serious "miscalculation" made by the President in his actions of last weekend. The Secretary of State yesterday made direct reference to the "crisis of authority" facing this nation.

Earlier this week we teetered on the brink of an even more serious problem, when there was the possibility that the President might defy a court order. Fortunately, he chose not to take that extreme step and in doing so showed the capacity to reverse himself when the national interest and public pressure demanded it.

While the President's compliance with the court order is a constructive step, it does not resolve the continuing crisis of confidence confronting us, nor has it stopped the public outcry for the thorough, unbiased administration of justice. We have a long road to travel before our government can again claim the respect of the American people, and we can take a crucial and giant step down that road by passing the legislation being introduced today. I fervently hope that the Congress will act speedily and affirmatively in passing this bill and suggest to the President that he join us in this effort as part of an over-all effort to correct past abuses and to begin the necessary reconstruction of the foundation of our democracy.

Mr. President, I would like to make one final point. While we have the compelling responsibility to fulfill the Constitutional and legal requirement that justice be administered fairly, fully and impartially, no matter where the investigation may go and no matter who is involved, we have a second responsibility. That responsibility is to the prompt administration of justice. The American people rightly want to speed the day when all of the guilty are convicted and all of the innocent exonerated. The importance of speed can best be demonstrated in

the fact that until every allegation of misconduct is thoroughly investigated and until all offenses are fully prosecuted, it will be exceedingly difficult to focus the full attention and energies of our government and citizens on other vital national issues.

Of the other proposals that have been advanced for the prosecution of these cases, none offers the same speedy resumption of the special prosecutor's efforts as the bill we are introducing today. To develop some intricate procedure for the appointment of a special prosecutor will delay the time when this unfortunate episode in American history will be behind us.

Let us act now, let us have the Chief Judge make the necessary appointments as soon as possible, let us provide for the speedy, fair administration of justice in the pending cases, and let us move on to the other important business of this country.

RICHARDSON-COX GUIDELINES

Duties and Responsibilities of the Special Prosecutor

THE SPECIAL PROSECUTOR

There will be appointed by the Attorney General, within the Department of Justice, a Special Prosecutor to whom the Attorney General shall delegate the authorities and provide the staff and other resources described below.

The Special Prosecutor shall have full authority for investigating and prosecuting offenses against the United States arising out of the unauthorized entry into Democratic National Committee Headquarters at the Watergate, all offenses arising out of the 1972 Presidential Election for which the Special Prosecutor deems it necessary and appropriate to assume responsibility, allegations involving the President, members of the White House staff, or Presidential appointees, and any other matters *which he consents to have* assigned to him by the Attorney General.

In particular, the Special Prosecutor shall have full authority with respect to the above matters for:

- conducting proceedings before grand juries and any other investigations he deems necessary;
- reviewing all documentary evidence available from any source, as to which he shall have full access;
- determining whether or not to contest the assertion of "Executive Privilege" or any other testimonial privilege;
- determining 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;*
- deciding whether or not to prosecute any individual, firm, corporation or group of individuals;
- initiating *and conducting* prosecutions, framing indictments, filing informations, and handling all aspects of any cases within his jurisdiction (whether initiated before or after his assumption of duties), including any appeals;
- coordinating and directing the activities of all Department of Justice personnel, including United States Attorneys;
- *dealing with and appearing before* Congressional committees having jurisdiction over any aspect of the above matters *and determining what documents, information, and assistance shall be provided to such committees.*

In exercising this authority, the Special Prosecutor will have the greatest degree of independence that is consistent with the Attorney General's statutory accountability for all matters falling within the jurisdiction of the Department of Justice. The Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions. *The Special Prosecutor will determine whether and to what extent he will inform or consult with the Attorney General about the conduct of his duties and responsibilities.* The Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part.

STAFF AND RESOURCE SUPPORT

1. Selection of staff

The Special Prosecutor shall have full authority to organize, select, *and hire* his own staff of attorneys, investigators, and supporting personnel, on a full

or part-time basis, in such numbers and with such qualifications as he may reasonably require. He may request the Assistant Attorneys General and other officers of the Department of Justice to *assign* such personnel and to provide such other assistance as he may reasonably require. All personnel in the Department of Justice, including United States Attorneys, shall cooperate to the fullest extent possible with the Special Prosecutor.

2. Budget

The Special Prosecutor will be provided with such funds *and facilities* to carry out his responsibilities as he may reasonably require. He shall have the right to submit budget requests for funds, positions, and other assistance, *and such requests shall receive the highest priority.*

3. Designation and responsibility

The personnel acting *as the staff and assistants* of the Special Prosecutor shall be known as the Watergate Special Prosecutor Force and shall be responsible only to the Special Prosecutor.

CONTINUED RESPONSIBILITIES OF ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

Except for the specific investigative and prosecutorial duties assigned to the Special Prosecutor, the Assistant Attorney General in charge of the Criminal Division will continue to exercise all of the duties currently assigned to him.

APPLICABLE DEPARTMENTAL POLICIES

Except as otherwise herein specified *or as mutually agreed between the Special Prosecutor and the Attorney General, the Watergate Special Prosecution Force* will be subject to the administrative regulations and policies of the Department of Justice.

PUBLIC REPORTS

The Special Prosecutor may from time to time make public such statements or reports as he deems appropriate and shall *upon completion* of his assignment *submit a final report to the appropriate persons or entities of the Congress.*

DURATION OF ASSIGNMENT

The Special Prosecutor will carry out these responsibilities, with the full support of the Department of Justice, until *such time as, in his judgment, he has* completed *them* or until a date mutually agreed upon between the Attorney General and himself.

Mr. HUNGATE. Senator, I am sure that there will be questions from the subcommittee. We are now at the beginning of a quorum call. We had better go and answer it. I wonder if you could be available to us, let us say at 12:45? Would that suit the members? We will then endeavor to complete the questioning as soon as possible.

Senator BAYH. Mr. Chairman, I can cancel anything I have and I will be glad to. I would be glad and pleased to stay.

Mr. HUNGATE. I am willing to hear from the members of the subcommittee. I would imagine there would be some questions. I do not know.

Senator BAYH. Let me say that if I can be helpful, what I am doing here is far more important than anything that I have on my schedule, Mr. Chairman.

Mr. HUNGATE. Are there any questions?

Mr. DENNIS. Mr. Chairman, I really do not think it would be respectful for me to let my distinguished colleague from Indiana come here and not ask him a question.

Mr. HUNGATE. We would appreciate it if you could stay, Senator.

Senator BAYH. I will be glad to.

Mr. HUNGATE. We will come back at 12:45.

[Short break.]

Mr. HUNGATE. The committee will resume its hearings and proceed with Senator Bayh's testimony. We thank you very much for waiting. Mr. Mayne.

Mr. MAYNE. Senator Bayh, to what extent was there collaboration between you and Congressman Culver or between your respective staffs in arriving at the end product that each of you have arrived at?

Senator BAYH. I do not know. On our side there were four or five Members of the Senate involved in trying to put together what they thought would be a good, constitutionally sound bill, and I honestly cannot answer to what extent one of those Members or several of those Members may have communicated with Mr. Culver.

Mr. MAYNE. Well, apparently though, from your observation, it was not substantial?

Senator BAYH. Yes. And several of our staff, as usually is the case, you know, did more hours of work on this than several of us, and it is entirely conceivable that they cooperated with either Mr. Culver or his staff. I just cannot answer that question.

Mr. MAYNE. Well, I think it adds considerably to the validity of the overall proposal that they are so similar, having been arrived at by independent groups working on them.

Thank you, Mr. Chairman.

Mr. HUNGATE. Mr. Smith.

Mr. SMITH. Senator Bayh, I want to thank you for coming over here to testify in regard to this proposal to establish an independent Special Prosecutor. I wanted to introduce myself. My name is Henry Smith from New York. It was reported to me last year that you did not know who I was although we had met so I wanted to tell you, now that we have met again.

Senator BAYH. Well, I do not know who reported it, Henry, but I do know who you are.

Mr. SMITH. Senator, I have not had a chance to look at the bill that you and some of your colleagues in the Senate have introduced. Is it substantially the same as the Culver bill?

Senator BAYH. Yes; it is basically the same, yes. I think Mr. Culver in his statement really described those areas of difference and I frankly am now of the opinion that I would probably be more comfortable from the standpoint of due process going with the proposition of letting the chief judge appoint a three-judge panel and then let them have the authority that in our bill and in the Senate we give only to the chief judge. As I understand it, that provision is contained in Mr. Culver's bill.

I think one important provision contained in ours that I do not think is contained in his, although I have not studied his as carefully as I have ours, is that we limit the term to 2 years and I think the more we can prescribe the duration of the authority, the stronger we are on constitutional grounds.

Mr. SMITH. Well, I think, Senator, you have answered my next question then. I was going to ask if you had any preference in the method of appointing a Special Prosecutor, but you just said that you think maybe the newest proposal of Mr. Culver of a panel of judges might be better than the chief judge?

Senator BAYH. I would go either way. I think you can make a good constitutional case. We have had a number of constitutional author-

ities that have supported our approach of letting the chief judge do it. The ABA's unanimous recommendation referred only to the court, which would suggest I suppose, all 19 judges. I would feel more comfortable with a panel. You get something being decided by 19 people and you may have difficulty moving as expeditiously as circumstances might require. I think by letting the chief judge appoint a three-judge panel, perhaps also with the provision that none of the three judges can sit over cases under the Special Prosecutor's jurisdiction, that that gets us away from some other problems that might be raised. I would be comfortable with that.

Mr. SMITH. Thank you very much, Senator.

Mr. HUNGATE. Mr. Kastenmeier.

Senator BAYH. I am sorry if someone gave you the impression that I didn't know who Henry Smith was. It may have been at a time when I might have preferred my friend, Max McCarthy, to Henry Smith, but it was not because I did not know you or had anything personal against you.

Mr. SMITH. That is the time it was, Senator, when you were up in my district campaigning against me.

Senator BAYH. As I recall that was the slogan that others were using; was it not? Anyway, I appreciate the jest in which you bring it forth.

Mr. HUNGATE. Mr. Kastenmeier.

Mr. KASTENMEIER. Thank you, Mr. Chairman. In any event, I would like to compliment you on taking the leadership in connection with this question which is really a crisis question in the Senate. If one were to assume just for the purposes of argument, that the approach that you have suggested is rejected, for any reason, let us say, a constitutional ground or otherwise, is there any other way or means or any other formulation whereby we could have an independent prosecution which would meet what I think would be the needs that I think we all see in terms of a prosecution?

Senator BAYH. No, not in my judgment, Mr. Kastenmeier, and I would have to say that as one who has been involved, although there are several over there in the Senate that have played as active a role as I have, and made as significant a contribution to this, I can just speak for myself, but I did not rush into this without considering the implications. I was sort of a reluctant mover into an area that is plowing virgin territory. We had never done this before, thank God, and I hope we do not have to do it again. But, I think our Constitution was purposely left flexible so that we can deal with the contingencies that exist tomorrow that we may not foresee today. And the reason I was satisfied that this was the best way to go was twofold. One, I did not know of any other proposal that could really guarantee independence. Now, if that is what we are after then let us do it the only way you can guarantee independence.

Second, and perhaps this is part of the independence, but I think it is perhaps a good portion of pragmatism which takes into consideration the great degree of disenchantment which exists in the country today in the political process. I believe in the political process, and I think usually it works pretty well. But, right now the public, as far as the prosecution of the Watergate is concerned, is not going to believe any political figures. Thus to involve the Congress as a stop-

gap, and to involve the President as an appointer, is I think to make it less credible as far as the people are concerned. Those are my two basic reasons for going this route.

Mr. KASTENMEIER. There are two or three other approaches that are in bill form. There is Congressman Bennett's bill which suggests that the Senate and House appoint a Special Prosecutor. There is Congressman Biester's bill which would have the President appoint the Special Prosecutor with the advice and consent of the Senate and such appointee would have to come from a select list by certain legal organizations, the ABA and others, and the President could only remove such a person after a Civil Service Commission finding only for good cause. Do either of those options suggest a reasonable alternative to you?

Senator BAYH. Not in my judgment. They may be reasonable alternatives, but they are not nearly as good. They do not provide the kind of independence that this other approach provides.

Senator Percy has another proposal. You go through the Presidential appointment, advice and consent of the Senate and then he can be removed, or the President may remove, but then either House of Congress within 30 days can withdraw the power to remove. You know, where you comingle the power to appoint and the power to remove in two branches of Government you are on shakier constitutional ground, in any precedent that I have read, than we are on this one. Plus, I just think the American people out there, they want to see this thing pursued and they obviously have some doubts about the President. And there has been an effort made to suggest that any of us who want independent prosecutors are really out to get the President. And I can understand the practicality of this, so I take it away from the Congress that is controlled by the other party, give it to a Federal judge who does not have to run for public office. Let him have this power, or other judges have this power, and then let us proceed.

You know, I am sure you will have a chance to hear Professor Cox yourself. But, one of the most telling points that he makes is that the first thing you think about justice, as far as Watergate is concerned, is convicting somebody. But, a fundamental aspect of justice is exonerating those that are innocent. And I ask how in the world are the American people going to look at some people who have been raked over the television and the front pages of our newspaper if a prosecutor who is appointed by the President exonerates that individual? Mr. Cox points out, that there are some publicized people who he has investigated and he does not believe there is a probable cause to continue their investigation, certainly no reason to bring an indictment or the case before the grand jury for indictment. And yet because of his termination, that is going to have credibility that those people have been unfairly accused and I think that is as important as seeing that those who are guilty are convicted.

Mr. KASTENMEIER. There is one other tangential option, and that is that to the extent that this entire affair may concern the President himself that we use the route of impeachment. That is to say, the investigation through impeachment having extraordinary powers presumably to compel testimony or reach testimony and have the Special Prosecutor for that purpose and whether by this committee or any

other of the House that we might achieve more or less the same result in terms of justice. Do you have any comment about that?

Senator BAYH. Well, I would personally feel that we have two responsibilities here. One, to deal with the impeachment responsibility, which is clearly in the province of the House as far as the initiation is concerned. And I think it would be rather presumptious for me to suggest how you here in the other body should proceed. That is clearly your initial responsibility.

And then, of course, we, in the Senate, have a jury responsibility if you bring the bill for impeachment. We also have another responsibility, however, and I think we still have the possibility of doing one without the other. We have the responsibility of doing one without the other if we can and that is to see that we have not only justice but the appearance of justice while the House is considering the wisdom of impeachment.

The very act of studying impeachment has a lot of political connotations to it. In fact, if you look at what a number of people, including the Vice President designate has said in describing the terms of impeachment, it is a different kind of deed really, than any that is prescribed by statute that I know of. High crimes and misdemeanors. And Congress by its very nature is a political body and these decisions are going to have a lot of nonspecific statutory consideration. But, when you are putting somebody in jail, not just impeaching him, although impeachment does not preclude the other, if we read the Constitution carefully, you want it done according to specific rules, due process, evidentiary procedure and the like. For that reason an independent prosecutor should proceed at the same time the House is considering the other responsibilities that you have.

Mr. KASTENMEIER. I thank you for your answers. Thank you Mr. Chairman.

Mr. HUNGATE. Thank you. We have another rollcall going on. If it meets with the committee's approval, we will continue until the second bell.

Mr. Dennis.

Mr. DENNIS. Thank you, Mr. Chairman. I will be very brief.

I would like to welcome my senatorial colleague from the great State of Indiana to our committee. When we were both younger, Mr. Chairman, we both served in the Indiana General Assembly, and I retain a friendly feeling from that sort of common denominator in our background. But, Senator, it seems to me we do not need to discuss this matter back and forth at any great length. I think we are confronted with what all will concede is sort of a dilemma here. There does not seem to be much doubt that prosecution of the criminal laws is an executive function and historically always has been. And, of course, under the *Cox* decision, with which you are familiar, the court said in so many words that the U.S. attorney was an executive officer and acted as such.

Senator BAYH. May I interrupt?

Mr. DANIELS. Sure.

Senator BAYH. Or would you rather—I do not think the *Cox* case, with all respect to my friend and former colleague and present colleague, I do not think the *Cox* case is on point. The *Cox* case if I might suggest, could be argued to sustain my contention that first of all,

under article 2, section 2, very clearly we have the power to delegate, and once you have delegated to one branch of Government the authority to appoint, another branch of Government then cannot assume the power to remove. And this was corrollary to *Cox* where the court said that somebody has to watch out over justice and thus that you cannot force—I'm sorry—I was arguing the *Myers* case.

The *Cox* case, the *Cox* case deals with the day-to-day responsibility of bringing indictments. And we very carefully, in giving the authority to the judge, or Mr. Culver giving it to the three-judge panel, very carefully preclude the day-to-day supervision which I feel the *Cox* case did prohibit. I would agree with you wholeheartedly if we were giving that kind of authority to the judge to say to the Prosecutor you can indict, you have to consider the evidence or you must do thus and so, you must appeal, you cannot appeal, we specifically do not want the judge or the judges to have that authority.

Mr. DENNIS. Well, of course, the only thing the *Cox* case actually held, as I discussed here with these other gentlemen, was that the U.S. district judge could not force the U.S. attorney to sign an indictment. But, in the discussion by the court, it very definitely did say that one of the reasons for that was that the U.S. attorney was an executive officer and that his functions as the U.S. attorney were functions as an executive officer. And I merely use that as an illustration of judicial affirmation of the fact that basically enforcement of the criminal laws is an executive function and that is what puts us in the dilemma we would be in if we hand over this basically executive function to the judicial branch for supervision, appointment, removal and so forth. I have no particular quarrel with the idea because you are trying to get an independent prosecutor. But, it is a serious constitutional problem, as I think all admit.

Now, I just want to put it to you. I have considerable confidence in your august body at the other end of the Capitol here, and it is a very familiar proposition of course, that executive appointments are made by the President with your advice and consent. And I do not know why it could not even be proposed, as part of a legislative approach, that if there was a removal that a report should be made to the Congress setting forth the reasons. I think that could be done even under *Myers*. Now, that is a rather familiar approach, and I just put it to you whether it would not be better, rather than building in the serious constitutional argument under your bill to follow a familiar approach of that sort relying on the Senate's advice and consent to check up on the Executive. This approach is also supported by the fact of life that an arbitrary removal of a Special Prosecutor again is rather remote and if it did happen, then we might well talk about the impeachment procedure, it seems to me. What bothers me about your bill is building in a defense for smart attorneys, which they are certainly going to have.

Senator BAYH. Well, one suggestion I would make——

Mr. HUNGATE. Pardon me.

Senator BAYH. You have to go vote.

Mr. HUNGATE. What bothers the Chair is the rollcall going on, and that is the second bell. If I may suggest this, subject to the agreement of the subcommittee and the Senator? Would it be permissible that any further questions they might desire to put to you could be sub-

mitted in writing to you on or before noon tomorrow, to which you would respond to on or before noon Monday?

Senator BAYH. That would be fine, or, you know, I can stay, whichever you prefer.

Mr. HUNGATE. Well, it seems that we are going to be running back and forth, and we have to move on too, as the Chair sees it.

Mr. DENNIS. Maybe the Senator could give a quick answer to my question if he wants to. I do not care how he does it personally. I do not have anything else.

Senator BAYH. I have found my friend from the 10th district a reasonable man. We have not always agreed as to the best definition of reasonable, but I have a great deal of respect for Congressman Dennis. We had this Watergate situation before us this last year and we were all trying to find a way to do it under the normal procedure. And I would just like to ask my fellow Hoosier to read the agreement, take time to read what Mr. Richardson and Mr. Cox said about the agreement, take time to read what the President said about what he would not do and what Senator Scott said the President told him he would not do and then consider how that average constituent of ours is looking at this situation if we go right down that same track over and over again.

Mr. DENNIS. May I respond to my friend? What he points out is probably one of the reasons why no Executive, and particularly this one, could possibly do that again without good cause. Second, we cannot make this legislation constitutional just because the average citizen might wish or like it. That is the box we get into.

Senator BAYH. Well, let us assume, which I am willing to do, feeling you have a responsibility to learn from what you have done or not been able to do in the past, let us assume that what Congressman Dennis says is true, that the President would not dare do it, as Elliot Richardson said he would not dare do it once, that he would not dare do it again. I wonder if that average citizen out there, who has become almost a professional skeptic, now, is going to believe that someone who he has read in the newspaper is guilty or has done thus and so is then exonerated because the Special Prosecutor, not the independent prosecutor, refuses to take action, do you feel they are going to believe that person is innocent? I do not think so.

Mr. DENNIS. I think if we pass a scheme which turns out to be thrown out by the court, the average citizen is going to think we are all a bunch of jackasses.

Senator BAYH. Mr. Chairman, may I suggest one more thing, and then I will close? I have come to the conclusion, at least as far as I am concerned, that we need to contain a provision in our bill, or in legislation similar to some of those clauses contained in the Voting Rights Act and other civil rights legislation which permitted for the immediate appeal of the constitutionality prior to the empaneling of a jury to a three-judge court and then immediately to the Supreme Court so that you would not let a lot of people—first you would not have the constitutionality drug out over an extended period of time, and second because you would have the appeal before double jeopardy set in. You would not have people using that as an excuse, and thus not be convicted.

Mr. HUNGATE. Thank you very much, Senator.

Mr. DENNIS. Mr. Chairman, I thank my colleague, and I wish that we could discuss this further.

Mr. HUNGATE. The committee will resume sitting at 2:30.

[Whereupon, at 1:16 p.m. the hearing was recessed to reconvene at 2:30 p.m. the same day.]

AFTERNOON SESSION

Mr. HUNGATE. The subcommittee will be in order and resume its hearing.

We are pleased to welcome a former member of this committee, a distingiushed member, Mr. Biester, of Pennsylvania. Again we thank you for the time and attention you have given this matter and your patience with the committee. We will be very glad to hear from you.

TESTIMONY OF HON. EDWARD G. BIESTER, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. BIESTER. Thank you, Mr. Chairman.

I appreciate those remarks and actually enjoyed listening this morning to the very interesting and thoughtful testimony of Congressman Culver from Iowa and Senator Bayh.

I really appreciated the opportunity to be here while they were testifying because I found many of the questions which had occurred to me occurred to the members of the subcommittee and were thrashed out rather early on and I appreciated that.

I have a prepared statement, Mr. Chairman, which I will go through but I will interpolate rather frequently.

Mr. HUNGATE. Without objection your prepared statement will be made a part of the record at this point and you may proceed as you see fit.

Mr. BIESTER. May I also ask, Mr. Chairman, that the Library of Congress Congressional Research Service paper dated October 29, 1973, entitled "Establishing Independent Federal Prosecutor, a Preliminary Analysis of the Constitutional Issues," be also included immediately after my prepared statement as an exhibit to it.

Mr. HUNGATE. Do you have a copy of that?

Mr. BIESTER. Yes, I do.

Mr. HUNGATE. One copy, I assume.

Mr. BIESTER. I have one copy.

Mr. HUNGATE. Without objection that will be considered for inclusion in the record.

[The documents referred to follow:]

STATEMENT OF HON. EDWARD G. BIESTER, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. Chairman, I appreciate this opportunity to appear before your Subcommittee, and I am particularly encouraged that you have responded with such dispatch in holding hearings on the matter of a Special Prosecutor for the Watergate investigation. The rapidity with which events are occurring compels Congress to act with all deliberate speed.

President Nixon has indicated his desire to create another Special Prosecutor's office. While I am pleased to see that he acknowledges the need for such an office,

I do not believe Congress can in good conscience, and on behalf of the people it represents, accept the proposal in the form it has been offered.

The President's decision, revealed this past Friday, to have Acting Attorney General Bork appoint a Special Prosecutor to work from within the Justice Department on the Watergate investigation fails to satisfy the requirements of the situation. The unanswered questions surrounding the Cox dismissal and the dubiety of Presidential motive in abolishing the Special Prosecutor's office call for the re-establishment of a strengthened office subject to an absolute minimum of outside interference. The situation demands from Congress early passage of legislation which will fully assure the independent pursuit of all the facts in the Watergate case.

Congress should go as far as it Constitutionally can to insure a Special Prosecutor bill which is viable and comprehensive and, above all, which can withstand the most determined legal challenge. Your Subcommittee and the full Judiciary Committee should report the strongest measure possible to insure an independent investigation—legislation which will earn the support of a majority of the Congress and meet whatever Constitutional objections may be raised in court.

In the legislation I have introduced, H.R. 11075, lies a constructive proposal through which Executive, Legislative and public participation can realize a Special Prosecutor's office acceptable to most citizens with the least question of the Constitutionality of its provisions.

H.R. 11075 would authorize the President to select a Special Prosecutor from among names submitted to him by five national legal associations: the American Bar Association, the National Bar Association, the American Trial Lawyers Association, the Association of American Law Schools and the National District Attorneys Association. Once the President has chosen one individual from the submitted recommendations, his name would go to the Senate for confirmation.

The Special Prosecutor would be given primary authority to prosecute any Federal offense arising out of any campaign with respect to the 1972 Presidential election. All Federal agencies would be directed to cooperate fully with the Special Prosecutor in the execution of his responsibilities which include any investigatory and prosecutorial activities he deems necessary. He may be removed from his office by the President but only for good cause as established and determined by the Civil Service Commission on the record after opportunity for hearing.

I perceive several strengths and advantages in such an approach.

It avoids raising the serious Constitutional questions of how far we can go in empowering and insulating a Special Prosecutor's office. If the Special Prosecutor is to perform Executive functions such as implementing prosecutorial powers he must, do so from within the Executive branch and not the Judicial or Legislative. H.R. 11075 locates the Special Prosecutor in the Executive but it allows him a separate and independent identity from all other offices in the Executive, including the F.B.I., the Department of Justice and the Office of the President.

It is contestable whether the Constitution's exception to Presidential appointment within the Executive branch, namely permitting Congress to "vest the appointment of such inferior officers, as they think proper . . . in the courts". (Article II, Section 2), would include an individual of the proposed stature of a Special Prosecutor. This passage has been interpreted to cover lower- and mid-level type appointments, but not one which would vest a single individual with such far-reaching and weighty Executive responsibilities.

The grounds for Congressional establishment of a Special Prosecutor's office outside the Executive are equally shaky. In the past when Congress has pursued an investigation of the Executive branch it has investigated on its own but has left prosecution in the hands of the Executive. Furthermore, independent regulator agencies have not extended their prerogatives to include the application of criminal sanctions. While it may be argued that Watergate represents an unprecedented situation, the elasticity of Constitutional interpretation to accommodate what Congress may prefer to do in this matter is not unlimited.

It is debatable, from a Constitutional standpoint, whether Congress could justify and whether the courts would uphold the lengthy and tenuous linkages authorizing a Special Prosecutor's office which are embodied in much of the legislation before you today. Specifically, a process would be open to question which has the Legislative branch appointing an individual from the Judicial branch who would in turn empower another individual to implement functions and responsibilities of the Executive branch.

The legal propriety or the desirability of having the Judiciary appoint the Special Prosecutor is also questionable. Do we want to disqualify Judge Sirica from any further judicial involvement in the Watergate proceedings by entrusting him—or any other Federal judge in the District Court—with the appointive and supervisory powers provided in certain of the legislation before this Subcommittee. If a satisfactory alternate course is possible, I feel that avenue should be pursued, leaving the judges of the District Court to the job they have thus far been performing with distinction.

It is significant to note Professor Cox's observation regarding the appointment of a new Special Prosecutor. Although he personally favors having the U.S. District Court here in the District of Columbia make the selection, he admits to the strong possibility that it could run into serious Constitutional problems. There is no question that Congress may delegate or confer the powers which it has, but it may not confer either Article II Executive power of Article III Judicial power. While the Constitutional language is not clear, there are Executive functions conferred on the President to the exclusion of the other two branches of government. Having the legislation challenged in the courts, with the prospects of lengthy delays in the resumption of the Watergate investigation, would do little to help bring this entire situation to its earliest conclusion.

H.R. 11075 provides for inputs in the naming of the Special Prosecutor from among the Executive and Legislative branches of the government and from the public as represented by the legal profession. The Special Prosecutor will need the support and cooperation of those within and without the government if he is effectively to exercise his duties and responsibilities. H.R. 11075 encourages this by setting forth a selection process which would go a long way toward realizing a broad-based decision and a widely accepted nominee.

In order to protect the Special Prosecutor from removal for inconsequential reasons or from interference with the forward progress of his investigation, he may be removed from office only for good cause as determined by the Civil Service Commission. The fundamental privilege of the President to dismiss subordinate employees of the Executive is upheld, but I believe it is within Congress' power to insure the integrity of the Special Prosecutor's office by requiring a hearing and a determination by the Commission prior to removal.

Some of the legislation proposed seeks a degree of independence for the Special Prosecutor which would make that office a virtual branch of government unto itself, and others would nominally place the office within the Executive while restricting the Chief Executive from exercising the fundamental rights of the President to oversee the Executive branch.

Arguments can be made on both sides of the issue involving the Constitutionality of the legislation before this Subcommittee. What we need is a proposal with the best chance of avoiding these Constitutional arguments but one which will still produce a mechanism insuring that the investigation will proceed quickly and independently with the least likelihood of a court battle challenging its right to proceed at all.

H.R. 11075 embodies the approach which should be taken if we are to have a Special Prosecutor's office which can pass the Constitutional test and avoid time-consuming court delays. Furthermore, it must be able to bring forth the indispensable cooperation of the Executive branch which will be vital to the successful completion of the investigation.

In evaluating the legislation I have introduced, I would be the first to admit that as a basic framework it could be strengthened, and this Subcommittee can most certainly improve upon its features. For one thing, it might be appropriate to include a provision stipulating that the President must make his selection known to the Senate within a specified time after he has received the recommendations from the legal groups. As the legislation now stands, no time limit is imposed. Also, it may be wise to specify that in the event the President tries to remove the Special Prosecutor the Civil Service Commission would be directed to give the matter priority consideration and expedite the proceedings as quickly as possible. It may be necessary, as well, to clarify the grounds on which the Civil Service Commission would make its ruling by including terms such as "neglect of duty" and "malfeasance in office." Furthermore, it might be appropriate to enumerate certain of the investigatory and prosecutorial responsibilities as well as amplify on staffing and salary provisions. Perhaps the office should be made permanent so that all Presidents and those who seek the Office may know that no one is immune from the law in this country.

In conclusion, this legislation attempts to go as far as legal restrictions permit to insure the most independent investigation and prosecution possible. It seeks to

provide the Special Prosecutor with the broadest access to information and the best security for his position that judicial interpretation suggests can be upheld.

I thank the Chairman and the Subcommittee members for their consideration of my testimony this morning on this most critical legislation.

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ESTABLISHING AN INDEPENDENT FEDERAL PROSECUTOR

A PRELIMINARY ANALYSIS OF THE CONSTITUTIONAL ISSUES

(By Johnny H. Killian, Legislative Attorney, American Law Division, Oct. 29, 1973)

Arising out of the controversy over the investigation into and the prosecution of offenses connected with the Watergate matter is the proposal in Congress to provide for the creation of an office of prosecutor which would be independent of control and direction of the President and not subject to removal by the President. The constitutional issues raised by this proposal are the subject of this memorandum. Because of the necessity of dealing with the matter in such a short time, it is not claimed that the treatment here is definitive.

This analysis proceeds in three sections. First it is considered whether the prosecutorial function is necessarily an executive one so that under the concept of separation of powers undergirding the constitutional allocation of functions in the Federal Government the office of prosecutor is an executive branch office. Determination that the inquiry must be answered in the affirmative requires an exploration of the President's constitutional powers with regard to persons performing the prosecutorial function. Second, the power of Congress to vest the appointment of inferior offices in the courts pursuant to article II, section 2, is dealt with along with the question whether the exercise of this power involves any exception to the general rule of presidential supervision of executive officers. Third, an alternative approach to the appointment of a special prosecutor by the courts is considered wherein it is inquired whether Congress could by imposing particularized duties upon an executive officer effectively insulate him from substantial presidential control.

I

Resolution of the questions presented by the proposal for a special, independent prosecutor requires the consideration of one of those abstractions which is universally recognized to be basic to the government created by the United States Constitution but upon the details of which there seems to be equally universal disagreement. Just what is it that the concept of separation of powers imposes upon Congress' powers to provide for the execution of federal criminal laws through the device of an office free of presidential direction; conversely, what are the irreducible confines of the President's executive authority to oversee and to direct the execution of the Nation's laws. The history of practice tells us much but it does not tell us that the practice is constitutionally compelled and unchangeable. There are decisions of the Supreme Court with a bearing on the issue but their relevance is largely tangential.

It is of course basic learning under our constitutional theory that the Constitution separated governmental powers into tripartite divisions. *Wayman* v. *Southard*, 10 Wheat. (23 U.S.) 1, 46 (1825). There are opinions of the Supreme Court which ascribe to this scheme of division a rigidity which in fact it does not have. *Kilbourn* v. *Thompson*, 103 U.S. 168, 190–191 (1881). Thus, in *Springer* v. *Philippine Islands*, 277 U.S. 189, 201–202 (1928), Justice Sutherland wrote:

> It may be stated then, as a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power. . . .
>
> 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 in-

> cidental 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; . . .

"[T]he Constitution," wrote Chief Justice Taft in *Myers* v. *United States*, 272 U.S. 52, 116 (1926), "was so framed as to vest in the Congress all legislative powers therein granted, to vest in the President the executive power, and to vest in one Supreme Court and such inferior courts as Congress might establish, the judicial power. From this division on principle, the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires." For this basic premise, he derived for the Court a plenary power in the President, unrestrainable by Congress, to remove all persons appointed by him, an issue to which we shall return. Most recently, the Court in *United States* v. *Brown*, 381 U.S. 437, 441–446 (1965), discussed separation of powers in the context of the constitution proscription against bills of attainder. According to the Court, Congress was forbidden to pass bills of attainder inasmuch as under the constitutional system prescribed by the Framers the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons was one reserved to the judiciary, trial by legislature being wholly contrary to our concept of separation of powers. "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." *Fletcher* v. *Peck*, 6 Cr. (10 U.S.) 87, 136 (1810).

Yet, while it is clear that the government is divided into three departments, it is equally clear that no hermetic sealing off of the performance of separate functions has ever been achieved. Thus, in *Waymann* v. *Southard*, 10 Wheat. (23 U.S.) 1 (1825). Chief Justice Marshall in upholding the congressional delegation of rule-making power to the federal courts drew a distinction between that class of subjects which must be entirely regulated by the legislature and that class which may be delegated to another department under general standards by the legislature. From this principle has flowed a plethora of delegations from Congress primarily to the President to do such legislative functions as change tariff duties or to exempt some imports from duties altogether. *Hampton & Co.* v. *United States*, 276 U.S. 394 (1928); *Field* v. *Clark*, 143 U.S. 649 (1891). The "judicial power of the United States" as conveyed in Article III may only be exercised by judges having Article III prerequisites of guaranteed tenure and compensation, but Congress has been held to have power to create "Article I" legislative courts which may exercise some form of judicial power. *American Ins. Co.* v. *Canter*, 1 Pet. (26 U.S.) 511 (1828); *Palmora* v. *United States*, 411 U.S. 389 (1973). Aside, however, from rule-making and perhaps a few closely related functions, Article III judges may only exercise Article III judicial functions. *Keller* v. *Potomac Electric Power Co.*, 261 U.S. 428 (1923).

But it is when the independent regulatory agencies are considered that the concept of separation of powers—tripartite departments exercising functionally disparate powers—has been most buffered. Clearly, two classes of legislative power have been delegated to these agencies: first, every such agency is empowered to issue rules and regulations, and, second, every such agency implements a standard or principle set forth in the authorizing statute with regard to the type of regulation with which it is authorized to deal and which Congress could, though seldom easily, itself implement, fixing rail rates itself, for example, rather than directing the ICC to do it. Moreover, the agencies all exercise some form of judicial power, adjudicating disputes, resolving controversies of private or public rights, and the like. "The Federal Trade Commission," Justice Sutherland wrote for a unanimous Court in *Humphrey's Executor* v. *United States*, 295 U.S. 602, 628 (1935):

> Is an administrative body created by Congress to carry into effect legislative policies embodied in the statute, in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. . . . In administering the provisions of the statute in respect of "unfair methods of competition" . . . the commission acts in part quasi-legislatively and in part quasi-judicially.

Justice Sutherland's position with regard to whether the FTC can exercise executive or quasi-executive functions as well is open to considerable disagreement. At one point he observes that the Commission "exercises no part of the

executive power vested by the Constitution in the President," while at another point he observes that "[t]o the extent that it exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial department of the government." Ibid. There thus appears to be an executive function or an executive power which can only be exercised by the President or subject to his direction—an Article II function or power, much like Article III judicial power—and a lower-case executive function or power which can be conferred by Congress under its necessary and proper powers upon institutions which it creates.

Obviously, then, any analysis of the proposals for an independent prosecutor in the context of separation of powers limitations upon the law-enforcement powers of the office becomes difficult and necessarily somewhat imprecise because of the fuzziness of the language of the Court on the critcial points at issue, an imprecision which is not removed when one goes to the basic source. If one looks to the language of Article II, one cannot say with assurance that the Framers intended the President to be the administrative chief of the executive branch, clothed with a general power to control the acts of all executive officers. No explicit power of control is conferred. Such a power is clearly implied only in the clause designating the President as the Commander-in-Chief of the armed forces. The President is of course empowered to appoint officers of the executive branch, subject to legislative provision vesting the appointment of certain officers elsewhere, but if control is to be found there one must explain the different principle of lack of control over federal judges whose appointment is authorized by the same language and over members of the independent regulatory agencies whom the President also appoints. The President is also authorized to require the written opinion of the heads of departments upon any subject relating to the duties of their respective offices, a curious authorization to include if the President had been given the more inclusive power of control.

These are the only clauses enumerating the specific powers of the President with regard to the relationship between the President and executive officers. But Article II does vest "the executive power" in the President as well as the duty to "take care that the laws be faithfully executed." From these clauses there was derived almost from the beginning—from the debate in the First Congress on the President's removal powers and from Hamilton's "Pacificus" letters—the argument that the vesting of "the executive power" in the first sentence of § 1 of Article II was a grant of power and that the succeeding more specific grants, except when "coupled with express restrictions or limitations," "specify the principal articles" implied in the general grant and hence serve to interpret it." Corwin, *The President—Office and Powers 1787–1957* (4th ed. 1957), 178–182, 194–195.

These latitudinarian interpretation of presidential power was fully subscribed to by Chief Justice Taft in *Myers* v. *United States*, 272 U.S. 52 (1927), who derived from the "grant" of executive power and the imposition of the obligation of the faithful execution of the laws a plenary executive power in the President which was not susceptible constitutionally of any restraint or limitation by Congress. Specifically, *Myers* held that the power of removal of all officers appointed by the President—executive *and* members of the independent regulatory commissions—save only for judges was inherently an executive function into the performance of which Congress could not intrude. The power of removal was inherent in the executive power because, to come to the immediate relevance of *Myers*, it is the means by which the President may control those who are responsible for carrying out his obligation to faithfully execute the laws.

> The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. . . . As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he can not continue to be responsible. Id., 117.

It must first be said that the Court no longer appears to accept the premise that the first sentence of § 1 of Article II confers on the President all "execu-

tive" power minus only that which subsequent language excepts out. See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952); *United States* v. *United States District Court*, 407 U.S. 297 (1972). Secondly, of course, *Myers*' broad dictum empowering the President to remove even the members of the independent regulatory agencies has been sharply cut back. Thus, in *Humphrey's Executor* v. *United States*, 295 U.S. 602, 631–632 (1935), the Court said:

> Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause will depend upon the character of the office. The *Myers* decision, affirming the power of the President alone to make the removal, is confined to purely executive officers.

The postmaster position at issue in *Myers*, the *Humphrey* Court continued was of the "purely executive officer" category. Thus,

> [a] postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the *Myers* case finds support in the theory that such an officer is merely one of the units in the executive department and hence inherently subject to the exclusive and illimitable power of removal by the chief executive, whose subordinate and aid he is. . . . [T]he necessary reach of the decision goes far enough to include all purely executive officers. It goes no further—much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President. Id., 627–628.

In *Wiener* v. *United States*, 357 U.S. 349, 353 (1958), Justice Frankfurter for an unanimous Court defined "the essence of the decision in *Humphrey*'s case."

> It drew a sharp line of cleavage between officials who were part of the Executive establishment and were thus removable by virtue of the President's constitutional powers, and those who are members of a body "to exercise its judgment without the leave or hindrance of any other official or any department of the government," 295 U.S. at 625–626, as to whom a power of removal exists only if Congress may fairly be said to have conferred it. This sharp differentiation derives from the difference in functions between those who are part of the Executive establishment and those whose tasks require absolute freedom from Executive interference.

Wiener held that Congress had conferred upon the War Claims Commission quasi-judicial functions, to adjudicate "according to law" certain claims and had therefore set outside the President's power to control through the removal power the members of that body.

Nonetheless, both *Humphrey* and *Wiener* proceed on the premise that the President's obligation to see to the faithful execution of the laws is a basic executive function as to which the President may direct and supervise his subordinates and ultimately if necessary fulfill through the removal of certain officers and their replacement by persons more amenable to direction.

Congress has succeeded through the establishment of independent regulatory agencies in creating institutions which execute some of Congress' laws independent of presidential direction. If, however, we follow the line of thought in *Humphrey*, it is seen that these agencies in the first instance receive delegated legislative powers and in the second instance receive the kind of Article I judicial power which Congress can confer. Such agencies may exercise an executive function—not Article II executive power—"in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial department of the government." 295 U.S. 628. That is, Congress may delegate or confer the powers which it has but it may not confer either Article II executive power or Article III judicial power. This is the case inasmuch as while Congress can delegate power which it possesses—legislative power—it cannot delegate powers belonging to the other departments of government. And even the limited judicial power which it can confer cannot wholly displace Article III courts; that is, persons subject to Article I judicial power must at some point be permitted judicial review in Article III courts of constitutional questions. See *Chicago, M. & S.P. Ry.* v. *Minnesota*, 134 U.S. 418 (1890); *Crowell* v. *Benson*, 285 U.S. 22 (1932); *Lockerty* v. *Phillips*, 319 U.S. 182 (1943). Congress may of course confer the powers which it gives to independent commissions to executive branch officers who are subject to presidential direction and control; an example is the quasi-legislative and quasi-judicial powers conveyed by the Packers and Stockyards Act of 1921 upon the Secretary of Agriculture. See *Stafford* v. *Wallace*, 258 U.S. 495 (1922); *Morgan* v. *United States*, 298

U.S. 468 (1936); *Morgan* v. *United States*, 304 U.S. 1 (1938). The mixture of functions does not alter the President's power to remove. *Morgan* v. *Tennessee Valley Authority*, 115 F.2d 990 (C.A. 6, 1940), cert. den., 312 U.S. 701 (1941).

Finally, it must be observed that under the doctrine of *Kendall* v. *United States ex rel Stokes*, 12 Pet. (37 U.S.) 524 (1838), Congress may constitutionally give an executive officer a practical sort of independence from presidential control by specifying in elaborate detail the nature and scope of his duties and the methods to be followed in performing them, in making the duties, in other words, purely ministerial. Such officers are not thereby made independent in the sense of being beyond the reach of the President's discretionary power of removal, but the President cannot authorize or require them to deviate from their statutory duty.

Recognizing that the case law and the constitutional language is not clear, one can nevertheless draw some basic conclusions and tentatively apply them in analyzing the proposal here. The cases do appear to recognize an executive function or power conferred on the President to the exclusion of the other two branches of government. Whether this function or power be found in the nature of the executive, be conferred by the phrase "executive power" in the first sentence of section 1 of Article II, or be derived from the faithful execution clause, the execution of the laws passed by Congress is deemed by *Myers*, *Humphrey*, and *Wiener* to be included within the executive power exercisable by the President and delegable to his subordinates over who he exercises control and responsibility to such a degree that he must have the sole power to remove in order to fulfill that role. Further, *Humphrey* and *Wiener* stand for the proposition that the only execution tasks which can constitutionally be removed from under the President's direction and given to an independent agency are those clearly incidental to the quasi-legislative and quasi-judicial functions which justify its independence. Of course, quasi-legislative and quasi-judicial functions can be given to an executive officer; Congress is not compelled to give them to an independent agency. But the executive function must be performed under the direction of the President and *Myers* holds while *Humphrey* and *Wiener* recognize that Congress may not withdraw them from that direction by limiting the President's power to remove the officers who perform them. Congress could not constitutionally give to an independent agency functions which, separately considered, could not validly be made the exclusive job of an independent agency, else it could at will remove the President's executive powers through this device.

Certainly, the faithful execution clause makes rather clear that the prosecution of offenses against the United States is an executive function. "The Attorney General is the head of the Department of Justice . . . He is the hand of the President in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offenses, be faithfully executed." *Ponzi* v. *Fessenden*, 258 U.S. 254, 262 (1922). The structuring of the executive branch is, of course, within the discretion of Congress acting under the necessary and proper clause. Thus, the creation of offices and the allocation of functions within the executive branch is a power clearly possessed by Congress and Congress has thus made the Attorney General the "hand of the President" in prosecutions, in Chief Justice Taft's phrase. But it could have placed the function elsewhere in the executive branch. Indeed, by the Judiciary Act of 1789, section 35, 1 Stat. 92, the United States Attorney in each judicial district was authorized to execute the laws of the United States and to bring actions and to represent the United States in court, a function in the performance of which they were subject to the direction of the President. 2 Op. Atty. Gen. 482 (1831). The Attorney General was merely authorized by the same section of the statute to represent the United States in the Supreme Court and not until the Act of July 31, 1861, 12 Stat. 285, was the Attorney General given supervisory power over the United States Attorney.

The discretion in structuring, however, would not run to placing an essentially executive function in another branch. Cf. *United States* v. *Cox*, 342 F. 2d 167, 190–93 (C.A. 5, 1965) (Judge Wisdom concurring), and cases cited. But as the discussion above of the validity of congressional creation of the independent agencies exercising some elements of all the formal tripartite governmental functions expressed in the separation of powers concept demonstrates, there may well be areas of overlap of functions and of shared responsibilities. Indeed, it s observable that the Constitution does not create analytically distinct categories of governmental functions which are totally separable.

II

In the *Federalist* Madison was concerned not with defending the separation of powers features of the Constitution but in rebutting the contentions of those who argued that the Framers had too dangerously blended the "several departments of power." Adverting to the counsel of Montesquieu, whom everyone quoted on the subject, Madison contended that "he did not mean that these departments ought to have no *partial agency* in, or no *control* over the acts of each other." The philosopher had rather meant that the whole power of one department must not be exercised by another department. The Framers had acted on the principle, Madison contended, "that unless these departments be so far connected and blended, as to give to each a constitutional control over the others, the degree of separation which the maxim requests as essential to a free government, can never in practice, be duly maintained." [1] The necessity of combining checks and balances with a separation of powers had earlier been noted by Madison in the Convention.[2]

> If a constitutional discrimination of the departments on paper were a sufficient security to each against encroachments of the others, all further provisions would indeed be superfluous. But experience had taught us a distrust of that security; and that it is necessary to introduce such a balance of powers and interests, as will guarantee the provisions on paper.

It is unnecessary here to consider the various checks and balances which the Framers introduced by way of giving one department a partial and limited agency in the exercise of another department's powers. Sufficient it should be to note the President's veto as one instance of executive participation in lawmaking. What is relevant for our purposes is the Constitution's authorization in connection with the power of appointment and its meaning with regard to the executive function of execution of the laws.

"I conceive," said Madison in the first Congress, "that if any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controuling those who execute the laws." [3] But the Constitution expressly involved the other two branches in the process. Article II, section 2, cl. 2, gives the Senate the power to advise and consent to presidential nominations and the Congress the power to establish offices not provided for by the Constitution the appointment to which may be in the President with the advice and consent of the Senate. However, the clause continues: "but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

No explanation accompanied the addition of this language to the appointing clause in the final days of the Convention.[4] It was early suggested that the power conferred was intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged. *Ex parte Hennen*, 13 Pet. (38 U.S.) 230, 257–58 (1839). If this interpretation held, the proposal to vest the appointment of the special prosecutor in the District Court would be of doubtful validity, but this interpretation is no longer subscribed to by the Court.

When in the Force Act of 1871, 16 Stat. 433, Congress authorized the circuit courts of the United States to appoint supervisors of elections to enforce the right to vote in federal elections, inferior executive officers certainly, the Supreme Court experienced no difficulty in upholding the Act. *Ex parte Siebold*, 100 U.S. 371, 397–98 (1880). Recognizing that the officers were performing essentially executive functions, the Court said:

> It is, no doubt, usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officer appertain. But there is no absolute requirement to this effect in the Constitution; . . .
>
> But as the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress. . . . [T]he duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts; and in the present case there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void.

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[1] *The Federalist*, Nos. 47, 48, J. Cooke ed. (1961), 323, 325–26, 332 (emphasis in original).
[2] M. Farrand, *The Records of the Federal Convention of 1787* (rev. ed. 1937), 77.
[3] 1 *Annals of Congress*, 481–82 (1789).
[4] Farrand, *op. cit.*, 627–28.

To be sure, the courts have usually been given the power to appoint officers who perform judicial functions, such as clerks, commissioners, referees and registers in bankruptcy, but there are exceptions beside the office concerned in *Siebold*. Thus, *Hobson* v. *Hansen*, 265 F. Supp. 902 (D.C.D.C. 1967), utilized the language of Article 2, section 2, cl. 2, as an alternative basis for upholding the power long vested in the District Court of the District of Columbia to appoint members of the school board, the other alternative holding being on the line of authority giving Congress power to vest in the federal courts of the District of Columbia certain non-article III functions. *Keller* v. *Potomac Electric Power Co.*, 261 U.S. 428 (1923); *O'Donoghue* v. *United States*, 289 U.S. 516 (1933).[5]

Pertinent here is the fact that Congress has empowered district courts when the United States Attorney's office in a district is vacant to fill the office temporarily until the President appoints someone. 28 U.S.C. section 546. The only case in which it appears that such an appointment was attacked is *United States* v. *Solomon*, 216 F. Supp. 835 (D.C.S.D.N.Y. 1963), in which the power was upheld. Relying on the language of Article II and of *Siebold*, the court could see no separation of powers problem. It should be noted that the court did suggest as additional reasons for sustaining the authorization that the appointment was temporary and that it did not bind the President, he having the power to displace the judicial appointee with his own nominee at any time. Id., 842–43.[6]

It seems clear, therefore, that Congress could authorize the District Court to appoint a special prosecutor.[7] The basic question which remains, however, is how much freedom from presidential direction Congress will be constitutionally capable of conferring on him. In other words, does the President's obligation to see to the faithful execution of the laws, as construed in *Myers*, give him power to superintend law enforcement by inferior officers appointed in the alternative manner allowed by Article II, section 2, cl. 2?

Again, the removal power provides the touchstone, inasmuch as *Myers*, *Humphrey* and *Wiener* view it as the foundation of the President's power to direct and control his subordinates. Of course, all three cases dealt with persons appointed by the President with the advice and consent of the Senate and the holdings are so expressly limited to that situation. But it is the rationale which is relevant here.

The ordinary rule would seem to be that the power to remove in the absence of a contrary provision accompanies the power to appoint. *Ex parte Hennen*, 13 Pet. (38 U.S.) 230 (1839), so held in connection with the legality of the removal from office by a District Court of its clerk, appointed by it. More important, it has been held that when Congress provides for the appointment of inferior officers in the alternative, by the heads of departments, it has "the power to limit and regulate removal of such inferior officers . . . "*Myers* v. *United States*, 272 U.S. 52, 127 (1927). In *United States* v. *Perkins* 116 U.S. 483 (1886), the Court upheld a provision of law restricting the power of a head of a department in removing one appointed by him except under certain circumstances. The Court expressly adopted the words of the Court of Claims ruling below.

> We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict and regulate the removal by such laws as Congress may enact in relation to the officers so appointed.
>
> The head of a department has no constitutional prerogative of appointment to offices independently of the legislation of Congress; and by such legislation he must be governed, not only in making appointments but in all that is incident thereto. Id., 485.

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[5] It would not appear that this District of Columbia rationale would be any support for the proposal inasmuch as the question is not as to the judicial nature of the function of appointing but where the Constitution says Congress may place the power, although the rationale may have a subsequent use.

[6] It is not within the purview of this memorandum to consider the due process-impartial tribunal problem raised by vesting the appointment of a prosecutor in the judge who is to preside over the trials. Cf. *In re Murchison*, 349 U.S. 133 (1955). It was contended in *Solomon*, 216 F. Supp., 843, that the combination of the power to appoint and the concomitant power to remove the prosecutor provided a nexus between court and prosecutor too close to comport with due process. The court rejected the argument on the basis that the removal power was in the President and not in the court.

[7] Quaere, whether the reference to "Courts of Law" permits Congress to specify a member of the District Court, the Chief Judge, rather than the court as an institution. The question was raised when Congress in the Bankruptcy Act of 1867, 14 Stat. 517, 518, gave to the Chief Justice of the United States the power to nominate registers in bankruptcy for the district judges to appoint. *Cong. Globe*, 39th Cong., 2d sess. (1867), 1011.

Chief Justice Taft in *Myers, supra*, 161, wrote:

> The power to remove inferior executive officers, like that to remove superior executive officers, is an incident of the power to appoint them, and is in its nature an executive power. The authority of Congress given by the exempting clause to vest the appointment of such inferior officers in the heads of departments carriers with it authority incidentally to invest the heads of departments with power to remove. It has been the practice of Congress to do so and this Court has recognized that power. The Court also has recognized in the *Perkins* case that Congress, in committing the appointment of such inferior officers to the heads of departments, may prescribe incidental regulations controlling and restricting the latter in the exercise of the power of removal.

Does this language with regard to the heads of departments extend to the courts? May a judge with authority to appoint someone in the executive branch be similarly empowered to remove him and concomitantly to supervise him? The characterization of the power to remove inferior executive officers as in its nature an executive power is not necessarily dispositive. The appointment of inferior executive officers is in its nature an executive power as well; yet the Constitution permits the vesting of such a power in the courts. However, it is one of the lines of reasoning of *Myers* that exceptions from the vesting of executive power in the executive branch, as well as of the vesting of legislative and judicial powers in each of the other two branches, are to be strictly construed and the blending of the three departments carried no further than the Constitution expressly provides. Thus, *Myers* held, the joining of the Senate in the appointing process, through its power to confirm or reject presidential appointments, carried with it no inference that the Senate could be constitutionally joined with the President in removing such officers, for the reasons considered in the first part of this memorandum.

To approach the question from the constitutional side of the judicial power, it should be noted that federal courts may not be vested with non-Article III powers, *Hayburn's Case*, 2 Dall. (2 U.S.) 409 (1972); *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962). If the power to remove executive officers is an executive power, it would appear that in the absence of an express constitutional authorization akin to the power to receive appointing authority no Article III court could be empowered to remove an executive officer. As we have noted above, in certain cases the Supreme Court has treated federal courts in the District of Columbia somewhat differently than it has treated federal courts elsewhere, on the assumption that because of Congress' plenary jurisdiction over the District of Columbia it can invest federal courts in the District with certain non-Article III powers. This might arguably afford a basis for so vesting the removal power. However, the 1970 District of Columbia Court Reorganization Act by clearly denominating two separate court systems, the federal courts created pursuant to Article III and District courts created pursuant to Article I, D. C. Code, section 11–101, may have removed a great deal of the basis for this rationale.

Aside from these problems there remains the effect of the President's obligation to see to the faithful execution of the laws upon any proposal to vest more than the appointing power in the courts. As we have noted in the discussion of *Myers* above the faithful execution clause was a major factor in the determination of the Court that the President must have the power to remove officers appointed by him in order to meet this obligation, in order to have the power to supervise and direct his subordinates. The "reasonable implication" is "that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he can not continue to be responsible." *Myers* v. *United States*, *supra*, 117.

How then is it possible to reconcile the authority of *Perkins*, reaffirmed in *Myers*, that Congress can limit the removal power of the heads of departments when the appointing power is vested in the heads rather than in the President? Is it not a limitation upon the faithful execution obligation if inferior officers who do the execution by delegation from the department heads are not subject to removal and therefore somewhat free of direction and control? If that is the effect of *Perkins*, then it must be admitted that the result follows. It should be noted, however, that the language of both *Perkins* and of *Myers* in this regard are expressly authority only for the validity of congressional limitation upon the removal power of the department heads; no reference is made to the possible power of the President himself to remove or to cause the removal of such inferior officers.

A tension obviously exists here between one of the principle rationales of *Myers*, confirmed in *Humphrey* and *Wiener*, and the result of *Perkins* and the confirmatory language of *Myers*. The authority to resolve the matter is lacking; however, if we follow the analysis of part one of this memorandum the balance would seem to tilt somewhat against a conclusion that Congress could invest a special prosecutor appointed by the court with independence of the President.

III

Under the separation of powers concept and under the scheme of government established in the Constitution, the law which the executive executes is in the main that enacted by Congress; the Constitution itself and treaties entered into pursuant to the Constitution are the only other sources of law recognized. Article VI, cl. 2. The relevance of this point in this instance is illustrated by *Kendall* v. *United States ex. rel. Stokes*, 12 Pet. (37 U.S.) 524 (1938), which grew out of President Jackson's instructions to his Postmaster General to refuse to comply with a congressional mandate to pay a sum of money to Stokes.

> The theory of the constitution undoubtedly is, that the great powers of the government are divided into separate departments; and so far as these powers are derived from the constitution, the departments may be regarded as independent of each other. But beyond that, all are subject to regulations by law, touching the discharge of the duties required to be performed.
>
> The executive power is vested in a president; and so far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power. But it by no means follows, that every officer in every branch of that department is under the exclusive direction of the president. Such a principle, we apprehend, is not, and certainly cannot be claimed by the president. There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the president. But it would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the president. And this is emphatically the case, where the duty enjoined is of a mere ministerial character. Id., 610.
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> It was urged at the bar, that the postmaster-general was alone subject to the direction and control of the president, with respect to the execution of the duty imposed upon him by this law; and this right of the president is claimed, as growing out of the obligation imposed upon him by the constitution, to take care that the laws be faithfully executed. This is a doctrine that cannot receive the sanction of this court. It would be vesting in the president a dispensing power, which has no countenance for its support, in any part of the constitution; and is asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the president with a power entirely to control the legislation of congress, and paralyze the administration of justice.
>
> To contend that the obligation imposed on the president to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible. *Id.*, 612–613.

The meaning of the principle of this case, as Chief Justice Taft recognized in *Myers*, *supra*, 135, is that Congress may structure the obligations and duties of an executive officer in such detail that he is effectively rendered free of administrative and supervisory direction of the President, although he may remain ultimately subject to removal by the President for carrying out the will of Congress, a matter over which Congress is not without remedy. Thus, should Congress devolve upon an executive officer already in place the additional responsibilities of a special prosecutor, empowering him for example to utilize judicial process to obtain documents and other materials as to which the President may claim executive privilege, instructing him, for instance, to challenge claims of executive privilege, such an officer might very well have as much independence as could in effect be wished. Congress may designate officers in place to perform additional duties without requiring their reappointment or any further action by the President. *Shoemaker* v. *United States*, 147 U.S. 282 (1893). Proceeding

this way would avoid the difficulty to be associated with attempting to compel the President to name a new officer.

Additionally, if Congress were to select an officer appointed by the head of a department, it could take advantage of the holding in *Perkins* and the confirmatory language in *Myers*, set out above, approving the congressional power to limit and to regulate the removal of such an officer by the department head. Of course, the problem raised above whether this limitation and regulation would bind the President would still be present, but even if it should be thought that the President's power would be left uncurbed the other consequences of its exercise would no doubt constitute a deterrent of no little force.

IV

To summarize: It appears that the separation of powers concept which is embodied in our constitutional structure, and especially the vesting of the executive power to see to the faithful execution of the laws, places upon any proposal for an independent office substantial obstacles to achievement. First, the office seems necessarily to be located in the executive branch. Second, there would necessarily be a range of presidential power to direct and control which could not be avoided. Third, a special prosecutor could no doubt be appointed by a court pursuant to congressional authorization, but it remains doubtful that through such a device independence of the President could be achieved. Fourth, a large measure of independent discretion could seemingly be conferred upon an executive branch officer through statutory vesting of obligations which the President could not override, although it is impossible to determine how far Congress could carry this; probably it could not exercise its power in any plenary fashion, inasmuch as to do so would be to wholly undermine one of the President's independent powers.

Mr. BIESTER. Thereupon, Mr. Chairman, I will begin my testimony.

Mr. Chairman, I appreciate this opportunity to appear before your subcommittee, and I am particularly encouraged that you have responded with such dispatch in holding hearings on the matter of a Special Prosecutor for the Watergate investigation. The rapidity with which events are occurring compels Congress to act with all deliberate speed.

President Nixon has indicated his desire to create another Special Prosecutor's Office. While I am pleased to see that he acknowledges the need for such an Office, I do not believe Congress can in good conscience, and on behalf of the people it represents, accept the proposal in the form it has been offered.

The President's decision, revealed this past Friday, to have Acting Attorney General Bork appoint a Special Prosecutor to work from within the Justice Department on the Watergate investigation fails to satisfy the requirements of the situation. The unanswered questions surrounding the Cox dismissal and the dubiety of Presidential motive in abolishing the Special Prosecutor's Office call for the reestablishment of a strengthened Office subject to an absolute minimum of outside interference. The situation demands from Congress early passage of legislation which will fully assure the independent pursuit of all the facts in the Watergate case.

Congress should go as far as it constitutionally can to insure a special prosecutor bill which is viable and comprehensive and, above all, which can withstand the most determined legal challenge. Your subcommittee and the full Judiciary Committee should report the strongest measure possible to insure an independent investigation—legislation which will earn the support of a majority of the Congress and meet whatever constitutional objections may be raised in court.

Now, I will tell you as a matter of some history in my consideration

of this situation that at the time that the gentleman from Iowa, Mr. Culver, introduced his bill, it was my initial inclination to co-sponsor it. It seemed to meet what I felt were the needs of the hour and called for the creation of an independent prosecutor whose propriety would be unquestioned and whose flexibility would be unchallenged, but the more I looked into it, Mr. Chairman, the less sanguine I became of the constitutionality of the Culver proposal.

I might say that the Library of Congress research document which will be included with my testimony comes to a series of conclusions which raise very substantial questions about the constitutionality of that approach.

What I have therefore attempted to do is to provide a mechanism which meets the constitutional needs of locating the Office of Special Prosecutor in the executive branch and still be certain that he is a man highly qualified, a person independent of the President, although appointed by him, and not subject to the whim of the President with respect to his actions.

Now, H.R. 11075, which is a bill incidentally which is a product not only of my work but of other Members of Congress as well, particularly Mr. Coughlin from Pennsylvania, who was also a member of this distinguished committee, Mr. Heinz from Pennsylvania, and Mr. McDade from Pennsylvania, would authorize the President to select a special prosecutor from among names submitted to him by five national legal associations: the American Bar Association, the National Bar Association, the American Trial Lawyers Association, the Association of American Law Schools, and the National District Attorneys Association. Once the President has chosen one individual from the submitted recommendations, his name would go to the Senate for confirmation.

Now, there is ample precedent, Mr. Chairman, for the Congress to provide a mechanism for selection on the part of the Chief Executive from a panel of names. If one simply looks at the footnote to the dissenting opinion of Justice Brandeis in the *Myers* vs. *United States* case, on page 265, there is a lengthly catalog of dozens of acts in which Congress has placed limitations on the flexibility of the President with respect to nominating persons to hold office. I believe that the limitation of picking from a panel of names submitted by these distinguished organizations would comport with those precedents.

Now, I have placed in the bill five legal associations of national reputation. I certainly do not mean to indicate that that is necessarily the only list which should be considered. I certainly feel that the wisdom of the subcommittee, the wisdom of the committee may very well expand or contract that list. But the important point is that the American people would have the satisfaction of knowing that the name was not drawn by the President out of a hat, that the name was in fact drawn from a panel of the most competent and most independent potential prosecutors that these distinguished associations could bring to his attention.

Now, by providing for Senate confirmation our bill gives a voice to the legislative branch with respect to its approval not only of the person who is nominated but also to examine that person quite carefully about his intentions and about his view of the independence that

he will experience in the office and the degree of aggressiveness that he intends to apply to his duty.

The Special Prosecutor would be given primary authority to prosecute any Federal offense arising out of any campaign with respect to the 1972 Presidential election. In that connection, Mr. Chairman, I agree with Mr. Culver that authority to enter into civil matters would be far too broad a function for this office. All Federal agencies would be directed to cooperate fully with the Special Prosecutor in the execution of his responsibilities which include any investigatory and prosecutorial activities he deems necessary. He may be removed from his office by the President and I don't see how constitutionally we can prohibit that, but only for good cause as established and determined by the Civil Service Commission on the record after opportunity for hearing.

Now, I don't recall whether it was Mr. Homet or Congressman Culver this morning, in answer to a question of Mr. Dennis about the constitutionality of that last proviso. I don't know how anyone can be categorical about that because I have not been able to find—it does not mean there is not any—but I have not been able to find, in the short time I have had available to research, any definitive ruling by the Supreme Court on that question.

I perceive several strengths and advantages in such an approach.

It avoids raising the serious constitutional questions of how far we can go in empowering and insulating a Special Prosecutor's office. If the Special Prosecutor is to perform executive functions such as implementing prosecutorial powers he must do so from within the executive branch and not the judicial or legislative. H.R. 11075 locates the Special Prosecutor in the executive but it allows him a separate and independent identity from all offices in the executive, including the FBI, the Department of Justice, and the Office of the President.

It has been argued quite thoughtfully this morning that article 2, section 2, authorizes the Congress to repose in the courts the selection of a Prosecutor the office of which is created by the Congress itself. I am not sure about that. I am not certain that this is exactly what the language which is referred to really authorizes as one reads the language. I gave it at first reading in connection with this matter the same reading which many of the early commentators gave it, which was that the Congress may by law vest the appointment of such inferior officials as they think proper in the President alone or in the courts of law or in the heads of departments. I gave it the reading that the heads of departments could appoint subordinants in their departments, that the courts could appoint clerks, bailiffs, and so forth, and that the President could appoint advisers and those who would work in the White House directly under him. But it is clear that that reading is not the established reading at the present time and it is clear that courts may in fact appoint certain persons pursuant to congressional enactment.

But even if that were the case, I really have serious doubts about the validity of that reading if one takes it too broadly, because does it mean that the Congress could under such a broad reading of those phrases permit the President pursuant to congressional action to appoint law clerks for the Supreme Court? And if that were the case, to in a sense pack the office of the court with Presidential——

Mr. HUNGATE. If the gentleman will yield. Your reading of article 2, section 2, would be that when they say the Congress may by law vest the appointment of such inferior officials as they think proper in the President alone, your construction would be they mean the President may appoint people inferior to himself?

Mr. BIESTER. That is right.

Mr. HUNGATE. In the courts of law, the courts might appoint inferior judicial officials or the heads of the departments who might appoint inferiors in their departments. That would be your construction?

Mr. BIESTER. That was my conclusion but I must advise the chairman that the case law is such that the reading is not the correct reading, and I only want to place before the Chair and the subcommittee the possibility that that case law may not be absolutely correct, because if one carries the rationale of that case law to its logical conclusion, it would give each of those three named entities the power to select persons to serve in different branches of the Government and I think that is a very hazardous reading of that language.

Mr. HUNGATE. Mr. Pauley.

Mr. PAULEY. The Supreme Court in the *Siebold* case did, to my way of thinking and understanding, hold that the clause could not be read as limiting the power of any of the three enumerated sources to appoint only officials who would perform functions connected with their particular branch of Government or department, but the decision did seem to lay down some kind of limitation by indicating that, if the function the official was to perform was incongruous, and that is the rather strange word that the court used, then the statute might well be invalid as a delegation by the Congress of that appointment power. I think that would take account, perhaps, of the hypothetical situation you pose with respect to vesting powers in the President to appoint Clerks for the Supreme Court.

Mr. BIESTER. Or giving the power of the Court to create a Prosecutor or to appoint a Prosecutor.

Mr. PAULEY. Right.

Thank you.

Mr. BIESTER. Now, the grounds for congressional establishment of a Special Prosecutor's Office outside the Executive are equally shaky. In the past when Congress has pursued an investigation of the executive branch it has investigated on its own but has left prosecution in the hands of the Executive. Furthermore, independent regulatory agencies have not extended their prerogatives to include the application of criminal sanctions. While it may be argued that Watergate represents an unprecedented stiuation, the elasticity of constitutional interpretation to accommodate what Congress may prefer to do in this matter is not unlimited.

If I might offer an interpolation at this point, Mr. Chairman. If the Special Prosecutor is not in the executive branch, then it seems to me that the following circumstance takes place.

One of the arguments offered by the President with respect to confidentiality of communication within his office and the executive branch was that there was a separation of powers reason to prohibit congressional authority from intruding into and questioning of details with respect to confidentiality in the executive branch.

To the extent that the Special Prosecutor is not part of the executive branch there persists the possibility that courts might ultimately hold that that defense of confidentiality is valid against another branch of the Government, or agent of another branch of Government.

It is debatable, from a constitutional standpoint, whether Congress could justify and whether the courts would uphold the lengthy and tenuous linkages authorizing a Special Prosecutor's Office which are embodied in much of the legislation before you today. Specifically, a process would be open to question which has the legislative branch appointing an individual from the judicial branch who would in turn empower another individual to implement functions and responsibilities of the executive branch.

The legal propriety or the desirability of having the Judiciary appoint the Special Prosecutor is also questionable.

I certainly was pleased that Congressman Culver has amended his bill to protect Judge Sirica's position because I think that Judge Sirica has done an outstanding job throughout this entire proceeding and I think the country would be the poorer if he were eliminated from further work on this case. But I am not certain even with the amendment that Congressman Culver has offered that Judge Sirica would not in the future be compromised because there is a tenuous connection between his office and the ultimate selection process.

Now, I think it is significant to note Professor Cox's observations regarding the appointment of a new Special Prosecutor. And I am not certain I am aware of exactly where Professor Cox is on this question and, as I understand, he will testify here next week and he can clarify for himself where he is on the record. But there certainly has been sufficient question in his mind to lead him to take two different positions within a reasonably short period of time.

One of the concerns which I have is that if we engage in a process questionable from a constitutional standpoint, we may prolong procedural litigation and may delay even further the real process of investigation and prosecution that the country feels has been deferred far too long in this matter.

Mr. HUNGATE. If I understood Senator Bayh correctly, the suggestion that in an analogy perhaps to the Civil Rights Act and some other legislation, we should provide for immediate appeal to the constitutional question. Would you think that may be a wise provision?

Mr. BIESTER. I certainly do because I think the shortest period of time should be taken on the question of constitutionality, but it seems to me that even if that process were limited to a period of 90 or 120 days, there may very well occur during that period of time circumstances which makes an investigation thereafter more difficult than an investigation now.

Mr. EDWARDS. Are you anticipating, Mr. Biester, that upon enactment of this legislation there could be an immediate challenge of the constitutionality of the legislation itself that would further delay the investigation?

Mr. BIESTER. Well I would think if the Special Prosecutor process is followed in accordance with the Culver bill, I would expect that, yes, because experts have indicated that they do not agree on it.

Mr. EDWARDS. Yes; I understand. Thank you.

Mr. BIESTER. Now, one of the concerns I think which all of us have is that the Prosecutor be independent, and I have already referred to the mechanism which occurs in our bill which we believe creates a more independent status than he might otherwise enjoy by placing him within the protection of the civil service laws.

Arguments, Mr. Chairman, can be made on both sides of the issue involving the constitutionality of the legislation before this subcommittee. What we need is a proposal which has the best chances of avoiding these constitutional arguments but one which will still produce a mechanism insuring that the investigation will proceed quickly and independently with the least likelihood of a court battle challenging its right to proceed at all.

H.R. 11075 embodies the approach which should be taken if we are to have a Special Prosecutor's office which can pass the constitutional test and avoid time-consuming court delays. Furthermore, it must be able to bring forth the indispensable cooperation of the executive branch which will be vital to the successful completion of the investigation, including, if I might add, broad immunity which may very well be necessary to get the cooperation and testimony of vital witnesses, and that immunity may have to be extremely broad, Mr. Chairman, and may require the cooperation of the executive branch and the Department of Justice.

In evaluating the legislation I have introduced, I would be the first to admit that as a basic framework it could be strengthened, and this subcommittee can most certainly improve upon its features. For one thing, it might be appropriate to include a provision stipulating that the President must make his selection known to the Senate within a specified time after he has received the recommendations from the legal groups. As the legislation now stands, no time limit is imposed. Also, it may be wise to specify that in the event the President tries to remove the Special Prosecutor, the Civil Service Commission would be directed to give the matter priority consideration and expedite the proceedings as quickly as possible. It may be necessary, as well, to clarify the grounds on which the Civil Service Commission would make its ruling by including terms such as "neglect of duty" and "malfeasance in office." Furthermore, it might be appropriate to enumerate certain of the investigatory and prosecutorial responsibilities as well as amplify on staffing and salary provisions. Perhaps the Office should be made permanent so that all Presidents and those who seek the Office may know that no one is immune from the law of this country.

In conclusion, this legislation attempts to go as far as legal restrictions permit to insure the most independent investigation and prosecution possible. It seeks to provide the Special Prosecutor with the broadest access to information and the best security for his position that judicial interpretation suggests can be upheld.

I would be very happy to attempt to answer any questions, Mr. Chairman.

Mr. HUNGATE. Spoken like a man who has served on this committee. Thank you very much.

You reflect credit on your work in the Congress and on your service in this committee. The only judgment of yours that I would question, would be your leaving us.

Mr. Edwards.

Mr. EDWARDS. I say amen to that, Mr. Chairman. It certainly is a very creative presentation by our colleague.

I just have a couple of questions.

The purpose of your bill is to make the Special Prosecutor very independent but still comply with what you think the Constitution has in mind; that is, that he be appointed by the President. How, under your proposal, do you protect the Special Prosecutor from having his office taken away from him and his staff not paid or just suspended pending a ruling by the Civil Service Commission?

Mr. BIESTER. It seems to me that I picked the process of civil service because I wanted to try to deal with something which was a known mechanism.

I note that Senator Percy from Illinois has offered legislation, I believe yesterday, which would provide for a veto power on the dismissal of the Prosecutor by one of the Houses of the Congress. My question with respect to that is the matter of the Constitutional prerogatives of the President to dismiss hose who are in he executive branch.

I would be very open to and would hope that perhaps the subcommittee might develop a tougher mechanism than the simple civil service provision I had put in.

It seems to me conceivable that the subcommittee could toughen that provision to provide that until such time as the Commission has ruled that the Prosecutor shall continue in office with all of the prerogatives of office, and I believe that may very well stand the test.

Mr. EDWARDS. Do you think that a President, this President or any other President, would sign your legislation?

Mr. BIESTER. I can't presume to prejudge what this President or any President would do with this legislation, but I believe that if the subcommittee and the committee give to the House a measure which is unquestionably constitutional, and a measure which guarantees to the extent we can constitutionally do so the independence and aggressiveness of a Prosecutor in this instance, it is my belief that there is sufficient public pressure to warrant a belief that in turn that such a veto would be overridden.

Mr. EDWARDS. Thank you for very helpful testimony.

Mr. HUNGATE. Mr. Smith.

Mr. SMITH. Thank you, Mr. Biester, for your testimony. I think it is fairly complete in regard to the interesting proposal that you have advanced for the appointment of a Special Prosecutor from a list of outstanding lawyers prepared by prestigious legal bodies and subject to confirmation by the U.S. Senate.

I think the method proposed by you does avoid some constitutional questions on which there is honest controversy. I do not think I have any particular questions for you. I am sure that yours will be one of the proposals that will receive all the consideration of this committee and the Judiciary Committee, and I would join my colleagues in regretting that you had found it necessary to leave this committee. Thank you.

Mr. BIESTER. Thank you, Mr. Smith.

Mr. HUNGATE. Mr. Dennis, please.

Mr. DENNIS. As has already been observed, Mr. Biester, I recognize your bill as a serious effort to meet the dilemma in which we find ourselves where we want a Special Prosecutor who is independent and

yet we do not want to simply be going through the motions and spinning our wheels by passing legislation, the validity of which will not be upheld, and I think that is the grave possibility under these various proposals such as the Culver and the Bayh bills that we discussed this morning, where you give this appointment of an executive official to perform executive duties to the judicial branch. Yet I recognize that when you follow the more subtle proposal of leaving the appointment in the executive, you also leave the removal power in the executive, which in this instance there is a desire to avoid. What you have tried to do is meet that by confining the executive appointment to a person recommended by a panel, so to speak, and circumscribing the removal power by the civil service proposals.

Frankly, I don't know whether your version would stand up or not, but I recognize it as a serious attempt to resolve what I think is a serious constitutional dilemma here, and I think it is entitled to real consideration from the committee because it recognizes those realities and tried to meet them, and I feel personally that it comes closer to meeting them than the bills we talked about before.

I am not sure whether under our constitutional scheme you really can do what we are trying to do. I think we may have to live with the Presidential removal power and trust that the public opinion of the day, the situation as it exists and such language as we can put into the bill may be enough to prevent arbitrary dismissal, which I really think any President now would be pretty bold to attempt. But I don't know that I have much to question you about.

I see what you are trying to do and I think it is a very worthwhile effort which this committee certainly ought to think about.

Mr. BIESTER. Thank you. I think that it should be pointed out that the hazard we have in the time that I have referred to so far has been the hazard that the lengthy litigation over whether in fact a Special Prosecutor appointed, as the Culver bill would appoint him, in fact had the power to function.

Mr. DENNIS. Yes.

Mr. BIESTER. That may not be the course taken by any defendant in this instance. The course taken by the defendant in this instance may very well be to let the matter go and raise the issue in a timely fashion, not treat it as an interlocutory matter, and then perhaps after all of the work is done and juries have met and we are in the final appellate procedures discover it was all to naught. That would be the most frustrating result I can conceive of for the American people.

Mr. DENNIS. Well, and you cannot really get a ruling, of course, until somebody takes that point to the Supreme Court of the United States and gets it resolved.

I think we have a serious problem here which your bill attempts at least to meet.

Mr. HUNGATE. Mr. Kastenmeier.

Mr. KASTENMEIER. Thank you, Mr. Chairman.

I am sorry I was not here a bit earlier to welcome back our distinguished colleague, Mr. Biester, who served so exceptionally well on my subcommittee and on the full committee for so many years and I compliment him on taking the initiative in terms of the question that confronts the Congress and the American people. I only have really two questions.

One is what if we should pass your bill or one like it, and the President vetoes it, vetoes it because in fact he has in the meantime appointed another Special Prosecutor of his own; what course of action would you recommend? Would we override the veto or what?

Mr. BIESTER. I would say that we should reconsider the bill under those particular circumstances and write into our legislation the exclusive authority on the part of the Prosecutor who would be appointed pursuant to our bill, resubmit it to the President for signature and if he vetoed I think there are enough votes in this Congress under the current setting to override that veto.

There can only be, it seems to me, one Prosecutor in this instance.

Mr. KASTENMEIER. Second, do you conceive of a Prosecutor, envision it in your bill accepting the President's limitation on his seeking evidence from the White House or otherwise, as the President announced in his press conference the other night? Should your Prosecutor be limited as the President would limit him?

Mr. BIESTER. Absolutely not.

Mr. KASTENMEIER. I thank the gentleman.

Mr. HUNGATE. Mr. Hogan.

Mr. HOGAN. Yes, I, too, would like to welcome back our colleague from Pennsylvania and say that we miss his input in our deliberations on this committee and we wish you were with us now to give us guidance and we are pleased he has come before us today. I have some specific questions about your bill.

You state that the President must, with the advice and consent of the Senate, appoint a Special Prosecutor from lists of not more than three individuals nominated by these various organizations. Are we talking about 15 names or are we talking about 3 names?

Mr. BIESTER. Fifteen names.

Mr. HOGAN. So each of these organizations would nominate three?

Mr. BIESTER. Excuse me, I should correct myself. It may be 15 names, it may be 3 names.

Mr. HOGAN. No more than 15 names?

Mr. BIESTER. That is correct. But they may name the same persons and so all five groups might submit the same three names.

Mr. HOGAN. Now, I am sure that the gentleman is a member of various bar associations, as we all are. I for one have never been polled or in any other way asked to express an opinion on some action taken by that organization.

How would these organizations come up with their three names? We mandate that they submit the names within 15 days after the enactment of the act. Obviously this does not allow enough time to poll the members or convene a special convention, so isn't what we are really contemplating that the executive director or the president is going to submit the names?

Mr. BIESTER. I think the manner they use is actually up to them but I would say that with respect to all of the associations I have enumerated in the bill, I can't conceive any of them having a special convention within 15 days and, therefore, I would assume that it would be done by their board of directors or by whatever entity their bylaws provide for this sort of function.

Mr. HOGAN. What efficacy would this selection have as being repre-

sentative of the entire organization if the board of directors does not meet and they do not in any way poll their members?

Mr. BIESTER. I am not making the statement that it will represent a consensus of the entire association. My purpose is to provide means by which the finest caliber personnel may be brought to the President's attention, and only those persons, and that I have confidence in whatever the mechanisms are, in at least the five associations which are named in the bill, that they have the capacity and the expertise to produce a panel of names which will embrace the best possible people available for this job, and I must agree with you, I would not expect that they would canvass each member of the association for approval of the panel that they might submit.

Mr. HOGAN. Let's say that those organizations have the potential for coming up with those names, but I am sure you will agree that bar associations have their own brand of politics which come into play any time there is any kind of selection process such as this.

Mr. BIESTER. Or judgeships.

Mr. HOGAN. Or judgeships.

Going to another aspect of the bill, it seems that the Special Prosecutor will have authority to prosecute any offense against the United States arising out of any campaign with respect to the 1972 Presidential election.

Now, does this envision that the Special Prosecutor will have branches all over the United States in every congressional district where campaigns took place? Obviously we know from news events that an aspect of this prosecution could very well occur in California, in New York, and in my State of Maryland.

This aspect of the legislation granting carte blanche in any kind of offense to the Special Prosecutor, and coupled with that he is given the sole authority to appoint and fix the salaries of any staff that he deems necessary without any restraint whatsoever. In other words, he has an unlimited authority to hire as many people and pay them as much as he wants on his sole say so. In addition, he will have authority to undertake any action he deems necessary and proper.

Mr. BIESTER. Yes.

Mr. HOGAN. To me, then, we are creating the most powerful office in the United States of America. We give the Special Prosecutor an unlimited authority to hire, we give him unlimited authority to take any action he alone deems necessary, and we allow him to go any place in the United States and prosecute any offense growing out of that election.

Mr. BIESTER. Let me try to answer those questions if I can, Mr. Hogan.

First of all, the reason that the bill confers such discretion on him with respect to staff is that a natural concern of those who are apprehensive about his being in the executive branch at all is that by cutting off staff, officers, and other requisites to efficient functioning, his capacity to function at all could be snuffed out without necessarily approaching directly his ability or capacity to hold the office.

With respect to the expanse of the prosecution, I would be content with any language the subcommittee produces which covers the Presidential campaigns of 1972. That is my concern. It is not my concern that the Prosecutor be engaged in all elections that took place in

1972 but all primaries that took place with respect to the Presidential election of 1972 and the election itself.

Mr. HOGAN. If I might interrupt you, my State of Maryland has a prohibition against someone standing at the polls, within 100 feet of the polling place. That is an offense that this Special Prosecutor would have authority to prosecute at every polling place in the United States of America.

Mr. BIESTER. I would certainly be amenable, and obviously wisdom of the subcommittee is appropriate here, to make clear that we are talking about Federal offenses.

Mr. HOGAN. This is a Federal offense, it is a Federal election.

Mr. BIESTER. Well, I would be apprehensive about being too narrow in the scope of powers given to the Special Prosecutor in terms of what he could or could not prosecute for and I think once we start writing a list of laws which he shall not be deemed to concern himself with we run the hazard of limiting the scope of his functions, particularly to—with respect to the immunity problem, because I consider that one of the most serious of his practical problems if he is appointed by the court pursuant to the Culver bill.

Mr. HOGAN. I can see the rationale behind the gentleman's trying to achieve this but I am fearful that we are creating a Frankenstein monster here in the process of trying to do what the gentleman wishes.

I understand that Mr. Cox' office had some 80 employees, so there should be no effort to reduce the number of employees that the new prosecutor is able to hire. But to give absolutely no control to anybody over anything that this Special Prosecutor does seems to me would be to create a czar with unbridled power.

Mr. BIESTER. Mr. Hogan, you have characterized the office we would be creating as the most purposeful in the country, if not the most powerful in the country. The problem here is that the office in which the prosecution may very well be focusing its most direct attention is, in fact, the most powerful office in the country and when we——

Mr. HOGAN. If I might interrupt you, there is nothing in your bill to prevent the Special Prosecutor hiring more employees than there are in the executive branch.

Mr. BIESTER. I think there is a rule of reason.

Mr. HOGAN. We don't legislate rules of reason, we legislate for all eventualities.

Mr. BIESTER. No; I don't think so. I think we legislate with respect to certain rules of reason, but I want to come back to the reason why there must be great flexibility and considerable potency in his office because it must be very clear that he is in no way shackled by any kind of implicit constraint on his capacities to prosecute some of the most powerful officeholders in the country. As soon as you place shackles of that kind upon him then public support and confidence in his work immediately begins to erode and I think it is regrettable that we find ourselves at this juncture in our Country's history, but I think not to deal with the problems we experience today forthrightly would be to let down the public that is looking for us now to provide a means to resolve the problem that is currently the most vexing one they experience.

Mr. HOGAN. I thank the gentleman. I have no further questions, Mr. Chairman.

Mr. HUNGATE. Thank you.

Ms. Holtzman.

Ms. HOLTZMAN. Thank you very much, Mr. Chairman.

I just have two questions.

First, I gather that the reason that you have required the President to appoint a Special Prosecutor from names selected by prominent national bar associations is because you do not have confidence in the ability or the desire of the President to appoint somebody who would be truly impartial or who would seek, with a commitment to the integrity of his own office and public mandate, all materials necessary and relevant to the investigation of the illegal acts within his power? Is that correct?

Mr. BIESTER. Not correct. My concern is that since I have come to the conclusion that for the sake of constitutionality the office must be in the executive branch and, therefore, must be appointed by the President, that the American people would be satisfied that that choice was not made quixotically, politically, or with a view to an easy effort, and the question is not satisfying necessarily me or individual members of the subcommittee or the committee or of the Congress but to satisfy the American people and history that the process was undertaken by persons with the highest credentials and the most independent capacities.

Ms. HOLTZMAN. Well, then, if I may paraphrase what you have said, the purpose of requiring the President to make his choice from such a panel is to assure the American people and to satisfy them with respect to their need for confidence in the absolute integrity and independence of this Prosecutor which they would not have if the President appointed that person simply on his own judgment.

Mr. BIESTER. Which they may or may not have, that is right.

Ms. HOLTZMAN. Turning to the question of the constitutionality which was raised earlier this morning, the provision of the Constitution under which your bill would be legal and constitutional is the very provision that would authorize the Congress to vest the appointment power in the courts of law. Let me read it to you. Article 2, section 2 says that "the Congress may by law vest the appointment of such inferior officials as they think proper in the President alone, in the heads of departments, or in the courts of law."

Presumably your bill falls within that section of the Constitution in that very language; is that not correct?

Mr. BIESTER. No: because my bill actually creates an office which is not an inferior office. My bill creates an office which can only be filled by one who is approved by the Senate.

Ms. HOLTZMAN. Well, which section of the Constitution does your bill derive its authority from?

Mr. BIESTER. I think you are in the appropriate section but not the appropriate clause.

Ms. HOLTZMAN. Point the clause to me, if you would not mind, so I have that clear in my mind.

Mr. BIESTER. It is section 2, and I guess it is clause—well, I guess it is actually—you can find it in both one and two. Although I would think probably two is the one it falls in:

> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint

Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . .

Ms. HOLTZMAN. And how do you interpret the qualifying clause?

Mr. BIESTER. The Congress may by law vest?

Ms. HOLTZMAN. Right.

Mr. BIESTER. Well—I have great difficulty with that clause because as I indicated earlier, when I first read that clause with respect to this particular problem, what I thought it meant, before going to the commentators, was that the Congress could create inferior offices and provide that the heads of departments could fill those offices in their departments but the courts could fill the office of clerk or bailiff in their courts and that the President could fill those offices in the White House or pursuant to his direct command.

But as I have gone through the cases, it seems clear that the Supreme Court does not agree with that reading and the Supreme Court has held that it is appropriate for the Congress to provide that courts may actually appoint persons not necessarily of the type of bailiff or clerk or someone working frequently under them, but as counsel has pointed out; a full reading of that case provides that or demonstrates that there should not be an incongruity between the appointing body and the function that is to be performed. Because I asked the question if we give the phrase the broad meaning which apparently is being given, then the Congress could vest in the President the power to appoint law clerks for the Supreme Court. Obviously I don't think that is consistent with our notion of what the separation of powers calls for. And if incongruity means we could not give the President the power to appoint law clerks for the Supreme Court, I wonder whether we ought not to read that we cannot give courts the power to appoint persons functioning in the executive branch.

Ms. HOLTZMAN. Well, I am not sure that what you are talking about in your example about the President appointing law clerks has to do with power or desirability. But do you take it it would be unconstitutional therefore for the Congress to vest in the Attorney General the power to create a Special Prosecutor or could we do so by law?

Mr. BIESTER. Oh, I think we could perfectly well do that.

Ms. HOLTZMAN. Wouldn't the constitutional power to do that derive from the very last clause of article 2, section 2, the very same clause that says that the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone and in the courts of law or in the heads of the departments?

Mr. BIESTER. Yes.

Ms. HOLTZMAN. So if you take the position that the Attorney General can appoint a special prosecutor by virtue of a law created by Congress, it must follow that the courts of law could do the very same thing.

Mr. BIESTER. Let me answer——

Ms. HOLTZMAN. Then I will be happy to yield.

Mr. BIESTER. Yes; but he then would not be a person confirmed by the Senate, he would be a person who would be somewhat inferior in stature to the kind of office which I am trying to see created under my bill, and I think a person somewhat inferior in stature to the person who those who support the Culver bill want to see created.

Ms. HOLTZMAN. I see. So the point you are making is if you want to have the Special Prosecutor confirmed by the Senate then you have to vest the power in the President of appointment, but if you don't want to have the Special Prosecutor confirmed by the Senate it is constitutional to vest the power of appointment in the courts of law as it would be in the Attorney General?

Mr. BIESTER. No; that is not what I'm saying. What I am saying is that if you want an officer of some majesty whose independence derives not simply from having been selected by a department head, then he is appointed by the President and is approved by the Senate, that gives him, it seems to me, a special stature that is not——

Ms. HOLTZMAN. I am not talking so much about the stature, I am talking about what the Constitution means, how you interpret the Constitution.

As I gather it, you have now taken the position that it would be constitutional for the Congress to allow the Attorney General, to empower the Attorney General to appoint a Special Prosecutor, and I point out the power to do that is in the very same sentence that says the Congress has the power to place such appointments in the courts of law; and I am asking you why you draw a distinction as to the constitutionality? If you grant the constitutionality of allowing the Attorney General to create a Special Prosecutor, then it seems to me you have to grant the constitutionality of allowing the courts to appoint a Special Prosecutor, as long as you do not go into the President's appointing with the advice and consent of the Senate, perhaps?

Mr. BIESTER. I am not sure that the Supreme Court has given the same reading to this language that I have. In fact, I think they look at it differently than I do, so what I am talking about is probably somewhat beside the point.

It seems to me that if a Special Prosecutor is engaged in what are essentially executive department functions, that it is appropriate for the head of a department to appoint him because the head of the department is also engaged in the executive functions.

If we assume the separation of powers and say that the courts of law are a separate function from the executive function, then to say that a judge can appoint a prosecutor does not flow from the same capacity in the head of the department.

Ms. HOLTZMAN. It may be a troublesome concept. My problem is it is all linked together in the very same clause in article 2, section 2 of the Constitution, and so I find it hard to distinguish between our power which seems to be completely discretionary to place the appointed power in the Attorney General or to place it in the courts of law.

Mr. DENNIS. Would you yield on that point?

Ms. HOLTZMAN. I would be delighted.

Mr. DENNIS. I appreciate my colleague yielding.

It seems to me that possibly the answer is that when you give a power to the Attorney General to appoint a Special Prosecutor for a certain purpose, there is no division between the executive branch and the prosecuting function and there is no incongruity there, to use that word which the courts have used; but if you go over and try to give the judicial branch the authority to appoint a prosecutor in the

executive branch to perform executive functions, there is where you run into trouble.

Ms. HOLTZMAN. If I may answer my distinguished colleague.

I think that you are deriving the concept of separation of powers from some other language in the Constitution, but if we expound this particular clause we are talking about the appointing power and not the function of the prosecutor, and by giving the appointing power to the courts, which seem to be clearly permissible in this section, we may not be violating an executive function. We are talking about an appointive power, and I think this may be the distinction.

Mr. HUNGATE. The witness insists on being heard.

Mr. DENNIS. Would my colleague yield?

Ms. HOLTZMAN. I yield back my time.

Mr. HUNGATE. Let me get Mr. Biester and then Mr. Dennis.

Mr. BIESTER. I would like to clarify this with Ms. Holtzman because I think it is an important point. I think there is a hazard in looking at this clause alone or this phrase alone or sets of phrases alone because I think we can agree that just because these phrases are linked together does not necessarily mean that they are interchangeable in terms of impact.

Ms. HOLTZMAN. Why not?

Mr. BIESTER. Because I do not believe that the language means, and I can't believe that you would believe that the language means that the Congress could vest in the President the power to appoint Supreme Court law clerks.

Ms. HOLTZMAN. I don't see why not.

Mr. HUNGATE. There are those who would argue he does worse than that.

Ms. HOLTZMAN. The Congress can regulate the jurisdiction of the Supreme Court. I am not sure that we can't vest in other persons the power to create bailiffs or referees and so forth. It is a question of the appropriateness of our doing so rather than our power to do so, it seems to me.

Mr. BIESTER. OK. All right, I am not going to pursue it but it is a question which is one of the questions which will be raised in the constitutional issue.

Mr. HUNGATE. I need to get to Mr. Dennis and we may consider the rest of the discussion after class. I have got to get to another witness.

Mr. DENNIS. I do not think I have anything to add except that I would like to refer my colleagues to the decision in *ex parte Siebold* which you will find in 100 U.S. 371, where is discussed the power of the courts. In that case Congress vested the courts with the power to appoint election commissioners in Federal elections and the Supreme Court said there was nothing incongruous about it because there was no place else particularly suited to make the appointment and it was reasonably logical to give it to the courts. But the implication was very plain that had it been an appointment which was incongruous to the courts, you could not have relied on this language that Ms. Holtzman was relying on. This ties in with the point I was making a minute ago that when you try to give the courts the power to appoint an executive official who is to take care of an executive function, enforcing the criminal law, then you run into the very incongruity that the court said did not exist in the *Siebold* case.

Mr. HUNGATE. Mr. Pauley had one short question.

Mr. PAULEY. Mr. Biester, I simply wanted to ask you whether you thought it would improve your bill by strengthening the independence of the prosecutor to be appointed to provide, as have other bills, that the appointment be made from a person outside the executive branch?

Mr. BIESTER. I think it would improve the bill.

Mr. HUNGATE. Mr. Hoffman.

Mr. HOFFMAN. On this question of the crossover in that clause of article 2, hadn't we already gone past that where the Congress has provided for the courts to appoint U.S. attorneys?

Mr. BIESTER. Yes. As I say, my point was with respect to degrees of incongruity and I confess the Supreme Court's reading of this particular subsection is quite inconsistent with mine and, therefore, I defer to the wisdom of the court and I think the Congress must, but I think it raises certain policy questions which are very, very serious, very, very serious indeed.

Mr. HUNGATE. Mr. Biester, briefly, Mr Hogan raised the question about delegation. Do you see any constitutional problems in the delegation of authority to name the panel?

Mr. BIESTER. None watsoever.

Mr. HUNGATE. There is no time limit in which the appointment power would have to be exercised under your bill, as I understand it.

Mr. BIESTER. No; as I mentioned in my testimony, I think the bill would be strengthened by such a provision.

Mr. HUNGATE. If an appropriate time limitation were placed?

Mr. BIESTER. Yes, sir.

Mr. HUNGATE. What about the power of dismissal? Where would that reside, through civil service or could he be dismissed? Could the President dismiss him?

Mr. BIESTER. He can only dismiss him through civil service.

Mr. HUNGATE. Do you think it would strengthen the measure to have guidelines, as was suggested this morning? Or do you think you have adequate guidelines in the bill?

Mr. BIESTER. That is a very serious question, Mr. Chairman, because as Mr. Hogan pointed out, the language of the bill is extremely broad with respect to the discretion of the prosecutor himself. The subcommittee may wish with respect to anyone of these bills to specify precisely what his powers are and to specifically authorize him to do some of the things which the administration has challenged ahead of time with respect to what it believes he should be empowered to do.

Mr. HUNGATE. Thank you very, much, Mr. Biester. You have waited very patiently all day here and the only exculpation I can give is you are like the fellow charged with being a drunk and committing arson. He said well as far as being drunk he would plead quilty; as far as the arson the bed was on fire when he got in it. And I think you knew what we were like when you came in here. You have been very helpful to us.

Mr. BIESTER. Mr. Chairman, I have had in my mind thoughts of moments when I might come back with the committee to discuss legislation. In my moments of reflection I have looked forward to that event. I find it ironic for me that the moment when this happens and when I am appearing before this subcommittee we are doing it on a

subject which is very painful to me and I know to the members of the subcommittee.

Mr. HUNGATE. Thank you again, sir.

The next witness will be Barbara Jordan, Congresswoman from Texas, and a member of this committee. We are pleased to have you with us. The subcommittee is proceeding under a deadline of 3:45 so the chair would propose we would recess at that time and come back at 4:15.

TESTIMONY OF HON. BARBARA JORDAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Ms. JORDAN. I understand your time constraints, Mr. Chairman, and I certainly will be brief. I can promise you one thing, that I will offer no solutions to your constitutional dilemma which are raised by the creation of a Special Prosecutor. I perhaps may even compound those dilemmas.

I am a cosponsor of the bill you heard testimony on this morning by Mr. Culver and I would urge this subcommittee to enact legislation, authorizing the appointment of an independent prosecutor. It is quite necessary that we do this in the interest of the people who are demanding that an independent investigation be made.

The election which we talk about glibly of 1972 was not the election singularly of a President but it was the people's election and the people of this country have a right to expect a dispassionate investigation of all allegations related to the President and his representatives. I think we have seen ample demonstration that this administration has a gross inability to investigate itself. We have seen several investigations started only to end precipitiously with coming to no conclusions. Perhaps we have not understood just how independent prior investigations were supposed to be.

I joined in the cosponsorship of House Joint Resolution 785 because I feel that unless the selection and dismissal of a prosecutor is based outside of the executive branch of the Government, he will not be truly independent. Promises of independence will no longer suffice.

In a real sense I would suggest that maybe we have asked too much of this administration. When the executive branch is both defender and prosecutor, we cannot expect either a dispassionate inquiry or vigorous prosecution.

I think it is unreasonable to expect that this administration or any administration would prosecute itself for criminal acts.

Congress in the past has scrupulously written legislation which avoids the appearance of conflict of interest. We can cite many instances where the Justice Department has investigated the executive branch and has reached definitive and just conclusions. For the most part U.S. attorneys have been diligent in their prosecutions of executive branch personnel. I still would assert, however, that this diligence does not give investigations the aura of fairness or independence which I feel such an investigation should be given. I hope this committee would approve some variation of the pending resolution before it.

Yesterday, I introduced H.R. 11176. This bill would attempt to create a permanent system entitled special judicial prosecutor. The situation that we are in now is that the pending legislation relates only to *Water-*

gate related activities. Are we to have the Congress act each time the executive branch is being investigated? Consequently, the bill which I have introduced, is not inconsistent with the measure before you, and I hope you would give some consideration to this kind of mechanism.

A Federal grand jury investigating activities of an officer in the executive branch could ask the U.S. district court to appoint a special judicial prosecutor. The bill allows for no less than 12 members of the Federal grand jury to submit a request in writing to the district judge seeking the appointment of a special judicial prosecutor to aid and assist the grand jury in its endeavors. The court would be required to appoint a prosecutor who would be answerable to the judicial branch for purposes of tenure and to the grand jury for purposes of the investigation.

The bill would empower district court judges to insure the integrity of files, notes and other records from prior stages in the investigation conducted by the Justice Department for transmittal to the special judicial prosecutor. The special judicial prosecutor would have the same function and powers to decide scope of the inquiry and which witnesses to be called before the grand jury as those enjoyed by U.S. attorneys and other Federal prosecutors. The special judicial prosecutor could be removed only by the appointing judge for extraordinary impropriety. This special judicial prosecutor would be able to stay on the job until he had completed it, until he feels that his investigation has been thorough. Unlike other bills which are pending before this committee, H.R. 11176 would apply to all cases in which, during an investigation of the executive branch, a grand jury feels that its inquiry is being compromised or there appears to be a conflict of interest as between those presenting the investigation to the grand jury and those being investigated.

Our system contains three institutions which investigate and report on illegal conduct—legislative committees, grand juries and the judiciary. Of the three, the grand jury when given adequate powers, in my judgment, is best equipped to undertake a dispassionate investigation. Under normal circumstances a U.S. attorney will oversee the presentation of alleged illegal conduct to the grand jury, but when the U.S. attorney and other officials of the Department of Justice have an interest in the inquiry, the grand jury should have the option of obtaining an independent prosecutor. This action in my bill is not mandated, it merely provides an alternative which the grand jury could invoke.

I believe very strongly that all of the activities which surround the 1972 Presidential campaign should be investigated by a prosecutor who is independent of both the executive and legislative branches of the Government. That is why I urge favorable consideration of House Joint Resolution 785. But I also hope that we will apply the lessons we have learned from the tumultuous past few weeks and favorably consider a bill which would help assure and guarantee that we don't find ourselves in this situation again.

Thank you, Mr. Chairman.

Mr. HUNGATE. Thank you very much for an outstanding presentation and some food for thought for the subcommittee.

Mr. Kastenmeier.

Mr. KASTENMEIER. No, Mr. Chairman, I have no questions of our colleague. I think her presentation is excellent and the bill creating a

permanent office indeed we should regard very seriously, I think it is an excellent suggestion.

Mr. HUNGATE. It seems that Mr. Biester had implied in his presentation a permanent office. Of course he was discussing another bill.

Ms. JORDAN. He was discussing another bill but I did note very carefully Mr. Biester made that point.

Mr. HUNGATE. We hope they are not busier than the Subversive Activities Control Board. But the idea is there.

Mr. Dennis.

Mr. DENNIS. I would like to congratulate our colleague for a very forthright and well presented statement, and, of course your suggestion for a permanent bill raises larger questions than those really that we have been considering here—possibly raises some more constitutional questions in addition. I would want to think about that some. You rather put by legislation another department in the Government perhaps and whether that can be done and so on I think is worthy of thought, both whether it can be and whether it should be. It raises some rather wide philosophical considerations.

Ms. JORDAN. Yes, sir.

Mr. DENNIS. I would think probably perhaps the committee for immediate purposes might have enough to chew without going quite that far, but that is not to say we should not give it some thought down the road. So I certainly appreciate your appearance and your presentation.

Ms. JORDAN. Thank you, Mr. Dennis.

Mr. HUNGATE. Mr. Edwards.

Mr. EDWARDS. Just one question.

I thank the gentlewoman for her very imaginative testimony. The grand jury gets empaneled by the district judge but then the grand jury thinks the U.S. attorney has a conflict of interest or is not doing an appropriate job so they have a vote and the foreman goes to the district court and says we ought to have a Special Prosecutor; is that right?

Ms. JORDAN. That is the idea.

Mr. EDWARDS. Then down the road when it comes time to investigate an actual prosecution of a particular case, your Special Prosecutor asks the U.S. attorney to sign an indictment and he refuses.

Ms. JORDAN. That certainly is conceivable that that could happen because certainly the U.S. attorney would have to retain his authority to sign the indictments and present minutes but what would occur in the interim is that the instances of illegality would have been raised to the level of awareness of the grand jury and if the special judicial prosecutor had been successful in adducing telling and significant evidence I would think that an Attorney General or U.S. attorney would have great difficulty simply refusing to move if he were confronted with hard facts which were virtually indisputable.

Mr. EDWARDS. I believe that there are some precedents in State law, is that correct, for this type of approach?

Ms. JORDAN. I am sorry, I am getting something from the other ear. Would you repeat the question?

Mr. EDWARDS. Are there not some precedents in State criminal law for such a special prosecutor?

Ms. JORDAN. Yes; there are precedents for that. Going back to your previous question, my bill would allow the special judicial prosecutor to have the power and authority to sign the indictments.

Mr. EDWARDS. That answers my question. Thank you very much.

Mr. HUNGATE. Mr. Mayne.

Mr. MAYNE. Thank you, Mr. Chairman.

I, too, want to congratulate the distinguished gentlewoman from Texas on her very fine statement, particularly with regard to a permanent system.

I noted in your opening remarks that you emphasized the need for speed in this subcommittee reporting out a bill and I think I can assure you that we are going to do our best, but I wish also to note the need for adequate deliberation. I am sure you recognize that there are some serious constitutional problems involved and we want very much to come up with the appointment of a prosecutor that will meet constitutional requirements.

Thank you.

Ms. JORDAN. I would hope that you would move with speed that is consistent in judicious consideration of the very serious nature of this whole problem. I do understand the problem we have.

Mr. MAYNE. Thank you.

Mr. HUNGATE. Ms. Holtzman.

Ms. HOLTZMAN. Thank you, Mr. Chairman.

I want to join with my colleagues in congratulating my colleague from Texas on her very excellent thoughts and statements to us and I simply have one question.

Have you any comments on the alternative methods that have been proposed for the selection of the Special Prosecutor. Can you tell us, if you have any views on this, what dangers or improprieties might you see in the appointment by the President, whether it is from a panel named by the bar association or otherwise, or by the Attorney General, of a Special Prosecutor with regard to the Watergate and Watergate related matters?

Ms. JORDAN. I think, Ms. Holtzman, that we have to find some way to place the appointive power of this Special Prosecutor outside the President. I say this simply because we all well know that when an officer is charged with prosecuting and defending himself he is not liable to act hastily or to act with all open consideration of the problems which he is going to be confronted with.

Now, as to the alternatives presented, how do we do that? If it is constitutionally possible I would favor the approach of placing the appointive power in the hands of a judge—if it is constitutionally possible—and you have heard testimony from persons today who perhaps feel both ways, and I am sure that we could find as many constitutional authorities on one side of this issue as on another, and the only way that it is going to ultimately be resolved is pass a bill and let's hear what the Supreme Court has to say about it.

Mr. HUNGATE. Mr. Hogan.

Mr. HOGAN. I find myself as mesmerized in listening to the gentlewoman from Texas. Her facility with the English language reflects a very brilliant mind and I wish we had more time to probe these points with her.

I share her concern about the need for some entity in which the American people can have confidence and I find myself with an ambivalence in this matter because, as the Congresswoman for Texas has observed, we do have a fairly good record of the Department of Justice

prosecuting its own—one in the recent past of great prominence. And so all my instincts say we ought to stay within the normal and customary system, rather than tinker with this and come up with some new entity only to find out later we have created a lot of problems with that new entity. So I am trying to find some compromise where we can have a prosecutor with the independence to reaffirm the American people's confidence that those guilty will be brought to justice and yet also stay within the confines of the traditional judicial system.

Ms. JORDAN. It is a difficult task. I am glad I am a member of this committee.

Mr. HOGAN. Thank you, Mr. Chairman.

Mr. HUNGATE. I thank you again. We heard testimony this morning that it is important to do justice and also to carry out the appearance of doing justice. I am sure you recognize how that adds to our difficulties in some of these situations.

Thank you very much.

Ms. JORDAN. Thank you, Mr. Chairman.

[The prepared statement of Hon. Barbara Jordan follows:]

STATEMENT OF HON. BARBARA JORDAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

The purpose of these remarks is twofold: to urge this subcommittee and the full Committee of the Judiciary to enact legislation authorizing the Court of Appeals for the District of Columbia to appoint a special prosecutor, and to enact legislation which will make it unnecessary for the United States to be both a defendant and prosecutor in the same case.

Last November the American people went to the polls and elected Richard Nixon as the President of the United States. Although Mr. Nixon was elected, it was not his election. The election belonged to the American people. At the very least they have a right to expect a dispassionate investigation of allegations Mr. Nixon and his representatives tampered with their election.

This Administration has amply demonstrated its inability to investigate itself. Mr. Nixon has announced anew as many so-called "impartial and freewheeling investigations" as he has fired investigators.

Mr. Nixon has announced investigations by Mr. Dean and Mr. Ehrlichman. Both Mr. Dean and Mr. Ehrlichman have denied under oath they conducted investigations. Mr. Nixon has announced investigations by Messrs. Gray, Peterson, and Kleindienst. But these three gentlemen have denied under oath that they ever received any such orders from the President. Mr. Nixon has pledged the independence of Mr. Cox. Perhaps we misunderstood just how independent Mr. Nixon wanted Mr. Cox to be. Mr. Cox is so independent he does not even have to report to work.

I am proud to have joined with Mr. Culver in sponsoring House Joint Resolution 785, establishing, within the Judicial Branch special prosecutor. Many proposals have been advanced which purport to guarantee the independence of a special prosecutor, but unless the selection and dismissal, or replacement, of a special prosecutor is independent of the Executive Branch, he will not be truly independent. Promises of independence are no longer sufficient. Independence of a special prosecutor guaranteed by an Act of Congress is within our Constitutional prerogatives and, moreover, is our only recourse. H.J. Res. 785 fulfills these criteria, and should be enacted with all deliberate speed.

In a sense we have asked too much of this Administration. When the Executive Branch is both defendant and prosecutor we should not expect either dispassionate inquiry or vigorous prosecution. It is unreasonable to expect that this Administration or any other would prosecute itself for criminal acts. Congress has scrupulously written legislation which avoids the appearance as well as the fact of a conflict of interest during criminal investigations and prosecutions. However, we have failed to apply such principals to investigations of the Executive Branch, by the Executive Branch.

I fully recognize the Department of Justice has investigated and prosecuted executive branch personnel. During 1972, for instance, a Department of Agricul-

ture official was convicted of defrauding the United States of approximately $300,000 by causing false invoices to be honored for payment by the U.S. Treasury. The Department of Justice also obtained convictions against a Bureau of Customs chemist and a former postmaster. One of the largest investigative and prosecutive efforts in the history of the Detroit office of the U.S. Attorney was launched into the FHA housing scandal in Detroit.

U.S. Attorneys have, for the most part been diligent and dispassionate in their prosecutions of Executive Branch personnel. The Watergate break-in and campaign irregularities stemming from the 1972 presidential election involve allegations of illegal conduct among the President's closest advisors and campaign officials. Passage of H.J. Res. 785 would guarantee interest of the Watergate investigation but we need a system whereby investigations of executive branch officials can proceed through the investigatory and prosecutory stages without the special intervention of the Congress in each case.

Yesterday I introduced H.R. 11176 which would set up a permanent system whereby a federal grand jury investigating activities of an officer in the Executive Branch could ask the United States District Court to appoint a Special Judicial Prosecutor. The Court would be required to appoint a prosecutor who would be answerable to the Judicial Branch for purposes of tenure and to the grand jury for purposes of the investigation. The bill would empower District Court Judges to insure the integrity of files, notes and other records from prior stages in the investigation conducted under the Justice Department for transmittal to the Special Judicial Prosecutor. The Special Judicial Prosecutor would have the same functions and powers to decide the scope of the inquiry and which witnesses to be called before the grand jury as those enjoyed by U.S. Attorneys and other federal prosecutors.

The Special Judicial Prosecutor could only be removed by the appointing Judge for extraordinary improprieties. The Special Judicial Prosecutor would be able to stay on the job until he feels he has conducted a thorough investigation and prosecution.

Unlike other bills before the Committee, H.R. 11176, would apply to all cases in which, during an investigation of the executive branch, a grand jury, feels that its inquiry is being compromised or that there appears to be a conflict of interest as between those presenting the investigation to the grand jury and those being investigated.

Our system contains three institutions which investigate and report on illegal conduct: legislative committees, grand juries, and the judiciary. Of the three, the grand jury, when given adequate powers, is best equipped to undertake a dispassionate investigation. Under normal circumstances, an U.S. Attorney will oversee the presentation of alleged illegal conduct to the grand jury. But when the U.S. Attorney or other officials of the Department of Justice have an interest in the inquiry, the grand jury should have an option of obtaining an independent prosecutor.

My bill does not mandate any course of action. It merely provides an alternative which the grand jury could invoke.

I believe very strongly that the Watergate break-in and other alleged illegal activities related to the 1972 presidential campaign should be investigated by a prosecutor independent of both the executive and legislative branches of government. That is why I urge you to favorably consider H.J. Res. 785. I also urge you to apply the lessons we have learned from the tumultuous past weeks and favorably consider H.R. 11176 in order that this situation does not occur again.

A BILL to authorize in certain cases the appointment of a special judicial prosecutor and investigators to assist grand juries in the exercise of their powers

Be it enacted by the Senate and House of Rercsentatives of the United States of America in Congress Assembled, That the table of the sections of chapter 215 of title 18, United States Code, is amended by inserting immediately after the item relating to section 3328, the following new item:

"3329. Powers of grand jury; special judicial prosecutor and investigators."

SEC. 2. Title 18, United States Code, is amended by inserting immediately following section 3328 a new section as follows:

"3329. Powers of grand jury; special judicial prosecutor and investigators.

"(a) Any grand jury impaneled before a United States district court may give notice to the court that it wishes to be assisted by a special judicial prosecutor in an inquiry into any activities of an officer in the Executive Branch. Any such

notice shall be given in writing signed by twelve or more members of the grand jury. Such grand jury shall not be discharged by the court prior to the receipt by the court of written notice from the grand jury that such inquiry has been completed.

"(b) Upon receipt of notice pursuant to subsection (a), the United States District Court shall appoint a special Judicial Prosecutor for the purposes and with the powers set forth in this section, and shall not remove or replace said officer except for extraordinary improprieties as an officer of the court.

"(c) Any judge of the United States District Court, after making an appointment or reappointment pursuant to subsection (b) shall excuse himself from presiding over or otherwise participating in any prosecution or other judicial proceeding arising out of the exercise of responsibilites by a Special Judicial Prosecutor appointed by him.

"(d) The United States District Court having jurisdiction over any inquiry into the activities of an officer in the Executive Branch is vested with supervisory jurisdiction to issue and enforce all orders necessary and appropriate to insure the integrity and inviolability of all files, notes, correspondence, memorandums, documents, physical evidence, and other records and work product compiled, obtained or otherwise produced and maintained by the United States District Attorney or any other officer of the Justice Department from the date of impanelment of the grand jury until the appointment of a Special Judicial Prosecutor pursuant to subsection (b).

"(e) The Special Judicial Prosecutor appointed pursuant to this section may without regard to the laws relating to the competitive service, appoint or reappoint such permanent or temporary staff at such salaries (not to exceed the rate of $36,000 per annum) as may be necessary to assist in the exercise of his responsibilities, and may for that same purpose make use of necessary support services and facilities at Government expense. The United States Department of Justice is authorized and directed to pay the salaries and expenses of the Office of Special Judicial Prosecutor hereunder, all from its general funds including contingency funds. Notwithstanding any other provision of law, any impounding or withholding or other impediment to the provision of such funds shall be unlawful.

"(f) Anything in the laws of the United States regarding the authority and responsibilities of the Attorney General or of the several United States attorneys to the contrary notwithstanding, the Special Judicial Prosecutor shall have exclusive authority and responsibility on behalf of the United States of America to conduct all grand jury presentments and all other criminal proceedings, including without limitation the initiation and conduct of prosecutions, the framing and signing of indictments, and the filing of informations, and all pretrial and posttrial motions, orders, trials, appeals, petitions, and other processes (whether initiated before or after his assumption of duties) in all Federal courts including the Supreme Court of the United States, arising out of the grand jury's inquiry into the activities of any officer in the Executive Branch.

"(g) The Special Judicial Procesutor shall have full access to and use of the material described in subsection (d) and shall have power throughout the territory of the United States to compel the production of testimonial and documentary or physical evidence relating to any or all of the subject matter described in subsection (f) of this section. In particular, and without limiting the generality of the foregoing, the Special Judicial Prosecutor shall have full power to—

"(1) determine whether and how far to contest the assertion of Executive Privilege or any other testimonial or evidentiary privilege;

"(2) determine whether or not application should be made to any Federal court for a grant of total or partial immunity to any witness, consistently with applicable statutory standards, or for other warrants, subpenas, or other court orders including an order of contempt of court;

"(3) issue instructions to the Federal Bureau of Investigation and other domestic investigative agencies for the collection and delivery solely to the Special Judicial Prosecutor, and for safeguarding the integrity and inviolability of all files, notes, correspondence, memorandums, documents, physical evidence, and other records and work product compiled, obtained, or otherwise produced and maintained by the Office of Special Judicial Prosecutor; and

"(4) decide whether or not to prosecute any person and how to conduct and argue any appeals or petitions arising out of his prosecutorial activities.

"(h) All offices, departments, and agencies of the Federal Government shall

cooperate fully with requests by the Special Judicial Prosecutor for information and assistance. In particular, the Department of Justice shall assign to the temporary supervision and control of the Special Judicial Prosecutor such personnel as he may reasonably require.

"(i) The Special Judicial Prosecutor shall have the authority and responsibility to deal with and appear before congressional committees having jurisdiction over any aspect of the matters covered by this Act, and to provide such information, documents, and other evidence as may be necessary and appropriate to enable any such committee to exercise its authorized responsibilities.

"(j) The Special Judicial Prosecutor may from time to time make public such statements or reports, not inconsistent with the rights of any accused or convicted persons, as he deems appropriate; and he shall upon completion of his assignment submit a final report to the United States District Court which empanelled the grand jury in connection with which the Special Judicial Prosecutor was appointed.

"(k) The Special Judicial Prosecutor shall carry out his responsibilities under this section until such time as, in his judgment, he has completed them or until a date mutually agreed upon between the United States District Court Judge who appointed the Special Judicial Prosecutor pursuant to subsection (b) and himself.

"(l) Any judge of the United States District Court, on empanelment of a grand jury, shall charge and inform the grand jury of its rights and duties under this section."

Mr. HUNGATE. The committee will now recess its hearings until 4:15.

[Short recess.]

Mr. HUNGATE. The committee will resume its hearings. We have two witnesses remaining this afternoon. The first is the Honorable John Moss of California, our distinguished colleague. We are pleased to have you with us and appreciate your patience. You have a prepared statement and without objection it will be made part of the record at this point. You may proceed as you see fit.

[The prepared statement of Hon. John E. Moss follows:]

STATEMENT OF HON. JOHN E. MOSS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman and Members of this distinguished Committee:

I appear before you today in support of H.R. 11067 to establish an Independent Office of Special Prosecutor. The purpose of this legislation is to provide for continuation of the investigation and prosecution of criminal activity related to the Watergate matter and other alleged criminal activity pertaining to the 1972 Presidential campaign. I also support House Resolution 784 introduced by Mr. Culver and some 109 co-sponsors. With one or two exceptions it is substantially similar to the legislation I have sponsored.

Mr. Chairman, 185 years ago last month, as he was leaving a meeting of the Constitutional Convention, Benjamin Franklin was asked:

"What do we have, Dr. Franklin?" He replied, "You have a Republic—" "If you can keep it."

That, Mr. Chairman, sums up both the purpose and the urgent necessity for this legislation: to insure that our Republic and its laws will continue to function on behalf of the people; that no individual may be above those laws; and that all those who violate our laws will be brought to justice, notwithstanding the fact that the accused may include persons who now hold or have held the highest positions in the Executive Branch of the government of the United States.

I will not catalog events of the past year relating to the Watergate investigation. Nor will I attempt to review events of the weekend of October 19 through 22. You are familiar with the circumstances surrounding the summary discharge of Special Prosecutor Archibald Cox. And the American people, as evidenced by the greatest mass outpouring of public protest in our history—directed in large part to us as their elected representatives—is both familiar with and deeply troubled by these events.

Viewed in the context of recent allegations of impropriety by officials in the Executive Branch, the President's firing of Special Prosecutor Cox demonstrates the need for this legislation. The President had pledged "full authority" for

the Special Prosecutor, "without interference" in the conduct of his investigation. But the discharge of Mr. Cox and the blatant interference with his investigation makes it clear that, in these extraordinary circumstances, the Executive Branch is fundamentally incapable of investigating and prosecuting itself.

The question to a large extent is access to information on behalf of the people. We have not put all scandal behind us. Rather, every few days new revelations continue to be made, each raising further questions in the minds of the public. Each new exposé further shakes the confidence of the people in their government. We can expect more of these delayed action explosions in the future.

Cumulatively, they heighten the need for full and impartial investigation of all the facts. Under the present circumstances this is impossible.

I make no allegation as to the ultimate guilt or innocence of any person. A man is presumed innocent until proven guilty. And that guarantee is part of the fabric of our law. However, I do assert that you and I and the American people have no way of knowing for sure just who is guilty and who is not guilty unless we can be sure of independent and vigorous investigation and prosecution. That, simply stated, is the purpose of the legislation I have sponsored. To guarantee the American public a fair investigation of all facts and an impartial determination of guilt or innocence. The events of the last week establish that only an investigation by a prosecutor not under control of the Executive Branch and not appointed or removably by the Executive Branch can do that.

The legislation I have sponsored establishes an Independent Office of Special Prosecutor within the Executive Branch. The Special Prosecutor would be appointed by the Chief Judge of the U.S. Court of Appeals for the District of Columbia. Other bills, I am aware, would vest appointment power for the Special Prosecutor in the Chief Judge of the District Court for the District of Columbia. I prefer the provision in my legislation since it would not result in the possible removal of Judge Sirica from an active role in the investigation and related prosecutions. His knowledge of the proceedings and his obvious determination to see justice done make it essential that the legislation not indirectly preclude his further participation.

The Special Prosecutor would be delegated "full and exclusive authority" for investigation and prosecution of illegal conduct relating to Watergate and the 1972 Presidential campaign. He would be authorized to continue all investigations and prosecutions commenced by Mr. Cox and he would succeed to all records and documents which were in the possession or under the control of Mr. Cox. The Special Prosecutor could be removed only by the Chief Judge of the Court of Appeals for the District of Columbia for neglect of duty or malfeasance in office.

Mr. Chairman, I think you will agree that the situation we are facing is unprecedented. Nevertheless, I believe the Constitution is fully equal to it and more. In fact, it is only upon reviewing our Constitution in times such as these that one becomes fully aware of the genius of its draftsmen. It *is* flexible enough to permit establishment of a truly independent special prosecutor without damaging in any way the basic separation of powers.

Now I hope you will understand that I do not come before you as a constitutional lawyer, but as a legislator who has functioned within this constitutional structure of ours for almost a quarter of a century. In this context, I have the following observations on the question of the constitutionality of this legislation.

The Constitution vests "all legislative powers herein granted in the Congress, enumerating a series of legislative powers, including the power to establish lower federal courts. While the Constitution does not enumerate a legislative power to create, define or punish crimes and offenses whenever necessary to effectuate the objects of the federal government, this power is universally conceded and has been exercised from the beginning of the Republic. Over 500 Sections of Title 18 of the United States Code have been enacted by the Congress based on this authority.

The Constitution then provides in Article 1, Section 8, that "the Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States or in any department or office thereof." It is most significant to note that there are *two* separate subjects of the incidental powers clause. First, the Congress is afforded power to make all laws "necessary and proper" to carry into execution the "foregoing" legislative powers, including the power to establish the federal courts and to define and

provide means of punishment for federal crimes. Second, the Constitution authorizes Congress to make all laws "necessary and proper" to carry into execution "all other powers . . . vested in the government of the United States", clearly including the Executive Branch's power to prosecute, under appropriate circumstances.

I am, of course, aware that some have suggested Article II of the Constitution, establishing the Executive Branch, somehow precludes Congress from creating an independent Special Prosecutor. I do not concur in these suggestions. Nothing in Article II explicitly precludes such a statute. In fact, Article II provides that ". . . the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments.

Thus, while the Constitution does not expressly vest in the Congress power to provide for investigation and prosecution of crimes independent of the Executive Branch, it seems clear that where a direct conflict of interest precludes the Executive Branch from impartially carrying out these duties, Article 1, Section 8, authorizes the Congress to provide "necessary and proper" laws for enforcement of the federal criminal code and other federal statutes. Similarly Article II authorizes Congress to vest the appointment of a prosecutor in the courts of law.

I do not by these observations mean to suggest that Article I or Article II of the Constitution are the sole source of Congressional power to provide for enforcement of the laws of this Nation. They are sufficient for that purpose. But the basis for the legislation I am proposing is even more fundamental. It is inherent in the very existence of a Constitution. It is inherent in the establishment of a Congress. It is inherent in the concept established by that Constitution and carried forward by that Congress that our government is above all other things a government of laws—and must so remain if it is to survive.

Construed in any other manner, the Constitution and its purposes would be frustrated. Such a result is clearly not required by our Constitution.

Mr. Chairman, one further matter remains to be discussed. The proposed legislation does not, of course, state who the Special Prosecutor appointed by the Court will be. That is properly left to the discretion of the Court of Appeals.

Yet I cannot end a statement on legislation for the appointment of an independent prosecutor without recalling the exemplary conduct of the first Special Prosecutor, Archibald Cox. If this legislation is enacted, I respectfully suggest to the Court of Appeals that the appointee should possess the courage and integrity of an Archibald Cox. As long as we can keep this Republic it will be in his debt.

I would be pleased to attempt to answer any questions which you may have.

TESTIMONY OF HON. JOHN E. MOSS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Moss. Mr. Chairman, I will attempt to move over some of the prose which will be in the record at this point.

Starting with the last paragraph on the first page, I think that the purpose and the urgency for this legislation is to deal with the need to reestablish the confidence of the American people in the integrity of our system, to insure that our Republic and its laws will continue to function on behalf of the people, that no individual may be above those laws, and that all those who violate our laws will be brought to justice notwithstanding the fact that the accused may include persons who now hold or have held the highest positions in the executive branch of the Government.

I will not catalog events of the past year relating to the Watergate investigation. Nor will I attempt to review events of the weekend of October 19 through 22. You are familiar with the circumstances surrounding the summary discharge of Special Prosecutor Archibald Cox. And the American people, as evidenced by the greatest mass outpouring of public protest in our history—directed in large part to us

as their elected representatives—is both familiar with and deeply troubled by these events.

Viewed in the context of recent allegations of impropriety by officials in the executive branch, the President's firing of Special Prosecutor Cox demonstrates the need for this legislation. And that legislation, Mr. Chairman, is the bill I have introduced, H.R. 11067, to establish an Independent Office of Special Prosecutor. The President has pledged "full authority" for the Special Prosecutor, "without interference" in the conduct of his investigation. But the discharge of Mr. Cox and the blatant interference with his investigation makes it clear that, in these extraordinary circumstances, the executive branch is fundamentally incapable of investigating and prosecuting itself.

The question to a large extent is access to information on behalf of the people. We have not put all scandal behind us. Rather, every few days new revelations continue to be made, each raising further questions in the minds of the public. Each new exposé further shakes the confidence of the people in their Government. We can expect more of these delayed explosions in the future.

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The legislation I have sponsored establishes an Independent Office of Special Prosecutor within the executive branch. The Special Prosecutor would be appointed by the chief judge of the U.S. Court of Appeals for the District of Columbia. Other bills, I am aware, would vest appointment power for the Special Prosecutor in the chief judge of the District Court for the District of Columbia. I prefer the provision in my legislation since it would not result in the possible removal of Judge Sirica from an active role in the investigation and related prosecutions. His knowledge of the proceedings and his obvious determination to see justice done make it essential that the legislation not indirectly preclude his further participation.

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Mr. Chairman, I think you will agree that the situation we are facing is unprecedented. Nevertheless, I believe the Constitution is fully equal to it and more. In fact, it is only upon reviewing our Constitution in times such as these that one becomes fully aware of the genius of its draftsmen. It is flexible enough to permit establishment of a truly independent special prosecutor without damaging in any way the basic separation of powers.

Now I hope you will understand that I do not come before you as a constitutional lawyer, or for that matter, Mr. Chairman, as a member of the bar, but as a legislator who has functioned within this constitutional structure of ours for almost a quarter of a century. In this context, I have the following observations on the question of the constitutionality of this legislation.

The Constitution vests "all legislative powers herein granted" in the Congress, enumerating a series of legislative powers, including the power to establish lower Federal courts. While the Constitution does not enumerate a legislative power to create, define or punish crimes and offenses whenever necessary to effectuate the objects of the Federal Government, this power is universally conceded and has been exercised from the beginning of the Republic. Over 500 sections of title 18 of the United States Code have been enacted by the Congress based on this authority.

The Constitution then provides in article 1, section 8, that "the Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or office thereof." It is most significant to note that there are two separate subjects of the incidental powers clause. First, the Congress is afforded power to make all laws "necessary and proper" to carry into execution the "foregoing" legislative powers, including the power to establish the Federal courts and to define and provide means of punishment for Federal crimes. Second, the Constitution authorizes Congress to make all laws "necessary and proper" to carry into execution "all other powers . . . vested in the Government of the United States," clearly including the executive branch's power to prosecute, under appropriate circumstances.

I am, of course, aware that some have suggested article 2 of the Constitution, establishing the executive branch, somehow precludes Congress from creating an independent Special Prosecutor. I do not concur in these suggestions. Nothing in article 2 explicitly precludes such a statute. In fact, article 2 provides that ". . . the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments.

Thus, while the Constitution does not expressly vest in the Congress power to provide for investigation and prosecution of crimes independent of the executive branch, it seems clear that where a direct conflict of interest precludes the executive branch from impartially carrying out these duties, article 1, section 8, authorizes the Congress to provide "necessary and proper" laws for enforcement of the Federal criminal code and other Federal statutes. Similarly article 2 authorizes Congress to vest the appointment of a prosecutor in the courts of law.

I do not by these observations mean to suggest that article 1 or

article 2 of the Constitution are the sole source of Congressional power to provide for enforcement of the laws of this Nation. They are sufficient for that purpose. But the basis for the legislation I am proposing is more fundamental. It is inherent in the very existence of a Constitution. It is inherent in the establishment of a Congress. It is inherent in the concept established by that Constitution and carried forward by that Congress that our Government is above all other things a Government of laws—and must so remain if it is to survive.

Construed in any other manner, the Constitution and its purposes would be frustrated. Such a result is clearly not required by the Constitution.

Mr. Chairman, I will not read beyond that point and am available to attempt to respond to any questions members of the committee may care to direct to me.

Mr. HUNGATE. I thank the gentleman for his contribution.

Mr. Smith.

Mr. SMITH. No questions.

Mr. HUNGATE. Mr. Dennis.

Mr. DENNIS. I appreciate our colleague appearing down here. I think he has made a very clear statement. I don't think I have many questions.

I think the gentleman has been here somewhat during the day and I think we all realize we have got a Constitutional dilemma here. Now, I see the gentleman's argument. I think it is a fair question whether really under the Constitutional setup the only way you reach perhaps the extraordinary situation that might exist if the President were really personally involved would be through the Constitutional method of impeachment. I can't help, therefore, but wonder whether we are not trying to stretch the structure by legislating because I do think it is pretty arguable that perhaps you are putting the judicial department into the executive no matter how you cut it with these various bills.

Saying that, I don't want to suggest I am advocating impeachment but, philosophizing, I wonder whether if you really get to that bad a situation maybe you are almost driven to that conclusion.

Mr. Moss. Mr. Dennis, let me say that I believe our system is essentially one of blending and not one of precisely neatly drawn lines separating the authority and the functions. I think there is a great deal of overlapping that occurs in order that the system operate at all. It occurs between the executive and the legislative. It certainly occurs between the judicial and the legislative. It is virtually impossible for a decision to be rendered by a court without adding to or taking something from an action taken by the legislative body for determination by the Executive. But I have the confidence that had we failed to sometimes test by pushing a little, that the viability of our system would not have been proven as many times as it has, I think again, based on a reasonable need, and clearly we have that, short of the actual impeachment of the President, attempting to prosecute those under the direct control, where there is clearly conflict existing, that we have the power, at least we should make an attempt within the system to find the answer. If we go too far the courts can tell us rather quickly. An expedited appeal could be provided to clarify the authority. But I think the effort must be made and I think in so doing it is

not in any manner inconsistent with the actions taken by this Government many times to deal with extraordinary situations.

Mr. DENNIS. Well, I see the gentleman's position and I think we all see the problems, so I don't believe I want to belabor the point. This subcommittee and all of us will have to consider it pretty carefully.

Thank you, Mr. Chairman.

Mr. HUNGATE. Mr. Mayne.

Mr. MAYNE. Thank you, Mr. Chairman.

The gentleman from California always makes a very distinguished contribution, and certainly today is no exception. I do want to commend him specially for the provision in his bill for the appointment of the Special Prosecutor by the chief judge of the court of appeals rather than the chief judge of the district court. I think you have put your finger on a very serious weakness in House Joint Resolution 785. It would have been a tragic and unnecessary loss to be deprived of the services of Judge Sirica who, as the gentleman very correctly points out, has experience and familiarity with the case which we just can't do without, and certainly his courageous handling of the matter from its very inception has probably been more responsible than anything else for the progress made in these proceedings.

If the gentleman has not already heard, I am sure he will be glad to know that during their testimony this morning, both Senator Bayh and Congressman Culver recognized this weakness and have alternate proposals themselves for submission of the appointment to a panel of three judges which would not include Judge Sirica, but your solution is also a very helpful one in that respect.

Mr. Moss. Well, I thank the gentleman.

Let me assure you that I am convinced that Judge Sirica is one of the true giants of the judiciary of our times, most distinguished.

Mr. MAYNE. Thank you.

Mr. HUNGATE. Mr. Smith.

Mr. SMITH. Yes, Mr. Chairman, thank you. I feel I want to apologize to my colleague, I was a little bit rude, I had come in late and had not heard your testimony, and I have now had a chance to read some of it. I do want to join with my colleagues in thanking you for this effort toward meeting a serious problem that faces our country, and I know that your assistance is going to be helpful to us, and thank you very much.

Mr. Moss. Thank you.

Mr. HUNGATE. I would especially express my appreciation concerning the fact that the law is too important to be left to lawyers. When I came up here, I didn't see how anybody else could handle it. The longer I am here, the more I see advantages of some outside views. I appreciate the many contributions the gentleman has made to this Congress, and I think he hits the point—we must guarantee the American public a fair investigation of people's guilt or innocence. And I was pleased to hear his view and to see his statement that he believes the Constitution has the flexibility to permit establishment of this, but I take it that it is your view that we have the separation of powers, but it is not your view that the legislative, executive, and judicial are separate watertight compartments.

Mr. Moss. That is correct, Mr. Chairman. You may recall for some 16 years I chaired the Subcommittee on Government Operations. Dur-

ing that time, I was the author of what has become known as the Freedom of Information Act.

For 11 years of the study before we felt we could strike out with a legislative solution, we perhaps examined more claims of privilege in more instances of this interesting blending of the branches of government, and I think nothing came through more clearly that they are not precise compartments all neatly separated, and I think that again is part of the genius of the framers of the Constitution.

I might add, Mr. Chairman, that I gained additional courage to appear before the Committee on the Judiciary upon reviewing a little history to discover that of the 55 drafters of the Constitution, 21 were not members of the bar.

Mr. HUNGATE. Well, I could say that the members of the committee have spent enough time at the bar to compensate for any other ones.

Thank you very much for the very helpful contribution.

Mr. Moss. Thank you.

Mr. HUNGATE. Mr. Bennett, we want to thank you, too, our colleague, for your time, and we are sorry that we have kept you waiting.

TESTIMONY OF HON. CHARLES E. BENNETT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. BENNETT. I thank you and the rest of the committee for your kindness in being willing to hear me at this late hour, and I will be very brief. I will put in the record the prepared statement I have.

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

Mr. BENNETT. Mr. Chairman, it is clear that Congress has the power to create the office of Special Prosecutor, define his duties, and vest appointment in the courts. It is also clear that Congress has broad powers to regulate the conditions of removal of such a prosecuting officer, particularly when the appointment is made by the court rather than by the President with the consent of the Senate. That flows from various decided cases. All of this flows from article II, section 2, of the Constitution, together with heretofore decided court decisions now before this committee.

Hobson v. *Hansen*, 265 Federal Supplement 902, makes questionable that the court which does the appointing of such a prosecutor should also be the court to make court decisions on cases brought by such an appointee. I understand therefore, that the committee is very likely to protect against any impropriety in this respect; and this seems wise in view of the *Hobson* decision.

I express the hope that the committee will as soon as possible come out with a measure that will be constitutional and grant the needed independence to a prosecutor in these matters. I believe if this be done the President would find it wise and proper not to delay proceedings by any unimportant or unduly legalistic matters not going to the overall merits.

Thank you. That completes my statement.

[The prepared statement of Hon. Charles E. Bennett follows:]

STATEMENT OF HON. CHARLES E. BENNETT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. Chairman, I greatly appreciate having the opportunity to testify on the vital and timely matter of the appointment of an independent special prosecutor to deal with the Watergate case and related matters. I have introduced H.R.

11043, to secure the appointment of an independent special prosecutor on this matter. My bill also reflected my strong opinion that there is a need for the prompt appointment of an independent prosecutor to make certain that all pertinent matters can be explored and the confidence of the people reestablished.

The nation still faces many unanswered questions in regard to the Watergate and related activities. The answers to those questions must still be found.

In view of the large numbers of bills that have been introduced with the wording of H.J. Res. 784, I believe that the best approach would be to vote out H.J. Res. 784, which has been introduced I am told by over a hundred members of the House and with similar legislation in the Senate endorsed by fifty-three members of the Senate.

This legislation would direct U.S. District Court Judge John J. Sirica to appoint a special prosecutor who could only be fired by Judge Sirica.

The confidence of the people in the activities of the Executive Branch must be reestablished. This, I believe, can best be done through speedily enacting legislation to create a new special prosecutor whose independence will be undoubted.

I do not believe that the President should appoint another prosecutor that would be under his jurisdiction and could be ultimately fired by the President. Because of the lack of confidence in the Executive Branch, the public could never really be sure that such a special prosecutor had properly delved into misconduct even if it reached the Presidency. It is in the best interest of the country and of the President himself that the prosecutor be independent. He more than anyone else needs confidence reestablished in the government.

Under this legislation the prosecutor would have all the necessary staff and funding to fulfill his responsibilities. All of the material and evidence generated by the special Watergate Prosecution force under Archibald Cox would be available to the new independent prosecutor and the new prosecutor would be empowered to continue all legal steps begun by Cox. The special prosecutor, to insure his independence, would be able to determine when his assignment is completed. The special prosecutor could only be dismissed by the Chief Judge for "extraordinary improprieties."

I hope that the committee will take prompt action on this legislation so the special independent prosecutor can begin his work at the earliest possible moment.

Mr. HUNGATE. Never have so many owed so much to so few words. Thank you very much.

Mr. BENNETT. Thank you.

Mr. HUNGATE. Mr. Smith?

Mr. SMITH. I want to thank our colleague, too, for coming before this committee and giving us the benefit of his research and activity in this regard and also for his patience while waiting to assume his place at the witness table today.

Mr. BENNETT. I tried not to repeat what you have already heard, I summarized what you have heard, and you have good briefs before you from the Library of Congress which I have read and you read and I didn't see any reason for laboring it.

Mr. SMITH. Did you hear some of the testimony of Mr. Culver this morning?

Mr. BENNETT. I did not.

Mr. SMITH. He has made some changes in his bill and——

Mr. BENNETT. Obviously he must if he is going to protect Judge Sirica as the man to handle the case or the availability of him to handle the case. He can't also appoint the prosecutor and retain that with any degree of security. I am not saying it can't be done but I am saying the court decisions that have been rendered make it questionable.

Mr. SMITH. Without going into it deeply, would you think that you would be in favor of an approach like that toward the appointment of a Special Prosecutor?

Mr. BENNETT. Yes, the courts have pointed out that they might decide that Judge Sirica could make no decisions in the case and I

see no reason for disqualifying him from making those decisions since there is no reason to. We might as well have the senior circuit judge or someone else make the appointment. I would strongly urge that because the courts are quite critical of the court appointing such a man and also making basic decisions. That having been pointed out by the court it would be sheer folly for the committee to engage on that unless they don't want Judge Sirica to hear the case, and I see no reason for precluding him from doing that.

Mr. SMITH. No.

Thank you, sir.

Mr. HUNGATE. Mr. Dennis?

Mr. DENNIS. Mr. Bennett, your bill here is a very interesting bill and it has an approach nobody else has had exactly which has a certain amount of attraction to me but I am just wondering, you say the Senate and House shall appoint.

Mr. BENNETT. Well, that is what I said in my bill. My bill was one of the first, if not the first, of the bills introduced on the subject. Therefore, it represents speed of action and some lack of study of the law. I have since that time studied the law much more carefully with the help of the Library of Congress primarily; and article II, section 2, of the Constitution makes it very questionable that the Congress can do this and, therefore, I am not even coming before you asking you to do this. I think we have problems enough to follow the article II, section 2, as literally as we can.

Mr. DENNIS. Right.

Mr. BENNETT. And there are cases on removal which give substantial hope that you can give a firm term and be protected reasonably. I think those cases have to be very carefully scrutinized because I think you could draw from those cases language which would make it fairly sure that this man would be independent. I think if you don't do it within the language of those cases you might well run into difficulty.

As someone said early when I was listening to the testimony, if all of the testimony and all of the reports and everything that this Congress does on this bill shows clearly that the Congress wants to have an independent prosecutor, no man sitting in the White House as President is going to overthrow that because he would know it would be an open invitation to impeachment.

Mr. DENNIS. I am very much inclined to agree with you on that and that is one of the reasons why I wonder whether the power of removal, although we should be just as careful about it as we can, is really quite as important as we tend to think, because it seems very doubtful to me that any President right now could exercise an arbitrary power of removal very readily and that leads me to the point, too, which I wonder if you would agree with, that if we could protect the power of removal reasonably well, we would then be on safer ground to leave the power of appointment, possibly subject to confirmation by the Senate, with the Executive than we would try to transfer that normally executive function over to a judicial official?

Mr. BENNETT. Well, I must say I don't entirely agree with you because the cases that I have read would indicate to me that we are in stronger position in giving this power to a court than you are in giving it to the President or to a Department head. They say so. The cases specifically say so. They say in the case of giving it to a court

you are exercising your authority in a direction less controllable by the Executive and there are specific cases on that.

Mr. DENNIS. If you have some cases along those lines I think the committee would appreciate the citations perhaps. Not now.

Mr. BENNETT. I would be glad to afterward but I think they are available in the Library of Congress.

Mr. DENNIS. I am sure they are.

Mr. BENNETT. I don't mean Library of Congress, but the very fine briefs which have been gotten up by the Library of Congress in this field. But I will be glad to talk with the counsel about that later.

I would like to say that there are some cases also that go to another point you raise, and that is whether or not there might be some words of art that you could put into the statute, and I call attention to CRS page 8 and page 9 where the cases of *Humphrey's Executor* v. *United States* and *Weiner* vs. *United States*, which is a Supreme Court decision, seem to indicate that the exact language you chose in setting up this Prosecutor may be right important with regard to the question of removal.

In other words, this is not a thing which we want to pass over. It might be the most important thing you will do is to look at these cases carefully because they do go into that and they do differentiate between the various types of appointments and removal.

Mr. DENNIS. The *Humphrey*'s case, if I remember, indicates that you could restrict the power of removal to a quasi-judicial, quasi-legislative official much more than you can to a strictly executive official. The problem is, of course, that some other cases indicate that prosecutors who are enforcing the criminal laws as handled by the Executive are strictly executive officials rather than the type that the *Humphrey*'s case was talking about. That is one of the difficulties.

Mr. BENNETT. But these cases do, in my opinion, indicate that the purpose of the function that is given to the person may be important; and notably the purpose of the function here to be given to this particular person is to evade conflict of interest by having an independent Prosecutor.

So, I think that is important in the legislative history and in what you actually say in the statute.

Mr. DENNIS. Well, that is worthy certainly of consideration and we appreciate your help here. We can use all we can get.

Mr. BENNETT. Well, I really primarily am coming here because I feel there is such overflow of feeling on the part of my constituents I would be failing in my position as a legislator if I did not come here, and I appreciate, therefore, your being willing to listen to rather repetitious statements by me in this field, but my major purpose here is to express the very deep concern on the part of my constituents and myself that an independent Prosecutor be established. Having read the cases I feel sure that one can be properly appointed through the court and that this is the best place to do it and I feel sure that we can be from all practical standpoints assured that he would not be removed, because if he were removed, if we draw the law properly, I think that the President would feel that he would be turning his back upon the will of the country and, therefore, I think he would not do it.

Mr. DENNIS. We all feel concerned and I don't think anyone needs to be in any way apologetic for trying to help reach the solution.

Mr. BENNETT. I appreciate your sacrifice in listening to me this late.

Mr. HUNGATE. What would your view be, if the President appoints a Special Prosecutor of national stature prior to enactment of such legislation. Would you think such legislation is still necessary to establish the special independence of the Prosecutor?

Mr. BENNETT. I think it is necessary to appoint one through the process of legislation this way.

Mr. HUNGATE. That would mean, as you see it, the view of your constituents?

Mr. BENNETT. They want him as independent as he can possibly be and the court decisions are clear even if we passed a special law and gave him the right to appoint a Special Prosecutor we are not on as sound a ground with regard to the independence of that prosecutor as we would be if we gave the court that power. There are court decisions to that effect and you certainly want to do the best you can.

Mr. HUNGATE. Are these the cases to which you referred?

Mr. BENNETT. They are all in the Library of Congress brief.

Mr. HUNGATE. Thank you.

Mr. BENNETT. As I read them.

Mr. HUNGATE. Thank you very much and you have been most helpful. Don't worry about repetition.

Do you have a prepared statement, Mr. Fuqua?

Mr. FUQUA. Yes.

Mr. HUNGATE. Without objection, it will be made a part of the record. [See p. 167.]

TESTIMONY OF HON. DON FUQUA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. FUQUA. Thank you, Mr. Chairman and members of the Commitee.

I realize the hour is late and I welcome this opportunity to appear before you today concerning a matter of great consequence. As you know, I have introduced legislation vesting in the Chief Judge of the U.S. District Court for the District of Columbia the power to appoint a Special Prosecutor to investigate and prosecute any offense against the United States arising out of the 1972 Presidential election. I introduced this legislation because I feel strongly that President Nixon has violated the trust of Congress and the American people by summarily dismissing Special Prosecutor Cox.

Although I am not an attorney, I recognize that there are Constitutional obstacles inherent in any proposal to create the office of the Special Prosecutor. Certainly, I do not presume to have the answers to those Constitutional concerns. I do believe, however, that the measure I have introduced would avoid some of the more obvious Constitutional problems which might otherwise arise.

Basic to a discussion of the constitutionality of establishing the office of the Special Prosecutor is the concept of separation of powers. Because the President is charged with the responsibility of faithfully executing the laws and the prosecutorial function is essentially one of the Executive, I am satisfied that the Special Prosecutor must be an employee of the executive branch and to come to some extent under the supervisory power of the President. The manner in which this employee is appointed and the degree to which he is independent and

not subject to Presidential removal except for cause is another question.

Article II, section II, clause II of the Constitution states that ". . . Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of Departments."

Adequate legal precedents and authorities exist which uphold the power of Congress to direct the courts to appoint both judicial as well as executive branch officers of the United States. There is some question as to whether "courts of law" may be construed to mean the Chief Judge of a particular court.

It is my understanding that other bills would place this appointive power in the several judges of the U.S. District Court for the District of Columbia. I have no problems with placing this appointive power with the entire court although it appears that any due process problems could be eliminated by the Chief Judge recusing himself should prosecutions brought by the Special Prosecutor be assigned to his court.

Section 3 of the measure I have introduced would prohibit the removal of the Special Prosecutor except for neglect of duty or malfeasance in office. It is essential that we provide the Special Prosecutor with the greatest amount of independence possible within constitutional bounds. Removal only for cause certainly tests the boundaries of the concept of separation of powers. I am advised, however, that a careful reading of Myers, Humphrey's Executor, and Weiner support the theory that if the Special Prosecutor is to be at all independent, a statutory removal for cause provision must be available. I have been referred to that language in Weiner which declared the essence of Humphrey's Executor to be that it "drew a sharp line of cleavage between officials who were part of the executive establishment and were thus removable by virtue of the President's constitutional powers, and those who are members of a body 'to exercise its judgment without the leave or hindrance of any other official or any department of the government,' as to whom a power of removal exists only if Congress may be fairly said to have conferred it." The question requires, it seems to me, a balancing of the concept of separation of powers against the need to give the Special Prosecutor more than an appearance of independence. Important to this question, of course, is the fact that the Special Prosecutor will be investigating the very branch of government of which he is a part.

While the issue of Presidential removal powers is great indeed, I sincerely hope that the President would not be so impolitic to remove a statutorily supported Special Prosecutor except for obvious good cause. The political shock waves which have reverberated across our Nation as a result of the dismissal of Special Prosecutor Cox and the subsequent resignations of Mr. Richardson and Mr. Ruckelshaus must not be repeated. Our system of government requires prudent accommodation rather than belligerent confrontation and Congress must insure that such challenges to our national political institutions be met with every available constitutional safeguard.

Government by crisis and confrontation is divisive. I want the President to be successful and regain the confidence and trust of the American people for when the President does well the country does

well. The manner in which the House of Representatives responds to this crisis of confidence depends in large part on the collective wisdom of members of this committee. I am hopeful that early action can be taken on the various legislative proposals to establish an office of the Special Prosecutor as it is in our national best interest.

Again, I thank the committee for this opportunity to testify on legislation which will determine, in part, whether indeed we are going to have a government of law or of men.

Mr. HUNGATE. Thank you very much, Mr. Fuqua, for a most helpful statement and raising some points that had not been previously presented to us.

Mr. Smith?

Mr. SMITH. Mr. Chairman, I want to join in thanking the gentleman from Florida for coming before us here today with these proposals. You have raised some new points of law that we had not considered and that we shall consider, I know.

Mr. FUQUA. I thank you very much.

Mr. HUNGATE. Mr. Dennis?

Mr. DENNIS. I would like to thank Mr. Fuqua, too, for his contribution and his effort. I don't know that I have any particular questions. We have pretty well covered the waterfront this afternoon. I think we all have a common goal and we all see the problems and I don't know if much is gained except by thinking about it rather than asking questions.

One thing did occur to me. Do you feel that—perhaps this is a detail of the bill rather than getting into the big constitutional problems—perhaps if you follow the court appointment route that there might be some advantage to using the Chief Judge of the Court of Appeals rather than the trial judge and thereby at least remove from the picture the problem of having the man who may be sitting on the case also appointing the prosecuting attorney?

Mr. FUQUA. I don't find any problem with that. I think whether it is the Chief Judge of the Court of Appeals or of the District Court, is of less importance. I think the procedure by which the Prosecutor is appointed and the procedure for his removal are the key elements in any bill that we consider.

Mr. DENNIS. Well, I think there is no question about that and, of course, the problem is that the appointment in this field would normally lie with the executive, but when it does the removal power lies there too, and therein is part of our problem. But I certainly thank you.

Mr. FUQUA. I thank the gentleman.

Mr. HUNGATE. I take it from your statement you think it important that the statute provide a method of removal of the Special Prosecutor.

Mr. FUQUA. I think it is essential, Mr. Chairman, that we do provide a means of removal to make the statute constitutional. We must, of course, place limits on that removal power if the Prosecutor is to be truly independent.

Mr. HUNGATE. Well, I ask you what I have asked others, suppose the President does appoint a Special Prosecutor, do you think that would put an end to the need of legislation of this type?

Mr. FUQUA. I was listening to the witnesses that preceded me and I join with them. I think it is that this committee proceed with reason-

able prudence in reporting out legislation. This is essential to restore confidence in our Government. I think the American people and I know that the people that I am privileged to represent, feel we should have an independent Prosecutor who could proceed in an orderly fashion and legal fashion and let the chips fall where they may.

Mr. HUNGATE. I want to thank you again. We have heard testimony today from all around the country, just about, Iowa and Indiana, Pennsylvania, Texas, California and this is Florida's afternoon, I think. It seems to me to pretty much echo the sentiment of the need for a special and independent Prosecutor. You realize the difficulty that the committee faces in trying to whittle out something that will meet the constitutional requirements in this task. Your testimony and the testimony of the others has been most helpful to us.

Mr. FUQUA. I appreciate the chairman's diligence and the committee's.

Mr. HUNGATE. We are hoping to complete some kind of legislation by next week.

Thank you very much.

Mr. FUQUA. Thank you.

[The prepared statement of Hon. Don Fuqua follows:]

STATEMENT OF HON. DON FUQUA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. Chairman and members of the committee. I welcome this opportunity to appear before you today concerning a matter of great consequence. As you know, I have introduced legislation vesting in the Chief Judge of the United States District Court for the District of Columbia the power to appoint a special prosecutor to investigate and prosecute any offense against the United States arising out of the 1972 presidential election. I introduced this legislation because I feel strongly that President Nixon has violated the trust of Congress and the American people by summarily dismissing Special Prosecutor Cox.

Although I am not an attorney, I recognize that there are Constitutional obstacles inherent in any proposal to create the office of the special prosecutor. Certainly, I do not presume to have the answers to these Constitutional concerns. I do believe, however, that the measure I have introduced would avoid some of the more obvious Constitutional problems which might otherwise arise.

Basic to a discussion of the constitutionality of establishing the office of the special prosecutor is the concept of separation of powers. Because the President is charged with the responsibility of faithfully executing the laws and the prosecutorial function is essentially one of the Executive, I am satisfied that the special prosecutor must be an employee of the Executive Branch and to come to some extent under the supervisory powers of the President. The manner in which this employee is appointed and the degree to which he is independent and not subject to Presidential removal except for cause is another question.

Article II, Section II, Clause II of the Constitution states that ". . . Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of Departments." Adequate legal precedents and authorities exist which uphold the power of Congress to direct the courts to appoint both judicial as well as executive branch officers of the United States. There is some question as to whether "courts of law" may be construed to mean the Chief Judge of a particular court. It is my understanding that other bills would place this appointive power in the several judges of the U.S. District Court for the District of Columbia. I have no problems with placing this appointive power with the entire court although it appears that any due process problems could be eliminated by the Chief Judge recusing himself should prosecutions brought by the special prosecutor be assigned to his court.

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a careful reading of *Myers*, *Humphrey's Executor*, and *Weiner* support the theory that if the special prosecutor is to be at all independent, a statutory removal for cause provision must be available. I have been referred to that language in *Weiner* which declared the essence of *Humphrey's Executor* to be that it "drew a sharp line of cleavage between officials who were part of the Executive establishment and were thus removable by virtue of the President's constitutional powers, and those who are members of a body 'to exercise its judgment without the leave or hindrance of any other official or any department of the government,' as to whom a power of removal exists only if Congress may be fairly said to have conferred it." The question requires, it seems to me, a balancing of the concept of separation of powers against the need to give the special prosecutor more than an appearance of independence. Important to this question, of course, is the fact that the special prosecutor will be investigating the very branch of government of which it is a part.

While the issue of Presidential removal powers is great indeed, I sincerely hope that the President would not be so impolitic to remove a statutorily supported special prosecutor except for obvious good cause. The political shock waves which have reverberated across our nation as a result of the dismissal of Special Prosecutor Cox and the subsequent resignations of Mr. Richardson and Mr. Ruckelshauss must not be repeated. Our system of government requires prudent accommodation rather than belligerent confrontation and Congress must insure that such challenges to our national political institutions be met with every available Constitutional safeguard.

Government by crisis and confrontation is devisive. I want the President to be successful and regain the confidence and trust of the America people for when the President does well the country does well. The manner in which the House of Representatives responds to this crisis of confidence depends in large part on the collective wisdom of members of this committee. I am hopeful that early action can be taken on the various legislative proposals to establish an office of the special prosecutor as it is in our national best interest.

Again, I thank the Committee for this opportunity to testify on legislation which will determine, in part, whether indeed we are going to have a government of law or of men.

Mr. HUNGATE. We will adjourn until 10 in the morning. [Whereupon, at 5:10 p.m., the subcommittee adjourned, to reconvene at 10 a.m., Thursday, November 1, 1973.]

SPECIAL PROSECUTOR LEGISLATION

THURSDAY, NOVEMBER 1, 1973

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

The subcommittee met, pursuant to notice, at 10 a.m., in room 2141, Rayburn House Office Building, Hon. William L. Hungate [chairman of the subcommittee] presiding.

Present: Representatives Hungate, Kastenmeier, Edwards, Mann, Holtzman, Smith, Dennis, Mayne, Hogan, and Wiggins.

Also present: Herbert E. Hoffman, counsel; Thomas W. Hutchison, assistant counsel; Roger A. Pauley, associate counsel; and Stephen P. Lynch, research assistant.

Mr. HUNGATE. The subcommittee will come to order.

We have a number of witnesses scheduled today. First, we are very pleased to have with us the Hon. Chesterfield Smith, the president of the American Bar Association. Mr. Smith, please come forward to the witness table. If you have anyone you desire to have come with you that will be fine.

We also have scheduled this morning Whitney North Seymour, Jr., as well as three very distinguished constitutional law experts whom we hope to hear as a panel.

We also have two Members of the House to whom we did not get yesterday. They would like to be heard today. I have explained this so that we may try to proceed with expedition. If we seem to move the time along, it is because we have a great number of witnesses to hear today.

You may proceed in any way you choose, Mr. Smith. We are very glad to have you here.

TESTIMONY OF CHESTERFIELD SMITH, PRESIDENT, AMERICAN BAR ASSOCIATION

Mr. SMITH. Mr. Chairman, my name is Chesterfield Smith. I am president of the American Bar Association. I am a trial lawyer from central Florida, and I have been engaged in trial practice all of my professional life.

During that professional life, it has always seemed evident to me that lawyers bear a special responsibility in our society toward the preservation of a free and democratic government. As officers of the court, lawyers, above all others, should jealously defend and promote the rule of law without which an orderly and free society cannot

exist. For that reason, on October 22, 1973, I, as president of the American Bar Association, suggested that the recent actions of President Nixon resulting in the termination from Government service of former Attorney General Richardson, former Deputy Attorney General Ruckelshaus, and former Special Prosecutor Cox, should be of grave concern to every citizen of this sturdy land. Those actions have, or so I am convinced, cast substantial doubt upon our ability to function as a society ruled by law, and not as a society ruled by a man. While admittedly the situation is not unique, it still seems to me that the time tested procedures of administering the rule of law in criminal proceedings, as we have known, developed and perfected them in this country, are perhaps at stake.

Believing this, I called an emergency meeting of the American Bar Association Board of Governors; it was held in Chicago last Saturday. After full consideration, the following resolution was there adopted as the position of the association:

Having in mind (1) the American Bar Association in May of this year called for the appointment of an independent special prosecutor with responsibility for the investigation and prosecution of matters related to the so-called Watergate affair; and (2) the circumstances which have since produced the resignation or termination of the services of Attorney General Elliot Richardson, Deputy Attorney General William Ruckelshaus, and Special Prosecutor Archibald Cox, and the abolishment of the Office of the Special Prosecutor which was charged and given full authority to investigate and prosecute offenses arising out of Watergate, the 1972 Presidential election, and allegations involving the President, members of the White House staff or presidential appointees; it is hereby

Resolved, That the statement issued by President Chesterfield Smith on October 22, 1973, a copy of which is annexed hereto, is hereby ratified, confirmed and adopted as the statement of the position of this Association as of the date issued; (NOTE: Copy of the October 22, 1973 statement while a part of this Resolution is annexed at the end of this statement to the Committee for convenience.)

Further resolved that the American Bar Association, having advocated the appointment of an independent prosecutor to investigate the Watergate affair and other matters, as referred to above, urges that the Congress of the United States, consistently with the provisions of Article II, Section 2, of the Constitution, or such other power as may exist, create by legislation an independent Office of Special Prosecutor in relation to the matters in question and now under investigation, and authorize the appointment of such Special Prosecutor by the United States District Court for the District of Columbia in the manner as is provided in the filling of vacancies in the office of United States attorneys (28 U.S.C. Sec. 546);

Further resolved that the Association recommends to the Congress of the United States that it promptly extend the life of the existing grand jury in the District of Columbia, which has considered a portion of this matter, for a period of six (6) months;

Further resolved that the Association tenders its good offices to the President, the Attorney General, the Courts and the Congress to aid in any manner which may be effective in implementing the purport of these resolutions; and

Further resolved that the President of the American Bar Association be, and he hereby is, authorized and empowered to appoint such special committee or committees as he shall deem necessary or appropriate to assist him in carrying out of the policies expressed in these resolutions.

Resolved that pursuant to Section 6.10 of the Association's Constitution the Board of Governors hereby determines that there shall be a meeting of the House of Delegates on Monday, December 10, 1973, commencing at 9 A.M. in Washington, D.C.

Further resolved that the calling of this meeting may be cancelled by action of the Board of Governors; and

Further resolved that the business to be considered and acted upon at this meeting shall be related to the implementation of the resolution just adopted by this Board."

I am very proud that the American Bar Association throughout its history has moved with both speed and energy to protect the rule of law whenever that rule has been placed in jeopardy. I recall the vigorous action taken by the association in 1937 when President Franklin Roosevelt proposed that the composition and function of the Federal courts, with particular emphasis on the Supreme Court, be significantly altered by legislative action to comport with political necessities as he personally saw them. To what I believe is its everlasting credit, the American Bar Association there willingly and forcefully assumed a leadership role in preserving the independence of the judiciary and thus, by opposing that proposed encroachment by the President of the United States, preserving the rule of law. The records of the association show that it rallied the support of all lawyers in the country, whether association members or not, in opposition to the President's plan to pack the Supreme Court with new and additional members. I believe that it was in large measure due to the nonpartisan opposition of the American Bar Association that that proposal of President Roosevelt was defeated.

I recite this history because it seems to me that once again the American Bar Association, and all of the other segments of the organized bar, in accord with the proud tradition of the legal profession, have rallied to the defense of the courts and the judicial process, and that such defense once again has been conducted in a nonpartisan and unbiased manner.

The American Bar Association is no newcomer to the Watergate arena. Last spring, President Robert Meserve, on behalf of the association, called for the appointment of an independent prosecutor with plenary responsibility for the investigation and prosecution of possible criminal matters surrounding the 1972 Presidential campaign and related acts or dirty tricks which all of us have now combined under the simple term "Watergate." The association was convinced that only a prosecutor, independent and free from the dictates and controls of those whom he was to investigate, could satisfactorily resolve in the minds of the people the legality or illegality of the matters which he was directed to investigate. The association, when taking that position, was not picking up a new or untried theory; instead it was relying upon both its own widely accepted and universally hailed Code of Professional Responsibility (cannon 5) and its Standards for Criminal Justice.

I suggest that the association's position is based upon four simple yet evident propositions:

First, the rule of law applies to all citizens without exception;

Second, law enforcement investigations and prosecution procedures under that rule of law require complete severance and independence as between the subject of the investigation and the investigator;

Third, independence means at the minimum that neither the appointment nor tenure of persons conducting the investigation nor the scope of the investigation, including the lines of evidence to be pursued, shall be controlled in any way by the subject under investigation;

Fourth, should any controversy relating to the scope or propriety of a particular procedure or investigative objective arise between the law

enforcement authorities and a subject of investigation, the resolution of the issue is for the courts.

Those four propositions in my opinion are in substantial accord with the spirit and objectives of both the Code and the Standards relating to the prosecutorial function, each of which provides that a lawyer (a prosecutor) should have no conflict of interest, or the appearance of conflict of interest. It was the desire and goal of the association when it asked for the appointment of a Special Prosecutor that a man completely independent of partisan influence or the appearance of partisan influence, be selected. Sadly, that desire and goal has not materialized.

Based upon assurances made by Elliot Richardson to the Senate Judiciary Committee during hearings on his confirmation as Attorney General, the American Bar Association was most hopeful that when Archibald Cox was appointed as Special Prosecutor, he would be allowed to pursue justice in light of the principles that I have mentioned. President Nixon himself stated that the Attorney General had full authority to appoint an independent prosecutor who could follow criminal leads wherever they went. And, even though the association recognized then that under the law the President or the Attorney General could legally renege, still we, as all other Americans who wanted so very much to believe that justice would prevail, received the appointment of Mr. Cox with high hope.

But it was not to be. Our adversary system of criminal justice, long tested in this and other English-speaking countries, requires that contending parties before an impartial judge be equal if it is properly to function. Each of the parties must be free to present his contentions to that impartial judge for determination. The judge himself is not an actor, and if he is to do his job well, the two parties must present to him all of the issues for determination. In this way we historically have, with success, tested the truth and verity of testimony, documentary evidence, and opposing contentions. In an adversary way, we have permitted each opponent the right to pick at, examine, and cross-examine material submitted to the court by the opposing party. We have allowed each party the full right to determine what he will proffer or not proffer to the court to substantiate his position or to rebut the positions of the adversary party.

It has never been seriously suggested anywhere to my knowledge that the truth of opposing contentions could be fairly and equitably ascertained if one of the parties before the court could determine what evidence and what contentions the other party could present to the judge or jury.

By mandating instructions to the Special Prosecutor who was seeking evidence which might be material to his investigation in a pending court proceeding, the President, in my judgment, violated basic principles of justice. Every American knows that the courts are our first line of defense against governmental tyranny or arbitrary power. Whatever may or may not develop out of further criminal proceedings, I believe that the people of our Nation through their recent outcry recognized that abandonment, by Presidential fiat, of those time tested procedures that traditionally have insured the equitable resolution of disputes between man and his government, constituted a clear and present danger to our national way of life. Regardless of how commendable it may have been, the fact that the President has since

changed his mind and agreed both to submit the subpenaed tapes to Judge Sirica for in camera inspection and to have acting Attorney General Bork appoint a second Special Prosecutor, has not solved the basic problem.

The designation by the President of his own prosecutor, a man wholly dependent on the continued support of an acting Attorney General who is wholly dependent on the continued support of the President, would continue to thwart the established processes of justice. I reiterate my personal opinion that the gravity of the situation demands resolute action on the part of the Congress. While I am concerned over the actions of the President, I do believe, and have believed, that the legislative forces of this Nation will act swiftly and decisively to correct this damaging encroachment upon our system of justice.

While I too fully understand that the security of our country should always be uppermost in our concerns, as a lawyer, as an American, and as an officer of its courts, I am convinced that, regardless of Presidential action, or inaction, Congress should, at its first priority, take whatever measures are available to it to reestablish the Office of the Special Prosecutor and to make the Special Prosecutor independent of the direction and control of those who he is investigating. As president of the American Bar Association, I care not whether the Special Prosecutor is Archibald Cox or some other highly qualified lawyer. I do care that the Special Prosecutor not be an employee of, or under the control of, the President or an employee of the President.

The President is not above the law, and he cannot unilaterally withhold from consideration executive materials that might materially affect the decision to prosecute or not to prosecute, nor can he unilaterally mandate that a prosecutor not seek such material through the courts for submission to a grand jury. The Special Prosecutor operates under similar restrictions. Both must submit their respective contentions for decision by the court which has jurisdiction over the matter. It is, of course, completely proper at any time for those being investigated to object and seek recourse through the courts. If those who are being investigated feel that the material sought by the Prosecutor, or the tactics he employs are illegal, they should submit their objections to the court for a determination as to whether the Prosecutor's acts are legally permissible. Certainly those who are being investigated cannot make such a determination. Under a government of laws, the matter in dispute must be presented to a judge, and be legally tested in an adversary proceeding.

"Watergate" is a mess which must be cleared up for the future good of our country, and the courts must be a prime participant if we are to be successful. If crimes have been committed, it is in our national interest that we punish those who committed those crimes, to deter future crimes. But if the White House is permitted to withhold material evidence which might be pertinent to legal proceedings, it seems to me that those who may have committed crimes can never receive the constitutionally mandated fair trial, and thus "Watergate" will never be resolved. I submit that our people will never feel that justice has been done in "Watergate" until such time as an independent prosecutor is permitted to go into all aspects of the matter without limitations imposed on him by those whom he is to investigate.

So believing, I urge, on behalf of the American Bar Association, that the Congress create by legislation an independent Office of Special Prosecutor in relation to the matters formerly under the jurisdiction of Special Prosecutor Archibald Cox in accord with the resolution of the association which I read.

Mr. Chairman, that completes my prepared statement.

Mr. HUNGATE. Thank you. I notice there is a further statement, Mr. Smith, attached here. Would you like that made a part of the record?

Mr. SMITH. Yes, sir. I would like it made a part of the record. It was attached to the resolution adopted by the board of governors, and as such makes that complete.

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

[The prepared statement of Mr. Smith follows:]

STATEMENT OF CHESTERFIELD SMITH, PRESIDENT OF THE AMERICAN BAR ASSOCIATION

As President of the American Bar Association, I urge in the strongest terms that appropriate action be taken promptly by the courts and, if necessary, by the Congress, to repel the attacks which are presently being made on the justice system and the rule of law as we have known it in this country.

The American Bar Association last spring, through its then-President, Robert Meserve, called for the appointment of an independent prosecutor with responsibility for the investigation and prosecution of the matters which had been revealed by the Senate Select Committee on Presidential Campaign Activities, by the press, and through the Federal Grand Jury, and which are now commonly called the "Watergate Affair." The position of the Association was based upon its Standards for Criminal Justice, which provide that a prosecuting officer should have no conflict of interest or the appearance of a conflict of interest. Thus, under the Standards, it would be improper for an investigation of the President himself, of the Office of the President, or of the Executive Branch of the Federal Government, to be conducted by a prosecutor subject to the direction and control of the President.

Based upon assurances made publicly by high officers of the Administration, the ABA was most hopeful that when Archibald Cox was appointed Special Prosecutor, he would be allowed to pursue justice in all aspects of his investigation without control by those whom he was charged with investigating. Now, the President of the United States, by declaring an intention, and by taking overt action, to abort the established processes of justice, has instituted an intolerable assault upon the courts, our first line of defense against tyranny and arbitrary power. The abandonment, by Presidential fiat, of the time-stated procedures to insure the equitable distribution of justice constitutes a clear and present danger of compelling significance. The substitution, again by Presidential fiat, of a makeshift device—unilaterally improvised and conferring upon one individual functioning in secret, the power to test evidence—may well be acceptable for a Congressional investigation, but to also insist that it be utilized by the courts in criminal proceedings is an assault of wholly unprecedented dimension on the very heart of administration of justice. The absolute gravity of the situation demands the most resolute course on the part of the courts and, if necessary, the Congress.

There can be no menace to our security from within and none from without more lethal to our liberties at home and more fatal to our influence abroad than this defiant flaunting of laws and courts. As an American, as a lawyer, and as an officer of the court, in expressing the gravest concern, I express my hope and confidence that the judicial and legislative forces of this nation will act swiftly and decisively to challenge, repeal, and correct this damaging incursion by the President of the United States upon the system of justice, and therefore upon the basic liberties of the citizens of this country.

I continue to hope also that the President of the United States will, upon further reflection, change his course and cease what I believe to be an unprecedented flaunting of the rule of law. I also believe that the Congress should, as its first priority, take whatever measures are available to it to reestablish the office of the Special Prosecutor and to make the Special Prosecutor independent of the direction and control of those whom he is investigating.

The people of this country will never believe that justice has been done in the "Watergate Affair" until such time as that independent prosecutor is permitted to go into all aspects of the "Watergate Affair" without limitations or controls imposed on him by those whom he has reason to believe are possible participants. At the same time, it is clearly proper that those who are being investigated by the Special Prosecutor present their objections to his conduct to the courts for a determination as to whether such conduct is legally permissible.

I pledge to do all within my personal power to see that the American Bar Association assists the United States District Court for the District of Columbia and any other Federal court in the discharge of its duties and responsibilities in this Constitutional crisis.

As a final comment, I applaud—indeed, I am proud of—the action of three great lawyers, Elliot Richardson, William Ruckelshaus, and Archibald Cox, who, in a most dramataic way, have emphasized to the people of this nation that they are lawyers who honor and cherish the tradition of the legal profession and that they are lawyers who properly and without hesitation put ethics and professional honor above public office.

Mr. HUNGATE. Again, I extend a welcome and the appreciation of the committee to you for being with us to contribute to our consideration of this very important subject matter.

I have a somewhat warm feeling for the ABA. I have worked with the tax exempt wing in the American Bar Foundation in 1956 on a survey of the administration of criminal justice, and I know the interest of the association in this field is not just come to fruition, but it has been a deep and broadening interest, and you have worked at it a long time.

Mr. SMITH. Yes.

Mr. HUNGATE. Mr. Kastenmeier.

Mr. KASTENMEIER. Thank you, Mr. Chairman, and I would like to compliment Mr. Smith on a most forceful statement, and one in general terms very useful to this committee for its advice and the guidelines it sets forth. It is my understanding that this very morning the President has suggested that two names will be sent over to the Senate, one for another Special Prosecutor, and that in connection therewith were certain conditions which the President said he would agree to; namely, that such a Special Prosecutor would not be discharged except with the consent of, I think, the chairmen of the Senate and House Judiciary Committees.

There may have been other conditions of that sort, but I think that is the essential element of the proposal the President makes.

Assuming that is the case, would this be agreeable to you? Does this suffice as a substitution for an independent prosecutor that you recommend?

Mr. SMITH. Well, first as a predicate, because I, too, read the newspaper and have heard the speculation as to the name of the man, I would say he is a personal friend of mine for whom I have the highest esteem, and I doubt that the Acting Attorney General could have found a better man in America than Mr. Leon Jaworski.

To answer your specific question, it would not change our position in any way. We believe that the Special Prosecutor should not be appointed by the person who he is investigating. One reason for this is our desire to have the American people feel that the investigation is made without a conflict of interest, or the appearance of a conflict of interest. When somebody appoints and selects the person who is to investigate him, still people may wonder why was he selected. And, even though I personally know Mr. Jaworski to be an absolutely tre-

mendous man, those who do not have the benefit of knowing him may quite properly wonder why was he chosen by the President. They may ask, would somebody have been chosen that was going to cause trouble. Frankly, it puzzled me a little to read in the paper today that Mr. Jaworski would be interviewed by Mr. Haig, Mr. Buzhardt, and Mr. Garment, since he might investigate those in the executive office. If he is to be their adversary, why is he subject to their scrutiny and approval apparently before selection?

Mr. KASTENMEIER. It would appear, and I did not mention Mr. Jaworski's name because I do not think his excellent reputation is really in point here. I think he is generally acknowledged to be a superb lawyer.

Mr. SMITH. He is a fabulous man.

Mr. KASTENMEIER. But the fact is, even under this arrangement, he is still an employee of the President, so to speak, is he not? And this is the problem.

Mr. SMITH. Yes. Yes, sir. We think that he ought to be absolutely independent of the President, either in the initial appointment or in operation and control. Now, under the hypoethical that you gave me, that the President has allegedly said the Special Prosecutor could be discharged only with the concurrence of specific congressional leaders, here also, only the President can initiate the discharge. We think that somebody else ought to have that authority.

No independent prosecutor, or anybody else, should be free from all control. But they should be free from the control of the person whom they are directed to investigate.

It is just as important here, I think, that perhaps the most important thing facing this country right now is credibility and a restoration of faith. It will be extremely hard if the person who investigates these charges finds out there is nothing to them; then he would have to explain to the American people why he is not prosecuting. His job to persuade the people to believe his findings is very important to this country. I am sure that a first-rate prosecutor, when he gets all of the facts, is going to exonerate a lot of the people who have been connected with Watergate. Some of them he may prosecute, of course, but I am inclined to believe that the bulk of them will be exonerated. But it is more important that the man who makes the investigation, and then exonerates some, be free from any conflict of interest, or the appearance of a conflict of interest, than in any other case.

Mr. KASTENMEIER. I could not agree with you more, Mr. Smith. And so that the record be clear, at least the last news we have is a phone call from Mr. Max Friedersdorf of the White House, as follows, and I quote:

> The President will announce at 10 o'clock this morning the appointment of Senator Saxbe as Attorney General and Leon Jaworski as Special Prosecutor. He will also announce that the Special Prosecutor will not be removed without the consensus of the House and Senate leadership, and the chairman and ranking member of both the House and Senate Judiciary Committees.

But I think we are still, as you suggest, in the same box with respect to the initiation of a possible discharge, and the fact that the President still regards this individual as his employee, as he did Mr. Cox.

I would furthermore ask you, Mr. Smith, insofar as we have to deal with specifics, and insofar as you are able to on behalf of either the

American Bar Association or yourself, could you suggest which approach we might take? For example, many Members of this House and of the other body have suggested that either the chief judge of the Federal District Court of the District of Columbia, or a panel thereof, be entitled to appoint such a prosecutor. Clearly, the Prosecutor would be independent. But some people raise the objection as to whether it is constitutional for the court to engage a prosecutor exercising an executive function. What is your view about that, sir?

Mr. SMITH. Well, the view of the association would coincide with my personal view. That is, that the most desirable way for this to be done constitutionally is for the appointment to be made by the U.S. District Court for the District of Columbia. That appointment should be made by the court, not by one judge. However, the court could decide on internal procedures selection committees, panels, delegation of authority; as long as the ultimate decision was made by the court.

Mr. KASTENMEIER. Well, I thank you for your answers, sir, and I yield back the balance of my time, Mr. Chairman.

Mr. HUNGATE. Yes, sir.

Before I yield to Mr. Smith of New York, I have a brief question.

We are told that the President will not remove the new Special Prosecutor without a consensus of the House and Senate leadership on both sides of the aisle, and the chairmen and ranking minority members of the House and Senate Judiciary Committees. How would you define "consensus"?

Would you have an opinion on that?

Mr. SMITH. I think that is as specific as a definitive ruling of the court.

Mr. HUNGATE. Thank you, Mr. Smith.

Mr. Smith, I give you Mr. Smith, the distinguished ranking minority member from New York. We have got the Smith brothers this morning.

Mr. SMITH [New York]. Mr. Smith, I want to apologize for not being here to hear your testimony, but I shall certainly read it with great interest, and I thank you for coming before this committee and giving us your time and your thoughts, and the thoughts of your great organization. And so, I am going to pass on the questioning to somebody to whom it is more apropos since he was here.

Mr. HUNGATE. Mr. Edwards.

Mr. EDWARDS. Thank you, Mr. Chairman.

Mr. Smith, thank you for an excellent statement. You suggest that a sound precedent for the court in the District of Columbia filling the vacancy, or appointing the Special Prosecutor, would be the filling of the vacancies in the office of the U.S. attorney, 28 U.S.C. 546. You consider that a good and sound precedent for this rather extraordinary procedure?

Mr. SMITH. I consider it more as an example. I do not have the constitutional fears that have been expressed by others. I have not sat down and scholarly researched it myself, but based on experience as a lawyer who for many years has been engaged in constitutional interpretation and for many years has worked in constitutional drafting. I have a feeling that there is not any real constitutional problem in this area. However, to be specific, we use that as an example, not as a precedent.

Now, some of our people have researched the matter for the ABA and their opinion is that what we have suggested is a constitutionally sound procedure. And they too used this as an example. We are not saying that this statute determines the constitutionality, but we do point out that it exists and that it has not been questioned that the courts could appoint a prosecutor who has the same basic duties as are here contemplated.

Mr. EDWARDS. Under 546, the U.S. attorney is appointed by the district courts. Can he be fired by the Attorney General?

Mr. SMITH. No, sir. A new U.S. attorney can be appointed, confirmed by the Senate, and the temporary appointee made by the court is automatically terminated. It is only a temporary expedient for the courts to fill a vacancy while a vacancy exists, and to that extent the Attorney General, by recommending somebody to the President, securing his nomination and confirmation, can have an impact on him. But he has no right to fire him.

Mr. EDWARDS. Thank you very much.

Mr. HUNGATE. Mr. Dennis.

Mr. DENNIS. Mr. Smith, we all appreciate your being here and giving us this statement. Referring again to this statute which provides for the filling of vacancies in the office of the U.S. attorney, of course all of those U.S. attorneys are subject to removal by the President, all of them who are appointed under that statute, so I take it you are not citing the statute as an example on that branch of the matter? You do not want him to be subject to removal as I understand it?

Mr. SMITH. This is a unique situation, and as a unique situation I think that the President should not have the right to remove from office a temporary U.S. attorney appointed by the courts. He, of course, has the right to name a new and permanent U.S. attorney; this has the effect under the statute of removing the court's temporary appointee who is under the control of the President to some extent. That statute is an example of the courts being the appointing authority, and that statutory process in its entirety is not what I want. I would not want here a Special Prosecutor constituted by the courts who could be removed by the President's simply naming somebody else.

Mr. DENNIS. Well, actually—and you may well be right in your thrust—but are not all U.S. attorneys, whether regular or special, removable by the President?

Mr. SMITH. Yes, sir, except those who are acting. He cannot remove them as such. He can replace them. That is the same thing, perhaps, but——

Mr. DENNIS. Well, my impression was he could even remove them, but I may be mistaken.

Of course, you know, you may be right, and I see the basis on which you proceed, which I think is a sound basis myself, generally speaking that you cannot investigate yourself. But the constitutional dilemma which some people espoused here is not entirely simple, it seems to me. I have got about four briefs in front of me now which argue that question back and forth and, of course, the problem with the Presidential appointment is, as you know, that that normally imports Presidential removal power. The problem with a judicial appointment, however, is that many people see that the prosecution of the

criminal law is basically an executive function, which I think is probably true. And the U.S. attorneys who are carrying that out, whether special or regular, are performing an executive function as an arm of the executive branch or a band of the President, as the court said in one of the cases, and that, therefore, you get into constitutional problems when you start having the judicial branch appoint executive officers to perform executive functions.

Now, you do not think that is any problem, I take it?

Mr. SMITH. Well, the classifications and the examples that you give are such that certainly I, as a trial lawyer, admit that sound arguments on opposing positions can be made. Many of the decisions that talk about what a prosecutor is, whether an executive function or some other kind of function, have a different context. As lawyers we use those decisions to persuade in argument and we try to draw a position that favorably affects the position which we are now advocating. The truth and fact of it is that this is a unique situation, unparalleled in the history of this Nation, in which people at the top of the executive branch are being investigated.

We do not have experience with such a situation and those court decisions to which you make reference do not so indicate. Our experience with the common law, which is accepted in this country, our experience over the years, has indicated a lawyer before the courts cannot have a conflict of interest and properly discharge his responsibility. The Constitution provides that the only way a President can be tried is by impeachment. But, it also provides that if he were impeached and convicted, whatever crimes he may have committed, whatever investigation had been brought up during the period of time that he was President would carry over, and he could then be prosecuted in the courts, and that the conviction of impeachment would not exonerate him from those responsibilities.

It seems to me then that the people who drafted the Constitution must have had in mind that the President himself could not in any way control an investigation of possible crime in which he may be involved. And, while it is quite clear to me that the President cannot be tried or even indicted while he is the President of the United States, it seems equally clear to me under the Constitution that he can be investigated, and that he can be investigated by both of the other branches of Government. So it is my opinion that if the Congress wanted to investigate him in the impeachment process, they can; or, if the Congress wanted to authorize the courts to do that investigation through court procedures, that they could.

Mr. DENNIS. Do you belong to the school of thought, then, which feels that the President would have to be impeached and convicted, and removed from office before he could actually be tried for a criminal offense?

Mr. SMITH. Yes, sir, I do.

Mr. DENNIS. Of course, at that point he would be tried by the regular U.S. attorney, I suppose?

Mr. SMITH. Yes, sir; I think it would be proper. There would no longer be a conflict of interest then. A Special Prosecutor could do it, however. The matter is one of appearance. For example—I do not think that any judge or Prosecutor who had been appointed by the President should try him, even though he is no longer the President,

because there remains the appearance of a conflict. While there is no real conflict, people may wonder here if the man who received a lifetime appointment as judge, or an appointment as a U.S. attorney, from the fellow whom he is prosecuting, is really boring in and doing the job. While he might be, and, of course, we would hope that he would be, the appearance to people is also important—perhaps as important as the fact.

Mr. DENNIS. Well, now, of course it is a much debated question, as you know, whether he actually has to be impeached and removed before he can be tried.

Mr. SMITH. Yes, sir.

Mr. DENNIS. Supposing that is not so, or is ultimately held not to be true, and he could be tried while in office. He could certainly be tried, and normally would be tried by the ordinary prosecuting officals, the U.S. attorneys in the Department of Justice in that case, would he not?

Mr. SMITH. I would hope that any man who had a conflict of interest would disqualify himself from acting, and I think anybody appointed by the President, in my judgment, would have a conflict of interest, in prosecuting the President. That is why I am suggesting——

Mr. DENNIS. So you would have to have a Special Prosecutor in that case?

Mr. SMITH. That is what I am suggesting, that the Prosecutor should be somebody who is not appointed by the person who is being tried. I do not see how anybody could prosecute somebody who had given him the job. I know when Attorney General——

Mr. HUNGATE. Pardon me. If you are in politics a while, you can find that out.

Mr. SMITH. Yes, sir. I know that when Attorney General Kleindienst resigned, the President pointed out that the resignation was quite proper under ethical traditions because it appeared that he was going to have to investigate people with whom he had been closely associated. Well, that ethical principle still holds, and to me the principle the President enunciated there seems to be relevant here.

Mr. HOGAN. Would the gentleman yield briefly?

Mr. DENNIS. All right.

Mr. HOGAN. Does the witness feel a judge appointed by the President would be ineligible to try him too?

Mr. SMITH. Yes, sir.

Mr. HOGAN. Thank you.

Mr. DENNIS. We did have a somewhat similar situation in this country, and that was the famous Teapot Dome situation. In that case the Special Prosecutor was appointed, but the Congress passed a joint resolution authorizing and directing the President of the United States to make the appointment by and with the advice and consent of the Senate. And that was done. And, of course, the Special Prosecutor did go ahead and conduct those prosecutions, including that of the Attorney General, as you recall, for a period of about 6 years. That was the remedy used at that time. It seemed to work. What would you say to that approach here?

Mr. SMITH. In that case the President whose administration they were investigating was dead. The Executive officers who were to be

investigated did not have anything to do with the appointing authority, as I understand it. The new President did it, and he wanted the investigation made, but the investigation was not directed at him or his people. It was directed at other people.

Mr. DENNIS. It was directed at very high officials of the administration.

Mr. SMITH. Yes, sir. It was directed at the Attorney General, and they bypassed him there, and I think that was proper.

Mr. DENNIS. You see, the problem is that if you should be wrong and some of these fellows that think there are constitutional problems should be right, we start down that road where we might get all of these indictments thrown out, and what I keep thinking is, if you could follow a better established road, and somehow hedge it around with enough safeguards such as they attempted to do in the Teapot Dome, we might be a little safer. We could look a little silly down the road somewhere otherwise.

Mr. SMITH. I understand those problems, and I think that it would perhaps be constitutionally safer to do it exactly like you said. But, it would not do the job. The people of our country, in my judgment, are not going to be satisfied for the executive branch of Government at the highest levels, including the Office of the President, to be investigated by somebody selected by the President to conduct that investigation. It has the appearance of a conflict, as well as a real conflict.

Now, I know Mr. Leon Jaworski, and if he is selected, as is rumored, he is a very fine, independent man, and he will do a tremendous job. But, not everybody has the privilege of knowing him that well. Other people might wonder why he was selected by those people to make this investigation of those who selected him. Why could not somebody else select him? So, assuming that there are constitutional problems in the appointment of a Special Prosecutor by the courts, and I am not naive enough to suggest that others might disagree with my judgment on the Constitution here, I would still go that way because if the Special Prosecutor is selected in any other way, Watergate will continue to be with us. It is important that we get somebody who can come in here and either exonerate or convict these people who are under those terrible charges; that we get someone who can look at all of the facts and then can go before the people and say: I am independent; this fellow who I am investigating did not select me; somebody else did, and I have looked at all of the facts and these charges are unwarranted and these matters should be dropped. We need something like that, and until we get something like that, we are not going to be able to put Watergate behind us.

Mr. DENNIS. Thank you, sir.

Thank you, Mr. Chairman.

Mr. HUNGATE. The gentleman from South Carolina, Mr. Mann.

Mr. MANN. Mr. Smith, I first want to compliment you for your early response to the crisis of the weekend before last. In your statement of October 22 you indicated a feeling for the fundamental system of law in this country, which I am sure caused a lot of people to think clearly on that subject. A proposal is before this committee which would permit the chief judge to appoint a three-judge panel to appoint the Special Prosecutor.

Now, I realize that the American Bar Association board of governors did not have that alternative before them when you met. What is your offhand reaction to that suggestion?

Mr. SMITH. I basically think that it would be far better than having the Special Prosecutor appointed solely by the judge who was to try the case. Based upon past experience and feelings, I think also that that appointment would be constitutionally permissible. However, I do not think that it looks as good as for other judges to be involved. So, I think this panel idea is far superior to that. I do not think that the panel idea is inconsistent with the position of the American Bar Association. I think we envision that the court itself could set up procedures under its rules to discharge this responsibility if the Congress granted it to do it, and that they could by court role have a panel screen the selections for the court, and that such a procedure would not be inconsistent with what we asked for through the board of governors of the American Bar Association.

Mr. MANN. As lawyers, we appreciate the implications of a person appointing his own investigator or prosecutor, and we refer to the necessity of causing or making every effort to remove the appearance of any influence. But, because of the fact that we are dealing with a couple of hundred million laymen in this country, I wonder if we can articulate the problems that can arise from the appointment of a Prosecutor in this case by the President, and without any reflection upon the appointee.

Would you not, for example, say that such appointment would imply a prior consultation that would indicate that they are philosophically in tune, or that is, would imply that there is a tacit understanding that positions taken by the appointor would be complied with by the appointee?

Mr. SMITH. Yes, sir, I would. I may say, when I learned as I walked in here today that the President was going to nominate Mr. Jaworski that I got into a conflict of interest myself. I thought, how can I be theoretically honest here, when they have such a wonderful fellow whom they have picked, and who is my friend, and who I know will do a good job? And then I thought about it some more, and I decided that that does not answer the problem that I have been articulating, and that just the things you mentioned do exist, and that the people in my judgment would not be satisfied until it is a Special Prosecutor otherwise appointed. And so, I decided, after thinking about it, that my position should be exactly as it was yesterday, and that the appointment of Mr. Jaworski did not change it in any way.

Mr. MANN. Thank you, sir. Thank you, Mr. Chairman.

Mr. HUNGATE. Thank you.

Mr. Mayne.

Mr. MAYNE. Thank you, Mr. Chairman.

President Smith, I certainly wanted to commend you and the board of governors for the very active interest that you have displayed in this matter of such importance to our country. I feel that the people of the United States will be enocuraged by the American Bar Association's active participation, and I too want to say that I certainly agree with the point made in your testimony, that even though it was legal for the President to discharge Mr. Cox, there is no question that he had the power to do so, that it nevertheless was a very unwise and

unfortunate thing which was very damaging to the judicial process in the United States.

Now, I was interested in the answers which you gave when rather suddenly Mr. Hogan, my colleague on my right, asked you if a judge appointed by the President should be ineligible to try him, and you said yes. Now, on further reflection, do you still adhere to that view?

Mr. SMITH. Well, of course I understand that there are substantial legal implications involved in my answer and that the judge himself would have to decide whether within his own conscience he had a conflict which would require him to recuse himself. I do think from the appearance that it would be highly desirable that a judge not appointed by the President preside at a trial of the man who appointed him. But, legally each judge should be free to do his duty and discharge it as he sees fit and proper.

Mr. MAYNE. Well, now, would you extend that to the Supreme Court of the United States if the same matter were to reach it on appellate review?

Mr. SMITH. Not to the same degree, but it would at least concern me there.

Mr. MAYNE. Well, it is hard for me to believe, Mr. Smith, that you really would feel that it was not in the best interests of the people of the United States, or in the faithful administration of justice, to disqualify a distinguished lawyer and jurist, for example, like Louis Powell, from participating in such a major decision.

Mr. SMITH. I think——

Mr. MAYNE. Do you really carry this view to that length?

Mr. SMITH. I think that Justice Powell would be concerned about it and properly should be. There are of course differences between the appellate court and the trial court. When the matter gets above the trial level, the appearance of conflict becomes different in degree. But nevertheless, still I would be concerned about it.

Mr. MAYNE. Well, it is one thing to be concerned about it——

Mr. SMITH. I am not suggesting legally that a judge would have to disqualify himself if he determined that there is no bias and that he could render a fair and impartial judgment.

Mr. MAYNE. Well, it is one thing to be concerned about it, and it is another thing to seem to be laying the groundwork for disqualifying any Nixon appointee to the Federal bench from any consideration of any of these matters. And it seems to me that that is the sort of groundwork laid by the first answer that you made to Mr. Hogan, and I welcome some moderation of that view which you have now expressed, and I certainly would not want you to be held to a spur of the moment answer.

Mr. SMITH. Right. I think——

Mr. MAYNE. I would like you to have full opportunity to reflect on the implications of your first statement.

Mr. SMITH. Well, while you are putting words in my mouth, I think they are put there well, and I will accept them as my own. I do need to further reflect on it, but it still is my tentative position that we should be greatly concerned about it, and I would hope that on the trial level, if the situation ever arises, a judge appointed by the President would not try him. Now, the President could not be tried in my judgment,

while he was the President. So as I have said, if he was actually being tried he then would only be a citizen, and he would be an ex-President, and the conflict or the appearance of conflict would not be exactly the same. Certainly I am not suggesting that, I do not want to suggest that, the President is ever going to be tried. I do not know of anything wrong he has done except relating to the matters surrounding the firing of the Special Prosecutor, and that is all I am fussing about.

That is not a criminal matter, and I do not want to get into a hypothetical in which I indicate that I think there are real possibilities of a criminal trial of the President. I do not. And I do not know any reason to believe that there is going to be a criminal trial—of an ex-President, and I do not want, I do not want, to lay a predicate that is bad for anybody in the future. To that extent, I am very glad that you qualified my previous expression.

Mr. HOGAN. Would the gentleman yield briefly?

Mr. MAYNE. Yes.

Mr. HOGAN. I am sure you understand, Mr. Smith, that the Constitution mandates that the Chief Justice of the Supreme Court preside over any impeachment of the President.

Mr. SMITH. Yes.

Mr. HOGAN. He is also a Presidential appointee.

Mr. SMITH. Yes, sir.

Mr. HOGAN. So, would he have to disqualify himself and avoid the constitutional mandate placed on him?

Mr. SMITH. In my opinion, no, not under an impeachment trial. That is not a criminal proceeding, and I do not think it proper there that people who are his allies or in his parties, or who are his friends, or otherwise, disqualify themselves in the Senate, or the House either.

Mr. HOGAN. I submit it might not be a criminal trial, but the effect is the same.

Mr. SMITH. It certainly has grave consequences.

Mr. MAYNE. President Smith, this is not a criticism, but I noticed that you rather skirted over the constitutional problems here, leaving that to others, which is entirely proper. But, I am sure you realize that those of us who are sitting up here will have to very carefully consider those problems.

Mr. SMITH. Yes, sir.

Mr. MAYNE. And may I also say that I find it a good deal more comfortable sitting down there, rather than having to assume some judicial care in trying to consider both sides of the question. It is much better trying to be a distinguished trial lawyer like yourself.

I take it from your testimony that you are very strongly opposed to having any Special Prosecutor to be a member of the executive branch of Government?

Mr. SMITH. Yes, sir. I think that is the position of the American Bar Association.

Now, so that we would not misunderstand each other, I think that we want to get this matter of Watergate behind us, and if Mr. Cox had been left in, we recognize that he was always subject to those limitations that I have been talking about. But, we went along with his appointment and hoped the matter would be satisfactorily resolved. If the Congress comes up with these other proposals that have been

suggested by you and by others on this panel, well, in my personal opinion they may be better than the situation we have now. The association is suggesting what we think would be the optimum, and the optimum is that there be a Special Prosecutor, not appointed by those he is to investigate, and not in any way under the control of those whom he is to investigate. And that is what we ask the Congress to do.

However, I understand the possible constitutional problems. But, I think that you ought to resolve them by going ahead and doing it the way we have suggested. There will be problems if it is declared unconstitutional, but the other problems I have discussed will exist if other procedures are followed, and those problems are more apparent, and more real, and as long as they exist, we will not get rid of Watergate.

Mr. MAYNE. Well, at least it would be fair to say that you do have a strong preference for the solution being one in which the Special Prosecutor would not be a part of the executive branch?

Mr. SMITH. Well, the association wants him appointed by the U.S. District Court for the District of Columbia. I do not know that I can articulate well this concept Congressman Mayne, but I do not think that it is too important whether you characterize that the Special Prosecutor is part of one of the three branches of the Government or not. This is a special and unique circumstance, and the theoretical exercise of in which department the Special Prosecutor has to be placed should be reserved until the court has to consider the constitutionality of the office, if ever.

Whatever power exists, this is the best way it can be done, and we should try it.

Mr. MAYNE. Well, I am sure you would agree with me, and I think this is evident from what you have already said, that if a method of selection is used which is different from that which you would prefer, there could not be a better choice under this less desired method than Leon Jaworski of Texas?

Mr. SMITH. Well, I am not qualified to say who would be better than him. I am qualified to say that he is a splendid choice, and a splendid man, and a first-rate lawyer.

Mr. MAYNE. Thank you.

Thank you, Mr. Chairman.

Mr. HUNGATE. Ms. Holtzman.

Ms. HOLTZMAN. Thank you very much, Mr. Chairman, and thank you, Mr. Smith, for the very excellent testimony you have given us.

I find myself rather saddened by the fact that in this very distinguished committee room we are discussing the question of the trial, the possible or hypothetical trial, of the President of the United States, for possible illegal activities. And I think the testimony shows that our institutions of Government have to strain a great deal to deal with such concepts, and perhaps it would be best if every President conducted himself in such a way that the question of illegal conduct did not even arise. And I think in that regard I would like to ask you if you have any comments, and perhaps it is unfair because your testimony was not directed to that, about the question of the so-called missing tapes that has come up in Judge Sirica's court yesterday and today?

Mr. SMITH. I have no comments. I was surprised, and I am sure others were. That is the kind of thing that bothers me about this whole

matter. I think that there is substantial merit to the President's concern about Executive privilege, and his desire not to reveal certain information stored in the White House. And I think that those are legitimate positions that he can take and should advocate.

My problem has been his contention that he can unilaterally determine those issues, and that he does not have to present them to the court, and that he can direct the Special Prosecutor not to present them to the court for decision. It seems to me that is putting one man too high and too far, in a place where there is nobody who can take issue with him in the courts of our Nation, and I disagree.

I think that the President, in order to get out of the situation that he is in now, and I agree with him that this matter ought to get out of the Congress and into the courts, should turn over almost all of the evidence immediately, even though such action by him does grave damage to some of these principles he has heretofore properly raised. I think our country faces greater risk and greater damage from his continued refusal that it would form a bad precedent and we need to get to the bottom of Watergate to put it behind us and get on with Government. These are not my positions as President of the American Bar Association, but these are my positions as an individual lawyer who is gravely concerned that this matter has now reached such proportions that it materially affects the future of our country.

Ms. HOLTZMAN. Thank you. As long as most of us seem to agree on the need for an independent Prosecutor, and seem to agree also that the best way of assuring that would be to place the appointment in the hands of the district court and prevent removal by the President, if we are convinced that there is at least a sound constitutional basis for such legislation, do you not think that the best thing would be to go ahead and enact such legislation, have its constitutionality tested quickly on perhaps a request for additional Presidential material, so that we would not in any way jeopardize any indictments or trials further, but that we could proceed quickly in that regard?

Mr. SMITH. That is in accord with my sentiments exactly. I throw out as a gratuitous comment, even though perhaps I am speaking too fast like I did with Congressman Mayne a while ago. It seems to me that a desirable solution now is for you to pass the legislation, and for the U.S. district court to also then appoint Mr. Jaworski so the court too would have control over his discharge from now on, and that such action would perhaps eliminate some of the constitutional problems that have been raised.

I still think that there is the problem of the fact that the President and the Acting Attorney General selected him initially and he is going to be investigating the executive department. But my suggestion is at least a possible solution that would mitigate some of the possible problems I see for the future.

Ms. HOLTZMAN. Do you think a special prosecutor appointed by the President might be affected by the fact that Mr. Cox was fired because he sought Presidential papers and Presidential tapes, and therefore, any subsequent Special Prosecutor who sought the same thing might be fired? I mean, do you think that the Cox firing would act as some sort of an inhibition on the independence of a presidentially appointed Special Prosecutor?

Mr. SMITH. Yes.

Ms. HOLTZMAN. Thank you, Mr. Chairman. I have no further questions.

Mr. HUNGATE. Mr. Hogan.

Mr. HOGAN. Yes; I would like to thank Mr. Smith for his testimony, And I realize that since the firing of Archibald Cox took place on Saturday, and you issued your statement on Monday, that it did not really lend much time over that weekend for legal research into the constitutional questions involved. I, for one, and perhaps the other members of the committee would, however, be very grateful if the ABA would focus its resources on the very serious constitutional questions inherent in this whole issue. There are some very serious questions that I do not think any of us can reach a consensus on.

First of all, this is an unprecedented act we would be taking. There has never been a similar situation in the history of the Republic. Now, it can be argued that we never have had the situation that we now have either. But, I agree with Mr. Dennis's observation that we would hardly be doing a service to the public, or doing anything to shore up credibility if we went forward, and enacted legislation which subsequently was determined to be unconstitutional, and all of the indictments resulting therefrom were thrown out.

I would submit that that would strain the public's credibility even more. So, if there were some way that we could find a clearly constitutional solution to the independent Prosecutor question, I think we would be better serving our responsibilities.

Now, one of the items that you referred to justifying this was title 28, section 546, which really does not confer the authority that I think you are proposing or assuming it does, because in the cases where it has been tested, it has been clearly stated that the judiciary had no power to appoint any U.S. attorneys. It was only a temporary power, and I would like to quote briefly from a test of this in *United States* v. *Solomon*, where the court said, "The appointive power of the judiciary contemplated by section 506 [now 546] in no wise equates to the normal appointive power. First, the judiciary's power is only of a temporary nature. The appointment itself contemplates only a temporary mode of having the duties of the office performed until the President acts. Second, the exercise of the appointive power by the Judiciary in no wise binds the executive. The statute clearly contemplates that the executive branch is free to choose another U.S. attorney at any time, the judicial appointment not withstanding." And it goes on in the same tone.

And so, we really are on a pioneer edge of the law when we try to read into that section the power for a judge to appoint a Special Prosecutor.

I am also concerned about the inherent conflict of interest to have the Chief Judge appoint the prosecutor who is going to come before his court to present the case. And even the author of one of the bills which is pending before us concedes that this strains the constitutionality, and hence he has come up with a compromise for this three-judge panel. I would like to ask you, Mr. Smith, if you have any fears about the power that this Special Prosecutor would be given under the legislation before us, and to put that in proper perspective I will quote from the Bayh bill which states that this Special Prosecutor would be "authorized and directed, and have exclusive jurisdiction to investigate as he deems appropriate, and prosecute against, in the name of the United

States" and several things are enumerated. And number three says, "offenses alleged to have been committed by the President, Presidential appointees or members of the White House staff."

Now, he will, under this legislation, have all authority for all offenses committed by all Presidential appointees, including all judges all officials of the entire executive branch on their income tax cases, a speeding ticket on the Suitland Parkway, all of these things by this legislation would be given to the Special Prosecutor. In addition to that, he would have unlimited authority to hire as many people as he saw fit, and assigned to no one, and to compensate them in whatever way he deemed appropriate without any control from anyone.

Now, my question is, do you think that maybe we are creating a Frankenstein monster, creating someone that does not have to answer to anyone, to have unfettered power, and would be the strongest office of any officeholder in the United States of America?

Now, are we over-responding in order to come up with a political solution, and creating worse problems in the process?

Mr. SMITH. Well, that is quite a question. Certainly I am concerned. I for one am not ready in any way to have a permanent Special Prosecutor. I start off by saying, as you did, that this is a unique situation, and I am convinced that the Founding Fathers did not have these questions before them when they drew the Constitution. And the solutions that you suggest seem to me to have constitutional arguments that can be made against them, just as the other solutions do.

I think that we are not going to find a clear solution in the Constitution that would answer all of these questions. I am aware of the *Solomon* case, although I have not personally researched this matter at length. I read that case because I looked at the statute, and it was the only one cited right under it, and I could do it easily.

I believe that the courts have the right even without that statute to take the same action that statute permits them to take. We certainly do in my own State of Florida, and it has been exercised when there was not a statute.

A similar thing is done in many other States. Recently in Chicago, the State's attorney was under investigation, and the courts appointed a Special Prosecutor.

Now, while all of these things may or may not be constitutional, I do think that you are not going to find a situation that is in black and white in the Constitution.

Now, insofar as powers are concerned, the legislation should obviously be carefully drafted. Somebody ought to be in control of somebody, and somebody ought to have some rights to look at somebody. The appointing authority ought to also have removal authority. But, I am not too concerned about whether the Special Prosecutor will be investigating anybody's tax returns, or concerned about his finding crime wherever it may exist among public officials. This Special Prosecutor can only present things to a grand jury, and while it is certainly possible that we can have a runaway grand jury, the matter ultimately has to go to trial, and into the courts. So if people have committed crimes within the executive branch of Government, I am willing for them to be uncovered and prosecuted, and presented to the courts. And if they are tried and acquitted, I will applaud. If they are convicted, I will think the Prosecutor did his job well.

Mr. HOGAN. Well, I think one of our problems is that there is no such thing as a runaway grand jury in the Federal jurisdiction and I think we might find a solution in that regard because, as you know, an indictment must be signed by a U.S. attorney, which presents another problem we have to give to this Special Prosecutor. So, if I could restate your answer, you do feel that the Chief Judge of the U.S. District Court should supervise the activities, and the hiring of the Special Prosecutor?

Mr. SMITH. No, sir. The American Bar Association's position is that the appointment should be made by the U.S. District Court, not by the Chief Judge, and while I would not want the court supervising him, the U.S. District Court certainly should have the right to remove him and appoint another.

Mr. HOGAN. Well, I am sorry. But, if you do oppose the idea of giving him this unlimited authority to do what he sees fit, who would specifically supervise him, and if it would be the U.S. District Court, it would be the same court——

Mr. SMITH. Well, nobody should specifically supervise him, like the President himself does not specifically supervise those people that work for him. He does not know what they do on a day-to-day basis, but when things are brought to his attention he can remove them.

I would certainly give the authority, if there were abuses of authority by the Special Prosecutor, for the appointing authority to remove the Special Prosecutor.

Mr. HOGAN. But, it does not bother you that there might be any conflict of interest between a court appointing the Prosecutor being the same court where he is going to be presenting cases?

Mr. SMITH. If he was investigating the court, I certainly would not want the court to appoint him, but it does not give me any concern here for him to be appointed by the court and thereafter present matters to one of the judges of the court. That has traditionally been done in this country. I would assume that most of you perhaps all of you are lawyers, and that most of you have been appointed by courts in times past to represent either the State or defendants in court proceedings.

The court is in an impartial position, and it should have no more right to appoint somebody to represent a defendant than it should to represent the people of the country.

Mr. HOGAN. Well, I would like, in closing, I would like to thank you, Mr. Smith, for coming forward with your testimony, and I would request that if I am in order, Mr. Chairman, that the ABA supply a documented legal brief, if you will, on the various constitutional questions that we in this committee are trying to wrestle with to try to come up with some solution.

Mr. SMITH. Mr. Hogan, perhaps we can get some individual members of the association to do it. Congressman Mayne, as a former member of our House of Delegates, at least knows that I cannot present anything as coming from the ABA without having an emergency meeting, sending out 16 copies in advance to everybody you can talk to, and the House of Delegates voting on it. We have called an emergency meeting of the House of Delegates for December 10th, but I cannot present a brief in behalf of the association until that brief has been approved.

Now, individuals in the association can do whatever they wish, and I think that lawyers anywhere who have this helpful information—I know you have a substantial problem, and I do not want to minimize the constitutional gravity of any legislation—I think that such lawyers as individuals ought to help you.

I do notice that you have some fine ABA members who are going to testify right after me who are experts in the field of constitutional law. I also think that it is not feasible that we have an official brief as such because its approval would take too long. I hope that this legislation is resolved long before we can get through the needed processes. My situation is somewhat like asking the Congress to do something. To do so, I have to talk to a lot of people, and official action must be taken.

Mr. HUNGATE. Thank you, Mr. Chairman. Thank you, Mr. Smith.

Observations have been made, Mr. Smith, of the rather quick decision being made here. I suppose it is rather obvious to you as a trial lawyer that making quick decisions on difficult points of law is not an uncommon thing in the trial of cases, is it?

Mr. SMITH. Well, I am quite often wrong. I have lost a lot of cases, as they say.

Mr. HUNGATE. But, you have acquired the ability to make a quick decision on matters?

Mr. SMITH. Yes, sir. And I have won a lot, too.

Mr. HUNGATE. You do not favor a permanent Special Prosecutor. I am interested in that because we have had some testimony, I think from Congresswoman Jordan of Texas, and from one of our Florida colleagues, that a permanent office would be a good idea.

Mr. SMITH. I am not certain that I want to take my last or final position, but my tentative position is that there is no need for one, and I do not now favor one. In fact, I suspect that it could create great mischief.

Now, have given dabbling consideration in my past to some type of ombudsman who might go around and explore problems or complaints in all kinds of nooks and crannies for the people, but I never have been even completely sold on that proposal. I have kept looking at it, and perhaps ultimately we will find an even better solution.

The American Bar Association has created a long-range study committee to study all Federal law enforcement agencies and to make recommendations as to how their operations can be improved.

We advised this Committee through its chairman that we did. So,we are looking into all Federal law-enforcement agencies to see if we can make recommendations to the Congress as to where Federal law-enforcement agencies can be restructured; we hope to perhaps defortifize them to some extent. At this time I do not know whether we can ever come up with anything that we can agree on as an Association recommendation to you. It was our thought that we wanted to get out of the emotion and hysteria of Watergate, so we have a long-range effort underway. It will be at least 18 months, I think, before our studies are completed and our house of delegates votes on it. We will then bring anything approved to the Congress. Certainly I think we will look at the proposal for a Permanent Special Prosecutor and I would not want to finally conclude that it is undesirable. But, my own judgment is that this is a very unique situation with which we are now faced that we have gone almost 200 years without

needing a Special Prosecutor appointed by somebody other than the President of the United States, and that we may never have one again. So I prefer at least that the decision be made now on a temporary basis and that the permanent decision be made later on after some of the political nuances that are inevitably involved in any such situation as this have been dissipated, and our people and their representatives are looking at it fairly and objectively.

Mr. HUNGATE. Mr. Smith, you have stated, and others in these proceedings, have stated, that it is not only important that justice be done but that there be the appearance that justice is being done. I suppose that means we should travel one or two miles extra to provide the appearance of justice being done as well as the actuality.

Mr. SMITH. I think that what is needed here is to get this matter of Watergate finally resolved and behind us, and that we can only do it, I think, through due process and fair trials for those people who have had these allegations made against them. Certainly we have got to exhaust all legal remedies to get the necessary evidence before proceeding with those trials. I think it is fairly clear that some of these people that have been accused cannot be tried so long as evidence is in existence somewhere but not available for submission to the court, at least under our existing judicial decision. Such a result is not going to satisfy everybody until or unless they at least know what that evidence is. I am worried about that nationwide attitude of our citizens and I would like our country to get off of Watergate.

Mr. HUNGATE. Mr. Smith, if in the end we as lawyers must choose between justice and what appears to be justice, do we choose justice?

Mr. SMITH. Yes, sir.

Mr. HUNGATE. Thank you very much.

The next witness is Mr. Whitney North Seymour, Jr. The Chair welcomes you. Do you have an opening statement, Mr. Seymour?

TESTIMONY OF WHITNEY NORTH SEYMOUR, JR., FORMER U.S. ATTORNEY, SOUTHERN DISTRICT OF NEW YORK

Mr. SEYMOUR. I do, sir.

Mr. HUNGATE. The Chair has been lax in enforcing the 5-minute rule, but the Chair will no longer be lax, so that we can hear as many of our distinguished witnesses as possible. We appreciate your patience, sir. You may proceed as you wish.

Mr. SEYMOUR. Mr. Chairman and members of the committee and distinguished, able counsel and other members of the staff, I am very grateful for the opportunity of appearing here today. I do so from the vantage point of having served in this administration for 3½ years as a Presidential appointee and having been in charge of the U.S. Attorney's Office in the Southern District of New York, a fairly unique institution working within the Department of Justice that prides itself on a tradition of independence going back to the days of Henry L. Stimson, who was appointed by Theodore Roosevelt as the first salaried U.S. Attorney at the turn of the century.

I would like to offer some views that I have taken the trouble to write out in advance, and then I would like to address myself specifically to the constitutional question.

When Thomas Jefferson drafted the Declaration of Independence, some of the principal abuses he cited as grounds for throwing off the royal yoke and establishing a new constitutional government were dependency of the judiciary, invasion of the people's rights and obstruction of justice.

The Preamble to the Constitution of the new nation thereafter specified the establishment of justice as one of its major objectives:

> WE THE PEOPLE of the United States, in Order to form a more perfect Union, *establish Justice*, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Recent events have catapulted this nation into a constitutional crisis revolving around the abuse of Presidential powers in relation to the preservation of that justice which was sought to be secured by the Constitution.

Top members of the White House staff, other members of the executive department answerable to the President, and possibly even the President himself, have engaged or acquiesced in a series of unprecedented activities in direct conflict with fundamental notions of justice. Individually many of these activities have also been unlawful. Until recently it was supposed that those activities which constituted crimes could and would be prosecuted separately. By causing the discharge of the Special Prosecutor and forcing the resignation of the top officials of the Justice Department, the President's recent actions have now at least delayed and possibly have obstructed such prosecutions.

Obviously the first matter that must receive attention is the reestablishment of a Special Prosecutor's Office to investigate the various violations of law growing out of the 1972 Presidential campaign. It is not enough that the Acting Attorney General should select a Special Prosecutor, for sad recent experience has taught us that there can be no genuine guarantee of independence so long as the prosecutor can be summarily discharged by an official whose friends and former associates are the potential subjects of investigation and prosecution. Indeed, any man who now accepts the post against the background of recent events will have thereby already compromised the independence of the investigation by acknowledging the power of the White House to discharge him whenever he opposes its will. The public can never have confidence in the impartiality and objectivity of any investigation carried out under such a cloud.

The primary objective of Congress must be to guarantee independence for the new Special Prosecutor. This can easily be achieved by having him appointed by the Court as proposed in pending legislation. There are several commendable bills pending before the House to achieve this result. My own personal preference is for H.R. 11067, introduced by Mr. Moss and Mr. Dingell, which provides for appointment by the chief judge of the court of appeals. I have no hesitation in heartily endorsing the principles behind this bill on the understanding that sufficient resources will be provided to guarantee that the job can be done with complete effectiveness.

I do think it desirable not to risk disqualification of Judge Sirica in subsequent proceedings by placing the apointment on him. The chief judge of the courts of appeals, or the circuit council, or the

Judicial Conference of the United States would be suitable vehicles for spreading the responsibility. So would the full panel of district court judges acting in concert.

I do want to express the hope that the efforts of this committee will not be limited solely to the question of establishing a new office of independent Special Prosecutor to deal with the 1972 Presidential campaign. Many other problems have also arisen during the course of recent events which underscore the even more serious need of restoring public confidence in the impartiality of the entire administration of justice in this country.

Although we have all been shocked by the disclosures of the Watergate hearings, these have only served as a focal point for concerns which go much deeper. The insight which they have provided into attitudes of the White House toward the agencies of law enforcement and the courts give new significance to apparent abuses in the administration of justice over the course of the past several years. Among these are:

1. The White House has given the appearance of condoning violations of law of the most serious sort. No efforts were made on behalf of the President to insure proper conduct in the management of his 1972 reelection campaign or in the solicitation or handling of campaign contributions by his personal counsel or by top campaign officials. When the Vice President was recently sentenced on felony tax fraud charges he received a congratulatory letter from the White House which contained no hint of disapproval of the Vice President's betrayal of public trust and unlawful conduct.

2. The independence of the Federal judiciary has been undermined by such conduct as improper communications with the trial judge in the Ellsberg case, and by the White House's abdication of the responsibility for selecting candidates for the Federal bench and turning it over to local political leaders.

3. The President's pardon powers have been abused in such a way as to imply political favoritism and the use of executive clemency for political advantage.

4. Senior members of the White House staff have improperly used Federal investigative agencies for political purposes, including the FBI, IRS, and CIA, and have thereby compromised their independence and integrity and impaired public confidence in the civil service arm of Federal law enforcement.

5. The White House has improperly interfered with the proper functioning of the Office of Attorney General, most recently to such an extent that it forced the resignation of two very able public servants, thereby undermining respect for the Department of Justice.

6. The powers granted to the President for national security purposes have been perverted and misused in order to achieve political and other improper objectives, the full extent of which is still far from being known.

In addition to the immediate task of establishing a truly independent office of Special Prosecutor, therefore, the Congress should also direct its attention to rectifying these more long-range problems in the administration of justice before they result in permanent damage.

I propose for your consideration a four point program looking toward remedying these defects:

1. Comprehensive hearings should be held into the obligations of the Office of the President toward maintaining integrity in the administration of justice, and consideration of institutional changes that may be indicated to cure present inadequacies. Such hearings should cover such questions as the leadership responsibilities of the executive in discouraging illegal conduct by members of the administration, as well as by affiliated campaign personnel; executive responsibility to maintain the independence of the courts and participate in the selection of properly qualified judicial candidates who are required to be appointed by the President; standards for exercise of Presidential pardon powers; the proper relationship between the White House and Federal investigative agencies; standards for the nomination of candidates for Attorney General; the proper relationship between the Department of Justice and the White House; and some method of accountability for the lawful exercise of national security powers.

Such matters obviously might be the subject of hearings in connection with this committee's inquiry into whether grounds exist for an impeachment proceeding.

2. Legislation should be considered to divide the responsibilities of the Federal Bureau of Investigation so that its domestic security role, which often involves close liaison with the White House, is separated from its criminal investigative role, which should be maintained completely free of any possible political interference. Conceivably, the criminal investigative function might be combined with similar operations in other Federal investigative agencies into a single quasi-independent criminal investigative agency in order to eliminate the problems of duplication and of jurisdictional disputes which have interfered with the effectiveness of the FBI in recent years.

3. New legislation to prevent campaign abuses must be enacted. A number of good proposals are already before the Congress. Limitations on the amount of contributions, the use of currency, and new techniques to eliminate the need for raising such large war chests, are essential, including some form of public financing.

4. A new approach to enforcement of election laws is an absolute necessity. Fear of the consequences of "throwing the first stone" has largely immobilized enforcement by prosecutors on both Federal and State levels. There is little hope that any new campaign reform legislation will be effectively implemented so long as existing enforcement machinery is relied on to do the job. What is needed is some form of independent Federal Campaign Practices Commission, structured along the lines of the SEC, with concurrent civil and criminal jurisdiction to permit its staff to go into court to enforce campaign abuse laws. The Commission should have full investigative powers and should also have access to investigative reports from existing Federal agencies. This staff should be experienced and skillful. Indeed, in addition to present proposals to have a Special Prosecutor appointed by the court, it would be entirely feasible to establish a Federal Campaign Practices Commission as an alternative vehicle for appointing a Special Prosecutor to look into the Watergate disclosures, and thereby, I might add, avoid the constitutional question.

The powers of such a Commission should in any event be broad enough to permit such an investigation in the future whenever the

occasion arises so that a coverup of the sort we have witnessed will never be possible again.

In a letter to John Randolph, the first Attorney General of the United States, George Washington wrote: "The due administration of justice is the firmest pillar of good government." The administration of justice in the United States today is in a state of disarray. Investigations have been impeded. Prosecutions have been obstructed. High law enforcement officials who have dared to assert their independence have been forced out of office. The pillars of government are on very shaky ground.

No citizen can have confidence in the fair and impartial execution of the laws under these circumstances. The courts have done all they reasonably can. The executive branch has shown itself unable or unwilling to correct these abuses. The responsibility, therefore, inevitably falls upon the Congress. We look to you to take prompt and effective action to restore public confidence in American justice and in the faithful performance of the duties imposed on public officials under the Constitution of the United States.

* * * * * * *

That completes my prepared statement. I would like to add a thought or two on the specific questions of constitutionality.

I do not hold myself forward as a constitutional expert, but I have had the advantage of picking the mind of Michael D. Hess, formerly chief of the civil division in my office in the southern district of New York, and he has come up with several matters that bear on the issue. I suspect they are before the committee already, but let me just cite them to be certain.

One, of course, is *Ex parte Siebold*, decided by the Supreme Court in 1879; and the other is the *Solomon* case which was referred to during the questioning of Mr. Smith, decided in the Southern District of New York in 1963. I do commend to the members of the committee a reading of the full text of that opinion which really covers the historical antecedents going back to Montesquieu and Locke plus quotations from Madison, which make quite clear that the three branches of Government are not watertight compartments; that they do have, under our constitutional scheme, some flexibility. I think one would be foolish to assert that the constitutional question here is clear. It is a very difficult one, and I do not envy you your job in deciding it.

But it also seems to me that the spirit and tradition of the Constitution, which has been a history of flexibility in dealing with the great problems before this country, also is susceptible of producing a solution here that will work. And I suspect that drawing on the concept that created a separate way to go about impeachment proceedings, and drawing on some of the earlier precedents, it is perfectly possible to hammer out legislation which will guarantee the appointment of a prosecutor who is not subject to possible removal from the very focal point, at least indirectly, of his investigative efforts.

Mr. HUNGATE. Thank you very much. You have outlined your views with great clarity.

Mr. Kastenmeier?

Mr. KASTENMEIER. Thank you, Mr. Chairman. I would like to express my appreciation for Mr. Seymour's statement, particularly the tenor of it which was somewhat different from others so far, as it not

only listed the series of problems which give rise to the need for the Special Prosecutor, but also to suggest some solution. It gives a charge, I would suggest, to Congress as to how we might proceed.

Indeed, this committee, the Judiciary Committee of the House, is charged with having hearings into the administration of justice and consideration of how it can more effectively operate. Your statement is obviously positive insofar as it suggests not only that we treat the wrongdoing institutionally in the best fashion now available to us, but that we affirmatively seek by refinement of our institutions to prevent recurrence in the future. I think it is a very excellent statement.

Mr. SEYMOUR. Thank you, sir, and let me offer my continuing availability to the committee and its staff at any point as it progresses along this road.

Mr. KASTENMEIER. At this moment, of course, the committee is in the middle of a series of several very serious questions, the Special Prosecutor, and this subcommittee already having disposed of, at least as far as committee procedure is concerned, the grand jury continuation question, and with the Ford nomination, and the impeachment, all demanding a certain amount of expedition. This particular subcommittee of the House Judiciary Committee is already under a great deal of urgent strain as far as activity. So I do not know to what extent we can now proceed to go on to affirmative matters with respect to the administration of justice and other questions. But looking far ahead, I hope that the gentleman from New York will be of help to the committee in the future, in formulating and carrying out some of the changes that will respond to the present scandal and crisis. Thank you.

Mr. SEYMOUR. I am at your service.

Mr. HUNGATE. Mr. Smith?

Mr. SMITH. Thank you, Mr. Chairman.

Mr. Seymour, I want to thank you for coming before use and giving us the jewels of your experience and your thought in this regard.

Mr. SEYMOUR. Thank you.

Mr. SMITH. Am I correct that you are the immediate past U.S. Attorney for the Southern District of New York?

Mr. SEYMOUR. I am now a citizen—taxpayer and private lawyer. I resigned from the U.S. Attorney's Office effective June 1, of this year, after my able successor, Paul J. Curran, had been confirmed.

Mr. SMITH. Have you also had experience in the prosecutorial level in the State government?

Mr. SEYMOUR. Quasi-prosecutorial. Very briefly, I have had 6 years on the Federal level. I served as an assistant in the 1950's, under Judge Lombard in the same office and then as a U.S. attorney for 3½ years.

Mr. SMITH. In the southern district of New York?

Mr. SEYMOUR. In the southern district and, if I may say so, a great office, of which I am very proud. I also served as chief counsel to a State investigation commission in New York starting in 1959, looking into municipal corruption. That did not involve actual prosecution in the courts but it did involve investigatory techniques.

Mr. SMITH. During your experience as a U.S. attorney, or otherwise, Mr. Seymour, have you had any experience with Special Prosecutors?

Mr. SEYMOUR. Direct experience, no, except, and I do not think this is entirely relevent, in the cases in my office, where I would disqualify myself from acting, we would go through the motions of having an

acting U.S. attorney being appointed pro hac vice. I, of course, remember in my history of New York State the Herlands Commission, for example, and Charles Evans Hughes' remarkable work in investigating the insurance scandals 60 years ago. And the State commission of investigation, which I became counsel for a special unit of, although it does not prosecute in the courts, comes fairly close. It just recently concluded hearings in Albany, for example, disclosing extensive corruption in the local law enforcement machinery and, therefore, performing a very useful function of coming in as an independent outsider without being beholden to the local political structure, and being able to disclose violations of law which were then referred to the district attorney for actual prosecution in the courts.

Mr. SMITH. And this is a permanent State commission, is that correct?

Mr. SEYMOUR. That is a permanent State commission, the State commission of investigation and it is bipartisan, with four members on the commission, correct.

Mr. SMITH. When an acting U.S. attorney was appointed in cases where you had to disqualify yourself, was that done by an acting U.S. attorney in the Justice Department, or an appointment made by the Attorney General?

Mr. SEYMOUR. Well, in point of fact, it was really almost an administrative step. It was done by the chief assistant in my office who has been there for 32 years, just stepping into my shoes. And, you know, it was really kind of a miniscule——

Mr. SMITH. So he would already be an employee?

Mr. SEYMOUR. He was there and he knew the office fully and it was almost a formality as to who made the ultimate decisions, if they were needed.

Let me remind you of one other example coming out of New York in history, the Seabury investigation, which again, although not resulting in prosecutions in the court, certainly involved the most intensive kind of investigation of wrongdoing and led to the resignation of Mayor Walker. Again, I think there is quite a good parallel in fact, not in form, to what you are dealing with here.

Mr. SMITH. Am I correct, were you at one time president of the New York State Bar Association?

Mr. SEYMOUR. No. I am often confused, to my advantage, with my father who has been the president of the American Bar Association. I am currently a vice president of the New York State Bar Association and recently was elected chairman of its House of Delegates.

Mr. SMITH. I was not too far wrong on that. We do appreciate your statement and I must say that looking down the road, some of the work that you have suggested that we might undertake would give us a mighty full schedule. I think it is very important. I would hope that sometime we could get to that.

Mr. HUNGATE. Mr. Seymour, you perhaps heard the announcement this morning that the President is appointing Mr. Jaworski as Special Prosecutor.

Mr. SEYMOUR. Yes.

Mr. HUNGATE. Mr. Jaworski cannot be removed without the consensus of the House and Senate leadership and the chairmen and

ranking members of both the House and Senate Judiciary Committees. What is your reaction to this as it affects this legislation?

Mr. SEYMOUR. Well, the question I would ask is what is the enforceability of that undertaking? I had rather supposed that there was a commitment from the White House that Archibald Cox could not be removed. Certainly in the spirit of permitting the confirmation of Elliot Richardson after making a commitment with the full White House approval that Mr. Cox would have full independence, it seemed to me the White House's action was inconsistent with that. It was justified by a statement that there were subsequent events. Well, I would suppose here, "subsequent events" would be the justification for disregarding that commitment and, therefore, I really think from the standpoint of public confidence that really a statutory approach to building in independence, which can have no question at all about its enforceability, is essential.

Mr. HUNGATE. In other words, you think we should seek the best vehicle possible to provide a special and independent Prosecutor?

Mr. SEYMOUR. I certainly do.

Mr. HUNGATE. Thank you.

Mr. Edwards?

Mr. EDWARDS. Thank you, Mr. Chairman. I have just one question.

Do you think there ought to be a permanent Office of Special Prosecutor for use in investigating the executive department?

Mr. SEYMOUR. In the sense of the recommendation I made in my point 4, I think there should be a permanent standing agency to investigate and prosecute violations of the election laws. I do not think that ought to be left to the regular prosecutors because they just do not do it, and for understandable human reasons, but they do not do it. And I think that the powers of such an independent commission, which I suggest might be structured along the lines of the SEC, should include investigatory and prosecutor powers that could be adequate to cover the present Watergate situation, and any future Watergate situation of whatever scale, so in that sense, yes, I do advocate the permanent institution.

Mr. EDWARDS. Fine. Thank you very much.

Mr. KASTENMEIER (presiding). The gentleman from Indiana, Mr. Dennis.

Mr. DENNIS. Thank you, Mr. Chairman, and thank you, Mr. Seymour, for a very excellent presentation.

Mr. SEYMOUR. Thank you.

Mr. DENNIS. I wanted to ask you as a practical matter at the present moment how much danger do you think there really is that the President would remove a man like Mr. Jaworski without obvious grounds that would suit everybody who looked at them?

Mr. SEYMOUR. I do not know how you can fully predict the twists and turn of events, particularly in the months of shock that we have all been through. But, I have no doubt that if it served the White House's purposes (and I include the members of the staff, I do not just refer to the President) to decide that the new appointee should be removed, that he would be removed notwithstanding this committee, even if the leadership of the House and Senate balked at it. There is a commitment, but it is a commitment under present circumstances. And I do not think that is enough to rebuild confidence in the American

public in the true independence of that prosecutor. And, as a practical matter, I can conceive of circumstances under which he could be discharged.

Having now seen the discharge of Mr. Cox. If you had asked me ahead of time if I could have conceived of his discharge, I would have said no. You know the old story about "whiteman cheat Indian twice, shame on Indian."

Mr. DENNIS. Well, that is part of my point. It seems to me that to do it again right now, or in anytime in the foreseeable future to a respectable person who was in the job doing the job would be an exceedingly dangerous thing for the President to do. It seems to me that there is a constitutional remedy for that perhaps but it is not necessarily your legislation.

Mr. SEYMOUR. Could you have conceived, Mr. Dennis, that the President would have forced the resignation of Elliot Richardson and William Ruckelshaus?

Mr. DENNIS. I do not think he even foresaw that or he probably would not have done it.

Mr. SEYMOUR. With those kinds of events occurring in our past, I am not prepared to predict anything.

Mr. DENNIS. None of us can really tell about that, so let me shift over to something else for a moment.

As you acknowledge, there are constitutional problems with the approach which you are nevertheless advocating, so I have been trying to consider whether there is any way we could hedge about the removal power which normally flows from a Presidential appointment and thus pursue a little safer constitutional course. If you could have an appointment by and with the advice and consent of the Senate, which is a normal procedure, and then do something to hedge about the removal power that usually goes along with that, it seems to me it might be a little bit safer constitutionally. Have you ever given that idea any consideration?

Mr. SEYMOUR. I am not sure I have come up with the answer. Let me say parenthetically, that the *Solomon* case, of course, comes out with a different answer to the question that you addressed to Mr. Smith awhile ago. Judge Levet there found that the President had the power to remove an acting U.S. attorney appointed by the court. The only parallel that comes to my mind is, of course, the appointment of members of the Federal judiciary who are appointed for life, but that is a constitutional—no; I guess it is not a constitutional universality. It may be possible in your legislative powers to actually create life tenure during good behavior and that might achieve it, but, I would then be a little reluctant to see us get a Special Prosecutor unless he is within 4 or 5 years of retirement.

Mr. DENNIS. I do not believe I would want to go for that.

Mr. SEYMOUR. I think it is perfectly feasible to work out a machinery for removal for cause that does not require just an abdication of the removal power to the Executive on whatever basis might occur to him.

Mr. DENNIS. Well, for instance, we do have one bill in here by Mr. Biester of Pennsylvania which gives the appointment to the President subject to the advice and consent of the Senate, and then says that the President may remove him but only on a showing of cause in

accordance with the civil service procedures. It seems to me that that had some possible merit to it and I thought, myself, if you wrote this strongly in the law that this Special Prosecutor had every power and authority and was proceeding to do the job and then said that he could be removed only for, or could be removed for gross impropriety, but that before his removal the President should make a statement in writing to the Congress that he intended to remove him and stating why, then that might do something.

Mr. SEYMOUR. I know the point you are making and I, frankly, do not think the way to approach it is to try to put limitations on the President's power of removal. The reason Judge Levet said in the *Solomon* case that the President could remove the acting U.S. attorney was because the Congress had so enacted. He just referred to the statute and I think that it necessarily follows that if the Congress has the power to authorize the judiciary to make this appointment, that the other side of that coin is that the judiciary alone can be vested in the power for removal.

Now, the disadvantage as I see it of setting up an elaborate removal procedure which can be triggered by the President is that the moment someone with a motive other than sincere good faith wanted to obstruct the work of the Special Prosecutor, all he would have to do would be to initiate that proceeding and suddenly the Special Prosecutor is going to be fighting to hold on to his job rather than worrying about his responsibilities. So, you could effectively, even if the grounds were not found to exist, you could effectively blunt the operation of the Special Prosecutor by putting him on the griddle that way and I do not think that this is a desirable thing.

Mr. DENNIS. There may be no way out of the dilemma, but I must admit it worries me to adopt a scheme which we all know is constitutionally challengeable, and then have the indictment returned and an appeal, and maybe the court will throw them all out and what have we accomplished?

Mr. SEYMOUR. I would assume that a Special Prosecutor would get an indictment filed pretty fast and motions——

Mr. DENNIS. Tested out?

Mr. SEYMOUR [continuing]. Motions to quash will be before the court really in pretty short order. And, if it turns out to be unconstitutional, one could seek another remedy. Certainly I do not think the investigative function is unconstitutional because it will be done with grand jury process which is entirely legitimate, so that the work going on in the preliminary stages still will have been preserved. And I think it is probably a calculated risk that it is reasonable to take under the circumstances.

Mr. DENNIS. Thank you. The Chairman says my time is up. I would like to inquire about some of these specifics and possible reforms because I recognize that you are a man of experience on this subject, and you have made some pretty positive statements here that I really would like to develop. But, thank you very much.

Mr. SEYMOUR. I would welcome the opportunity and if this is not the time, I would be delighted to do it informally.

Mr. DENNIS. Thank you.

Mr. KASTENMEIER. The gentleman from South Carolina, Mr. Mann.

Mr. MANN. No questions, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Iowa, Mr. Mayne.

Mr. MAYNE. Thank you, Mr. Chairman.

I want to commend you, Mr. Seymour, for your very fine presentation which is certainly what the subcommittee would have expected from a person with your great reputation for the outstanding achievements in the Southern District of New York.

Mr. SEYMOUR. Thank you.

Mr. MAYNE. And like Mr. Dennis, I am very interested in some of your specific proposals. But, I believe, as has already been pointed out, they involve some things which are not really within the present scope of our immediate problem, but certainly as we get to these things later on, I am sure the full Judiciary Committee will want to take advantage of your kind offer to be of assistance.

What is your principal reason for preferring H.R. 11067, introduced by Mr. Moss and Mr. Dingell? Is it the fact that it would enable Judge Sirica to continue in the case?

Mr. SEYMOUR. Principal but not sole. I thought on balance, all of the provisions in that bill came quite close to a good workable program. I had a few minor quibbles about the power to direct the U.S. attorneys but then I figured out that that really had to do just with the specific prosecution, and probably would not present a problem. And I have a problem about voluntary cooperation from Federal agencies, because I think the Special Prosecutor ought to have the power to mandate cooperation from other agencies. But, apart from a few very minor points, I think the general framework is quite good.

Mr. MAYNE. Well, I would strongly agree with the prinicpal reason you had for preferring the bill because I share your view that it would be a great loss to risk the loss, at least, of Judge Sirica who has played such a key role in this case from the very beginning. And I think you will be happy to learn if you have not already, that the principal sponsors of the other proposals, which is their original form filed a week ago last Tuesday, definitely provided for the removal of Judge Sirica, have had second thoughts about that and indicated yesterday their willingness to withdraw that provision of their bill so that some other means of appointment would be used which would enable Judge Sirica to continue in his very important present capacity.

Mr. SEYMOUR. Good. I am glad to learn that.

Mr. MAYNE. Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentlewoman from New York, Ms. Holtzman.

Ms. HOLTZMAN. Thank you, Mr. Chairman, and I wish to thank my very distinguished colleague from the New York bar for his very forthright, very thoughtful; and very fine statement and testimony before us.

Mr. SEYMOUR. Thank you.

Ms. HOLTZMAN. I would like to ask you the following. Aside from the question of the appearance of doing justice and the question of satisfying the public concern about the integrity of the prosecution, what problems would you see arising from a non-judicially appointed Special Prosecutor, in other words, a Special Prosecutor who would be responsive to the White House? Can you give us a list of problems that might arise either in the compromising of trials that were to take place or in the possible misuse of immunity? I wonder if you might

just give us a list of some of the dangers you see if we do not have an independent prosecutor?

Mr. SEYMOUR. This response is really from the hip because I have not made a full list. But, I can give you some right off the top of my head that would really alarm me.

Ms. HOLTZMAN. OK.

Mr. SEYMOUR. First and foremost are the investigative resources. For Heaven's sake, if the FBI can respond to an order to go and lock Archibald Cox and the Attorney General of the United States out of their offices, on a White House instruction, now what is their true independence in providing the kind of investigative work and resources for a prosecutor who is built into the justice system and is dependent upon it? That is why I urge you to get to the business of considering the FBI when you can get to it. But, under present circumstances, I am deeply troubled by the sequence of events, first of all, with Patrick Gray and now with the new Director, Mr. Kelly, of appearing to be so involved in something that really should not—that they should stay away from. So, that bothers me.

Obviously, the grant of immunity is crucial in most of these investigations. You get a witness who is himself personally involved as, for example, a contributor of corporate funds. Now, a donor of corporate funds in the abstract is the fellow who ought to be prosecuted but if the contributor of corporate funds can give you testimony of what quid pro quo of governmental favors he was going to get in return for that consideration, then it is much more important to prosecute the offerer of the quid pro quo, and yet if the corporate donor refused to testify because of his own exposure to criminal liability, your only tool is to offer him immunity. And immunity, under the present statute, must be approved by the Office of the Attorney General. There just is no question about that. And I notice that one of these bills at least speaks to the question of the authority to grant immunity.

Ms. HOLTZMAN. If I might interrupt you at that point. You would see the abuse in the area of immunity being——

Mr. SEYMOUR. Denial.

Ms. HOLTZMAN. In the Special Prosecutor is wishing to grant immunity for the purpose of obtaining additional evidence that might be denied by the Attorney General?

Mr. SEYMOUR. Correct.

Ms. HOLTZMAN. Let me ask you: Do you see the possible abuse in terms of granting immunity to people who perhaps should not be granted immunity, in other words, insulating people from prosecution?

Mr. SEYMOUR. It is possible but it is a riskier thing obviously for a fellow who has public exposure to do, although I point out to you there has been recently a very real question about the grant of immunity to Mr. Sharp in connection with the matter regarding former Assistant Attorney General Wilson in Texas. So, it is possible for something to go wrong along the line, and, actually, in our expression to give an "immunity bath" to the wrong person. But, I think it is much more likely—and this is the kind of thing you really cannot point the finger of accusation at anybody—it is much more likely for someone who is so minded to say we will not grant immunity in this

case, knowing that it will prevent you from getting the evidence you want against an important person close to the administration, so that you cannot proceed.

Ms. HOLTZMAN. I did not mean to interrupt your entire train of thought. Perhaps you would see some other problems that we would be facing by the lack of an independent prosecutor?

Mr. SEYMOUR. I do not foresee any of the kinds of violation in which legal—and I emphasize legal, court supervised—electronic interception, might play in these kinds of cases. If it is conceivable, again the Attorney General has absolute veto power over that, so again you would have the problem of being denied approval when, for example, you have a witness who is cooperating with the investigation and who is prepared to follow through on some improper transactions, even in the course of the investigation. It is not out of the question at all. Our sad experience has taught us that somebody could try to fix evidence, fix prosecutive decisions, even in the work of the Special Prosecutor. Now, when that sort of thing comes along, if a cooperating witness says, look, I have been approached to do this, what should I do? Then the ideal thing in that situation is to get the approval from the Department under its policies for a consensual recording and put a recording device on the man to go into the meeting where they are going to discuss a bribery to obstruct justice. And you need that because you need corroboration, so that you will not have a "one-on-one" situation. If the Department can say no to that, then you have lost that opportunity.

Now, I have just given you three off the top of my head. Going all the way down the line there are such matters as disapproving vouchers for witness travel, or prohibiting assistants from going out of the District. There are just a million tight controls that can obstruct effective law enforcement.

Ms. HOLTZMAN. Mr. Chairman, since my time has run out, and this is a very crucial area for the committee to consider in terms of the need for the independence and, in fact, how to ensure it if we do decide to set up an independent prosecutor, I wonder if we might ask the witness to submit, possibly in the form of a letter, any additional areas where he would see problems arising?

Mr. SEYMOUR. I would be delighted to.

Mr. KASTENMEIER. Without objection, the witness will be so requested and we will be pleased to receive such information.

Now, the gentleman from Maryland, Mr. Hogan?

Mr. HOGAN. I have no questions, Mr. Chairman.

Mr. KASTENMEIER. If there are no further questions, the chair would like to express the gratitude of the committee to the witness for his appearance this morning.

Mr. SEYMOUR. Thank you very much.

[A letter from Mr. Seymour supplementing his testimony follows:]

WHITNEY NORTH SEYMOUR, JR.,
ONE BATTERY PARK PLAZA,
New York, N.Y., November 13, 1973.

Hon. WILLIAM HUNGATE, M.C.,
House Judiciary Committee, House Office Building,
Washington, D.C.

DEAR MR. HUNGATE: During the course of my recent testimony before your subcommittee in support of legislation to create an independent office of special prosecutor, I was requested to supplement my testimony by letter to identify

procedures and services essential to the effective functioning of a Federal prosecutor's office which might be susceptible to interference in such a way as to curtail the prosecutor's ability to investigate and prosecute violations of Federal law. Although the following list is not definitive, I believe it fairly indicates the major areas in which a prosecutor would be vulnerable to lack of cooperation or deliberate obstruction:

1. Grants of immunity from prosecution, frequently necessary to obtain witness cooperation, require approval by the Department of Justice. This applies to both formal grants of immunity and informal promises not to prosecute which would constitute estoppel.

2. Electronic surveillance, whether done without knowledge of the participants or with the knowledge of one party, presently requires Department of Justice approval. Consensual tape recordings are extremely important sources of necessary corroboration in official corruption cases.

3. Staff personnel—lawyers, file clerks, stenographers, etc.—require Departmental approvals, and particularly in the case of civil service personnel can exert a life-or-death influence on the operations of a prosecutor's office.

4. Investigative personnel to conduct field interviews and audit books and records are only available to a prosecutor with the permission of the head of the agency (FBI, IRS, etc.)

5. Criminal indictments must be signed by a United States Attorney or other authorized official of the Department of Justice subject to direction of the Attorney General. Cooperation of U.S. Attorneys may also be necessary in related investigations.

6. Authorization to incur travel expenses (as to interview a witness in another part of the country or abroad) requires prior approval by administrative personnel in the Department of Justice.

7. Authorization to incur litigation expenses for such items as fees for handwriting and similar experts and for stenographic transcripts prepared by outside reporters requires approval by the Department of Justice administrators.

8. Service of subpoenas within the United States requires cooperation from the United States Marshal's Service; service outside the U.S. usually requires assistance from both the Department of Justice and the State Department.

9. Extradition of defendants from foreign countries cannot be achieved without wholehearted cooperation from both Justice and State.

10. Access to official records from government agencies (in addition to the White House) ordinarily requires cooperation from the agency head.

11. Access to witnesses in custody of the Bureau of Prisons usually requires assistance and cooperation from Bureau officials.

12. Long-term and short-term protection of witnesses from physical harm cannot be arranged without Department of Justice approval and full cooperation from the Marshal's Service.

I hope the foregoing is of assistance to the committee in its important work.

Sincerely yours,

WHITNEY NORTH SEYMOUR, JR.

Mr. KASTENMEIER. Incidentally, the Chair will point out that there is a biographical sketch of the witnesses attached to the list of witnesses before each Member's place this morning.

The Chair would now like to call Prof. Gerhard Casper of the University of Chicago Law School as the next witness.

TESTIMONY OF PROF. GERHARD CASPER, UNIVERSITY OF CHICAGO LAW SCHOOL

Mr. KASTENMEIER. Do you have a prepared text, Mr. Casper?

Mr. CASPER. Mr. Chairman, I apologize. All of my efforts went into the research and not the typing and, therefore, I could not distribute a prepared statement beforehand.

My name is Gerhard Casper and I am professor of law and political science at the University of Chicago. I have been with the University of Chicago since 1966 teaching constitutional law and I have had some insterests in institutional matters like separation of powers. I have

recently, for instance, testified before the Special Senate Committee on the Termination of the National Emergency about the problem of emergency powers of the President.

In dismissing Special Prosecutor Cox, the President has created a situation which makes the further untrammeled investigation of the serious accusations leveled against the administration very difficult. The President, by this act, has made it clear that he will exercise at least some control over the Justice Department inquiry into possible wrongdoings of his own administration. In a manner of speaking, the accused controls the accusations against himself. This brings about, to say the least, an appearance that the administration of justice and its integrity could be subverted, that the President could place himself and his administration above the law. Four major options may be explored for overcoming these difficulties.

The first option, reestablishment of a Special Prosecutor by the President, is the option the President is now pursuing. It is very difficult to see how the appearances created by the President's affirmation of authority over the Special Prosecutor could be destroyed in this manner.

The second option is the appointment of a Special Prosecutor by the District Court on its own initiative. Such authority is nowhere conferred by statute. I do not know of any case where a Federal court has asserted such authority as an inherent power. 28 U.S.C. 543 gives the power to appoint special attorneys to the Attorney General. Moreover, rule 7(c) Federal rules of criminal procedure requires that any indictment shall be signed by the attorney for the Government. Present statutory law establishes a monopoly for criminal prosecutions in the Department of Justice.

I am turning to the third option, establishment of an Office of Special Prosecutor by an act of Congress which would also define the jurisdiction and powers of the Special Prosecutor. In this option, appointment of the Prosecutor would be by the President with the advice and consent of the Senate; the Special Prosecutor's tenure would be for instance for the life of the office. I am not advocating that solution, I am only offering this example to clarify the constitutional issues which are of importance and I think it will become apparent why I do so. This third option raises two major problems. (1) Can the Congress partially deprive the executive branch of the overall responsibility for executing the laws? (2) Can the President's appointment power, which the solution recognizes, be so limited as to exclude removal of the Special Prosecutor by the President?

The first of these two questions pertains to the separation of powers. The argument against the constitutionality of such legislation would have to be based on article II which vests the Executive power in the President. There is a considerable amount of loose thinking abroad about separation of powers and executive power, or rather the President's duty to execute the laws within the perimeters established by those laws. As the necessary and proper clause of the Constitution, as well as the history of the United States show it can hardly be argued that article II confers upon the President a monopoly for law enforcement. For instance, I have no doubt that article II did not do away with the common law system of private prosecutions as a matter

of constitutional law. The Government Prosecutor monopoly was conferred by statute. What the law gives, the law can take away.

Again and again, the Congress in the exercise of its sweeping powers under the "necessary and proper" clause, has established independent agencies. In *ICC* v. *Chatworth Cooperative Marketing Association*, 347 F.2d 821 (CA–7 1965), the defendants appealed on the ground that a statute permitting the Commission or its agents to initiate judicial proceedings to enforce the Interstate Commerce Act, violated the constitutional grant of the executive power to the President or his agents. The court rejected this contention. "[T]he function of initiating a judicial proceeding for the enforcement of a legislative enactment is not the exercise of a prerogative exclusively reserved to the President."

It seems to me almost indisputable that Congress has the power to set up an independent agency for the purposes of law enforcement where the administration of justice is endangered by the fact that the executive is charged with investigating itself.

Can the Presidential power of appointments be so limited as to exclude removal of an official by the President? The Constitution does not address itself to the question of removal except as far as judges are concerned. The President has no explicit power of removal. The Supreme Court has developed a rule in the cases of *Myers*, Humphrey's executor, and *Wiener* v. *United States* that suggests that only a purely executive official cannot be immunized by Congress against removal. The question is whether the executive character of an official is determined by his being charged with executive functions—as a prosecutor clearly is—or by his nexus with the President. Since the Congress can make an office ministerial in the sense that it is not subject to the President's direction but performs duties independently conferred upon it, it follows, in my opinion, that the removal power of the President can be excluded. The War Claims Act had not expressly refused the President the power to remove a Commissioner. Nevertheless, the Court concluded:

> If, as one must take for granted, the War Claims Act precluded the President from influencing the Commission in passing on a particular claim, a fortiori must it be inferred that Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing.

(*Wiener* v. *United States*, 357 U.S. 349, 356). To be sure, the Court's statement is made as a matter of statutory construction. I find it equally compelling, as a matter of constitutional construction in those areas where the President is not vested with discretionary powers by the Constitution, but is simply charged with executing the laws.

I am turning now to the fourth major option before you at this time: that is, establishment of an Office of Special Prosecutor by the Congress along the lines just suggested, but with appointment of the Special Prosecutor vested in the District Court for the District of Columbia. This alternative again raises two major questions: (1) Would the mode of appointment constitute an unconstitutional interference with the Presidential power of appointments? (2) Does appointment of a prosecutor by a court constitute an improper blending of prosecutorial and judicial functions in violation of the due process clause of the fifth amendment?

I am turning to the first question.

(1) What does article II, section 2 mean when it says that the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments? First of all, what is an inferior officer? I submit it is any officer who is not the President, a court of law or a department head and whose appointment is not otherwise provided for by the Constitution, as, for example, the appointment of ambassadors. A special prosecutor clearly falls into the category of an inferior officer. Indeed, 28 U.S.C. 543 provides a statutory precedent in empowering the Attorney General to appoint special attorneys. However, the convention debates do not offer any evidence for this or any other interpretation of the clause. I assume that the provision was intended as a delegation of appointments authorization not having our problem in mind at all. There is, however, nothing in the text of the clause which prevents option 4.

For an authoritative interpretation, we must rely on the courts. In ex parte Siebold, Mr. Justice Bradley, speaking for the Court, addressed himself in some detail to the separation of powers arguments as they pertained to the appointment of election judges by the U.S. circuit courts. He came to the conclusion that "as the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress." 100 U.S. 371, 397, (1879). Earlier, Mr. Justice Story had written in his Commentaries: "The propriety of his discretionary power in Congress, to some extent, cannot well be questioned. If any discretion should be allowed, its limits could hardly admit of being exactly defined; and it might fairly be left to Congress to act according to the lights of experience." And I call your attention in particular to the following sentence. "It is difficult to foresee or to provide for all the combinations of circumstances which might vary the right to appoint in such cases. In one age the appointment might be most proper in the President; and in another age, in a department." (2 Story, Commentaries 360–62; 1891 ecl.)

This view was subscribed to by the District Court for the District of Columbia in *Hobson* v. *Hansen*, 265 F. Supp. 902, 911 (1967). However, in any event, appointment of a prosecutor by a court can no way be said to be unrelated to court functions. Therefore, even in an abstract scheme of things, there is nothing unnatural about the Congress determining in its discretion that appointment of a prosecutor should be vested in a court of justice. Again, we have the statutory precedent in 28 U.S. 546, which gives the district court power to fill vacancies in the office of U.S. attorney.

As concerns the due process argument, that is, the improper blending of prosecutorial and judicial functions, cases like the U.S. Supreme Court decision. In *Rex Murchison* in 1955, and the southern district of New York case of *United States* v. *Solomon* (216 F. Supp. 835, 1963) suggest that the mere appointment of a Special Prosecutor by a court does not constitute an improper blending of judicial and prosecutorial functions.

I have, therefore, come to the conclusion, members of the committee, that as far as the power of Congress is concerned, there can be no doubt that both the route of appointment by and with the advice and consent of the Senate, and the route by the Federal District Court are

permissible. And I should mention that I have had doubts like everybody else before I began my research. But, I have now rather firmly reached the conclusion that the constitutional power cannot be doubted at all. The only question which remains, and which it may be more proper for you to determine than for me, is, of course, whether this is the wisest course in view of sentiments about the matter.

Mr. HUNGATE. Thank you very much. If you will please remain there then we will have each of the other two gentlemen come up and present his statement, and then we will question all of you as a panel.

Our next witness is Prof. Daniel J. Meador of the University of Virginia Law School. Professor Meador, we welcome you here and look forward to your contributions, sir.

TESTIMONY OF PROF. DANIEL J. MEADOR, UNIVERSITY OF VIRGINIA LAW SCHOOL

Mr. MEADOR. Mr. Chairman, I have submitted a written statement which I would request be entered into your record.

Mr. HUNGATE. Without objection, it will be made a part of the record.

[The prepared statement of Professor Meador follows:]

STATEMENT OF DANIEL J. MEADOR, JAMES MUNROE PROFESSOR OF LAW, UNIVERSITY OF VIRGINIA

I am Daniel J. Meador, James Monroe Professor of Law at the University of Virginia, where I have been a member of the Law Faculty since 1957, with the exception of four years during which I was Dean of the University of Alabama Law School and one year during which I was a Fulbright Lecturer in England. During 1972–73 I served as Chairman of the Courts Task Force which authored the *Report on Courts* for the National Advisory Commission on Criminal Justice Standards and Goals. Currently I am director of the Appellate Justice Project of the National Center for State Courts.

In response to the invitation of committee counsel, I am presenting my views on the constitutionality of a proposal that Congress create an office of special prosecutor, with a high degree of independence, charged with responsibility for investigating and prosecuting suspected offenses arising out of the Watergate episode and the 1972 presidential campaign. In varying forms such a proposal is embodied in H.J. Res. 784, H.R. 11043, H.R. 11067, H.R. 11075, H.R. 11081, H.R. 11132, and H.R. 11135. The comments which follow are directed to the constitutional validity of the proposal and not to its wisdom and desirability; the latter are matters for the political judgment of Congress.

Although the question is not free from doubt, my conclusion, supported by the reasoning set forth below, is that it is constitutionally permissible for Congress, in the present circumstances, to provide by legislation for a special prosecutor, with investigatory and prosecutory responsibilities as to specified matters, to be appointed by a federal court, and subject to removal only by the court.

1. THE CONSTITUTIONAL TEXT

Article II, Section 2, of the Constitution grants to the President power, with the advice and consent of the Senate, to appoint certain federal officials "and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." This is followed immediately by a proviso: "but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." For purposes of the question at hand, it is enough to read the words "such inferior officers" in the latter clause to refer only to "all other Officers of the United States" in the preceding clause.

It is unnecessary to consider here whether this provision would permit Congress to place in the courts the power to appoint officials unconnected with the courts. For a prosecuting attorney, like all members of the bar, is an officer of the court. In the criminal process he is as integral as the judge to the work of the

courts. See American Bar Association, *Standards Relating to the Prosecution Function and the Defense Function* 44 (1970). His role is so intimately involved in the judicial process that the prosecutor's office was dealt with at length in the *Report on Courts* (1973) of the National Advisory Commission on Criminal Justice Standards and Goals. Thus there is little substance to an argument that to authorize a court to appoint a prosecuting attorney is to involve the court in the appointment of a wholly unrelated official. Such an argument was made as to court appointment of board of education members in *Hobson* v. *Hansen*, 265 F.Supp. 902 (D.C. 1967), appeal dismissed, 393 U.S. 801 (1968). But even as to those board members, the court upheld the constitutionality of the statute vesting their appointment in the U.S. District Court for the District of Columbia. While that decision relied in the alternative on the special powers of Congress over the District of Columbia, it rested equally on the constitutional power of Congress under Art. II, Sec. 2, to provide for court appointment of officials (265 F.Supp. at 911–16).

In Ex parte *Siebold*, 100 U.S. 371 (1879), the Supreme Court sustained the constitutionality of an Act of Congress which authorized judges of the United States Circuit Courts to appoint "supervisors of election" in connection with elections of representatives to Congress. The supervisors thus appointed were authorized and required by the statute to attend at the times and places fixed for registration of voters, to challenge applicants, and to cause names to be registered as they thought proper; the supervisors were also required by the statute to attend the elections, to challenge voters, to be present when ballots were counted, and to inspect poll books and tallies. The argument was made that these supervisors performed only executive duties and that the courts could not be empowered to appoint officers whose duties were not connected with the judiciary. In rejecting that argument and upholding the statute, the Supreme Court said:

> The Constitution declares that "the Congress may, by law, vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law, or in the heads of departments. It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution; and, if there were, it would be difficult in many cases to determine to which department an office properly belonged.
>
> Take that of marshal, for instance. He is an executive officer, whose appointment, in ordinary cases, is left to the President and Senate. But if Congress should, as it might, vest the appointment elsewhere, it would be questionable whether it should be in the President alone, in the Department of Justice, or in the courts. The marshal is preeminently the officer of the courts; and, in case of a vacancy, Congress has in fact passed a law bestowing the temporary appointment of the marshal upon the justice of the circuit in which the district where the vacancy occurs is situated. [presently 28 U.S.C. § 565]
>
> But as the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress. (100 U.S. at 397–98)

In addition to the statute mentioned in the *Siebold* opinion authorizing court appointment of marshals, there is, and has been for many years, a statute authorizing a federal district court to appoint a United States Attorney whenever a vacancy in the office occurs in the district. 28 U.S.C. § 546. The constitutionality of this provision was sustained in *United States* v. *Solomon*, 216 F. Supp. 835, 838–43 (S.D.N.Y., 1963). As to both marshals and U.S. Attorneys, the court's appointment holds only until the vacancy is otherwise filled. But this is because Congress chose to couch the appointing power in those terms. The constitutional basis for the Congressional authorization of these judicial appointments is Art. II, Sec. 2, and nothing there limits the authorization to temporary appointments or to those necessary to fill a vacancy on an interim basis.

For present purposes, however, it is unnecessary to consider the constitutionality of a statute empowering the courts to appoint a general prosecutor for all purposes or on a permanent basis. The proposals under consideration all contemplate that the special prosecutor is to have a specifically defined province. He is not to roam over the entire range of suspected criminal activity in the nation. Rather, his authority to investigate and to litigate is restricted to matters arising out of specified activities—Watergate and the 1972 Presidential election. The life of the office is also limited to the time within which those matters are disposed of.

2. CONFUSING THE FAMILIAR WITH THE NECESSARY

Where an existing scheme is the only one we have known, there is often a misleading tendency to view it as the only one that is constitutional. Although there are scattered provisions in the federal statutes authorizing courts to appoint officials, most officials are appointed by the President or by a lesser executive officer. This is because Congress has arranged matters that way. The entire executive structure is, to a high degree, a statutory creation. The cabinet departments and their heads and sub-heads are all provided for by Acts of Congress. Provisions concerning the Department of Justice and its officials, for example, are found in 28 U.S.C. § 501 et seq. Though familiar and long standing, this arrangement is nevertheless not constitutionally mandated. The text of Art. II, Sec. 2, and such judicial explication as there has been of these clauses point clearly toward a choice vested in Congress as to the allocation of the appointing power.

Another familiar feature of our system is the placing of prosecutorial functions almost exclusively in an official who is considered a member of the executive department. This too gives rise to erroneous assumptions that the Constitution requires such an arrangement.

Here the English practice may be instructive. There is in England a Director of Public Prosecutions with a staff of lawyers: this office may be analogized to an American prosecutor's office. But relatively few cases are handled by that office. The basic principle in England, subject to a few exceptions, is that any member of the public may prosecute a crime. The prosecuting party need have no special interest in the case, although a prosecution is always conducted in the name of the Crown. Many prosecutions are carried out by the police, as they investigate and assemble evidence of offences; they prosecute, however, not as officially designated prosecutors but as members of the public, and they engage private lawyers to present the cases in court just as a private citizen would. Other prosecutions are at the instance of businesses such as insurance companies or of government departments such as the Board of Trade. Some are by private individuals. Jackson, *The Machinery of Justice in England* 154–65 (6th ed. 1972); Devlin, *The Criminal Prosecution in England* 16–19 (1960). The point is that there is no concept of an executive official, or any other official, with a monopoly on the prosecuting function. There is instead a multiplicity of prosecuting possibilities. In the main, private, non-governmental attorneys appear in court to present cases in the name of the Crown, at the instance of the prosecuting party who may or may not be a government official or agency.

While English practices are of course not binding on the meaning of the United States Constitution, they are significant in that they reveal attitudes about legal institutions held by a people with a common legal ancestry and with a traditionally high regard for civil liberties and government under law. The English way of handling prosecutions suggests that there is nothing fundamental to ordered liberty or government under law about having a monopoly of all prosecutions lodged in an executive officer appointed by the President. Nothing in our Constitution expressly prohibits an adoption of the English arrangement. But to sustain a court appointment of a special prosecutor, in the present circumstances, it is not necessary to go nearly so far as that. It is necessary only to recognize that all prosecutions for all offences need not be placed in the hands of one official or one department; a prosecuting attorney can be designated to handle a specially described group of cases, leaving all others to other prosecuting parties.

The English practice is instructive also in underlining the functional distinction between investigating suspected criminal conduct and presenting cases in court, that is, the distinction between the role of the investigator and the role of the advocate. In England criminal investigations are handled by the police; the presentation of cases in court is handled by solicitors and barristers. There lawyers appearing in court, in the name of the Crown, have no role in investigation. In the United States these roles are to a degree kept separate, but they are often blended. Many American prosecuting attorneys play an active part in investigating cases as well as appearing in court as lawyers for the state. The proposals for a special prosecutor contemplate combining the investigating and litigating functions in a single individual and office. The constitutionality of authorizing court appointment of a lawyer to represent the government in litigation, and to play no role in investigation, might be somewhat clearer because of the intimate relationship between advocate and court. But adding the investigating function to this advocate's responsibilities would not appear to alter the constitutional power of Congress to place the appointing power in the court.

3. SEPARATION OF POWERS

The doctrine of separation of powers is pointed to as an obstacle to the proposal for a Congressionally authorized, court-appointed special prosecutor. While nowhere expressly set forth in the Constitution, this doctrine is viewed as one of the premises on which the constitutional scheme rests. It is reflected in the creation of the three departments of government—executive, legislative, and judicial. But the special prosecutor proposal, if carefully structured, need not run afoul of the purpose of the doctrine.

The purpose of the separation of powers is to prevent the concentration of power and thereby to protect liberty and to guard against abuses of power. As Madison wrote on this subject in The Federalist (No. 47), "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many . . . may justly be pronounced the very definition of tyranny." And in this same paper Madison read Montesquieu—"The oracle" on the subject—as meaning "that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted."

Taking the prosecutorial function out from under the dominion of the President in no way runs counter to these concepts. The separation of powers is not concerned with the diminution of power; it is concerned about the consolidation of power. Thus there would appear to be no violation of the doctrine, properly considered in light of its purpose, in allocating the prosecution of certain described offences to one outside the executive branch. Indeed such a division of the overall prosecution role might be thought of as consistent with the purpose of the separation of powers doctrine by dividing power still more.

Apprehensions may be voiced, however, that authorizing a court to appoint and remove a prosecutor would move toward combining in the judicial branch the executive power in relation to those cases within that prosecutor's jurisdiction. But this need not be so for at least two reasons.

First, nothing in the proposed bills suggests that the appointing court is to control the prosecutor in his decisions and actions. Presumably existing law to the effect that a court cannot direct a prosecutor in the performance of his duties would continue. To make this clear, it might be desirable to include in the bill a provision expressly stating that a court may not exercise any control over the special prosecutor's discretionary decisions concerning the investigation and prosecution of cases. Grounds for removal should be spelled out.

Second, in order to insure that the "same hands" do not exercise the "whole power" of two departments, it might be wise to include in the bill a provision that no judge participating in the appointment of the special prosecutor shall sit in any matter handled by the special prosecutor's office and that no judge who has participated in any such matter shall participate in the appointment or removal of the special prosecutor. A provision such as this would also serve the salutory purpose of assuring future defendants in cases brought by the special prosecutor that the judge sitting in those cases would not have had any role in appointing the prosecutor and could have no role in his removal. The appearance of justice is as important as the fact of justice.

Considerations of justice and its appearance would also be served by vesting the appointing power in the court, or a majority of its judges, rather than in a named judge. Placing the power in the court would also be on firmer constitutional ground since Art. II, Sec. 2, speaks in terms of "the Courts of Law."

An argument of another sort is based on a premise that the Constitution vests in the President a certain minimum core of executive power which cannot be withdrawn by Congressional legislation and that the prosecution of federal crimes is part of this essential executive power. History and practice, however, rebut the idea that the prosecuting function must be lodged under the executive and can be placed nowhere else. The English practice, outlined above, is strong evidence that in Anglo-American jurisprudence there are a variety of legitimate arrangements for getting criminal cases before the courts. The view that there is nothing uniquely "executive" about a prosecuting attorney's role finds support also in the practices of some states in permitting a private attorney engaged by private persons to act as a special prosecutor. See 63 *Am. Jur. 2d*, Prosecuting Attorneys § 9, at 342–43 (1973). This view is also supported by the presence for many years in the U.S. Code of the provision authorizing a federal district court to appoint a U.S. Attorney when a vacancy occurs, 28 U.S.C. § 546. Indeed, state courts have taken the view that a court has inherent power to appoint a

lawyer to represent the state in criminal cases when the regular prosecuting attorney is disqualified or unable to act. See 63 *Am. Jur. 2d*, Prosecuting Attorneys § 11, at 344 (1973).

Whatever in general may be thought of as the core of executive power and as the lines of separation among the three departments of government, express provisions of the Constitution control. Thus the provision in Art. II, Sec. 2, giving Congress power to vest appointing authority in the courts governs, even if it appears not to accord neatly with the separation of powers doctrine. As applied to court appointment of a prosecuting attorney, in the special circumstances where Congress finds allegations and grounds of suspicion that the President himself and persons closely associated with him may have engaged in criminal conduct, that clause goes far towards answering any objections based on the separation of powers.

Whether it is wise for Congress to deal with existing circumstances by the proposed means is another matter. The proposal, for example, to create a position of special prosecutor to be appointed by the President and the Senate acting together, with restrictions on presidential removal, would avoid most of the constitutional arguments which can be made against vesting the appointment in the court. Such choices of means, however, are for Congress to make.

Mr. MEADOR. Thank you, sir. I appreciate your invitation to appear here and present my views on the constitutional question.

Now, I am limiting myself to the question of whether the Congress has the constitutional power to create a Special Prosecutor. I do not intend to address the issue of the wisdom or the desirability of doing that.

If agreeable with the committee, I would prefer not to read my statement, but rather to underscore two or three highlights, and to offer a few suggestions. Also, I would not try to repeat some matters which Professor Casper has touched on.

My beginning point in the analysis here, as with everyone else, is article II, section 2, of the Constitution which does include the clause giving Congress the power to vest the appointments of inferior officers in the courts of law. My conclusion, which I will state at the outset, after having studied the matter and brooded over it, is that this clause does empower Congress to create a Special Prosecutor of the sort being discussed here today.

I might address one or two arguments made against the constitutionality of this. There is an argument that this clause in article II, section 2, authorizes the courts to appoint only officials who are within the court's domain, some kind of inferior judical officer within the judicial structure. The Supreme Court seems to have rejected that argument in ex parte *Siebold*, when it sustained the statute which authorized the U.S. circuit court to appoint election supervisors who were not, I think, judicial officers by any view of the matter. The U.S. District Court for the District of Columbia also rejected that argument in *Hobson* v. *Hansen*, when it sustained the constitutionality of the statute authorizing that court to appoint members of the board of education.

Moreover, there is nothing in the text of the Constitution which suggests that limitation. Even that argument should be thought to have substance, it is my view that the appointment of a lawyer to represent the Government in the presentation of criminal cases is the appointment of an officer closely related and connected with the court. This is not a proposal to appoint an unconnected, unrelated official. A prosecuting attorney, like all lawyers, is an officer of the court. Indeed, in the American Bar Association Standards on Criminal Justice the position is taken that in the judicial process in criminal

cases we have a tripartite function. We have the judge, the prosecuting attorney, and the defense attorney. They are all integral to the judicial process.

I do think the statute which has been cited several times here this morning, 28 U.S.C. section 546, authorizing the appointment of U.S attorneys, does evidence a long understanding that courts may be given authority to appoint the Prosecutor. The fact that this particular appointment is temporary, or interim, is simply because that is the way the statute is drawn. It does not appear to me that the nature of that appointment is controlling in limiting the constitutional power of the Congress.

Now, I think there is a problem here in discussing this because of the very old and human problem of confusing the familiar with the necessary. There is a tendency in all of us to view any scheme that exists, or has been around as long as we have been around, as being the only constitutional way of doing things. In this country, in the Federal Government from the beginning, we have had the prosecuting function placed in the executive branch of the Government. I submit, though, that that is only because that is the way Congress set out to do it and we have adhered to that.

It also makes a lot of sense generally and in normal circumstances. However, I submit that there is nothing in the Constitution itself that mandates that arrangement. It seems to me that the idea of exclusive Presidential and Department of Justice control over criminal prosecutions, that is to say, a monopoly of the prosecuting function, is simply an arrangement of convenience and familiarity which we have. I can find nothing expressly in the Constitution that requires that nor do I really find anything there by implication. It seems to me, as far as the Constitution goes, that Congress, if it thought wise, could arrange the prosecutorial function in a variety of ways. One of the oldest means is private prosecution, allowing private persons to initiate prosecutions. That is the basic principle in England today and long has been. We could have prosecutions initiated by a variety of individual governmental agencies or officials. In State courts, as I am sure many of you know, there are arrangements whereby private persons may engage private lawyers to act as special prosecutors, and the courts permit that.

I cite all of these simply to say that in my view there is nothing so uniquely executive within the meaning of article II of our Constitution, or even governmental for that matter, that compels the use only of the President, the Department of Justice, or purely executive agencies for this purpose.

I would like to offer to the committee a few suggestions that have occurred to me as I have thought about this, on the assumption that Congress might want to propose a measure of this kind. I offer these thoughts as a way of strengthening the constitutionality of such a proposal, as well as its fairness.

The first is that it seems to me wise that there be in the bill specific findings as to the circumstances, presumably what Congress perceived to be the extraordinary circumstances which gave rise to the proposal, and that there also be a statement of purposes. In, for example, H.R. 11067, we do have a Statement of Findings and Purposes. I find that very helpful and I would submit that if the measures were adopted,

this would be helpful later to the courts if the validity of it were challenged. It is not that this is constitutionally required for the validity of the bill. It is merely that it is helpful to a court when it passes on a scheme to see the circumstances as Congress saw them and what the Congress perceived to be the problem, and what it was trying to do.

Second, I suggest that the scope of the prosecutor's role and the life of his office be specifically set out as detailed and as precisely as possible. I suggest this simply to avoid unnecessary apprehensions over the creation of a permanent prosecutor or an unlimited prosecutor.

The third suggestion would be to vest the appointing power in a court rather than a judge or designated judges. I say that chiefly because of the very wording of article II, section 2, which speaks of Congress' vesting appointing power in the "courts of law" rather than judges. Now, again, I am not suggesting it would be unconstitutional to place it in a judge. In ex parte *Siebold*, the statute was phrased in terms of the judge of the Circuit Court. I just think again it is safer. It might obviate one more argument that might be made against the validity of the statute.

A fourth suggestion or recommendation that I offer is that there be a provision written into the bill that the judge or judges participating in the appointment shall not sit in any matters arising out of the Special Prosecutor's activities. And, moreover, that any judge who has sat on any matters arising out of the Special Prosecutor's activities shall not thereafter participate in the appointment of any other Special Prosecutor and shall not participate in the removal of the Special Prosecutor.

I say this for two reasons: One is that it blunts to some degree the possibility of a Separation of Powers argument. To use Madison's words from the Federalist, the thing to be guarded against was placing the whole power of one department into the hands which exercise the whole power of another department. As to those cases which the Special Prosecutor is handling, he might be viewed as exercising the whole of Executive Power, if you will, or the power to enforce the law, and to place his appointment and removal into the hands of the judges exercising the judicial power might be seen by some to be the kind of consolidating of power that the Separation of Powers was designed to prevent.

To obviate any appearance of that, and here I heartily endorse Mr. Chesterfield Smith's concern about the appearance of justice, to obviate any appearance of that kind, I would like to see in the bill, any bill of that kind, a provision of the suggested sort.

A second reason for such a provision is that this serves very much the fairness and the appearance of fairness to any potential defendants. They are entitled to the assurance that any judge sitting on their case not only had no hand in the appointment of the prosecutor but would and could have no hand in his removal.

The last suggestion I tender is that there be a statement in the bill, which would really state existing law but there is a value in making it clear, I think, and that is that the court appointing the prosecutor would have no control over the prosecutor's activities or the exercise of any of his discretionary decisions. The court would have the power of removal, but I think it should be made explicitly clear that this in no way would extend to supervising or controlling the prosecutor's actions.

Thank you very much, Mr. Chairman.

Mr. HUNGATE. Thank you for a very fine statement. Your thoughts are most helpful.

Professor Mishkin, of the University of California Law School, is the next witness.

TESTIMONY OF PROF. PAUL J. MISHKIN, UNIVERSITY OF CALIFORNIA LAW SCHOOL

Mr. HUNGATE. Do you have a prepared statement?

Mr. MISHKIN. Yes, sir, I do. I would request that it be entered in the record.

Mr. HUNGATE. Without objection, your statement will be made a part of the record at this point. You may proceed as you see fit, sir.

[The prepared statement of Professor Mishkin follows:]

STATEMENT OF PAUL J. MISHKIN, PROFESSOR OF LAW, UNIVERSITY OF CALIFORNIA AT BERKELEY

My name is Paul J. Mishkin. I am professor of Constitutional law at the University of California at Berkeley. I welcome the opportunity to appear before this Committee which is dealing with what is undoubtedly a most important matter for the integrity of our government and the welfare of our country.

The subject to which I will address myself is the constitutionality of the Congress establishing a new Special Prosecutor to be appointed by a Federal judge or court and protected against removal except for his own misconduct, whose principal focus would be crimes relating to presidential election campaigns or misconduct on the part of executive officers. On initial consideration, proposals along these lines seemed to me to raise constitutional difficulty. On further study and reflection, however, I have concluded that an act of Congress creating such an office would be entirely constitutional. That conclusion is supported by the text of the Constitution, by authoritative precedent, by principle and by history.

The most direct source of the authority to vest such appointment in a Federal judge is Article II, Section 2 of the Constitution. After providing that the President, with the consent of the Senate, shall appoint "Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States" not otherwise provided for, that section continues:

> "But the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

The language seems plain enough. And on the basis of the Constitutional history as well, I have little doubt that the proposed Special Prosecutor would be an "inferior Officer" within the meaning of this provision. On the face of the Constitution, therefore, there seems to be no reason why his appointment could not be vested in a judge or judges of what the Constitution elsewhere describes as "inferior" Federal Courts.

The objection has been raised, however, that this language should be taken as allowing vesting in the courts of law only appointments of officers whose work is somehow judicial or related to the work of the courts. It would certainly be possible to make a strong case for the proposition that prosecuting attorneys would qualify even under such a restrictive interpretation; moreover, some early history of the Republic which I shall mention later would support that position. But it seems sufficient to say at this point that the Supreme Court of the United States has entertained that restrictive view but on full consideration decisively and unanimously rejected it. In 1880, the Court squarely held that while Congress might appropriately be guided by such considerations, the Constitution itself imposed no such limitation. *Ex Parte Siebold*, 100 U.S. 371.

The appointment issue might appropriately be taken as completely settled by this case. But one need not rest simply on authority, for this conclusion is well supported by reason, principle and history as well. Judicial appointment of the prosecutor, his independence from the executive, and his protected tenure of office is entirely in accord with the separation of powers which we properly consider a fundamental principle of the framework of our democratic government. The other

side of the coin of separation of powers is checks and balances. In the words of Justice Louis Brandeis, "Checks and balances were established in order that this should be 'a government of laws and not of men.' . . . The doctrine of separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments to save the people from autocracy." *Myers v. United States*, 272 U.S. 52, 292-93 (1926).

What must be emphasized is that separation of powers means not the building of high walls or watertight compartments between the different branches but the *sharing* of power among them. In the words of Mr. Justice Jackson:

> "While the Constitution diffuses power the better to secure liberty it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."

It would be possible to spell out many examples of this, but it hardly seems necessary. I cannot, however, resist pointing out the fact that in President Nixon's brief in the Court of Appeals in the Watergate Tapes Case, the President is described in a single sentence as both "Chief Executive . . . and Chief Legislator." (p. 11)

Our Constitution thus provides—and this has been considered its genius—for the kind of flexibility and development which are essential if a fundamental framework of government is to survive for long in a constantly changing world. Thus, with the industrialization of our society, it has now become well established that the Constitution permits the establishment of independent regulatory agencies with members having protected tenure and with functions that are fairly characterized as essentially mixed legislative, judicial and executive in nature. In view of some recent argumentation, it is perhaps worth noting that the essential charge and responsibility of such agencies is to execute the laws entrusted to their care.

In 1934, the Supreme Court unanimously upheld the constitutionality of a provision protecting the members of such a Commission against removal without cause. Rejecting an effort by President Roosevelt to remove a Federal Trade Commissioner, the Court held that protected tenure could be sustained whenever the functions assigned to an office appropriately called for such protection. *Humphrey's Executor v. United States*, 295 U.S. 602.

The protection of the Special Prosecutor's tenure against removal except for cause can easily be justified in terms of the function which the office is to perform. It is certainly not difficult to support the need for such insulation of an officer whose principal charge involves the determination and prosecution of criminality in high executive offices. If abstract reasoning is not sufficient to demonstrate that necessity, recent experience should certainly fill any lack.

Viewing separation of powers in light of its purposes, let us consider the effect of the proposals for an independent Special Prosecutor. He is to be charged with prosecuting crimes committed in, by or for the executive branch. Does this contribute to a concentration of power which is the danger sought to be avoided by the separation doctrine? Or isn't it, rather, fair to say that the creation of this office, particularly under present circumstances, would in fact constitute one of the checks and balances which are no less important than separation of powers in our scheme of government?

To be sure there is a danger when the role of prosecutor is too closely tied with that of the judge presiding over the trial. And this might be of constitutional proportions if one contemplates continuous supervision by a judge of the activities of the prosecutor. When, as contemplated by many of the bills presently before you, the judge will in fact merely be an appointing authority with limited power to remove, the dangers involved are of much smaller proportion. In fact, it may be worth recalling that judges sitting on criminal cases can appoint defense counsel, and presumable have the power to remove them if they misbehave badly enough in the conduct of the case, but no one seems to feel that this combination of powers represents a serious threat. Nevertheless, to be safe, and in order that justice not only be done but also be seen to be done, it would probably be at least the better part of wisdom for the appointing judge to disqualify himself from sitting on trials conducted by the Special Prosecutor.

Note, however, that the objection just considered arises from the point of view of due process or fairness to a defendant being prosecuted, and not from any claim of the executive branch. From the latter point of view, the objection raised is that prosecution is "inherently executive" and must be part of the

executive branch. Sometimes this is justified on the basis that prosecutorial decisions should ultimately be accountable to the electorate, and this can only be achieved through making the President responsible. I agree that ultimate accountability to the electorate is indeed an important element of our form of government. But it seems to me that the idea that this is only achievable by keeping all prosecutions under the President is much more attractive as superficial theory than sustainable in fact: On the one hand, it is certainly highly unlikely that prosecutorial decisions will become a significant element in any given presidential campaign. On the other, the Congress is also accountable to the electorate, no less than the President. And it would seem clear beyond question that, should such drastic action be necessary, Congress would have the absolute power to abolish totally the office of Special Prosecutor which it has created.

The phrase "inherently executive" needs further analysis. The term "inherently" normally is used to signify that a power may be inferred, though not expressly provided for in the Constitution, because it goes with a power which is granted by the Constitution. In that sense, I agree that the prosecutorial function is "inherently" an executive function—without being explicitly stated in the Constitution, it is clearly a function which can be derived from the duty to take care that the laws be faithfully executed.

But that concept of "inherently executive" does not mean that no one else may exercise a prosecutorial role. To support that conclusion, "inherently executive" must be made to mean instead "exclusively executive". And that proposition seems to me impossible to maintain. Indeed the very existence of the Grand Jury, with its duty of investigating corruption and other offenses, in government and out, and its power to stand astride the issue of whether any prosecution can be initiated, might itself be viewed as a refutation of that proposition. It is true that in recent years we have seen great centralization of the conduct of Federal criminal prosecutions in the Department of Justice. And while I consider that on the whole a desirable development, the reasons are reasons of policy and evenhandedness rather than constitutional necessity.

Certainly the early history of this country contradicts any idea that criminal prosecution was perceived as exclusively an executive function.

The Federalist papers considered the essence of the executive power to consist of foreign affairs, the planning and managing of appropriated funds, and military operations; in line with this concept, the original Departments of the government were Foreign Affairs (later State), Treasury, and War. There was an Attorney General, but he was not the head of a Department. There was no Department of Justice until 1870. There were local U.S. Attorneys but until 1861 they "remained formally independent of supervision by the Attorney General or anyone else, save as particular statutes gave to him or another officer, such as the Solicitor of the Treasury, a power of direction in particular matters." (Hart & Wechsler, *The Federal Courts and the Federal System* 67, n.2 (1953).)

The attitude of the Framers toward the function of prosecution as purely executive was thus apparently far from categorical. This is certainly suggested also by the fact that at least some of them considered it entirely appropriate under the Constitution that the local U.S. attorneys might be appointed by the district judges, and the Attorney General by the Supreme Court. That was the proposal of the Senate Judiciary Committee in the First Congress, whose membership included five members of the Constitutional Convention [out of first 8, then 10 members of the Committee]—including such leaders as Ellsworth and Paterson. Though this provision was dropped on the Floor of Senate (for reasons unavailable to us), the very fact of the Committee proposal indicates that prosecution was not conceived as ineluctably executive in nature. The notion of central executive control of federal criminal prosecutions is certainly of relatively recent vintage.

Finally, the idea that prosecution must be instituted and managed by a member of the executive branch is totally inconsistent with another fact of history: the First Congress (which has been viewed as virtually a continued session of the Constitutional Convention) explicitly authorized criminal prosecutions to be instituted and maintained to conclusion by *private individuals* (as well as public prosecutors); one example of this is a statute *outlawing larceny* in federal territory (1 Stat. 112, § 16 (Act of April 30, 1790)).

All of this confirms the basic proposition that—regardless of what some abstract concept of separation might imply—the concept of separation of powers under our Constitution certainly allows for an office such as is contemplated in the bills before this Committee. I have previously dealt specifically with the issue of judicial appointment of a Special Prosecutor. I believe that his inde-

pendence of the executive and his insulation from removal from office are also entirely consistent with the Constitution. I also believe as a general proposition that the power of removal may appropriately be assigned with the power of appointment. But in any event, in the present case, the same reasons that support the appointment of the Special Prosecutor by the judiciary equally support vesting the power of removal in the judiciary. As I indicated previously, I recognize that too great an aggregation of such power in a single judge may raise a question of fairness or due process for defendants in related criminal trials were that judge to preside over such trials. But that problem can be met. And I see no incongruity with the judicial role for a judge to exercise such powers over a prosecutor. We are certainly accustomed to such judicial supervision over grand juries, and no question can now be raised as to that. It is also true that under the First Judiciary Act and since, judges have exercised certain supervisory powers over United States marshals, who are law enforcement officers.

I thus have no difficulty with vesting the power of removal in a judge or judges. Other possibilities exist. But the choice is in my judgment for this Committee and the Congress. I do not believe that the Constitution bars a reasonable solution to this question.

Mr. MISHKIN. What I would like to do would be to use those ideas that have not already been broached. It is obvious to me this morning, if it were not clear to me before, that the committee is well acquainted with the leading cases and I will therefore not try to develop them as I have in the formal statement but confine myself to those parts that may perhaps add a little to the discussion this morning.

Ex Parte *Siebold* has been talked about and I am sure the members of the committee are quite familiar with it. The only point I would add with regard to article II, section 2, clause 2, is that I do not think there is any doubt that the Special Prosecutor would be an "inferior officer" within the meaning of that clause. I have heard some argument occasionally as to that point. There is precious little constitutional history as to how the clause was inserted but what little there is, plus the text, leaves little doubt in my mind that he is an inferior officer within the second clause of article II, section 2, that we have talked about this morning.

I might add that the use of the word "inferior" appears in one other place in the Constitution. That is, it talks about "inferior courts," meaning inferior to the Supreme Court. And in both contexts I think the purpose is to indicate a rank order, an officer of a certain rank, and I have no doubt that the Special Prosecutor would be within the "but" clause of article II, section 2.

I think that the question of checks and balances and separation of powers is perhaps the core of what we have been talking about and I would like to make one major observation on that. The phrase has often been repeated that the separation of powers does not mean the building of watertight compartments. I think perhaps it is even more important to look at it the other way, which is that separation of powers means a sharing of powers. Justice Jackson put it rather nicely when he said:

> While the Constituition diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

We have many, many examples of that. Rather than spell out examples, however, I cannot resist pointing out that in President Nixon's brief in the Court of Appeals in the *Watergate Tapes* case the President is described in a single sentence as both Chief Executive and Chief Legislator.

The kind of flexibility that Justice Jackson is talking about, and that the very concept implies, obviously can be demonstrated by all kinds of experiences we have had; I am sure the committee is aware of them. The independent regulatory commission is the most used example and probably the most noticeable. I think that flexibility is obviously what is necessary at this point.

If you view separation of powers in light of its purposes, the effect of the proposals for an independent Special Prosecutor, I think, is quite clearly not to raise the kind of dangers that are involved when we worry about too much concentration of power in one place. The Special Prosecutor is going to be charged with prosecuting crimes committed in, by or for the executive branch. Does this contribute to a concentration of power which is a danger sought to be avoided by the separation doctrine—or is it rather fair to say the creation of the office, particularly under present circumstances, would in fact constitute one of the checks and balances which are no less important than the separation of powers—which are in fact, in my view the other side of the coin of separation of powers?

There has been a good deal of discussion about the problem of the judge who makes the appointment presiding over the trial of related cases. I think that if you do, in fact, contemplate continuous supervision by the same judge who has the power of appointment and the power of removal, that does, indeed, raise a very substantial problem. But the proposals that have been talked about this morning—either having the whole court act or imposing restrictive limits on the role of the presiding judge—both do provide a solution to that problem.

What I would like to point out is that the objection that has been just talked about is one that is seen from the viewpoint of due process or fairness to the potential defendant. It is not the objection that is frequently raised, that the prosecution is "inherently executive and must be part of the executive branch." Sometimes that argument is justified on the grounds that you must have electoral responsibility in prosecutorial decisions, that the line of prosecutorial decisions has to be made ultimately accountable to the people and that this can be done only through the President. I agree that ultimate accountability is important. But it seems to me that the idea that it can be achieved only by keeping all prosecutions under the President is much more attractive in superficial theory than it is sustainable in fact.

On the one hand, it is obviously most unlikely that prosecutorial decisions will become a significant campaign decision issue on any Presidential campaign. On the other hand, Congress is also accountable to the electorate, no less than the President, and it is clear, I think beyond question, that should such drastic action be necessary, the Office of Special Prosecutor could be abolished by Congress at any point. Accountability can be had in more than one way.

What I would like to do is address just a little further analysis to the constantly used phrase "inherently executive." We usually use the term "inherently" to refer to the kind of power that you infer when it is not expressly granted. The term normally means that when the Congress grants certain powers but does not mention others, we consider the others as inherently tied in. In that sense, certainly, prosecution is an inherent executive power—in the sense that while not mentioned, it is clearly implied in the power and duty to see that the laws are faithfully executed. But to support the contention that the prosecution is

only for the executive branch, the phrase "inherently executive" has to be made to mean instead "exclusively executive." And that proposition seems impossible to maintain. The very existence of the grand jury, which has the duty of investigating corruption and other offenses in Government and out, and the power to stand astride of the issue of whether any prosecution can be initiated, is itself a partial refutation of that proposition. But history perhaps makes it even clearer.

We now think of the Department of Justice as centralizing all criminal prosecution by the United States. It is certainly true that that Department now has a tremendous degree of central authority, that it has resisted effectively the efforts of agencies to get the authority to prosecute independently, and that, indeed, it controls Federal criminal prosecutions generally. On the whole, I must say I consider that a desirable development. But the reasons I think that are reasons of policy and evenhandedness, and not reasons of constitutionality. Certainly in the early history of this country, it was clear that criminal prosecution was not an exclusively executive function and that it was not centralized. If you look at the Federalist Papers you find that the description of what is the essence of executive power is identified as revolving around foreign affairs, the planning and management of appropriated funds, and military operations; there is no reference to anything like prosecution. In fact, in line with that concept, the First Congress—which is sometimes treated as a continuation of the Constitutional Convention—set up only three departments, the Department of Foreign Affairs (later the State Department), Treasury and War. There was an attorney general but he was not the head of a department. There was no Department of Justice until 1870. There were local U.S. attorneys, but until 1861 they "remained formally independent of supervision by the Attorney General or anyone else save as particular statutes gave him or another officer, such as the Solicitor of the Treasury, a power of direction in particular matters."

The attitude of the framers toward the function of prosecution as purely executive was thus apparently far from categorical. This is certainly supported also by the fact that at least some of them considered it entirely appropriate under the Constitution that the local U.S. attorneys might be appointed by district judges and the Attorney General by the Supreme Court. That was the proposal of the Senate Judiciary Committee in the First Congress, a group which, as I think you all know, included quite a few of the original framers: five of the committee (first of 8 members and then 10), including Ellsworth and Paterson. In their proposal for the First Judiciary Act these people specified that local U.S. attorneys should be appointed by the district judges and that the Attorney General of the United States should be appointed by the Supreme Court of the United States. This provision was dropped on the floor of the Senate, and since the Senate met in secret at that time, we have no reason given. But regardless of the reason, this history certainly indicates that some of the leading framers, people who knew the temper of the times and the contemporary attitude toward prosecution considered judicial appointment a wholly appropriate possibility. And that itself reveals a great deal about the conception of what prosecutorial functions were.

Finally, as has been mentioned earlier today that we had private prosecutions, and not for unusual crimes only. The First Congress

again, just as an example, enacted a statute punishing larceny on Federal territory or of military munitions or food, and provided explicitly that the criminal action could be brought by a private prosecutor who carried through to conviction and, indeed, then recovered half of the value of the fine (which could be up to four times the amount of what was taken). If you have any doubt about the statute being penal, it also provided that on conviction the penalty included lashing of up to 93 strokes.

All of this history I think confirms the basic proposition of the concept of the separation of powers under our Constitution—regardless of what some abstract concept might imply—certainly allows for an office such as is contemplated in the bills before this committee.

I have dealt previously with the issue of judicial appointment as much as I thought necessary here in light of this morning's discussion. I believe that the Prosecutor's independence of the executive and his insulation from removal from office are also entirely consistent with the Constitution. I think as a general proposition that the power of removal goes appropriately with the power of appointment. In any event, in the present circumstances, I think the very same reasons that argue for the power of appointment to be vested in the judiciary also support the power of removal being vested there.

I recognize that too great aggregations of power in a single judge can raise the question of fairness or due process for the defendants who are involved in the trials. I think that problem can be met as we have said this morning. But, I would like to emphasize that I think there is no incongruity at all as far as the judicial role is concerned for a judge to exercise such powers over a prosecutor, not from the point of view of the defendant but from the point of view of the appropriateness of the judge doing it. We are accustomed to judicial supervision over grand juries and by now it is a little too late to raise any question about that. It is also true that under the First Judiciary Act and since, judges have exercised certain supervisory powers over the U.S. marshals, who are law enforcement officers, and done other things that quite clearly indicate that we accept that kind of a role (up to a point) in judges.

I think that treats most of the points that have not been dealt with, as far as I can see, and perhaps at this point it might be better to proceed by questions.

Mr. HUNGATE. Thank you very much for your very worthwhile contribution.

Mr. Kastenmeier.

Mr. KASTENMEIER. Thank you, Mr. Chairman. I only have perhaps two questions I should ask Dr. Casper who has done work in comparative law. There was an allusion of sorts by Professor Meador to British law. Granted that your parliamentary systems are different from our system, but, nonetheless, can you draw on any experience in terms of European systems of justice which might serve as a model for answering the problem that we have before us?

Mr. CASPER. Congressman Kastenmeier, there is always the danger once one has moved from Europe to the United States, that one suddenly becomes an expert on all European countries. I will refrain from doing that, but I do have one comparative observation on the German system of prosecutions.

Under German law of criminal procedure, there is no discretion vested in prosecutors. That is, there is no formal discretion in the sense that they can discontinue a prosecution for any reason. But rather, once there is probable cause, a prosecutor has to proceed. By the way, I have no doubt in my mind that Congress has the power to pass such a law if it so wanted. Such law may create more problems than it resolves but that is not the point here.

Now, under the German system it is also possible for the victim of a crime to go to court and challenge a prosecutor's decision not to prosecute. And indeed if the court finds that the prosecutor wrongly refused to prosecute, the prosecutor will be ordered to bring charges. There are no grand juries in Germany.

I think what that points to is the fact that the German system has remained distrustful of full executive control over prosecutions; that indeed it is viewing prosecutions more as a part of the general administration of justice and ultimate responsibility for the adminstration of justice lies with the courts, rather than with the prosecutors. Obviously, constitutional developments in the United States have been very different. However, I think the same basic principle, that in order to have justice done there must be some check on prosecutors is an applicable consideration.

Mr. KASTENMEIER. Yes. To get an overview of what we are facing, if the argument is that Congress cannot create an Office of Special Prosecutor for appointment by the courts and if we have a situation, perhaps hypothetical, where Mr. Agnew or the President had quashed any efforts to pursue prosecutions against him, either specially or within the Department of Justice, we are still left, of course, with impeachment, but I assume, very little else in our system. Would you not all agree? I address this to Mr. Meador and Mr. Mishkin, really. There is very little else other than impeachment? And I wonder whether that is necessarily a tolerable situation?

Mr. MISHKIN. I think it might have been—Madison had a concept of impeachment which perhaps would have sufficed. If you take a concept of impeachment which includes any kind of abuse of office that amounts to a substantial problem—maladministration is the word sometimes used, but even if you take it somewhat more narrowly—if you take Madison's view that the wanton removal of meritorious officers is a ground for impeachment, or the failure to control one's subordinates when they have abused the power you vested in them, and if that were realistic and had been the way impeachment developed through our history, it might indeed, have been a sufficient remedy. But I think it is clear that it has not been the way impeachment has developed in our history. To the extent, then, that it is a very remote kind of weapon, a weapon that is essentially used only in extraordinary circumstances, I think Congress needs to create other checks and I think Congress has the power to do so.

Mr. KASTENMEIER. Thank you, Mr. Mishkin.

Mr. HUNGATE. Mr. Dennis?

Mr. DENNIS. Professor Casper, I was interested in your view that either approach, either Presidential appointment with the advice and consent of the Senate, or judicial appointment, would be constitutional. And I was particularly interested in your statement under the first

approach that you felt it would be possible to put safeguards and limitations around the Presidential power of removal. And I was wondering whether you had any more specific suggestions as to the type of limitation that you think could be validly put on the Presidential power of removal, if we did go the route of Presidential appointment with the advice and consent of the Senate?

Mr. CASPER. In my statement I gave what I considered to be the most extreme example: appointment of a special prosecutor with tenure during the life of his office. By the way, if I may pursue this just for a second: as an idea it was suggested to me by the facts in *Wiener* v. *United States*, where the appointment of the Commissioners on the War Claims Commission had been for the life of the Commission.

An act of Congress could set up an Office of Special Prosecutor for a year or 2 years. It could then be prolonged or it could be cut short as Professor Mishkin pointed out. That also provides one check on the Special Prosecutor. That solution would seem extreme because o f clearly excludes the President from any authority over removal and I would say that if that is constitutional, and it is firmly my opinion that it would be constitutional, then anything less than that also would have to be constitutional. For instance, the appointment of the Special Prosecutor with the advice and consent of the Senate, and the removal of the Special Prosecutor by the President with the advice and consent of the Senate.

Mr. DENNIS. You think that would be valid in spite of the *Myers* v. *United States?*

Mr. CASPER. Yes, because I think *Myers*, in essence, is not good law any more. It has been overcome by *Humphrey's Executor* and *Weiner* v. *United States*, where the court held that when an office was quasi-judicial or quasi-legislative as, for instance, the Federal Trade Commission, that then Congress could limit the power of removal. Now, I am arguing that what is quasi-judicial or quasi-legislative is not something we can determine abstractly as Professor Mishkin has pointed out. It is extremely difficult to determine abstractly what is necessarily an executive function. One possible wa yof construing *Wiener* and indeed a way which I think would be in accord with the spirit of *Wiener* would be to look at the quasi-judicial nature in terms of the independence given to the office by the act of Congress. And, therefore, the President can be kept from removing the official.

Mr. MISHKIN. May I say something?

Mr. DENNIS. Yes, I would be happy.

Mr. MISHKIN. I do not agree that *Myers* has been overruled totally. I think that it certainly has been very sharply qualified in particular areas by *Humphrey's Executor* and by *Wiener*, as I am sure you all know. I do agree that in the case of the Special Prosecutor, the qualifications of *Humphrey's Executor* and *Weiner* would support what has been proposed, as I said. The point that I would like to make is that there is an awful lot of language in *Myers* which has not clearly been overruled which would suggest that if you provide by statute for a Presidential appointment with the advice and consent of the Senate, there is possibly a lot of constitutional argument ahead, because the language in *Myers* suggests that that route of appointment may very strictly limit the possible routes of removal. Indeed the

language goes so far as to suggest that if the appointment is made by a President with the advice and consent of the Senate, that proves that the appointee is a superior officer who is subject to the President and, therefore, perhaps cannot be removed other than by the President alone.

Moreover, if you add some of the history of Andrew Johnson and the Tenure of Office Act, a removal provision which said the President may remove only with the advice and consent of the Senate also brings you into a lot of constitutional argument. And much as I enjoy that, I think that the committee obviously thinks, and I agree, that that could present quite practical difficulties in the months ahead. So, that route involves some problems, too.

Mr. DENNIS. I would be glad to have Professor Casper's comment.

Mr. CASPER. May I respond?

I gladly stand corrected by Professor Mishkin in terms of my perhaps overbroad statement on the status of *Myers*. However, I would take exception to the statement Professor Mishkin is now making that once you go the route of appointment by the President with the advice and consent of the Senate, then the officer can be removed by the President.

Mr. MISHKIN. I did not suggest that.

Mr. CASPER. I am sorry.

Mr. MISHKIN. I suggested that if you go that route, and try to vest removal anywhere else, you may be involved in a lot more constitutional debate.

Mr. CASPER. Sure. But I come back to my basic point. You can foreclose all removal as, indeed, we are doing with Commissioners, the Comptroller General and so on, who are appointed for terms. The Comptroller General is appointed by the President with the advice and consent, but for a term. I think it is 14 years.

Mr. HOFFMAN. Fifteen.

Mr. CASPER. Fifteen years and can clearly not be removed.

I feel rather strongly that if removal can be foreclosed altogether, any lesser restrictions are also possible.

Mr. DENNIS. So, we get constitutional problems either way you go. But, I have been thinking, sort of thinking right along that if you could hedge this removal power about sufficiently, you would have fewer—proceeding in the more familiar route, fewer problems. I guess my time is up.

Mr. MISHKIN. May I make a comment?

Mr. HUNGATE. Yes, Mr. Mishkin.

Mr. MISHKIN. A one-sentence comment. It does seem to me it would be possible, whichever direction the committee goes, to include provisions in the bill expediting as much as possible the resolution of any constitutional question, and I think that would be desirable.

Mr. HUNGATE. I think a prior witness may have mentioned that the Civil Rights Act provides for an immediate constitutional determination.

Mr. MISHKIN. I have several ideas but I think most of them would involve simply a proceeding for a determination at a relatively early stage, either in prosecution, perhaps at indictment, or perhaps even earlier, and then providing for expedited appeals all the way up. But, there is one additional thing that is perhaps possible. If the President

wants to have a quick test he can refuse to sign the commission and since the Constitution requires that he commission all officers of the United States, a mandamus action, which has some precedent very early in our history, would be valid. As long as it was not brought originally in the Supreme Court, it would be possible to have a quick test that way.

Ms. HOLTZMAN. Mr. Chairman?

Mr. HUNGATE. Yes, Ms. Holtzman?

Ms. HOLTZMAN. Just on that point, who would bring the mandamus action?

Mr. MISHKIN. The officer. If you recall, my allusion was to *Marbury* v. *Madison*, although in that case the commission had been signed but not been delivered. Chief Justice Marshall's opinion was that the officer was clearly entitled to mandamus in those circumstances. I would suggest that if the duty of the President to sign is mandatory, which it is, then you would have the same case for mandamus here. What was wrong in *Marbury* v. *Madison* was they started at the Supreme Court level, but the action could be started by the judicially chosen Special Prosecutor at the court of appeals or the district court level, and you would have quite a sharply framed action.

Mr. HUNGATE. Mr. Edwards?

Mr. EDWARDS. Thank you, Mr. Chairman.

In addition to the constitutional argument that I am sure we are going to have to contend with further down the road in the committee, and perhaps on the floor of the House, it seems to me that the big argument is going to be with regard to the appointive power. Can any of you learned scholars see any kind of a resolution that you might approve of that would permit the power to remain in the President; or is the power of taking away the appointment from the President crucial to the issue?

Mr. MEADOR. You mean apart from any constitutional consideration, as a matter of policy?

Mr. EDWARDS. Of policy, yes, so far as policy is concerned.

Mr. MEADOR. Aside from any constitutional aspect?

Mr. EDWARDS. We have other legislative proposals that provide for appointment by the President with additional safeguards. Indeed the President this morning has offered his suggestion for an additional safeguard.

Mr. MEADOR. Well, the way I would see that issue, without trying to give a definitive or spur-of-the-moment personal answer, would be this: Will an appointment by the President, with whatever safeguards might be constructed around it, be seen by the American public to be the setting up of a truly independent and unfettered prosecutor? I am back to Mr. Chesterfield Smith's point about the appearance of justice. I thought on that point he was quite good and, that is, the questions that will be raised concerning the arrangements here, et cetera. That would be what I would be asking. I am not prepared to answer definitely at the moment.

Mr. EDWARDS. Of course, the Constitution does not provide that there must be the appearance of justice. The Constitution, I think, attempts to provide for justice, not necessarily the appearance.

Mr. MEADOR. I thought you had asked apart from the constitutionality of the whole matter, other considerations?

Mr. EDWARDS. Yes, we are talking about policies, aside from constitutionality.

Mr. MISHKIN. I think—if I may add—I think the answer to that question is clear, as was demonstrated this morning by Mr. Smith's testimony. There is no doubt that he values highly both the ability and the integrity of Mr. Jaworski, and I have worked with Mr. Jaworski and have no reason to doubt either. I have little doubt that, even if you should require the advice and consent of the Senate or any other panel, the probability would be very high that Mr. Jaworski would be confirmed. It would still leave the fact abundantly clear that his selection was made by the President; and that, in turn, would mean that any exoneration later would have a cloud over it. So that whichever way you go, nomination by the President leaves trailing ends down the road that would be unhappy.

Mr. EDWARDS. Mr. Mishkin, Roger C. Cramton, the dean of the Cornell University Law School, would answer you by saying quite simply to let it be, that if the new prosecutor did encounter the same difficulty that Mr. Cox encountered, then the situation would be so acute that there would be an immediate national drive toward impeachment. That would be the normal constitutional recourse. And so he says in his opinion that it would be better in the long run. After all, it is the first time in nearly 200 years that we have considered this course, that we should be wary of any extraordinary course which sometimes has results that we do not anticipate.

Mr. MISHKIN. I have seen Mr. Cramton's piece (by your courtesy) and I think it is an excellent brief. But I am not persuaded. I think the cost of going that way is extraordinarily high.

First of all, there may or may not be impeachment. If we have a repeat, for example, of the Cox situation, the odds certainly increase but there is no guarantee that it would happen at that stage; then we might have to go through another stage of this kind of discussion as to whether there should be a Special Prosecutor, and we have prolonged the agony.

Second of all, I think the dangers on the other side are not that great. They are only great if you assume the Congress is not going to exercise the kind of judgment that we have a right to expect it to, and which on the basis of history, we certainly have reason to believe they will exercise. Congress has rarely set up offices that go running about wildly. It has happened sometimes in the Halls of Congress, but rarely has it been delegated to somebody else.

Mr. EDWARDS. Thank you very much.

Mr. CASPER. Mr. Chairman, may I perhaps respond to a couple of points here on the impeachment question? I think we have to be really very wary of relying on that mode of enforcement for two reasons. The President has done a few rather extraordinary things, and yet inquiry into impeachment remains what Jefferson once called it, "a scarecrow." But, secondly, the Congress obviously has full discretion over the decision whether to impeach or not, and in exercising that discretion has also to take into consideration political matters which may be unrelated to the issue of Special Prosecutor. For instance, the war in the Mideast or any other emergency in the future. This would seem to make impeachment not very effective as a sanction.

Finally, in response to the overall situation, it seems to me important that we now get an orderly, and that means statutory procedure, for dealing with the Watergate complex.

From that point of view I would be very wary of the President's apparent proposal this morning that the Special Prosecutor whom he has nominated shall only be removed if he gets the consensus of the congressional leadership. With all due respect for those of you who are part of the congressional leadership, I do not quite know what kind of a constitutional body that is. It is nowhere defined. I do not know who belongs to it, and I do not know whether in all instances the congressional leadership will render its judgment on the basis of administration of justice considerations only. So, that seems to me not a very promising approach.

Mr. HUNGATE. I appreciate the gentleman touching upon the problem of defining who the congressional leadership is. It could be the group that meets at the White House and decides major questions. It could be the group that decides what legislation we consider next week, which I suppose is bipartisan, or in my Newsletter anyway I am part of it. I would certainly like to know who that group is.

Mr. Mayne, please.

Mr. MAYNE. Mr. Chairman, I am grateful to you for introducing that note of humor into this hearing this morning, because I think it is something that is sorely needed. Those of us both in government and in the academic world at times tend to take ourselves a little too seriously, and it is good to be brought back to a little better sense of balance. If you had not interjected the much-needed lightness into the situation, I was about to say that Professor Casper seems to really express a distrust and suspicion of anyone in government to make such a decision. But, after being brought back to my senses by the chairman, I will refrain from such comment.

Now, Professor Meador and Professor Mishkin, you seem to espouse the judicial appointment of the Prosecutor and have some serious misgivings about the constitutionality of the other approach. But, it seems to me you are quite at odds with another eminent scholar who was directly involved in this thing, Prof. Archibald Cox, who had to say on Sunday that he had rather serious reservations about the constitutionality of the judicial appointment. But, he said, as I understood his statement, and as he was quoted in the Washington Post, he said he would have no hesitancy at all in predicting the constitutionality of a bill that allowed for appointment of the Special Prosecutor by the President with the advice and consent of the Senate. And which also included very strict limitations on the power of removal. He seemed to think, at least at that time, that you would run less, much less risk of danger of constitutional objection by going that route and by very closely restricting the grounds for removal.

Now, I understand also that there has been some change of heart or mind on Mr. Cox's part since then, and that he may not now still adhere to the views that he expressed so eloquently on Sunday. But, that will be cleared up when he testifies. But, what do you have to say as to that approach?

Mr. MISHKIN. Well, as you pointed out, I think Professor Cox said that on further study he changed his mind as to the doubts on judicial

appointment. At least, that was what was reported in the papers. On the other hand, I did not mean to suggest that I have a doubt about the constitutionality. I think those would be constitutional.

Mr. MAYNE. What would be?

Mr. MISHKIN. To have power vested in the President to appoint with advice and consent and some controlled removal, such as, indeed, by the President with the consent and advice of the Senate.

Mr. MAYNE. Would you think then that this might be a safer way for us to proceed, to try to concentrate on adequate restrictions on removal, and going that route rather than the judicial appointment which does seem to have some body of authority against it?

Mr. MISHKIN. Well, it depends on what you mean by safer. In my judgment, the odds are that either solution will be upheld when it is tested. What I was suggesting was that, though it is my opinion that the route you suggest would be constitutional, I think it would be open to litigation. And, regardless of what the odds are, in my judgment both will be sustained, but the delays and turmoil involved in litigation, cannot be avoided either way. That was the point I was trying to make.

Mr. MAYNE. Thank you.

Mr. HUNGATE. Ms. Holtzman.

Ms. HOLTZMAN. Thank you, Mr. Chairman.

I do not know if I have enough time, but I really have two questions that go really more to the constitutional language and some of the history and perhaps, if I ask them both, then I can get my 5 minutes adequately taken care of.

My first concern is: Is there anything in either English history or history prior to the Constitution regarding the practice of courts of law in using the appointment power? I mean, was this an appointment power that was dreamt up by the constitutional framers or had the courts of law been exercising an appointment power prior to that time? And is there any experience that would be enlightening in that regard? That is my first question.

The second one really has to do with the definition, the parsing out of article II, section 2, and is it really a question of congressional interpretation. What is an inferior officer? Is that something Congress can decide simply by giving power to the President of appointing with the advice and consent of the Senate, or is there some other standard that can be used? Does the Congress have an absolute right under these words, "as they think proper," to give the power of appointment to the President or the head of a department or a court of law with respect to any appointment of an inferior officer? I think I would certainly find useful any help from you in parsing out the constitutional language of article II, section 2—and also on the historical experience of the appointive power of the courts of law.

Mr. CASPER. Should I respond perhaps?

Mr. HUNGATE. Mr. Casper.

Mr. CASPER. First, I should like, as a point of personal privilege, to respond to Mr. Mayne that I am far from being distrustful of the Congress. I just tried to argue that we need now the most orderly, that is, the statutory proceeding we can possibly have, most immunized against further politics, or immunized against further politics to the farthest possible extent, and that was all the point that I wanted to make.

As to the appointment powers of the courts, I did attempt to research that as far back as the King's Bench, Ms. Holtzman, but I did not really get very far because the time did not permit it. One case I was able to read suggests that indeed the King's Bench in the exercise of its overall supervisory powers did claim such an appointment power. But I cannot be altogether certain. But, I wonder, however, whether that is not in a way asking the wrong question because whatever may have been the situation before, in article II, section 2, such appointment power is clearly given to the courts.

Now, that has never been in dispute. Justice Bradley in *Ex Parte Siebold* said there would be no doubt that they could appoint even marshals who are clearly, as Professor Mishkin pointed out, law enforcement officers. And I think the only problem we are left with is the definition of inferior. And I have two suggestions to offer. In a way, article II, section 2, is self-defining. That is, it is clear by article II that Congress may not vest the appointment of the head of a department in the President alone. But, otherwise, anybody who is not President, a court of law, or head of a department is an inferior officer and I think indeed the theory is borne out by precedent and, that is, that the United States Code presently provides that the Attorney General can appoint special prosecutors.

Now, that is indeed an application of this provision and it clearly defines a Special Prosecutor as inferior. It is only statutory precedent but I think it is quite sound. The Attorney General is the head of a Department, who is presently, by statute, vested with the power of appointing on his own initiative a Special Prosecutor.

Ms. HOLTZMAN. Thank you. Perhaps the other professors might be willing to answer that?

Mr. MEADOR. I might just answer on the power of the court to appoint. I think there is some relevant history and practice here. Traditionally, you can find in a lot of places the statement that courts have inherent powers to appoint members of the bar to present matters before them. This has come up in recent times chiefly in connection with defendants in criminal cases before we had the present constitutional requirements. Courts for many, many years, decades, have appointed lawyers to represent defendants even though they may not have been constitutionally compelled to do so, and even though there was no statutory authority to do so. There are cases scattered around in the State courts in which the State court has appointed an attorney to represent the State in a criminal case, to present the case in the name of the State. And I would not doubt, for myself, that every court has that power even in the absence of statute.

I would think, for example, that the U.S. District Court, even if we had no statute at all on the point, would have the power to appoint a lawyer, a member of the bar, to present a prosecution before it if that was necessary. I think courts have that inherent power and I think there is a good deal of historical evidence in the last 150 years in this country to sustain it.

Mr. MISHKIN. On your second question, maybe it would be helpful to review how that second clause, the "but" clause, got into the Constitution. The Committee of Style had reported the first clause only, in effect dealing with ambassadors, other public ministers, Justices of the Supreme Court, heads of departments and all other officers not other-

wise provided for and which would be set up by law (and vesting their appointment in the President with the consent of the Senate). That was all there was.

A motion was made on the floor to add the "but" clause regarding inferior officers. The objection was raised that if it was necessary it did not go far enough because it ought to be possible to vest appointment power still further down. At this point, a vote was taken but it was evenly split, so that the matter would have ended with the clause not being adopted. Someone then pointed out that it was necessary to have this clause, or some such provision, because the language that was in would not be adequate. And at that point, it was unanimously passed.

It seems to me that the history indicates that the inferior officer goes right up to anybody inferior to the ones named. Perhaps even the judges of the inferior courts.

Ms. HOLTZMAN. Thank you.

Mr. HUNGATE. Mr. Hogan?

Mr. HOGAN. Thank you, Mr. Chairman.

Mr. Meador, you are not saying that Federal judges, and judges, have appointed prosecutors?

Mr. MEADOR. I have no evidence that, in the absence of statute, a Federal court has ever appointed a prosecutor. I would not say it has not happened, but I can cite you no instance. I was speaking of the experience as reflected in a number of State-reported decisions.

Mr. HOGAN. One distinct difference is that, for a valid indictment, the U.S. attorney must sign the indictment returned by the grand jury, a true bill returned by the grand jury, which is a big distinction which I think separates the Federal courts from the State.

Mr. MEADOR. If I might add a point: I see quite a difference between a court directing a prosecuting attorney as to what he may or may not do and the question of appointing him. The court may appoint but may not control. That is the way I take it to be the law.

Mr. HOGAN. Of course, the only clear case is the *Solomon* case where it was made very clear by the court that their power to appoint a temporary U.S. attorney was only until the President exercised his authority to appoint a permanent one.

Mr. MEADOR. Yes, by virtue of statute.

Mr. HOGAN. Yes, by statute.

Mr. MEADOR. I do not think the court there relied upon the Constitution.

Mr. HOGAN. No, but it was interpreting the statute.

Mr. MEADOR. Correct.

Mr. HOGAN. I assume you were in the room earlier when the president of the American Bar Association stated that he did not think any judge appointed by the President would be competent to preside over any of these matters. I would ask if you share this feeling, and point out that any of these constitutional issues which might go to the Supreme Court of the United States would obviously have to be acted upon by presidential appointees.

Mr. MEADOR. I may have misunderstood Mr. Smith, but I took him to be saying—at least I thought he said—that he did not think that any district judge or any judge appointed by the President should preside over the trial of the President. I did not quite understand him to say that no judge appointed by this President should participate in any matters arising out of the Watergate or other related problems.

I thought it was a narrower point—that the trial of the President himself should not be presided over by one of his appointees. I would agree with that.

Mr. HOGAN. Well, that puts an additional restraint, and also gives fuel to the credibility problem which obviously is the foundation of all of the deliberations which we have been going through for the last several days. But, we might be doing a disservice by further giving justification to lack of credibility, confidence in the executive branch—and that troubles me very much.

If I could get some consensus. I notice that you, Professor Meador, in your conclusion state that the proposals to create a Special Prosecutor to be appointed by the President and the Senate acting together, with restrictions on the Presidential removal would avoid most of the constitutional arguments which can be made against vesting the appointment in the court. Now, would we be not well-advised, even if it is constitutional and obviously it would be challenged in the court, for the judiciary to make the appointment. Would we not be well-advised in the interest of getting this thing resolved to create a system whereby the President appoints a Special Prosecutor with the advice and consent of the Senate, and either mandates removal with the same approval, or makes the appointment for a fixed tenure to isolate the Special Prosecutor from removal.

Mr. MEADOR. All I can say in response to that is that that seems to me to be the ultimate policy judgment the Congress has to make in this situation, that it will come down to a matter of how important you think it is in the totality of the present circumstances to have a prosecutor not initially selected by the President. That is the ultimate judgment. I am not prepared to make a case on either side of that. But I have some inclinations. I think you can choose either route constitutionally in the sense that, obviously, if the courts do not appoint the prosecutor, the arguments against that arrangement cannot be made. I do not think the arguments against that scheme have a great deal of merit. I think that it is constitutional. I view the committee having a consitutional choice here, and that it is a policy question.

Mr. HOGAN. I think that the analogy you made about the court appointing defense attorneys is a very valid one to argue the corollary power to appoint a prosecutor. I want to mention one thing in passing, without any criticism.

There is a tendency to quote the Federalist Papers as if they had efficacy of legislative history, which they obviously do not. They are valuable to teach us the insights on the thinking of the Founding Fathers at that time, but they have no efficacy whatsoever. They are not analogous to the Congressional Record, for example.

Mr. MISHKIN. I could not agree more. And since I brought them up, perhaps I should point at that I immediately followed that by reciting the action of the First Congress which followed precisely the same pattern, I agree that the Federalist Papers are not legislative history.

Mr. HOGAN. I understand.

The last comment which I would like to make is that the powers given to the Special Prosecutor in the various legislative proposals before us would certainly seem to argue against it being an inferior office. He has virtually no control over it whatsoever and would certainly, in the legislation before us, be a superior officer.

Mr. Chairman, I have no further questions.

Mr. HUNGATE. Thank you.

Gentlemen, I address this to the three of you, although I think perhaps Professor Casper has indicated his opinion, I am sure you are aware of the President's announcement this morning about the appointment of Senator Saxbe to be Attorney General and Mr. Jaworski to be Special Prosecutor. The Special Prosecutor will not be removed without the consensus of the House and Senate leadership, and the Chairman and the ranking members of both the House and Senate Judiciary Committees. The question is, does this change the need for this legislation?

Mr. CASPER. I think I have answered the question.

Mr. HUNGATE. Your answer would be, it has not, as I understood you?

Mr. CASPER. Yes.

Mr. HUNGATE. Professor Meador?

Mr. MEADOR. I think I have already answered it, too, Mr. Chairman, in saying that to me, this touches on the ultimate question as to how important you think it is in the interest of American society in these circumstances to have a prosecutor not initially selected by the President. Now, I am not prepared to argue strongly one way or another on that question. I came here only to discuss the constitutionality of the proposal.

Mr. HUNGATE. Thank you.

Professor Mishkin, do you have a comment?

Mr. MISHKIN. As I think I have implied, if I have not stated, in my answers, I would subscribe to Mr. Chesterfield Smith's analysis.

Mr. HUNGATE. Thank you.

Who commented about not having a permanent, independent Prosecutor? Someone made that remark, I think.

Mr. MEADOR. I think I did.

Mr. HUNGATE. We had a couple of congressional witnesses yesterday that seemed to think it might be wise to have such a permanent office. Would you comment briefly on that?

Mr. MEADOR. Yes, sir.

I made the comment in connection with my suggestion that the bill, if there be a bill, specify precisely the range of duties and the life of the office to avoid apprehensions among those who fear a permanent prosecutor for one reason or the other. A limitation in the bill would just pull the string, it seems to me, of some of the arguments that might be made. Now, if you want to talk about the long-range merits of a special prosecutor, I think there is a case to be made. I recall the former Attorney General, Elliot Richardson, made a point about trying to think of various ways to get law enforcement, criminal law enforcement, somewhat removed from the more political process. And I think that that could be a move in that direction. I think there is constitutional power to do that.

Mr. MISHKIN. If I may?

Mr. HUNGATE. Yes.

Mr. MISHKIN. May I just add that I think that the question is a very important and serious one. But I think, as Mr. Smith indicated this morning, it would probably be better faced after the political vibrations of the present circumstances are gone.

Mr. HUNGATE. In a calmer atmosphere?

Mr. MISHKIN. Yes.

Mr. HUNGATE. We frequently hear that we need to consider this question free of politics. Of course, that is asking us to consider the problem free of a part of the problem.

Ms. HOLTZMAN. Mr. Chairman?

Mr. HUNGATE. Ms. Holtzman?

Ms. HOLTZMAN. Thank you very much. I have just one question. There has been some talk here about the importance of signing of indictments. My understanding is that that is a statutory and not a constitutional requirement. I just wanted you to confirm or dispute that.

Mr. CASPER. Most certainly it is a statutory requirement, only.

If I may add one point about that: There is one case which does not decide that question, but leaves some doubt and that is *United States* v. *Cox*. There is no relationship. This is the case of a conflict between Judge Cox, the Federal judge in Mississippi, and the United States. He had ordered the U.S. attorney to sign an indictment which the U.S. attorney refused, under orders from the then Acting Attorney General. I think it was Mr. Katzenbach. And the court of appeals said the order was clearly improper under the Federal Rules of Criminal Procedure, but it also added that if the Federal Rules of Criminal Procedure did not give the Justice Department the discretion it actually possessed under them, there might be a constitutional problem. However, the court did not elaborate on that point at all, and that is the only comment I have found.

And I think the court's position is clearly erroneous because for the reasons which I have stated earlier, I have no doubt that Congress could tomorrow eliminate all prosecutorial discretion in the sense that it would order prosecutions wherever there is probable cause and could vest control of that matter in the courts. Surely, article II nowhere includes anything like the notion that there should be prosecutorial discretion vested in the Executive.

Mr. HUNGATE. Thank you very much, gentlemen. You have been very helpful to us. Your contributions will be of great assistance in our deliberations. Thank you.

Now, we have a colleague here whom we had scheduled yesterday and who has come in today. We apologize for the time we have taken. The gentleman is a member of the Missouri bar. We are pleased to have you with us today.

TESTIMONY OF HON. RICHARD ICHORD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSOURI

Mr. HUNGATE. Do you have a prepared statement, Congressman?

Mr. ICHORD. I have a prepared statement. However, I will not give it, because due to recent events, I think it is pretty much out of date.

I will be very brief. I think that I can say what I have to say in about 3 minutes, Mr. Chairman, if that is permissible.

Mr. HUNGATE. That certainly is.

[The prepared statement of Hon. Richard Ichord follows:]

STATEMENT OF HON. RICHARD H. ICHORD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSOURI

Mr. Chairman, it is a pleasure to be able to testify today before the Criminal Justice Subcommittee of the House Judiciary Committee in support of legisla-

tion requiring the federal court appointment of an independent special prosecutor. Specifically, I would like to offer testimony in support of my own legislation, H.R. 11145 introduced on Monday, October 29. H.R. 11145 is similar to other bills now pending before this subcommittee but differs in certain particulars.

Mr. Chairman, I am not here to fan further either legislative or public passions over the firing of Special Prosecutor Cox. While I sympathize with the public outrage, this body must guard against over-reacting to the events of the past weeks and calmly gauge its duties as responsible representatives of the American people and as the legislative interpreters of the Constitution. This is clearly not the time for partisan politics or precipitant acts taken in the passion of the moment. Rather this is the time for clear and profound thought as to what we, as members of the legislative branch of government, can do to help our nation in this hour of trouble.

I am here today because I feel that this nation has been hurt by the unresolved political scandals before it and because I firmly believe that this body bears some responsibility to clear up such matters and assist this nation to get back to the important business of our country.

Clearly, Mr. Chairman, the decisions made by President Nixon to release the Watergate tapes to Judge Sirica and to have acting Attorney General Robert H. Bork appoint a new Special Prosecutor, while welcomed, in no way have brought an end to the grave constitutional and leadership crises in which we find ourselves.

Still unresolved is the question of access to the letters and documents related to those tapes which Special Prosecutor Cox had been seeking. Still unresolved are the apparently endless leads which Mr. Cox and his staff had been following and which reportedly have touched on crimes not directly related to the Watergate affair, but which involve offenses against the United States at high official levels. Finally, there is still unresolved the adequacy of having a Special Prosecutor as an employee of the executive branch and subject to removal by that branch investigating extremely sensitive issues about that executive branch.

The firing of Special Prosecutor Cox has firmly convinced me that the investigation of the national political scandals now affecting this nation will be best achieved by reestablishing a completely independent special prosecutor—independent of both the legislative and executive branches—appointed by and subject to removal by the Chief Judge of the United States District Court for the District of Columbia.

Today I urge Congress and in particular this subcommittee to profit from the hindsight of the past two weeks and give priority consideration to the proposals now before it for establishing, through legislation, an independent office of special prosecutor.

Congress clearly has the constitutional authority to enact such legislation under Article II, Section 2, Clause 2 of the Constitution which states that Congress, by law, may vest the appointment of such inferior offices of the United States, as they deem proper, in the President alone, in the courts of law, or in the Heads of Departments.

Given the nature of the criminal offenses and alleged criminal offenses made against this nation, I cannot be satisfied with the President's promise to have acting Attorney General Bork appoint another Special Prosecutor to replace Mr. Cox. The President assured us in his news conference on last Friday evening, October 26, that the administration's new prosecutor would have "total cooperation from the executive branch" and "be given information that is needed." While such assurances are welcomed, Mr. Chairman, they do not quell the doubts that many members of this body and many citizens of this nation have as to exactly how free a new administration prosecutor would be to carry out his responsibilities.

President Nixon has already stated that the new administration prosecutor will not be given access to presidential documents for his investigations. The new prosecutor would also not be permitted to take his demands for evidence in White House files into the courts, a freedom which Mr. Cox felt was so important to an honest, open investigation. Finally, the administration's new prosecutor will be given his information to investigate the executive branch only as that same executive branch deems necessary and proper. Nothing could be further from the spirit of an open, independent investigation than this latter restraint on an administration prosecutor.

With such views in mind, I feel that Congress has no rational alternative to the creation of a federal court appointed special prosecutor through legislation

under the authority of Article II, Section 2, Clause 2 of the Constitution of the United States. To continue under an even more restricted Special Prosecutor appointed by the Administration is not proper or adequate. Clearly, it is not feasible for the Administration to appoint a Special Prosecutor to investigate and prosecute itself.

Additionally, to simply continue with the Senate Watergate Committee's investigations alone merely places Congress and the executive branch on a collision course, which could only prove detrimental to the nation in the long-run and inadequate in light of the expanded nature of the alleged criminal offenses which go far beyond the break-in of the Democratic National Committee headquarters in 1972.

I, therefore, call upon this subcommittee today to give careful but expeditious consideration to the proposals now pending before it to create an independent office of special prosecutor.

In particular, I request consideration of H.R. 11145 which provides that this special prosecutor be appointed by and subject to removal by Judge John Sirica. In this manner of appointment and removal lies the only hope for obtaining a special prosecutor which is wholly independent of both the legislative and executive branches of government.

Certain provisions of H.R. 11145 differ from some of the other proposals now under discussion by this subcommittee.

In the first place, it provides for the protection and eventual transfer of all files, notes, correspondence, memoranda, documents, physical evidence, and other materials and works compiled, or otherwise produced or maintained by the Office of Special Prosecutor established by the Attorney General of the United States on May 24, 1973 to the new court appointed special prosecutor established by this Act. I firmly believe that the new special prosecutor must have full access to these materials in order to adequately carry forth the work of Mr. Cox and his staff.

Secondly, H.R. 11145 does more than authorize the Chief Judge to appoint a special prosecutor. Rather it provides that a special prosecutor must be appointed within 30 days after enactment of the Act. The urgent need for such a prosecutor demands expeditious appointment.

Thirdly, this particular legislation provides that the special prosecutor investigate all offenses against the United States arising not only out of the unauthorized entry into the Democratic National Committee headquarters at the Watergate, but also any campaign activity with respect to the Presidenial election of 1972 and any activity of any member of the White House Staff, any Presidential appointee, or any person acting on behalf of the President. I believe the language of this legislation provides broad authority for the special prosecutor to investigate and prosecute the national political scandals which paralyze this nation without transgressing the area of impeachment which is the proper purview of Congress. For this particular reason, H.R. 11145 does not include the language of some bills which empowers the special prosecutor to directly investigate and prosecute any criminal acts arising out of activity of the Presidential person himself.

Fourthly, H.R. 11145 gives the special prosecutor primary authority to prosecute the offenses to the United States that I have just outlined. I believe such a provision is necessary to prevent jurisdictional disputes from arising between the special prosecutor and other bodies which are operating in the field.

Finally, H.R. 11145 provides for Congressional funding of the office of special prosecutor in lieu of provision in other bills which call for such funding from the general funds of the Department of Justice or elsewhere. This provision will ensure that the special prosecutor is wholly independent of the executive branch not only in authority but also funding as well.

Mr. Chairman, legislation which I described above or legislation which is similar to it has garnered much support. Former Prosecutor Cox has voiced support of such legislation; the American Bar Association has voiced support of such legislation; more than one-half of the Senate has voiced support of such legislation; more than one-half of the Senate Judiciary Committee has voiced support of such legislation; the Chairman of the Senate Watergate Committee, Senator Sam Ervin, has voiced support of such legislation; the Democratic leaders of both the House and Senate have voiced support of such legislation; and over one-third of the members of the House of Representatives have voiced support of such legislation to mention but a few of the groups. In

light of such support and in light of the urgent necessity of clearing up the political scandals which wrack this nation and getting on with the business of the country, I respectfully request this Subcommittee to favorably report legislation along the lines set forth in H.R. 11145.

Mr. ICHORD. Let me make it clear at the outset that I am not here to fan either legislative or public passions over the firing of Special Prosecutor Cox. While I sympathize with the public outrage, I submit that this body must guard against over-reacting to the events of the past week, and calmly gage its duties as responsible representatives of the American people and as legislative interpreters of the Constitution. It is not a time for partisan politics or precipitant action in the passions of the moment. Rather, this is a time for clear and profound thought as to what we as members of the legislative branch of Government can do to help our Nation in this hour of trouble.

I am here today because I feel that this Nation has been hurt by the unresolved political scandals before it, and because I firmly believe that this body has some responsibility to clear up such matters and to assist this Nation to get back to the important business of the country.

I think what has happened, Mr. Chairman and members of the committee, is that many of the bills before you have confused the matter of impeachment with the matter of prosecution. All of these bills involve both political and constitutional considerations. But, some of these bills would empower the Special Prosecutor to investigate and prosecute the President of the United States, as I read them, which is just about as constitutional as the President appointing the Special Prosecutor to prosecute the Congress for dereliction of its duties. So, therefore, I think that what the committee should do is consider limiting the powers and the duties of the Special Prosecutor. I do not have any problem with the approach that I have taken in H.R. 11145. Under article II, section 2, clause 2 of the Constitution, I think the Special Prosecutor clearly will be an inferior officer if appointed by the chief judge of the district court. But, I believe, we must limit his prosecution to crimes arising out of the Watergate affair and to crimes arising out of the political election of 1972, with specific authority to prosecute White House appointees and members of the White House staff. The question we have before us is basically a political question: Should the executive branch appoint a prosecutor to investigate and prosecute itself?

I think that such investigations and prosecutions should not be undertaken by either the executive or legislative branches. I think the only course we have here is to permit the courts to appoint the Special Prosecutor and not confuse the question of possible impeachment, with investigation and prosecution.

I would hope, Mr. Chairman, that the committee would seriously consider reporting legislation along the lines which are contained in H.R. 11145.

Mr. HUNGATE. Thank you.

I thank the gentleman very much for his suggestions. I note that you would provide independent funding for the office.

Mr. ICHORD. I think we should not rely upon funding coming from the Justice Department. Again, it should be completely independent. We should provide for independent funding.

Mr. HUNGATE. Mr. Edwards?

Mr. EDWARDS. Even with safeguards from removal by the President, should we insist that the prosecutor be appointed by the courts?

Mr. ICHORD. And removed by the courts.

Mr. EDWARDS. And removed.

Mr. ICHORD. Get it out of the political arena here in the Congress and the political arena in the Executive.

Mr. EDWARDS. Thank you very much for an excellent statement.

Mr. HUNGATE. Let me see if I understand you correctly.

Mr. Ichord, I previously read a statement, and you were here, I think, on the present selection of Mr. Jaworski to be the Special Prosecutor. That action does not change your ideas?

Mr. ICHORD. That does not change my idea one iota. The primary problem is, rightly or wrongly, that many American people think that you just cannot have a prosecutor appointed by the Executive to investigate and prosecute the Executive. Therefore, I think the only alternative we have is the judicial branch of Government, and I think it is clearly constitutional if you limit the responsibilities and the jurisdiction under article II, clause 2, section 2.

Mr. HUNGATE. Mr. Dennis?

Mr. DENNIS. Well, Mr. Chairman, our colleague from Missouri always makes his position very clear. I think I understand it and there is much to be said for it. And I do not think I will argue it with him, in any event today. It is too late an hour so thank you very much.

Mr. HUNGATE. Miss Holtzman?

Ms. HOLTZMAN. I just want to thank the gentleman from Missouri for his statement which is very important and helpful to us. I appreciate his comments. Thank you.

Mr. HUNGATE. Mr. Hogan?

Mr. HOGAN. I would not want my good friend to get off that easily, so I will ask him a couple of probative questions.

I have the highest respect for the gentleman. But I will level with him the same objections that I made to some of the other witnesses before us, and I am quoting from your bill: "It shall be the duty of the Special Prosecutor to investigate and prosecute any offense against the United States arising out of" and then I drop down "any activity of any members of the White House staff, any Presidential appointee, or any person acting on behalf of the President."

So, if I could draw a scenario for the gentleman, when he is driving into work some morning with the third or fourth assistant of the Census Bureau and driving out on Suitland Parkway and is pulled over by a U.S. Park policeman for speeding, under your bill this would be prosecutable by the Special Prosecutor?

Mr. ICHORD. Certainly my legislation is not meant to cover that type of situation. I would say to the gentleman from Maryland that H.R. 11145 is not intended to include such incidents. I was thinking in terms of the alleged crimes pertaining to Watergate and related events that have been committed by members of the White House staff, White House appointees, and other such persons working on behalf of the President. Certainly I would not mean to give the Special Prosecutor the type of blanket authority suggested by my colleague from Maryland. We still have a Department of Justice and we still have the courts in Prince Georges County, Md. to cover such infringements of the law.

Mr. HOGAN. This would be a Federal offense since it is a Federal highway, and your bill does not say exclusive jurisdiction, but some of the others do. So, I just point this out. You would certainly not object to a limitation?

Mr. ICHORD. No, certainly. I think the jurisdiction should be limited as the gentleman from Maryland suggests.

Mr. HOGAN. I thank the gentleman and I have no further questions, Mr. Chairman.

Mr. HUNGATE. Thank you very much. The subcommittee appreciates the patience and contributions of all the witnesses.

The Chair announces that we will adjourn today and resume at 10 Monday morning, at which time we have scheduled Acting Attorney General Bork. On Monday afternoon Mr. Archibald Cox is scheduled to testify. On Tuesday, the full committee will meet at 10 a.m. on the evidence code. The grand jury extension bill will also be brought up on Tuesday. On Wednesday, the subcommittee will meet at 10 a.m. to hear Professor Bator of the Harvard Law School and Dean Cramton of Cornell Law School.

We plan to start the markup on the Special Prosecutor bill Wednesday, and hope to conclude it on Thursday of next week.

We will now stand adjourned.

[Whereupon, at 1:45 p.m., the hearing was adjourned to reconvene on Monday, Nov. 5, 1973, at 10 a.m.]

SPECIAL PROSECUTOR LEGISLATION

MONDAY, NOVEMBER 5, 1973

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

The subcommittee met, pursuant to call, at 10:10 a.m., in room 2141, Rayburn House Office Building, Hon. William L. Hungate [chairman of the subcommittee] presiding.

Present: Representatives Hungate, Kastenmeier, Edwards, Mann, Holtzman, Smith, Dennis, Mayne, and Hogan.

Also present: Herbert E. Hoffman, counsel; Thomas W. Hutchison, assistant counsel; Roger A. Pauley, associate counsel research assistant and Stephen P. Lynch, research assistant.

Mr. HUNGATE. The subcommittee will come to order.

The Chair will first address the question of privilege, affecting the rights of the House collectively and, particularly, a statement for which the Chair assumes full responsibility, personally.

An editorial appeared in the New York Times on Friday, November 2, 1973, which the Chair will put in the record at this point.

[The New York Times article follows:]

[From the New York Times, Nov. 2, 1973]

SPECIAL PROSECUTOR . . .

Possibly the most important legislation pending in Congress today is the bill to establish an independent prosecutor in the Watergate case. Until such an office is established under protection of the District Court of the District of Columbia, the files assembled at direction of former Special Prosecutor Archibald Cox are in jeopardy. With each passing day, there is a growing risk that the able staff that Mr. Cox organized may become demoralized and its work brought to a halt. Mr. Nixon's attempt at this juncture to intrude a prosecutor agreeable to himself into the proceedings can only be regarded as a disruptive maneuver.

Leon Jaworski, whom Mr. Nixon nominated yesterday as special prosecutor, is in an anomalous position, somewhat like that of Senator John Stennis in his ill-conceived mission as an intermediary between the White House and the Senate with regard to the Watergate tapes. Mr. Jaworski's personal integrity is not in doubt, but he is fatally handicapped from the outset because he enters the Watergate investigation as the President's man.

Early action in the Senate to set up an independent prosecutor is assured since the bill introduced by Senators Hart of Michigan and Bayh of Indiana now has the cosponsorship of 53 other members, eight Republicans and 45 Democrats. Hearings on the bill are under way in the Senate Judiciary Committee.

But the House Judiciary Committee under chairmanship of Representative Rodino of New Jersey has been shockingly irresponsible in failing to act upon similar bills introduced in the House. The inquiry into a possible impeachment

of President Nixon that the committee has undertaken is in no sense a substitute for creation of an independent special prosecutor. While the committee is pondering the impeachment question, the investigation and prosecution of the numerous crimes and conspiracies must go forward.

A constitutional question has been raised against the Hart-Bayh bill because traditionally the prosecuting power has been solely under the control of the Executive. But the Constitution clearly states that "Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments."

When the Executive is conspicuously failing to enforce the law, Congress has a duty to assist the courts in seeing that the rule of law is upheld. The doctrine of the separation of powers was never intended to be a straitjacket.

The Hart-Bayh bill is likely to be amended to provide that the special prosecutor be appointed by all the judges of the District Court rather than by Chief Judge John J. Sirica alone. Once that improvement is made, President Nixon himself could hardly oppose such a bill on grounds of principle inasmuch as he introduced a similar bill when he was a member of the Senate in 1951.

Ideally, the House would now be moving on a parallel course with the Senate. Unless the House acts, Mr. Nixon will have triumphed after all in the Cox affair. He has yielded the tapes—some of them, anyway—that are almost certainly not conclusively incriminating, and he has rid himself of the special prosecutor who was looking into so many dark corners of his Administration.

Mr. Nixon must not be allowed to succeed with his coup. The public has a right to an independent prosecutor. The public has a right to ask Speaker Albert and Chairman Rodino: Why are you failing to perform your duty in this matter?

Mr. HUNGATE. Although the article has been put in the record, I wish to read the editorial at this time.

Possibly the most important legislation pending in Congress today is the bill to establish an independent prosecutor in the Watergate case. Until such an office is established under protection of the District Court of the District of Columbia, the files assembled at direction of former Special Prosecutor Archibald Cox are in jeopardy. With each passing day, there is a growing risk that the able staff that Mr. Cox organized may become demoralized and its work brought to a halt. Mr. Nixon's attempt at this juncture to intrude a prosecutor agreeable to himself into the proceedings can only be regarded as a disruptive maneuver.

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Early action in the Senate to set up an independent prosecutor is assured since the bill introduced by Senators Hart of Michigan and Bayh of Indiana now has the sponsorship of 53 other members, eight Republicans and 45 Democrats. Hearings on the bill are under way in the Senate Judiciary Committee.

But the House Judiciary Committee under chairmanship of Representative Rodino of New Jersey has been shockingly irresponsible in failing to act upon similar bills introduced in the House. The inquiry into a possible impeachment of President Nixon that the Committee has undertaken is in no sense a substitute for creation of an independent special prosecutor. While the Committee is pondering the impeachment question, the investigation and prosecution of the numerous crimes and conspiracies must go forward.

A constitutional question has been raised against the Hart-Bayh bill because traditionally the prosecuting power has been solely under the control of the Executive. But the Constitution clearly states that "Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

When the Executive is conspicuously failing to enforce the law, Congress has a duty to assist the courts in seeing that the rule of law is upheld.

And as an aside, I might be assured that they are as cognizant of the constitutional implications as I am of the operations of a metropolitan paper. And I repeat:

The Hart-Bayh Bill is likely to be amended to provide that the special prosecutor be appointed by all the judges of the District Court rather than by Chief

Judge John J. Sirica alone. Once that improvement is made, President Nixon himself could hardly oppose such a bill on grounds of principle inasmuch as he introduced a similar bill when he was a Member of the Senate in 1951.

Ideally, the House would now be moving on a parallel course with the Senate. Unless the House acts, Mr. Nixon will have triumphed after all in the Cox affair. He has yielded the tapes—some of them, anyway—that are most certainly not conclusively incriminating, and he has rid himself of the special prosecutor who was looking into so many dark corners of his Administration.

Mr. Nixon must not be allowed to succeed with his coup. The public has a right to an independent prosecutor. The public has a right to ask Speaker Albert and Chairman Rodino: "Why are you failing to perform your duties in this matter?"

On October 11, 1973, then Attorney General Richardson asked that legislation be introduced extending the Watergate grand jury. Within the week, Chairman Rodino introduced such legislation.

On Saturday, October 20, Mr. Cox was fired and on the first business day following that, which was October 23, Mr. Culver and over 100 others introduced bills addressed to this question.

The following day, October 24, Chairman Rodino announced referral of this matter to the Subcommittee on Criminal Justice and requested expeditious action.

The following day, October 25, the chairman of this subcommittee announced on the floor and in the Congressional Record that hearings would begin on October 29.

On October 29, hearings on the grand jury extension were held. We heard from the Watergate prosecuting team of Phillip A. Lacovara, Henry S. Ruth, and Richard Ben-Veniste. We subsequently recommended to the full committee the extension of an automatic 6 months with an addtional optional 6 months.

On October 30, the next day, the full Judiciary Committee approved the grand jury extension.

On October 31, the hearings on the Special Prosecutor began with several sponsors, including Congressman Culver and Senator Bayh, testifying.

On November 1, the president of the American Bar Association, Chesterfield Smith, appeared. Also heard were Whitney North Seymour, formerly a district attorney for the Southern District of New York, and three outstanding professors of constitutional law. It was announced on November 1, that Acting Attorney General Bork, and Mr. Cox, himself, would be here today for the November 5 hearing, and that other professors would be heard November 7, and that the markup would begin and was intended to be finished this week.

The grand jury extension legislation is scheduled for floor action tomorrow, November 6.

After all of these announcements on November 1, the editorial to which I referred appeared in the New York Times on November 2. It urged immediate, urgent action. I apologize to Mr. Rodino and to Mr. Albert for these erroneous references made to them. To this hour, I have heard nothing from the New York Times.

There is a separation of powers in our Government and there is a House of Representatives. There are three equal bodies, the executive, judiciary, and legislative. There are two bodies of the legislature of which the House is one. The impeachment question will be considered in the House and will first be decided here whether or not it is to be proceeded with. The confirmation of Gerald Ford will be considered in the

House equally with any other body. The question of the Special Prosecutor and grand jury extension will be promptly and expeditiously considered and acted on in the House, as an equal branch of government.

To the extent that this is not known to the country, and to the extent that Gerald Ford is only known to but 7 percent of the American people; and to the extent that Carl Albert is not a national figure, it represents a failure on the part of responsible journalism, the duty that responsible, professional journalism, owes the American people.

That concludes my hiatus and I feel better.

Without objection, we will place in the Record, the following:

(1) A letter from Representative Charles M. Teague of California, addressed to the chairman of the House Judiciary Committee, proposing the judiciary appoint a Special Prosecutor to assist grand jury and legislation be enacted to authorize him to sign resulting indictment and proceed with trial.

(2) A letter from Representative John Slack of West Virginia, addressed to the chairman of the House Judiciary Committee, proposing the appointment of a Special Prosecutor, independent of the executive branch, relevant to the Watergate matter.

(3) Letter from the Federal Bar Association, recommending the appointment of a Special Federal Prosecutor with a mandate identical to that of former Special Prosecutor Archibald Cox, but taking no position as to the method of such appointment.

(4) Letter and accompanying resolutions from the Connecticut Bar Association, urging an independent prosecutor not under the control of the executive branch of the Government.

(5) Statements of the Bar Association of San Francisco and of its officers and certain past presidents regarding the Watergate investigation and appointment of a Special Prosecutor.

(6) Letter from concerned members of the Yale Community signed by 19 faculty members of Yale Law School, 10 Yale alumni, and 258 other members of the Yale Community, recommending the appointment of an independent Special Prosecutor as a first step in restoring the public's confidence.

(NOTE: Copies of petitioners' signatures are on file in the subcommittee.)

(7) A petition from Stonehill College, signed by over 350 members of the faculty and student body, urging the establishment of an independent Special Prosecutor.

(NOTE: Petitioners' signatures are on file in the subcommittee.)

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., October 31, 1973.

HON. PETE W. RODINO, Jr.,
Chairman, House Judiciary Committee, Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Your Committee has had thrust upon it in recent weeks a number of responsibilities which are central to the resolution of what is being widely referred to as a crisis of confidence in the ability to govern our nation. While I do not wish to add in any way to the burden of the historic decisions which the Judiciary Committee must now weigh, I do want to bring to your attention a proposal relating to these matters.

In both of the ongoing investigations which the Committee is conducting, the national interest clearly demands that the Committee proceed with dispatch

but, at the same time, with the deliberateness which a thorough inquiry requires. Therefore, it must be expected that many days, if not weeks, will elapse before Committee recommendations are forthcoming on either the confirmation of the designee for Vice President or possible impeachment proceedings.

In the interim there is still another unresolved issue which is a component of the challenge which faces government and with which we must deal. The public quite literally demands that an impartial and independent prosecutor be appointed to bring to justice those who may be guilty of crimes associated with or arising from the Watergate break-in. The process by which the successor to Mr. Archibald Cox shall be chosen and appointed has been subject to some disagreement and discussion, particularly in the other body. From what I have been able to learn, there are certain disadvantages associated with most of the leading proposals which have been advanced.

Should the President or his subordinate appoint a successor to Mr. Cox as he announced he intends to do, the President could either place restrictions on him, as he has indicated he would, or dismiss him for cause. These conditions allow questions as to the full independence for such a prosecutor to remain which in turn will serve to reduce public trust and confidence in the conduct of the prosecutions. Further, such an arrangement is clearly unacceptable to certain Senators and House Members.

On the other hand, fundamental Constitutional issues appear to be involved in action by Congress to direct the President to appoint a particular individual as prosecutor or to otherwise attempt to designate who the prosecutor will be, except by use of its confirmation power. However, as a practical matter, Senate confirmation of a Presidential nominee for Special Prosecutor further confuses the issue of the independence which the prosecutor could exercise. Just as the President could place restrictions on the prosecutor as a condition of continued employment, so might Senators make their confirmation of him conditional on certain assurances from him. With the example of Attorney General Richardson in mind, this seems very likely. Members of the Senate Judiciary Committee are to be expected to question a potential prosecutor closely on his intended performance in specific situations, probably describing elaborate scenarios to precisely establish, under oath, what his actions would be. Is a prosecutor whose latitude in certain circumstances is circumscribed in this manner, by Senators who attain office through the same kind of partisan contests as a President, truly independent? It seems to me that the independence comprised to the Congress is in no way superior as a principle than independence comprised to the President.

I have been advised that the Trial Judge may, under existing authority and precedent, appoint an investigator to assist the Grand Jury in reaching its indictments or acquittals, but that such an officer would not be empowered to proceed beyond the Grand Jury stage into actual prosecution of those indicted. Could not this limitation be overcome through carefully drafted legislation?

I am inexpert in this area of law and defer to your considered judgment as to the legal principles involved. I think you can agree, however, that elements of the case are unique as regards separation of powers, and that the circumstances which have arisen in connection with it are unusual enough and serious enough to warrant special legislation. I do not think that the Judiciary would shrink from the task of making such an appointment if such is clearly the intent of Congress. If such a procedure were followed, the American people would see this volatile issue removed from the arena of the contenders for office and standard bearers for parties. I would hope this method would satisfy the public that the Prosecutor is truly independent—not subject to restrictions imposed either by the President or a majority of Senators. Both the President and the Congress could find some reassurance in the fact that the prosecution would not be conducted by an agent of the other.

I very respectfully request that the Committee consider drafting legislation to authorize a special Watergate prosecutor to be appointed by Judge Sirica. Although I have not heard discussion of this approach, I realize that these thoughts may be totally unoriginal and already the subject of Committee consideration.

Sincerely,

CHARLES M. TEAGUE,
Member of Congress.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., November 1, 1973.

Hon. PETER W. RODINO, Jr.,
Chairman, Judiciary Committee, House of Representatives,
Washington, D.C.

DEAR PETE: I am aware of the tremendous responsibility which has fallen to you and Members of the Committee as a result of the sequence of events in the Executive Branch of government. I am confident that you will provide wise and balanced leadership toward the proper disposition of that responsibility.

A careful review of the reactions received from my constituents requires me to address you in connection with one of these pending matters—the appointment of a special prosecutor to pursue inquiries related to the Watergate affair. It is my firm belief that the special prosecutor should be independent of the Executive Branch, and should be accountable to the Congress—the people's forum. I believe further that he should be appointed to pursue a specific line of activity concentrated in the events relevant to the Watergate matter and alleged crimes committed in connection with the 1972 election.

An open-end or undefined charge of responsibility for the prosecutor would encourage proliferation of unrelated and tenuous charges, with consequent delay in arriving at essential conclusions about the Watergate matter. This would not be in the public interest, since it is most desirable that we move rapidly into specifics and away from generalities and peripheral matters to the end that the atmosphere is cleared and we can give the people cause to maintain full faith and confidence in their government in Washington.

Yours sincerely,

JOHN SLACK,
Member of the Committee.

THE FEDERAL BAR ASSOCIATION,
Washington, D.C., October 31, 1973.

Hon. PETER W. RODINO,
Chairman, House Judiciary Committee,
House of Representatives,
Washington, D.C.

DEAR REPRESENTATIVE RODINO: The Federal Bar Association, through its Executive Committee, recommends the appointment of a special federal prosecutor with a mandate identical to that of the recently-removed Archibald Cox. The Association takes no position as to the method of such appointment as long as it inspires public confidence and is consistent with the Constitution of the United States. The Association, however, does take the positive view that the special federal prosecutor must be completely independent of any other governmental entity and be absolutely free to pursue any matters which in his judgment are warranted and within his mandate. He should be removable only for "cause."

In addition, the Federal Bar Association publicly commends career federal attorneys, especially in the Department of Justice, for their outstanding and continuing devotion to the ethical practice of law in the national interest.

Sincerely,

SIMON H. TREVAS,
President.

CONNECTICUT BAR ASSOCIATION,
Hartford, Conn., October 29, 1973.

Hon. PETER W. RODINO, Jr.,
Chairman, House Judiciary Committee, U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN RODINO: The Connecticut Bar Association's Assembly and House of Delegates, at their Annual Meeting on October 23, 1973, adopted two Resolutions pertaining to the President's dismissal of Special Prosecutor Archibald Cox and the abolition of his office. Copies of these Resolutions are enclosed herewith.

You will note that one of the Resolutions is directed to members of Congress and the other to the President. Both Resolutions are consistent with the position taken by the Association's House of Delegates on April 30, 1973, urging the President to "appoint a special prosecutor . . . independent and outside of the Department of Justice, to be in charge of the Watergate investigation".

The House of Delegates represents the 4,432 members of the Connecticut Bar Association and is the major governing body of this voluntary Bar Association.

On behalf of the Connecticut Bar Association, I urge your serious consideration of these Resolutions.

Sincerely,

JAMES R. GREENFIELD,
President.

OCTOBER 23, 1973.

RESOLUTION ADOPTED BY CONNECTICUT BAR ASSOCIATION, ASSEMBLY, AND HOUSE OF DELEGATES

Whereas, the Connecticut Bar Association is mindful of its commitment to the rule of law, the political expression of which is a government of laws, not of men; and

Whereas, the Association is conscious of the duties imposed upon members of the Bar to protect and promote the rule of law, without which "individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible", (Preamble, Code of Professional Responsibility), and is cognizant of its responsibility to act constructively in the midst of the present Constitutional crisis; and

Whereas, the Association is dedicated to its earlier Resolution endorsing the appointment of an independent prosecutor to investigate the Watergate controversy; and

Whereas, it views with dismay the precipitate dismissal of Special Prosecutor Archibald Cox, the abolition of his office, and the disruption of its independent investigation, by the President of the United States, and considers such actions a breach of faith with the United States Constitution, the United States Congress and the American people; and

Whereas, the effect of such extreme Presidential action can only be to inhibit a thorough-going independent investigation of the Watergate controversy, with prosecution wherever warranted; and

Whereas, we share Mr. Cox's belief that it is now for the Congress and ultimately the American people to decide whether we shall continue to be a government of laws and not of men;

Now, therefore, be it resolved, that the Connecticut Bar Association, acting through its Assembly and House of Delegates, calls upon the United States Congress and urges its members to consider actively and immediately all remedies available for meeting the present crisis precipitated by the actions of the President.

And be it further resolved, that copies of this Resolution be sent forthwith to the Connecticut delegates in the Congress of the United States.

Whereas, the Constitution of the United States has established a government of law and not of men; and

Whereas, recent events have caused many citizens to doubt that our laws are being impartially administered by the Federal Government;

Now, therefore, be it resolved, that this Assembly and House of Delegates of the Connecticut Bar Association, in annual meeting assembled, respectfully calls upon the President of the United States to take actions which clearly indicate that:

(1) He respects the independence of the judiciary as a separate branch of the government,

(2) He will comply with final orders of the courts of the United States; and

(3) He will work with the appropriate judicial and/or legislative branches to establish an independent prosecutor for Watergate and related matters who is not under the sole control of the executive branch of government.

THE BAR ASSOCIATION OF SAN FRANCISCO,
San Francisco, Calif., October 26, 1973.

To: The Honorable Richard M. Nixon, the Honorable Mike Mansfield, the Honorable Hugh Scott, the Honorable Carl Albert, the Honorable Gerald Ford, the Honorable James O. Eastland, the Honorable Jerome R. Waldie.

From: Richard B. Morris.

The attached statements of The Bar Association of San Francisco and of its officers and certain past presidents regarding the Watergate investigation and related developments are sent for your information and action.

Enclosures.

THE BAR ASSOCIATION OF SAN FRANCISCO,
San Francisco, Calif., October 22, 1973.

DEAR MEMBERS OF THE BOARD OF DIRECTORS: As the current president of this Association, joined by the officers and past presidents whose names are listed below and by Robert G. Sproul, Jr., and David E. Nelson, Co-Chairmen of the San Francisco Lawyers Committee for Urban Affairs, and Frank D. Tatum, Jr., President of the Legal Aid Society of San Francisco, I ask your support at our regular meeting on October 24 for the following statement of principles and for a decision that we should help in every way we can to assure that the values of truth and the rule of law are reaffirmed in this country.

STATEMENT

The effects of what has come to be called "Watergate" and its developing aftermath require a reaffirmation of basic principles by every concerned citizen. Such principles fundamentally involve the rule of law as controlling this country's affairs and the need for forthrightness in communicating about those affairs. In the context of Watergate, expression of these principles includes the following:

(1) The President of the United States, in his actions and in what he says about those actions, must be the prime exemplar of those principles;

(2) The rule of law should determine what evidence related to Watergate in the possession or control of the White House is relevant to the issues and should be turned over to appropriate agencies or branches of the government.

(3) The constitutional powers of the executive, judicial and legislative branches of the government should be employed effectively to develop the whole truth with regard to whether and to what extent obstruction of justice, corruption or other lawlessness was involved in Watergate and to take all means to effect whatever remedies may be required to honor the rule of law.

(4) A special prosecutor, independent of the Executive Branch, should be established, funded, equipped, and staffed promptly to continue the work, momentum, and investigations already begun by Special Prosecutor Cox.

I am circulating this letter to the presidents of a number of leading bar associations across the United States and asking them to join us in this endeavor so that appropriate collective citizen action can be taken by the organized bar.

Sincerely,

MICHAEL TRAYNOR.

THE BAR ASSOCIATION OF SAN FRANCISCO,
San Francisco, Calif., October 24, 1973.

RESOLUTION

The Bar Association of San Francisco, through its Board of Directors acting at its regular meeting on October 24, 1973 and pursuant to its Articles of Incorporation and by-laws, hereby adopts the following resolution.

Resolved that the following Statement of Principles is hereby adopted and approved by this Association:

STATEMENT OF PRINCIPLES

The effects of what has come to be called "Watergate" and its developing aftermath require a reaffirmation of basic principles by every concerned citizen. Such principles fundamentally involve the rule of law as controlling this country's affairs and the need for forthrightness in communicating about those affairs.

In the context of Watergate, expression of these principles includes the following:

(1) The President of the United States, in his actions and in what he says about those actions, must be the prime exemplar of those principles;

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(3) The constitutional powers of the executive, judicial and legislative branches of the government should be employed effectively to develop the whole truth with regard to whether and to what extent obstruction of justice, corruption or other lawlessness was involved in Watergate and to take all means to effect whatever remedies may be required to honor the rule of law.

(4) A special prosecutor, independent of the Executive Branch, should be established, funded, equipped, and staffed promptly to continue the work, momentum, and investigations already begun by Special Prosecutor Cox.

Further resolved, that the President of this Association, in consultation with the General Counsel and such officers, directors, and members as he deems advisable, is authorized to take all actions that he deems necessary or appropriate to articulate, publicize, and implement the foregoing Statement of Principles.

Further resolved that this Association strongly supports the efforts of American Bar Association President Chesterfield Smith and of other bar associations, national, state, and local, that are being or may be taken to reaffirm and implement the foregoing principles, and authorizes the President as he deems advisable on behalf of this Association to join with the American Bar Association and other bar associations in the articulation, publication, and implementation of the foregoing principles and in such statements of principle and actions that may be adopted or taken from time to time that are substantially similar to or in accord with the principles and premises of this Resolution.

THE BAR ASSOCIATION OF SAN FRANCISCO,
San Francisco, Calif., October 24, 1973.

MEMORANDUM

The following is a summary of the information I have received concerning action by presidents of bar associations and associations across the country in response to my letter of October 22, 1973 (copy attached) sent to them by night letter:

1. *The District of Columbia Bar.*—Telegram of October 23, 1973 from Charles T. Duncan, President:

> "Without opportunity to bring your telegram to the attention of our Board of Governors, I join in the meaning and spirit of your telegram concerning the dismissal of special prosecutor Archibald Cox."

President-Elect John Douglas, in our telephone conversation of October 23, stated that he appreciated our proposed statement and authorized me to add his name as President-Elect, joining in that statement.

2. *Chicago Bar Association.*—Telegram of October 23, 1973 from James W. Kissel, President:

> "At a special meeting of the Board of Managers of the Chicago Bar Association yesterday, the following resolution was adopted: 'The oath of office taken by the president of the United States requires him to faithfully execute his office, preserve, protect, and defend the Constitution of the United States, take care that the laws be faithfully executed. The events of this past weekend appear to indicate that the conduct of the President may have violated that oath of office. Accordingly, the Chicago Bar Association strongly urges an immediate and thorough investigation and debate by the United States House of Representatives into such conduct of the President.' From the discussion of Watergate, I can assure you the Chicago Bar Association is strongly in accord with the principles outlined in your telegram received today."

3. *San Diego Bar Association.*—In telephone conversations with John Newburn, President, on October 23 and October 24, 1973, John authorized us to use his name as President and the San Diego Bar Association's name as joining in our proposed statement. Their association has also sent a letter to various congressmen. John is meeting with President of the ABA Chesterfield Smith and with

Clinton Bamberger of the NLADA at its meeting today in Coronado. He will furnish a copy of our proposed statement to Bamberger.

4. *Bar Association of Metropolitan St. Louis.*—By telephone conversation this morning with Frank Vigus, President, I understand that their association yesterday issued a press release condemning the President's recent actions with regard to evading decisions of the court, the subsequent discharge of Cox, and calling for the President to abide by the rule of law and that if he persists in disregarding it, the Congress should take steps to resolve the constitutional crisis. Frank said their statement still applies notwithstanding the turnover of the tapes to Judge Sirica yesterday. The reason is that there is still more evidence and an independent prosecutor is needed. With regard to our statement, Frank said "We're with you" and can so state.

5. *Boston Bar Association.*—I talked by telephone with John Brooks, President, this morning. He joins personally in the proposed statement of principles. His board is meeting next week. He apparently has sent us a telegram to this effect which as of this writing has not been received.*

6. *Philadelphia Bar Association.*—I talked with Bill Klaus, Chancellor-Elect this morning, having not been able to reach the Chancellor, Joseph Bongiovanni, Jr. Their Board is meeting at noon today and Bill Kraus will advise me of their action.

7. *Los Angeles County Bar Association.*—I understand that the officers issued a statement yesterday and that the Board is meeting today. We should get the text of their action today or tomorrow morning.

8. *Beverly Hills Bar Association.*—I talked by telephone with Orland Friedman on October 23, 1973. The Beverly Hills Bar Association is preparing a statement that is in substantial agreement with the principles as they have been articulated in our proposed statement. We should get the text by this afternoon.

9. *Santa Clara County Bar Association.*—I talked yesterday with Nordin Blacker who is handling this matter, and sent him a copy of our proposed statement. I expect positive action to be taken by the Santa Clara Bar Association this week.

10. *The American Bar Association.*—I spoke by telephone with Alan Kurland, who is coordinating these matters at the ABA in Chicago. President Chesterfield Smith has already issued a statement and has called a special meeting of the ABA Board of Governors for Saturday. Kurland will be furnishing our proposed statement and any action that we take today to the Board of Governors. We exchanged information. I told him of the above actions. His understanding of local bar action around the country is as follows: The Los Angeles Bar issued a general statement yesterday; the Philadelphia Bar is expected to issue a statement today; the Chicago Council of Lawyers yesterday issued a statement specifically calling for impeachment and is the only organized bar group to go this far that Kurland is aware of; the Chicago Bar Association acted as quoted above; the St. Louis Bar Association made a statement with regard to the conduct of President Nixon; various senior statesmen of the Association of the Bar of the City of New York met last night and are considering what action that association should be taking. No State Bar has acted yet to Alan's knowledge.

MICHAEL TRAYNOR.

THE BAR ASSOCIATION, OF SAN FRANCISCO,
San Francisco, Calif., October 25, 1973.

Charles T. Duncan, District of Columbia Bar Association and John Douglas.
Orville Schell, The Association of the Bar of the City of New York.
James W. Kissel, Chicago Bar Association.
John Newburn, San Diego County Bar Association.
Frank Vigus, Bar Association of Metropolitan St. Louis.
John Brookes, Boston Bar Association.
Joseph Bongiovanni, Jr., Philadelphia Bar Association and William Klaus.
William Shea, Los Angeles County Bar Association.
Orland Friedman, Beverly Hills Bar Association.
Burroughs B. Anderson, Seattle-King County Bar Association.

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* Telegram received October 24, 1973. An an individual I support your statement of principles regarding Watergate. No official action taken yet by Boston Bar Association.

Gentlemen: In follow-up to my night letter of October 22, enclosed herewith is an October 24 resolution of our Association, adopted by unanimous consent of Board of Directors. Also enclosed is a memorandum covering background events.

Our Board of Directors has seconded the idea that this Association collaborate with bar associations in other cities and states, and with the American Bar Association to the extent a community of principle and interest persists regarding the Watergate investigation and related developments. To this end, by copy of this letter, I am advising Presidents of bar associations which we have not as yet contacted regarding our position. While geography necessarily makes common action difficult, we strongly believe that the organized bar has responsibilities of such dimensions in this matter that the inconveniences involved in collaboration are acceptable to us. We look forward to working with you and other association leaders to see that objectives substantially similar to those specified in the attached resolution are promptly attained.

I am advised that the Board of Governors of the American Bar Association is meeting Saturday, October 27, to consider this matter. Action taken by the organized bar throughout the nation will be specially reported to that Board by Alan Kurland, a member of the ABA staff (Chicago 312–493–0533) who is serving as a clearing house regarding bar activity in connection with the Watergate case. I would like to suggest that you assure that Mr. Kurland is advised prior to Saturday of any relevant action taken by your Association.

Very truly yours,

MICHAEL TRAYNOR,
President.

CONCERNED MEMBERS OF THE YALE COMMUNITY,
YALE LAW SCHOOL,
New Haven, Conn., October 24, 1973.

Hon. PETER W. RODINO,
Chairman, Committee on the Judiciary,
U.S. House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: In our present constitutional crisis, events follow upon each other with such rapidity it becomes difficult to keep abreast of the latest developments. In a letter to you dated October 22, we expressed concern over events of the past weekend, which we felt constituted serious threats to the pursuit of justice. These events included the President's refusal to supply information needed for the investigation and prosecution of criminal offenses and his broken pledge to give the Special Prosecutor a free hand in investigating all criminal offenses arising out of the 1972 Presidential election.

Mr. Nixon has now agreed to surrender edited versions of the requested tapes. While an immediate constitutional crisis over the President's failure to obey a court order has thus been avoided, only a portion of the information needed to conduct a thorough criminal investigation will be supplied as a result of Mr. Nixon's concession. Moreover, the investigation itself has been seriously impaired by the firing of Mr. Cox and the abolition of the office of special prosecutor. Action must be taken immediately to restore the public's confidence that a full and thorough investigation into events surrounding the 1972 Presidential election will be pursued. The provision by Congress for an independent Special Prosecutor would be a healthy first step.

Though the President's reversal on the tape issue may have averted an immediate crisis, we must not forget that grave questions remain. These include the President's responsibility for corruption in his administration, his continued resistance to a full and thorough investigation of Watergate, his invasion of rights guaranteed under the First, Fourth, and Fifth Amendments of the Constitution, secret and misrepresented bombing of a foreign nation, and impoundment of Congressional appropriations. The question of apparent abuses of the public trust of the Office of the President must be resolved.

Sincerely,

CONCERNED MEMBERS OF THE YALE COMMUNITY.

(This letter signed by 19 faculty members of Yale Law School, 10 Yale alumni, and 258 other members of the Yale community.)

STONEHILL COLLEGE,
North Easton, Mass.

We, the undersigned, strongly protest the raw exercise of power by President Nixon in the dismissal of Special Prosecutor Cox and the forced departures of Attorney-General Richardson and Deputy Attorney-General Ruckelshaus.

We further protest the breaking of a pledge to the U.S. Senate, and through it to the American people, to allow the Special Prosecutor the freedom to pursue the investigation into the Watergate scandal without interference.

We urge the Congress to take the necessary steps to enable the courts and the grand jury to reconstitute the abolished office of Special Prosecutor, independent of the executive branch, so that the unfinished investigation might move forward to completion.

Mr. HUNGATE. Are there any members that have an opening statement?

Mr. SMITH. Mr. Chairman?

Mr. HUNGATE. Mr. Smith of New York.

Mr. SMITH. I think that the chairman has made a statement in regard to the editorial of the New York Times of November 2, which all of us here on this committee can support. We certainly know that you, Mr. Chairman, have done everything in your power to bring this matter of the appointment of a Special Prosecutor by the Congress up for early and immediate hearings.

I would suspect, although I did not see, that the news columns of the New York Times carried probably a fairly good report of the activities of this committee and this immediate action, and I would suggest that perhaps the constitutional lawyers who write the editorials for the New York Times might well read the news columns of that paper.

Mr. DENNIS. Mr. Chairman?

Mr. HUNGATE. Mr. Dennis?

Mr. DENNIS. I would like to briefly concur with what you have said and what my ranking member, the gentleman from New York, has said. I have already taken occasion to send a letter to the editor of the Times, I think for the first time in my career. It is rather difficult for me to understand. I have no brief, obviously, for anybody concerned here, but it is rather difficult for me to understand how we can have these public hearings with the lights and the reporters and everything else and, apparently, an utter lack of communication between the reportorial staff of the New York Times and the editorial staff.

I have heard about living in Ivory Towers, but this is the grossest example I have ever unfortunately experienced. The chairman has been working us very hard here on this matter and I think properly so. It is a very difficult matter, whether people realize it or not. And I certainly was surprised and take exception to the very ill-informed editorial in question.

Mr. HUNGATE. I thank the gentleman, and now we shall proceed.

We are pleased to have with us this morning——

Mr. MAYNE. Mr. Chairman?

Mr. HUNGATE. I am sorry.

Mr. Mayne?

Mr. MAYNE. I want to commend the chairman for his statement, and after reading the editorial in question, it would appear that nothing would have satisfied the writer of that editorial short of this subcommittee and the full committee immediately rubber-stamping the

Hart-Bayh bill and other similar proposals as soon as they were introduced on October 23. Apparently, they do not want us to have hearings as to both sides of this question. But, they call it irresponsible not to just go right ahead and adopt what they would like to see adopted.

Now, I think we have already seen an example of how destructive it would have been to a proper carrying out of the Watergate investigation if these proposals had been rubber stambed by the Congress. There is a very serious flaw in the bills, in that both the Hart-Bayh bill and the Democratic study group, Culver bill, would have vested the appointive power in Judge Sirica, the Chief Judge of the District Court. And by the specific terms of those bills, they disqualified the judge from any further participation in the case. Now, I think the subcommittee has done a real service in taking enough time to point out that that would be a disaster. It would deprive the people of this country of the services of Judge Sirica, whose experience and familiarity with the case are sorely needed.

Certainly, no reasonable person could say that you, Mr. Chairman, have not proceeded as speedily as can reasonably be done. You have had this committee in session almost daily and particularly considering the other demands upon our time in connecton with other pressing matters, I think that the editorial in question is really an insult, not only to the Speaker and to Chairman Rodino, but to you. And I want you to know that on this side that insult is resented very deeply.

Mr. HUNGATE. I appreciate that.

Mr. HOGAN. Mr. Chairman?

Mr. HUNGATE. Mr. Hogan?

Mr. HOGAN. Mr. Chairman, I concur with everything that has been said and I think all of us who are on this other side of the news reporting have seen numerous instances of the superficiality of the press where an article pontificates about issues of tremendous importance without really understanding the issues themselves. And I would submit that not only were they grossly unaware of the activities going on in this committee, but I would submit that the writer or writers of that editorial probably have not even read the Bayh bill that they so enthusiastically endorse.

Mr. HUNGATE. I thank the gentleman.

The committee will now proceed with Acting Attorney General Robert Bork.

On the questioning, we will follow the 5-minute rule.

We welcome your cooperation and your appearance here, General Bork.

TESTIMONY OF HON. ROBERT H. BORK, ACTING ATTORNEY GENERAL OF THE UNITED STATES

Mr. HUNGATE. Do you have an opening statement?

Mr. BORK. I do.

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

Mr. BORK. Thank you.

Mr. Chairman and members of the subcommittee, I am pleased to have the opportunity to discuss with you today the question of legislation which would, in various ways, attempt to create a Special

Prosecutor for Watergate and related matters outside the executive branch of Government. Such proposals appear to me to create a number of serious constitutional and practical difficulties. As a background for discussion, it may be helpful if I describe to you the current situation of these investigations and prosecutions.

There has been no interruption in the work of the former Watergate Special Prosecution Force. The group of lawyers assembled by Mr. Cox remains intact and has continued its work from the same quarters, with the same staff, and with the same investigative and administrative support from the Department of Justice. The grand juries have been running just as before and the Department of Justice continues to support bills now before Congress to extend the life of the Watergate grand juries. The Special Prosecution Force continues to have access to the full resources of the executive branch, including assistance from the Federal Bureau of Investigation and investigations from the Internal Revenue Service.

Today, the new Special Prosecutor, Mr. Leon Jaworski, takes office with precisely the same charter that Mr. Richardson established for the former Special Prosecutor, with the sole exception that the new charter contains an additional safeguard of the Special Prosecutor's independence. That safeguard is the President's assurance that he will not exercise his constitutional power to discharge the Special Prosecutor or to limit his independence in any way without first consulting the majority and minority leaders and chairmen and ranking members of the Judiciary Committees of the Senate and the House, and ascertaining that their consensus is in accord with his proposed action.

Although it is anticipated that Mr. Jaworski will receive cooperation from the White House in getting any evidence he feels he needs to conduct investigations and prosecutions, it is clear and understood on all sides that he has the power to use judicial processes to pursue evidence if a disagreement should develop.

This is the posture of affairs and I am perfectly satisfied that Mr. Jaworski will conduct the investigations and prosecutions with complete impartiality and diligence.

The question is whether congressional legislation appointing a Special Prosecutor outside the executive branch or empowering courts to do so would be constitutionally valid and whether it would provide significant advantages that make it worth taking a constitutionally risky course. I am persuaded that such a course would almost certainly not be valid and would, in any event, pose more problems than it would solve.

As I have said, the Special Prosecution Force is now, and has been, in uninterrupted pursuit of the cases under its jurisdiction. Should the Congress or the courts attempt to establish a new Special Prosecutor, there is bound to be legal confusion, delay, and disruption of these investigations and prosecutions.

There is also the danger—and this is the problem that concerns me most—that the establishment of a Special Prosecutor outside the executive branch would ultimately be held unconstitutional so that persons otherwise properly convicted would go free. A person so "convicted" would, on a second trial, conceivably have a double jeopardy claim under the fifth amendment and, perhaps more plausibly, a claim that he had been denied the right to a speedy trial guar-

anteed by the sixth amendment and that the publicity generated by his first—invalid—trial denied him due process and an impartial jury as required by the fifth and sixth amendments, respectively. There is, moreover, the real possibility that the delay involved in such a procedure would have let the statute of limitations run on some offenses and that witnesses and other evidence would be lost. These seem to me very substantial dangers that ought not to be courted unless there is no other way to proceed.

The constitutional problem arises, of course, because the Constitution of the United States makes prosecution of criminal offenses an executive branch function. The Constitution distributes the powers of the three branches of Government and the 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." Article II, section 2 gives the President "Power to Grant Reprieves and Pardons for Offenses against the United States." This power, too, indicates that the Constitution lodges in the executive branch complete control over criminal prosecutions. As Prof. Roger Cramton has stated, although "the nature and extent of this power has been disputed, there can be little doubt that functions placed in the four original Federal departments—conduct of foreign relations, command of the military, enforcement of the law, and collection of taxes—are at the core of the Executive's authority."

This conclusion was emphatically affirmed by the Fifth Circuit Court of Appeals, sitting en banc, in *United States* v. *Cox*, 342 F. 2d 167 (1965), certiorari denied, 381 U.S. 935 (1965). A Federal grand jury handed up a perjury indictment against two black witnesses on the basis of their testimony in a civil rights case. At the direction of Acting Attorney Katzenbach, the U.S. attorney refused to sign the indictment and the district court cited him for contempt. The Fifth Circuit reversed, holding that prosecution is placed by the Constitution under the control of the executive branch, not the judiciary. The majority opinion said:

> It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.

(342 F. 2d at 171.)

Judge Wisdom, concurring specially, further 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.) And, further, "The functions of prosecutor and judge are incompatible." (342 F. 2d 192.) The Supreme Court declined to review the Cox decision.

Congress' duty under the Constitution is not to enforce the laws but to make them. The Federal courts' duty under the Constitution is not to enforce the laws but to decide cases and controversies brought under the laws. The executive alone has the duty and the power to enforce the laws by prosecutions brought before the courts. To suppose that Congress can take that duty from the executive and lodge it either in itself or in the courts is to suppose that Congress may by mere legislation alter the fundamental distribution of powers dictated by the Constitution. Under such a theory, the Congress, should it deem it

wise, could take the decision of criminal cases from the courts and assume that function itself or lodge it in the Criminal Division of the Department of Justice. That is simply not our system of government.

It has been suggested that the traditional understanding of the Constitution, which places prosecutorial power solely in the executive branch, may be evaded by exercising two powers expressly given the Congress in article II, section 2 and in article I, section 8. I shall examine these in turn to suggest why I do not think the power to lodge prosecutorial powers outside the executive branch is fairly contained in either of them.

Article II, section 2 grants wide powers to the President with respect to a number of matters, including the nomination or appointment of various officers of the United States, and then states:

> But the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

This provision was added with little or no debate toward the end of the Constitutional Convention. It is impossible to believe that as an afterthought, and without discussion, the framers carelessly destroyed the principle of separation of powers they had so painstakingly worked out in the course of their deliberations.

It seems as clear as such matters ever can be that the framers intended to give Congress the power to vest in the courts the power to appoint "inferior Officers" such as clerks, bailiffs, and similar functionaries necessary to the functioning of courts, just as they intended "Heads of Departments" to be able to appoint most of their subordinates without troubling the President in every case. The power is clearly one to enhance the convenience of administration, not to enable Congress to destroy the separation of powers by transferring the powers of the executive to the judiciary or, for the matter of that, transferring the powers of the judiciary to the executive.

There is no doubt whatever that the powers delegated to Mr. Jaworski are not only those exclusively vested in the executive branch but also are broad and comprehensive. Let us examine the jurisdiction and powers of the Special Prosecutor set up by the Department of Justice. The Special Prosecutor has four heads of jurisdiction:

1. Offenses arising out of the unauthorized entry into Democratic National Committee Headquarters at the Watergate;

2. Offenses arising out of the 1972 Presidential election for which the Special Prosecutor deems it necessary and appropriate to assume responsibility;

3. Allegations involving the President, members of the White House staff, or Presidential appointees; and

4. Any other matters which he consents to have assigned to him by the Attorney General.

That, I think you will agree, is a very wide criminal jurisdiction. An Attorney General can delegate such functions to a Special Prosecutor but I doubt that Congress can take them away from an Attorney General and give them either to itself or to the judiciary. If it can, I do not see why Congress could not simply abolish the Antitrust Division or the Criminal Division of the Department of Justice, and hand their law enforcement functions over to itself, to the courts, or to the Secretary of State. I do not see why it could not abolish the

Department of Justice and enforce the laws itself on such a theory. These are results the framers certainly never intended and that our constitutional system does not permit.

Much the same argument applies to Congress' power under article 1, section 8:

> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [that is, the enumerated powers of Congress], and all other powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof.

I take it that no one suggests the power to create a Special Prosecutor outside the executive branch is found among the enumerated powers such as the power to regulate commerce or to lay and collect taxes. The theory, therefore, must be that the power to make laws necessary and proper for the enforcement of the laws includes the power to remove law enforcement from the executive branch.

If the necessary and proper clause were read in that fashion it would be a power lodged in Congress that swallows up much of the rest of the Constitution. Under this theory, for example, there could have been no doubt of the constitutionality of the plan to pack the Supreme Court in the 1930's. In fact, if a recalcitrant Supreme Court frustrated Congress' wishes by applying the Constitution, the Congress could declare it necessary and proper that the Congress rather than the court decide constitutional cases. No one has ever suspected before that the necessary and proper clause was a power to amend the Constitution that makes wholly unnecessary the specific procedures for amendment provided by article V.

The necessary and proper clause must be read as a means of making the exercise of powers by the various branches effective, not as a means of shifting powers between the branches of government. Thus Congress may create or abolish various positions within the Department of Justice. It may provide or take away jurisdiction. It may pass or repeal substantive laws. It may appropriate funds or not as it sees fit. But all of this does not add up to a theory that it can keep the laws but forbid the executive branch to enforce them and transfer the enforcement function to itself or to the courts.

It is particularly important in times of crisis and deep-seated unease that we adhere to the constitutional system that has sustained us so long. It is all too easy to say that this is an emergency and we will only violate the Constitution this one time. But that kind of expediency is habit forming. Bad precedents, once established, are easily used in the future.

In sum, we now have a Special Prosecutor and a staff in operation. There is every reason to expect that they will carry out their investigations and prosecutions with the full rigor that the law requires. There is no reason to abandon a constitutional system of government that has served us so well for so long.

Mr. HUNGATE. Thank you very much, General.

The chair will first recognize for 5 minutes, Mr. Kastenmeier.

Mr. KASTENMEIER. Thank you, Mr. Chairman.

I, too, would like to extend a welcome to Acting General Bork in his first appearance in that capacity before this committee. And in that connection, Mr. Bork, assuming the Senate does confirm the nominee for the Attorney General sent down by the White House, to which

position will you return? That is to say, will you be the Deputy Attorney General in that case or what?

Mr. BORK. No, Mr. Kastenmeier. I am the Acting Attorney General only by virtue of the fact that I am Solicitor General and the automatic operation of the succession regulations placed me in the position of Acting Attorney General. Once an Attorney General is confirmed, I will remain as Solicitor General.

Mr. KASTENMEIER. I understand. Why did you fire Mr. Cox?

Mr. BORK. That is a story I have told several times and I will be glad to tell it again.

Mr. KASTENMEIER. In a nutshell, and it has to do with your testimony in terms of Mr. Jaworski, of course.

Mr. BORK. Right.

I had had very little to do with Mr. Cox. I was not familiar with his operation; I was not involved in the negotiations about a compromise that led to the discharge. I first became involved the afternoon of October 20, when Mr. Richardson called me into his office and filled me in on what was taking place.

As the afternoon wore on, it became apparent that there would be difficulty and that there would probably be an order given to discharge Mr. Cox. Even at that moment, I did not see what was coming to me.

Later, Mr. Richardson said, "Given my promises to the Senate in my confirmation hearings, I cannot discharge Mr. Cox." Mr. Ruckelshaus has made it clear that he regarded himself as the personal choice of Mr. Richardson as deputy, and also because of his own confirmation hearings he was bound by the representations that Mr. Richardson had given to the Senate.

In our discussions, it was perfectly clear that I was not in that special position. When the order to discharge Mr. Cox came to me, I reflected that, and I had very little time for reflection, I reflected that if I refused and resigned, the Department of Justice, I think, would have been in chaos and would have been crippled. I think there would have been, after that pattern had been set by a man who had no special commitments to the Senate. I doubt that any of the presidential appointees or senior officers would have stayed. It would have been easy to resign at that point, personally. Mr. Richardson and Mr. Ruckelshaus both said that if I discharged Mr. Cox, they thought that I should stay on to give the Department some continuity. It was clear that the decision at the White House to discharge him was final. If I did not do it, the only result would be to badly cripple, badly hurt the Department of Justice. I did it for that reason.

My initial reaction, as I said, was to discharge Mr. Cox and resign. I was persuaded otherwise.

Mr. KASTENMEIER. One of the reasons I asked is if you find that the assurances you have given here about the Special Prosecutor continuing to have full access to the resources and to certain evidence are countermanded by the White House, would you resign? That is to say, do you feel you have given us any assurances which, if they fail to be carried out in terms of the White House, would cause reaction upon your part?

Mr. BORK. As I have said before, I regard myself during the period when I was in charge of these investigations and prosecutions, a brief

period and now that I have chosen Mr. Jaworski, I do not expect that there will be any further trouble about the Special Prosecutor. But, should these investigations or prosecutions be compromised in any way, I would regard my position as morally untenable.

Mr. KASTENMEIER. Thank you.

Mr. HUNGATE. Mr. Smith of New York?

Mr. SMITH. Acting Attorney General, Mr. Bork, I, too, thank you for appearing this morning before this committee with your testimony. I think your statement has been a good one of the constitutional problem that faces us on this committee in regard to the separation of powers.

It may be, Mr. Bork, that down the road the Congress as representing the people of the United States, is going to demand a different kind of an independent Special Prosecutor and this, of course, is the purpose of the many bills that we are considering here, and that the Senate is also considering.

Do you suppose, Mr. Bork, that we could pass constitutional legislation which might require a Special Prosecutor, whether appointed by the President or by the courts, to be confirmed by the Senate?

Mr. BORK. Is that the end of the question, sir?

Mr. SMITH. Yes. My question is, and I am sorry if this is one of the first quick impressions to you, would it be possible for the Congress to require any future Special Prosecutor to be confirmed by the Senate?

Mr. BORK. It certainly would be possible, sir. I think there are some considerations involved in that. I think the Congress has full power to require any officer set up to be confirmed by the Senate. Curiously enough, under the case of *Myers* vs. *United States*, involving the President's discharge of a postmaster first class, who had been confirmed by the Senate, the majority seemed to think in that case, led by Justice Taft, that the fact of Senate confirmation made the man more liable to unilateral discharge by the President than would be otherwise the case, because it makes him less clearly an inferior officer within the meaning of the Constitution and more clearly a superior officer as to whom the President has constitutional powers, rather uninhibited powers.

Mr. SMITH. General Bork, back in the 1860's, I believe, the Congress considered and finally passed, when the Congress was having a lot of difficulties with President Andrew Johnson, a Tenure of Office bill because the President at that time, apparently, was discharging and firing a lot of presidential appointees. And the Tenure of Office act which became law, I understand—I have not followed its constitutional history—provided that any presidential appointee should continue in office until his successor had been confirmed by the Senate. The effect of that bill, of course, was to hold up for different periods of time, and perhaps indefinitely, the discharge of a presidential appointee by the President.

Here, again, I am sorry to ask you this without having a chance to look at it, but would you like to comment on that?

Mr. BORK. Yes, I would, Mr. Smith, because curiously enough, over the weekend I looked at that in anticipation of just this discussion.

The Tenure of Office act was of dubious constitutionality when passed, I think. But, in this case of *Myers* v. *United States*, the Chief

Justice Taft discussed its history and said that it had been constitutionally invalid so that insofar as we know much about the Tenure of Office act and its constitutional validity, we have very little precedent. But, the *Myers* case, which is the leading case on this topic, said that it was invalid.

Mr. SMITH. Did the *Myers* case specifically involve this Tenure of Office act?

Mr. BORK. No, sir, it did not. The *Myers* case is one of the most difficult opinions in the Supreme Court to read. It runs about 270 pages and Mr. Taft, I think, must have discussed every statute and every case and every administrative procedure from the beginning of the Constitution on to date. And he finally got up to Andrew Johnson and the Tenure of Office act. The case does not involve that act and it is dictum, to be sure. But, he said it is an unconstitutional act.

Mr. SMITH. As far as you know, there was never a constitutional test of the Tenure of Office act?

Mr. BORK. I do not believe so. So far as I know, there is none.

Mr. SMITH. Thank you very much.

Mr. HUNGATE. Mr. Edwards of California?

Mr. EDWARDS. Thank you, Mr. Chairman.

Mr. Bork, the problem as you know with your position is, as enunciated by previous witnesses and some very distinguished witnesses, that the President is appointing a prosecutor to investigate the President. And the other approach under the Bayh-Culver bill, would permit the court or the judge to appoint a special prosecutor.

Can I assume from your testimony, except for the constitutional problem that you lay out, that you would agree it would be better if the prosecutor were truly independent in that he would not be appointed by the White House?

Mr. BORK. If it were not for the constitutional problem, and the practical problems that would arise because of the position the investigation and the prosecutions are now in, it would always be better if an investigator and a prosecutor were separated from whomever might turn up as the subject of his investigations.

I think, however, we have a constitutional system we have to live with. We have been tempted to modify it before. I can think, for example, that had this precedent of establishing a Special Prosecutor outside of the executive branch been established previously, I think that during the era of Senator McCarthy we might well have had a Special Prosecutor designed to root out subversion throughout the executive branch.

There are a number of times when this kind of distrust of the executive branch existed and a Special Prosecutor could be appointed. And I think that would be a very bad precedent.

Let me say this: I think as a practical problem, not much of one really exists at this stage. For one thing, Mr. Leon Jaworski has an extraordinarily distinguished career and he is a man of great integrity. But, in addition to that, I think it is only fair to recognize that as political realities are, I just do not—full cooperation has been promised and, in addition, political realities seem to me to be such that Mr. Jaworski is going to have a free hand.

Mr. EDWARDS. Mr. Bork, the President of the American Bar Association said that before Mr. Jaworski was appointed, he was inter-

viewed by General Haig, by Leonard Garment and by Fred Buzhardt. What was the message or what was the communication imparted to him by those three gentlemen?

Mr. BORK. Well, Mr. Jaworski wanted full assurances of his independence. And that independence, that was what was communicated to him, that they wanted a professional job and that they would not interfere with the way it was done.

Mr. EDWARDS. Were these three separate interviews?

Mr. BORK. No. I was present throughout most of this and I think I was probably the only person, when I came in, present throughout the day. Henry Petersen also came in to explain the situation to Mr. Jaworski and what the job entailed, what kind of a staff he had, what the structure of his staff was. It was a meeting that did several things. One of them was to provide Mr. Jaworski with assurances that he would not be interfered with. There was a meeting also because I wanted to get an impression of Mr. Jaworski. I knew his reputation was enormous but I was most impressed by him and by the serious, detailed way he went about asking questions and looking into the matter. I would not call them interviews at all in that sense, Mr. Edwards. He was not a job applicant. He was a man whom I was prepared to beg to take the job because of his eminence and his skill. I did not have to do that because Mr. Jaworski understood completely the seriousness of the situation the Nation faces and undertook this if I may say so, as a patriotic duty.

Mr. EDWARDS. Where a vacancy exists in the U.S. Attorney's Office, from time to time the courts are empowered to appoint U.S. attorneys; is that not correct?

Mr. BORK. That is correct.

Mr. EDWARDS. Why do you think that is not unconstitutional then?

Mr. BORK. Well, because the court appoints a U.S. attorney as an emergency matter, but that U.S. attorney remains subject to the control and direction of the Department of Justice nonetheless and also remains subject to Presidential removal.

Mr. EDWARDS. Is he subject to Presidential removal?

Mr. BORK. I believe so, sir.

Mr. EDWARDS. I have no further questions at this time, Mr. Chairman.

Mr. HUNGATE. Mr. Dennis from Indiana?

Mr. DENNIS. Mr. Bork, I am conscious of the constitutional problem that you raise about putting the prosecutorial function, which is normally an executive function, over into the judicial branch, and I think it is a very serious question myself. At the same time, I have been persuaded that under existing circumstances, an independent prosecutor and one who was obviously so as a matter of law, would be desirable if it could be accomplished within the constitutional framework. And therefore, of course, I have considered methods of doing that which would not take it out of the executive branch. And I thought of the normal procedure of the Presidential appointment with advice and consent of the Senate, and there, as you have pointed out, you run into the Myers doctrine, which, in effect, holds that in that type of an appointment, you cannot put any limitations on the Presidential power of removal.

So, through that process of thought, I come down to another thought which also has been, I believe, Senator Taft's thought over in the Senate. And I would like to see what you think of the idea. Why could we not vest the appointment in the Attorney General with the advice and consent of the Senate, and then rely on the language which is in the *Myers* case itself, quoting *United States* v. *Perkins*, which indicates that if you vest appointment in the head of a department rather than in the President, Congress can also restrict the power to remove, so that you could draw legislation which would vest the appointment in the Attorney General, a head of a department, and a head of an executive department, but require the Senate to advise and consent, which would bring in the Congress, and then provide that the Attorney General only, not the President, could remove only for good cause shown, such as gross misconduct in office, and hedge about the removal power with requirements which, in the case of the Chief Executive, you could not do under Myers?

Mr. BORK. The difficulty I see in that plan is the idea of Senate confirmation of a man nominated by the Attorney General rather than the President. I do not know that there is any constitutional procedure for that.

Mr. DENNIS. I do not know that there is any precedent for it but, also, I have not found anything that would say that you could not.

Mr. BORK. Well, this clause seems to break into two parts. The President has power by and with the advice and consent of the Senate and so forth, and he shall nominate by and with the advice and consent of the Senate, a certain class of officers who are clearly superior officers. Then it provides: "But heads of departments may be vested by Congress with the power to make appointments." The clause seems to break into rather two clear parts, one of which involves Presidential appointment with the advice and consent, the other part of which is head of department appointment without advice and consent. I would be troubled by that. It is possible, I think, and of course you mentioned the *Perkins* case, which I believe is the Cadet Engineer?

Mr. DENNIS. That is right, I believe.

Mr. BORK. It is possible, of course, for the Congress in establishing an inferior officer, to be appointed by the head of the department, to provide certain kinds of restrictions upon the causes for which he may be removed. But, I would think that would be inconsistent with the advice and consent of the Senate.

Mr. DENNIS. Well, of course, my desire was to bring the congressional branch in and that is the reason for the advice and consent of the Senate, as to which I see your argument. I still am not sure that there is anything invalid about it. But, supposing that part were not in it, or were held invalid, you would still have an appointment by the Attorney General and removal only for some specified causes, which we would specify in the statute, and thus bind down the fact as a matter of law that there could be removal only for certain reasons. That could be done, could it not?

Mr. BORK. I think it could be with two qualifications, if I may, Mr. Dennis.

Mr. DENNIS. Yes.

Mr. BORK. We are in somewhat unknown territory here. I think one would have to be careful about the spelling out of the causes for which

removal would be proper. For example, I do not think the President's assurance that he will not remove without consulting, is a clause that could be constitutionally written into law. But removal for cause or something like that could be.

Mr. DENNIS. That was my idea.

Mr. BORK. The other kind of qualification I have, and it is a qualification born of uncertainty rather than knowledge, is that the cases we have, by and large involving major figures, the *Myers* case, the *Humphrey's* case, and so forth, the *Perkins* case, have all been suits for back pay rather than for reinstatement. Now, I am told there are certain kinds of officials who manage to sue and use a mandamus action or injunction action and get reinstated. Whether an official of this nature, of this importance, with this relationship to the executive branch would be held to be allowed to have specific performance, and be reinstated in office rather than get back pay, I do not know. I do not say there is not an answer to that. I am uncertain about it. That is all I am saying.

Mr. DENNIS. The chairman indicates that my time is up. I would like to pursue this further, but thank you, sir.

Mr. HUNGATE. Mr. Mann of South Carolina?

Mr. MANN. Mr. Bork, Mr. Jaworski has stated that he had been offered this job before Mr. Cox got it in May. Do you know the circumstances surrounding that?

Mr. BORK. No, sir, I do not. I was up in New Haven when Mr. Richardson was—I was not down here on the job yet and, in fact, I was one of the recipients of a phone call from Mr. Richardson's staff with suggestions and so forth. I did not participate in that process other than to receive a phone call and make some suggestions.

Mr. MANN. On the question of the consequences of a Special Prosecutor created by Congress or by the courts being held invalid, do you see any problems with the results of the investigative work of that prosecutor? Let's assume, for example, that based on his efforts, a grand jury returned a presentment calling for indictments. I would assume that if the issue of constitutionality had not been decided at that time, then it would be the intent of the Attorney General of the United States to support and sign those indictments, would it not?

Mr. BORK. You mean Mr. Jaworski's indictments?

Mr. MANN. Yes.

Mr. BORK. Yes, although I would prefer, in a way, that we give Mr. Jaworski the power to sign his own indictments.

Mr. MANN. But let us assume, as I have said, that the constitutional issue had not been settled at the time the indictment stage was reached. Would there be any constitutional problem then if Mr. Jaworski did call upon the Attorney General to sign the indictments?

Mr. BORK. No; but to be frank, Mr. Mann, I do not see any constitutional problem at all in the Special Prosecutor, as it is now set up.

Mr. MANN. Let us assume we are talking about a prosecutor that supplants Mr. Jaworski based on an appointment by the court?

Mr. BORK. Yes, there would be a problem from the beginning. It may be that the first time that the prosecutor subpenaed a witness that the witness would move to quash the subpena on the grounds that he was not dealing with a lawful prosecutor. It may be that a man whose factual case was weak would perhaps reserve the point and not

raise it until he began to appeal his conviction, because that would give him a much better constitutional position to avoid trial a second time.

Mr. MANN. Well, if we have a subpena of the nature that we have been talking about it in the last few weeks, it is not likely that that would be reserved, is it?

Mr. BORK. Well, it depends on—you are talking about subpena to the White House?

Mr. MANN. Yes.

Mr. BORK. It might be. I do not know about that. I was not thinking about that, because I was thinking of a man who is likely, he thinks, to be indicted and he might reserve it because he would rather be indicted, go through trial and, at that point, move that the entire thing was a nullity.

Mr. MANN. All right, then, based upon that, as an investigator-prosecutor appointed by the courts, if that investigative prosecutor called upon the Department of Justice to handle the indictment from the signature stage on, would there be any problem?

Mr. BORK. No; but there would be no problem if what you are suggesting, Mr. Mann, is an independent special prosecutor who, in fact, relies upon the Department of Justice to do his work for him and do his prosecutions for him.

Mr. MANN. Well, I think we can agree that the primary concern is in the investigative process.

Mr. BORK. Well, you know, I should speak to that because there is a problem of realism there. We have 40 or 50 lawyers over there in that task force who have been working on this case from the beginning, and they are still there. I have urged Mr. Jaworski to keep them there because I think their remaining intact is essential to the expeditious handling of these cases. I have no qualms whatever that those lawyers and investigators who were operating under Mr. Cox are still doing their job effectively and are going forward. I do not think there is any real problem about that.

Mr. MANN. Well, assuming that the Attorney General undertook the prosecution, upon grand jury presentment, there would be no problem about those lawyers proceeding with the prosecution under the auspices of the Attorney General, would there?

Mr. BORK. No, if they are under the auspices of the Attorney General, which means executive branch control, there is no problem.

Mr. MANN. Thank you.

Mr. HUNGATE. Mr. Mayne of Iowa?

Mr. MAYNE. Thank you, Mr. Chairman.

General Bork, is the situation this: that Mr. Jaworski's charter is the same as the charter which was held by Mr. Cox, with the sole exception that there is this provision that he can be removed only with the consent of a consensus of this group of legislative leaders?

Mr. BORK. That is correct.

Mr. MAYNE. Well, now, the practical difficulty, of course, is that many people feel that that original charter, which was held by Mr. Cox, was not sufficient to save him from rather summary discharge. Now, there is this additional safeguard, to be true, but isn't there some way that we could strengthen this that would meet constitutional objection, and do you not think this committee should try to come up with

some way of ingrafting upon this charter, some statutory guarantees that the charter must be enforced?

Mr. BORK. I think it would be perfectly—I think there would be no constitutional difficulty with legislation which protected the tenure of the Special Prosecutor. I think there would be constitutional difficulty if you made him subject to confirmation by the Senate, because I think at that stage you would lessen his protection rather than increase it. And with the qualifications I expressed to Mr. Dennis a moment ago about, in my mind at least, some uncertainty about how those safeguards would be enforced, whether a court would, in fact, issue a mandamus to continue this relationship, or an injunction, or whether it would resolve itself as it has in the *Myers* case and the *Perkins* case, into a claim for back pay, which is certainly not the issue before us.

Mr. MAYNE. But I take it that you do feel that it would be a proper and productive subject for this subcommittee to pursue, to try to develop legislation that would give statutory guarantees of tenure to the Special Prosecutor?

Mr. BORK. I think there is no problem at all with the constitutionality of that kind of thing, as long as the prosecution remains in the executive branch. And as to its wisdom and how it be drafted, I would rather not express myself until I have had a chance to look at what was proposed and to comment upon it. But the general concept is certainly a constitutional one.

Mr. MAYNE. And so that we may be sure that there is no misunderstanding, this type of statutory guarantee could be applied specifically to the present Special Prosecutor, Mr. Jaworski?

Mr. BORK. That is correct.

Mr. MAYNE. I was intrigued by your reference to the situation in the Joseph McCarthy era. Now, when you talked about the dangers that might well have developed there, if there had been a Special Prosecutor with wide authority, were you referring to the permanent office of Special Prosecutor which is suggested in some of the bills, or a special independent prosecutor who was not permanently established?

Mr. BORK. I was thinking of a nonpermanent one. But once the precedent is established, every time a time of crisis or deep distrust arises, I am afraid that the same thing would happen. And in many cases, I think a Special Prosecutor, as in the McCarthy era, would lead to very ugly legal and political results. I think we are dealing with a precedent which has great potential danger in it. This idea of a permanent Special Prosecutor, I might say, strikes me as not a terribly good one, because what you are doing is building an office whose sole function is to attack the executive branch throughout its tenure. It is an institutionalized wolf hanging on the flank of the elk, which does not seem to me to be the way to run a Government.

Mr. MAYNE. Then I take it that while certainly our system of separation of powers was not flawless in dealing with the Joseph McCarthy situation, you feel that our established constitutional procedures probably did a better job in containing that redoubtable Senator than we would have been able to if there had been a Special Prosecutor with a wide charter ruling over that situation?

Mr. BORK. Had Senator McCarthy succeeded in getting a Special Prosecutor established for doing his work for him, he would not have contained. It would have been, I think, a terrible situation.

Mr. MAYNE. Some of the briefs that have been submitted for judicial appointment of a prosecutor, place great stress on ex parte *Siebold*, which is the case where a judicial appointment of an election supervisor was upheld. I wonder if you could tell us your reaction to that decision, and why, obviously, you do not agree that that is authority, persuasive authority at least for a judicial appointment?

Mr. BORK. No. I think ex parte *Siebold* is entirely a straw. You cannot support the kind of building you are trying to erect here with that case. In the first place, it is a case from 1879. All that was done was to appoint some people to watch some House of Representatives' elections. I think probably it should not have been done. I think probably that was not a judicial function, and the court should not have accepted the task.

But, even if one think ex parte *Siebold* was correctly decided, which I do not, I would hope that era is behind us. It is certainly, the appointment of a supervisor to look at an election is certainly unlike taking a major area of criminal jurisdiction out of the Department of Justice and the executive branch and locating it somewhere else. The magnitude of the two things is wholly different.

Mr. MAYNE. The language in that opinion indicates that the holding was partially based on the fact that there was no incongruity in the duty required in the case, having these election supervisors——

Mr. BORK. That is a good point.

Mr. MAYNE. Is there an incongruity in the bills before us today?

Mr. BORK. I think so. As Judge Wisdom pointed out in the *Cox* decision, the functions of the prosecutor and judge are simply incompatible.

Mr. HUNGATE. Pardon me. The time of the gentleman has expired. We will go around the subcommittee again.

Eighteen hundred and seventy-nine is old, but I think the gentleman would accept 1789 papers as good authority.

Mr. BORK. These things go in cycles.

Mr. HUNGATE. The Constitution, for example.

Ms. Holtzman, please?

Ms. HOLTZMAN. Thank you, Mr. Chairman.

The understanding is that Mr. Cox was fired because he announced that he was going to enforce the court order of the District Court for the District of Columbia requiring the President to comply with the subpena and turn over nine tapes of Presidential conversations. Attorney General Richardson said that he would have done the same thing if he were in Mr. Cox's shoes. Would you have done the same thing, Mr. Bork?

Mr. BORK. You mean the same thing, you mean would I have pressed the——

Ms HOLTZMAN. Would you have sought to enforce the court order requiring the President to comply with the subpena?

Mr. BORK. Yes; I certainly would have sought to enforce the court order. But, let us remember one other thing and that is, that Mr. Richardson thought that the compromise as to the tapes, which was suggested, was a reasonable compromise for that stage of the proceeding. I cannot very well cast myself back into a situation which I still do not fully understand, because I am not familiar with that course of negotiations or what was at stake. But, it is quite possible

I would certainly have used the judicial process to try to obtain the evidence, the investigations and prosecutions required, whatever I would have thought that would have been needed. Whether or not I would have thought the compromise offered was reasonable, as apparently Mr. Richardson did and a lot of people did, I do not know because I have not examined the needs of those cases and how far the compromise would have gone to meet them.

Ms. HOLTZMAN. But, you do not disagree with the action taken by Mr. Cox in announcing that he would seek to enforce the court order, is that correct?

Mr. BORK. If the question is, do I agree that a Special Prosecutor, including Mr. Cox, should use judicial process and when he gets a court order should he enforce it, no, I do not disagree with that.

Ms. HOLTZMAN. Well, let us turn to some other matters that may arise, because I was rather surprised by your statement that you would envisage no "practical problems," to use your quote. In testimony last week regarding the so-called missing tapes, Mr. Bull stated, I gather, that President Nixon listened to all of the tapes subpenaed by Mr. Cox on June 4.

Do you think a Special Prosecutor ought to go into court to subpena the June 4 tape?

Mr. BORK. Ms. Holtzman, I am as of this moment in charge of the special prosecution and the matter is before Judge Sirica, and attorneys under my general authority are in court; that is, Henry Ruth and Phil Lacovara. I do not think I really ought to comment upon an ongoing judicial matter in which I am formally, at least, concerned.

Ms. HOLTZMAN. So, you cannot make any statement as to whether or not you think the Special Prosecutor ought to subpena the June 4 tape, assuming that the testimony of Mr. Bull is what I said it was?

Mr. BORK. The immediate decision as to that question will be made by Mr. Henry Ruth who knows far more about the details of those cases than I do. And I am sure when Mr. Jaworski comes aboard this morning, that he will discuss that with Mr. Ruth and they will arrive at some decision as to what to do in the case. But, I think I ought not to sit here without really intimate knowledge of it, and furthermore, in some sense being involved in it, and talk about what ought to be done in a courtroom case.

Ms. HOLTZMAN. Well, you can see, and envisage many other circumstances in which the Presidential papers and the Presidential tapes will become relevant not only to the investigation by these Watergate grand juries but also to various trials that are about to take place and will take place in the future. I would like to get some sort of clear statement from you, since you are the one who ostensibly appointed the Special Prosecutor and is ostensibly in control of what is happening as to what you feel is proper for a Special Prosecutor to do. It is one thing to say there are no practical problems and that, in fact, I found to be a disturbing statement. Do you or do you not feel that it would be incumbent on the Special Prosecutor to obtain all evidence that would be necessary: (1) To insure the prosecution of cases where indictments have been handed down; and (2) to obtain all evidence, whether they are in the President's hands or not, otherwise necessary for the investigation by the grand jury?

Mr. BORK. Yes, Ms. Holtzman, I have stated that that is precisely my position.

Ms. HOLTZMAN. Well, do you not think that event is a practical problem and do you not envisage the same thing happening with respect to Mr. Cox, in which the President will say again that he does not wish to turn over the Presidential papers?

Mr. BORK. When I said——

Ms. HOLTZMAN. That an order would be issued?

Mr. BORK. Maybe I did say that I envisaged no practical problems. If I did, I was certainly—these cases abound with practical problems. What I envisage is a great deal of cooperation from the White House should there come a point at which the President feels the confidentiality of a certain piece of paper is important, so that he ought not to turn it over. And I understand and it is clear to me that Mr. Jaworski can go to court and test out that claim. And we now have some law from the Court of Appeals of the District of Columbia about what the respective rights of the parties are.

Ms. HOLTZMAN. Well, along these lines, Mr. Bork, President Nixon in a Friday news conference two Fridays ago, stated that he will cooperate with the new Special Prosecutor, but "not by having a suit filed by the Special Prosecutor within the executive branch against the President of the United States."

Mr. BORK. Is he talking about Mr. Cox?

Ms. HOLTZMAN. I am sorry?

Mr. BORK. Was he talking about Mr. Cox?

Ms. HOLTZMAN. No. He was talking about the future. And, secondly, Mr. Haig earlier last week was quoted as having said in a television interview, in essence, that if the Presidentially appointed Special Prosecutor was the type who would feel encumbered by having to pledge not to seek additional White House documents "he's perhaps not the man that we would want." Do you agree with Mr. Haig's statement?

Mr. BORK. Oh, yes. If Mr. Haig, if I understood what you read, said that anybody who would feel he could—he would not go to court if he needed the evidence is not the man we want, that is precisely correct. I agree with that precisely.

Ms. HOLTZMAN. No, no. I think that the statement is that if he felt that he would be encumbered by having to pledge not to go to court, and then he is not the man that they would want.

Mr. BORK. Ms. Holtzman, let me state what I think rather than trying to react to the statements quoted to me from Mr. Haig and Mr. Nixon, with which I am really not familiar. I think when I was in charge of these cases briefly and I am glad it was briefly because I think we need a Special Prosecutor, my position was that I could not be ordered not to go to court to get evidence that was essential to the successful investigation or prosecution of a case. I take it that Mr. Jaworski—I am sure that Mr. Jaworski will take that same position.

Ms. HOLTZMAN. Well, the reason I ask you this is because you have said to us that there will be full cooperation, and that there will be full independence, and yet, I am quoting to you statements both by the President and by Mr. Haig, who did interview the Special Prosecutor, Mr. Jaworski, which would indicate to the contrary. And so, I wanted to have your comments with respect to that.

Mr. BORK. My only comment is I do not know what those statements really mean because I have not examined them. My only comment is that my understanding is that he is free to go to court.

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

Mr. Hogan of Maryland.

Mr. HOGAN. Yes.

Mr. Bork, you indicated that you think that it is totally improper for the Special Prosecutor to be appointed by a judge and there certainly is substantial history indicating this might be undesirable. But, how is that really any different from the judge appointing the defense counsel?

Mr. BORK. Well, a defense counsel he appoints to aid a man who cannot afford a counsel as the Constitution gives him a right to. That does not involve setting prosecutorial policy and law enforcement policy for the Government of the United States. If the court appoints a prosecutor with wide jurisdiction to take away from the Government of the United States all of the matters within his jurisdiction, then I think we have an area in which prosecutorial policy is no longer being made where it should be. And we will have endless questions of conflict between an Attorney General and such a Special Prosecutor about who is supposed to prosecute which case.

Mr. HOGAN. So in other words, you think the rationale behind this is really not the impartiality of the judge, but the involvement of the judiciary in the prosecution?

Mr. BORK. It is two things: One is the constitutional and practical difficulties of taking away law enforcement policy from the executive branch; and the other thing is, I think, both the reality and the appearance of a judge running a prosecution are just wrong.

Mr. HOGAN. You indicated the constitutional basis for exclusive prosecution within the executive branch. How does that square with the early days of the Republic when private individuals were enabled to prosecute criminal offenses, that, of course, being based on the British system where private prosecutions can be initiated by anyone?

Mr. BORK. I am not—is it true in Britain that a criminal prosecution can be brought by anyone?

Mr. HOGAN. It is my understanding that they can.

Mr. BORK. I cannot speak to that and as to early Colonial or very early American experience with certain classes of crimes, perhaps as to which private prosecution was permitted, I am afraid I must plead a great deal of ignorance. And if you would like a response to that, I would be glad to find out about that and see what relationship it has to this issue and submit a statement.

Mr. HOGAN. I think that would be helpful to the committee because whenever we are wrestling with constitutional questions, we always try to find out what the thoughts of the Founding Fathers were, so in the early days of the Republic, when there were private prosecutions by individuals, obviously, they did not intend if that is the historical fact, as I understand it is, that prosecutions be within the exclusive jurisdiction of the Executive.

Mr. BORK. Were those by any State, Mr. Hogan, State prosecutions, because if they were State prosecutions we may have a very different constitutional setup. They do not have the separation of powers in all of the States the way the Federal Government does.

Mr. HOGAN. Well, but in those early days of the First Congress, we really did not have State governments as such. The Colonies were still floundering around. As I understand it, this was during the First Congress as to larceny on Federal lands, when there were prosecutions initiated by individuals.

Mr. BORK. I will look into that and see, and see if I can give you a more satisfactory answer than I can at the moment.

Mr. HOGAN. Now, as my time is running out, could we replow some of the same ground we have been over before?

There is some serious constitutional dispute about whether or not the judiciary can appoint a Special Prosecutor. But, is it your feeling that we would be well within our constitutional prerogatives and not create a situation where almost inevitably whatever we do would be challenged by defendants adversely affected by the activities of such a prosecutor, if we set up a mechanism whereby the prosecutor had to be confirmed by the Senate, and could be and would be appointed for a fixed term, a certain number of years, as is done with the Comptroller of the Currency or any of the other administrative commissions? Would that meet all of the constitutional tests, and would it achieve the independence that we are striving for?

Mr. BORK. I think not. As I tried to indicate, Mr. Hogan, you certainly can, if you wish, constitutionally make this a Presidential appointment, subject to Senate confirmation. But, I think that very fact tends to indicate under the *Myers* case, that he is, that he becomes a superior officer and, therefore, more vulnerable to Presidential discharge rather than less. I think the constitutional ground which gives the maximum, although I am not sure what the maximum is, safeguard, would be to regard him as an inferior officer subject to appointment by the Attorney General or the Acting Attorney General and statutory safeguards about the conditions of his removal set up.

Mr. HOGAN. So, you do not think we could create an analogous situation, say, to the Comptroller who is appointed for a fixed term and cannot be removed except for cause?

Mr. BORK. Well, the Comptroller is a situation I am not entirely familiar with, but he is not an executive branch—he has functions—the Comptroller, the last I heard was planning to try to get powers——

Mr. HOGAN. Let us take the SEC or the FTC and all of the various administrative agencies. They are both executive and quasi-judicial.

Mr. BORK. That is the *Humphrey's* case which suggests that such a man is not removable by the President because he has functions that are not purely prosecutorial, but are legislative and judicial as well. But the man we are talking about, the Special Prosecutor, has only prosecutorial functions. So I think he is more easily removable.

Mr. HOGAN. Thank you, Mr. Bork.

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

General Bork, I am pleased to hear you say you do believe there should be a Special Prosecutor. Now, let me ask, if I understand you, that under Mr. Mayne's questioning, you thought it would be constitutionally possible to set up a fixed term for such a prosecutor?

Mr. BORK. You can set up a fixed term. A fixed term by itself does not prevent his discharge within the term, because the postmaster first class in the *Myers* case had a fixed term, and he was held subject to discharge. I think you can constitutionally set the terms upon which he

may be discharged, but those terms, themselves, are subject to constitutional limits.

Mr. HUNGATE. You would agree to the constitutionality of the fixed term. You would agree then the provision under which the discharge may be made could be specified in the statute, is that correct?

Mr. BORK. That is correct. But I am qualifying that.

Mr. HUNGATE. Pardon me?

Mr. BORK. I am just qualifying that to say it would not be constitutionally permissible to set any standard——

Mr. HUNGATE. Something reasonable and just, such as this committee might select?

Mr. BORK. Or discharge for cause or something like that.

Mr. HUNGATE. If I understand you further, you thought that the appointment should come, should or must come, from the executive branch?

Mr. BORK. I think to give the man such safeguards as can be given him, he should be an inferior officer as defined by the Constitution, and that means he is an officer appointed by the head of a department. And in this case that means that Attorney General or the Acting Attorney General.

Mr. HUNGATE. That keeps us in the executive branch, is that correct?

Mr. BORK. That is correct.

Mr. HUNGATE. One of our members, Mr. Biester, a former member of this committee, introduced a bill that would provide that the selection, as I understand his bill, would be made by the President but from a list specified by such groups as the American Bar Association, the American Trial Lawyers Association, the Association of Law Schools, and so on. Would you think that would be a constitutionally permissible method, if the list from which the selection should be made, were submitted for executive decision?

Mr. BORK. I think that is a proposal to which the President might agree, but I do not think he could be compelled to agree.

Mr. HUNGATE. You find a constitutional problem in that?

Mr. BORK. Yes.

Mr. HUNGATE. It is not uncommon in the States when selecting judges to submit to the Governor a panel, the so-called Missouri plan. He must pick from the panel or he does not pick.

Mr. BORK. As a means of working things out, it might be an acceptable compromise. But if a President would not accept it, I do not think he could be constitutionally compelled to accept it.

Mr. HUNGATE. You have a constitutional problem with such a method of appointment?

Mr. BORK. Only if it is not agreed to. Of course, if the President agreed to it, there is no problem.

Mr. HUNGATE. Well, pardon me. Whether we agree on something should not determine whether it is constitutional or not, should it?

Mr. BORK. Certainly the President has agreed, for example, in this new charter, to discharge the new Special Prosecutor or to limit his independence only after consultation with certain congressional and Senate and House leaders. That is a condition which I think could not be constitutionally imposed upon him.

Mr. HUNGATE. If I may interrupt you, on page 2 of your statement, "without first consulting the majority and minority leaders, and the

Chairman and ranking members of the Judiciary Committee of the Senate and the House," and so on. Now, the note that came to me through Chairman Rodino, November 1, 1973, when this suggestion was made to have Mr. Jaworski as the new Special Prosecutor, was that he can be removed only by consensus of the House and Senate leadership, and the House and Senate Judiciary Committee chairman. I am confused as to what the term "leadership" might mean.

Mr. BORK. Well, I have here among these many papers the charter I have issued, and it is not the specific—the specific language is not "leadership."

Mr. HUNGATE. This is a transcription of a phone call. I did not take it, but this is the way it came to me.

Mr. BORK. Well, let me perhaps——

Mr. HUNGATE. Could we have a copy of the paper that you rely on?

Mr. BORK. Yes What I did, sir, allow me to read a paragraph from my statement to the press at the White House press conference.

Mr. HUNGATE. Yes, sir.

Mr. BORK. This was on November 1, and this language was then worked into the charter.

There is no expectation whatever that the President will ever have an occasion to exercise his constitutional right to discharge the Special Prosecutor or that it would ever be necessary in any way to limit the independence that he is being given. Should this expectation prove to be ill founded the President has given his personal assurance that he will not exercise his constitutional powers with regard to the Special Prosecutor without first consulting the Majority and Minority leaders and the Chairman and ranking members of the Judiciary Committees of the Senate and the House.

Mr. HUNGATE. Thank you. That would be Senator Mansfield and Senator Scott in the Senate, I guess, and it would be Speaker Albert and Mr. Ford in the House, and Senator Eastland and is it Senator Hruska in the Senate, and Chairman Rodino and Mr. Hutchinson?

Mr. BORK. I think that is correct.

Mr. HUNGATE. I believe, and we will correct the record if I have made an error, I am just trying to get names on these positions. Now, that concensus, what would you think it would be, a majority vote, or two-thirds?

Mr. BORK. I think it has to be more than a bare majority. I think Senator Spong—that is the second time I have made that mistake. If I make that mistake once more—I think Senator Saxbe said he thought a concensus meant at least six votes, six agree out of the eight.

Mr. HUNGATE. A three-fourths vote then, perhaps.

General, the question of the security files, if I may jump over to that question. This committee had referred to it a resolution, H.R. 634, which we recommended not be adopted, and was subsequently tabled in the House, which would have directed the Attorney General, so far as not incompatible with the public interest, to furnish the House not later than 15 days following the adoption of the resolution, true copies of all papers, documents, recordings, memorandums, and items of evidence, regarding the Watergate affair. Could you give us some assurance or advise us as to the security and status of those papers?

Mr. BORK. Yes. I am not intimately familiar with the procedures to provide security and if I were I think I should not talk about

them because it might compromise the security. But, elaborate security precautions were worked out with the Administrative Division of the Department of Justice. Those security precautions, which were in place under the former Special Prosecutor, remain the same way. And I think they are entirely satisfactory to the force working over there. And there is in addition a court order which we submitted to Judge Sirica limiting access to those files.

Mr. HUNGATE. In discussing this in questioning with Mr. Hogan again, the right to prosecute, is there not an exception? Where do we find this? 42(b) of the rules of criminal procedure, I think, contempt cases where we do have a court-appointed prosecutor to carry those forward. Is there any question as to the constitutionality of that action?

Mr. BORK. No. I think a court which feels that it has been flouted as a court has inherent power to protect itself as by appointing a prosecutor to prosecute a contempt.

Mr. HUNGATE. Mr. Kastenmeier.

Mr. KASTENMEIER. Thank you, Mr. Chairman. The fact really is, Mr. Bork, that you do not support any of the legislation before this committee relating to a Special Prosecutor's office, is that not the case?

Mr. BORK. As I understand it there are five categories of legislation before this committee and all of them I believe take the appointment of a Special Prosecutor and his control outside of the executive branch. Insofar as that is true I do not support any such legislation.

Mr. KASTENMEIER. You do not affirmatively support the suggestion either made by Mr. Dennis or Mr. Mayne?

Mr. BORK. Well, I think it is constitutional. If I were to—I understood I was here to testify today as to these matters.

Mr. KASTENMEIER. But you do not advocate——

Mr. BORK. I would like, before I am asked would I advocate them or not, I would like to have an opportunity to examine them and to see what the bill was. I do not either advocate or oppose them at this moment. I would like to see what they are.

Mr. KASTENMEIER. There seems to be a very practical difficulty with the new Special Prosecutor being appointed and the discharge of Mr. Cox. And I am not sure that this is understood. Are we to assume that Mr. Jaworski will be more cooperative with respect to the White House as Mr. Cox apparently was not? Or did, in fact, the White House retreat in terms of its demand that it not be pursued that vigorously in terms of special materials that were regarded as privileged by the Special Prosecutor? In other words, in what respect does Mr. Jaworski differ from Mr. Cox precisely, or on the contrary, has the White House changed its view with respect to the role of the Special Prosecutor?

Mr. BORK. I really cannot answer as to the White House view of the role of the Special Prosecutor and whether it has changed. I would have to know a good deal more than I know about the circumstances which led up to the discharge of Mr. Cox to be able to answer that. I was not engaged—perhaps on two or three occasions Mr. Richardson called me in to discuss with him, and upon occasion with Mr. Cox, the jurisdiction of Mr. Cox, which apparently was a continuing matter for discussion between the Attorney General and Mr. Cox. I do not know the details about that. I do not know

what it was that led to the attitudes that developed. I came into this at a certain stage. The only statement I have had from the President was that he wants vigorous and full investigation and prosecution. I said I would give him that. Now that we have a new Special Prosecutor I think two things, I think three things. I think one, if you know Mr. Jaworski you know you are going to get a vigorous prosecution and I am sure the White House understands that. I think second, if you understand the position in which Mr. Jaworski finds himself, quite aside from his personal integrity, about which I do not mean to do anything but express the highest regard, quite aside from that, a man in that position has to press forward and cannot be seen or be suspected in any way of not giving the investigation and the prosecution his best. And third, I think the reality in this country is now that the Special Prosecutor will certainly not be hindered in carrying out his duties.

Mr. KASTENMEIER. Well, of course, I recognize the difficulty you are in as far as that question is concerned. Accepting that we cannot rely upon you for an answer I do not know upon whom we can.

Part of the problem is as the chairman says, it is a question of public confidence, and how can we go home again and establish or fail to establish something which will have the confidence of the American people, albeit subject to constitutional attack? This is really the crux of the problem. And in terms of the latter, may I inquire if the Congress does establish a Special Prosecutor's office in the Court could you not obtain an early test as to its constitutionality so that we might not lose the work, so it might not be subject to an attack later on that you suggest it might?

Mr. BORK. Well, should the Congress establish such a bill I would hope that either the Congress would find a means to provide an early test or that we would be able to think of a way to provide an early test not because, not being thought of as trying to destroy the Congress' work but being thought of to make sure that whatever takes place will stand up. Now, even then it must be recognized it may delay these investigations and prosecutions, and a very important element in criminal investigation is that witnesses being called in constantly as they are today, that force is in full operation, they are interviewing witnesses, taking them before the grand jury and witnesses must believe in the lawyers and in the solidity of the investigation that is going forward or they will begin to withdraw. They will not talk, they will become evasive. They must believe that a strong force is going forward. It would be most unfortunate if any bill passed by Congress, because of the dubiousness of its constitutionality, and the prospect of a conflict and so forth, it would be most unfortunate if that took away any of the credibility of the efforts that are now being made and to that degree may damage any investigation.

Mr. HUNGATE. Mr. Smith?

Mr. SMITH. No questions.

Mr. HUNGATE. Go ahead, Mr. Bork.

Mr. BORK. It has just been pointed out, Mr. Hungate, that you mentioned the Speaker of the House, Mr. Albert. He is not on the list. He is not on the list as stated. It is the House majority leader, Mr. O'Neill of Massachusetts and the minority leader who will replace Mr. Ford.

However, I am also given to understand that although he is not on the list it is of course true that the Speaker would be consulted.

Mr. HUNGATE. I simply misstated myself. I thank you for the correction. I would like to ask just a couple of things. You mentioned about the quick resolution of the constitutional question. Aren't there provisions perhaps of the Civil Rights or Voting Rights Act that provide for rapid trips to the Supreme Court to clarify such issues?

Mr. BORK. Yes. We would have to think of a way that would provide a real case of controversy.

Mr. HUNGATE. But this has been provided in other statutes, or the mechanism has been designed for a speedy test, has it not?

Mr. BORK. We could expedite it, that is right. The only problem would be, I think, to find a way of devising a case or controversy so that we would not be asking the Supreme Court for an advisory opinion.

Mr. HUNGATE. The problem some of us face I think is this: Let us suppose I am in trouble as I usually am and I say, "Don't you people worry! I am going to investigate myself." I cannot get away with that, and I think that is the problem we face even with the President. Perhaps exoneration is the biggest problem of all because they say well, he knew we would exonerate him, he is our brother. Could you briefly address that sort of a problem and how you think we solve that?

Mr. BORK. Well, that is a problem because when the executive branch investigates itself there is always necessarily a problem of credibility just as when any other branch of government undertakes to investigate itself, or the behavior of one of its members. I mean it is not a problem, it is not a problem, if I may say so that is endemic or inherent only in the executive branch. But there is a problem.

Mr. HUNGATE. Pardon me, except that the executive branch is one man. Now, in the House, 435 have to go crazy at once, if possible. But, it seems more unlikely.

Mr. BORK. The practical problem, the practical answer I think is this and it may be an answer which is hard to explain because it is not simply stated and that is this: You have a Department of Justice with many people in it. You have an Attorney General. I hope we will have an Attorney General soon. You have a Special Prosecutor who is a man of—I do not think anybody doubts his competence, his high competence or his integrity. You also have a staff of 40 or 50 lawyers over there working with the FBI and the IRS investigators. Under those circumstances, how any one man or any two or three men could ever cover anything up I do not know. It would be bound to come out.

Mr. HUNGATE. They could lose a lot. Mr. Smith?

Mr. Hogan, did you have a question?

Mr. HOGAN. I wanted to mention two things quickly, Mr. Chairman. I wanted to call to the witness' attention two of the bills before us that do not call for appointment of a Special Prosecutor by the judiciary. There is one by Congressman Bennett which calls for the House and Senate to appoint, which I assume would be equally objectionable. But I would commend to your attention a bill introduced by Congressman Biester, a former member of this committee, which calls for appointment by the President from a panel. That is H.R. 11075. It calls for appointment by the President from a panel recommended by a number of bar associations throughout the country and subject to

removal by the President for cause, established and determined by the Civil Service Commission. So, this may answer the constitutional objection which you raised. The other quick thing I wanted to point out relates to during my questions to you alluding to the statute enacted by the First Congress. I have the citation for you. That is I stat. 112, section 16, enacted April 30, 1790, in which the First Congress explicitly authorized criminal prosecution being instituted and maintained to conclusion by private individuals. And it specifically dealt with larceny on Federal territory.

Mr. BORK. I can only say as to that that I will go back and read the statute with great interest and respond as soon as I can.

Mr. HOGAN. But again, if the First Congress allowed prosecution outside of the executive branch, then maybe they were closer to the interpretation of the original Constitution than we.

Mr. BORK. It is conceivable that there are special circumstances and Federal territory, does that mean outside of the United States?

Mr. HOGAN. Presumably that is before the territories—territories were territories before they became States.

Mr. BORK. I really cannot speculate. I can see with a lot of special circumstances such as the fact there may have been no Federal prosecutors out there.

Mr. HOGAN. But they were patrolled by U.S. Marshals which were Federal investigators so there is an analogy.

Mr. BORK. I think, Mr. Hogan, I would love to debate it but I would love to debate it a little more than from the basis of knowledge I have now.

Mr. HOGAN. Very good. Thank you, Mr. Chairman.

Mr. HUNGATE. Thank you. The Chair would first like to recognize counsel for the majority and then counsel for the minority on a 5-minute basis and then we will resume with Mr. Edwards.

Mr. Hoffman.

Mr. HOFFMAN. Mr. Attorney General, when announcement was made that Senator Saxbe would be appointed Attorney General there was a reference made to legislation which was to be submitted by the Department to overcome the constitutional inhibition against his taking that position. What type of legislation are you proposing to submit?

Mr. BORK. It will be a bill that returns the salary of the office to the level at which it was when Mr. Saxbe became a Senator.

Mr. HOFFMAN. What is that?

Mr. BORK. The salary level is $35,000.

Mr. HOFFMAN. So Mr. Saxbe will then be earning not only less than all other cabinet officers but less than some supergrades in the Department?

Mr. BORK. Mr. Saxbe would make quite a sacrifice. I have talked to him and he says he is perfectly willing to make that.

Mr. HOFFMAN. Now I call your attention to article I, section 6 of the Constitution, page 3——

Mr. BORK. I will use this copy.

Mr. HOFFMAN. I call your attention to the language that is in clause 2 which reads:

> No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office . . ., the emoluments whereof shall have been increased during such time.

Mr. HOGAN. You missed a line.

Mr. HOFFMAN. No, I left out a line. I am reading the lines only which apply to the Saxbe case.

Mr. HUNGATE. Read the whole line.

Mr. HOFFMAN (reading):

> No Senator of Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time.

Now, as I read that, and I am inclined to think we lawyers often make the public laugh at us because we take simple language and confuse it, it does not say he cannot draw the salary, it says he cannot hold the office, is that not correct?

Mr. BORK. Yes. Let me say this, sir. I would like—I do not mind discussing this a bit but I would like if we are going to go into the Senator Saxbe question I would like a chance to prepare on that issue. But, let me say this about it. There was a case, the case I think of Philander C. Knox, Secretary of State, I believe it was faced precisely this same problem. At that time the Attorney General wrote an opinion to the effect that the rationale of this constitutional provision was to prevent Senators or Congressmen or Representatives from voting for bills and raising salaries in the expectation of getting the increased salary. And he said that since that was the rationale of the bill, the Attorney General then did, reducing the salary to the prior level would fully meet the constitutional reason. And as I understand it, Mr. Knox was confirmed and took the office.

Mr. HOFFMAN. He took an $8,000 salary for a $12,000 job. But let me ask you something. Would you agree that there is a constitutional question to be examined with respect to that procedure?

Mr. BORK. Oh, of course.

Mr. HOFFMAN. And would you agree that the Attorney General of the United States will be handing down many more indictments than a Special Prosecutor, will be having many more trials than a Special Prosecutor and therefore, that which you say on page 3 of your statement—the problem that concerns you most, that ultimately the action might be held unconstitutional and indictments and trials thrown out by the dozens—would that not apply to what you are doing with the Attorney General, even more so than with the Special Prosecutor?

Mr. BORK. I do not think so. I do not think the Attorney General in most cases, since the indictments—that is done elsewhere.

Mr. HOFFMAN. Well, the Attorney General appoints the 93 U.S. attorneys and they in turn appoint some 600 assistant U.S. attorneys, all working under the Attorney General, is that not correct?

Mr. BORK. I think they are Presidential appointments.

Mr. HOFFMAN. The U.S. attorneys are. That is correct. But, all of the prosecutions, all of the work in the enforcement of the laws, as you indicated in your statement, is really out of the Attorney General's office? Do you not think that the problem concerning you most about the court appointed Special Prosecutor will apply all the more with respect to the Attorney General of the United States, the Chief Legal Officer of the United States?

Mr. BORK. I really do not think so because I take it, if it developed and I do not think it would develop that the Attorney General was not Attorney General because he was disqualified from holding the office—in fact, there are people there, however, exercising the authority who are properly there and I do not think these indictments are going to be thrown out and I think we have constitutional authority not judicial authority, but constitutional authority in the sense of what the Senate decided in the case of Philander C. Knox.

Mr. HOFFMAN. But as you know that never went to court. Let me just read one excerpt, and then I will yield, from the House debate on that very legislation which I think we ought to all take a lesson from.

> What would we be attempting to do, respecting a reduction of salary, to amend the Constitution of the United States by legislative enactment, and that is the purpose of this bill. I will forever feel humiliated if this Congress in this way deliberately passes this Act to override the Constitution of the United States. I believe it not only violates the letter of the Constitution, but it violates the spirit of the Constitution. Are we going to say that the United States Senators and Members of the House may engage in this evil machinations and schemes, in these designs which also involve the increases in other salaries and then pass a bill like this temporarily reducing the salary as an avenue of escape? This is not a question of reducing salary, this is a question of trying to get around the Constitution.

Mr. BORK. I think I would love to debate that. I think I disagree with you. I think that this bill we are proposing takes care of the constitutional reason of the clause and, therefore, I do not regard this as an evasion or in any way an attempt to amend the Constitution by legislation. However, I confess that I did not come with the materials on that subject this morning.

Mr. HUNGATE. Congressional debate is a little like smoke. It does not hurt you if you do not inhale it.

Mr. BORK. I will put down my cigarettes.

Mr. HUNGATE. Oh, no. Mr. Pauley.

Mr. PAULEY. Thank you. Mr. Attorney General, I would like to return to the subject of the Special Prosecutor legislation and your views on that. You have indicated that you think that article II, section II of the Constitution has the effect that if the Congress attempts to condition the appointment of an individual on the advice and consent of the Senate that the individual so appointed becomes a superior officer as to whom few if any restrictions can be placed on the President's power of removal. Is that correct?

Mr. BORK. That is correct.

Mr. PAULEY. And then you have indicated that you think that perhaps the most promising approach from the standpoint of placing restrictions on the removal power is to vest the appointment in a head of department, presumably in the Attorney General?

Mr. BORK. Well, that is already vested. I appointed him pursuant to statute which vests that power.

Mr. PAULEY. Do you see any distinction in terms of the constitutional limitations on removing a special prosecutor between placing the power of appointment in the President alone as article II, section 2 mentions, rather than in a head of department?

Mr. BORK. Yes. I think the higher the officer, the more he is subject to Presidential direction and removal for the very good constitutional reason that the President must have about him men who will carry

out his policies and not obstruct them. And that is the reason that the major cabinet officers are appointed by the President and confirmed. In the *Myers* case the majority have been agreed, I think, that the power to remove this postmaster first class depended upon whether he was a superior officer or an inferior officer. The majority thought that the prime criteria was Senate confirmation and so he was removable because he had been confirmed by the Senate. The minority thought that the prime criteria was the functions he performed. I think under either criterion the Special Prosecutor is an inferior officer.

Mr. PAULEY. But what I was attempting to explore is the fact that the Constitution seems clearly to say that there can be inferior officers who are appointed nonetheless by the President, since it states "But the Congres may by law vest appointment of such inferior——

Mr. BORK. Oh, quite right, quite right. If Congress does not vest that power in the head of a department, the President would have to do it.

Mr. PAULEY. But, suppose the Congress vests the power in the President without requiring senatorial advice and consent, is not that office an inferior office, and cannot the same, presumably the same, removal conditions be attached to that appointment as if the Congress vested the appointment in a head of a department?

Mr. BORK. I must say to you that I simply have not examined that question and I simply do not have a flat answer to it. I would be glad to examine that one if you wish and submit a statement of what my examination turns up.

Mr. PAULEY. I would appreciate that. I realize that there have been other demands made upon you for memorandums, but I think it would be helpful. Thank you, Mr. Chairman.

Mr. HUNGATE. Yes. Without objection. Would a week be time enough?

Mr. BORK. I am sorry?

Mr. HUNGATE. How much time would you need?

Mr. BORK Oh, I think a week would be plenty.

Mr. PAULEY. Thank you.

Mr. HUNGATE. If we are not done with the bill by then. As soon as you can.

Mr. PAULEY. I think that the committee plans to proceed even more expeditiously than a week.

Mr. BORK. All right. I thought a week was suggested to me. All right, I will try to get it out in 2 or 3 days.

Mr. HUNGATE. Three days will be fine, sir.

Mr. PAULEY. Thank you very much.

Mr. HUNGATE. Whether they proceed as a regular prosecutor or Special Prosecutor, their only authority will be to enforce the laws of the United States, is that not right?

Mr. BORK. That is correct.

Mr. HUNGATE. Mr. Edwards.

Mr. EDWARDS. Thank you, Mr. Chairman.

I guess you are telling us Mr. Bork, that any of these bills we are considering, if enacted, are going to be vetoed, is that correct; if they are enacted?

Mr. BORK. That is a duty that does not fall within my Department, Mr. Edwards.

Mr. EDWARDS. You are certainly going to advise a veto, is that correct?

Mr. BORK. Well, I think my general rule would be to advise the President to veto a bill that altered a fundamental constitutional distribution of powers, but whether my advice would be accepted or not I have no idea.

Mr. EDWARDS. Have you ever changed your mind before on constitutional questions?

Mr. BORK. Frequently.

Mr. EDWARDS. In civil rights laws, for example?

Mr. BORK. I never thought the civil rights laws were unconstitutional.

Mr. EDWARDS. Or any part thereof?

Mr. BORK. It is a very complex statute. I never examined all of it for that purpose.

Mr. EDWARDS. Well, Mr. Bork, we seem to be going in a circle. Now, the President has appointed a Special Prosecutor, but just before he is appointed, he trots over to the White House and is interviewed by Mr. Buzhardt, General Haig, and Leonard Garment. Just a short time ago General Haig has said they were not going to appoint the kind of prosecutor who would seek additional White House documents. And at the same time the President said at his news conference that he is not going to cooperate with a Special Prosecutor who is going to file a suit against the President of the United States. Now, having Mr. Jaworski go to the White House and talk to these three surrogates of the President, is this not a little bit like negotiating in advance with the adversary?

Mr. BORK. No. I wish to stress, Mr. Edwards, that I was present and we discussed the problem of cooperating and I specifically said it must be understood that the Special Prosecutor is not precluded from using judicial process to gain evidence he feels he needs. And there was general agreement to that proposition. And Mr. Jaworski, I am sure, would not have taken the job on any other terms, I am sure.

Mr. EDWARDS. But you do agree, as your response to my previous question indicated, Mr. Bork, that it really would have been better for the public confidence of the country for the general appearance of propriety, if constitutionally the appointment of a Special Prosecutor would not be in the hands of the White House. Is that not correct?

Mr. BORK. I think that most of this debate would certainly evaporate if that were the case. I do not think it would be better for the country. I think this prosecution, these investigations will be handled absolutely with integrity and with rigor by Mr. Jaworski and I think the constitutional provisions are terribly important. And I just wanted to add that in the charter I have given Mr. Jaworski which is identical to the charter Mr. Cox had with the exception, the single exception of the additional safeguard, it is provided that he has the right to test out claims of confidential privilege.

Mr. EDWARDS. Well, then, what you are telling us is, Mr. Bork, that the executive department has turned over a new leaf insofar as Watergate is concerned, that they really are very much interested now in getting to the bottom of it. Is that correct?

Mr. BORK. Mr. Edwards, without being entirely familiar with the series of negotiations and so forth and the suggested compromises that led up to what took place I can certainly not agree to the statement that somebody has turned over a new leaf. All I know is the leaf

I am looking at and the leaf I am looking at is one of freedom for the Special Prosecutor and power to use judicial processes.

Mr. EDWARDS. Thank you.

Mr. HUNGATE. Well, as Adam said to Eve in the Garden, there seems to be a leaf missing somewhere. Sorry, I could not let that go, General.

Mr. Dennis.

Mr. DENNIS. Mr. Bork, referring briefly to the matter of the Attorney General, which is not before us this morning, it has occurred to me and you may comment if you wish, that if you are going to go on the theory of the intent rather than of the language of the constitutional phrase and question, that since we passed the act of 1968 which for all intents and purposes takes the power to vote salary increases out of the hands of the Congress and puts it in an independent commission and the Senator actually never voted on his own salary, that perhaps under that setup the whole spirit at least of that constitutional phrase may not apply at all.

Mr. BORK. Maybe not. But I think I would rather go as far as I can to insure that the spirit of that provision is met. I called Mr. Saxbe when this problem was brought to my attention and he said he would serve for nothing if that was what was required. I think the spirit of the constitutional provision is fully complied with.

Mr. DENNIS. Now, if I understood your testimony sir, there is no constitutional difficulty, in your view, to passing a statute which would take the special prosecutor that we now have, Mr. Jaworski, under your appointment, and restrict the power of removal by statute to good cause?

Mr. BORK. I think there is no constitutional objection to that principle.

Mr. DENNIS. That is what I understood you to say. And, therefore, we could simply pass a statute to that effect and hedge him about with that protection without more, could we not?

Mr. BORK. I think you could. I have previously expressed some possible qualifications about the efficacy of that as a matter of remedy as to whether a court would order him reinstated were he fired. I do not know the answer to that fully. I do not know that there is a full answer to that. But, I see no constitutional problem about doing it.

Mr. DENNIS. Yes, sir. Now, pursuing that a little further, if you went back to the suggestion I made previously about creating a Special Prosecutor appointed by the Attorney General but subject to confirmation by the Senate, and again hedged about with restrictions on the power of removal, there would be no reason why if such a statute were passed the Attorney General might not appoint Mr. Jaworski and let the Senate pass on him would there?

Mr. BORK. That is entirely correct, sir. But, I repeat my constitutional doubts about the validity of a procedure of a Senate confirmation of a man appointed by a head of a department rather than by the President.

Mr. DENNIS. I understood those, and again I guess that is one of these questions we really have no way to resolve exactly. Now, just referring briefly to your statement on pages 7 and 8, you set out four categories of the jurisdiction of the Special Prosecutor. Do I understand that those are the same categories which Mr. Cox had and which

the Attorney General has already previously referred to, the special prosecuting attorney?

Mr. BORK. They are precisely the same categories. In this language here it lists them this way paraphrasing slightly. I have here the exact language, but this is clearly the language, the meaning, and the language is exactly the same as Mr. Cox' charter.

Mr. DENNIS. So the legislation we have before us, which employs the language, all other matters heretofore referred, pursuant to regulations of the Attorney General, to the Special Prosecutor would embrace each of these four categories, is that correct?

Mr. BORK. I would think so.

Mr. DENNIS. And according to your understanding of the situation, if the Special Prosecutor however appointed should feel that he had to go to court to get Presidential or other documents, the President would allow it to be tested in the court, and the Special Prosecutor would not be discharged because he went to court in that effort?

Mr. BORK. That is my understanding.

Mr. DENNIS. I thank you, sir.

Mr. HUNGATE. Mr. Mann.

Mr. MANN. No questions.

Mr. HUNGATE. Mr. Mayne.

Mr. MAYNE. Thank you, Mr. Chairman. I would just like to commend you, General Bork, for the careful preparation which you and your staff have put into the subject assigned today which was legislation to provide for the appointment of an independent Special Prosecutor. And I would also like to say that I can certainly understand your reluctance to get into other subjects which are not specifically related to the assigned one. I think it is commendable that you would want to look into some of these other questions that have been asked you with more deliberation rather than just shoot from the hip in answering them this morning.

Mr. BORK. Thank you.

Mr. HUNGATE. Ms. Holtzman.

Ms. HOLTZMAN. Thank you, Mr. Chairman. Just with respect to the powers granted to the Special Prosecutor, I note that Mr. Cox specifically had the power of determining whether or not to contest the assertion of executive privilege. I do not see that power enumerated in the four headings you have here.

Mr. BORK. No. No.

Ms. HOLTZMAN. Can you tell us if he has that power?

Mr. BORK. These headings, Ms. Holtzman, are his jurisdiction. That is the subject matter he is entitled to inquire into, as to which he is entitled to prosecute. But, that does not go into his powers.

Ms. HOLTZMAN. Does he, Mr. Jaworski, specifically have the power to contest or determine whether or not to contest the claim of executive privilege? Have you given that to him?

Mr. BORK. Yes. The appendix to the charter, which is identical to Mr. Cox's, says in particular the Special Prosecutor shall have full authority with respect to above matter information, conducting matters before the grand jury and so forth and the third one is determining whether or not to contest the assertion of executive privilege or any other territorial privilege.

Ms. HOLTZMAN. Thank you. Now, at one point in your response to Mr. Kastenmeir you said that you were not able to say what the White House's attitude at this point was to the Special Prosecutor and yet you have assured this committee that it is your understanding that the Special Prosecutor is free to go to court. Who gave you that assurance?

Mr. BORK. Ms. Holtzman, I think I better say that I did not say I was not sure what the attitude of the White House was. I did say that I did not want to comment upon whether their attiude had changed, whether a leaf had turned over and so forth and so on. I stated to the gentlemen who were sitting with Mr. Jaworski and myself that it must be understod that he had the power to go to court.

Ms. HOLTZMAN. And what did they say?

Mr. BORK. Yes.

Ms. HOLTZMAN. Has the President told you personally that the Special Prosecutor is empowered to go to court and that he would not fire him if he went to court to seek to challenge executive privilege or obtain Presidential papers?

Mr. BORK. I do not know that I have discussed those details with the President personally.

Ms. HOLTZMAN. All right.

Mr. BORK. I do not think I have.

Ms. HOLTZMAN. Following up on that, you state in your testimony that the President has given his assurance that the Special Prosecutor would not be discharged without the consent of certain congressional leaders and other congressional personnel. Did he give you that assurance? Did he tell you that in person?

Mr. BORK. Yes.

Ms. HOLTZMAN. He did? At the meeting at which Mr. Jaworski and you met with certain Presidential aides, did Mr. Jaworski ask specifically if he would be fired if he sought to obtain Presidential papers?

Mr. BORK. I do not recall him saying he would be fired. But he said he wanted full independence, and when I said he had to have the power to go to court he agreed that that was essential. Everybody else agreed to it. It seems to me implied in that is if you go to court you will not be fired. I mean, I cannot understand what it means otherwise.

Ms. HOLTZMAN. But your testimony then is that that point was not specifically discussed, that he would not be fired if he went to court?

Mr. BORK. I did not hear anybody discuss it in those terms. I think it was perfectly clear from our statement that he must have the power to go to court. Everybody agreed to that. I did not then turn around and say "and are you also promising not to fire him?" That was perfectly clear from the discussion.

Ms. HOLTZMAN. Do you not think in view of the lack of confidence that many of the people in this country feel that that was a necessary question to have asked at that point?

Mr. BORK. I think the question was really answered in the discussion without putting it that way.

Ms. HOLTZMAN. I see. Was any question or any discussion in that meeting about the necessity, leaving aside the question of power, the necessity that Mr. Jaworski might feel for seeking Presidential papers and Presidential tapes? Did that come up?

Mr. BORK. Yes. Yes. We discussed the general fact that there are, that there are, legal contexts in which the Special Prosecutor may feel

he needs access to that material and it is quite clear that he has the power, in the event that it cannot be worked out cooperatively, or by agreement, that he has the power to seek access by judicial process.

Ms. HOLTZMAN. How many names did you submit to the President?

Mr. BORK. I did not submit any names. I did not submit any names to the President.

Ms. HOLTZMAN. For this appointment?

Mr. BORK. I am afraid I must describe to you a rather disorganized process because I was a man operating without a staff and with a few people helping out on an ad hoc basis. I had available Mr. Richardson's files on his search for a Special Prosecutor. I read part of those. I had an assistant read all of them. I called people on the phone, lawyers I know, academics I know. I kept getting names. Then I would discuss the names with other people. Names kept going on the list, and coming off the list. When we got to Jaworski the reports were uniformly excellent and the White House lawyers knew of Mr. Jaworski and knew that he was a top flight, responsible, and experienced lawyer. And at that point we got him in to talk to us and our talks were completely satisfactory and Mr. Jaworski became the man.

Ms. HOLTZMAN. Well, to clarify my own thinking in your own testimony you submitted—did you submit Mr. Jaworski's name to the White House?

Mr. BORK. Well, I am not so sure I like the connotation of "submit."

Ms. HOLTZMAN. Well, did you tell them in the White House you were thinking of appointing him?

Mr. BORK. Oh, yes. Oh, yes. We talked about Mr. Jaworski and others repeatedly, because I had a set of criteria that I thought any man had to meet and some of the names—frankly, my background has not been in prosecution or criminal law and I had to get information about these people because I thought one of the most important criteria for selecting this man be that he have prosecutorial experience which Mr. Jaworski has a great deal of.

Ms. HOLTZMAN. Well, if you were appointing the Special Prosecutor, can you tell us why you wanted to give his name to the White House and ask for White House approval of your choice?

Mr. BORK. I never asked for White House approval. But, I think it was important that the man have White House assurances of his independence. And Mr. Jaworski got those assurances. I am sure there probably would have been a couple of lawyers in the country who because of their outlook or something else that the White House would have said now, wait a minute, think twice about that one, or someone else would have said wait a minute, think twice about that one. But that did not happen with respect to Mr. Jaworski.

Ms. HOLTZMAN. Thank you. My time has expired.

Mr. HUNGATE. Mr. Hogan.

Mr. HOGAN. Mr. Bork, continuing along that line of questioning, we had the same assurances with the appointment of Mr. Cox. Did you not say that the new Special Prosecutor will have authority to seek Presidential papers?

Let us assume that he does and the President again says you are fired. Where are we then? And suppose the President then comes to the leaders of the Congress as he indicated he would and they say no, we do not concur in the firing of him. Where are we then?

Mr. BORK. Well, I think we are then in a situation which is so unrealistic that I cannot imagine it happening.

Mr. HOGAN. Well, a lot of unrealistic things have been happening in recent weeks.

Mr. BORK. I think what has happened in recent weeks makes that more the impossible to imagine in a scenario.

Mr. HOGAN. Well, I might comment that several months ago when the big dispute about all of the tapes was going on there was never any indication that any of them were missing and now we find that two of them never existed. This is, I think, an unusual development as well.

But let me go to another point. Do you think enactment of any of this legislation before the subcommittee would impede the investigation of the Special Prosecutor's Office, or since it is ongoing anyway, would there not be that much disruption?

Mr. BORK. Well, I think the creation of a new Special Prosecutor outside of the executive branch is bound to lead to delay in litigation and challenges, is bound to lead to witnesses we are dealing with now, or the Special Prosecutor forces are dealing with now, backing off because maybe, maybe they are telling things they do not really want to tell when they do not really have to tell it because they no longer are dealing with a viable prosecution force. Yes, I think there is considerable possibility in many of these bills for delay, for confusion, for legal wrangling.

Mr. HOGAN. Now some quick questions. How many attorneys are there in the Criminal Division?

Mr. BORK. I cannot answer that. I do not know exactly how many there are.

Mr. HOGAN. Could you supply that?

Mr. BORK. I certainly can.

Mr. HOGAN. When you augment your testimony and also the number of attorneys in the U.S. attorney's office for the District of Columbia?

Mr. BORK. I do not know that. I did have that figure but I have forgotten it. Let me make sure somebody is writing down these questions here. OK.

Mr. HOGAN. And then the third question is how many attorneys are there on the Special Prosecutor's staff?

Mr. BORK. He has now I think it is between 40 and 50.

Mr. HOGAN. I am curious to know how that compares with the entire Criminal Division and the entire U.S. attorney's office.

Mr. BORK. Oh, it is much smaller. I think it may not be that much smaller than the U.S. attorney's office for the District of Columbia but it is much smaller than the U.S. attorney generally, maybe not for certain areas, but it is much smaller than the Criminal Division. But then the jurisdiction of the Special Prosecutor is much smaller than the total Criminal Division.

Mr. HOGAN. Presumably it is much smaller than the U.S. attorney's office which has the whole spectrum of criminal prosecutions in the District of Columbia, but I would be curious to know if there are more attorneys on the Special Prosecutor's than in the U.S. Attorney's office.

Mr. BORK. Mr. Hogan, the number of attorneys on the Special Prosecutor's staff happens to be the number that Mr. Cox has employed to date. There is no limit. Mr. Jaworski will be fully entitled to hire more attorneys if he sees fit.

Mr. HOGAN. I understand that and one of the things that concerns me is there does not appear to be any limitation whatsoever on the Office of the Special Prosecutor.

Mr. BORK. Well, the only limitation is what the Special Prosecutor feels he needs to carry out his powers within the jurisdiction he has been given.

Mr. HOGAN. And I submit that is not much of a limitation. Thank you, Mr. Chairman.

Mr. HUNGATE. On page 3 of your statement, you relate to the possibility of an unconstitutional prosecutor and a person so convicted on a second trial claiming double jeopardy. Well, do you think it would be double jeopardy if you are prosecuted by someone who is not really a prosecutor?

Mr. BORK. Mr. Hungate, as I indicated there, I said he could conceivably have a double jeopardy claim, and I said perhaps more plausibly he would have other claims. All I am indicating is that the double jeopardy claim is a possibility. I do not think it is a very strong one.

Mr. HUNGATE. Thank you. I would say I agree with your statement, I think, as I have understood it, several times concerning the confirmation by the Senate of an appointee to this position would make him even more subject to being discharged simply by the President. As I read the Federalist Papers, and that is before 1879, Madison seems to indicate that the absolute power to dismiss this sort of official renders him even more subject to impeachment for those sorts of actions, if improper.

Now, page 6 of your statement relates to the separation of powers. You are not a watertight compartment man, are you? I mean, you recognize these powers spillover?

Mr. BORK. No, sir. I am not. Whatever else I am I am not a rigid constructionist.

Mr. HUNGATE. So we do sometimes find what would appear to be legislative powers perhaps in treaties being exercised by the President in conjunction with approval of the Senate only, and the House taking no part?

Mr. BORK. Mr. Hungate, I wish to make it clear that the separation of powers is an important concept but of course the Constitution in many important areas blends powers as, for example, the Senate confirmation of a Presidential appointee is the perfect example of a blending of powers.

Mr. HUNGATE. Now, on page 9 regarding the constitutionality of the Supreme Court packing plan, do you think the plan was unconstitutional? I want to get some outside information here, or was it simply Court policy?

Mr. BORK. No, I think that I would argue that it was unconstitutional because I think it was designed to destroy the independent judicial review function of the Supreme Court.

Mr. HUNGATE. What about the size of the Supreme Court, has it varied?

Mr. BORK. Oh, yes. I do not mean to say it would be unconstitutional, to vary the size of the Supreme Court. I only mean that plan, I think, was quite evidently designed to destroy the constitutional law the Supreme Court was making. I happen also to think that the constitutional law the Supreme Court was making was a bad law but that does not seem to me to be any reason to destroy the Court.

Mr. HUNGATE. One last item that I am concerned about and that again is the security of the files and documents. Now, we have had Mr. Lacovara, Mr. Ruth, and Mr. Ben-Veniste here and I would appreciate anything you can do to assure that those files are all intact and will so remain and they are protected under Sirica's order. I say that because we have so represented the situation to Congressman McCloskey, and induced him thereby to withdraw his resolution which would have made them more or less available to all of the Members of the House. So, you understand how seriously I regard that, and I am sure you do.

Mr. BORK. I will make this statement now, Mr. Hungate, that the files are secure. We are operating under the security procedures which are quite tight that Mr. Cox had set up for them. I will, in addition to that, if you would like, send you a copy of the order entered by Judge Sirica on security of the files.

Mr. HUNGATE. I appreciate your attention to this and unless there are further questions, we want to thank you.

Ms. HOLTZMAN. Mr. Chairman?

Mr. HUNGATE. Yes, Miss Holtzman.

Ms. HOLTZMAN. I have some additional questions if I may be recognized for that purpose.

Mr. HUNGATE. Yes. The Chair will state his intention to adjourn not later than 1 o'clock and hopefully sooner and to resume sitting at 2 o'clock when we have a witness. Mr. Cox is scheduled at that time. You may be recognized. Miss Holtzman is recognized.

Ms. HOLTZMAN. Thank you. The reason I am asking you these questions is because I hear from my own constituents and, in fact, from people throughout the country about the tremendous concern for having an independent prosecutor who is going to obtain all of the evidence relevant and necessary to the investigation. And in line with that I want to probe a little bit the attitude of the White House with regard to some of the materials that Mr. Cox requested and presumably was fired for having sought. Has there been attempt on the part of the White House to turn over to the Special Prosecutor or to you during the time of your tenure as Acting Attorney General any of the White House papers that Mr. Cox was seeking? Have you requested them and have they turned them over?

Mr. BORK. Let me say a couple of things and I hope I do not lose the track of what I am trying to say before I get to the end and if I do you put me back on. I understand the concern of the constituents and I understand everybody's concern about the need for the independence in this prosecution. And let me say that I share it in more than a general sense because I have now put myself on the line about this matter that it must be independent. Now, I am sorry. Having made that self-serving statement I have forgotten what I was supposed to answer.

Ms. HOLTZMAN. Well, the question was, in view of the concern about——

Mr. BORK. Oh, yes.

Ms. HOLTZMAN. The independent prosecutor, has the President or the White House at this point and during your tenure as Acting Attorney General, begun to turn over any of the papers Mr. Cox requested and said were not being turned over to him?

Mr. BORK. The short answer to that is that I have not been directly involved in that. I know that Henry Petersen, with Henry Ruth, was preparing a demand for documents which had not yet been produced. I think that demand has probably been sent. But, I have been letting Henry run that. I should say, in all fairness, that Elliot Richardson told me that the White House had turned over vast amounts of material to Mr. Cox so that the impression that they had been withholding everything was not an accurate impression.

Ms. HOLTZMAN. I was not talking about everything. I was talking about specific papers that he was seeking and had not been turned over to him. So, you cannot give us any additional information?

Mr. BORK. No, I am afraid I would have to ask Mr. Petersen what has happened in this period.

Ms. HOLTZMAN. I see. Second, getting back to the point about your having submitted a name to the White House or having given Mr. Jaworski's name to the White House, you did that you said in order to get their assurances about his independence. Prior to giving the White House Mr. Jaworski's name, did you have any conversations with anybody in the White House with respect to the standards for the kind of person you would pick for the Special Prosecutor?

Mr. BORK. Well, yes, I had conversations about it, but it was quite clear in my mind what those standards had to be. I know a lot of lawyers, or could have found a lot of lawyers who could have performed the special prosecutor's function very well. But, I thought it was essential that I find a lawyer who was nationally known and whom the bar would at once recognize as a man of substance and a man of integrity and so that narrowed the field a good deal. Second, I thought it essential that he be a lawyer with prosecutorial experience, because in this kind of matter there are going to be a lot of very tough judgements to be made, and I want them made by a man who has experience with that kind of judgment.

Ms. HOLTZMAN. Well, prior to the time though that you submitted or gave Mr. Jaworski's name to the White House, did you discuss with the White House the need for independence in the prosecutor that you selected?

Mr. BORK. I certainly did because I discussed with the White House the fact that as long as I was in charge I had to be independent and I had to have power to go to court.

Ms. HOLTZMAN. I was not asking about your independence. I was asking prior to the time that you submitted Mr. Jaworski's name to the White House or said that this was the man that you intended to appoint, did you discuss the need for independence of your appointee?

Mr. BORK. Oh, yes.

Ms. HOLTZMAN. You did, specifically on that point?

Mr. BORK. Yes.

Ms. HOLTZMAN. And what was the purpose of giving them Mr. Jaworski's name if you had received assurances prior to that time?

Mr. BORK. Well, I wanted them to give Mr. Jaworski assurances and I also, frankly, I talked to a lot of lawyers about various people and

I also looked for information, and one of the things that Leonard Garment could do for me was, "I know somebody who knows him," or "I know him," but that was true of a lot of people I talked to.

Ms. HOLTZMAN. Well, drawing your attention to October 20 when Mr. Cox was fired, is it not a fact that at that time there was a Federal regulation on the books stating that Mr. Cox could be fired only for gross improprieties, and that was 28 C.F.R. section 0.37?

Mr. BORK. Yes; there was. That was a regulation promulgated by Mr. Richardson as Attorney General. At the time I acted, Mr. Richardson was no longer Attorney General. I took my letter to Mr. Cox to be an amendment of that regulation, and in any event on Monday morning I rescinded that regulation. Now with Mr. Jaworski I have reinstated that regulation.

Ms. HOLTZMAN. But presumably if you resign then you would regard that such a regulation can be abrogated in the future, is that correct?

Mr. BORK. If I resign it could be abrogated, yes. A departmental regulation can always be amended or altered or rescinded.

Mr. HOLTZMAN. Is it not a fact, Mr. Attorney General, that several Supreme Court cases such as United States ex rel. Accardi vs. *O'Shaughnessey*, hold that a Secretary or head of a department is bound by the regulations on the books at the time even though he may have full power to change those regulations?

Mr. BORK. For certain purposes, yes. I do not think this is one of those purposes. I have no doubt that that will be debated in some other forum perhaps.

Ms. HOLTZMAN. Is it not true you said the regulation was rescinded, but it was not rescinded as of Saturday or took effect on Saturday?

Mr. BORK. I think that my letter as of Saturday effectively rescinded it but I certainly think as of Monday it was explicitly rescinded.

Ms. HOLTZMAN. Did you know on Saturday when you issued the order firing Mr. Cox that 28 C.F.R. section 0.37 was on the books?

Mr. BORK. Yes.

Ms. HOLTZMAN. Thank you. I do not have any further questions.

Mr. HUNGATE. Any questions? Mr. Mayne?

Mr. MAYNE. Thank you. Mr. Bork, I will try to make this brief because you have been testifying for a long while. You have testified that in your opinion the Watergate prosecution is going forward vigorously at the present time?

Mr. BORK. That is correct.

Mr. MAYNE. And that the entire staff which former Special Prosecutor Cox appointed is on board and actively carrying its functions?

Mr. BORK. That is correct. One of the first things Mr. Henry Peterson and I did was to go over to that office and meet with the senior personnel and urge them, with all of the persuasiveness we could muster, to stay on board as a matter of professional obligation so that this prosecution and investigation could be conducted successfully.

Mr. MAYNE. I take it then that if nothing happens to impede the work of that staff and the special prosecutor we may anticipate indictments in the near future?

Mr. BORK. That is my understanding.

Mr. MAYNE. Now, you said in response to a question from one of the other members that you thought it would be extremely unfortunate if some bill such as we are considering here today were passed, since because of its dubious constitutionality it would in some way hamper the investigations and prosecutions presently underway. I think you said that it would destroy the credibility of the present prosecutors and that they would not be able to get the same cooperation from witnesses which is so indispensable to any successful prosecution. I wonder if you would elaborate in a little more detail as to just how you feel the enactment of these bills or some of them would have that very disruptive effect on the Watergate prosecution and the ultimate bringing to justice of those guilty?

Mr. BORK. Well, in the first place, as to the credibility of the prosecutors with the witnesses, of course, many of the witnesses in the criminal matters, are themselves implicated and are willing to come in and tell the story because they think if they do not then matters will go even worse for them. If they get the idea that they are suddenly dealing with a Watergate special prosecution force which may not be in existence much longer and that they may have a new set of lawyers or a new prosecutor to deal with whose own authority may be questionable, many of those men and women may, as a matter of prudence, decide to stop cooperating and telling their stories in full to see what happens. Better not to have told the story if the thing is going to come apart.

Maybe there is some other way out. I think that is the primary danger about credibility with witnesses. I would also be concerned if that kind of a pattern developed about who was the Special Prosecutor, about the possible loss of legal staff from what is now an intact and functioning prosecution force. And I think that would be very unfortunate because those men not only know the witnesses, they know the files, they know the evidence, they are deep into these cases. And if their confidence in whether or not they were on a special prosecution force, and who is the Special Prosecutor, if their confidence was shaken and they began to get resignations, I think that will be very unfortunate for this whole matter.

Mr. MAYNA. I take it that there is no question in your mind that constitutionally the President does have the authority to appoint an Attorney General with the advice and consent of the Senate and that you as the Acting Attorney General do have authority to appoint a Special Prosecutor?

Mr. BORK. There is no doubt. That is correct. I have no doubt about it.

Mr. MAYNE. So there is a legally constituted Special Prosecutor in place as of this morning carrying out his functions?

Mr. BORK. That is correct.

Mr. MAYNE. Now, if one of these bills passes and is signed by the President, there would then be a second prosecutor in being, would there not?

Mr. BORK. That is correct.

Mr. MAYNE. And there would be competition between the two offices as to who was to have access to the witnesses and to everything else necessary to carry out a prosecution?

Mr. BORK. Well, if it was signed by the President so that the President agreed, I would assume that the President, if he agreed to that

procedure, would abolish the present, would direct me, or direct Mr. Saxbe if he is confirmed at that time, to abolish the present Watergate special prosecution force because he has agreed to another one, which I think would be or would have these disastrous effects. There might not be competition because we might have abolished the first one and set up a second one.

Mr. MAYNE. But then if the President did sign the bill there would remain the constitutional uncertainties as to whether or not such a judicially or such a new prosecutor was legally appointed?

Mr. BORK. Oh, certainly, Mr. Mayne. The President's signature on the bill would in no way remove the constitutional doubts. That would remain for the Supreme Court.

Mr. MAYNE. Thank you.

Mr. BORK. May I say a word to Mr. Hogan? Mr. Hogan, I have been handed information you asked for about one thing. There are 150 assistant U.S. attorneys in the District of Columbia U.S. Attorney's Office and there are about 200 to 225 attorneys in the Criminal Division.

Mr. HOGAN. Thank you.

Mr. HUNGATE. General, in recent events in Maryland and Baltimore and so on there has been a commendable degree of cooperation has there not, between State prosecutors and the Federal prosecutors where they could have raced into court I suppose separately?

Mr. BORK. As I understand, yes, sir.

Mr. HUNGATE. So it is possible that you could have different prosecutors with jurisdiction over the same or similar offenses and it can be worked out harmoniously? It has been.

Mr. BORK. It could be worked out harmoniously, but if the Special Prosecutor outside of the executive branch brought any prosecutions, we would be into the constitutional issue.

Mr. HUNGATE. Yes. Ms. Holtzman.

Ms. HOLTZMAN. Thank you again, Mr. Chairman.

Mr. Bork, have you had any conversations with Mr. Jaworski as to his intention to retain members of Mr. Cox's special prosecution staff?

Mr. BORK. Yes. Yes I did. I sat down with Mr. Jaworski and Mr. Henry Peterson and we both said to him that we regarded the retention of that force intact, in place, as essential to the expeditious and fair handling of these matters and urged him very strongly to meet with that group and urge them to stay on the job. He agreed with that and my understanding is that he plans to meet with them, explain his intentions and urge them to continue with their work.

Ms. HOLTZMAN. Thank you, Mr. Chairman.

Mr. HUNGATE. Well, in the absence of further questions, General, you have been very courteous and patient this morning. It has been a long period of questioning and we appreciate your appearance here.

The committee will now adjourn until 2 p.m.

Mr. BORK. Thank you, Mr. Chairman.

[Whereupon, at 12:50 p.m. the hearing was recessed to reconvene at 2 p.m. this same day.]

[A subsequent letter and attachments from Hon. Robert H. Bork follows:]

OFFICE OF THE SOLICITOR GENERAL,
Washington, D.C., November 7, 1973.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: During the course of my appearance before the Subcommittee on the Judiciary yesterday morning several questions were raised as to which I requested the opportunity to respond in writing.

1. Mr. Pauley, the minority counsel, asked whether the Congress might impose conditions upon the removal of an officer appointed by the President alone, without the advice and consent of the Senate. He suggested that such a power might be found in Article II, Section 2 of the Constitution (the Exception Clause), which provides: "but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Preliminarily, let me stress that my primary concern is that the Exception Clause not be construed to undercut the constitutional distribution of governmental powers. The suggestion made by Mr. Pauley, since it would vest the appointment of the Special Prosecutor in the Executive Branch does not trench upon that principle as severely as would legislation vesting the appointment power in the courts.

Even so, the suggestion raises constitutional questions. *Myers* v. *United States*, 272 U.S. 52, holds that an officer appointed by the President with the advice and consent of the Senate is a superior officer whose removal cannot be restricted by the Congress. On the other hand, if Congress vests the power to appoint an "inferior Officer" in a "Head of Department," it would seem that Congress might also restrict to some degree the right of that Department head to remove such an officer. *United States* v. *Perkins*, 116 U.S. 483. The text of Exception Clause would suggest that the same result would follow if the "inferior Officer" is appointed by "the President alone" under an appointing power vested by the Clause. The difficulty is that if the President, rather than a Head of a Department, makes the appointment it becomes less clear that the officer is in fact "inferior." And if he is not inferior, no limits may be placed on the President's powers of removal. These considerations appear to have led Mr. Chief Justice Taft writing in *Myers, supra*, to conclude the Congress could not gain control over removal of a Presidential appointee simply by withdrawing the necessity for his confirmation by the Senate. He stated (272 U.S. at 161–162):

> Whether the action of Congress in removing the necessity for the advice and consent of the Senate, and putting the power of appointment in the President alone, would make his power of removal in such case any more subject to Congressional legislation than before is a question this Court did not decide in the *Perkins case*. Under the reasoning upon which the legislative decision of 1789 was put, it might be difficult to avoid a negative answer, but it is not before us and we do not decide it.

2. Congressman Hogan has asked for my views as to the relevance of a statute enacted by the First Congress. The statute to which he referred was entitled "an Act for the Punishment of Certain Crimes against the United States." The Act was passed April 30, 1790, and appears at 1 Stat. 112. It has been suggested that § 16 of the Act authorized private prosecutions and thus that the First Congress did not view the prosecution function as inherently executive.

Section 16 of the Act (a copy of which is enclosed) was directed at the punishment of larceny in the federal territories ("places under the sole and exclusive jurisdiction of the United States"). The statute provided that a person convicted was to be fined "not exceeding the four-fold value of the property stolen" and further provided that one "moiety" or share was to be paid to the owner of the goods and "the other moiety to the informer or prosecutor . . .". I think it far from clear that this statute authorized private prosecutions. All of the cases decided under § 16 which I have been able to locate appear to have involved prosecutions by United States Attorneys. See, *e.g.*, *United States* v. *Davis*, 5 Mason 356; *United States* v. *Clew*, 4 Wash. 700. The phrase "informer or prosecutor" may well have referred to complainants or witnesses rather than one who tried the case.

In any event, even assuming that the Act authorized certain private prosecutions, that fact in no way supports the proposition that the Constitution permits the transfer of prosecution functions from the Executive Branch to the legislative or the judicial branch. The authorization of private prosecutions in the federal territories—areas where a governmental structure did not exist or existed in only skeletal form—could be viewed as legislation adopted under Art. I, § 8—"The Necessary and Proper clause"—to assist the executive in enforcing the laws. As you know, Congress has in many instances provided for enforcement of federal civil statues by private parties. That, however, is a far different matter from transferring prosecution functions to the judicial or legislative branches.

3. I am also enclosing: (1) a copy of the order entered by Judge Sirica on October 26, 1973, with respect to the custody of the files of the watergate Special Prosecution Force; and, (2) a copy of the charter of the special prosecutor.

4. Some of the information I furnished to the Committee in response to Congressman Hogan's inquiry concerning the number of attorneys in the Criminal Division of the Justice Department, the United States Attorney's Office of the District of Columbia, and the Special Prosecutor Force was erroneous. The correct figures are: 434 attorneys in the Criminal Division of the Justice Department; 154 attorneys in the United States Attorney's Office for the District of Columbia; and 42 attorneys in the Special Prosecutors' force.

Sincerely,

ROBERT H. BORK,
Acting Attorney General.

[First Congress. Sess. II. Ch. 9. 1790]

Larceny, what cases shall be judged, and how punished, Act of March 3, 1825, ch. 27.

SEC. 16. *And be it [further] enacted*, That if any person within any of the places under the sole and exclusive jurisdiction of the United States, or upon the high seas, shall take and carry away, with an intent to steal or purloin the personal goods of another; or if any person or persons, having at any time hereafter the charge or custody of any arms, ordnance, munition, shot, powder, or habiliments of war belonging to the United States, or of any victuals provided for the victualing of any soldiers, gunners, marines or pioneers, shall for any lucre or gain, or wittingly, advisedly, and of purpose to hinder or impede the service of the United States, embezzle, purloin or convey away any of the said arms, ordnance, munition, shot or powder, habiliments of war, or victuals, that then and in every of the cases aforesaid, the person or persons so offending, their counsellors, aiders and abettors (knowing of and privy to the offences aforesaid) shall, on conviction, be fined not exceeding the fourfold value of the property so stolen, embezzled or purloined; the one, moiety to be paid to the owner of the goods, or the United States, as the case may be, and the other moiety to the informer and prosecutor, and be publicly whipped, not exceeding thirty nine stripes. (*a*)

Receivers of stolen goods, & how punished, Act of March 3, 1825, ch. 27

SEC. 17. *And be it further enacted*, That if any person or persons, within any part of the jurisdiction of the United States as aforesaid, shall receive or buy any goods or chattels that shall be feloniously taken or stolen from any other person, knowing the same to be stolen, or shall receive, harbour or conceal any felons or thieves, knowing them to be so, he or they being of either of the said offences legally convicted, shall be liable to the like punishments as in the case of larceny before are prescribed.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

IN RE INVESTIGATIONS BY JUNE 5, 1972 GRAND JURY AND AUGUST 13, 1973 GRAND JURY

ORDER

Upon consideration of the motion dated October 25, 1973, submitted on behalf of the grand juries pursuant to Rule 6 of the Federal Rules of Criminal Procedure and 28 U.S.C. 1651, it is by the Court hereby

Ordered:

1. The transcripts of testimony taken before the above-captioned grand juries, all reporters' notes of such testimony, all exhibits introduced before the grand juries, and all writings, memoranda, notes, and other files containing information derived from such testimony or exhibits or secured pursuant to grand jury subpoena, and located within the office of the former Watergate Special Prosecution Force, 8th and 9th floors, 1425 K Street, N.W., Washington, D.C., are declared to be in the custody of this Court.

2. The Administrator of the General Services Administration is directed to instruct all officers of the Federal Protective Service assigned to security functions at the above described offices of the foregoing provision and not to permit the removal of any transcripts, exhibits, memoranda, files, or other writings from those offices except in the possession of an attorney employed by the Watergate Special Prosecution Force as of the close of business on October 19, 1973. Except for personal papers, such attorneys may remove such materials only for the purpose of conducting legal proceedings, interviewing witnesses, or otherwise discharging their official duties. In addition, Henry E. Petersen, Assistant Attorney General in charge of the Criminal Division, may remove copies of such materials for the same purposes.

3. No materials shall be removed from the above described offices by any person unless a true and exact copy of all such materials is left in the customary file in those offices.

4. The provisions of this order shall remain in full force and effect pending further order of the Court, either on application of the movants, the Acting Attorney General, the Assistant Attorney General in charge of the Criminal Division, or upon the Court's own motion.

5. The United States Marshal for the District of Columbia is directed to serve forthwith certified copies of foregoing order and moving papers upon the Administrator of the General Services Administration, the Director of the Federal Bureau of Investigation, the Director of the United States Marshals Service, or the Acting Assistant Attorney General for Administration, Department of Justice.

DEPARTMENT OF JUSTICE

TITLE 28—JUDICIAL ADMINISTRATION

CHAPTER I—DEPARTMENT OF JUSTICE

PART O—ORGANIZATION OF THE DEPARTMENT OF JUSTICE

Order No. 551–73

ESTABLISHING THE OFFICE OF WATERGATE SPECIAL PROSECUTION FORCE

By virtue of the authority vested in me by 28 U.S.C. 509, 510 and 5 U.S.C. 301, there is hereby established in the Department of Justice, the Office of Watergate Special Prosecution Force, to be headed by a Director. Accordingly, Part O of Chapter 1 of Title 28, Code of Federal Regulations, is amended as follows:

1. Section 0.1(a) which lists the organization units of the Department, is amended by adding "Office of Watergate Special Prosecution Force" immediately after "Office of Criminal Justice."

2. A new Subpart G-1 is added immediately after Subpart G, to read as follows:

"Subpart G–1—Office of Watergate Special Prosecution Force

§ 0.37 *General Functions.*

The Office of Watergate Special Prosecution Force shall be under the direction of a Director who shall be the Special Prosecutor appointed by the Attorney General. The duties and responsibilities of the Special Prosecutor are set forth in the attached appendix which is incorporated and made a part hereof.

§ 0.38 *Specific Functions.*

The Special Prosecutor is assigned and delegated the following specific functions with respect to matters specified in this Subpart:

(a) Pursuant to 28 U.S.C. 515(a), to conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings, which United States attorneys are authorized by law to conduct, and to designate attorneys to conduct such legal proceedings.

(b) To approve or disapprove the production or disclosure of information or files relating to matters within his cognizance in response to a subpoena, order,

or other demand of a court or other authority. (See Part 16(B) of this chapter.)

(c) To apply for and to exercise the authority vested in the Attorney General under 18 U.S.C. 6005 relating to immunity of witnesses in Congressional proceedings.

The listing of these specific functions is for the purpose of illustrating the authority entrusted to the Special Prosecutor and is not intended to limit in any manner his authority to carry out his functions and responsibilities."

Date: 2 Nov. 1973.

ROBERT H. BORK,
Acting Attorney General.

APPENDIX

DUTIES AND RESPONSIBILITIES OF THE SPECIAL PROSECUTOR

The Special Prosecutor.—There is appointed by the Attorney General, within the Department of Justice, a Special Prosecutor to whom the Attorney General shall delegate the authorities and provide the staff and other resources described below.

The Special Prosecutor shall have full authority for investigating and prosecuting offenses against the United States arising out of the unauthorized entry into Democratic National Committee Headquarters at the Watergate, all offenses arising out of the 1972 Presidential Election for which the Special Prosecutor deems it necessary and appropriate to assume responsibility, allegations involving the President, members of the White House staff, or Presidential appointees, and any other matters which he consents to have assigned to him by the Attorney General.

In particular, the Special Prosecutor shall have full authority with respect to the above matters for:

—conducting proceedings before grand juries and any other investigations he deems necessary;

—reviewing all documentary evidence available from any source, as to which he shall have full access;

—determining whether or not to contest the assertion of "Executive Privilege" or any other testimonial privilege;

—determining 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;

—deciding whether or not to prosecute any individual, firm, corporation or group of individuals;

—initiating and conducting prosecutions, framing indictments, filing informations, and handling all aspects of any cases within his jurisdiction (whether initiated before or after his assumption of duties), including any appeals;

—coordinating and directing the activities of all Department of Justice personnel, including United States Attorneys;

—dealing with and appearing before Congressional committees having jurisdiction over any aspect of the above matters and determining what documents, information, and assistance shall be provided to such committees.

In exercising this authority, the Special Prosecutor will have the greatest degree of independence that is consistent with the Attorney General's statutory accountability for all matters falling within the jurisdiction of the Department of Justice. The Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions. The Special Prosecutor will determine whether and to what extent he will inform or consult with the Attorney General about the conduct of his duties and responsibilities. In accordance with assurances given by the President to the Attorney General that the President will not exercise his Constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence that he is hereby given, the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part and without the President's first consulting the Majority and the Minority Leaders and Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action.

Staff and Resource Support

1. *Selection of Staff.*—The Special Prosecutor shall have full authority to organize, select, and hire his own staff of attorneys, investigators, and supporting personnel, on a full or part-time basis, in such numbers and with such qualifications as he may reasonably require. He may request the Assistant Attorneys General and other officers of the Department of Justice to assign such personnel and to provide such other assistance he may reasonably require. All personnel in the Department of Justice, including United States Attorneys, shall cooperate to the fullest extent possible with the Special Prosecutor.

2. *Budget.*—The Special Prosecutor will be provided with such funds and facilities to carry out his responsibilities as he may reasonably require. He shall have the right to submit budget requests for funds, positions, and other assistance, and such requests shall receive the highest priority.

3. *Designation and Responsibility.*—The personnel acting as the staff and assistants of the Special Prosecutor shall be known as the Watergate Special Prosecution Force and shall be responsible only to the Special Prosecutor.

Continued Responsibilities of Assistant Attorney General, Criminal Division.—Except for the specific investigative and prosecutorial duties assigned to the Special Prosecutor, the Assistant Attorney General in charge of the Criminal Division will continue to exercise all of the duties currently assigned to him.

Applicable Departmental Policies.—Except as otherwise herein specified or as mutually agreed between the Special Prosecutor and the Attorney General, the Watergate Special Prosecution Force will be subject to the administrative regulations and policies of the Department of Justice.

Public Reports.—The Special Prosecutor may from time to time make public such statements or reports as he deems appropriate and shall upon completion of his assignment submit a final report to the appropriate persons or entities of the Congress.

Duration of Assignment.—The Special Prosecutor will carry out these responsibilities, with the full support of the Department of Justice, until such time as, in his judgment, he has completed them or until a date mutually agreed upon between the Attorney General and himself.

AFTERNOON SESSION

Mr. HUNGATE. The committee will be in order.

We are resuming hearings on House Joint Resolution 784 and related measures providing for the appointment of a Special Prosecutor.

We are pleased to have with us this afternoon Mr. Archibald Cox, the former Special Prosecutor.

I understand that you do not have a prepared statement, Mr. Cox, but you will speak to us extemporaneously.

TESTIMONY OF HON. ARCHIBALD COX, FORMER SPECIAL PROSECUTOR

Mr. Cox. I have pulled my thoughts together, Mr. Chairman, and I would be glad to speak for a few minutes about the question that is before the committee and then answer any questions you have.

Mr. HUNGATE. We would be pleased to hear from you. You may proceed as you wish, and at the conclusion of your statement we will inquire under the 5-minute rule.

Mr. Cox.

Mr. Cox. As I see it, Mr. Chairman, the single greatest need of the country today is the restoration of confidence in the basic integrity of government.

We may and do safely differ over policies and programs. But in a free society no government is possible without a large degree of basic

trust between the governors and the governed. That basic trust has been badly shaken by a variety of causes and events, some within, and others outside the Government.

One major cause—and only one in my judgment—but one major cause is the evidence giving reason to believe that there has been criminal abuse of power and position by some persons high in the executive branch. I say "evidence giving reason to believe" in order to emphasize that the allegations have not been proved, and that some or possibly all may prove to be unfounded.

It is equally plain, however, that some allegations rest upon evidence that is not insignificant, or that perhaps can be said to make a prima facie case, although the fact remains to be proved one way or another.

In this condition of affairs, I suggest, one indispensable step toward the restoration of trust in the integrity of our Government is a careful, fairminded, humane, and exhaustive investigation into the facts, followed by prosecution of any wrongdoers, and full disclosure of the true facts with respect to the innocent as well as the guilty, insofar as it is humanly possible to discover the true facts.

Such an investigation and prosecution, if it commanded public confidence, would not only demonstrate the capacity of our governmental institutions to cleanse themselves, but it would, I think, demonstrate the realities of the ancient principle of equal justice under law by showing that those guilty of wrongdoing in high office are subject to the same laws as those whose station in life may not be as high.

The kind of investigation required and the essential public confidence in its integrity can be commanded, I believe, only by an independent prosecution force outside the normal hierarchy of the executive branch with statutory powers and duties, and resting upon a statutory base. My belief in that principle is not lessened by the recent appointment of Mr. Leon Jaworski. I want to make it clear that none of my remarks bespeak any lack of confidence in him. I have known him some and worked with him some, and certainly in those connections he has been a man of not only capability, but courage and integrity.

So that what I shall have to say is in every sense institutional, and not in any sense personal.

When I speak of an independent prosecutor I have a number of things in mind. It is of the utmost importance, I believe, that he should be free to determine into what subjects within his jurisdiction he will inquire, how far he will press the inquiry, and which he will put first in order of priority. And it is equally important, of course, that he have the formal powers to indict, to give immunity, to appear before grand juries and other things of that kind.

The need for independence, as I see it, rests upon a number of considerations. The first is the problem, familiar to all of us as it is to lawyers, of divided loyalty or conflict of interest, as it may be put. I think it is simply institutionally unsound or even impossible for a man under the direction of the executive branch to inquire into the doings of those who either were or are high in the executive branch. The pressures on either side are too strong.

This is not purely a theoretical concern. There is some evidence that it is of practical importance. Those of you who have followed the testimony before the Ervin committee of the Senate will recall the pressures that the White House put on Patrick Gray when he was Director of the FBI. There was an instruction to Assistant Attorney General Petersen at one point that he was not to inquire into the break-in at the office of Dr. Fielding, Ellsberg's psychiatrist, because it involved matters of national security.

There was an incident in which Liddy, one of those who was associated with the Watergate break-in, went out to the golf course a few days later and saw Attorney General Kleindienst, and it was a very long time before that action of Liddy's was ever reported to the investigators.

Similarly, going back to past events, there was the failure to inquire into the activities of Donald Segretti, who was perhaps not in charge of but most active in the various dirty tricks during parts of the 1972 campaign.

These are things which I think go to illustrate the difficulties which arise when a man who is subject to the normal duties and pressures in the executive branch undertakes to conduct an investigation into affairs involving his associates, or possibly his superiors.

The second reason I think an independent prosecution force, and therefore an independent Special Prosecutor, is of very great importance is to give witnesses confidence in their security. I have two particulars in mind. During the time that I was Special Prosecutor, a number, not a large number, but a significant number of witnesses came to us and offered information, some of which were leads that were not important, and some of which were leads that seemed perhaps significant, and others of which clearly had important information. And a number of them made it very clear that they would not have given this information to the Department of Justice or to any other organization which was not only not independent but not entirely separate from the executive branch, so that their identity, for a time at least, and perhaps longer, what they said, what charges they made, or what their positions were, would not be reported to others in the executive branch.

I don't mean to imply that their fear of reprisal was necessarily justified. I do think it is a human failure, and one that we have to take account of in seeking to set up sound arrangements of this kind.

A somewhat different example is afforded by the case of John Dean. His identity and his basic story, of course, have been well known, because he gave it to the Ervin committee. Just before the events that led to my being here today, he decided to plead guilty. And I believe that he has a good deal more information to give.

It is speculation, or partly speculation, on my part, and I can't vouch for it 100 percent, but I am strongly persuaded from what was reported to me, that Mr. Dean's decision to plead guilty resulted from the fact that he became convinced that the work of the special prosecution forces was for real, that it was truly independent of the Department of Justice and the rest of the executive branch, and consequently, he concluded, as I understand it, that he was not likely simply to be made a scapegoat, but that if he pleaded guilty and cooperated with the rest of the investigation, and if there were indictments, any prosecutions would be vigorously pressed.

Again I refer to this simply as an illustration. I do not mean to endorse or assert disbelief in Mr. Dean's highly controversial testimony. That is something that one shouldn't pass judgment on, even as a prosecutor, until the investigation is completed. And as far as I was concerned, the investigation wasn't completed and isn't completed.

But I think the reference—whatever the truth may be—illustrates that independence does afford opportunities for getting testimony, testimony to be carefully scrutinized sometimes, and to be weighed with care before it is accepted, but nonetheless testimony that may be important which wouldn't be available in other cases.

The third reason for stressing the need for an independent special prosecution force is that it should be one which is in a position to resist direct and indirect White House pressures to limit the investigation. And I use the word White House with all its vagueness, because my knowledge does not go behind that symbol.

But there were occasions when I was Special Prosecutor that it was quite clear to me that someone, calling from the Executive Office Building or the White House, would speak to the Attorney General and urge him to urge me to limit the investigation.

I want to make it plain that the Attorney General never did more than raise reasonable questions, and that if I had a reasonable answer, he indicated his satisfaction.

This was possible, I think, for two reasons. One was that there were very strong guarantees of independence in the so-called guidelines which had been written at the time his name was before the Senate Judiciary Committee. The other rested in the fact that Elliot Richardson and I had a long time and warm, though not really intimate, relationship. And I knew him well enough to know that he wouldn't put any improper pressure on me, and he knew me well enough to know that the best way to get me to do something I didn't want to do was to attempt to put pressure on me.

But the incidents, nevertheless, are revealing of the problem of pressure, unless you have an arrangement that guarantees independence.

I mentioned three. There came a day when it was printed in one of the West Coast newspapers that the Special Prosecutor was investigating San Clemente and the expenditures made on the place at San Clemente. It was no time at all before the Attorney General's telephone started ringing from San Clemente, and a very few minutes later that my telephone was ringing from the Attorney General.

Now, the fact was—and I don't want to mislead anybody about this—the fact was that we were not launching an investigation of any size or depth or detail. The newspaper story resulted from the fact that I had said to my executive assistant, I think I ought to know something about all these charges about San Clemente. Pull together what is public knowledge and give me a memo on it, so I at least will know when people speak to me about it.

And he had taken what I think seemed to him the very natural course of calling up a newspaper and asking for all its clips.

Well, the result was headlines. And having mentioned the subject, I should say perhaps that at least while I was Special Prosecutor, beyond what is already public knowledge, this had been put at least on a back burner as something that, for the present and the immediately foreseeable future, would have been a misexpenditure of our

energies, particularly because the House committee was better equipped than we were and was going to go into the subject. But I think again it shows my main point.

Another example was when it came out in the newspapers that the Special Prosecutor was going to investigate the antitrust actions with respect to Precision Valve Co., the company of which the predominant owner was Mr. Abplanalp. Again I guess there must have been calls to the Attorney General, because he called me. I was able to satisfy him that this was a matter within my jurisdiction, and that it was better that we proceed with it. And indeed the investigation did go forward. And it was concluded that the antitrust settlement was handled in entirely routine—I shouldn't have said settlement—the antitrust action was handled in an entirely proper routine fashion.

The third illustration is of a little different character. And that is why I added it to the other two.

Some of you will remember that there came a time not many weeks ago when the papers were filled with stories that an indictment was about to be returned by the Federal grand jury here in Washington growing out of the break-in of the office of Dr. Fielding, Ellsberg's psychiatrist. It wasn't long after those stories appeared that counsel for one of the persons, who thought he might be indicted, began presenting to us the argument that the trial of any such indictment would be damaging to the national interest, because the defendant would push to put in evidence matters that should be kept as State secrets, and the release of which would be injurious to the welfare of the Nation.

About the same time, the Attorney General called to raise the same question. And the impression I got was that the reason he had called was that at least one of the defendants had been in touch with White House counsel, who had in turn been in touch with him.

I emphasize again that in this instance there was clearly nothing improper about this. Indeed, the question that the Attorney General raised was what I, as a law professor, would call a good question. It caused me to go back and put the question to my staff. And the problem is one that needed to be wrestled with.

It was rather the sequence of communication that seemed to me to illustrate the need for arrangements guaranteeing independence. The raising of such question with one who has the guarantees of independence can be a very useful thing. But the raising of such things with one who is subject to the man who raises them in any real sense may have an altogether different effect.

Now, I once again—and I am sorry to keep putting these things in—I once again must say a word out of caution, because my role was that of a prosecutor. I spoke of stories appearing in the newspapers that such an indictment was going to be returned. That is true. I did not mean, in referring to the newspaper stories, to lend any support to the stories to indicate that an indictment was in fact going to be returned. It would have been improper for me to comment on that. And I am simply stating the chronology of events.

The fourth reason, in my judgment, for an independent special prosecution force is because it is necessary to be sure that the Special Prosecutor and his staff will have the legal standing and the will to use all forms of legal process to obtain information from other parts of the

executive branch of the Government. I am going to develop this at a little length if I may, Mr. Chairman, and I just mention it now.

A second requirement for the kind of investigation necessary to restore faith in our Government and faith in the principle of equal justice under law is, I think, that the jurisdiction of the Special Prosecutor should be just as broad as the jurisdiction vested in me under the guidelines. That jurisdiction fell into three parts. I speak somewhat loosely of the first. It dealt with the Watergate break-in and what has come to be known as the resulting coverup.

The second was to deal with offenses arising out of the 1972 Presidential campaign.

And the third branch of the jurisdiction covered allegations against the President, White House assistants, and other Presidential appointees.

And the last, I think, and in its second and third aspects—in other words, allegations against White House assistants and other Presidential appointees—was a very important head of jurisdiction.

Now, the reason I say the jurisdiction should be just as broad is because of the character of the investigations which the evidence seemed to warrant, even though the result might have been to conclude that in the particular area being investigated there was no wrongdoing.

We divided our work roughly into five sections. One was Watergate, and the so-called coverup. A second dealt with the subject of campaign contributions. I think I ought to give you three illustrations so you will know the kind of things they covered. One is the unlawful corporate contributions, which you have seen reported in the press, those by American Airlines, Gulf Oil, 3M, and I would be surprised if there weren't other charges of that kind for the coming time in the ensuing months.

An example of a somewhat different problem is the very large contribution by Associated Milk Producers, Inc., because there was a question in connection with that contribution as to whether it did not have an undue influence on governmental action. I say a question. And again I must emphasize. I am not prejudging the question. But that illustrates one aspect of the campaign contribution investigation.

Mr. HOGAN. Could I interrupt and ask the witness a question at that point?

Mr. HUNGATE. A brief one.

Mr. HOGAN. In connection with that milk investigation, all I know about it is what I have read in the newspapers. But there were indications that overtures were made to Senator Humphrey and to others. And I wonder if these aspects of that were investigated as well, leading toward a possible indictment.

Mr. COX. I honestly am unable to tell you, because I had not had a very recent report from the men who were pursuing that investigation. I do know that in the case of campaign contributions there has been a charge filed by reason of a gift to Senator Humphrey's nomination campaign, just as there had been charges on the other side of the political fence. But I am afraid I am ignorant, Mr. Hogan, on the matter of the milk producers.

Mr. HOGAN. Thank you.

Mr. HUNGATE. Thank you for permitting the interruption. We will hold them for as far back as we can. But we do have some interesting questions for you.

Mr. Cox. The third example of the type of inquiry being pressed under the head of campaign contributions was into what there was at least some reason to believe was a very large money-raising effort supervised within the White House staff in 1969 and 1970, which may have violated even the campaign contribution laws, political committee laws then in existence.

There is much work to be done in both these first two areas. The third category, as we labeled it, was called dirty tricks. And it is frequently associated with the name of Donald Segretti. I think that there is probably less additional work to be done in that area than others I mentioned, although the question of whether there was any higher responsibility for the dirty tricks remains open.

Fourth, I would categorize as possible offenses involving the abuse or attempted abuse of the power and processes of Government. I emphasize possible. One was the break-in at Dr. Fielding's that I have mentioned before. And that, of course, has been gone into very carefully.

Another example is the bugging of various persons, some in positions which may have been sensitive in terms of the national security, and others apparently not in such positions.

A third example is at least the possible attempted perversion of the Internal Revenue Service. So far as I know, at least one such possible effort clearly was repudiated by the Service and the Secretary of the Treasury. And when speaking of possibilities, I want to disavow and put to rest any innuendos in that connection. Nevertheless, the question whether there was an effort to do it remains. And my statement about putting it to rest does not cover the full point of time either.

Finally, I mention in this connection instances that arose with respect to the handling of possibly hostile members of an audience by Secret Service agents, arguably, possibly, or some such words, under the direction of high officers of the Government in such a way as to deprive them of their civil rights.

One of the examples that has been in the press a good deal and therefore I can mention it, was Billy Graham Day in North Carolina. I think it was in 1970.

And then finally there remains a great deal of work still to be done in connection with the ITT investigation with which you are all at least familiar enough to know what character it takes.

I underscore once again that those are avenues of inquiry, and that my mentioning them should not be taken as implying that there would be an indictment in any case, or for that matter that there would not be an indictment in any case.

A third and important aspect of any statute creating an independent prosecutor in my judgment would be that he should be given the power and the duties to use legal processes to obtain evidence in the executive branch. I believe that both the power and the duty are absolutely essential if this is to be the kind of exhaustive and impartial inquiry that will be reassuring. Unless that evidence is available I do not think any findings of innocence could be completely reassuring. And in terms of finding the guilty parties, most of the evidence bearing on most of those areas are in the papers in the executive branch. And of course, the documentary evidence, the paper evidence, has the value that it is not subject to all the vagaries and weaknesses of human recollection.

I want to discuss this, as I said, at some length, partly because I regard it as terribly important, and partly because it has been controversial in connection with my dismissal.

I should also make it plain that what I say about the furnishing of information and the difficulties of obtaining information is based upon—as my testimony in the Senate was—a memorandum prepared for me by my staff shortly before I was dismissed, shortly before the controversy in which I asked him to summarize the state of affairs with respect to requests for information. I believe it to be entirely accurate, but I am testifying in a sense, too, on something that is secondhand.

It is plain that some things were supplied to the special prosecution force. Logs listing meetings and phone calls between various individuals and the President were supplied. And they were supplied for Dean, Haldeman, Mitchell, Ehrlichman, and Petersen.

I believe there were no meetings at which were present Chapin, Hunt, Liddy, and Strachan. And consequently when I complained on one occasion that we had never been given those, I was in error, because there simply was nothing to give, and I apparently had been told that and forgotten it.

On the other hand, there were a number of logs that were promised back in June or July that the special prosecution force did not have, at least at the time that my memorandum was prepared, involving names associated with the Fielding break-in.

A significant file with respect to ITT was supplied to us. The Strachan political matters memorandums were supplied under the subpena. And there were a number of other individual papers which we obtained from time to time, some known to me, and I suspect others in the office that are not known.

But I must say that despite those bits of cooperation, I came to have the feeling that the effort to obtain information from the Executive offices and from counsel to the President resulted on the whole in delay, evasion, and finally in refusal. And I think because I attach so much emphasis to this point in any legislation you write, it would be worthwhile perhaps to indicate the difficulties, character of the difficulties.

There were a number of things that we specifically requested that have simply not been forthcoming. On August 23, for example, there was a request for items A through H. That would be eight different kinds of things, records and logs reflecting meetings and telephone conversations between Young, Krogh, Colson, Ehrlichman, Hunt, and Liddy between June 13, 1971, and December 11, 1971. This is a period that spans the Ellsberg-Fielding break-in; second, logs of meetings between the President and those individuals in the same period.

Third, records sent or received by the individuals named above relating to the Pentagon Papers, Ellsberg, Fielding, Hunt, Liddy, Hunt and Liddy special project No. 1, Project Odessa, or Project O. These were all activities—maybe all would be activities of the plumbers.

Fourth, records of telephone calls between August 1, 1971, and September 15, 1971.

Fifth, all records relating to the subjects described above that were removed from Krogh's files at the Department of Transportation and delivered to the White House or Executive Office Building between October 31, 1971, and May 31, 1972.

The other three items are similar to those. I think I have given you an illustration. Those, as I said, were asked back on August 23. And to the best of my knowledge, none of them have been supplied. The request was narrowed in terms of what was needed at once about a month ago. But even the narrower list, to the best of my knowledge, has not been supplied.

Another example was a request for records relating to the wiretapping of Joseph Kraft. That was presented August 27, and has not been filled.

A second example of the difficulty of obtaining information of course is afforded by the famous tapes and memorandums relating to conversations with the President.

I should say simply that the nine tapes that were covered by the subpena that was taken out of the district court were not the only ones which would be important to the full investigation of these subjects. But they were good examples, and were therefore chosen for the court case.

A third aspect of this problem was simply the delays in obtaining things. For example, it was in July after we got a subpena that the counsel to the President advised the court that the so-called political matters memorandums prepared by Strachan for Mr. Haldeman would be supplied. But it was actually—I am going by memory—but it was 6 weeks or more or later that we ever got, actually got the memorandums.

Now, some of the time can be laid at my doorstep in that I acquiesced. Mr. J. Fred Buzhardt called me sometime after saying that they would supply the papers and said:

> Look here, some of these papers aren't conceivably relevant, but they would be damaging in a way to investigators not engaged in any investigation anybody would be interested in. Do we have to supply you with those?

I, of course, replied:

> Well, until I can see them and make sure that they are not in any way related to an investigation I should conduct, why of course you don't have to give us those. I am not out to embarrass people unnecessarily for things which are not in any sense involved in wrong doing of any kind and are therefore not a proper subject of investigation.

But there was the difficulty in obtaining the logs that I mentioned at the beginning, and the fact that some of them haven't been supplied.

Another source of concern about this matter of obtaining papers is illustrated by an excerpt from a memorandum written to me by one of the attorneys on my staff concerning an interview with a man who I can identify as, formally or not, a member of the White House staff, but whom I would prefer to call X, if you don't mind, Mr. Chairman. And he refers to another member of the staff whom I would prefer to call Y, if I may.

X, who was the witness being interviewed by one of our attorneys, also explained that immediately after Y testified before the Senate Watergate Committee, Y indicated to X that the Senate was going to subpena X's and Y's political files. X consulted with Buzhardt, who determined that to avoid the subpena problem all of X's political files should be deposited in the President's files. That day X combed his file and deposited the relevant material in the President's file.

I do not mean to insinuate that there was anything illegal or improper about this. I just don't know as to that, I honestly don't know.

I am simply using it as an example of the difficulty of getting papers, and therefore for the need of somebody who has the power and really will go after them.

The same thing, or same sort of thing, apparently happened to a number of other papers. Of course, the tapes themselves were taken from their normal custody where they could have been subpenaed by a subpena directed to the head of the Secret Service and put in the personal custody of the President, which was the only reason for regretfully taking the steps of having to name him a defendant.

And I give you one more example to illustrate my point. A number of the files maintained by individuals whose names have been connected with Watergate were impounded when they left the Government, and have been put under security in a separate room, I think a number in the Executive Office Building or the White House.

Quite clearly, those papers contain the most pertinent and persuasive evidence on the subject of inquiry that I listed. Quite clearly too they contain a lot of other information which would be utterly irrelevant to the inquiry, and which—well, I don't think it would have done any harm, but I can see how it might have been thought inconvenient or unwise for a Special Prosecutor to be poring over them.

So that the problem was one of, well, how could they be separated out? And my suggestion was, well, why don't we begin by having an inventory made, and then at least the Special Prosecutor and his office can identify what he really needs. But after a long period I was told—it doesn't appear in the logs—that the inventory was not forthcoming.

I mention these things simply to bring out the point that the obtaining of information from executive files will be of the utmost importance, and that the power to seek through legal process to attach this evidence is clearly one that should be given any special prosecutor, and I think by statute. I say by statute not only to make it clear and irrevocable and give the public confidence that it will be so, but also because during the legal arguments there comes from time to time the suggestion that, well, one employee in the executive branch—to wit, Cox—surely can't use legal process to seek to obtain evidence from another higher. And in the case before the court, involving the grand jury seeking information from the executive branch, the President, I did not think that idea would prevail. Neither of the courts thought it serious enough to mention.

But if there is legislation on this subject, I think it would be very wise to put in the legislation an explicit provision giving the Special Prosecutor the standing to seek legal process to obtain evidence needed both in the grand jury investigation and at any trial.

Obviously, an important element of any legislation would be an authority for an independent budget. And I think there should be in such legislation a limit on the removability of the Special Prosecutor.

This raises the first of the constitutional questions that have to be thought about in connection with the legislation we are discussing.

There are three important cases. One was the *Myers* case, in which Chief Justice Taft wrote for a divided court during the 1920's, and held the old Tenure-of-Office Act unconstitutional, because it tended to limit the President's power to remove, I think it was, postmasters.

The second important case is the case of Humphrey's Executor. You

will recall that he was a Federal Trade Commissioner whom President Franklin Roosevelt sought to remove, and the removal was held improper.

And the third was a case involving a member of the War Claims Commission—the name has slipped my mind, I am sorry to say. In my view, the case of Humphrey's Executor, and the ensuing case involving a member of the War Claims Commission, both give firm support to the proposition that under the circumstances now existing, the Congress could appropriately limit the grounds for removing any person who might be appointed Special Prosecutor.

The decisive distinction between the *Myers* case and those cases as I read them is that the cases that sanction the limit on the power of removal speak on whether there is a need for independence. And if there is, as in the obvious case of a member of the Federal Trade Commission, or a member of the War Claims Commission, then the court indicates that the limit may be imposed. It would seem to me that in this instance there is an obvious need for independence, for the reasons I have stated, that is simply unrealistic to ask the whole public to believe that a prosecutor who is in the executive branch and not guaranteed some protection against removability will feel entirely free to press the questions of the conduct of past and present members of the executive branch to the limit. There are individuals who could and would do that and as I said before, Mr. Jaworski, so far as my experience with him goes, may well be one. But here we need the appearance that will satisfy the public of independence and integrity just as much as the fact of independence and integrity.

Mr. Chairman, I have been so long——

Mr. HUNGATE. Would that be the *Weiner* case?

Mr. COX. I guess that is the name of it; yes. I think it is.

The last point I was going to speak to was, how should the Special Prosecutor be selected. As I see it, there are three choices: One, that the appointment be made by the President with the advice and consent of the Senate; two, that the appointment, and, therefore, any question of removal, be made by the District Court of the United States for the District of Columbia; and the third would be sort of a combination of the two.

It occurred to me that perhaps a wise solution, and one not subject to the same constitutional doubts as the second one, would be to provide for appointment by the President by and with the advice and consent of the Senate, but to provide that if no appointment was made with the advice and consent of the Senate before the Congress should recess, then the tasks and responsibilities should fall to the U.S. district court. The obvious purpose of this would be to bar a recess appointment in which the Senate would not participate.

In my view, the appointment by the district court, and the handling by the district court of any questions of removal, is quite clearly preferable as an ideal method. It assures the greatest independence, I think, and the greatest appearance of independence.

Furthermore, in my judgment, although I must acknowledge, and do freely acknowledge that there is room for some constitutional doubt, I do not think the doubt is a very serious doubt. And it is a doubt which I have satisfied myself that I would be willing to run if I were in the position of the members of the committee.

Let me explain that, and then I will be through.

As you will all recall, article 2, section 2, authorizes the Congress to vest the power of appointment of inferior officers in the President, in heads of departments, or courts of law, so that there is clearly a constitutional base for delegating this power of appointment to the courts.

At one time, in appearing on "Meet the Press" 8 days ago, I was worried that that power of appointment that could be vested in the courts might be limited to appointing routine supporting officers to the judiciary, clerks, and possibly marshals, and other people of that kind. I expressed a greater doubt on that occasion than I now feel. To my embarrassment, a friend of mine brought to my attention the case of *Ex parte Siebold*, in 99 U.S., where the Supreme Court upheld the right of Congress to delegate to the Federal courts the appointment of supervisors of Federal elections.

Now, it would seem to me that a prosecutor is far more closely linked with the administration of justice, the role of courts, than a supervisor of elections. Indeed, in some States I think, including Tennessee, the attorney general is appointed by the Supreme Court of the United States. Certainly temporarily U.S. attorneys are appointed by the courts. We know of other specific significant assignments that a court may make, such as naming an attorney to prosecute a case in contempt of court, or recently the Supreme Judicial Court of Massachusetts had occasion, unfortunately, to appoint attorneys to institute proceedings against judges in one or two of the inferior courts.

So this is not an unusual type thing for a court to do, although in this instance it would be on a scale and have an importance which, to the best of my knowledge, has no precedents.

The other constitutional question, I suppose, or other opportunity for raising a constitutional question is whether giving their power to the district court would involve taking away from the executive, some essentially executive privileges in derogation of article 2.

My answer, at least to my own satisfaction, is that the line between executive power and judicial power under article 3 is not all that sharp. There are fuzzy lines, functions that could be assigned, sometimes to the judiciary and sometimes to an elective court, not an article 3 court.

Here it would seem to me that the greatest incongruity would not be in having the district court make the appointment of a prosecutor, independent of the executive branch, but in one high executive official, called upon to investigate possible wrongdoing at the highest executive levels.

I would also point out that unlike areas like the enforcement of the antitrust laws, or various other kinds of important social legislation, really there is no need for political responsiveness in the conduct of a Special Prosecutor concerned with offenses like obstruction of justice, or possibly bribery, fraud on the United States, perjury, a violation of civil rights, and other things of that kind. Indeed, the very thing one wishes the investigation to be free of is political sponsorship, political partnership, running in either direction.

Now, I have said that appointment by the court seems to me to be a preferable idea. I do firmly believe that, and I would run the constitutional risk.

I might say, as I have thought about some of it over the weekend following the appointment of Mr. Jaworski, I think that the greatest

need of all is to get on with it, to get a statute having these powers, and calling for appointment one way or other, enacted quickly, and so as to have the investigation go forward, and to hold the staff, which I think was an admirable staff, of the Special Prosecutor's Office, to hold that staff intact. I must in honesty say that I think a prompt decision either on appointment by the President with and by the advice and consent of the Senate, with limits on removability, or a statute providing for appointment by the court with the removability then vested in the court, but the enactment of a statute having the other characteristics I have mentioned, one or more of these in the very near future is probably more important than which of the two should be chosen.

That completes my statement, Mr. Chairman. I apologize once more for such length. As you know, professors are geared to an hour.

Mr. HUNGATE. We appreciate that. You are a great scholar of the law, and most recently the Special Prosecutor. Certainly this subcommittee, all being lawyers, expresses confidence in you and your views.

Mr. Kastenmeier?

Mr. KASTENMEIER. I, too, would like to extend a welcome to Mr. Cox for appearing before this committee.

I have a very few brief questions, and then a few more.

First, are you satisfied that the staff which you accumulated in the Special Prosecutor's Office remained intact as of Wednesday or Thursday last?

Mr. Cox. This was a great strain on the staff. They did not know where they were. Many of them felt very troubled. They saw the Attorney General acting as a man of principle, and then the Deputy acting as a man of principle, and many of them felt that they should do the same thing. But they were persuaded, or persuaded themselves, that it was important to keep the staff together, and I have every reason to believe that it is still together as of today.

Mr. KASTENMEIER. Thank you.

This morning Acting Attorney General Robert Bork mentioned the same mandates that you have referred to in terms of areas of jurisdiction for investigation, but he additionally offered a fourth one. Not only did he mention offenses arising out of the entry into the Democratic National Headquarters, and events arising out of the 1972 Presidential campaign, and third, allegations involving the President, members of the White House staff or appointees, but he mentioned, fourth, gaining other matters which he consents to have assigned to him by the Attorney General.

I would ask you, as to the third item, and the fourth item mentioned by Mr. Bork, whether these areas were particularly sensitive in terms of your relationship with the White House. And I ask you this because I seem to recall that it was really in this area that the greatest concern grew out of the White House.

In that context, I would further ask whether the present investigation or the future investigation will cover the third and fourth items, as you see it, as presently constituted, either within the Justice Department or with a Special Prosecutor operating as an employee of the President?

Mr. Cox. First, I should correct one inaccuracy in your statement. The fourth heading that you mentioned, Mr. Kastenmeier, was in

fact in the guidelines under which I operated. I had forgotten it. I do not think there ever was a matter which was specifically assigned by the Attorney General that cannot fall under one or the other of the headings.

There is no doubt that the third item, allegations involving the President, the White House staff, or Presidential appointees, was the one which seemed to be far and away the most sensitive. I think all the subjects that I mentioned as examples of there being a reaction, apparently, by the White House staff fell in that last area.

There was concern, to put it mildly, but the Attorney General and I used to discuss it some—are you going back to January 1969, and going to go over everything that this administration has done, and then continue on into the future going over everything the administration has done?

If you read the hearings before the Senate Judiciary Committee, it is true that the charter was intended to be just about that broad as to the past. I do not think it was intended to run indefinitely as to the future, and I certainly did not see myself as a permanent watchdog.

In point of view, Attorney General Richardson and I had agreed that I would speak to him before initiating any new investigation; that is, one that I did not have underway, relating to a period before—I think the date was January 1, 1971—or any date after my appointment.

We did investigate things running back, but they very clearly involved potentially—and again I must say I do not imply any guilt, but if there was guilt it possibly implicated the White House staff, and it was much the same character of things that had been mentioned at the time of the hearings.

I cannot tell you how the Department of Justice would conduct itself in these respects, nor can I tell you what Mr. Jaworski's intentions are. I have not been in touch with him yet except indirectly, and only to a degree to get together. I do not know just what his mandate is.

Mr. KASTENMEIER. But in that respect, would you not feel that if he went as far as you did in this respect that he would have the same difficulties with the White House?

Mr. Cox. Well, I would think the chances were that he would have the same difficulties. I think perhaps I was an object or subject, whichever it is, of perhaps more suspicion than he would be to some members of the staff. I never thought it was justified, but I guess that is not for me to say.

I can see ways where he will not be the subject of suspicion. I want to make it clear that whatever the suspicions, I do not think we ever conducted ourselves in a partisan manner or a manner out to get anybody.

Mr. KASTENMEIER. Thank you. I appreciate it.

Mr. HUNGATE. Mr. Smith of New York?

Mr. SMITH. Mr. Cox, I, too, want to thank you for coming this afternoon and giving us the benefit of your experience. It was a rapid life, I guess, that you had for a few months.

Mr. Cox, would you feel that Congress should consider the establishment of a permanent Special Prosecutor?

Mr. Cox. I think it would be unwise to reach an affirmative conclusion on that question at this time, Mr. Smith. It has been suggested.

I think it raises interesting and important questions. But I also can think of some very real difficulties in terms of someone using it as a springboard for political futures.

Both Mr. Jaworski and I are too old to think of it in that way, but I think it would be unwise to act under the exigencies of the present situation. I would like to see it chewed over for a year or two, and then fully considered. And I honestly do not know how I would come down.

Mr. SMITH. You think this is a unique situation for the continuation of a Special Prosecutor in the parameters in which you acted?

Mr. Cox. Yes, sir, I think this is a truly unique situation.

Mr. SMITH. Mr. Cox, you stated that you thought that the great necessity was to get on with it. But I think you also said that in regard to the independence of any Special Prosecutor, there were two aspects: One was the appointment, and the other one was the removal.

The President appointed Mr. Jaworski, of course, as Special Prosecutor. Going down the road ahead now, if the Congress were to establish the Office of an independent Special Prosecutor, perhaps appointed by the district court or a panel of three judges, or however, it is conceivable that we could end up with two Special Prosecutors.

Mr. Cox. I do not think so, Mr. Smith. I think that if Congress created the statutory Office and vested this jurisdiction in that Office, that that would supersede any prior executive action.

Mr. SMITH. It would supersede it to the extent that it was a constitutional delegation of powers, we expect. But there would be perhaps problems as to the constitutional question.

Mr. Cox. Well, if the power were put in the district court, and the Executive chose to assert that that was unconstitutional, then I suppose you are right, that conceivably Mr. Jaworski might choose to stay on the job and attempt to function.

May I adjust one more sentence. Forgive me for interrupting. It sort of bubbled out.

Of course that would not be true if it were a Presidential appointment by and with the advice and consent of the Senate, there could be no doubt about that.

Mr. SMITH. We have heard testimony, almost unanimous, as to the integrity and character of Mr. Jaworski. All of the witnesses who have commented about him have commented that to their knowledge he is a man of great integrity, of great experience, as well as a former president of the American Bar Association.

Do you think, Mr. Cox, that in order, perhaps, to get on with it, and to the best of your ability to avoid a constitutional confrontation that would cause delays and so forth, that we might devote our attention to guaranteeing the tenure of any Special Prosecutor who might be appointed, Mr. Jaworski or anybody else, rather than equally giving our attention to the appointment of one?

Mr. Cox. Well, I would not wish to totally ignore the problem. I think restating what I said, if it was the only way I could get prompt action, I would be willing to say, well, all right, I will give up my desire for a Special Prosecutor appointed by the court, if you will, or at least some of your party colleagues will go along with him on a basis guaranteeing tenure and appointment by and with the advice and consent of the Senate.

He would not go beyond that and I would not go beyond that. If I were the President I have all the power under myself, and if I were a Senator I would wish to quiz Mr. Jaworski and obtain his commitment on two points. While he is not responsible, I have seen enough different statements to genuinely leave me uncertain on two points. That is why I wish to question him.

I would wish to be sure that he planned to exercise the full jurisdiction stated, but not of course pursuing things where there was not any evidence, but that he recognized this was his area of responsibility, and where there was sufficient reason to inquire, that he proposed to make the inquiries. I would want very firm assurance on that point because at one time—and it may just have been the use of words less precisely than we do in the statute—the President referred to having somebody conduct the Watergate investigation. But that is a great deal narrower.

The second thing I would wish to have assurance on was that he did intend, and indeed regarded it as his duty, to pursue the legal process to get the kind of evidence I have mentioned, and that there was not any kind of understanding or commitment that would block him on either of those fronts.

I would still prefer to have what I described as the ideal arrangement. But I guess I am simply recognizing that the legislative process sometimes involves some give and take, particularly if you have to work fast.

Speaking solely for myself, that is the direction I would attempt to work something out in if I could not have my "druthers." If I could have my "druthers," I would get that.

Mr. SMITH. Thank you very much, Mr. Cox.

Mr. HUNGATE. Mr. Edwards from California.

Mr. EDWARDS. Thank you, Mr. Chairman.

Mr. Cox, Mr. Bork this morning seemed to rely on the belief of Prof. Roger Cramton to a great degree, and Professor Cramton is against the appointment of a Special Prosecutor by the court on the ground that, first, it is unconstitutional; and second, it is a dangerous precedent to create a fourth agency of government; and, lastly, that it is not necessary because the President would not dare do again what he did to you.

Now, what is your view on that view, particularly the last point?

Mr. Cox. Well, I did not ever really think that he would take the step he took. I read that it was going to be taken from time to time during the summer by various columnists, but I do not like to say that he would not dare to take it. I never thought he would take it.

Mr. EDWARDS. Thank you.

Now, you were operating under guidelines worked out between you and Mr. Richardson, is that correct?

Mr. Cox. And the Senate Judiciary Committee.

Mr. EDWARDS. And the Senate Judiciary Committee.

Did the Attorney General, Mr. Richardson, get the approval of these guidelines of President Nixon?

Mr. Cox. I do not know the extent to which he had sort of a blanket authorization. The reason for my hesitance is that it seems to me that during the hearing over on the other side when I was testifying, one

of the Senators called attention to a passage in Mr. Richardson's testimony in which he said he had not gotten the express approval—I am not quoting when I say "express"—of the President. But this was a matter of widespread knowledge. And I think I am right in recalling that after I was appointed, the President indicated in general terms his approval of the arrangement.

Mr. EDWARDS. Thank you.

We are being asked again by the President to agree to guidelines in this bill. They are guidelines that are clearly voluntary and do not have the effect of law, which would be that the firing of the Special Prosecutor could only be by the agreement and consent, which, according to the dictionary, means nearly unanimous, of certain political leaders and chairman and ranking Republicans on the committee.

But before Mr. Jaworski was appointed, he goes to the White House and consults with General Haig, Fred Buzhardt, and Leonard Garment.

What do you suppose that consultation could have been?

Mr. COX. Well, that is one of the things I would want to inquire into before I were prepared to approve Mr. Jaworski's appointment, simply because I would wish to know everything about his understandings with them. I am sure he would state it honestly.

Mr. EDWARDS. I am sure he would.

Mr. MAYNE. Mr. Chairman?

Mr. HUNGATE. Yes; Mr. Mayne.

Mr. MAYNE. It seems to me that in fairness to the witness, the gentleman from California should state to him that when Acting Attorney General Bork testified this morning he stated clearly and precisely what the nature of these conversations was, and that the purpose of them was to enable Mr. Jaworski to obtain these assurances of his complete independence and freedom of operation directly from these gentlemen in the White House.

That is the subject of those conversations, as is very clear from the record here, and I think it is very unfair to the witness to ask him to speculate as to what went on in those conversations when it has already been made very apparent.

Mr. HUNGATE. The Chair will take notice that the witness' comment on those would necessarily be hearsay. I suppose the record will be available as to General Bork's statement.

Mr. Edwards, do you care to comment?

Mr. EDWARDS. Yes. I think it is a perfectly legitimate speculation that we should explore. These three gentlemen, Mr. Buzhardt, General Haig, and Leonard Garment, were representing the President. And, query: Is this an appropriate thing to do, to consult at what could be described as an adversary lawyer before an appointment of a prosecutor?

Ms. HOLTZMAN. Mr. Chairman, if the gentleman would yield——

Mr. EDWARDS. I yield.

Ms. HOLTZMAN. My recollection is, I never asked Mr. Bork and he does not recall anybody else on the committee asking him, about what was said at that meeting. So I do not think it is appropriate for the witness to say further what was said in the entire conversation.

Mr. HUNGATE. I will have to refresh my recollection with my logs this morning. As I understand it, this is the matter of the witness

conferring with an individual prior to his appointment, when one purpose of his appointment might be to investigate him in an adversary manner.

Is that a fair statement?

Mr. EDWARDS. That is correct.

To clear the record even further, Mr. Bork did not volunteer any additional information, nor was he asked as to whether this particular subject was the only one discussed at the meeting.

Mr. HUNGATE. If the Chair may be pardoned for phrasing the question the way he did, in the witness' opinion, would it be appropriate for the gentleman named, who might be the object of an adverse interview, to interview prior to appointment the Special Prosecutor designate?

Mr. COX. I do not know how to answer that, Mr. Chairman. If I try hypothetically to put myself in the position of one who was requested to take such a position at the time Mr. Jaworski was, and were willing to entertain it at all, I think I would have wished to get my assurances from the President himself.

Mr. HUNGATE. Do you have further questions, Mr. Edwards?

Mr. EDWARDS. No, thank you.

Mr. HUNGATE. Mr. Dennis?

Mr. DENNIS. Mr. Cox, would you see any constitutional infirmity or difficulty if we should pass a statute here which would simply provide that the existing Special Prosecutor presently appointed should not be removed except for gross improprieties or misconduct in office, and only by the Attorney General for those reasons?

Mr. COX. I think there is no constitutional question worthy of concern.

I am aware that it has been suggested that even that limitation on the President's power might run afoul of the *Myers* case. I feel very sure that it would not. But that is a matter of opinion.

Mr. DENNIS. Well, I would agree with you, I think, and particularly because the appointment here is that of the Attorney General rather than the President.

Now, that would of course remove any question about the constitutional propriety of an appointment of a prosecutor or by the Judicial Branch, would it not?

Mr. COX. Oh, yes.

Mr. DENNIS. According to your view, and mine, it would remove any question which might be raised under the *Myers* case with respect to limiting the power of removal?

Mr. COX. I think it would, yes.

Mr. DENNIS. Now, if that is correct, would that not be by far the simplest way to go to achieve the objectives which we all want to achieve, and yet avoid these constitutional pitfalls which we all admit exist, whether they may be resolved in one way or another?

Mr. COX. Well, I do not think it goes far enough in achieving the objectives. Despite my confidence in Mr. Jaworski as a man, if I were in your position, or the position of a Senator, I would wish at a very minimum to be assured concerning his conception of the scope of his duties and the manner in which he would carry them out, the field of investigation he would be prepared to pursue.

I would also wish to be assured with respect to his position con-

cerning the seeking of information. In other words, Mr. Dennis, what I am saying is that while I have not the slightest doubt of Mr. Jaworski's personal integrity and courage and independence, I do not know what his views concerning the nature of the assignment are, and the way in which—I am repeating, I am afraid—he would wish to perform it. So, at a minimum, I would wish the Senate to have an opportunity to have him appear and listen to his views on these points. Even then I do not know if it would be the best way of restoring public confidence.

Mr. DENNIS. If we added to the suggestion that I just made to you a provision that the Attorney General should make the appointment by and with the advice and consent of the Senate, that would take care of your last point, would it not, that they would have the opportunity to ask him the questions which concern him, and then provide that the Attorney General appoints by and with the consent of the Senate, and the Attorney General removes only for gross improprieties or misconduct? Why would that not meet the situation?

Mr. Cox. Well, I do not offhand see any major difference between appointment by the Attorney General or by the President in this instance. I think it would be novel—I do not know that it is a matter of importance—to have the head of one of the departments making appointments dependent on the advice and consent of the Senate. But I just noticed that is an oddity, the significance of which does not immediately appear to me.

Mr. DENNIS. I agree with you that that is probably novel.

However, I see nothing to prevent it. You will recall that in the *Myers* case the courts said that where you had a Presidential appointment by and with the advice and consent of the Senate, there existed a sweeping removal power which could not be interfered with. But in that very case the court intimated that if you give the appointment to a department head, which you can do under the second clause of article 2, then, you could hedge the removal around by statutory provisions.

I suggest that is the difference between what I am suggesting and a Presidential appointment.

Mr. Cox. Well, offhand it sounds like an ingenious suggestion.

Mr. DENNIS. We would not have this problem of the courts perhaps invading what many people regard as definitely an executive function.

Mr. Cox. Yes, I think the price you would pay for relieving that constitutional doubt would be a lessened confidence in the independence of the operation.

Mr. DENNIS. Of course, that is a matter of opinion. But it seems to me I have hedged it around pretty well.

I thank you, because the Chairman said I have exhausted my time.

Mr. HUNGATE. Mr. Cox, let me ask a question here before I move on to Mr. Mann.

Are constitutional confrontation questions to be avoided at all costs at all times?

The Plessy and Ferguson Votes Rights Act and Civil Rights Act—are there occasions when constitutional confrontation might do the country some good?

Mr. Cox. I guess—I would be the last man in the world to be in a position to deny that.

Mr. HUNGATE. Thank you, sir.

Mr. Mann?

Mr. MANN. Mr. Cox, I detect in the report that I received that there is some confusion about the extent to which the White House has cooperated in turning over evidence. We are aware of the judicial process that was employed to obtain certain evidence. But with reference to other evidence pertinent to the tasks of the Special Prosecution force, what is your impression concerning the cooperation you were getting?

Mr. Cox. That we were supplied some papers, but on the whole the record was one of delay and frustration, evasion. I think that I should have added before—and if you will permit me to use your time, I should add now—that I always thought that as long as the litigation over executive privilege was pending that it would not be entirely fair to go after them in public on those points, that they would be entitled to reply, well, we are trying to get the guidelines established here by litigation. I mention it because it is something that I think the statutes should cover, and because I think—I have seen some statement in the last 2 weeks about what was furnished that did not seem to be entirely in accordance with my understanding.

Mr. MANN. Aside from the cooperation or lack thereof by the White House, did you detect any reluctance or any indication of pressure on any other agencies, the FBI, and so forth, so far as furnishing the Special Prosecutor force information?

Mr. Cox. Certainly not so far as the FBI was concerned. The only thing I was hesitating over was that any inquiries that went to the Treasury, particularly about the Secret Service, always seemed to be stickier than inquiries that went to anybody elsewhere. I think some of them resulted, I guess some of them resulted from consultation with White House counsel.

I will give one example in the paper area, Mr. Mann.

One day I said to the Attorney General, I see that a lawyer in the Civil Division has the White House milk producers file. If he can have it, why can't I have it?

Mr. Richardson said, well, that is a fair question, and if he can have it I do not see why you cannot have it. He said, I will issue instructions that you have access to it.

Then a minute later he said, well, I guess I had better tell Fred Buzhardt that I am giving it to you. But when he told him he was forbidden to give it to me.

This is the kind of thing that I was referring to with my generalities about frustration and delay earlier.

Mr. MANN. Would it not be fair to assume that regardless of what arrangement we set up that the more the independence, the less the cooperation in the future?

Mr. Cox. Yes, sir.

Mr. MANN. Thank you, sir.

Mr. HUNGATE. Mr. Mayne of Iowa.

Mr. MAYNE. Thank you, Mr. Chairman.

Mr. Cox, I want to congratulate you on the flexibility which you have exhibited here today in your expressed willingness to take less than what you consider a perfect solution. There have been some reports that you are absolutely uncomprising and unyielding, and certainly your statements here today do not seem to bear that out.

Mr. Cox. Thank you.

Mr. MAYNE. Now, you said that you did not know what is Mr. Jaworski's mandate. The testimony of Mr. Bork this morning was that Mr. Jaworski's charter is identical to yours except that there is added to it the Presidential assurance that before he could be discharged there would have to be the consent of the eight Members of the majority and minority leadership, and members of the House and Senate Judiciary Committee. He said that Mr. Saxbe had said that it would take six out of eight of those gentlemen to concur, and there seemed to be some question as to whether that was authoritative.

I communicated with Mr. Melvin Laird during the noon recess, and he stated that the President has said that he would not discharge unless six of eight concurred in such a dismissal.

Now, there does seem to be a stronger protection for the continuance of this Special Prosecutor than was true in the case of the original one, if those are the facts. Would you agree?

Mr. Cox. I would agree that there was, both for that reason and inherent in the situation, a somewhat stronger protection; I would have to; yes.

Mr. MAYNE. I am familiar with your statement both here and earlier on "Meet the Press," and I believe before the Senate committee, that the likelihood of the same thing happening again is in your opinion greatly reduced. And I would concur in that assessment of the situation.

Now, you have spoken today again about the judicial appointment of the prosecutor. Of course, I do not believe you intend to minimize those at all, although you do say that you think that probably such an appointment could be upheld in the Supreme Court.

Mr. Cox. Well, I meant to put it a little stronger than that, Mr. Mayne. I for myself do not regard the constitutional doubt about legislation putting the power in the district court as sufficient to deter me from writing such legislation if I have the power. I recognize that there is some risk. And I recognize that there would be very substantial cost if my estimate about constitutionality was wrong—I do not mean money cost, I mean cost in defective indictments and things of that kind. But the best I can put it is to say, I do not regard the doubts as serious enough that they would dissuade me from supporting such legislation, if I could get it quickly.

Mr. MAYNE. I cannot help but be impressed by the statement which you made back on October 28 in the "Meet the Press" program. And that was against the background of long, long experience as a public servant, as Solicitor General, and as a distinguished professor at law school. You wrote books, I believe, on the court and on constitutional law. You had about 6 months of actual experience in this very hot seat, of being the Special Prosecutor.

So you were certainly not just talking off the cuff on the "Meet the Press" panel after 8 days of being able to reflect on this situation after your dismissal.

You did say in answer to a question by Mr. Otten about the legal authorities to the effect that setting up a prosecutor is strictly an executive branch function, and that there are severe constitutional problems in having the court set up a prosecutor. My recollection is that you said that you would have no hesitancy in saying that a bill that created a truly independent prosecutor and gave him enough power to do the job would be constitutional if it allowed for appointment by the President with the advice and consent of the Senate, and if it curtailed power of dismissal by prohibiting dismissal by the President, except for gross impropriety.

Then you went on and said that the other course you recognized as being a more dangerous one. You said there was more question in your mind about the constitutionality of vesting power of appointment in the U.S. district court.

I assume when you said that you had in mind the separation of powers, did you not?

Mr. Cox. I did; yes.

Mr. MAYNE. You said, there is room for argument that such an appointment would be unconstitutional, and you said the Congress was going to have to consider whether it is worth running the risk, because if it is unconstitutional, there would be the further possibility that indictments would be thrown out and justice never would be done.

Now, I am profoundly impressed today, Mr. Cox, just as I was on that Sunday, October 28, that a man with your long experience and knowledge would express these serious reservations about the approach which is taken on some of this legislation.

I know that you have said that a friend called the *Siebold* case to your attention, and this seemed to change everything. Would it be inappropriate for me to inquire who was the friend?

Mr. Cox. It was one of my colleagues at the Harvard Law School, but I talked to several of them on the phone, and I could not tell you which one eminent authority.

Mr. MAYNE. That satisfies me, Mr. Cox.

But did you really feel that the *Siebold* case, which dealt with election supervisors, should serve to change your opinion so markedly?

Mr. Cox. For better ways, yes. You summarize what I said on "Meet the Press" very fairly, I think. What happened, to give you a little more detail, I talked that night on the phone to several law school colleagues, and one of them read me a statement that Professor Freund had sent, I think, to this committee. The next morning I went to the Supreme Court Library and reread a number of these cases. On that basis, and that basis alone, I hope, certainly the way I see it, my doubts did shrink.

If you say to me, well, why should we put any more weight in what we say the second time than in what you said the first time, I do not know; all I can say is that there was a little more study in the interval.

Mr. MAYNE. Is not the *Siebold* case really quite different in that it does not represent very much of an encroachment upon what has always been considered a general executive responsibility, the enforcement of the law?

Mr. Cox. Well, I think that what was involved in the *Siebold* case is further away from a judicial responsibility, and that there was less

need for a judicial appointment there than here. I think it is in the *Siebold* case that the court speaks about the question of whether it would be incongruous for the judiciary to make the appointment.

It seems to me here that really the incongruity is in the top of the executive branch investigating itself.

Mr. MAYNE. But have we not always had the clear principle that the enforcement of the law is an executive function, and so it is a tortiori fairly incongruous for a court to assume that responsibility for the conduct of the prosecution?

Mr. COX. Well, I guess we differ on that.

Mr. HUNGATE. If you gentlemen will pardon me, I am late for the next class.

Ms. Holtzman.

Ms. HOLTZMAN. Thank you, Mr. Chairman.

Mr. Cox, with respect to the investigation, I have a question to ask you, particularly because when we are talking about the confidence of the public we are concerned about the nature of the exculpations, when people are exculpated as a result of the investigation. I think the people want to have the feeling that that was done fairly and fully and impartially, and that they were truly innocent, and that the public confidence in that process would be undermined if the prosecutor were not independent.

Is that not one of the major concerns about having an independent prosecutor?

Mr. COX. It is indeed.

Ms. HOLTZMAN. Along with that, and the scope of the investigation, somebody brought to my attention recently an article that appeared in the Washington Post concerning the Justice Department's statement that Mr. Rebozo, President Nixon's close friend, did not engage in criminal conduct in 1968 in connection with certain stolen securities. Would you have any comment on expanding the scope of the special or independent prosecutor to encompass charges made against close associates of the President so that exculpation will carry the full weight that it ought to?

Mr. COX. Well, I am not familiar with the facts of the particular case. I think any such finding as you call our attention to would carry a great deal more weight if there were a truly independent prosecutor, and preferably one appointed by the court and not by the President, than it can carry when it is a finding made by the Department of Justice. I think that is inherent in the present situation, and is an unfortunate part of the present situation, because the Department of Justice is manned by many fairminded, honest, professional people.

Ms. HOLTZMAN. Thank you.

With respect to the materials that you said you had difficulty in receiving from the White House, and some of which you say you never received, were subpenas issued for those materials?

Mr. COX. There was a question whether we should issue a whole lot, take out a whole lot of subpenas, or whether we should take out one and push that as far as we could and get a ruling and then go on from there. It seemed to me that the second course was the wiser, and therefore it is the one that we pursued.

There were, I think, one or two instances in which we took out other subpenas. I think Hunt's pass to the White House was subpenaed,

and there was some other piece of paper that was subpenaed. I think there were in both cases where we felt pretty sure if we subpenaed them we would get them.

Ms. HOLTZMAN. Did you receive the materials subpenaed?

Mr. Cox. Yes.

Ms. HOLTZMAN. Is there any doubt in your mind whatsoever that this independent prosecutor picking up where you left off would have to proceed to obtain the materials that you sought to obtain, whether by subpena or otherwise?

Mr. Cox. I am sure he should. I have read—I do not want to seem to dignify it, but I got the impression, I guess it was yesterday, watching one of the "Face the Nation" or other shows of that kind, that there was some understanding that this matter of seeking information would not be put before the court, but might be resolved in some other manner.

I must confess that I would have grave mistrust, speaking in institutional terms, not of personalities, of any arrangement of that kind. I think that the people would, on the whole.

Ms. HOLTZMAN. Getting back to the question of the materials you sought, is there any doubt in your mind——

Mr. Cox. I am having difficulty hearing.

Ms. HOLTZMAN. Getting back to the question about the materials that you sought, is there any question in your mind that any independent prosecutor who is doing his job would have to try to obtain those materials?

Mr. Cox. No; there is no question in my mind but that he would have to seek substantially all those materials.

Ms. HOLTZMAN. Thank you.

Mr. HUNGATE. Mr. Hogan?

Mr. HOGAN. Mr. Cox, a great deal has been said during these hearings to the effect and there is no disagreement with it, that it is important that the investigation be independent, that there be no question about integrity, and that the confidence of the Special Prosecutor and his force not be undermined in anyway. One of the things that troubles me is that, as several of the witnesses have said, we not only need concern ourselves with justice, but the appearance of justice.

You stated that you do not feel that the investigation at any time was conducted in a partisan way. But I would like to set forth some facts which I think do lend at least some suspicion as to whether or not your investigation may have appeared to have a partisan motivation or not.

Now, it is my understanding that you yourself served as the informal dean of John F. Kennedy's brain trust during his 1960 campaign, and served in the administrations of both President Johnson and President Kennedy. You were a delegate to the Massachusetts Democratic State Convention in 1972, and you led, or at least participated in an anti-Nixon rally, an antiwar demonstration at Harvard.

After your firing as Special Prosecutor, I am informed that you worked out of Senator Kennedy's office.

One of your top assistants, Henry Ruth, served under Robert Kennedy in the Justice Department.

James Vorneberg from your staff worked under Ramsey Clark and Katzenbach and Robert Kennedy of Justice, and was also head of

George McGovern's task force on crime during the Presidential campaign.

And Philip Heymann also served in the Justice Department under your supervision during the Kennedy administration.

James Neal was a special assistant to Robert Kennedy from 1961 to 1964.

Thomas McBride served in the Peace Corps under John F. Kennedy, and in the Justice Department during the Kennedy years.

William H. Merrill held various offices during the Kennedy-Johnson years as Assistant U.S. Attorney, and was a Democratic candidate for Congress in 1966, and was Michigan State chairman of the Kennedy for President campaign in 1968, and was a candidate for Lieutenant Governor of Michigan in 1970.

Philip Lacovara served in the Justice Department during the Johnson years.

George Frampton was a researcher, a speech writer for Sargeant Shriver.

Francis J. Martin worked for two Democratic Members of Congress, Representatives Dow and Conyers.

Roger M. Whitten worked in the 1968 Democratic Presidential campaign as Kennedy's campaign manager in the crime area, I understand.

What I am leading up to is the following. I have listed 11 members of your top staff that were very deeply involved in the Kennedy-Johnson administration in partisan Democratic politics. Is there reason to believe that if we are really concerned about objectivity, and no aspersions being cast on the possible impartiality of the prosecution, that there is something on the other side of the ledger about impartiality as well?

Mr. Cox. First, Mr. Hogan, I must say that some of your facts are categorically wrong. And——

Mr. HOGAN Tell me which ones.

Mr. Cox. Yes, sir.

The statement that I was a delegate to the Massachusetts convention is categorically wrong.

The statement that I ever took part in an antiwar demonstration or anti-anything demonstration is categorically wrong, unless my memory is totally failing me.

Mr. HOGAN. The Harvard Crimson article indicates that. That was the basis of my comment.

Mr. Cox. Where does it say that?

Mr. HOGAN. "An editor of the Harvard Crimson who closely followed Cox's career wrote of Cox's active participation during campus disturbances."

Mr. Cox. Oh, yes. But my role was to put down campus disturbances. Truly, the Harvard Crimson knew that, as does anyone else who was in Cambridge during that period.

Mr. HOGAN. It goes on to say:

"Cox was—this is an editor of the Harvard Crimson—"Cox was a general, and he thrived on it, he thrived on flying into the university police station and ordering cops around as if he were in charge. He thrived on holding all the delicate negotiation strings in his hands

alone, pumping his colleagues for information and feeding back almost nothing."

Mr. Cox. Well, this is the way the Harvard Crimson saw my efforts at keeping down demonstrations and keeping peace on the campus.

The one really public speech I made during that occasion was when a group of—I forget who they were—a group had scheduled what they called a county teach-in in support of the President's policy in Vietnam. The SDA and the Progressive Labor and others attempted to disrupt it. And I remember very well standing for 10 or 15 minutes on the platform, pleading with them to allow the people who wanted to support the President's policy to be heard. Sad to say, I was unsuccessful. But I take some pride in the effort.

And I most surely did not engage in any demonstrations of the other kind.

Mr. HOGAN. Were you accurately quoted when you said that you had such sharp philosophical and ideological differences with the administration's Justice Department operation that you could not consider taking a job with the Department?

Mr. Cox. Substantially, that is substantially accurate.

Mr. HOGAN. I know your answer would be, as you indicated earlier, that you do not think that partisanship in any way entered into the investigation. But could not a reasonable man assume on the basis of the things that I said about your staff and your former involvement in Democratic politics that someone might suspect that that was the case?

Mr. Cox. Well, there have been writers who have so suspected. So I suppose a man could. I did not think that was a disqualification. I think that it is wholly possible, and I certainly pray that it is wholly possible, for people to engage in law enforcement and the administration of justice in this country without their political affiliation having any part to play or being suspected of having any part to play.

I think we are in dire straits if that is not possible.

Mr. HUNGATE. The gentleman's time has expired at this point.

I heard that objection raised at my law school class reunion, the gold medal class of 1948, by one of our classmates. However, unless I misunderstood Mr. Bork this morning, he was rather anxious to keep intact this staff, which I think he said he thought was a fine staff.

I noted that in particular this morning, because I heard this criticism before.

In your statement, Mr. Cox, under, I guess, phase II on campaign contributions, that caught my attention. The American Airlines was one type, the milk producers was another type. I did not follow—was the White House staff raising funds; what was that? I am not familiar with that episode.

Mr. Cox. I referred somewhat vaguely, because this was information which I thought should not be fully made public developed in the course of an investigation. But I did refer to a rather large, apparently large fundraising operation run by the White House staff in 1969 and 1970, which may have violated the campaign laws as they then stood.

Mr. HUNGATE. That may have been hard to do.

Mr. Cox. Yes. If it was, there was a failure to register a political commitment.

Mr. HUNGATE. And you mentioned the X and Y situation.

Mr. Cox. I think they were political papers, but they were papers which apparently the Ervin committee had indicated it wished to obtain in the course of its investigation. The point that he was trying to make was taking them out of one set of files and putting them into another set of files where they would be harder to subpena.

Mr. HUNGATE. Might that be analogous to letting a fellow figure out that he was going to get sued, that same type of problem?

Mr. Hoffman.

Mr. HOFFMAN. Professor Cox, the staff does not always get that extra minute, so I ask you, if you will, to give me the shortest answers you can to the questions I shall ask.

No. 1, when you were nominated as Solicitor General of the United States, you were subjected to a confirmation hearing, is that correct?

Mr. Cox. Yes, sir.

Mr. HOFFMAN. And your local background came out at that time, did it not?

Mr. Cox. Yes. There was an FBI investigation.

Mr. HOFFMAN. And you submitted a biographical sketch to Senator Eastland, as do all nominees; is that not right?

Mr. Cox. I assume so.

Mr. HOFFMAN. And your background was known to everybody; that is, Mr. Richardson when he selected you, and Mr. Nixon when he went along when you were appointed Special Prosecutor; is that not correct?

Mr. Cox. Certainly Mr. Richardson knew it in great detail.

Mr. HOFFMAN. Now, Henry Ruth was one of the people that Mr. Hogan mentioned. He was a careerist in the Department of Justice in the Organized Crime Section when you got started, is that correct?

Mr. Cox. Yes. He was appointed under Attorney General Kennedy, as a GS–13. He left the Department, and he was rehired by Attorney General Mitchell as a GS–18 after a personal interview with Attorney General Mitchell.

Mr. HOFFMAN. After he made a reputation for himself in his organized crime work, he then became part of the Vorenborg staff, the Commission To Study Law Enforcement in the administration of justice, or whatever it was?

Mr. Cox. That is correct.

Mr. HOFFMAN. From there he went to New York City to work for Mayor Lindsay, did he not?

Mr. Cox. He did.

Mr. HOFFMAN. Mr. Lacovara and Mr. Heymann were two more that Mr. Hogan mentioned. As I recall, they were members of the professional staff of the Solicitor General's Office prior to their going into your operation?

Mr. Cox. That is true of Mr. Lacovara. He was in the Office of the Solicitor General under the present administration. Mr. Heymann had been in when I was Solicitor General, having previously been law clerk to Justice Harlan, and having engaged in no political activity that I know of at that time.

Mr. HOFFMAN. Now, you spoke of evaluating the *Precision Valve* case, and finding exoneration, and that was the end of it?

Mr. Cox. Yes, sir.

Mr. HOFFMAN. Would you expect that if you had been a Special Prosecutor or appointed by the administration, the American public would have accepted your exoneration as well?

Mr. Cox. I hope they did.

Mr. HOFFMAN. I mean, if you had not been given the independence and had—I think you have my question now.

Mr. Cox. I should doubt that an exoneration by someone who did not have the guarantees of independence that I did would be accepted as well.

Mr. HOFFMAN. Now the Congress is told that Mr. Jaworski will have the same independence that you had. He will not be fired except for extraordinary impropriety. He will not be fired except with a vote of six out of eight of the congressional leaders.

Were you ever charged with extraordinary improprieties?

Mr. Cox. No, sir.

Mr. HOFFMAN. As a matter of fact, Mr. Bork himself is on public record—he is the man who fired you, is he not?

Mr. Cox. He did.

Mr. HOFFMAN. And he is on public record as agreeing with Mr. Richardson that he was aware of no extraordinary impropriety, is that not correct?

Mr. Cox. I believe so.

Mr. HOFFMAN. Thank you.

Mr. HUNGATE. Mr. Pauley.

Mr. PAULEY. No questions.

Mr. HUNGATE. Any further questions?

Ms. HOLTZMAN. Thank you, Mr. Chairman. I have a few questions if I may be recognized.

It has come to my attention that Mr. Jaworski has stated, or at least been quoted as stating as follows:

> Should there be an impasse between the President and me, by any phase of the investigation, it will be presented to the representatives from the Judiciary Committee. From a practical standpoint, that would be the end of it.

Assuming that he made such a statement—and I do not mean in any way to impugn his integrity or his motives—would you comment on the desirability of having a Special Prosecutor make a prosecutorial decision in a political context?

Mr. Cox. Well, I think that decisions made outside the formal course of the administration of justice in the courts simply cannot command, under today's conditions, the same degree of confidence from the public as decisions made within the normal machinery of the administration of justice. That is regrettable. And it is in some instances, indeed in most instances, perhaps in all instances, unfair to the political process. But I am afraid it is true in a matter of this kind.

I am also afraid that one of the reasons it is true is that, except in a case involving alleged wrongdoing in high Government offices, the matter would not be submitted to the political process; it would be submitted to the judicial branch in the normal rules of law.

And I think that one of the things that people desperately want, and to which they are 100-percent entitled, is that people in public life be judged by the same rules that apply to others, and the higher they are in public life, the more important it is that they be judged according to those same rules.

Ms. HOLTZMAN. So that you would say that the decision by an independent prosecutor as to whether or not to obtain additional Presidential materials ought to be based on, one, his conscience; two, his understanding of the obligations of his job; three, the necessity of the material in the light of the prosecutions that would take place presumably; and four, the obligations to the American public to show that it was a decision made as a matter of conscience and judgment?

Mr. COX. I would think that was the way he should make his decision, and if he thinks it is necessary, he should then press before the courts to obtain the information, and not submit to some other form of disposition.

Ms. HOLTZMAN. Looking down the long road ahead of us in the Watergate and other related matters, is there any question in your mind that the new Special Prosecutor would not come up against precisely the same situation that you came up against; namely, that there will be a refusal to turn over Presidential papers or tapes? What then would be the course of events?

Mr. COX. Well, I think he will, yes. And I am sure that legislation should be enacted to guard against that.

Mr. DENNIS. Would the gentlewoman yield?

Ms. HOLTZMAN. I would be happy to.

Mr. DENNIS. I think we should point out for the record that in answer to a question which I asked Mr. Bork this morning, he stated categorically that his understanding was that the new Special Prosecutor now appointed would have full authority to go to the court to get anything that he wanted to get, and that the court decision would be abided by.

Mr. COX. I did not mean to assert any fact contrary to that, because I have no knowledge—I had seen the same statement as Ms. Holtzman had, and it gives me concern.

On the other hand, I recognize what you say about Mr. Bork's testimony.

Mr. DENNIS. I just wanted to make that caveat, since the question had arisen.

I thank you for yielding.

Ms. HOLTZMAN. I have another question going to the so-called missing tapes. It is my understanding—correct me if I am wrong—that in the Mitchell-Stans trial in New York, the U.S. Government asked for a postponement as recently as October 23 on the basis that the President would not supply the April 15 tape.

Do you have any comment to make with respect to that, or whether or not the Government ought to have disclosed to the New York court the nonexistence of the April 15 tape?

Mr. COX. Well, let me state the events as accurately as I can.

The defendants in the *Vesco* case first demanded tapes and papers from the Executive very broadly. And the defense was putting in that this was a fishing expedition.

The court pretty much sustained the prosecution's answer, but there were two tapes. One was for April 15, and the other I think was for February 28, where the lawyers for Stans and Mitchell were able to make some showing that the conversations might have involved some-

thing that had some relevance to the case, and he ordered—he said that his inclination was to say that the Government must produce those if the case was to go forward.

The U.S. attorney's office in New York handles this case, with some general supervision, under the Special Prosecutor. They communicated directly, although I think I was aware of it at the time, with Mr. Buzhardt. He took the question under advisement. He said he could give them no assurance at that time that the tapes for these two dates would be made available.

I do not think there was any categorical refusal either. But he could not say that he would turn them over.

He also commented to the Assistant U.S. Attorney in a way that used some such phrases, you know, sometimes there are technical difficulties. I am not quoting exactly, but the effect of the phrase on the Assistant U.S. Attorney was enough for him to report to one of my staff and then ultimately to me that the conversation had raised in his mind the question whether Mr. Buzhardt felt sure that the April 15 tape was in existence.

In any event, since the prosecution was not able to give assurance that it could produce the tapes, it asked for a postponement.

I am not aware—to come directly to your question—whether any representation of any kind was made to the court about the existence or nonexistence of tapes of those conversations. I just do not know. I have not the information.

Ms. HOLTZMAN. But is it fair to assume that possibly implicit in the concern about the obedience to the court order is that there is a representation to the effect that the tape did not exist?

Mr. COX. Well, I do not know enough about what was said for me to answer your question, either to agree or disagree or comment.

Ms. HOLTZMAN. Thank you.

Thank you, Mr. Chairman.

Mr. HUNGATE. Mr. Cox, I feel this would be a fair statement. As I understand the thrust of your testimony, you would favor certainly an independent prosecutor to be appointed by the court, and while that is not free from constitutional questions, you believe at this point in time that the constitutional questions should be resolved favorably on behalf of such legislation. That would be your preference?

Mr. COX. That is true, yes.

Mr. HUNGATE. Now, our colleague, Mr. Biester, a former member of the committee, on behalf of several others, has introduced a bill that would permit Presidential appointment. I believe the number of constitutional questions would lessen if the President makes the appointment.

Now, the public confidence and independence may be another factor. Under his proposal, five organizations, the American Bar, the American Trial Lawyers, the Association of American Law Schools, et cetera, each would name three men, as I read this, men or women. There would be 15 names.

The President would select from those names a Special Prosecutor. That Special Prosecutor could serve a specific term and you could provide that he could be removed only for good cause established in the terms of the Civil Service Commission.

What would be the general feeling on that, assuming that the President would choose from the list? I suppose you have to put another qualification that if, within a certain time, he did not pick from the list an alternate selection could be made.

Mr. Cox. By somebody.

Mr. HUNGATE. By, I suppose, the court or the Attorney General; the court, probably.

Mr. Cox. There are examples in our history of the power of Presidential appointment being limited by certain categories or qualifications. My recollection is that none of those statutes limits his choice quite as severely as the bill you described.

Mr. HUNGATE. I am thinking of an analogy, not Federal indeed, but the Missouri court plan. Somebody gives the Governor some names, and if he does not pick one he gets three more, ad infinitum.

Mr. Cox. I think what I would say would happen is that the constitutionality of such a measure would be—I suppose it would be a greater assurance that it would be constitutional than the one I say I would prefer, the doubts would be smaller. I think there would still be some room for argument, Mr. Chairman.

Mr. HUNGATE. Thank you very much.

Any further questions?

Mr. MAYNE. Yes, Mr. Chairman.

Mr. HUNGATE. Mr. Mayne.

Mr. MAYNE. But still, although your preference would be for the court-appointed prosecutor, I think you made it clear that you feel that the greatest need is to get on with it, as you said, to hold the staff together, and to have the investigation go forward.

Did you not indicate that if we could recommend legislation here which would by statute give adequate protection to the integrity of the operation, adequate safeguards against dismissal, and spell out the freedom of action of the existing independent Prosecutor, that this would be satisfactory to you, or could be accomplished promptly?

Mr. Cox. If you mean to include provision for appointment with advice and consent of the Senate, yes; not otherwise.

Mr. MAYNE. I have just one other line here, Mr. Chairman, that I do not believe has been gone into.

You did mention the matter of contributions from the milk lobby in your statement, and just now you have emphasized very properly that no public official, no matter what his office, should be immune to the proper standards of conduct.

Would you apply these same standards of conduct to Members of Congress?

Mr. Cox. I was speaking, of course, of the offenses under the criminal laws. I surely would; yes.

Mr. MAYNE. Well, there was quite a little discussion about great contributions by the milk lobby—one of those mentioned being Associated Milk Producers—both in your testimony and in public records. Apparently, your Special Prosecutor's office was looking into contributions to the Committee for the Re-election of the President.

Have you made any inquiries into contributions by the milk lobby to Members of Congress in the recent campaign, some of which were as high as $42,500 for one candidate?

Mr. Cox. Generally speaking, the jurisdictional line between the

Department of Justice and the Office of the Special Prosecutor was drawn between contributions to a candidate for the Presidency, of which the Special Prosecutor had jurisdiction, and contributions to a congressional candidate, over which the Department of Justice retained jurisdiction. So that my office was not looking in normal instances or on any general scale to congressional contributions.

Mr. MAYNE. There was some activity, though, in your office about the raising of the price support for milk on March 25, 1971. Do you recall that as being the basis of part of your investigation?

Mr. COX. The question was raised whether the large contributions to the Presidential campaign had exerted an improper influence on the change in the support price. There had been no conclusion reached, and I certainly do not intend to imply one.

Mr. MAYNE. Were you aware of the fact that, for several weeks before this price support was increased, many individual Members of Congress had been introducing bills which would have mandated a much greater price support increase, and that the decision eventually reached by Secretary Hardin was for a much smaller increase than that being demanded by many Members of Congress?

Mr. COX. I am aware of that; yes.

Mr. MAYNE. But you feel that it would not have been within the province of your committee to make an inquiry into that, but to leave it on other agencies in the Department of Justice?

Mr. COX. Well, if the investigation proceeded in such a way as to suggest that there was any link between the two, then I think I would have gone to the Attorney General and said, maybe this is something that you should list under the other matters referred to me with my consent by the Attorney General, and we would have talked it over. We did not come to that point and, indeed, to the best of my knowledge, any investigation of the milk producers thing was a long way from being brought to a focus.

Mr. MAYNE. Just to wind this phase of it up, I read in the press this week that Secretary Shultz has said that the decision to raise the price support at that time was at least in part to head off fear on the part of the administraiton that an even higher price support increase would be forced through by Congress if the Executive did not take that action.

Was that the rationale of the situation at the time you were considering this as Special Prosecutor?

Mr. COX. I am aware of it, certainly.

As I say, we really had not gotten to the point of pulling the information together and forming any tentative conclusions. And the work, therefore, was going forward under my subordinates who were pursuing the investigation, and it had not reached the point, yet, Mr. Mayne, where it would have to reach me before any even tentative decisions had been reached.

Mr. MAYNE. Thank you, Mr. Chairman.

Mr. HUNGATE. Mr. Hogan?

Mr. HOGAN. Mr. Cox, we are aware from your public apology, if I might call it that, of a news leak which was directly attributed to you, growing out of conversations you had with Members of the other body. But I am concerned about other possible news leaks from those surrounding you.

On October 27, Jack Anderson, in his Washington Merry-Go-Round, said:

Sources close to Cox tell us—

And then goes on to report that his associate Les Whitten—

Rushed over to the Prosecutor's Office immediately after Cox's sudden dismissal. Barely one step ahead of the FBI, he obtained only one document before the agency sealed the offices. This interesting document was a checkoff list which showed what the prosecutors were researching.

Then Barry Kolb, in the Washington Star, October 26, reports that Secretary of Agriculture Butz is under investigation by your office.

The Washington Star-News of October 4, under the byline of James Polk, reports that Patricia J. Haines sent a letter to the President telling him of an offer of campaign funds from the milk lobby.

The Washington Post of October 25 has Reginald Kessler reporting that "Bebe" Rebozo cashed $91,500 of stolen stock in 1968.

I am concerned about these whole series of leaks, which could only have come from your office.

You are aware too, I am sure, that the rules of grand jury prohibit disclosure of the matters under investigation. I wonder if maybe this does not cast some aspersions on the professionalism, which we have heard acclaimed here today, of your staff.

Mr. Cox. I would just be obliged to dispute, Mr. Hogan, that that information could have come only from the Watergate prosecution force. There are a great many leaks, or at least a gret deal of information, and a great deal of misinformation appears in the press on these subjects.

In many instances, I have seen things attributed to sources in my office which I knew to a virtual moral certainty did not emanate from my office. And I feel quite confident, although I can speak only from confidence in the individuals, that they have tried to preserve the secrecy that we did throughout the investigation.

Mr. HOGAN. If we pass legislation extending the Special Prosecutor, you do not anticipate having any supervisory role there, do you, Mr. Cox?

Mr. Cox. No, sir; I do not.

Mr. HUNGATE. In Missouri, Jark Anderson is our first authority.

Mr. HOGAN. Sensing the impatience of my colleagues, I will ask no further questions. But I want to make one further point in connection with the question asked by our colleague Mr. Edwards earlier about whether or not the President had in any way concurred with the understanding about the appointment of the Special Prosecutor, Mr. Cox. And I refer to the hearings in the Senate on the confirmation of Attorney General Richardson, which the staff has made available to us.

I would suggest that we insert into the record page 178, lines 14 to 23, 40 to 52, and page 179, line 1 to line 23, which indicates the Attorney-General-designate's testimony that there was no understanding or conversations with the President or his staff.

Is there objection?

Mr. HUNGATE. Without objection, it will be included in the record.

[The information referred to follows:]

Senator TUNNEY [continuing]. I inquired as to whether President Nixon asked you to retain ultimate responsibility over the Special Prosecutor. You answered that he never made such a request explicitly but that you, if you were to give up such a responsibility, you felt that the President would be disappointed.

Would you agree, then, that perhaps there was some kind of tacit understand-

ing on the part of the President on this subject, or is that really too much to tell?

Secretary RICHARDSON. There really is no tacit understanding, Senator Tunney.

Senator TUNNEY. You indicated that the subject had come up at a Cabinet meeting. Do you care to tell us in what way it came up and by whom?

Secretary RICHARDSON. The only thing that came up had to do with the fact that I had made the decision to name a Special Prosecutor and the response that this decision had received, something to that effect: what did I think was the likely course of the hearings; no more than that.

Senator TUNNEY. There was no discussion regarding who you would pick or regarding the responsibilities of the Special Prosecutor, the parameters of that responsibility?

Secretary RICHARDSON. No, I had had no discussions about the selection of the Special Prosecutor at any time when the President was present. The suggestions that were made by members of his staff are already a matter of record.

Senator TUNNEY. Were Mr. Haldeman and Mr. Ehrlichman present at that meeting?

Secretary RICHARDSON. No, they haven't been present since their resignations.

Senator TUNNEY. And has this subject of Special Prosecutor and the guidelines for the Special Prosecutor been the subject of discussion between you and the President since May 16?

Secretary RICHARDSON. No. I have had no discussion on any aspect of this subject with the President since my nomination came to the Senate.

Senator TUNNEY. And how about members of the White House staff—General Haig or Mr. Garment or others?

Secretary RICHARDSON. No. My only conversations with General Haig have involved Defense matters and the response to the question, in effect, how they are going up there.

Senator TUNNEY. And in testimony this morning, in answer to Senator Byrd's question, you have had no discussions at all with Mr. Haldeman, Mr. Ehrlichman, Mr. Wilson, their attorney, or anybody else?

Secretary RICHARDSON. That is correct.

Senator TUNNEY. Nobody else on the staff?

Secretary RICHARDSON. That is correct.

Mr. HUNGATE. Mr. Dennis.

Mr. DENNIS. Mr. Cox, would you agree with me that, however the Special Prosecutor may be appointed, it is very important, both as a matter of substance and as a matter of appearance, that his staff, besides being competent lawyers and investigators, should also be bipartisan and should represent the full political spectrum?

All of us are interested, I assume, regardless of our political philosophy, in an honest administration, and in the enforcement of the law.

Mr. Cox. I would think they should be selected without regard to any political affiliation or political activities, provided of course that they engage in no political activities during their term of service.

Mr. DENNIS. Thank you.

Mr. HUNGATE. The Chair would restate his understanding of General Bork's testimony this morning—and I stand to be corrected if the record shows otherwise—I thought he was making a favorable point, that he intended to retain the staff.

Mr. Cox. Well, that is the way the staff was selected.

Mr. HUNGATE. Thank you very much. You have been most patient with us, and very helpful to the committee.

The full Judiciary Committee will meet tomorrow on the Federal Evidence Code. We will resume our hearings on this matter at 10 a.m., Wednesday, with Congressman Whalen, Professor Bator of Harvard Law School, and Dean Crampton of Cornell Law School.

The committee will now adjourn.

[Whereupon, at 4:45 p.m., the committee adjourned, to reconvene at 10 a.m., Wednesday, November 7, 1973.]

SPECIAL PROSECUTOR LEGISLATION

WEDNESDAY, NOVEMBER 7, 1973

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

The subcommittee met, pursuant to notice, at 10 a.m., in room 2141, Rayburn House Office Building, Hon. William L. Hungate [chairman of the subcommittee] presiding.

Present: Representatives Hungate, Kastenmeier, Edwards, Mann, Holtzman, Smith, Dennis, Mayne, and Hogan.

Also present: Herbert E. Hoffman, counsel; Thomas W. Hutchison, assistant counsel; Roger A. Pauley, associate counsel; and Stephen P. Lynch, research assistant.

Mr. HUNGATE. The subcommittee will come to order. We will now resume our hearings.

The first witness to be called today is our colleague, Congressman Charles Whalen from Ohio. We are very pleased to have Congressman Whalen with us. The other witnesses we will hear today are Prof. Paul Bator of Harvard Law School, and Dean Roger Cramton of Cornell Law School.

Tomorrow we will hear from Mr. Leon Jaworski at 10 a.m. We hope to begin markup tomorrow afternoon.

If we cannot complete the markup tomorrow, then either Friday, if the members could make a Friday meeting, or else on Monday we would definitely complete the markup, with a report to the full committee as we handled the grand jury bill. The Special Prosecutor bill then would be scheduled for next Tuesday's full committee meeting, subject to the report of this subcommittee.

Mr. Kastenmeier?

Mr. KASTENMEIER. Yes. I support that. I think we ought to meet Friday if we do not complete action tomorrow. I would think one of the reasons we might meet Monday is if we run into certain difficulties which require an extra day or the weekend to resolve. Other than that event, I would hope that we could expeditiously complete it.

Mr. HUNGATE. The Chair will state that Friday is acceptable to me. I know that members have many responsibilities. I simply wanted to emphasize Tuesday is our earliest date for the full committee. If we have something to report on that date, we will have met our responsi-

bilities. Hopefully, we can conclude on Friday. If not Friday, we must conclude Monday.

Mr. Whalen, would you come forward, please. We will receive your testimony.

TESTIMONY OF HON. CHARLES W. WHALEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. WHALEN. Mr. Chairman, I thank you for this opportunity to meet with you and your subcommittee this morning to discuss my bill, H.R. 11135. As you know, this measure would provide for the appointment of a Special Prosecutor by the chief judge of the U.S. District Court for the District of Columbia.

Since I shall cover much of the same ground discussed by previous witnesses, my statement will be brief. I shall address my remarks to three questions.

First, what does H.R. 11135 propose?

Second, why should this or similar legislation be enacted?

Third, is this approach constitutional?

To begin, what are the principal provisions of my bill?

First, the Special Prosecutor will investigate the 1972 Presidential primaries and general elections. Second, in carrying out that responsibility, he will be vested with all of the powers and duties of the Attorney General of the United States, as well as those of the U.S. attorney in any judicial district in which legal proceedings will or may be brought as a result of his investigations. Third, the Attorney General and all governmental departments will be required to cooperate with the Special Prosecutor. In turn, his Office shall cooperate with congressional committees having jurisdiction over any aspect of its activities. Fourth, the Office shall remain in existence until the Special Prosecutor certifies to the chief judge that all investigations and prosecutions authorized under the legislation are completed. The certification shall be accompanied by a full report of the Office's activities.

Next, what are the arguments in behalf of this measure?

I have two reasons for urging the subcommittee to act favorably on H.R. 11135 or similar proposals.

First, administration personnel, from the President on down, are presently under judicial scrutiny. I do not believe that they can be expected to investigate themselves. Therefore, the responsibility must be placed elsewhere, outside of the executive branch.

Second, the investigation and any subsequent prosecution or decision not to prosecute must be credible. You and I, indeed, all Americans, must be convinced beyond any doubt that the Watergate investigation has been absolutely thorough. Further, all of those who are guilty of illegal acts must be punished as the courts determine. I am a longtime personal friend of Senator William Saxbe, the nominee for Attorney General. I am convinced he is well qualified for this position and, certainly, he has a well-deserved reputation for independence. I do not know Mr. Jaworski, but I understand from colleagues that he is one of the best trial lawyers in the Nation. Nevertheless, I do not believe that the credentials of these men can overcome the deep-rooted skepticism which today is imbedded in the American people. Only the

work of a totally independent prosecutor, therefore, will be believed by the public.

Finally, does this proposal meet constitutional requirements?

I realize the answer to this question is debatable. You have heard from eminent legal scholars, including the president of the American Bar Association, who assert that a court-appointed Special Prosecutor is constitutional.

I am an economist, not a lawyer. Thus, it would be presumptuous for me to present a layman's opinion on this subject. Instead, I rest my case on the simple proposition that the role of the courts in our society is to assure that justice prevails. It seems to me that the cause of justice is ill-served when a suspect retains the power both to investigate and prosecute himself. This is a concept which, I feel certain, our Founding Fathers never intended when drafting our Constitution. Therefore, to enhance the court's ability to secure justice, the Congress must act to establish an independent prosecutor.

Only in this manner can the legislative branch clearly show the electorate that we recognize the essentiality of a forthright investigation and the need for the restoration of public confidence in the Federal Government.

Mr. Chairman, I thank you and will respond to any questions that you might have.

Mr. HUNGATE. Thank you very much for your statement.

We appreciate you being with us today.

Mr. Kastenmeier.

Mr. KASTENMEIER. Thank you, Mr. Chairman.

I would like to welcome our friend from Ohio. He has been before this committee on other important issues, such as privilege, and he is always qualified as shown in his testimony. I find very little to disagree with you, Mr. Whalen. I agree with the thrust of your statement. I hope that you would not only support, of course, your own bill, but similar proposals.

Mr. WHALEN. I would respond, Mr. Kastenmeier, simply by saying I do not have any pride of authorship in this bill. I am sure that it is imperfect in a couple of respects. I do, however, support the basic thrust or aim of the legislation that you are considering.

Mr. KASTENMEIER. Perhaps you have not had the opportunity to examine some of the other bills before us. There is one other bill, H.J. Res. 784, that has the cosponsorship of a large number of members, and appears superficially to be very much like your own bill.

Mr. WHALEN. Yes.

Is this the so-called Culver bill?

Mr. KASTENMEIER. Yes. I was going to ask you whether you can distinguish your own bill from it.

Mr. WHALEN. I have not studied it thoroughly. I did look at it prior to its introduction. It is a very lengthy bill. I think some of the basic features are very similar. It did go beyond my bill. For example, it provided, as I recall, for an extension of the grand jury. This we took care of yesterday on the House floor.

I think insofar as the appointment of a Special Prosecutor, the provisions of my measure and Congressman Culver's measure are very similar.

Mr. KASTENMEIER. Granted we have a crisis in the Federal Government. You are saying if there is any risk of constitutionality it would be better to assume that risk than to permit things to remain as they are, namely, that the executive branch give the appearance of investigating itself.

Mr. WHALEN. I would make three observations in response to that question, Mr. Kastenmeier. First, as I indicated in my formal remarks, I realize that the question of constitutionality is debatable. Second, I appreciate the fact that a number of outstanding witnesses have testified that in their opinion such an appointment would be constitutional. Third, I think in view of the extreme importance, it is well worth the risk that we go ahead and enact this legislation and ultimately leave it to the Supreme Court to decide.

Mr. KASTENMEIER. Thank you, Mr. Chairman.

Mr. HUNGATE. Mr. Dennis.

Mr. DENNIS. Thank you, Mr. Chairman.

Mr. Chairman, I understand our distinguished colleague's position. I think it is very clear. His bill is clear. I do not know that I need to question him.

I would like to compliment him on appearing here and taking the time to draw legislation and show the interest and the concern that he has. I may say it is only typical of our colleague, my good neighbor across the State line. I appreciate his appearance and certainly will consider his bill.

Mr. WHALEN. I thank you very much, Mr. Dennis.

Mr. HUNGATE. In case you do not know it, Mr. Dennis is letting you off easy.

Mr. WHALEN. So I have read.

Mr. HUNGATE. Mr. Edwards.

Mr. EDWARDS. Thank you, Mr. Chairman.

I, too, am grateful to our colleague Mr. Whalen appearing before us today with his excellent statement. He always is immensely helpful, and I have no questions.

Mr. HUNGATE. Mr. Mayne.

Mr. MAYNE. Thank you, Mr. Chairman.

I, too, would like to commend a very good friend from Ohio for his contribution this morning. I want to comment about the difference between your bill and the bill introduced by Mr. Culver and other members. I note that your bill does have the Chief Judge of the District Court for the District of Columbia make the appointment, but you do not have this following provision which is in the other bill, that after making the appointment, the Chief Judge shall be expected to excuse himself from presiding over or otherwise participating in any prosecution or other judicial proceeding arising out of the exercise of responsibility by a Special Prosecutor appointed by him.

Do you not think, however, that this would necessarily follow if the appointment were made, in this instance, by Judge Sirica?

Mr. WHALEN. As I indicated, Mr. Mayne, I have no pride of authorship in this, and I think there are some imperfections in the bill. I think one of these would be the failure to refer to that which you have specifically mentioned. I understand that Congressman Culver, in his appearance before this committee, backed off of that to the extent that he felt it might be possible for the committee to draw up a bill that

would provide for appointment by the entire Court. I would certainly have no objection to this. However, if the subcommittee and the committee in its wisdom decided that this responsibility should be vested in the Chief Judge, then I think certainly you would want to include a provision that he would have to disqualify himself from any further consideration of this matter.

Mr. MAYNE. That would seem to me to be a very damaging flaw in this approach, if we were to pass legislation which would disqualify Judge Sirica from continuing in the case, because he, I believe, more than anyone else has been responsible for the breaking of the Watergate case, and it would be a great shame to be deprived of his experience in this area with the facts.

From what you have said, you would have no objection to a change which will provide for some other judges of the district court or some other method of appointment by a person other than the Chief Judge, who is Judge Sirica.

Mr. WHALEN. Let me reiterate my position on this.

I feel that if Judge Sirica makes the appointment, that he would be duty-bound to disqualify himself. I, like you, would hate to see this happen. Therefore I would hope that the committee might be able to devise a mechanism whereby the entire court could appoint a Special Prosecutor. In this way Judge Sirica would be able to continue with his work.

Mr. MAYNE. Or perhaps a panel of the court.

Mr. WHALEN. Yes.

Mr. MAYNE. Thank you.

Mr. HUNGATE. Mr. Mann.

Mr. MANN. Mr Whalen, in reading the scope of the investigation with which the Special Prosecutor would be charged—that it be limited to matters in connection with the Presidential primaries and general election in 1972, and in any other campaign or other activities connected to such election—the mandate given to Mr. Cox and the mandate that the Attorney General indicated would be given to Mr. Jaworski, the Special Prosecutor, seems to be broader. For example, the matters surrounding the *Ellsberg* case might be considered as part of the election process.

What is your feeling about that limitation?

Mr. WHALEN. I feel that there has to be some prescribed limitation in any legislation that is acted on by Congress. It may be that this is too narrow. However, I think that in limiting it to the 1972 primaries and general election, that we do cover a rather broad territory.

A question has been raised about the financing with the President's real estate transactions. Conceivably—I do not know and I hope that this is not the case—it might have been done in part through campaign solicitations. This I believe would be a matter that the Prosecutor could investigate. As far as the Ellsberg break-in is concerned, I would assume that under the provisions of this bill, this would not be an area subject to the Special Prosecutor's investigation.

Mr. MANN. Do you think it should?

Mr. WHALEN. I think it should be investigated. Whether it should be done in this special instance, I do not think that it can, and I am not sure that it should be.

I do not think that the Congress would want to give the Prosecutor

carte blanche to investigate everything and anything. I think rather the bill must be set forth in the way that defines the area of special prosecution.

Mr. MANN. As a matter of interest, the Acting Attorney General set forth four mandates. The first two would relate to Watergate and the election. The third would reach allegations involving the President and members of the White House staff or Presidential appointees, admittedly very broad. That would be Ellsberg and other questionable areas that might not be tied directly to the campaign. And then fourth, any other matters that are assigned to him by the Attorney General. That is a very wide jurisdiction.

Mr. WHALEN. Yes.

Mr. MANN. I gather you would limit that to some extent.

Mr. WHALEN. Yes.

I feel that any measure that you act upon must have some definite limitations. We are here attempting to establish the Office of the Special Prosecutor. I think the word "special" would indicate that the work of this particular official would be limited by definition.

Mr. MANN. Thank you.

Mr. HUNGATE. Unless there are further questions, I want to thank you very much for taking the time and interest to contribute to this important question.

Mr. WHALEN. I thank you very much for this opportunity, Mr. Chairman.

Mr. HUNGATE. The next witness, Prof. Paul M. Bator, of the Harvard University Law School.

Professor Bator?

TESTIMONY OF PAUL M. BATOR, PROFESSOR, HARVARD UNIVERSITY LAW SCHOOL

Mr. BATOR. Mr. Chairman, I have a prepared statement which I believe has been distributed to the members of the committee.

Mr. HUNGATE. Without objection, it will be made part of the record at this point, and you may proceed.

[The prepared statement of Prof. Paul Bator follows:]

STATEMENT OF PAUL M. BATOR, PROFESSOR OF LAW AND ASSOCIATE DEAN, HARVARD LAW SCHOOL

My name is Paul M. Bator. I am Professor of Law and Associate Dean at the Harvard Law School. My special field is the Federal Courts and the Federal System. I am grateful to the Committee for inviting me to appear.

This statement is a brief summary of my personal views on the constitutional power of Congress to vest in a federal judge or a federal court the authority to appoint a new Special Prosecutor to investigate Watergate and related matters and to prosecute resulting criminal cases. I also have a suggestion on how to create procedures for the swift resolution of any constitutional doubts in this regard, in order to avoid jeopardizing the validity of future prosecutions.

When I first considered the question of the constitutionality of empowering a prosecutor outside the executive branch to prosecute crime, my initial reaction—adverted to in a short article published in the New York Times last May—was that such a measure would probably be unconstitutional. Further study and reflection have, however, led me to a different conclusion: Although the matter is not free from doubt, there is powerful and, ultimately, persuasive support in the law for the position that Congress has the constitutional authority to create such an office of Special Prosecutor. Here is a summary of the reasons which have led me to that conclusion:

1. Article II, Section 2, clause 2 of the Constitution explicitly authorizes Congress to vest the power of appointment of inferior officers

"as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

This clause has been broadly interpreted. The leading case is *Ex parte Siebold*, 100 U.S. 371 (1879), in which the Supreme Court rejected the proposition that the courts may, under this clause, be authorized to appoint only those inferior officers whose work is related to the administration of justice. The Court stated that the choice between the listed appointing authorities "is a matter resting in the discretion of Congress", so long only as the choice does not involve a manifest "incongruity". In fact, as far as I know, no case has invalidated a Congressional statute empowering the courts to make appointments under Article II, Clause 2, although a variety of appointments have been so vested. See, *e.g.*, *Hobson* v. *Hansen*, 265 F. Supp. 902 (D.D.C. 1967), appeal dismissed, 393 U.S. 801 (1968).

2. Giving the courts the power to appoint a Special Prosecutor to investigate and prosecute crimes committed by high executive officers and crimes related to federal elections is not only not "incongruous", but would seem to be encompassed even by a narrow reading of Article II, Clause 2. Such a power is more easily sustained than the power to appoint election supervisors, upheld in *Siebold*. Indeed, such a power is but an extension of the courts' existing authority to appoint U.S. Attorney in cases where vacancies occur (28 U.S.C. § 546), upheld in *U.S.* v. *Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963) Prosecutors are officers of the court; courts are intimately familiar with their qualifications; courts appoint defense counsel daily; appointing a prosecutor would not involve the court in "incongruous" political or military functions (as might be the case if courts had to appoint ambassadors or generals)

3. Is the function of prosecuting crime so "inherently" executive that it would violate the principle of separation of powers to authorize the courts to appoint a prosecuting officer for special purposes? I do not believe so. The leading case of *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), reaffirms the proposition, already clearly articulated by Madison in The Federalist, that the separation of powers is not a rigid abstraction. Rather it represents a practical political ideal whose purpose is to disperse power, not to create watertight conceptual compartments. In the *Humphrey* case the Supreme Court upheld Congress' power to create independent administrative agencies free from the President's political control, if such a step was justified by legitimate functional needs. The functional needs which would justify vesting the appointment of the Watergate Special Prosecutor in the federal courts are even stronger than those which supported the Federal Trade Commission Act in the *Humphrey* case; since the principal function of the Special Prosecutor will be to investigate possible wrongdoing on the part of the President and his closest advisors, the need to insulate the office from the President's political control is manifest.

4. The notion that the prosecution of crime is "inherently" a part of the executive power seems to be without strong historical justification. At the time our Constitution was adopted, even private citizens could bring criminal charges, both here and in England; indeed, the very First Congress explicitly authorized private prosecution in the federal territories, see 1 Stat. 112 (1790). The notion that public officials have a monopoly of the right to prosecute apparently did not develop until the 19th Century.

5. It is also relevant in this regard that almost every state permits its courts to appoint temporary prosecutors when that office is vacant; and that at least a dozen states permit their courts to appoint special prosecutors when the regular prosecutor is involved in a conflict of interest. (Among these states are Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Michigan, Missouri, Ohio, Oklahoma, Pennsylvania, and Texas.) See generally Note, *The Special Prosecutor in the Federal System: A Proposal*, 11 Am. Crim. L. Rev. 577 (1973).

6. Vesting the power to appoint the Special Prosecutor in the federal courts would not involve those courts in the performance of functions inappropriate to the judiciary. (There is, for instance, no danger here that the courts could interfere with the Prosecutor's discretion whether or not to prosecute. *Cf. U.S.* v. *Cox*, 342 F. 2d 167 (5th Cir. 1965).) And all claims of possible bias or unseemliness would be eliminated if the legislation were to provide that the judge or judges making the appointment should not sit on cases brought by the Special Prosecutor. Since the Special Prosecutor's jurisdiction would be defined and limited to specific areas, there could be no claim that the Congress was creating a nonaccountable permanent "fourth branch" of government.

7. Ultimately, the Constitutional justification for Congress' power to create an office of Special Prosecutor outside the executive branch lies in the words of Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 415 (1819): "This . . . constitution [is] intended to endure for ages to come and, consequently, to be adapted to the various crises of human affairs." It seems to me clear that our country needs and wants independent investigation and prosecution of possible criminal conduct by the high officers of the executive branch, investigation and prosecution *not* under the control of that same executive branch. Those who argue against the pending legislation in effect tell us that, no matter how urgent the necessity for independence, the country may not have what it needs and wants, because the Constitution forbids it. I do not think our Constitution creates such an ineffective and unworkable charter of government.

8. I add one more thought. Although I think the Congress has power to authorize the courts to appoint a Special Prosecutor to prosecute the crimes related to Watergate, the matter is admittedly not beyond dispute. It might therefore be urged against such a measure that if the courts were ultimately to rule against the validity of such legislation, the result would be potentially to invalidate a large number of prosecutions. In order to avert such a risk, the legislation authorizing the creation of the office of Special Prosecutor should itself provide for prompt judicial review of its constitutionality. This is easily done. Perhaps the most effective method would be to provide that any objection to the validity of the authority of the Special Prosecutor must be raised by a motion to dismiss the indictment, such a motion to be made within a short time after the indictment is returned. The bill should provide that such an objection is in all respects waived if not so made by timely motion. The motion should be made triable before a three-judge court, with direct appeal to the Supreme Court; and expedited hearing should be called for. I add that there could be no doubt whatever of Congress' power to enact such provisions for expedited judicial review. See *Yakus v. United States*, 321 U.S. 414 (1944).

Mr. BATOR. I will not read my statement, but I will briefly summarize some of the points which I have made in it.

My name is Paul Bator. I am a professor of law and an associate dean at the Harvard Law School, and I am very grateful to the committee for inviting me to appear.

This statement is a brief summary of my personal views on the constitutional power of Congress to vest in a Federal judge or a Federal court the power to appoint a new Special Prosecutor to investigate Watergate and related matters and to prosecute the resulting cases. I also have a suggestion on how to create procedures for a swift resolution of any constitutional doubts in this regard, so as not to jeopardize any prosecutions brought by such a Special Prosecutor.

When I first thought about this matter of constitutionality rather casually last spring, my reaction, as that of many others, was, that such an appointment by the court might be unconstitutional. But further reflection and study have led me to the conclusion that the vesting of such an authority in the courts would be constitutional.

The principal support for constitutionality is the explicit provision of the Constitution, article II, section 2, clause 2, which gives the Congress the discretion, and I quote, "as they think proper" to decide whether "inferior officers" should be appointed by the President alone or should be appointed by the heads of departments or by the courts of law. And the Supreme Court, in the *Siebold* case of 1879, rejected the suggestion that that provision be narrowly interpreted to authorize the courts to appoint only inferior officers connected with the administration of justice.

I might add, even had the narrow construction been accepted by the court, the provision for the appointment of a Special Prosecutor might come within the provision so construed, since the Special Prosecutor

would be connected with the administration of justice. The qualifications of lawyers and prosecutors are well known to the courts. After all, courts appoint defense lawyers every day. It would not be an inappropriate or unseemly thing for a court to appoint a prosecutor.

I think the fundamental question on constitutionality is whether the principle of separation of powers would render it unconstitutional to ask the courts to appoint a prosecuting officer, on the theory that prosecution of crime is part of the Executive power which the Constitution places in the hands of the President.

As I say, study and reflection have led me to the conclusion that, although the matter is not entirely free of doubt, the more persuasive authority in the law is that it would not violate the principle of separation of powers under special circumstances to authorize the courts to appoint such a Special Prosecutor. The doctrine of separation of powers is not meant to create a rigid, abstract set of watertight compartments. It is a practical, political ideal designed to guard against excess of powers, designed to disperse and diffuse powers among the branches.

The case of *Humphrey's Executor*—although it narrowly concerned only the Congress' power to limit the President's authority to fire a Federal Trade Commissioner—dealt broadly with the question whether separation of powers prevents Congress from creating an independent administrative agency, one free from the President's political control.

The court held that, if there are functional, practical necessities which justify independence, the Constitution does permit the Congress to create agencies which are independent agencies, free from the President's political control.

So it seems to me what the Constitution tells us is exactly what the Constitution ought to tell us, which is that the question is one for the Congress to decide and is basically to be determined in terms of necessity. Although prosecution of a crime is conventionally a function of the executive branches, in cases of necessity where special justification exists, article II of the Constitution should be read to permit the courts to appoint such a prosecutor.

By the way, the historical evidence is that the prosecution of crime at the time when the Constitution was written was not a monopoly of the executive branch. In fact, at that time private persons were allowed to prosecute crime, and the very first Congress, I believe, created legislation under which, in the territories, private parties could bring charges of crime.

I think it is also relevant that in almost every State the law permits courts under certain circumstances to appoint prosecutors. There are at least a dozen States where the law permits the courts to appoint a prosecutor if the ordinary prosecutor is involved in a conflict of interest. That is, it allows the courts to supersede the ordinary prosecutor in cases of conflict of interest.

Finally, as I say, I would just like to suggest that it is important that the legislation creating the Office of the Special Prosecutor contain a provision for expedited judicial review so that the question of the constitutionality of this legislation can be swiftly determined without jeopardizing any prosecution.

This could easily be done. It is plainly valid for Congress to create provisions for expedited review, and it has often done so. The nearest

analogy I have is the OPA legislation during World War II. Probably the most effective provision, and I make this suggestion in the last paragraph of my statement, would provide that an objection to the constitutional validity of the legislation be raisable only by motion to dismiss the indictment. That motion should be made within a short time after the indictment is brought down; and the motion should be heard by a court of three judges with direct appeal to the Supreme Court. The provision should call for expedited hearing; and the objection should be deemed waived unless made by motion.

You would be able to dispose of any constitutional questions long before any trial is commenced. If a court were then to hold that the Special Prosecutor may not constitutionally prosecute crime, the indictments would still be valid. They would then have to be referred to the Justice Department for signing and prosecution.

I think I will stop there.

Mr. HUNGATE. Thank you.

Now we will hear from Dean Roger C. Cramton of Cornell Law School, and then we will question the two witnesses.

Mr. Cramton, if you have a prepared statement, without objection, it will be made a part of the record. [See p. 343.] You may proceed as you see fit.

TESTIMONY OF ROGER C. CRAMTON, DEAN, CORNELL LAW SCHOOL

Mr. CRAMTON. Mr. Chairman and members of the subcommittee, my name is Roger C. Cramton. At the present time I am dean and professor of law at the Cornell University Law School. I appear before you, of course, as a private citizen who represents no special interest or organization.

I will not read my prepared statement, but will summarize its highlights.

I agree with much of what my friend and colleague, Paul Bator, has said. I agree with him that the legislation under consideration by the committee raises serious constitutional questions. I disagree with him in my ultimate conclusion as to how that issue would be decided by the Supreme Court of the United States, and I bolster that conclusion with practical considerations of conflict with the existing Special Prosecutor, the harmfulness of delay while the legal questions are litigated, and a fear that this legislation may be distracting the attention of Congress from other alternatives which are clearly within the congressional power and which would more expeditiously resolve the constitutional crisis that the country faces.

I will not summarize the various pending bills, since their provisions are familiar to you. Some would create a Special Prosecutor appointed by and removable by Chief Judge Sirica or other members of the Federal judiciary. Other bills would allow the President to appoint the prosecutor, but would limit his power of removal.

The Special Prosecutor in all of these bills would be vested with full authority to investigate and prosecute a wide range of matters, completely free of any supervision or control by the Attorney General or the President. He could compel production of national security and other information, require the use of the investigative facilities and records of the FBI, immunize witnesses from prosecution, and litigate in any court in the name of the United States.

The Constitution, of course, provides that "the Executive power shall be vested in a President of the United States," and the President's basic obligation is to "take care that the laws be faithfully executed." Each of the three branches of Government has a central core of functions upon which the other branches may not unduly encroach. While the Constitution contemplates some blending and mixing of functions, the basic tasks of one branch cannot be removed from it and placed in either another branch or an independent agency.

The proposed legislation is unwise and probably unconstitutional because, first, it vests the appointment of an important executive officer in the hands of the judiciary; and second, and more important, it deprives the President, as head of the executive branch, of the control and removal of an officer engaged in a vital executive function; to wit, the enforcement of Federal criminal laws.

The normal process of appointment routinely followed with respect to all major officers of the executive branch is nomination by the President with appointment following advice and consent of the Senate. The framers believed that a single person could best exercise the responsibility of choosing qualified officials, and the confirmation process would provide an adequate check against misuse of the appointing power.

The Constitution does also provide, as an exception to this normal appointment process, that Congress may "vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments." Proponents of the pending legislation argue that a Special Prosecutor is an "inferior" Federal officer whose appointment may be placed in a "court of law."

It is clear that the quoted clause permits the appointment of subordinate officials of particular branches of the Federal Government to be placed in the heads of those branches. The President may appoint subordinate officers of the executive branch, for example, and Federal judges may appoint employees of the judicial branch.

I think it is also clear, at the other extreme, that this clause does not permit one branch of Government to exercise sole appointive authority of vital officers of another branch. A literal reading of article II, section 2, clause 2, would permit Congress, for example, to vest in the Attorney General the appointment of all employees of the Supreme Court, or in the Chief Justice the appointment of all the advisers of the President of the United States. I have not discovered anyone who believes that legislation based on such a liberal reading would be constitutional. Thus, one has to interpret the constitutional language in less than its broad, literal fashion.

I believe that the Constitution envisions a rational and close relationship between the appointing branch and the nature of the functions which the inferior officer is to perform. Moreover, because the Federal courts are limited by article III of the Constitution to the performance of judicial functions, appointive and supervisory tasks of a nonjudicial character cannot be placed upon them.

It is true that the Supreme Court in the *Siebold* case, which has been discussed by Professor Bator, upheld a statute that authorized the Federal courts to appoint officers to supervise State elections in which Federal officers were on the ballot. However, the blending of powers involved in the functions of the appointed officials did not involve criminal law enforcement.

There are a few other situations in which Congress has authorized the Federal courts to appoint officers whose duties do not fall entirely within the judicial branch. Title 28, United States Code section 546 permits the temporary appointment of U.S. attorneys by the Federal courts. However, this appointment may be made only when a position is vacant, is effective only until the President fills the vacancy, and the President may remove the officer so designated at any time.

Finally, in *Hobson* v. *Hansen*, a three-judge district court, over the dissent of Judge Skelly Wright, upheld a statute authorizing the district court to appoint and remove members of the District of Columbia Board of Education. While I believe this decision is erroneous, it deals with a situation vastly different from that posed by legislation which would delegate an important part of the criminal law enforcement function to an officer in whose appointment or removal the President would not participate in any manner.

The objection to judicial appointment of executive officers does not rest alone on constitutional doubts emanating from the vesting of Executive power in the President. Involvement of the courts in the hiring, supervising, and firing of executive officers is bound to interfere with their judicial duties, involve them in political controversy, and threaten the impartial performance of judicial tasks.

These concerns have special application to those bills which would direct Chief Judge John Sirica to appoint a Special Prosecutor to investigate and prosecute Watergate-related matters. The appointment would take place in a highly-political context in which Judge Sirica's appointee would be competing with the investigatory effort now under the direction of Leon Jaworski. Moreover, Judge Sirica presided at the trial of the convicted Watergate defendants, and their pending appeals charge him with injudicious conduct during the course of the trial. He is also supervising the grand jury's continuing investigation of Watergate matters. The appearance of justice, and perhaps its reality, is violated if a judge who has been so intimately involved with the controversy and who may preside over future trials is cast in the further role of selecting and removing the prosecutor.

I doubt whether this defect is cured by placing the appointment in the entire District bench, as long as Judge Sirica is the Chief Judge of the District Court.

More troublesome than the questions about the appointing authority are the provisions of the legislation which limit the President's power to remove the Special Prosecutor. It seems to me these raise much more serious constitutional doubts than the appointing provisions viewed alone.

Although Congress defines criminal offenses and doubtless could establish standards for the exercise of prosecutorial discretion, it is difficult for me to imagine a function more clearly executive than the enforcement of the criminal laws. Cries that emergency and necessity require departure from the constitutional separation of powers would justify Congress appointing a person to conduct foreign relations if they lost confidence in Secretary of State Kissinger, or to appoint a new person to take command of the military in times of hostility, and so on. These hypothethicals suggest that the functions included are meant by the Constitution to be free from the control of another

branch. Controlling decisions make it clear that the President's power to remove executive officers cannot be infringed by Congress.

In *Myers* v. *United States*, the Supreme Court held that a statute attempting to limit the President's power to remove postmasters was unconstitutional. Subsequent cases, such as the *Humphrey's* decision, have limited the sweep of *Myers* by holding that Congress may protect the members of independent regulatory agencies from arbitrary removal when such protection is related to the independent performance of their quasi-judicial and quasi-legislative functions. But the Court has drawn a sharp differentiation between officers who perform "purely executive functions" and those that perform such functions incidentally to the principal functions of a quasi-legislative or a quasi-judicial nature.

The exercise of executive authority by independent regulatory agencies is limited in scope as well as incidental to their function as creatures of Congress. The enforcement functions, for example, of independent agencies such as the NLRB and the ICC are limited solely to civil matters. They have not and could not be authorized to apply criminal sanctions. Only a few such agencies are authorized to enforce their civil orders in the lower Federal courts, independent of the Department of Justice. And this exceptional power is limited by the effective supervision exercised by the executive branch when access to the Supreme Court of the United States is involved.

Finally, members of independent regulatory agencies are merely protected from arbitrary removal. They are appointed by the normal process of Presidential nomination and Senate confirmation, and they can be removed by the President if statutory grounds exist.

Sound reasons of law and policy support the view that the exercise of prosecutorial authority should be subject to Executive control in good times as well as bad. Thus, in the past decade alone, we have benefited from the fact that the Attorney General could protect blacks in the South from indictment by grand juries and district judges who are unsympathetic to the cause of civil rights. The smooth resolution of the constitutional crisis involving former Vice President Agnew also illustrates the wisdom of retaining Executive control of criminal law enforcement.

The existence of an emergency does not create power where none exists. As Mr. Justice Holmes stated, passions of the moment should not be allowed "to exercise the kind of hydraulic pressure which makes what previously was clear seem doubtful and before which even well settled principles of law will bend."

It seems to me that practical considerations support these constitutional arguments. A Special Prosecutor independent of the Executive is likely to be involved in conflict with the executive branch's own prosecutors. This is unseemly and might interfere with the orderly conduct of criminal proceedings.

The broad scope of the Special Prosecutor's authority under all the pending bills makes it likely that overlapping investigations, grand juries, and criminal trials, might result. Vexing problems of immunization of witnesses, who may settle the case in return for testimony, and duplicative investigations may interfere with law enforcement and prejudice individual rights. Persons convicted by the Special Prosecutor might even be immediately pardoned by the President.

The constitutional doubtfulness of legislation establishing an independent Special Prosecutor carries hazards of its own. The President might refuse to cooperate with a judicially-appointed Prosecutor on the grounds that his appointment or activities violated the Constitution. Uncertainty on this score would undermine the Special Prosecutor's ability to carry on a prompt and vigilant investigation.

A period of 6 months to 2 years might be required for a definitive resolution of these constitutional questions by the Supreme Court and I think the minimum period would be required even if a provision for expediting judicial review were to be included in the legislation. Finally, defendants would surely raise these questions in appeals from any convictions, and if they succeeded, they might well escape any punishment for their crime because of the attachment of double jeopardy.

These doubts concerning the wisdom and constitutionality of the proposed legislation may appear to be woven of lawyer niceties which should not stand in the way of the popular sentiment. After all, public confidence in the ability of the Department of Justice to investigate the executive who controls it is lacking, and there is a serious problem.

Yet this is the time, in my view, when the legislative branch should take special care not to intrude upon the constitutional framework. A basic concern with Richard Nixon's stewardship as President has been his apparent unwillingness to respect the constitutional and statutory limitations on his own authority. Alleged lawlessness on the part of the President, however, does not excuse or justify a neglect of constitutional niceties by the legislative branch precisely because the President is charged with actions that are excessive, unlawful, and arbitrary.

Doubts about the constitutionality of the legislative remedy should encourage Congress to simultaneously pursue four other available remedies. First, to allow the usual processes and institutions of justice to take their course by giving Saxbe and Jaworski, who are lawyers of integrity, the benefit of the doubt for the time being.

Second, Congress is not without devices of its own in ferreting out the facts, even if the executive branch proves reluctant to investigate itself. The Senate Watergate Committee is in the midst of a large-scale investigation, and investigations of related matters can be pursued by a number of other congressional committees. Any deficiency in terms of the subpena powers of these committees can be quickly cured by enabling legislation.

Third, a joint resolution of Congress censuring the President for his breach of faith toward Congress in violating the arrangements for an independent Prosecutor made in connection with the confirmation of former Attorney General Richardson and in reneging on his pledge to the Senate Watergate Committee to make detailed summaries of the tapes available to it through Senator Stennis. Congress, in my view, is entitled to expect fair dealing from the President. Is it too much to ask that the President honor solemn undertakings that he makes with a coequal branch of the Federal Government?

The final constitutional course is the drastic one of impeachment, which is the device fashioned by the Founding Fathers for dealing with a runaway Presidency. Explorations of the necessity of impeachment may begin in the House of Representatives while the other three

courses of action which I have spoken about are also being pursued.

In conclusion, attempts to take away the law enforcement function from the President are of doubtful wisdom and constitutionality. Alternatives are available to Congress other than its desire to pass the buck to an independent Special Prosecutor whose authority would be immediately questioned. In the current crisis, Congress can retain the moral authority to sit in judgment of charges of Presidential lawlessness only if it leans over backwards to respect constitutional limits on its own authority.

Thank you.

[The prepared statement of Dean Roger C. Cramton follows:]

STATEMENT OF ROGER C. CRAMTON, DEAN, CORNELL LAW SCHOOL

You have asked me to state my views concerning the constitutionality and wisdom of proposed legislation which would establish a special prosecutor to investigate Watergate-related charges—a prosecutor who would be totally independent of the Executive branch of the Federal Government. I appear before you, of course, as a private citizen who represents no special interest or organization. While I sympathize with the objectives of the proposed legislation and abhor the circumstances that make its consideration necessary, I have concluded that establishment by statute of an independent special prosecutor outside of the Executive branch is unwise and probably unconstitutional.

It is true that a number of eminent lawyers have argued that legislation authorizing judicial appointment and removal of an independent special prosecutor would ultimately be sustained by the Supreme Court of the United States, but they concede that a serious constitutional question is presented and that litigation of this question might delay and abort the criminal investigation which is now underway. In addition to these practical concerns, I believe that this legislative proposal is distracting attention from the other sources of action which are clearly within the power of Congress and which are more likely to resolve the current crisis in an expeditious manner. Finally, and most important, at a time when the President has acted with doubtful legality and little wisdom, it is of the utmost importance that Congress avoid placing similar strains on the Constitution in its search for a remedy. Our constitutional system is a durable one which has served us well in hard as well as easy times; we should not tamper with its delicate balance by adopting questionable measures which may later be regretted.

There are two basic proposals now before the Congress. One type would create a special prosecution office with the prosecutor appointed and removable by the chief judge of the United States District Court for the District of Columbia. A second type would also create a special prosecution office. The President, however, would have the power to appoint the prosecutor, subject to Senate confirmation. The President could also remove the prosecutor unless either House of Congress overruled him by majority vote.

The jurisdiction and powers given the special prosecutor in both bills are extremely broad. He would be vested with full authority to investigate and prosecute a wide range of matters completely free of any supervision or control by the Attorney General or the President, including authority to compel production of information sought to be withheld on national security grounds, to require use of the investigative facilities and records of the FBI, to immunize witnesses from prosecution, and to litigate in any court in the name of the United States.

The Constitution provides that "the executive power shall be vested in a President of the United States," and that the President's basic obligation is to "take care that the laws be faithfully executed." While the nature and extent of the executive power cannot be stated with precision, there is no doubt that the functions placed in the four original executive departments—conduct of foreign relations, collection of taxes, enforcement of the law, and command of the military—are at the core of the Executive's authority. Although the separation of powers envisioned by the Constitution involves a sharing and diffusing of power and not three totally watertight compartments, each branch of govern-

ment has a central function and may not encroach unduly upon the functions of another. Thus the President or the Congress (apart from the special case of impeachment) may not adjudicate the guilt of individuals, a function which is reserved to the courts. Nor is the Judicial Branch free to undertake executive or legislative functions other than those incidental to the performance of judicial duties. While some mixture of functions is contemplated by the Constitution and is permissible, the basic tasks of one branch cannot be removed from it and placed either in another branch or in an independent agency.

The pending bills are unwise and probably unconstitutional because it vests the appointment of an important executive officer in the hands of a federal judge, and because it deprives the President, as head of the Executive branch, of the control and removal of an officer engaged in a vital executive function, the enforcement of federal criminal laws.

I. APPOINTMENT OF A FEDERAL PROSECUTOR BY A UNITED STATES DISTRICT JUDGE IS CONSTITUTIONALLY SUSPECT

The normal process of appointment established by the Constitution is nomination by the President with appointment following "advise and consent" of the Senate. The Framers believed that a single person could best exercise the responsibility of choosing qualified officials; and the confirmation process would provide an adequate check against misuse of the appointing power. Federal officers who exercise the most important responsibilities are appointed in this fashion and Congress has been vigilant, when a particular office assumes great importance, to ensure that appointees are subject to Senate confirmation. Recent legislative proposals that would require Senate confirmation of the director of the Office of Management and Budget exemplify congressional concern with the maintenance of the confirmation process.

The Constitution also provides, as an exception to the normal process of appointment by the President and confirmation by the Senate, but Congress may "vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments." Art. II, § 2, cl. 2. Proponents of S. 2611 rely on this provision in arguing that appointment of a special prosecutor (an "inferior" federal officer) may be placed in the hands of "a court of law."

The basic purpose of this constitutional provision is clear: to allow the appointment of subordinate officials of particular branches of the government to be placed in the heads of those branches. Thus it is clear that Congress may authorize the President to appoint any subordinate official of the executive branch, and that the head of a department may appoint subordinate officials within his department. *United States* v. *Eaton*, 169 U.S. 331 (1898) (President may appoint vice-consuls); *United States* v. *Hartwell*, 73 U.S. 385 (1867) (Secretary of the Treasury may appoint clerks within his department); *Borak* v. *United States*, 78 F. Supp. 123 (Ct. Cl. 1948) (Attorney General may appoint examiners of the Immigration and Naturalization Service). Similarly, it is also clear that federal judges may be given authority to appoint employees of the judicial branch. *Rice* v. *Ames*, 180 U.S. 371 (1901) (court commissioner); *Ex parte Hennen*, 38 U.S. 225 (1839) (court clerks).

At the other extreme it is apparent that one branch cannot be given the sole appointive authority of important officials of another branch. A literal reading of Art. II, § 2, cl. 2 would permit Congress to vest the appointment of the law clerks and other employees of the Supreme Court of the United States solely in the President or the Attorney General. Similarly, it would support a statute authorizing the Chief Justice to appoint postmasters throughout the United States or advisers who serve in the Executive Office of the President. Since the removal power, with its effective ability to control, normally accompanies the power of appointment, the encroachment on the independence and responsibility of the other branch would be impaired intolerably by legislation of this character. It is not surprising that Congress has never attempted to legislate along these lines.

Thus the constitutional language authorizing Congress to "vest the appointment of such inferior officers, as they think proper, . . . in the courts of law" cannot be given a broad, literal interpretation that would justify the appointment of any and all executive officers by the federal courts. The Constitution envisions a rational and close relationship between the appointing branch and the nature of the function which the "inferior officer" is to perform. Moreover, because the federal courts are limited by Article III of the Constitution to the

performance of judicial functions appointive and supervisory tasks of a non-judicial character cannot be placed upon them.

The Supreme Court's initial interpretation of Art. II, § 2, cl. 2 adopted this sensible course. In upholding the authority of a federal judge to appoint and remove court clerks the Court stated:

> The appointing power . . . was no doubt intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged.

Ex parte Hennen, 38 U.S. (13 Pet.) 230, 258 (1839).

A subsequent case, *Ex parte Siebold*, 100 U.S. 371 (1879), should not be viewed as authorizing a totally unlimited delegation of appointive powers to the federal judiciary. In *Siebold* the Court departed from the strict language of *Ex parte Hennen* in upholding a statute which authorized the federal courts to appoint officers to supervise certain federal elections. While it is arguable that such officers performed "executive" functions, determinations relating to election fraud are akin to those in which courts have traditionally appointed masters. Moreover, Congress has the power to investigate the qualifications of its own members and the blending of powers involved in the functions of the appointed officials did not involve criminal law enforcement. The Court passed quickly over what was viewed as a minor objection in a case involving a major collision between the Federal Government and the States concerning the conduct of state elections in which Federal offices were on the ballot. Consequently, this case is hardly definitive authority for a dissimilar conflict between two branches of the Federal Government concerning the appointment of an officer to exercise criminal law enforcement functions.

There are a few other situations in which federal courts have upheld statutes authorizing them to appoint officers whose duties do not fall within the judicial branch. One arises under 28 U.S.C. § 546. In *United States* v. *Solomon*, 216 F. Supp. 835, 840–43 (S.D.N.Y. 1963), the temporary appointment of a United States attorney under 28 U.S.C. § 546 was upheld. However, this appointive provision is designed merely as an interim measure when a position is vacant; the President may remove the official so designated and the appointment is effective only until the President fills the vacancy.

Hobson v. *Hansen*, 265 F.Supp. 902 (D.D.C. 1967), is the only case involving judicial appointment of a non-judicial officer in which the statute purports to deny the President any power of removal. In the *Hobson* case a three-judge district court, over the dissent of Judge Skelly Wright, upheld a statute authorizing the district court to appoint and remove members of the District of Columbia Board of Education. While I believe the decision is erroneous, it deals with a situation vastly different from that posed by legislation which would delegate an important part of the criminal law enforcement function to an officer in whose appointment or removal the President would not participate in any manner.

The objection to judicial appointment of executive officers does not rest alone upon constitutional doubts emanating from the vesting of executive power in the President. Involvement of the courts in the hiring, supervising and firing of executive officials is bound to interfere with their judicial duties and to involve them in political controversy. As Judge Skelly Wright stated in his dissent in the *Hobson* case:

> [A] federal court's first duty is to guard zealously against impairment of its own integrity as an institution. Today is the first time a court has ever held that Congress may impose on this or any other federal court a duty so totally unrelated to the judicial function. . . . Attention to extra-judicial activities is an unwanted diversion from what ought to be the judge's exclusive focus and commitment: deciding cases. . . . Since [non-judicial] duties involve democratic choice, it is politically illegitimate to assign them to the federal judiciary, which is neither responsive nor responsible to the public will. . . . Most critically, public confidence in the judiciary is . . . placed in risk whenever judges step outside the court-room into the vortex of political activity. Judges should be saved 'from the entanglements, at times the partisan suspicions, so often the result of other and conflicting duties.'

Hobson v. *Hansen*, 265 F.Supp. 902, 915–16 (D.D.C. 1967) (dissenting opinion, citations omitted).

These arguments have special application to legislation which would direct Chief Judge John Sirica of the United States District Court for the District of

Columbia to appoint a special prosecutor to investigate and prosecute Watergate-related matters. The appointment would take place in a highly inflamed and political context in which Judge Sirica's appointee would be competing with an investigatory effort under the direction of Leon Jaworski, the new special prosecutor appointed by Acting Attorney General Robert H. Bork. Judge Sirica was the presiding judge in the trial of the convicted Watergate break-in defendants, and their pending appeal charges him with injudicious conduct during the trial. He is also supervising the federal grand jury's continuing investigation of Watergate matters. The appearance of justice, and perhaps its reality, is violated if a judge who has been so intimately involved with a controversy and who may preside over future trials, is cast in the further role of selecting and, subject to limitations contained in the legislation, removing the prosecutor. Keeping a proper distance between prosecutorial and judicial functions is an important aspect of due process wholly apart from separation-of-powers considerations. See *In re Murchison*, 349 U.S. 133 (1955) (due process was denied when a "one-man" grand jury returned charges and then presided at the trial).

II. LIMITATIONS ON THE PRESIDENT'S POWER TO REMOVE EXECUTIVE OFFICERS ARE PROBABLY UNCONSTITUTIONAL

The prosecution of crime is an essential element of the executive function in the American scheme of government. Although the Constitution shares and diffuses powers among the three branches in a manner that departs from the purity urged by Montesquieu, the fundamental scheme calls for the legislature to write the laws, an executive to enforce them, and a judiciary to interpret them in individual cases. Unlike civil law countries, the American executive is vested with considerable discretion in the enforcement of criminal laws. Only the executive is in a position to weigh public interest and administrative considerations along with the evidence in making decisions such as whether a basis for prosecution exists or whether a guilty plea for a lesser offense should be accepted.

Congress by legislation defines criminal offenses and doubtless could establish standards for the exercise of prosecutorial discretion. But, this done, it is difficult to imagine a function more clearly executive than the enforcement of the criminal laws. "The Constitution," as Edward S. Corwin said, "knows only one 'executive power,' that of the President, whose duty to 'take care that the laws be faithfully executed' thus becomes the equivalent of the duty and power to execute them himself according to his own construction of them." The transfer of the power to conduct prosecutions from the President or his agent, the Attorney General, is violative of the framework of the Constitution and the intendment of Article II.

Controlling decisions make it clear that the President's power to remove executive officers cannot be infringed by Congress. In *Myers* v. *United States*, 272 U.S. 52 (1926), the Supreme Court held that a statute attempting to limit the President's power to remove postmasters was unconstitutional. Chief Justice Taft, writing for the Court, based his decision on Article II of the Constitution:

> [A]rticle II grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers, a conclusion confirmed by his obligation to take care that the laws be faithfully executed; . . . [T]he President's power of removal is further established as an incident to his specifically enumerated function of appointment by and with the advice of the Senate, but that such incident does not by implication extend to removals the Senate's power of checking appointments; . . . to hold otherwise would make it impossible for the President, in the case of political or other differences with the Senate or Congress to take care that the laws be faithfully executed. (272 U.S. at 163–64)

Subsequent cases have limited the sweep of the *Myers* decision by holding that Congress may protect the members of independent regulatory agencies from arbitrary removal when such protection is related to the independent performance of their quasi-judicial and quasi-legislative functions. In *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), the Court distinguished the *Myers* case in holding that a member of the Federal Trade Commission could not be arbitrarily removed from office in violation of statute. A postmaster, the Court said, is an executive officer restricted to the performance of executive functions and has no duty related to either the judicial or legislative powers. Unlike "purely executive officers," officers performing quasi-legislative or quasi-judicial functions might be protected from removal:

> The Federal Trade Commission is an administrative body created by Con-

> gress to carry into effect legislative policies embodied in the statute, in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. (295 U.S. at 628)

The fact that the FTC did perform some incidental functions which were executive in nature did not affect the result. "To the extent that it exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judcial departments of the government." In short, the Court drew a sharp differentiation between officers who perform purely executive powers and those who perform such functions incidentally to their principal functions of a quasi-legislative or quasi-judicial nature. See also *Wiener* v. *United States*, 357 U.S. 349 (1958).

The exercise of executive authority by independent regulatory agencies is also limited in scope. While the "headless fourth branch" is difficult to fit into the tripartite scheme of the Constitution, recognition of the special character of such agencies as the NLRB and ICC as relatively autonomous centers of legislative and judicial powers has always stopped short of any notion that they could apply criminal sanctions. Their ability to enforce certain of their orders in lower federal courts is confined to civil cases; and it is limited by the effective supervision exercised by the Solicitor General, a subordinate of the President, when access to the Supreme Court of the United States is involved. Finally, it should be remembered that members of independent regulatory agencies are merely protected from arbitrary removal; their appointment is in accord with the normal process of presidential nomination and Senate confirmation, and they can be removed by the President if the statutory grounds exist.

Sound reasons of law and policy support the view that the exercise of prosecutorial authority should be subject to executive control. In *United States* v. *Cox*, 342 F. 2d 167 (5th Cir. 1965), a federal grand jury had returned an indictment for perjury against blacks who had testified in a civil rights case. But the United States attorney in charge of the case, at the direction of Attorney General Katzenbach, had refused to sign the indictment despite an order of the trial judge that he do so. A contempt citation against the U.S. attorney was reversed by the appeals court. The constitutional separation of powers, the court held, requires "that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions," 342 F.2d at 171.

There is no precedent in our history for the unilateral legislative establishment of a special prosecutor, any more than there is for the legislative establishment of a special office outside the executive branch to conduct foreign relations or to command the military. While there have been occasional scandals involving the executive branch, Congress has generally relied on its own investigative authority to get at the truth, rather than vest enforcement in officers independent of the Department of Justice. In the Credit Mobolier affair of the Grant Administration, for example, congressional investigations ferreted out the facts, and prosecutions were then conducted by the Attorney General. In the Teapot Dome scandal Congress did pass legislation authorizing and directing the President to appoint a special prosecutor, and President Coolidge, who publicly expressed a lack of confidence in Attorney General Daugherty, acquiesced in this legislation. But it was the President who appointed the special prosecutors and they served, just as Archibald Cox formerly did and Leon Jaworski now does, as employees of the executive branch who were under the President's direction and control if he sought to exercise it.

It can be argued that narrowly drawn legislation establishing a special prosecutor for the Watergate affair alone would not infringe on the executive function to the same extent as the creation of a permanent independent prosecutor. But this overlooks the historic tendency for governmental devices that have once proved handy to be called on again and again. The cumulative effect of modest departures from the constitutional framework, as the Supreme Court constantly reminds us when dealing with civil liberties issues, may be to erode the constitutional balance on which our system depends.

Nor do extraordinary circumstances excuse legislative actions that would be unconstitutional in ordinary times. As I will indicate shortly, other remedies are available to Congress if it concludes that the President has failed in his duty to "take care that the laws faithfully executed." The existence of an emergency

does not create power where none exists, *Ex parte Milligan*, 4 Wall. 2 (1866); and our judgment concerning the constitutionality of proposed legislation should not be influenced by the exigencies of the moment. The passions of the moment, as Mr. Justice Holmes stated, should not be allowed to "exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend." *Northern Securities Co.* v. *United States*, 193 U.S. 197, 400–01 (1904) (dissenting opinion).

Practical considerations support these constitutional arguments. The Constitution envisions a unified executive branch speaking and acting with a single voice. A special prosecutor independent from the Executive is likely to be involved in conflict with the executive branch's own prosecutors that is unseemly and might interfere with the orderly conduct of criminal proceedings. The broad definition of the special prosecutor's jurisdiction under both S. 2611 and 2616 makes it likely that overlapping investigations, grand juries, and criminal trials will result. Vexing problems of immunization of witnesses, settlement of cases in return for testimony, and duplicative investigations may interfere with law enforcement and prejudice individual rights. And a final paradox: since the Constitution vests the pardoning power in the President, a person convicted by the special prosecutor could be immediately pardoned by the President! As Hamilton wrote:

> The executive power is more easily confined when it is one. . . . It is far more safe there should be a single object for the jealously and watchfulness of the people; and, in a word, that all multiplication of the Executive is rather dangerous than friendly to liberty.

The Federalist Papers, No. 70.

The constitutional doubtfulness of legislation establishing an independent special prosecutor also carries hazards of its own. The President might refuse to cooperate with the judicially-appointed prosecutor on the grounds that his appointment or functions constituted an unconstitutional encroachment on the executive power. Since this assertion would be highly plausible, it could not serve as grounds for impeachment but would need to be resolved by litigation. Uncertainty concerning the legality of the special prosecutor's office would undermine his ability to carry on a prompt and vigilant investigation. A period of six months to two years might be required for a definitive resolution of the constitutional questions by the Supreme Court. And if such litigation was not precipitated at the outset by lack of cooperation on the part of both the executive branch and those proceeded against, convicted defendants would surely raise these questions in appeals from their convictions. If they succeeded, they might well escape any punishment for their crimes.

CONCLUSION

These doubts concerning the wisdom and constitutionality of legislation that would remove prosecutorial functions from the executive branch may appear to be woven of lawyers' niceties which should not stand in the way of legislation that has the general approval of the American people. Locke correctly remarked that "the people are very seldom or never scrupulous or nice in the point of questioning the prerogative while it is in any tolerable degree employed for the use it was meant—that is, the good of the people."

Yet this is a time in my view when the legislative branch of the Federal Government should take special care not to intrude upon the constitutional framework. A basic concern with Richard Nixon's stewardship as President has been his apparent unwillingness to respect certain limitations on his own authority found in constitutional provisions such as those making it the province of Congress to determine how federal funds should be spent or prohibiting invasions of private homes. Alleged lawlessness on the part of the President, however, does not execute or justify the legislature in neglecting the separation of powers required by the Constitution, especially when current problems are being handled in due course in the courts. Indeed, the times require an exacting and punctilious concern with constitutional niceties by the legislative branch precisely because the President is charged with actions that are excessive and arbitrary. Doubts about the constitutionality of the legislative remedy should encourage Congress to explore other available remedies.

Insofar as the enforcement of criminal laws is involved, the basic remedy is to allow the usual processes and institutions to take their course. The President

has now nominated Senator William B. Saxbe to be Attorney General, and Acting Attorney General Robert R. Bork has named Leon Jaworski as special prosecutor in place of Archibald Cox. Saxbe, Bork and Jaworski are lawyers of stature and integrity. They have made it clear that they will accept nothing less than a full investigation. They should be given the benefit of the doubt for the time being.

Meanwhile, Congress is not without devices of its own in ferreting out the facts even if the Executive branch proves reluctant to investigate itself. The Senate Watergate Committee is in the midst of a large-scale investigation; and investigations of related matters can be pursued by a number of other congressional committees. The authority of the Congress to inquire into the conduct of the Executive—to determine whether the President is faithfully executing the laws—is a vital protection against executive abuse. As Senator Ervin has said on several occasions, it may be more important to discover the truth concerning any wrongdoing in the executive branch and to prevent its recurrence than to send the guilty persons to jail. Congress can ferret out the truth by diligent investigation and can report the facts as it finds them in an impartial manner, leaving further action to the verdict of popular opinion.

A third course of action may be immediately desirable wholly apart from other alternatives: a joint resolution of Congress censuring the President for his breach of faith toward Congress. Public discussion has centered on the President's actions with respect to the courts in the matter of the tapes, and the ensuing question of whether he violated the court's order or merely went to the verge of doing so. There can be no question, however, that his behavior with respect to another branch of government, the Congress, has been disrespectful and dishonorable. He is guilty of a breach of faith with Congress in two respects: first, in violating the arrangements for an independent prosecutor that had been made by his Administration in connection with the confirmation of former Attorney General Richardson; and, second, in reneging on his pledge to the Senate Watergate Committee to make detailed summaries of the tapes available to it through Senator Stennis.

Congress is entitled to respect and fair dealing from the President. Is it too much to ask that the President honor solemn undertakings that he makes with a co-equal branch of the Federal Government? It should be recalled that it was a resolution of censure that expressed the public outrage at the conduct of the late Senator Joseph McCarthy; and a similar resolution in this instance may clear the air and force the President to consider whether resignation of his office may not be an honorable course under the circumstances.

The final constitutional remedy is the drastic one of impeachment. There can be no doubt that it was the device envisioned by the founding fathers for dealing with a runaway presidency. It is a respectable device, which must be pursued if all else fails and circumstances justify its use. Exploration of the grounds for impeachment may begin in the House of Representatives while these other courses of action are also being pursued. Because of the national paralysis and trauma of an impeachment trial, which would immobilize all three branches of the Federal Government, it would be highly desirable if measures that would resolve the crisis of confidence could be worked out without the necessity of such a trial.

Attempts to take away the law enforcement function from the President are of doubtful wisdom and constitutionality. Alternatives are available to Congress other than "passing the buck" to an independent special prosecutor whose authority would be immediately questioned. Congress can retain the moral authority to sit in judgment of charges of lawlessness on the part of the President only if, in the current crisis, it leans over backward to respect the constitutional limits on its own authority.

Mr. HUNGATE. Thank you very much.

Mr. Kastenmeier.

Mr. KASTENMEIER. I take it from your concluding remarks that you did not come here today as an apologist for the President?

Mr. CRAMTON. As I stated on the outset, I am a private citizen representing no special interest or organization.

Mr. KASTENMEIER. I am glad to join in welcoming you to the committee as one who appeared a number of times most instructively for other subcommittees of this committee.

I know you stood last year in a negative stance on newsmen's privilege, and you argued, I recall, the constitutional doubtfulness as to whether Congress may preempt States regarding privilege.

With respect to the question of prompt judicial review, assuming that the Congress does in fact pass something, in effect, the right of appointment to the court, I would ask what problems might be more explicitly involved, and how promptly could a judicial review be had?

I think, Mr. Cramton, you would agree, if indeed the court could reach the question and decide it affirmatively in terms of congressional action, most of your fears, would have been met. Would they not?

Mr. CRAMTON. Except, I think, each branch of Government has an obligation to read the Constitution for itself in the first instance, and to try to respect its limits. Congress should not enact unconstitutional legislation on the theory that the Supreme Court will bail it out if it behaves unconstitutionally.

Aside from that, you are right. If the kind of expediting provision to which my friend Paul Bator referred to were to be included, I think it might be possible to get a definitive resolution of the constitutional questions in as short a period as 6 months. In the meantime, the investigation is halted. Time passes. The present grand jury either goes out of existence or is extended by statute. The country continues to be absorbed in uncertainty. I think it is better for the time being to give Jaworski, who I have heard is a man of great integrity and responsibility, the benefit of the doubt to continue the Special Prosecutor's investigation which is now underway with its existing staff.

I might add that there are some built-in controls against his failure to conduct an adequate and vigilant investigation. There are a lot of eager staffers over there who are going to resign with a very large noise if he does not do so. And Assistant Attorney General Petersen, who is privy to all the details, is not going to stand for a whitewash either, even if Jaworski has agreed to one with the President. He will resign with a big noise. I think the public would draw certain conclusions from actions of that character.

Mr. KASTENMEIER. Practically speaking, unless the President understood in fact that there was to be a different form of prosecution, at least as far as the attitude of the Prosecutor is concerned, why would he entertain the same situation again in which he would find himself in a position where he fired a couple of people, and accepted the resignation of someone else?

Mr. CRAMTON. If you ask me to explain the convulsive fits and starts of Presidential decisionmaking of the past few months, I cannot. I view them as irrational. I view them as successively getting advice on one day from Rose Mary Woods, the next day from Ron Ziegler, and the next day from Bebe Rebozo.

The President appointed a new Special Prosecutor apparently because he was driven to it, and because, if he did not do so, there was a severe danger that he might be immediately impeached.

Mr. KASTENMEIER. That is precisely why we are here today.

I might say in conclusion, Mr. Chairman, that the alternative, notwithstanding the constitutional risks, is a risk worth undertaking.

Mr. CRAMTON. I view it as a question on which reasonable men can differ, obviously, and I conclude that the risks are, I think, greater than you do. But I respect your views.

Mr. HUNGATE. Mr. Smith?

Mr. SMITH. Professors Bator and Cramton, I want to join all my colleagues in welcoming you here and thank you for coming.

I think that the interesting testimony that you have both given points up the fact that two eminently qualified constitutional law specialists can differ in regard to what might be or might not be constitutional, which would lead me to believe that probably the question will never be resolved until the Supreme Court hands down a final decision in regard to this issue. Even though the "New York Times" said the other day editorially that it was clear that article II, section 2 of the Constitution would allow the Congress to provide that the court might appoint a Special Prosecutor, I am interested, Dean Cramton, in your statement that you felt that the attempt to protect a Special Prosecutor against removal by the President, who is the appointing power, carries with it more constitutional questions than the appointment of the Special Prosecutor by the courts.

Some of us have been working toward the possibility of protecting Mr. Jaworski, for instance, from arbitrary removal. We would allow removal only for nonfeasance, malfeasance, or impropriety.

Would you comment a little bit further about it?

Do you see any way in which, constitutionally, the tenure of a Special Prosecutor, be it Mr. Jaworski or anybody else, could be protected?

Mr. CRAMTON. My position is that vesting the appointing authority in somebody else outside the executive branch is easier to defend than the limitations on the power of removal. Nonetheless, the more limited the limitation on the power of removal is, the easier it is to defend, and then the more plausible the legislation. So if standards for the removal of the Special Prosecutor, such as malfeasance, neglect of duty, misbehavior, and so on, are stated in the statute, it is more likely to be upheld.

Mr. SMITH. Professor Bator?

Mr. BATOR. I agree. I think in this case Congress can legislate standards defining the President's power to remove. The oddity is, it seems to me Mr. Cramton's position should lead him to say it is completely unconstitutional.

Mr. SMITH. As I understand it, probably the Congress could not prohibit altogether removal of an officer by the appointing power, but could put reasonable standards and restrictions around it.

Mr. CRAMTON. I am not fully confident that is the case, but I think it makes the argument for the constitutionality of the legislation much more plausible. One ought to remember that one of the basic grounds on which it was sought to impeach Andrew Johnson was his removal of one of the members of his Cabinet, the Secretary of War, in violation of standards that Congress purported to put in legislation at that time. There continues to be very severe constitutional argument about whether or not that act of Congress which President Johnson refused to comply with on grounds of its unconstitutionality was indeed constitutional or not. It would be my position that Congress, for example, could not prohibit arbitrary removal by the President of members of his Cabinet.

What about a Special Prosecutor, who is exercising such an important executive function of such a delicate and high nature? I think it is arguable.

Mr. SMITH. Thank you very much.

Mr. HUNGATE. Mr. Edwards?

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

I, too, appreciate the statement of these two distinguished lawyers here today. We do have a problem; that is, if the President appoints a Special Prosecutor we have pretty strong evidence that he will not be independent, because the last one who was appointed was not independent. The moment he showed real independence the President fired him.

If the President appoints a Special Prosecutor with limitations on his being fired, then is that unconstitutional, too?

Do not the States have some problem with separation of powers, too?

We have had several witnesses, including you, Professor Bator, who testified that State courts seem to have no problem in appointing special prosecutors. I wish one of you would tell me why this is? Why is it so much more difficult and serious on the Federal level than on the State level to have a special prosecutor?

Mr. BATOR. My opinion is that is is not. State law is relevant and persuasive in showing that there is no such problem on the Federal level. It seems to me that the Federal Constitution ought to be read as creating as sensible a charter of government for the Federal Government as State constitutions do for the State governments. In fact, there are at least a dozen States which allow courts to appoint prosecutors where there is a conflict of interest, and almost every State allows the courts to appoint a prosecutor where there is a vacancy or inability to serve.

I think it is a persuasive argument that in the general theory of American government it is rather well known, and not so difficult, and not such a terrible impropriety for the courts occasionally to appoint prosecutors. It is widely done.

Mr. EDWARDS. I would like you to answer that also, Mr. Cramton, and tell me why the statehouse does not come tumbling down, but why, on the other hand, you expect the Federal Government to come tumbling down.

Mr. CRAMTON. I did not say that I expected the Federal Government to tumble down. I am talking about Federal limitations. They may limit and define power somewhat differently than do State constitutions. The question is whether we should violate constitutional restraints lightly.

The history of the State practice which Paul Bator referred to is highly relevant. It surely supports the view that he takes. I agree that it is relevant, but I do not think it is conclusive. It is not conclusive because the manner in which States divide powers and functions between branches of government is for the States and the State constitutions, and it does differ from the Federal Government practice.

For example, the fact that many State supreme courts can render advisory opinions does not mean the Federal courts can do so, because the Constitution says that they can only deal with "cases or controversies."

The fact that for many, many years legislative bodies acted as courts in many respects, for example, in handling divorces and so on, does not

mean that it is a "legislative function" today to give divorces to individuals.

What was done 500 or 600 years ago in England is relevant. What is done in some States today is relevant. But it is not controlling. We are talking about the Constitution that the Founding Fathers framed in Philadelphia, and which is the Federal Constitution, on which there is a gloss of about 200 years of Supreme Court decisions.

Mr. EDWARDS. That is very helpful. I think everybody on this subcommittee, indeed the full committee, considers himself or herself a strict constructionist as far as the Constitution is concerned. A number of us have always had problems with the House Internal Security Committee, because it seemed to us that the legitimate legislative purpose of committees has been negated by HISC for the unconstitutional purpose of exposure for the sake of exposure.

Do you think that has been a problem in the establishment of the Ervin committee? I think this is relevant, talking about constitutional matters. I am not looking for criticism of the committee itself, but the mandate.

Mr. CRAMTON. There is a question about whether some of the inquiry going on in the Ervin hearings does have a legislative purpose related to campaign financing and the like.

On the other hand, I think the congressional power to investigate, pursuant to the sole power of the House to impeach, is extremely broad and unlimited. That is an investigation of the President and Federal officers in which subpena power could be used. It need not be done as a television circus. It can be done quietly with an investigatory staff. Impeachment clearly is a power which the Constitution gives the House first, in terms of the bill of impeachment, and the Senate in terms of the trial of impeachment. And very broad investigatory authority surely accompanies those powers.

Mr. EDWARDS. Thank you very much.

Mr. Chairman, may Professor Bator answer that question?

Mr. HUNGATE. Yes.

Mr. BATOR. May I say a word about the issue raised by Mr. Kastenmeier about expedited judicial review, which I think is terribly important here?

Mr. HUNGATE. Yes.

Mr. BATOR. One question is the question raised by Mr. Cramton, whether it is seemly for the Congress to legislate in spite of constitutional doubts, and to let the matter be resolved by the courts. There may be circumstances where that would not be seemly, if the Congress feels it is rather clear that it is acting beyond constitutional authority.

But in this case, I think it is fair to say that the great weight of the authority is that the bill would be constitutional. There is the *Siebold* case, which was the Supreme Court's last word on it. In this circuit, there is *Hobson* v. *Hansen*, which approves such a power. So I do not think there is any question but that it would be perfectly seemly for the Congress to say that, since the weight of the authority is the way it is, we will legislate and provide for expedited judicial review.

There is no reason why the Congress cannot put in the legislation provisions which will allow the question to be definitely settled within 90 days after the first indictment is brought down. There is absolutely no reason whatsoever why that cannot be done.

Thirdly, the investigation does not need to stop while this litigation is going on. Nobody is arguing that it is unconstitutional for such a Special Prosecutor to investigate. The only question is his power to prosecute the criminal cases.

Mr. SMITH. Could the gentleman yield?

Mr. BATOR. Sir?

Mr. SMITH. Professor, I was just thinking that you might have a possibility for having two Special Prosecutors, one appointed by the court and one appointed by the President. I suppose the investigation could go on in parallel lines.

Mr. BATOR. I suppose there could be such a theoretical possibility, though I suppose the legislation would, if enacted, and sustained over any possible veto, at that point be binding on the President.

Mr. SMITH. A congressionally provided Special Prosecutor could perhaps preempt it, but during the 90-day period that you are pointing out for expedited judicial review, there might be two Special Prosecutors.

Mr. CRAMTON. It seems to me that Mr. Bator's response also assumes that the President would immediately comply with the legislation. It seems to me highly possible that he would say that the legislation is unconstitutional on its face, and I am not going to comply with it. And he would order the FBI not to turn over to the new Special Prosecutor the documents and files that were filed, and so on. As a practical matter, the investigation would stop until the litigation was totally cleared up. This seems to me to be undesirable and wrong.

Mr. HUNGATE. Mr. Dennis?

Mr. DENNIS. Thank you, Mr. Chairman.

Professor Bator, one of the interesting things in this very complex situation to me is the fact that both you and Mr. Cox initially took the position that this judicial appointment was unconstitutional, and then both of you quite quickly changed your minds.

Assuming that the wish was not father to the thought—and I do so assume—I have looked for the reason for the change. And the main thing that both of you very distinguished gentlemen have said is ex parte Siebold. I have read that case, and I quite agree that if I were filing a brief on that side of the question I would certainly cite ex parte Siebold.

But I just cannot see why either of you think it is so determinative. All that was involved there was the appointment of a minor election official. That seems to me completely different from the idea of vesting in the judicial branch the appointment of a Federal Prosecutor to execute the criminal law, which I believe is basically an executive function. I think you are putting much too much weight on *Siebold*.

If I am wrong, I would like you to tell me why.

Mr. BATOR. As to why I changed my mind, you remember the crack by Dr. Johnson, when he was asked about an error in his dictionary, and he said, "Pure ignorance, sir. Pure ignorance." I was very ignorant when I previously spoke.

The *Siebold* case is one reason. Not so much the result of the *Siebold* case as the text of the opinion, with regard to the spirit of article II, clause 2. That is to say, the *Siebold* case gives us the philosophy of how to interpret article II, clause 2. What it really says is, it is for the Con-

gress in its practical judgment to determine how to allocate these functions.

Second, there is the historical evidence that criminal prosecution was not at the time of the Constitution regarded as necessarily a part of the Executive power. There was this long tradition of the courts appointing prosecutors. Private persons brought charges in crime. The very first Judiciary Committee of the Senate, which included at least half a dozen people who were members of the constitutional convention, reported as part of the first judiciary bill the suggestion that all U.S. attorneys be appointed by the courts. There was no suggestion made that that was unconstitutional. It was eventually rejected, but there was no suggestion that it was unconstitutional.

So the notion that in 1789 there was kind of a growing theory that the prosecution of crime is necessarily part of the Executive power is without historical basis.

Mr. CRAMTON. May I comment on the *Siebold* case?

Mr. DENNIS. Yes.

Mr. CRAMTON. I think Professor Bator puts too much weight on a few phrases in a very long opinion that is now very old.

In the first place, the question of the appointive authority was an incidental and minor point in a case that was really a major collision between the Federal Government and State governments about control of elections, and that is what all the opinions talk about. There is only a paragraph that directs itself to the question of the appointive authority of the courts. It was sort of an incidental and minor point in a case that really dealt with other issues.

Second, the case does not involve in any way the question of the power of the President to remove one of those officials. That is the question that you have to struggle with and that I have attempted to deal with—what if the President of the United States had removed an election official appointed by one of those district courts? Would that removal be effective?

It is my view that it would be, and that the Supreme Court would have so held then and they would so hold now.

Mr. DENNIS. That brings me to a somewhat different question, which I will address to Mr. Cramton.

In the *Myers* case, as you no doubt know, the court, in holding that there could not be the restriction there imposed on the Presidential power of removal, cited the case of *United States* v. *Perkins* where the Secretary of the Navy had removed a graduate of the Naval Academy, although the statute said he could only be removed by a court-martial. The *Myers* opinion cited that case, and indicated that, while Congress could not restrict the President's power of removal in the Myers type of situation on the other hand if the Congress exercises its right to vest the appointment in the head of a department, then at the same time Congress could probably hedge that power of removal in a way that could not be done in the case of the President.

That being true, I would like to get your thought on an approach that would vest this power of appointment of a special prosecuting attorney in the Attorney General, possibly subject to the advice and consent of the Senate, and then, provide that the Attorney General could only remove him for gross misconduct in office.

Mr. CRAMTON. I feel that that is essentially what you have now with the President's agreement not to remove the existing Special Prosecutor without consultation with the House and Senate leaders. It seems to me that a breach of that agreement once again would require the public to draw the most dire conclusions.

Mr. DENNIS. I agree with you as a practical matter. But I do not think I agree with you that is the same thing. I am talking about writing it in the statutes.

Mr. CRAMTON. It would more likely be upheld if it were a provision merely stating grounds for removal.

Mr. DENNIS. I thank you.

Pursuing the matter one step further, would we not essentially get done what we need to do here if we just gave the present Special Prosecutor statutory protection as to removal?

Mr. CRAMTON. I would think that; that is the most practical and the most likely course that would succeed in terms of constitutional doubts.

Mr. DENNIS. Thank you.

Mr. HUNGATE. I could only wish that lawyers were like dentists. You go to a dentist, he tells you that a tooth has to come out, you go to another, he tells you the same thing.

Mr. Mann?

Mr. MANN. Professor Bator, your suggestion, with reference to expeditious judicial reveiew, is that it would be more accepted procedure to include language in the bill providing that a motion to dismiss an indictment on constitutional grounds be heard by a three judge court rather than to provide for immediate review by the U.S. Supreme Court?

Mr. BATOR. Yes, sir.

Mr. MANN. I thought I heard you say something about the signature on indictments. Did you suggest that perhaps indictments would not have to be signed by the Special Prosecutor?

Mr. BATOR. My suggestion there was that if on judicial review it were held, which I think it would not, that the Congress lacks the constitutional authority to vest the power to prosecute in the Special Prosecutor, then that ought not to invalidate the indictments which in fact the grand jury has brought down. The indictments would be salvageable.

There is a de facto doctrine that would help. There is also the point that the authority of the grand jury to proceed with its investigation and return indictments is not in question here. The only question is the role of the Special Prosecutor. And I would think that the very same indictment could be sent over to the Justice Department for signature and prosecution. You would not throw a lot of effort down the drain.

Mr. MANN. I asked a similar question of the Acting Attorney General, and he thought that prosecution could go forward under the auspices of the Attorney General.

With reference to the appointment of a Special Prosecutor by the Attorney General with statutory limitations on his removal, such as extraordinary improprieties or something more specific, do I get the impression, Dean Cramton, that that procedure appeals to you as being the most likely to be held constitutional?

Mr. CRAMTON. That is correct. As Chairman Hungate has suggested, lawyers do not agree on all questions, so this may go to the Supreme

Court of the United States. We are talking about matters of degree along a spectrum, and you clearly make the statute more plausible and make the sustaining of its constitutionality easier if the only limitation placed on the President is a requirement that he show cause in order to remove the Special Prosecutor.

Mr. MANN. Do you agree with Mr. Dennis that if this limitation on the power of removal by the Attorney General were fixed by statute, that it would be much more effective and be more likely to be constitutional than any commitment that the Attorney General might make based upon a commitment to the Congress in writing, which essentially he has done?

As we know, there was a firm commitment already made that was not observed. All you have to do is follow the people down the line until you find one that will not carry it out.

Is there any other way that the Attorney General may be given it without statutory indictment?

Mr. CRAMTON. I am concerned about the delay and confusion that seems to me to be likely to result from legislation appointing a Special Prosecutor. There may be delay in making an appointment since a person must be found. Second, the President is unlikely to cooperate. Third, you are going to have a delay of 6 months or longer while these questions are litigated all the way to the Supreme Court of the United States. All this must be weighed against the fear that the President will breach the solemn undertaking that he now has made not to remove Jaworski unless he gets the concurrence of six out of eight of the House and Senate leadership.

I just think the American public's tolerance for further breaches of commitments on the part of the President is extremely limited. Any further actions of this character on his part, and he is out. The public would have had enough, or too much, rather.

Mr. MANN. Thank you, Mr. Chairman.

Mr. HUNGATE. Mr. Mayne.

Mr. MAYNE. Thank you, Mr. Chairman.

I would like to ask both of you gentlemen what you think would be appropriate to write into a bill such as was suggested by Mr. Dennis to limit the power of the removal of the Special Prosecutor? What sort of safeguards would you suggest that we legislate?

Mr. CRAMTON. I think they ought to relate to misconduct in the course of the investigation, making it quite clear that a vigilant enforcement of the criminal laws was not and could not be viewed as misconduct. It has got to be improper behavior, bad behavior, taking a bribe or some kind of extraordinary impropriety.

I think language could be devised.

Mr. MAYNE. Professor Bator?

Mr. BATOR. I think language like that would be appropriate. I should think that it would also be appropriate to make it perfectly clear that the Prosecutor is free to press in the courts all claims for evidence which he thinks appropriate, to submit the appropriateness of those claims to the courts, and that he may not be fired for seeking such relevant evidence.

Mr. MAYNE. If such language were enacted, what is your opinion as to whether this would be a feasible, practical way out of this?

Mr. BATOR. I think it would be constitutional.

Mr. MAYNE. Professor Cramton, you referred to the delay that would result if the President refused to cooperate with a court-appointed Prosecutor, set up by some of the legislation that we are now considering.

Could delay not also be caused by challenges by others than the President, which could perhaps be just as time consuming?

Mr. CRAMTON. They might be, but they are less plausible in my view, less harmful, for the reasons that Professor Bator suggested. Since subpoenas or requests for information would come from a grand jury it would merely be the Special Prosecutor's connection or role in that proceeding which would be called into question.

I doubt that a suspect could raise those issues until he was indicted by an indictment signed by the Special Prosecutor. Then he would be able to do so. At that point you would get this appeal and the further prosecution of the criminal case would be held up. I do not worry about that so much as I worry about what is going to happen with the Special Prosecutor's staff, their knowledge, their ability, their records. Will those be turned over to the creature of Congress appointed under this statute? Would the President or the FBI and the Department of Justice do so? I think he might not cooperate.

He would have a plausible argument that the appointment was unconstitutional, that the functions were unconstitutional, and I do not think that his action would serve as a ground for impeachment, because his argument would be highly plausible.

Mr. MAYNE. Professor Bator, as I understood your testimony this morning, you now say that the idea of the prosecution or the enforcement of criminal law as being an exclusively Executive function is not very firmly imbedded in our constitutional scheme.

Did I misunderstand you on that?

You referred to the fact that before the Constitution was enacted, we had private prosecutions and so forth. You seem to now minimize the essential Executive nature of this prosecutorial function.

Mr. BATOR. I think conventionally and practically it is an Executive function. All I meant to say was that history does not justify the proposition that the Constitution said that there was an absolute and rigidly exclusive monopoly in the executive branch in the prosecution of crime; that the Constitution cannot be read as creating a rigid rule against the Congress' acting in cases of special necessity.

Mr. MAYNE. I do not believe that anybody that has testified here raised any doubts about the constitutionality of a court appointed Prosecutor in terms of the so-called watertight compartment theory of constitutional powers.

There does seem to me to be a very respectable body of opinion that prosecution is traditionally and constitutionally an Executive function. I realize that you have affirmatively stated to us that there has been some change in your thinking on this, and I would like to ask you if as recently as May 5 you were correctly quoted in the New York Times as having said "the Constitution vests the Executive power in the President and commands him to take care that the laws be faithfully executed. The enforcement of Federal criminal law is an essential part of the function of executing the laws. For the Congress or anyone else to purport to create an agency totally independent from

the executive branch with the power to enforce the criminal law would probably be unconstitutional."

Mr. BATOR. That is an accurate quotation and represents what my opinion then was. I have tried to indicate that opinion I now realize was formed on the basis of inadequate study and reflection.

Mr. MAYNE. It does at any rate give some support to the statement that you have made today that certainly the matter is not free from doubt.

Mr. BATOR. I wonder, Congressman Mayne, if you are familiar with Justice Jackson's opinion in a case in which he recanted some of the views that he had expressed as Attorney General. He added this paragraph to his opinion:

> Precedent is not lacking for ways by which a judge may recede from a prior opinion that has proven untenable. . . . Baron Bramwell extricated himself from such an embarrassment by saying 'the matter does not appear to me now as it appears to have appeared to me then.' Mr. Justice Story, accounting for his contradiction of his own former opinion, put the matter: 'My own error cannot furnish grounds for its being adopted by this Court.' An escape less self-deprecating was taken by Lord Westbury who it was said rebuffed a barrister's reliance on an earlier opinion of his lordship by saying, 'I can only say I am amazed that a man of my intelligence should have been guilty of giving such an opinion.' If there are other ways of gracefully and good-naturedly surrendering former views to a better considered position, I invoke them all.

Mr. MAYNE. My time has elapsed, and I think that is a good note on which to conclude this part.

Thank you, Mr. Chairman.

Mr. HUNGATE. Ms. Holtzman.

Ms. HOLTZMAN. Thank you, Mr. Chairman.

I would like to welcome both of you gentlemen here today, and especially Professor Bator who was my professor when I was at Harvard Law School, and it is as much a delight to hear him today as it was then.

Dean Cramton, I have a question going to a point that was raised by Professor Bator and other witnesses that we heard regarding the practice at the time that the Constitution was adopted to the effect that the prosecution of the criminal laws was not exclusively vested in the executive branch but was also vested in private individuals.

Does that not raise a strong argument in your mind against the argument today that the enforcement of criminal laws is exclusively executive?

Mr. CRAMTON. It surely is relevant. My objection is that it is not controlling, partly because the Founding Fathers intended to make a lot of changes on English practice. For example, Members of the Judiciary Committee who are getting into the history of impeachment have undoubtedly discovered that the practice of the English Parliament was to impeach private citizens and to use a legislative forum as a way of putting people in jail, not only removing officers from office.

Well, our Constitution clearly cuts back on that and makes it clear that the legislature cannot try people directly. So, my point is that history is relevant on these questions, but it is the intent of the Founding Fathers that is controlling.

Ms. HOLTZMAN. I understand, but I am not talking about history before the Constitution at this point. I am talking about history after

the Constitution in which the Congress itself for a substantial number of years vested enforcement of criminal laws in nonexecutive personnel.

Mr. CRAMTON. Congress did?

Ms. HOLTZMAN. Yes, by legislation.

Mr. CRAMTON. In the territories?

Ms. HOLTZMAN. That is correct.

Mr. CRAMTON. One has to remember that the situation prevailing even up until the time of the *Siebold* case in terms of the enforcement of Federal law and Federal instrumentalities throughout this very broad land—the post office and the U.S. District Court were the only nationwide officials. So there was a tendency on the part of Congress to use Federal judges for a variety of tasks. Some of them were struck down as imposing nonjudicial duties on them. Others, as in the *Siebold* case, were upheld.

We do not have that situation today. It seems to me that the questions presented are totally different.

Ms. HOLTZMAN. To my mind it is fairly compelling if not conclusive on the question of whether or not the enforcement of the criminal laws was intended by the Founding Fathers and the Constitution and interpreted by the courts to be exclusively an Executive function.

Mr. CRAMTON. Cite me a single case or a single instance in which the President could not and did not remove all of those creatures that were appointed by territorial courts. I suspect that historical inquiry would determine that he in fact did discharge them. He was viewed as having the power to remove them.

You are taking the position, Ms. Holtzman, it seems to me, that the power to appoint and the power to remove are always co-terminus, and I do not think that is true. I think it is possible for the appointive power to be put in a district court, but that the President could still remove despite a Federal statute purporting to limit his discretion.

Ms. HOLTZMAN. All right. I think that conceptually the problem can be broken down into three parts. It can be broken down into whether or not Congress can vest the power in the courts to appoint somebody to take charge of the investigation. Also, Congress can, to my mind, from the precedents cited today, invest the power in the courts to appoint a Special Prosecutor to prosecute the case.

Now, the question of whether the President can remove him, may possibly have more weight than others.

What I am trying to point out is at this point you can say with regard to the appointive power that there is a substantial historical precedent for vesting that in the courts or at least you can make the argument that the appointive power with respect to prosecutors of criminal law need not be wholly in the executive branch.

Mr. CRAMTON. I agree with you that the argument that such legislation is constitutional insofar as appointment alone is concerned is better.

Ms. HOLTZMAN. Would you say it is strong?

Mr. CRAMTON. No. In my statement I say it is still doubtful, but it is closer. I would expect a 5–4 decision on that question maybe, while on the other question the argument that it is unconstitutional is even stronger.

But as I have said, this is a question as to which reasonable men and reasonable women can differ.

Ms. HOLTZMAN. Professor Bater.

Mr. BATOR. Let me add a word. In the *Meyers* case, Chief Justice Taft said one of the strongest arguments against the constitutionality of limiting the removal power there was precisely that the President had made the appointment. In fact, the *Myers* case is the strongest authority for the proposition that limiting the removal power creates no independent constitutional problem at all. The only constitutional problem is to separate the two. If the President appoints, he cannot be prevented from firing.

Ms. HOLTZMAN. All right.

Thank you, Mr. Chairman.

Mr. HUNGATE. Mr. Hogan.

Mr. HOGAN. Thank you, Mr. Chairman.

I have been impressed by the testimony of both witnesses, and I am sure you appreciate the dilemma in which the members of this subcommittee find themselves. Obviously the thing that brings us all here together is to try to find some way to create a situation whereby the American people can have confidence that the prosecution is going to go forward unfettered. That is the objective that we all seek.

It is clear that the members of this subcommittee disagree, even though we have not met formally to discuss the legislative proposals, about two dozen of which are pending before us.

So I can predict that we will have protracted debate in the subcommittee, in the full committee, and on the floor of the House. If one of these proposals calling for a judicially appointed prosecutor does pass both the House and the Senate, the Acting Attorney General has advised us that he will recommend that the President veto it. So the legislation then comes back and would have to get a two-thirds vote, which is problematical, to override. Even assuming that, and assuming Professor Bator's recommendation for a 90-day expeditious judicial determination of the constitutionality, obviously these processes all take time. The prosecutors who were before this committee last week said that they expected to finish their work within 6 months.

So I think that in a sense this dispute may all prove to be academic, but that brings us to the point that we need to find some way to assure the American people that they can have confidence in the prosecution. It would seem to me that the best thing for us to do would be to try to work with the existing facts as we face them, and that is that we have a Special Prosecutor. How best can we take that situation and impose upon it public confidence?

Now, we have talked about ways of removal, confirmation and the appointment, and ways of removal. How about a proposal for fixed tenure, and removal subject to, perhaps, approval by the House and the Senate, or mandating the President's informal agreement that he will come to the leadership of the House and the Senate?

Do either of you gentlemen have recommendations on what we could do to expedite and try to find a compromise in this situation?

Mr. CRAMTON. My own view, as I have already stated, is that all the problems that you very neatly outlined indicate that this committee's consideration of legislation of this kind is a diversion from the main act, from courses of action that it ought to be pursuing.

If you ultimately come to the conclusion that the President of the United States is not faithfully executing the laws through his subordinates, or if you come to the conclusion that he is engaged in an obstruction of justice, it seems to me that your duty is clear. It is not to enact legislation dealing with a Special Prosecutor. The Constitution contains specific provisions for dealing with that situation, and you ought to move toward them.

In the meantime, while you are considering impeachment, I would tend to give the benefit of the doubt to the new Special Prosecutor and let him move ahead with the existing staff that he inherits from Archie Cox. If it is a whitewash job, there will be lots of noises from his staff and from the honorable lawyers who continue to hold employment in the Department of Justice.

Mr. BATOR. Mr. Hogan, I really in conscience should say that my own feeling is that the circumstances of the appointment of the existing prosecutor are such that I do not think the country will have confidence. I think the country is entitled to a truly independent investigation and prosecution of these matters, and desperately wants it. I think that it is ironic that the country should be told by the Congress that it just cannot have it.

Mr. HOGAN. What about the practical problem I alluded to that the prosecutors who were before the committee said they would be finished in 6 months?

Mr. CRAMTON. Mr. Chairman, before Mr. Bator answers that question, I am expected by your colleagues on the Senate side, and I am somewhat late already.

Would it be appropriate if I could be excused at this time?

Mr. HUNGATE. The Chair has two or three questions, if you could defer for about 5 minutes.

Mr. CRAMTON. I can stay 5 more minutes, but I do have to go.

Mr. HOGAN. I have no further questions, unless Professor Bator wants to comment.

Mr. BATOR. Why do I not defer for a moment and see if you can finish with Mr. Cramton.

Mr. HUNGATE. I take it you gentlemen both agree that whatever we do here today needs a quick appeal.

Mr. CRAMTON. Right.

Mr. HUNGATE. Legislative grounds for discharge of a Special Prosecutor would be advisable?

Mr. CRAMTON. Yes.

Mr. HUNGATE. Dean Cramton, you are here as a private citizen. You are serving on a board, one that I was serving on.

What is that board?

Mr. CRAMTON. The Commission on Revision of the Federal Court Appellate System.

Mr. HUNGATE. The Federal court?

Mr. CRAMTON. It is concerned with the procedures in the Federal appellate courts.

Mr. HUNGATE. You are a member of the board or staff?

Mr. CRAMTON. I am a member of the Commission.

Mr. HUNGATE. A member of the Commission. You are appointed by Chief Justice Burger or by the President?

Mr. CRAMTON. I was appointed by President Nixon last May or

June. It was, I might add, the third of my Presidential appointments, two with Senate confirmation.

Mr. HUNGATE. Your credentials are beyond cavil.

You made a statement about the importance of executive control of criminal law enforcement, and I think you referred to the Agnew case. There are some people that are very deeply concerned—they look at Mr. Segretti serving 3 years. They look at supervised probation, and another one who walks, as they say in the trade.

Do you think that someone thus might feel we ought to divorce the Executive from the Prosecutor?

Mr. CRAMTON. I understand it. I strongly disagree with it. If we are ever going to get through the period ahead with an orderly succession to a person that the public has confidence in and who therefore is able to exercise the substance of the Presidential power, then we are going to have to do it by a process of negotiation in which Congress and the Attorney General and the Special Prosecutor and the President are all going to participate.

I do not welcome an impeachment trial. I think that is the worst of all possible final conclusions. I think I would welcome a resignation of the President which led to an orderly succession.

My question is, How can one best get to that? I think one can best get to it by not having a person who might be so independent, so stubborn that he would not want to bargain, he would not want to negotiate, and you would have to go through an impeachment trial.

Mr. HUNGATE. Let me ask you a further question.

You are a person of unquestioned standing and responsibility. As I understood in your response explaining some of these decisions in the past several months, Presidential decisions, the word irrational was used. You are not the first who may have used it, but it is a very serious matter.

I would ask you if that was really the way you thought decisions were being made; if you thought that sort of judgment should be used in selecting our Special Prosecutor. Would that not again be a reason to select one through the judicial process?

Mr. CRAMTON. It seems to me to go to a more fundamental issue. All I said was I would not attempt to explain the course of Presidential decisionmaking over the past few months and I concede that I cannot.

Mr. HUNGATE. I thought the particular word was used. I apologize.

Mr. CRAMTON. I think I did use the word. I do not retract it.

Mr. HUNGATE. The removal of the Postmaster, we have been talking about that for a week or so. As I understand it, now, you cannot remove a Postmaster.

Mr. CRAMTON. That is right. Congress has legislated on the subject.

Mr. HUNGATE. Congress can legislate, so Congress cannot remove them.

Mr. CRAMTON. Can state grounds. Congress can require, at least in some situations, at least with inferior officers, not Cabinet members, that they be removed only on the instance of certain stated grounds.

Mr. HUNGATE. In the case of postmasters, that was not the law. It is now the law that they cannot be removed?

Mr. CRAMTON. I believe that is the case. I am not an expert on the subject of the new status of the Post Office.

Mr. HUNGATE. Thank you very much.

Mr. DENNIS. Mr. Chairman.

Mr. HUNGATE. Mr. Dennis.

Mr. DENNIS. Let me ask this gentleman one final question.

Would it be a sound general observation insofar as the Special Prosecutor legislation is concerned, that if we could devise a means which would keep the appointing power somewhere in the executive branch and surround it with sufficient safeguards as to the grounds for removal——

Mr. CRAMTON. I think so, but I do not think the situation is very much different from what we have now as a practical matter. I do not think the public is going to be satisfied with that kind of legislative action. I think you ought to turn to other issues if that is the kind of legislation you are going to enact. No legislation is just as good as that.

Mr. DENNIS. I would not necessarily quarrel with you about turning to other issues. Of course, we cannot legislate on a subject just because the public might like us to, unless it is sound legislation.

Thank you.

Mr. HUNGATE. Thank you very much.

I apologize for taking so much of your time. I appreciate your help.

Mr. CRAMTON. Thank you.

Mr. HUNGATE. Professor Bator, may we have you for a few minutes longer?

Mr. BATOR. Yes.

Mr. HUNGATE. Counsel has a question.

Mr. PAULEY. Mr. Bator, I would like to ask you a question about the *Myers*, *Humphrey* and *Wiener* line of cases that had been discussed this morning. Assuming that one takes the view that *Myers* does not control with respect to hypothetical legislation involving a Special Prosecutor, and that one concludes, as you apparently do, that it is *Humphrey's Executor* and *Wiener* which control, is it not true that those cases only dealt with the right of officers who were removed by the President to receive the compensation that they were due, and do not involve the issue of whether the President has the right at least to remove the officer from his employment and to make that removal stick? My point is that there is that further question which I think has never been resolved, at least by the Supreme Court.

And if it is the case that the President can prevent at the very least any member of the executive branch from staying in the executive branch, then does not all the legislation that has been proposed have to rely upon trust in the fact that the President will not remove that officer?

Mr. BATOR. I think the legislation I have seen would create an Office of the Special Prosecutor which is not in the executive branch. The technical question raised by both the *Meyers* and the *Humphrey* cases, would really not be raised if this bill is constitutional and if you take the Office entirely out of the executive branch.

One of the oddities here, sir, and really one of the oddities of Mr. Cramton's position, is this: Mr. Cramton says again and again that the Constitution requires that the President control the prosecution

of criminal cases. On the other hand, when he talks about Mr. Jaworksi, the only really good things he says about him is that the President in fact will not control that investigation and that prosecution.

Is the battle really only about a formality? I cannot believe that the Constitution requires us to adhere to such pure formalities.

Mr. PAULEY. It is not my understanding at least that the Culver bill and others like it propose to create an Office of a Special Prosecutor outside the executive branch itself; rather, that they simply sought to create, as it is argued under article II, section 2, can be done, an officer, inferior officer of the executive branch who would be appointed and removable by some means outside the executive branch.

Do you think that article II, section 2, is really talking about something else? And if it is, with respect to a Special Prosecutor at least, does that not raise different considerations, that is, lodging the entire Office outside the executive branch—than the other situation that I have described, which would simply empower a court to simply appoint and remove him?

Mr. BATOR. I guess it is unusual for a law professor to tell a practicing lawyer that he is getting too theoretical, but you are getting too theoretical for me. In other words, I do not really understand the problem, and it seems to me that article II says that the appointing authority can be vested in the courts. One does not need to ask the question whether it is within or without the executive branch. The Myers case simply says that the removal authority may sometimes have to follow the appointing authority.

Really, your fundamental question is the question that divides Mr. Cramton and myself, whether it is incongruous or inappropriate in view of the separation of powers to have a prosecutor appointed by the judges.

That seems to me to be kind of a functional question and not a theoretical one.

Mr. PAULEY. I do not think it is theoretical if you take the view, as apparently the White House does, that the President can remove anyone in the executive branch. Then it becomes a matter of some practical importance whether you can lodge and whether it is proposed to lodge the Office in the executive branch.

Mr. BATOR. I suppose that the question is whether the President can do it lawfully. That is really the fundamental issue. If the legislation is constitutional, he cannot lawfully remove the Special Prosecutor.

Mr. PAULEY. Perhaps he cannot lawfully do it, under your view, with respect to that officer being entitled to the compensation flowing from that job. But that is a separate question from whether as a legal remedy that officer could obtain reinstatement in his position from the courts, from which I understand the proponents of such legislation would wish to provide for him.

Mr. BATOR. I have not thought out the question of what would happen if the President, in spite of the constitutionality of the bill, fired the man and the man then sued to get his job back. I really just have not tried to think that one out. I do not know the answer.

Mr. PAULEY. Thank you.

Mr. HUNGATE. Mr. Hoffman would like a question.

Mr. HOFFMAN. Professor, you touched on one of the critical ques-

tions; that was, the expeditious manner in which we could test the constitutionality. The suggestion was made that it would probably take 6 months after indictment was returned.

Let me ask you, would it be possible to test the constitutionality on the President's refusal to issue a commission to the court-appointed Prosecutor?

Mr. BATOR. The provision itself would raise so many thorny constitutional problems of its own, I think it would be imprudent. It would be very hard to structure a lawsuit here between the President and the Special Prosecutor in a way that would work.

Mr. HOFFMAN. That would hold true as well, if the Special Prosecutor, for example, tried to sue for his pay. You would have the same problem.

Mr. BATOR. It might work, but I foresee a very thorny problem.

Mr. HOFFMAN. Could we get to it perhaps before indictment, by mandamus to require a reluctant FBI to turn over its investigative files to the court-appointed Special Prosecutor?

Mr. BATOR. Again, it is possible. The danger that you run is that the holding would be that everything is constitutional up to the point of actually prosecuting an indictment. Therefore, the only way to test the matter is to attack an indictment.

Mr. HUNGATE. Let me interrupt for a moment. I would like to inquire of the members on the initial markup we said we will start today. We have witnesses tomorrow. Mr. Dennis has agreed to appear tomorrow. Then Mr. Jaworski will testify.

Would it be your pleasure to meet briefly this afternoon to try to outline where we are? Or would you prefer to meet after all the witnesses conclude tomorrow?

Mr. DENNIS. Mr. Chairman.

Mr. HUNGATE. Mr. Dennis.

Mr. DENNIS. Personally, since I do have a couple of pieces of legislation that I would like to present to the committee, I would rather have an opportunity to do that before we start marking things up, because I think they are worthy of consideration.

Mr. HUNGATE. Ms. Holtzman, you had a comment.

Ms. HOLTZMAN. I would be happy with whatever the chairman decides. It seems to me, however, that it would not be inappropriate if we met this afternoon to at least agree on a general course of action. Then we can talk about the actual language tomorrow.

Mr. DENNIS. The point I am making is usually when we mark things up, we are through taking testimony. I will present it today if you want me to.

Mr. HUNGATE. We are also going to hear Mr. Jaworski. All I would ask the committee is, will we be prepared tomorrow to put in a pretty long day on our markup. How about Friday? I would like to finish. They would like to have our subcommittee report to the full committee before next Tuesday's session.

With that understanding, we are not really losing any time, because the full committee cannot act until Tuesday anyway; so we will conclude our testimony today, and tomorrow afternoon we will start work. If we do not finish tomorrow afternoon, we will proceed on Friday.

Mr. Mayne.

Mr. MAYNE. I will not be here on Friday, Mr. Chairman.

Mr. MANN. I will not be here.

Mr. HUNGATE. Ms. Holtzman.

Ms. HOLTZMAN. It seems to me that this legislation is of crucial national importance and that this committee has the responsibility to proceed expeditiously; and I think we ought to meet on Friday. And certainly, we will have settled the major questions in the scope of this legislation tomorrow.

Mr. DENNIS. Mr. Chairman.

Mr. HUNGATE. Yes.

Mr. DENNIS. I agree we ought to move, and personally, I can and will be here on Friday. However, I do think it is pretty important to have the full subcommittee present when we pass this bill out, too.

Mr. HUNGATE. The chairman's concern is that not only the full committee be here, but we must have a quorum. Let me suggest that we keep Friday in mind. I have already been advised that Mr. Mayne and Mr. Mann will not be able to be here, and that does upset the Chair.

We will go as far as we can Thursday, if necessary Friday. You will remember the possibility that we could conclude this Monday and get to the full committee Tuesday.

I want the members to understand that we are going to report something in time for the full committee to act on it next Tuesday.

Mr. DENNIS. I think we are all agreed on that.

Mr. HUNGATE. We are all agreed on the importance of that. Pardon us, Professor Bator.

Mr. HOGAN. I have an unanswered question hanging, which until we deferred.

Mr. HUNGATE. Go ahead, Mr. Hogan.

Mr. HOGAN. Professor Bator?

Mr. BATOR. I am embarrassed to say I have forgotten it.

Mr. HOGAN. I stated the practical difficulties of us doing something within the 6-month timeframe that the Prosecutor says is all that is necessary, and asked you whether or not you have any suggestion as to what we might do with the existing situation in order to act more expeditiously and avoid a veto and all the wrangling that we could anticipate.

Mr. BATOR. I guess I did not really have a suggestion. If it is the case that the Congress feels that it cannot act expeditiously, I do think the country will be bitterly disappointed.

Mr. HOGAN. I think that we can act, but what about the fact of a veto, and maybe the inability to override a veto? What have we done to restore the public's confidence in the unfettered prosecution then?

Mr. BATOR. If the legislation is vetoed and the veto is not overridden, I guess the existing situation would continue.

Mr. HOGAN. Your feeling is if we do not go with a court-appointed prosecutor——

Mr. BATOR. If I felt that such a provision is unlikely to survive a veto, then I would hope that the Congress would start working on some compromise proposals.

Mr. HUNGATE. Gentlemen, the second bells have rung. Counsel has some questions, and other members may have other questions.

Would it be possible, Professor, for you to remain here until we return, let's say at 12:30, or do you have other commitments?

Mr. BATOR. I can, but I am trying to catch a 1 o'clock plane. It is not essential, so I will come back if you want me to come back.

Mr. HUNGATE. Do you have any further questions on this side?

Mr. DENNIS. No, Mr. Chairman.

Mr. HUNGATE. Counsel, if you will explore that, perhaps you could submit in writing any specific questions to the professor, and he can get them back to us promptly, because as I said, we will be done by Monday.

The committee will stand adjourned until 10 in the morning when we will hear from our colleague Mr. Dennis and Leon Jaworski.

Mr. BATOR. Thank you very much.

[Whereupon, the hearing was adjourned at 12:10 p.m., to be reconvened the following day, Thursday, November 8, 1973, at 10 a.m.]

SPECIAL PROSECUTOR LEGISLATION

THURSDAY, NOVEMBER 8, 1973

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

The subcommittee met, pursuant to notice, at 10 a.m., in room 2141, Rayburn House Office Building, Hon. William L. Hungate [chairman of the subcommittee] presiding.

Present: Representatives Hungate, Kastenmeier, Edwards, Mann, Holtzman, Smith, Dennis, Mayne, and Hogan.

Also present: Representative Brooks.

Also present: Herbert E. Hoffman, counsel; Thomas W. Hutchison, assistant counsel; Roger A. Pauley, associate counsel; and Stephen P. Lynch, research assistant.

Mr. HUNGATE. The subcommittee will be in order. We will now resume our hearings.

Our witnesses today will be Mr. Dennis, a colleague on the subcommittee from Indiana, and Mr. Leon Jaworski, the gentleman who has been appointed as the new Special Prosecutor.

Without objection, we will insert in the record at this point the following:

1. A memorandum dated October 29, 1973, discussing the constitutional power of Congress to enact legislation vesting the power to appoint a Special Prosecutor in the Federal courts, by Lee C. Bollinger, Jr., assistant professor of law, University of Michigan Law School.

2. A memorandum, dated October 30, 1973, on the power of Congress to provide for the appointment of a Special Prosecutor and the creation of a special prosecutorial office to investigate and prosecute criminal activity surrounding the 1972 Presidential campaign, prepared by Richard Ehlke, legislative attorney, American Law Division, Library of Congress.

3. A letter and memorandum, dated November 2, 1973, on the question "Can Congress Guarantee Independence to Cox's Successor?," from Mr. Harry Kranz, Federal executive fellow at the Brookings Institution, Washington, D.C.

4. The statement of the Honorable Tom Railsback of Illinois for the establishment of an independent office of Special Prosecutor, the head of which is to be appointed by the judges of the Federal District Court for the District of Columbia.

5. A letter to the chairman of the Committee on the Judiciary, from Mr. John W. Gardner, chairman, Common Cause, with the memoranda to which the latter refers.

[The documents referred to follow:]

THE UNIVERSITY OF MICHIGAN LAW SCHOOL,
Ann Arbor, Mich., October 29, 1973.

U.S. HOUSE OF REPRESENTATIVES,
Washington, D.C.

DEAR CONGRESSMEN: Enclosed is a copy of a memorandum discussing the constitutional power of Congress to enact legislation vesting the power to appoint a special prosecutor in the federal courts. I hope it will be of some use.

Yours truly,

LEE C. BOLLINGER, Jr.,
Assistant Professor of Law,
University of Michigan Law School.

Enclosure.

OCTOBER 29, 1973.

CAN CONGRESS VEST THE APPOINTMENT OF A SPECIAL PROSECUTOR IN A FEDERAL COURT?

In the wake of President Nixon's decision to order the Attorney General to discharge Mr. Cox as the Watergate Special Prosecutor, many individuals and groups have called for legislation creating a new independent prosecutor who would be immune from presidential removal. Early last week, for example, the deans of 17 law schools signed a petition urging Congress to vest the power to appoint a special prosecutor in a federal court. The deans, along with many others of like mind, asserted that Congress was empowered to enact such a law by virtue of Article II, Section 2, of the Constitution. That Section reads in relevant part:

". . . [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: *but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Court of Law, or in the Heads of Departments.*" (emphasis added)

The purpose of this short memorandum is to discus whether the language, history and judicial interpretation of Article II, Section 2, support the position that Congress can, if it chooses to do so, vest the power to appoint a special prosecutor in a federal court.

Looking first at the language of Article II, Section 2, one is immediately struck by its clarity. Unlike the rather general phrasing found throughout much of the Constitution, this clause speaks with precision, without qualification or caveat. It says in plain terms that the Congress may, "as they think proper," vest the appointment of "inferior Officers" in "the President alone, in the Courts of Law, or in the Heads of Departments." By all appearances the individuals who penned this language intended to leave the delegation of the appointment power of lesser federal officials to the unfettered discretion of the legislative branch. If there be any limitation on this discretion, it must be implied, for it surely is not explicit.

We all recognize, of course, that language is an imperfect medium. What may appear clear on the surface, often becomes murky upon further study. Any inquiry into meaning, therefore, must wherever possible go beyond the literal text to an examination of the circumstances under which the words were written or spoken. In instances like this, that means looking at the available records of the Constitutional debates.

When the relevant debates are examined, one finds nothing to suggest that the framers intended to say anything different than they did. The clause was proposed without discussion by Gouverneur Morris. James Madison raised the only recorded objection. His criticism, however, was not that the clause would vest too much power in Congress, but that it did "not go far enough if it be necessary at all." Documents of the Formation of the Union of the American States, House Doc. No. 398, 69th Cong., 1st Sess. (1927). Madison thought that "Superior offi-

cers below Heads of Departments ought in some cases to have the appointment of the lesser offices." Id. Gouverneur Morris responded: "There is no necessity. Blank commissions can be sent." Id. After this brief exchange, the amendment was agreed to on the second vote.

When we next turn to the judicial decisions interpreting the pertinent clause in Article II, Section 2, we again find nothing to make us doubt Congress' authority to empower a federal court to appoint a special prosecutor. On the contrary, the one relevant Supreme Court decision strongly supports such an interpretation of congressional power. See *Ex parte Siebold*, 100 U.S. 371 (1879). At issue in *Siebold* was a congressional statute authorizing the judges of federal Circuit Courts to appoint supervisors of congressional elections and marshalls to assist those supervisors. Writing for the Court, Justice Bradley rejected the argument that "no power can be conferred upon the courts of the United States to appoint officers whose duties are not connected with the judicial department of the government." Id. at 397. Citing Article II, Section 2, the Court held that the "selection of the appointment power, as between the functionaries named, is a matter resting in the discretion of Congress." Id. at 397-98. This result seemed to make eminent good sense to the Court:

"And, looking at the subject in a practical light, it is perhaps better that it should rest there, than that the country should be harassed by the endless controversies to which a more specific direction on this subject might have given rise." Id. at 398.

The Court in *Siebold* was also unpersuaded by another line of constitutional argument: that the statute was inconsistent with Article III in that it delegated powers to the courts that were nonjudicial in nature. This is not a case, the Court said, where Congress had sought to impose duties on the judicial branch that were not authorized by the Constitution; on the contrary, here "the duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts" by virtue of Article II, Section 2. Id. at 398.

The *Siebold* decision is not the only precedent on Article II, Section 2, though it certainly is the most authoritative. For example, Congress long ago enacted a provision now contained in 28 U.S.C. § 546, which provides:

"The district court for a district in which the office of United States attorney is vacant, may appoint a United States attorney to serve until the vacancy is filled. The order of appointment by the court shall be filed with the clerk of the court."

This statute was upheld as constitutional in *United States* v. *Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963). The district court there relied on Article II, Section 2, in rejecting an argument that the provision violated the Doctrine of Separation of Powers.

Similarly, a three judge court relied on Article II, Section 2, in upholding a congressional statute under which judges of the United States District Court for the District of Columbia were authorized to appoint members of the District of Columbia Board of Education. See *Hobson* v. *Hansen*, 265 F. Supp. 902, 911-16 (D.C. 1967).

III

The foregoing review of the relevent legal authorities would seem to indicate that there is strong support for the proposition that Congress could under Article II, Section 2, place the power of appointment of a special prosecutor in the federal courts. Before accepting that conclusion as sound, however, we must consider the one major argument which can be anticipated in rebuttal: that it would be an impermissible usurpation of executive powers for Congress to delegate the appointment of executive officials to the judicial branch. Surely, it might be argued, the last clause of Article II, Section 2, should not be interpreted to mean that Congress may authorize a federal court to appoint the Under Secretary of State. Such a construction would give rise to a serious breach in the wall of separation of powers. And, if that is, so then a line must be drawn somewhere between "executive inferior officers" and other inferior officers. A special prosecutor, the argument would conclude, falls into the former category; his role would be to see that the laws are enforced, historically an executive function.

While this line of argument cannot be lightly dismissed, it contains several flaws which make it ultimately unpersuasive. First, insofar as the argument suggests that Congress may never vest courts with the power to appoint any official who will perform a nonjudicial, or an "executive," function, it is squarely

refuted by the Supreme Court's decision in *Siebold*, as well as by the other lower federal court decisions mentioned previously. Congress itself, moreover, has rejected the suggestion; as we have seen, 28 U.S.C. § 546 provides for the interim appointment of United States attorneys by federal district courts. Second, even if it is conceded that a court could not appoint an inferior officer whose duties would be exclusively executive in nature, that concession would not necessarily preclude judicial appointment of a special prosecutor. It has long been recognized that a prosecutor is intimately involved in the judicial as well as executive, functions of the government. As an officer of the court, subject to the supervisory power of the federal courts, the U.S. attorney performs a dual function within the overall scheme of government. He is, in short, markedly different for these purposes than the Under Secretary of State.

In order to sustain the power of Congress to provide for judicial appointment of a new Waterwate special prosecutor, however, one need not go so far as to assert that judicial appointment of all United States attorneys would be proper. For the situation now facing the country is unique and clearly calls for extraordinary solutions. The highest officials in the executive branch are the subjects of criminal investigations. That hard fact means that if the executive branch is to control the investigation of alleged wrongdoing by its own members, the very integrity of the government will be called into question. It would seem entirely unreasonable in this instance, therefore, to give a crabbed interpretation of Congress' constitutional powers, especially when the constitutional language is so explicit and the judicial decisions so favorable to a broad reading of congressional authority.

I therefore conclude that it would be constitutionally permissible for Congress to designate a court of law to appoint a special prosecutor, having limited powers of investigation and prosecution and holding office only for a limited period of time.

LEE C. BOLLINGER, Jr.,
Assistant Professor of Law,
University of Michigan Law School.

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WASHINGTON, D.C. 20540

APPOINTMENT OF A SPECIAL PROSECUTOR; CONGRESSIONAL LIMITATIONS ON STRUCTURE OF OFFICE AND CAUSES FOR REMOVAL

This memorandum concerns the power of Congress to provide for the appointment of a special Prosecutor and the creation of a special prosecutorial office to investigate and prosecute criminal activity surrounding the 1972 presidential campaign. Congress' power regarding the structure of the office and the removal of the special prosecutor is also discussed.

CREATION OF OFFICE

The power of Congress to create such an office would seem to be clear. James Madison, in discussing the relative powers of the executive and legislative branches in the first Congress, stated:

"The powers relative to offices are partly Legislative and partly Executive. The Legislature creates the office, defines the powers, limits its duration and annexes a compensation. 1 Annals of Congress 581, 582, as quoted in *Myers* v. *United States*, 272 U.S. 52, 128 (1926)."

Corwin states that the "Constitution, . . . by the 'necessary and proper' clause assigns the power to *create* offices to Congress, while it deals with the *appointing power* in the . . . words of Article II, Section 2, paragraph 2." Corwin, *The President: Office and Powers* 65 (2d ed. 1941) (Emphasis in original). See also, Willoughly, *Constitutional Law of the United States* § 665 (2d ed. 1934) ("all offices are created either by the Constitution itself, or by Congress").

VESTING OF APPOINTMENT-GENERALLY

Provision for appointment to offices is covered by Article II, Section 2, Paragraph 2 of the Constitution. It reads:

"He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers as they think proper in the President alone, in the Courts of Law, or in the Heads of Departments."

Thus, essentially two modes of appointment are available for filling offices of the United States. One is appointment by the President by and with the advice and consent of the Senate, and the other is the vesting of the appointment in the President alone, the Courts, or the heads of departments.[1]

VESTING OF APPOINTMENT IN THE COURTS OF LAW

There have been few cases arising from the vesting of appointment of an officer in a Court of law, mainly because Congress seldom chooses this mode of appointment. *Ex Parte Siebold*, 100 U.S. 371 (1879) is the leading case. The Court held that Congress had the power to vest the appointment of election supervisors (who operated pursuant to the Enforcement Acts of 1870 and 1871) in the Circuit Courts:

"The Constitution declares that 'the Congress may, by law, vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law, or in the heads of departments.' It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution; and, if there were, it would be difficult in many cases to determine to which department an office properly belonged. Take that of marshal, for instance. He is an executive officer, whose appointment, in ordinary cases, is left to the President and Senate. But if Congress should, as it might, vest the appointment elsewhere, it would be questionable whether it should be in the President alone, in the Department of Justice, or in the courts. The marshal is pre-eminently the officer of the courts; and, in case of a vacancy, Congress has in fact passed a law bestowing the temporary appointment of the marshal upon the justice of the circuit in which the district where the vacancy occurs is situated.

"But as the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress. And, looking at the subject in a practical light, it is perhaps better that it should rest there, than that the country should be harassed by the endless controversies to which a more specific direction on this subject might have given rise. The observation in the case of Hennen, to which reference is made (13 Pet. 258), that the appointing power in the clause referred to "was no doubt intended to be exercised by the department of the government to which the official to be appointed most appropriately belonged," was not intended to define the constitutional power of Congress in this regard, but rather to express the law or rule by

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[1] Strictly speaking, Congress would not seem to have unfettered choice in the method provided for appointment to office. The second method described in the text is reserved for what are termed "inferior officers." However, that term has never been authoritatively defined. By way of caveat, one commentator noted:

"The Constitution does not define the term 'inferior officers,' but it would appear that in this class are included all officers subordinate or inferior to those officers in whom other appointments may be vested. The point has never been squarely passed upon by the court since Congress has never attempted to vest the appointment of any but distinctively subordinate and inferior positions elsewhere than in the President by and with the consent of the Senate. Should it attempt to determine by law the appointment of heads of the great departments, or even the heads of important bureaus and divisions and commissions, or even of important local officers, the constitutionality of the law would undoubtedly be subjected to judicial examination." Willoughby, *Constitutional Law of the United States*, § 662 (2d ed. 1934). (Footnotes omitted).

which it should be governed. The cases in which the courts have declined to exercise certain duties imposed by Congress, stand upon a different consideration from that which applies in the present case. The law of 1792, which required the circuit courts to examine claims to revolutionary pensions, and the law of 1849, authorizing the district judge of Florida to examine and adjudicate upon claims for injuries suffered by the inhabitants of Florida from the American army in 1812. were rightfully held to impose upon the courts powers not judicial, and were, therefore, void. But the duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts; and in the present case there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void. It cannot be affirmed that the appointment of the officers in question could with any greater propriety, and certainly not with equal regard to convenience, have been assigned to any other depositary of official power capable of exercising it. Neither the President, nor any head of department, could have been equally competent to the task."

This view was followed in *Hobson* v. *Hansen*, 265 F. Supp. 902 (D.D.C. 1967), where a district court upheld the validity of D.C. Code 31–101 which required the members of the Board of Education to be appointed by the judges of the United States District Court for the District of Columbia.[2] The court relied heavily on *Ex Parte Siebold* and the fact that the officer to be appointed by the court may be unrelated to the administration of justice. Further, in discussing the *Siebold* limitation that the duty required by the courts may not be so "incongruous . . . as to excuse the courts from its performance, or to render their acts void," the court in *Hobson* noted that what was involved was the appointing of supervisors, pursuant to an explicit Constitutional provision, and not the performance by the court of the functions of supervision. 265 F. Supp. at 913. In this regard, it stated:

"The limitation which is referred to in *Siebold* is not an affirmative requirement that the duty of the officer be related to the administration of justice. It is a negative requirement that the duty may not have "such incongruity" with the judicial function as would void the power sought to be conferred.

"The 'incongruity' limitation is a safeguard should one be needed, to protect the governmental structure from legislative abuse." *Id.* at 914.

In the case of a special prosecutor the "incongruity" problem would seem to be minimized given the relationship of his duties to the administration of justice.

The court in *Hobson* also saw no due process problems in the appointing arrangement there. The Court stated that the "official act of participating in the selection of Board Members does not in and of itself preclude on due process grounds the ability of the judge to decide fairly the merits of litigation challenging the validity of the performance by a Board Member of his duties as such. If in a particular case such a challenge were made its soundness on due process grounds would depend on the circumstances bearing thereon and not on the mere fact that the judge had performed the duty reposed upon him by Congress in Section 31–101." *Id.* at 918.

Of course, the position and duties of a special prosecutor differ from those of school board members and the very fact that a prosecutor intimately involved in the administration of justice could conceivably be bringing cases before the judge who appointed him (and, possibly, has the power to remove him) may raise more serious due process questions than those addressed in *Hobson*. At least the propriety of such a situation may call for any case that may be pursued by the prosecutor to be brought before a judge who was not involved in the appointment process.

In *United States* v. *Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963), the court upheld the validity of 28 U.S.C. § 506 (now covered in 28 U.S.C. § 546) which permits the district court to appoint a United States Attorney when a vacancy occurs and until the vacancy is subsequently filled by the President. However, as

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[2] The court also upheld 31–101 on the basis of Congress' power under Article 1 to legislate for the District of Columbia and the fact that District Courts in the District of Columbia exercised both Article I and Article III powers. Thus, in the words of the court, "its [Congress'] plenary legislative power over the District accordingly enables Congress to place upon the District Court, or as, here, its judges, responsibilities which may be beyond the competence of other Article II courts and which are comparable to the responsibilities a state may confer on her Courts." 265 F. Supp. at 909.

Later, in noting the dual basis of its decision, the court stated that "we could rest alone upon Article I, but Section 31–101 gains support also from Article II, § 2, Cl. 2, of the Constitution." *Id.* at 911.

the Court recognized, "the appointive power of the judiciary contemplated by Section 506 in no wise equates to the normal appointive power." 216 F. Supp. at 842. See also, *In Re Farrow*, 3 F. 112 (1880). It pointed to the fact that the judicial appointment is temporary until the President acts and that the "exercise of the appointive power by the judiciary in no wise binds the executive. The Statute clearly contemplates that the executive branch is free to choose another United States Attorney at any time, the judicial appointment notwithstanding." *Id.*

It was these differences which also led the court to conclude that the "statutory scheme for the temporary appointment by the judiciary of the United States Attorney comports in all respects with due process of law." *Id.* at 843. The court noted that the appointive power in that instance was not equivalent to the normal appointive power which carries with it the power of removal. It was this dual power which the defendant in *Solomon* contended provided a "nexus between Court and Prosecutor too close to comport with due process" and which the court rejected because of the faulty premise. However, the presence of such a dual power may raise questions in the case of a special prosecutor and, as stated above, may make it desirable to provide for disqualification of the appointing judge from participation in proceedings brought by the special prosecutor.

Other cases in which the appointive power of the courts of law was discussed include *Rice* v. *Ames*, 180 U.S. 31 (1901) in which the court upheld an act of Congress which authorized the Circuit Courts to appoint commissioners who were authorized to handle extradition matters. In *Russell* v. *Thomas*, 21 Fed. Cas. 12, 162 (1874) the appointment by the court of United States commissioners of insolvency was upheld. *Birch* v. *Steele*, 165 F. 577 (5th Cir. 1908) was a similar case in which the appointment of referees of bankruptcy by the court was held to be constitutional under Article II.

REMOVAL

Congressional power over the removal of an officer would seem to be most extensive when Congress has provided for his appointment by means other than appointment by the President by and with the advice and consent of the Senate. The Supreme Court, in *United States* v. *Perkins*, 116 U.S. 483 (1886), stated (in adopting the language of the Court of Claims):

"We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed.

"The head of a Department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments but in all that is incident thereto." 116 U.S. at 485.

The *Perkins* holding was discussed in *Myers* v. *United States*, 272 U.S. 52 (1926). There, the Court stated:

"The authority of Congress given by the excepting clause [of Article II] to vest the appointment of such inferior officers in the heads of departments carries with it authority incidentally to invest the heads of department with power to remove. It has been the practice of Congress to do so and this Court has recognized that power. The Court also has recognized in the *Perkins* case that Congress, in committing the appointment of such inferior officers to the heads of departments, may prescribe incidental regulations controlling and restricting the latter in the exercise of the power of removal." 272 U.S. at 161.

"The *Perkins* case is limited to the vesting by Congress of the appointment of an inferior officer in the head of a department. *The condition upon which the power of Congress to provide for the removal of inferior officers rests is that it shall vest the appointment in someone other than the President with the consent of the Senate.*" *Id.* at 162. (Emphasis added.)

It follows from the above that, although the *Perkins* case specifically concerned appointment (and removal) by a head of a department, the rationale—that the power to regulate removal derives from the power to vest the appointment—would seem to be applicable when appointment is vested in a court of law. Indeed, the language of the *Myers* case quoted above, bears out the conclusion that Congress has the power to prescribe "incidental regulations

controlling and restricting the [office] in the exercise of the power of removal" whenever "it shall vest the appointment in some one other than the President with the consent of the Senate." 272 U.S. 52, 161, 162.

Even if Congress should provide in legislation establishing a special prosecutorial apparatus that the special prosecutor be appointed by the President by and with the advice and consent of the Senate, it still retains some power to regulate the nomination and removal of the officer involved. Congress has always exercised the power to prescribe various qualifications for office, even though by doing so, the President's discretionary power of nomination is circumscribed to some extent. See, *Myers* v. *United States*, 272 U.S. 52, 264 (1926) (Brandeis, J., dissenting) : Corwin, *The President: Office and Powers* 70 (2d ed. 1941) ; Note, 42 *Harv. L. Rev.* 426. Such qualifications may be prescribed "provided they are not so minute and special as, in effect, to leave to the President no real freedom of choice and to narrow the possible nominees down to particular individuals and thus make them, in effect, the nominees of Congress itself." Willoughby, *Constitutional Law of the United States*, § 667 (2d ed.) ; see, *Myers* v. *United States*, 272 U.S. at 128.[3]

Myers v. *United States*, 272 U.S. 52 (1926) was the first case to discuss at length the removal powers of the President and Congress and it indicated that the President had broad discretionary powers to remove not only executive officers but also quasi-judicial and quasi-legislative officers. However, this expansive view was soon cut down in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935) which "narrowly confined the scope of the *Myers* decision to include only 'all purely executive officers.' " See, *Wiener* v. *United States*, 357 U.S. 349 (1958).

The *Humphrey's* case involved a Federal Trade Commissioner who had been removed by the President without cause as required by statute. The Court distinguished such an officer from that of postmaster involved in *Myers*, the latter being described as "merely one of the units in the executive department and hence inherently subject to the exclusive and illimitable power of removal by the Chief executive, whose subordinate and aid he is." *Humphrey's Executor* v. *United States*, 295 U.S. at 628. The Federal Trade Commission, on the other hand is, according to the Court a body which "cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control." *Id.* at 628. The Court concluded :

"We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted ; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will."

Although the act of prosecuting is generally viewed as an executive activity, arguably a Special Prosecutor's Office created for the aforementioned purposes falls outside the category of "purely executive" since he is not intended to be an "arm or an eye of the executive." Thus, it would seem that in order to insure independence, Congress would have the power, even if it vested appointment in the President with the consent of the Senate, to regulate the removal of the special prosecutor in terms of specifying and limiting the cause for which he could be discharged.

SUMMARY

On the basis of the foregoing, the following conclusions would seem to be warranted :

(1) Congress has the power to create an Office of Special Prosecutor and define its duties ;

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[3] If Congress has the power to prescribe qualifications for those officers appointed by the President with the consent of Congress, *a fortiori* it would seem to possess power to prescribe qualifications for those officers whose appointment it has vested in the President alone, the Courts, or heads of Departments. As the Court in *United States* v. *Perkins*, 116 U.S. 483, 485 (1886) noted concerning an appointment vested in a head of a department :

"The head of a Department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments but in all that is incident thereto."

The same reasoning would seem to be applicable to an appointment which has been vested in a court of law.

(2) Congress may vest appointment of the special Prosecutor in the courts of law pursuant to Article II of the Constitution;

(3) Congress has broad powers to regulate the qualifications and removal of an officer who has been appointed by a court;

(4) Congress also has power to prescribe qualifications and restrict removal of an officer whose functions are designed to be performed independently of the Executive even if appointment of such officer is vested in the President by and with the consent of the Senate;

(5) Due Process problems may arise if the judge in whom appointment of the special Prosecutor is vested also presides over any proceedings eventually brought by the Prosecutor.

RICHARD EHLKE,
Legislative Attorney,
American Law Division.

THE BROOKINGS INSTITUTION,
1775 MASSACHUSETTS AVENUE, NW.,
Washington, D.C., November 2, 1973.

Hon. PETER W. RODINO,
U.S. House of Representatives,
Washington, D.C.

DEAR PETE: I have just completed research on the removal power, which relates to the appointment of a successor to Archibald Cox, and am enclosing a copy of my findings.

To the question "Can Congress Guarantee Independence to Cox's Successor?," my answer is affirmative—either by delegating appointment of the Special Prosecutor to the courts or by fixing his term and limiting Presidential removal to specified causes.

I hope to get this article published in the next week or so, but you're free to use the information it contains. Besides the "decision of 1789," (see Corwin, *The President: Office and Powers*, 1957, pp. 85–95), the key Court decisions are:

1. Myers v. U.S., 272 U.S 52 (1926), largely discarded later.
2. Humphrey's Executor v. U.S., 295 U.S. 602 (1935), the leading case
3. Morgan v. TVA, 115 F. 2nd 990 (C.C.A. 6th) (1940)
4. Wiener v. U.S., 357 U.S. 349 (1958)

Best wishes,
Sincerely,

HARRY KRANZ.

CAN CONGRESS GUARANTEE INDEPENDENCE TO COX'S SUCCESSOR?

(By Harry Krany)

Can Congress guarantee that the successor to Archibald Cox as Watergate Special Prosecutor won't be fired before he completes his work?

Like all the other novel constitutional questions raised by the Watergate scandals, this one can't be answered definitely until a case reaches the U.S. Supreme Court, testing whatever law Congress may pass. However, the clues from the 20th century court rulings, tracing their roots back to the great "decision of 1789," appear to support the view that Congress can either turn the appointment and removal power of an independent special prosecutor over to Judge John J. Sirica and the courts, or can require Congressional concurrence in Presidential appointment *and* removal of a new appointee.

In the leading Supreme Court case limiting Presidential removal power, the court held that "one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will."

Except for the power of impeachment of the President, the Vice President and all "civil officers of the United States," the Constitution is silent on the power to remove anyone from office. Article II, which deals with the President's authority, says (Sec. 2):

". . . . he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law, vest the appointment of such inferior officers,

as they think proper, in the President alone, in the courts of law, or in the heads of departments."

Shortly after adoption of the Constitution, the first House of Representatives split into four separate groups debating a bill proposed by James Madison to establish a Department of Foreign Affairs. The opening clause of that law (and similar bills also passed in 1789 creating a Secretary of the Treasury and a Secretary of War) provided that the principal officer of the new department was "to be removable from office by the President of the United States."

Madison's supporters argued that the removal power was an "inherent" or unwritten element of the Presidency; only he could remove a department head. The faction lead by Roger Sherman, who had been a member of the Constitutional Convention at Philadelphia as well as a signer of the Declaration of Independence, contended that the removal power was an incident of the power of appointment, shared jointly by the President and the Senate. This view was supported by Alexander Hamilton, who had written in *The Federalist Papers* the year before that the consent of the Senate "would be necessary to displace as well as appoint," thereby providing "stability of administration."

A third choice held that Congress, under a clause of the Constitution authorizing it to make all laws "necessary and proper" for carrying out any power vested in the U.S. "or in any department or officer thereof," could locate the power of removal wherever it thought fit. And a fourth small group urged that, except for impeachment or a common law writ, an officer had a vested right in his office and could not be removed for the term of his appointment as fixed by Congress.

Faced with these four differing interpretations of the Constitutional ambiguity, the first Congress compromised by adopting words which were acceptable to three of the four groups. The Madison clause providing that the appointee is "to be removable by the President" was stricken, and in its place was inserted "whenever the said principal officer shall be removed from office by the President of the United States."

Satisfying Madison's pro-President group, the compromise implied that the President already had the power of removal, in certain cases at least, without grant from Congress. Equally mollified was the third faction, since in *this* bill Congress placed the removal power in the President, but in others Congress could require Senate concurrence. And the fourth cell was unaffected, since the Foreign Affairs Department head was not given a fixed term, but could be removed at will by the President. Only Sherman's followers, who inferred a constitutional right for the Senate to share in the President's removal power, lost out. So divided were the Founding Fathers that it took Vice President Adams casting the tie-breaking vote as presiding officer in the Senate, to push through the compromise on all three bills creating the State, Treasury and War Departments.

In view of the strongly-held, diverse feelings among the men who wrote the Constitution and the fear of the Supreme Court about getting involved in this primarily political thicket, it is little wonder that the court for 140 years managed to side-step every occasion for resolving the question of the extent and location of the removal power. It was not until 1926 that the Court handed down the first of four decisions, dealing with the removal power and all harking back to the compromise of 1789.

In the famous Oregon postmaster case in 1926, Frank S. Myers had been appointed by the President, with the consent of the Senate, for a term of four years. Before his term expired, his resignation was demanded by the President; when Myers refused, he was discharged. On appeal, the Supreme Court upheld Myers' discharge. The opinion by Chief Justice Taft, who had served as President before assuming the bench, backed the Madisonian argument that only the *President* could remove executive officers appointed *by him* (with Senate consent) and that an 1876 law requiring the Senate to consent to removal of postmasters was void.

In 1935, however, the Supreme Court retreated from its divided *Myers* decision in what has become the leading case on removal power. Less than two years after William E. Humphrey, a member of the Federal Trade Commission, had been reappointed by President Herbert Hoover and confirmed by the Senate for a seven-year term, newly-inaugurated President Franklin D. Roosevelt requested Humphrey's resignation on the ground that they disagreed on public policy; Humphrey refused, and the President "removed" him from office. Humphrey sued for back pay, and the Supreme Court ruled in his favor.

The FTC Act allows removal of a commissioner only for causes specified in that law, and since the Commission acts primarily as a quasilegislative agency,

Congress may limit the President's power of removal, the court decided. Scrapping most of Justice Taft's argument eight years earlier, Justice Sutherland wrote:

"Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office; the Myers decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute."

Ironically, both Myers and Humphrey died before the court ruled on their claims. In two later cases, the Supreme Court has applied the distinction established in the Humphrey case and quoted with approval Justice Sutherland's remark that "one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will."

In 1940, President Roosevelt removed Dr. E. A. Morgan from the chairmanship of TVA for refusal to produce evidence to substantiate charges Morgan had levelled at his fellow directors. The act of Congress creating TVA permits removal of any member of the board either by concurrent resolution of both houses of Congress (without presidential signature) or by the President alone if the board member is guilty of applying "political tests" in TVA staff appointments. Although President Roosevelt's grounds for removing Morgan were not stated in the TVA legislation, the Appeals Court upheld the firing because TVA was primarily an executive or administrative function and the President's action was within his duty to "take care that the laws be faithfully executed." TVA, said the court, "is not to be aligned with the FTC, the ICC, or other administrative bodies mainly exercising clearly quasi-legislative or quasi-judicial functions."

In its last major pronouncement on the removal power, in 1958, the Supreme Court applied a "variant of the constitutional issue decided in" the Humphrey case, ruling that President Eisenhower could not fire Myron Wiener, a member of the War Claims Commission, to make way for "personnel of my own selection." The commission had been established by Congress with "jurisdiction to receive and adjudicate according to law" World War II damage claims. Members were appointed by the President with the Senate's consent, but Congress made no provision for removal.

Justice Felix Frankfurter, writing for the Court, said the "essence" of the Humphrey decision was that it

". . . drew a sharp line of cleavage between officials who were part of the Executive establishment and were thus removable by virtue of the President's constitutional power, and those who are members of a body to exercise its judgment without the leave of hindrance of any other official or any department of the government, as to whom a power of removal exists only if Congress may fairly be said to have conferred it. This sharp differentiation derives from the difference in functions between those who are part of the Executive establishment and those whose tasks require absolute freedom from Executive interference."

Declaring that the function of the War Claims Commission was of an "intrinsic judicial character," the court concluded that "no such power (as claimed by him) is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute simply because Congress said nothing about it. The philosophy of" the Humphrey case "precludes such a claim," Frankfurter ruled.

In short, the Supreme Court cases of the past four decades seem to hold that the President has unlimited power to remove those whom he appoints to carry out his *purely* executive or administrative powers, but that Congress in carrying out any of its constitutional powers may delegate quasi-judicial appointments to the courts or may limit the President to removal for specific causes during a fixed term, or may require concurrence by one or both houses in any presidential removal of a quasi-legislative or quasi-judicial appointee.

A special Watergate prosecutor would not only need quasi-legislative powers of investigation and quasi-judicial powers of prosecution, but would "require absolute freedom from executive interference," in the words of Justice Frankfurter.

Thus, either the Hart-Bayh bill which would delegate appointment and re-

moval power of the Special Prosecutor to Judge Sirica, or the Percy bill to allow the President to appoint the prosecutor with Senate concurrence, but allow either house to overrule a presidential firing, would be constitutionally permissible. Even in the Myers case in 1926, Justice Oliver Wendell Holmes declared:

"The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power."

BIO-DATA ON HARRY KRANZ

Harry Kranz is currently a Federal Executive Fellow at the Brookings Institution, Washington, D.C., on leave from his position with the U.S. Department of Labor. A Ph.D. candidate in public policy and administration at the American University College of Public Affairs, Kranz is also an attorney and a former New Jersey newspaper editor. He has done extensive research and writing on the Presidency, the bureaucracy, and the media. His B. Litt. in Journalism was from Rutgers University (1944) and his J.D. from American University (1962). Born in New York City, he now lives in Bethesda, Maryland. The views expressed in this article are his own.

STATEMENT OF THE HONORABLE TOM RAILSBACK (R., ILL.), BEFORE THE HOUSE JUDICIARY SUBCOMMITTEE ON CRIMINAL JUSTICE

October 31, 1973

AN INDEPENDENT SPECIAL PROSECUTOR

Mr. Chairman, I am gratified to the Subcommittee for permitting me to testify on the important legislative proposals it has before it today.

The public outrage and outcry which has arisen as a result of the President's firing of Special Prosecutor Archibald Cox, the subsequent abolishment of his office and the resignation of the Attorney General and Deputy Attorney General will not subside until the American public is assured that there will be a vigorous and fair investigation of any and all allegations arising out of Watergate and other activities relating to the 1972 Presidential campaign and election. The nation has been shocked and shaken and demands action to restore public trust in our democratic institutions and processes. This subcommittee has the burden of taking the first steps in restoring public confidence and demonstrating the ability of the Government to provide for the fair and impartial administration of justice. I am confident you will take prompt and decisive action.

I have given a great deal of thought to the question of an independent special prosecutor which would be established by statute. In my opinion, the American public will accept nothing less than a totally independent special prosecutor and, in view of the recent Presidential actions, they deserve nothing less and we delude ourselves if we believe otherwise. I seriously doubt that a special prosecutor within the executive branch, operating under any restrictions—can provide the necessary assurance of a complete and fair investigation and allay the fears and apprehension of the American public and the Congress as well.

Our principal goal must be to restore public faith and confidence, and to that end, only a prosecutor independent of the executive branch and the legislative branch is acceptable. I therefore support legislation providing for the reestablishment of an office of special prosecutor with a special prosecutor, appointed by the judicial branch, who has complete and full authority to engage in a thorough investigation of all allegations of criminal and civil offenses arising out of the 1972 Presidential election and related matters.

As you are well aware, numerous bills have already been introduced on the matter of a special prosecutor. I have reviewed those calling for a judicially appointed special prosecutor and have incorporated many of their key features in legislation of my own which was introduced today. With your permission, I would like to briefly outline my proposal, calling attention to several unique provisions.

The measure I have introduced calls for the establishment of an independent office of Special Prosecutor, the head of which is to be appointed by the judges of the Federal District Court for the District of Columbia.

The Special Prosecutor would have authority to investigate and prosecute offenses relating to the Watergate breakin activities related to the 1972 Presidential campaign and allegations of criminal offenses involving the President or other Presidential appointees.

The method of appointment of the new Special Prosecutor is based on the recommendation of the American Bar Association and is the method by which vacancies in the office of U.S. Attorney may now be filled. By this approach we would avoid the problems of selection by a single individual who could ultimately sit on a case brought by the individual so named. Removal of the Special Prosecutor could only be made by the District Court for neglect of duty, willful violations of the Act or the commission of extraordinary improprieties. The President is given authority to petition the District Court for removal on the grounds that the Special Prosecutor is preventing or impairing the faithful execution of the laws of the United States.

I would only conclude that the Government stands at an important crossroads today and your work is critically important in putting us on the right path. I want to thank you again for the opportunity to appear as a witness today.

COMMON CAUSE,
2030 M STREET,
Washington, D.C., November 6, 1973.

Hon. PETER W. RODINO,
Chairman, Committee on the Judiciary,
U.S. House of Representatives, Washington, D.C.

DEAR CHAIRMAN RODINO: Common Cause is concerned about the continued integrity of the Watergate investigation and prosecutions in light of recent events. We urge prompt passage of legislation establishing an Office of Special Prosecutor to be directed by a person selected by the Judiciary.

We have had two memoranda prepared on issues raised by the proposed legislation. One examines the constitutionality of the proposal and concludes that appointment of the Special Prosecutor by the Judiciary is constitutional. The other reviews the history of the Watergate prosecution and concludes that only the appointment of a prosecutor completely independent of the Administration will conform to the prohibition against conflict of interest in the American Bar Association's Canons of Ethics.

I believe these are important pieces of legal research and request that they be included in the record of your Committee's hearings on the appointment of a Special Prosecutor.

Sincerely,

JOHN W. GARDNER, *Chairman.*

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October 29, 1973

Mr. John W. Gardner
Chairman
Common Cause
2030 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Gardner:

You have requested our opinion regarding certain aspects of the establishment by former Attorney General Elliot L. Richardson in June 1973 of a Special Watergate Prosecution Force under the direction of a Special Prosecutor, the discharge by the Special Watergate Prosecution Force (hereafter "Watergate Prosecution Force") of its mandate, and, finally, of the recent dismissal of Special Prosecutor Archibald Cox.

In the following pages, we review the creation of the Watergate Prosecution Force, the scope of its activities in light of its jurisdiction under the Department of Justice regulation defining its mandate, 28 C.F.R. 0.37 (hereafter "§ 0.37"), and the current status of the Watergate prosecution in the wake of the events of October 29, 1973. In brief our conclusions are:

(1) The establishment of the Watergate Prosecution Force and the appointment of Mr. Cox as Special Prosecutor was a lawful and appropriate commitment undertaken by President Nixon and Attorney General Richardson to investigate and prosecute the Watergate affair and other incidents and offenses involving the President, his staff and appointees;

(2) The activities of the Special Prosecutor and the Watergate Prosecution Force between its establishment on June 4, 1973 and its purported abolition on October 22, 1973, insofar as those activities have been revealed by the public record, did not transgress the mandate provided by § 0.37;

(3) In its current status, under the general supervision of Acting Attorney General Robert H. Bork and the direct control of Assistant Attorney General Petersen, or under a new Special Prosecutor within the Department of Justice, the continued investigation and prosecution of the matters for which the Watergate Prosecution Force was responsible cannot proceed further without creating impermissible conflicts of interest on the part of the supervising Justice Department officials which:

(a) contravene the Canons of Ethics;

(b) impair public confidence in the integrity of the prosecution, of the criminal justice system, and the United States Government itself; and

(c) impair the conduct of the prosecution.

FACTS

On April 30, 1973, President Nixon accepted the resignation of White House assistants H.R. Haldeman, John D. Ehrlichman, and John W. Dean III, and of Attorney General Richard G. Kleindienst. According to the statement issued by

the President on this occasion, Attorney General Kleindienst "asked to be relieved as Attorney General because he felt that he could not appropriately continue as head of the Justice Department now that it appears its investigation of the Watergate and related cases may implicate individuals with whom he has had a close personal and professional association." Presidential Documents 431 (April 30, 1973). The President observed that in resigning, "Mr. Kleindienst has acted in accordance with the highest standards of public service and legal ethics." Id. While accepting Kleindienst's resignation, Mr. Nixon simultaneously announced that the name of Elliot L. Richardson, then Secretary of Defense, would be submitted to the Senate as nominee to be the new Attorney General.

On the evening of April 30, 1973, President Nixon explained these developments to the nation in a television address. With respect to the Attorney General-designate, Mr. Nixon said that he had directed him to do "everything necessary to ensure that the Department of Justice has the confidence and trust of every law-abiding person in this country." Id. at 434. Further, the President said that he had given Richardson "absolute authority" over "the Watergate case and related matters." Id. Finally, he said, "I have instructed him that if he should consider it appropriate, he has the authority to name a special supervising prosecutor for matters arising out of the case." Id. at 434-35.

Confirmation hearings began before the Senate Judiciary Committee on May 9, 1973. The Attorney General-designate, who remained on the stand through five additional days of hearings (May 10, 14, 15, 21, and 22), announced at the commencement of his testimony, that before the Committee acted on his nomination, he would select "a highly qualified and experienced individual of high character and broad experience for the role of special prosecutor in the Watergate case and related matters."

Hearings Before the Committee on the Judiciary of the United States Senate, Nomination of Elliot L. Richardson to be Attorney General, 93d Cong., 1st Sess. 4 (May 9, 1973) (hereafter "Richardson Confirmation Hearings.") Richardson stated that he had already consulted with individuals and organizations, including the President of the American Bar Association, seeking candidates for the Special Prosecutor position.

The balance of the hearings was mainly devoted to an exhaustive review of the terms of the charter that would be given the Special Prosecutor. On May 21, 1973, Mr. Richardson introduced his designee for the position, Professor Archibald Cox of the Harvard Law School, formerly Solicitor General of the United States. At the same time, he presented to the Committee the provisions of the mandate which Professor Cox had agreed to undertake. As reported in The New York Times for May 17, 1973, that mandate conferred broad jurisdiction*/ on the Special Prosecutor, granting him "full authority for investigating and prosecuting" three categories of matters:

> (1) ". . . offenses against the United States arising out of the unauthorized entry into Democratic National Committee headquarters at the Watergate . . ."
>
> (2) ". . . all offenses arising out of the 1972 Presidential election for which the special prosecutor deems it necessary and appropriate to assume responsibility . . ." and
>
> (3) "allegations involving the President, members of the White House staff, or Presidential appointees. . . ."

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*/ In several respects, Mr. Richardson's guidelines went beyond the provisions of S. Res. 109, introduced May 8, 1973, by Senator Adlai Stevenson, Jr., of Illinois for himself and 29 other Democratic Senators, which requested the Attorney General-designate to take specified steps to ensure the independence of the Special Prosecutor.

The guidelines also stated that the Special Prosecutor's jurisdiction would extend to "any other matters assigned to him by the Attorney General."

In carrying out this jurisdiction, the guidelines provided that the Special Prosecutor's powers would involve "full authority" over all steps of the investigation and prosecution, including, inter alia:

> "--Conducting proceedings before grand juries and any other investigations he deems necessary;
>
> --Reviewing all documentary evidence available from any source, as to which he shall have full access;
>
> --Determining whether or not to contest the assertion of 'executive privilege' or any other testimonial privilege. . . ."

The guidelines provided that "The personnel assigned . . . to the Watergate Special Prosecution Force . . . shall be responsible only to the special prosecutor. . . ." It provided that the Special Prosecutor:

> "will have the greatest degree of independence that is consistent with the Attorney General's statutory accountability for all matters falling within the jurisdiction of the Department of Justice. The Attorney General will not countermand or interfere with the special prosecutor's decision or actions. The special prosecutor will not be removed from his duties except for extraordinary improprieties on his part."

Finally, the guidelines provided that the Special Prosecutor would continue to carry out these functions "with the full support of the Department of Justice" until the tasks were finished, or "until a date mutually agreed upon between the Attorney General and himself."

Following the examination of Mr. Cox by the Committee and of these guidelines, both the Committee and the Senate acted favorably upon the nomination of Mr. Richardson. After his confirmation, on June 4, 1973, the guidelines were embodied in a regulation duly promulgated by the Department of Justice, and Professor Cox was appointed Special Prosecutor.

The Watergate Prosecution Force grew to a staff of approximately thirty-five lawyers, supported by approximately sixty investigators, secretaries and other personnel. Its work was organized into five task forces, each with discrete responsibilities, as follows:

(1) The Watergate task force, with responsibilities for offenses arising out of the break-in itself and the ensuing cover-up;

(2) The campaign financing task force, with responsibilities for offenses against the Corrupt Practices Act of 1925, the Federal Election Campaign Act of 1971, and of campaign finance regulatory provisions;

(3) The task force concerned with illegal abuses of Government power by White House staff officials, including the so-called Ellsberg break-in, other operations of "the plumbers" and abuses of national security agencies, and abuses of the Internal Revenue Service;

(4) The campaign offenses task force, covering "dirty tricks" committed during the 1972 campaign, such as the work of Donald Segretti in connection with the 1972 Florida primary campaign and elsewhere;

(5) The ITT task force, concerned with circumstances surrounding the settlement in 1971 of the antitrust suit alleging violations of Section 7 of the Clayton Act by the Department of Justice against the International Telephone & Telegraph Corporation (1971 Trade Cases ¶ 73, 665), and alleged perjury in that connection at hearings held in 1972 before the Senate Judiciary Committee regarding the confirmation of Richard G. Kleindienst as Attorney General.

On July 13, 1973, staff members of the Senate Select Committee on Presidential campaign activities (hereafter "Senate Watergate Committee"), in the course of examining Alexander Butterfield, Administrator of the Federal Aviation Administration, and formerly an aide to former White House Chief of Staff H.R. Haldeman, learned that President Nixon had arranged for the recording on tape of conversations taking place in certain of his offices as well as on certain White House telephone conversations. In light of this revelation, the Special Prosecutor on July 23, 1973, requested that the White House turn over to him 9 separate tapes of conversations involving the President, Messrs. Haldeman, Ehrlichman, Dean, Mitchell, and other figures. The President refused the request. Cox subpoenaed the tapes, and then, after the President declined to honor the subpoena, Cox filed suit, seeking to enforce the subpoena requiring that the tapes be turned over to him for possible presentation to the grand jury. The

District Court, on August 29, 1973, held that the President was not free, as his counsel claimed, to withhold the tapes or to determine for himself the scope of "executive privilege" in the circumstances of the case. The Court ordered the tapes submitted to itself, for determination as to which portions were relevant to the investigation and unprotected by national security or other privilege and hence required to be turned over to the Special Prosecutor. The President appealed the District Court's decision. On October 12, 1973, the Court of Appeals, sitting en banc, affirmed the District Court's order, with certain modifications.

Following the Court of Appeals decision, reports appeared, later confirmed by the parties, that negotiations were in progress between the Special Prosecutor and counsel to the President, concerning the President's response to the decision. On October 19, 1973, the last day remaining of the period within which the President was entitled to seek review of the decision, White House Press Secretary Ron Ziegler announced that the President would not exercise his right to appeal to the Supreme Court, nor would he comply with the terms of the Court of Appeals' affirmance of the District Court's order. Rather than comply with the order, the President would submit summaries prepared by himself and authenticated by Senator John Stennis. It was further announced that the President had determined that the Special Prosecutor was to refrain in the future from seeking any additional Presidential materials similar to the tapes covered by the District Court's order.

These actions by the President produced the following developments:

(1) The resignation of Attorney General Elliot L. Richardson;

(2) The resignation or firing of Deputy Attorney General William S. Ruckelshaus;

(3) The appointment of Solicitor General Robert H. Bork as Acting Attorney General;

(4) The dismissal by Bork, on the President's orders, of Special Watergate Prosecutor Archibald Cox;

(5) The abolition by Bork, on the President's orders, of the Special Watergate Prosecution Task Force established within the Department of Justice on June 4, 1973, pursuant to § 0.37;

(6) The reassignment of the Watergate Task Force's functions, as stated in § 0.37, to Assistant Attorney General Henry Petersen, under the supervision of Acting Attorney General Bork.

The Special Prosecutor explained his rejection of the President's settlement and offer in a press conference held during the afternoon of October 20, stating that he would seek full compliance with the Court's order with respect to the tapes covered thereby, and would continue to seek other similar materials pertinent to his investigation. The Special Prosecutor also disclosed then for the first time that, over a considerable period, he and his staff had sought numerous additional materials from the White House, some of which the White House had failed to provide up to that point.

Considerable adverse public reaction followed the President's actions. In light of the public disapproval, the President reversed his position with respect to the tapes. At 2:00 P.M. on the afternoon of October 23, 1973, his counsel, Professor Charles Alan Wright, announced that the President would comply with the terms of the District Court's order, as modified by the Court of Appeals. The President did not,

however, reverse or alter his decision to require the dismissal of Mr. Cox or to reinstate the Watergate Prosecution Force.

ANALYSIS

A. The Establishment of the Watergate Prosecution Force.

The Watergate Prosecution Force was provided for as noted above, in a regulation duly promulgated by the Attorney General. Order No. 517-73, 38 Fed. Reg. 14688 (June 4, 1973) The regulation was codified, until "abolished" in October 1973, as 28 C.F.R. § 0.37.*/

The provisions of § 0.37, matching the terms of the guidelines reviewed by the Senate during the Richardson Confirmation Hearings, are manifestly authorized by pertinent statutes.**/ In the first instance, the Attorney General is authorized to supervise the conduct of the investigations and prosecutions covered by § 0.37, by virtue of 28 U.S.C. § 519, which provides that, "Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States . . . is a party. . . ."***/

*/ The legality of the action of Acting Attorney General Bork carrying out the President's instruction to "abolish" the Watergate Prosecution Force has been challenged by a complaint filed October 23 in the U. S. District Court for the District of Columbia. Nader v. Bork, C.A. No. 1954-73.

**/ Authority to promulgate regulations is vested by 5 U.S.C. § 301 in the heads of all executive departments (the Department of Justice is declared by 28 U.S.C. § 501 to be an executive department) for various broad purposes, including ". . . the distribution and performance of its business. . . .")

***/ It may also be noted that under 28 U.S.C. § 509, with exceptions not pertinent here, "All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General. . . ."

Under 28 U.S.C. § 510, the Attorney General is authorized to delegate his authority through "such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General."

The broad language of § 510 ("such provisions as he considers appropriate") gives ample support to the delegation by Attorney General Richardson of the very broad authority granted Special Prosecutor Cox. The statute is, indeed, susceptible of a construction which would authorize a still broader delegation, conferring all the Attorney General's authority with respect to the matters covered by § 0.37, rather than merely "the greatest degree of independence consistent with the Attorney General's statutory accountability for all matters falling within the jurisdiction of the Department of Justice," as provided by § 0.37.

During the hearings on his confirmation, the point was pressed by certain members of the Committee that Mr. Richardson should not even retain "ultimate authority" over the business of the Special Prosecutor, but that he should and could delegate to the Special Prosecutor complete responsibility, as in a case where the Attorney General recuses himself from consideration of a particular matter. See Richardson Confirmation Hearings at 13-14, 68-69. The Attorney General-designate contended that such a complete delegation was unauthorized, unless the Congress by statute carved out an explicit exception to 28 U.S.C. §§ 516, 519;*/ he also contended that

*/ 28 U.S.C. § 516 provides:

> Except as otherwise authorized by law, the conduct of litigation in which the United States . . . is a party, and securing evidence therefore, is reserved to the officers of the Department of Justice, under the direction of the Attorney General. (Emphasis added.)

thus to take the Special Prosecutor entirely out of the line of command within the Department would create practical difficulties for the Special Prosecutor, with respect to the latter's relations with and access to resources and personnel under the jurisdiction of other divisions and agencies of the Department. Id. at 69. The Special Prosecutor's mandate as ultimately reviewed by the Committee and embodied in § 0.37, reflected the view of the Attorney General-designate, retaining for him ultimate "statutory accountability" for the Special Prosecutor's business, while vesting in the Special Prosecutor "the greatest degree of independence consistent" with such retention of authority by the Attorney General, while undertaking that the Attorney General would not "countermand or interfere with the Special Prosecutor's decisions or actions," and not remove the Special Prosecutor "except for extraordinary improprieties. . . ."

Nor can there be any question that § 0.37 represented an "appropriate" delegation of authority within the meaning of § 510. The basis of the establishment of the Watergate Prosecution Force under the direction of the Special Prosecutor was the widespread perception that for the Attorney General and his direct subordinates in the Department of Justice to maintain working control over the investigation of charges involving the White House, would put him and the agency in the position of serving two masters. The Attorney General-designate emphasized this problem at the outset of the hearings. Richardson Confirmation Hearings at 4. Other leaders of the government and of the bar concurred, among them Robert Meserve, then President of the American Bar Association.*/ There is strong, indeed over-

*/ See the "President's Page," 59 A.B.A.J. 681 (July 1973):

> The Watergate scandal . . . has posed serious challenges to the legal profession because . . . the faith of the American people in the justice system, and in the governmental structure itself, are at stake.

[Footnote continued on next page]

whelming, basis in logic and legal ethics for this position, in the considerations specified below.

(1) Amenability to Presidential Control

Without a Special Prosecutor, insulated from interference by the kind of guarantees afforded Professor Cox by § 0.37, Justice Department authorities in charge of the investigation of the matters within his jurisdiction would have been in the position of investigating and possibly prosecuting their own superior and his most intimate associates. Both the Attorney General and the Assistant Attorney General, Criminal Division, on whom would have fallen direct responsibility for the investigation in the absence of § 0.37, are direct Presidential appointees. The investigation itself was expressly focused on acts involving the President and his closest associates -- the Watergate break-in and the cover-up, offenses arising out of the 1972 Presidential election, and "allegations involving the President, members of the White House staff, or Presidential appointees. . . ." The most fundamental political and personal interests of the President were necessarily threatened by an investigation with this mandate.

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> The Association's initial response was to call publicly for the appointment of a special prosecutor of recognized statute and integrity, clearly disassociated from those implicated and completely free to carry out his tasks. Soon after his nomination to be attorney general, Elliot Richardson announced that he would appoint an independent prosecutor and invited the Association's co-operation in the selection. The Administration Committee of the Board of Governors acted promptly in authorizing me to consult with him as to qualified individuals under consideration. In the course of doing so, I advised Mr. Richardson . . . that I considered it to be of the utmost importance that the person chosen have complete freedom -- in fact as well as in appearance -- to pursue the investigations wherever they might lead.

In light of the above considerations, it would seem that neither the Attorney General, the Assistant Attorney General, nor any officer subject to their direct control could assume responsibility for the matters covered by § 0.37, consistent with Canon 5 of the Code of Professional Responsibility. Canon 5 provides that "A lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." Ethical Consideration 5-1 goes on to state:

> The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client. (Emphasis added.)

It would seem obvious that "compromising influences and loyalties" within the meaning of EC 5-1 are inherent in the assumption by a Presidential appointee of direct control over the matters covered by § 0.37.

Furthermore, on the historical record of the past year and one half, this conflict of interest was not merely theoretical. Prior to the assumption by Mr. Cox of the responsibility for the investigation, Justice Department authorities and other officials under the President's supervision had quite plainly failed to launch an effective investigation. On August 29, 1972, the President stated that a thorough investigation of the Watergate affair had been conducted by his counsel, John W. Dean III, which had demonstrated that no individuals then serving in the Government had been involved in the break-in.*/ According to Dean's sworn testimony before

*/ The President stated, "Within our own staff, under my direction, Counsel to the President, Mr. Dean, has conducted a complete investigation of all leads which might involve any present members of the White House or anybody in the government. I can say categorically, that this investigation indicates that no one presently employed, was involved in this very bizarre incident." Presidential Documents 1306 (August 29, 1972)

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the Senate Watergate Committee, no such investigation was ever conducted. See Hearings Before the Senate Select Committee on Presidential Campaign Activities, 93d Cong., 1st Sess. 955-56 (June 25, 1973) (hereafter "Senate Watergate Hearings").

Subsequently, on April 30, 1973, in his address to the nation on the Watergate investigation, President Nixon stated that, on March 21, he "personally assumed responsibility for coordinating intensive new inquiries," and that he "personally ordered those conducting the investigations to get all the facts and to report them directly to me, right here in this office." Presidential Documents 434 (April 30, 1973) Assistant Attorney General Petersen subsequently testified under oath to the Senate Watergate Committee that he could not recall receiving any such order from the President.

During this period, on April 18, 1973, the President personally ordered the Assistant Attorney General, Henry Petersen, to ignore the burglary of the offices of Dr. Lewis Fielding, Daniel Ellsberg's psychiatrist, on the ground that this was a matter of national security not properly cognizable by the criminal process. The Ellsberg break-in was not publicly revealed until April 27, 1973, when the President changed his mind on the urging of Assistant General Petersen and Attorney General Kleindienst, and permitted the Justice Department to make disclosure to the District Court conducting the Ellsberg trial. During the Senate Watergate Committee hearings, the former Deputy Director of the Central Intelligence Agency, now Commandant of the U. S. Marine Corps, and the former Acting Director of the Federal Bureau of Investigation, testified that strong efforts had been made by the highest officials on the White House staff, invoking the name of the President, to encourage the C.I.A. to ask the F.B.I. to desist from its investigation of alleged illegal "laundering" of campaign contributions through Mexican intermediaries to the Committee to Re-elect the President (hereafter "CREEP"), which funds ultimately passed through a bank account in the name of one of the Watergate burglars.

On April 17, 1973, the President stated that he had "expressed to the appropriate authorities my view that no individual holding, in the past or present, a position of major importance in the Administration should be given immunity from prosecution." Presidential Documents 384 (April 17, 1973) This statement was widely interpreted to preclude investigators from using an effective device to encourage the divulgence of information about other individuals involved in activities under investigation, a central concern expressed during the hearings on Mr. Richardson's nomination, as was specifically reflected in § 0.37.

Against this historical background, in light of the Code of Professional Responsibility, the effort by Attorney General Richardson to insulate the investigation from the direct control of officials directly amenable to Presidential control was manifestly "appropriate" within the meaning of 28 U.S.C. § 510.

(2) Assistant Attorney General Petersen's potential status as a witness.

A basic aspect of the subsidiary principles implementing Canon 5 is the injunction against an attorney serving as counsel and witness in the same proceeding. This policy is stated in Ethical Considerations EC 5-8 and EC 5-9. It is enforced through Disciplinary Rules 5-101 and 5-102, which provide in pertinent part:

> DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair his Independent Professional Judgment.
>
> * * *
>
> (B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:
>
> * * *

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

DR 5-102 Withdrawal as Counsel When the Lawyer Becomes a Witness

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

While we express no opinion as to whether these disciplinary rules would actually have been violated by Assistant Attorney General Petersen's continued conduct of the case, it is evident a substantial question could be raised under these provisions about the propriety of such a course. On the basis of facts now on the public record, Mr. Petersen could well become a witness to charges growing out of a number of matters under the jurisdiction of the Special Prosecutor under § 0.37, especially in view of the continuing contact between John Dean and Petersen regarding the status of the Watergate investigation from June 1972 through March 1973.

(3) Assistant Attorney General Petersen's professional and personal relationships to targets of the investigation.

Assistant Attorney General Petersen, though a career civil servant of the highest personal reputation for competence and integrity, was nevertheless a close associate of individuals threatened by the investigations placed under the Special Prosecutor's jurisdiction, especially former Attorney General John Mitchell and former Assistant Attorney General Robert Mardian. Mr. Mitchell's successor, Richard G. Kleindienst, took note of this problem when he submitted his resignation on April 30, 1973, and President Nixon acknowledged it in accepting Kleindienst's resignation, as noted above. While Mr. Petersen's ties to former associates such as Mr. Mitchell may have not been so close as those of Mr. Kleindienst, nevertheless the difference would appear to be a matter of degree. As such, on this additional ground, the fitness of Mr. Petersen to continue as supervisor of these investigations may be seriously questioned under Canon 5, especially EC 5-1.

(4) Assistant Attorney General Petersen's personal stake in decisions made in the course of his prior investigation.

Another element militating in favor of the substitution of a special prosecutor for Mr. Petersen was the fact that he had already conducted an investigation which, in the light of intervening revelations, the Special Prosecutor would reexamine and possibly reverse. One such decision was Mr. Petersen's determination to decline to investigate "dirty tricks" operations growing out of the 1972 Nixon campaign, e.g., the Segretti operation. Another such apparent decision was the failure of the Department of Justice up to the time of the promulgation of § 0.37 to pursue the request of members of the Senate Judiciary Committee to examine testimony presented at hearings held in the spring of 1972 concerning the nomination of Mr. Kleindienst as Attorney General, for possible perjury in connection with the ITT affair. Partly in recognition of this problem, no doubt, Attorney General

Richardson subsequently specifically assigned responsibility for investigating the ITT matter to the Watergate Prosecution Force.

(5) The possibility that prospective informants might be deterred from disclosing information.

A further significant risk of impairing the effectiveness of the investigation, inherent in placing it under the supervision of Presidential appointees loyal to the President and within his direct control, is the likelihood that prospective informants would be deterred from disclosing information. Regardless of the good faith and professional standards which Mr. Petersen and other officials possessed in fact, it could well have seemed extremely dangerous for prospective informants to turn over information to such officials, if the information was damaging to the President and if the informants were vulnerable to White House retaliation. This problem might have seemed a real one to Attorney General Richardson, or to prospective informants, because of the history revealed to the public at the Senate Watergate Hearings of contact between Mr. Petersen and Mr. Dean and other White House officials during the previous months.

(6) The possibility that targets of the investigation would be unfairly treated.

A contrary -- though very real -- problem inherent in the conduct of a prosecution by individuals in a situation of apparent divided loyalty is the possibility that targets and defendants might be treated with excessive harshness. Senator Hart, for example, stressed that, regardless of the true nature of an Attorney General's good faith and loyalties in a matter such as Watergate, the public would regard him as "the administration's man," rather than "their [the public's] man." Richardson Confirmation Hearings at 15. To overcome such suspicions, a Presidentially appointed prosecutor might well be motivated, however unconsciously, for example, to indict

on evidence which under other circumstances he might consider insufficient. Such unfortunate and unfair actions would be considerably less likely if responsibility were placed in the hands of a prosecutor whose decisions to forego prosecution would not automatically be suspect in the eyes of the public.

(7) The appearance of justice.

Finally, the promulgation of § 0.37 was appropriate, irrespective of the validity vel non of all the foregoing considerations, because of the fact that the Code of Professional Conduct is concerned as much with assuring that the legal system provides the appearance as it is with the reality of justice and fairness. See Canon 9. See also American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function § 1.2(a) (Approved Draft 1971).*/ This aspect of Attorney General Richardson's responsibilities was emphasized both by the Senate Judiciary Committee during his confirmation hearings (Richardson Confirmation Hearings 14-15) and by President Nixon himself in his announcement of Mr. Richardson's nomination, when the President said:

> "I have directed him to do everything necessary to ensure that the Department of Justice has the confidence and the trust of every law-abiding person in this country." Presidential Documents 434 (April 30, 1973)

On this ground alone, the promulgation of § 0.37 was plainly appropriate.

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*/ This section provides that: "A prosecutor should avoid the appearance or reality of a conflict of interest with respect to his official duties."

B. The Adherence by the Watergate Prosecution Force to its Mandate

The express basis of the President's decision to instruct the Attorney General to discharge Special Prosecutor Cox and to abolish the Watergate Prosecution Force was not that the Force had exceeded its jurisdiction in its investigation. On the contrary, Mr. Cox was discharged for his refusal to comply with conditions which were utterly inconsistent with his mandate. These conditions were (1) not to contest the President's proposal -- subsequently withdrawn -- to substitute an authenticated summary of the tapes for the tapes themselves in response to the Court's order, and (2) the instruction not to seek any further tapes, documents, or Presidential materials similar to the tapes. See letters exchanged between Special Prosecutor Cox and Charles Alan Wright, counsel to the President, dated October 19, 1973. Although there is some dispute between Cox and Wright as to the precise scope of the class of materials which Cox had been instructed to refrain from seeking,*/ there is no doubt that, for Cox to agree to any such limitation would have violated the provisions of § 0.37.**/

*/ Wright stated on this point:

> In what you list as point four you describe my position as being that you "must categorically agree not to subpoena any other White House tape, paper, or document." When I indicated that the ninth of your comments on the 18th was unacceptable, I had in mind only what I referred to in my letter as "private presidential papers and meetings," a category that I regard as much, much smaller than the great mass of White House documents with which the President has not personally been involved.

**/ Former Attorney General Richardson indicated at his press conference on October 23, 1973, that the President's intention

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Nor can there be any basis for contending that the Special Prosecutor's investigations had exceeded his mandate, insofar as the public record discloses. It is known that the investigation had gone beyond the immediate Watergate incident itself and the ensuing cover-up. Some of these inquiries evidently caused concern within the White House. In the Washington Post for October 28, 1973 (p. A6), for example, it is reported that at a news briefing at the White House on October 22, 1973, General Alexander Haig, the President's Chief of Staff, stated that "There are many of us who have been somewhat concerned about . . . what on occasion appear to be roamings outside the jurisdiction of the charter." In the same article, it is reported that the President himself was especially "irritated" by the investigation of the Watergate Prosecution Force into the payment by agents of Howard Hughes of $100,000 to President Nixon's friend, Charles G. Rebozo.*/ However, the provisions of § 0.37 show that Mr. Cox's

[Footnote continued from previous page]

to preclude access by the Special Prosecutor to further Presidential materials was both crucial to the President's position and the basis for Mr. Richardson's own refusal to carry out the instruction to discharge Mr. Cox and his resignation. In an interview with CBS News on October 24, 1973, the former Special Prosecutor indicated that he maintained a flexible position with respect to the settlement of the immediate question of the President's response to the Court order. Transcript of CBS Evening News with Walter Cronkite 4 (October 24, 1973) (hereafter "Cox CBS Interview"): "We could have talked that through, I think, except that when Mr. Wright came into the picture, he said, 'You'll never get the tapes' -- or other evidence of Presidential conversations, and, to my way of thinking, it was that that really cut off the discussions."

*/ In his October 24 interview with Mr. Cox, Walter Cronkite raised this issue:

[Footnote continued on next page]

jurisdiction was intended to go far beyond the Watergate incident itself and that his mission clearly encompassed matters such as the Hughes-Rebozo transaction or the controversy over campaign contributions by the dairy lobby. The mandate extended to "all offenses arising out of the 1972 Presidential election" and, finally, to all "allegations involving the President, members of the White House staff, or Presidential appointees, and any other matters assigned to him by the Attorney General." During the hearings on his nomination, the Attorney General-designate and Senator Kennedy had the following exchange, which cogently summarizes his representations to the Committee as to the scope of the Special Prosecutor's jurisdiction (Richardson Confirmation Hearings 44-45):

> Senator KENNEDY. The inclusion of activities that were prior to the campaign -- the noncampaign activities by some of the conspirators while in government, would that be included as well?

[Footnote continued from previous page]

"CRONKITE: Mr. Cox, clearly there was a line, or lines, of investigation, aside from Watergate, or peripheral to Watergate, that worried the White House. Can you tell us what they were?

"COX: Not -- with any assurance. We were carrying on investigations into the abuses of national security and other government agencies like the Internal Revenue Ser- -- Service. I say the abuses -- into the possible abuse, because we hadn't gotten to the point where anyone could find guilt or innocence either way. There were inquiries being pushed into the raising of campaign funds, particularly some very large funds raised in close conjunction with White House staff in 1970 and raised, I think, chiefly in cash. --" Cox CBS Interview 6.

> Secretary RICHARDSON. I think so, if I understand what you are saying. I would like just to go back for a moment to a point I made earlier; namely, that it seems to me that given the variety of acts or activities that have come to light lately, the only common denominator that seems to me relevant in deciding what the scope of the jurisdiction of the special prosecutor should be is the involvement of White House personnel, major administration appointees, or, as you have added and I agree, people who were part of the Committee to Reelect.
>
> Senator KENNEDY. Both within the campaign, the CREEP campaign and --
>
> Secretary RICHARDSON. Yes, Senator Kennedy -- to put it another way, what is involved here is a situation in which the confidence in the conduct of governmental and political processes has reached a crisis stage. A special prosecutor should be charged with responsibility for matters that affect that confidence. So this, I think, is in the broadest sense the touchstone that should determine what areas are assigned to him. (Emphasis added.)

The hearings on Mr. Richardson's nomination are replete with other statements by Messrs. Richardson and Cox, by members of the Committee, and by other Senators*/ to the effect that the

*/ Senators Cranston and Goldwater wrote a letter to the Committee expressing their concern that matters such as the Ellsberg break-in be made subject to the Special Prosecutor's jurisdiction. The Attorney General-designate and members of the Committee agreed that the break-in was plainly covered by the provisions of the mandate. Richardson Confirmation Hearings 191-92.

Special Prosecutor should, and under the provisions subsequently embodied in § 0.37 would, have authority fully as broad as the literal reading of the terms of the mandate. See Richardson Confirmation Hearings 153-54, 191-92, 213. None of the activities attributed to any of the five task forces described above nor discussed by Mr. Cox in his CBS Interview, nor mentioned by any other public source of which we are aware has described an investigation which roamed beyond the extremely broad provisions of § 0.37.

C. The Reassignment of the Functions of the Special Prosecutor to the Assistant Attorney General, Criminal Division, and the Acting Attorney General, or to a new Presidentially-appointed Special Prosecutor.

The dismissal of Special Prosecutor Cox and the subsequent repeal of § 0.37 by Acting Attorney General Bork, has been challenged, as noted above, in a complaint filed October 23, 1973, in the District Court for the District of Columbia. Nader v. Bork, C.A. No. 1954-73. The discharge of Mr. Cox is alleged to be unlawful, in that it contravenes the terms of § 0.37, which was in effect at the time of this action, October 20, 1973. The subsequent repeal of the regulation, undertaken on October 22, 1973, is further challenged, on the ground that, as Acting Attorney General, Mr. Bork did not possess sufficient authority to make this decision. The authority of an Acting Attorney General, other than the Deputy Attorney General, is based on 28 U.S.C. § 508(b), which allegedly confers more limited authority, encompassing only "caretaker" functions, than is conferred on the Deputy Attorney General acting as Attorney General under 28 U.S.C. § 508(a). Cf. Williams v. Phillips, 360 F. Supp. 1363 (D.D.C. 1973).

Whatever the outcome of Nader v. Bork, the investigation is presently under the direct control of Assistant Attorney General Petersen and Acting Attorney General Bork. The President, in his news conference of October 26,

1973, stated his intention to name a new Special Prosecutor within the Justice Department, while making it clear that Mr. Cox's successor, when one is appointed, would not be permitted to exercise the right recognized by the courts [In re Subpoena to Nixon, 360 F. Supp. 1 (D.D.C. 1973), aff'd, Nos. 73-1962, 1967, 1989 (D.C. Cir. October 12, 1973)] to seek "presidential documents" in court.*/ For the reasons stated in Section A of this letter, above, we believe that this arrangement, as it now exists or as it would under the President's plan, creates an impermissible relationship within the Executive Branch, and creates the appearance and reality of conflict of interest in the administration of the investigations initiated by the Watergate Prosecution Force.

Moreover, to the seven considerations noted in Section A, as to the inappropriateness in May and June 1973 of housing the Watergate investigation in the Department of Justice under the direct control of the Assistant Attorney General and the Attorney General, at least two additional considerations would now have to be counted against this arrangement:

(1) The possibility that the Department of Justice may not litigate against the President.

In a widely noted article, Professor Alexander Bickel of the Yale Law School contended in September 1973 that the Special Prosecutor's quest for tapes withheld by President Nixon was nonjusticiable in that it was not a "case or controversy" within the meaning of Article II of the Constitution. A. M. Bickel, "The Tapes, Cox, Nixon," The New Republic 13 (September 29, 1973). The basis of Professor

*/ The decision of the Court of Appeals is published at p. S.19303 of the Congressional Record for October 18, 1973.

Bickel's position was that the suit was a "contrived controversy" because, technically -- as it seemed at the time -- Mr. Cox was not Mr. Nixon's adversary, but his subordinate. Id. at 14. Now that the President has in fact discharged Mr. Cox, the position suggested by Professor Bickel would have considerable force as applied to the Attorney General himself, and it would have substantial force applied even to a Special Prosecutor within the Justice Department (as opposed to a Special Prosecutor established by legislation outside the control of the President). To the extent that this conclusion has merit, any official of the Justice Department would be precluded from litigating in pursuit of the tapes, memoranda, and other Presidential materials which the President had sought to prevent Special Prosecutor Cox from seeking.

(2) The Demonstration by President Nixon that he will not delegate full authority to investigate certain matters placed under the jurisdiction of the Watergate Prosecution Force by § 0.37.

The most significant difference between the current situation and the situation prevailing at the time of the adoption of § 0.37, is the recent decision by President Nixon to nullify that mandate. Recent events make it considerably more difficult to expect, and for the public to believe, that the President would maintain the independence of an investigation managed by other officials answerable to him, or that he would permit them to continue with an investigation which transgressed what he considered proper bounds. In light of the events of October 20, 1973, this conclusion would not be entirely vitiated, even if the President were to alter the position taken at his news conference of October 26, 1973, so as to give his new Special Prosecutor the full authority originally granted Mr. Cox. Hence, the conflicts of interest, noted above, which would have plagued an investigation directed by Assistant Attorney General Petersen in May and June of 1973, would at this time be exacerbated by any arrangement under the control of the President.

While we express no opinion here as to the constitutionality of the various proposals under consideration by the Congress for establishment of a Special Prosecutor independent of the President, we nevertheless note one mechanism which would avoid the conflict of interest problems inherent in a presidentially appointed Special Prosecutor. Congress could enact a statute providing that the Chief Judge of the District Court for the District of Columbia could, upon a finding that supervision of the investigation by the Department of Justice would involve impermissible conflicts of interest, himself appoint a Special Prosecutor to be financed through funds provided directly by the Secretary of the Treasury.

Sincerely yours,

ARNOLD & PORTER

By Mitchell Rogovin
Mitchell Rogovin

Simon Lazarus III
Simon Lazarus III

The Constitutionality of the Appointment of a Special Prosecutor by the Judiciary

(Prepared by: Kenneth J. Guido, Jr., Director of Litigation)

Legislation requiring the appointment of a new special Watergate Prosecutor by the Chief Judge of the District Court for the District of Columbia, or a panel of judges thereof, is presently under consideration by the Congress. The proposals would assign to the Prosecutor the responsibilities previously assigned to Archibald Cox, under the Justice Department regulations, 28 C.F.R. 0, 37. These include the responsibility: (1) to conduct all grand jury proceedings and represent it in obtaining documents and witnesses in its investigation; (2) to frame and sign indictments and file presentments; (3) to conduct all criminal prosecutions and appeals; (4) to deal with and appear before congressional committees having jurisdiction over matters within the scope of his authority; (5) to provide such information, documents and other evidence as may be necessary and appropriate to enable any such committee to exercise its responsibilities; and (6) to submit a final report to the Chief Judge of the United States District Court for the District of Columbia, to the Speaker of the House of Representatives, and to the President Pro Tempore of the Senate. The constitutionality of the statutory delegation to the District Court for the District of Columbia of the authority to appoint a special prosecutor with these powers to investigate, initiate and prosecute offenses and to assist the Congress in the exercise of its responsibilities in investigating charges arising out of the Watergate break-in and related events has been raised.

We have examined the facts surrounding the present controversy concerning the jurisdiction of the Department of Justice to investigate this matter and the constitutional precedents applicable to the proposal. It is our conclusion that there is ample constitutional authority for such legislation.

SUMMARY OF ARGUMENT

The manner in which officers of the United States, including a Special Prosecutor, are appointed is controlled by Article II, § 2., cl. 2, which provides:

> [The President] shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, Judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: *But the Congress may, by law, vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.* (Emphasis added).

I. The Language of Article II, § 2, cl. 2.

The language of Article II explicitly requires the appointment of Ambassadors, Public Ministers and Consuls, and Judges of the Supreme Court, to be appointed by the President by and with the consent of the Senate, and other officers of the United States when other provisions of the Constitution so require. By providing that "Congress may by law, vest the appointment of *such* inferior officers . . . in the President alone, in the courts of law, or in the heads of departments," a literal reading of Article II leads to the inescapable conclusion that "such inferior officers" refers to those offices the appointment to which are not otherwise provided for in the Constitution or are created by statute. The contrary interpretation, that inferior officers means the subordinates of the appointing authority, does injustice to the language of the provision since it leaves the term "such" as surplus language which the Supreme Court has repeatedly stated cannot be rationally assumed. *Platt* v. *Union Pacific Ry. Co.*, 99 U.S. 48 (1878): *Singer* v. *United States*, 232 U.S. 338 (1944). Moreover, such an interpretation requires a hermetic sealing off of the performance of separate functions which is impossible to achieve, *Waymen* v. *Southard*, 23 U.S. 1 (1825) (Opinion of Justice Marshall); *Wiener* v. *United States*, 357 U.S. 347 (1958), and ignores the phrase which delegates to Congress the authority to confer the appointment power upon the persons listed "as they [Congress] think proper."

II. The History of Article II, § 2, cl. 2.

When the inquiry is carried beyond the language of Article II, § 2, cl. 2., into the history of its adoption at the Constitutional Convention, whatever doubts as

to the intent that survived consideration of the bare language should be wholly dissipated. During the debates on Article II, it was proposed that the President should appoint by and with the consent of the Senate all officers of the United States, unless another provision of the Constitution provided otherwise. II Farrand, p. 398, 405, 496, 533. This precipitated strong objections. One group distrusted the authorization of participation by the Senate because they felt one individual who could be visibly held responsible should make the appointments. II Farrand, pp. 538–539. Another group strongly opposed delegating exclusive power of appointment to the executive because this might lead to the establishment of dictatorial power. II Farrand, p. 405, 550, 545.

The final votes were taken on Article II on September 15, 1787. As recommended the Article provided that the executive "shall nominate and by and with the consent of the Senate shall appoint ambassadors, and other public ministers, Judges of the Supreme Court, and all other Officers of the United States, whose appointments are not otherwise herein provided for." II Farrand, p. 499. The Convention, however, added after the words "provided for" the words "and which shall be established by law" so as to remove any doubts that the appointment of their officers was to extend only to those created by law. II Ferrand, p. 621. Moreover, that same day Gouverneur Morris moved to add at the end of the appointment power the provision "but the Congress may by law vest the appointment of such inferior officers as they think proper, in the President alone, in the Courts of Law, or in the heads of departments." Mr. Madison observed that if the provision was necessary at all, superior officers below heads of departments ought in some cases to have the same authority to appoint lesser officers. The motion was initially defeated on equal division, but at the urging of those who felt that it was too essential to be omitted, it was revived and passed. II Farrand, p. 627–628. Consequently, the history of the clause's development illuminates its meaning, and it is apparent that Congress was to be reserved the authority to determine by whom appointments below that of department heads were to be made and that the term "inferior officers" in no way was intended to limit from which of the three named bodies Congress was to select in conferring the power of appointment.

III. The Judicial Interpretation of Article II, § 2, cl. 2.

This is a conclusion that is uniformly supported by the case law. In the leading case of *Ex parte Siebold*, 100 U.S. 371, (1879), the Supreme Court was faced with a claim that the power to appont supervisors of elections, which Congress vested in the courts, was not authorized by Article II, § 2, cl. 2, since the power to vest the authority to appoint in the courts related only to offices concerned exclusively with the administration of the Judiciary. In rejecting this argument, and supporting the interpretation revealed by the language and the history of Article II, the Supreme Court stated:

> ". . . It is, no doubt, usual and proper to vest the appointment of such inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution; and, if there were, it would be difficult in many cases to determine to which department an office properly belonged. Take that of Marshal, for instance. He is an executive officer, whose appointment, in ordinary cases, is left to the President and Senate. But if Congress should, as it might, vest the appointment elsewhere, it would be questionable whether it should be in the President alone, in the Department of Justice, or in the courts; and, in the case of vacancy, Congress has in fact passed a law bestowing the temporary appointment of the Marshal upon the justice of the circuit in which the district where the vacancy occurs is situated.
>
> But as the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress. And, looking at the subject in a practical light, it is, perhaps, better it should rest there, than that the country should be harassed by the endless controversies to which a more specific direction on this subject might have given rise. The observation in the case of *Hennen*, to which reference is made, *Ex parte Hennen*, 13 Pet. 258, that the appointing power in the clause referred to "was, no doubt, intended to be exercised by the department of the government to which the official to be appointed most appropriately belonged, "was not intended to define the constitutional power of Congress in this regard, but rather to express the law or rule by which it

should be governed. The cases in which the courts have declined to exercise certain duties imposed by Congress, stand upon a different consideration from that which applies in the present case. The Law of 1792, 1 Stat. at L. 243, which required the circuit courts to examine claims of revolutionary pensions, and the Law of 1849, 9 Stat. at L. 414, authorizing the District Judge of Florida to examine and ajudicate upon claims for injuries suffered by the inhabitants of Florida from the American Army in 1812, were rightfully held to impose upon the courts powers not judicial, and were, therefore, void. But the duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts; and in the present case there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void. It cannot be affirmed that the appointment of the officers in question could, with any greater propriety, and certainly not with equal regard to convenience, have been assigned to any other despositary of official power capable of exercising it. Neither the President, nor any head of department, could have been equally competent to the task.

In our judgment, Congress had the power to vest the appointment of the supervisors in question in the circuit courts." 100 U.S. at 397–398.

Ex parte Siebold, supra, has been consistently cited approvingly by the Supreme Court. Moreover, there is no case that has held the delegation of the appointment power to a court or the judges of a court unconstitutional. Conversely, the appointments that have been so vested have uniformly been upheld, revealing a long established view of the extent to which the appointive power may be conferred upon the judiciary. See e.g. *Hobson v. Hansen*, 265 F. Supp. 902, 914 (D.C.D.C. 1967). For example, Congress has empowered the district courts to appoint clerks of the district courts, 28 U.S.C. § 751; to appoint referees in bankruptcy, 11 U.S.C. § 62; to appoint United States commissioners, 28 U.S.C. § 631; to appoint supervisors of federal elections, 16 Stat. §433; to appoint members of the Board of Education of the District of Columbia, D.C. Code § 31–101 (1961 Ed.); and to appoint temporary United States Attorneys, 28 U.S.C. § 546.

Moreover, the above mentioned statutes conferring appointive power upon a court or judges of a court have been upheld as valid exercises of congressional power under Article II, § 2, cl. 2. See *In re Hennen*, 13 Pet. 230 (1839) (Clerks of the District Courts); *Birch v. Steele*, 165 F. 577, 586 (5th Cir. 1908) (Referees in bankruptcy); *Rice v. Ames*, 180 U.S. 371, 378, 21 S. Ct. 406 (1901), *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 353, 51 S. Ct. 153 (1931), *In re Circuit Ct.* 65 F. 314 (C.C. W.D.N.R. 1894) (United States Commissioners); *Ex parte Siebold*, 100 U.S. 371 (1880), (Supervisors of federal elections); *Hobson v. Hansen*, 265 F. Supp. 902, 912–916 (D.C. D.C. 1967) (Members of the Board of Election of the District of Columbia); and *United States v. Solomon*, 216 835 (S.D.N.Y. 1963) (United States Attorneys).

It cannot seriously be argued that the prosecutor is not an officer of the court, not counsel to the grand jury, and is not subject to the disciplinary power of the Court. See, *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 352–353, 51 S. Ct. 153, 156–157 (1931); *United States v. Smyth*, 104 F. Supp. 282, 306 (N.D. Calif. 1952); *In re Sylvester*, 41 F. 2d 231, 236 (S.D.N.Y. 1930); *United States v. Maresco*, 266 F. 173, 717 (D.C.D.C. ——). Similar to the Federal Trade Commissioners in *Humphrey's Executor v. United States*, 295 U.S. 602, 55 S. Ct. 869 (1934), the Special Prosecutor is charged with duties which are judicial, legislative and executive, thereby justifying his appointment by the courts if Congress deems it appropriate. Consequently, it cannot be seriously argued that the functions of a Special Prosecutor are not ancillary to the judiciary and that a Special Prosecutor does not qualify as an "inferior officer."

IV. United States v. Cox

Opponents to the delegation of authority to appoint a Special Prosecutor to the courts cite *United States v. Cox*, 342 F. 2d 167 (5th Cir. 1965), cert. den., 85 S. Ct. 1767 (1965), for the proposition that separation of power's precludes such a judicial appointment. In so arguing, the opponents misread that opinion or misrepresent what was decided. Three of the seven judges rested their decision on constitutional grounds. *Supra* 171, 185. Three judges dissented, objecting to the assertion the grand jury is subservient to the executive, and stated that in a proper case the court could appoint counsel to prosecute the case. *Supra* at 177–179.

Judge Brown was the key vote in the *Cox* case. Although he agreed with the

decision to revise the contempt order on the grounds that the U.S. Attorney could not be compelled by the Court to *sign* the indictment, he sided with the three dissenting judges to constitute the fourth man in a four to three majority holding that the U.S. Attorney *could* be compelled to aid the grand jury in drafting an indictment in legal form. *Supra* at 182. Also, unlike the three judges who rested their decision on constitutional grounds, Judge Brown did not defend his position on constitutional grounds. Rather, his decision that the U.S. Attorney should be vested with unlimited discretion as to whether prosecution was to be maintained was based on a theory that the responsibility of prosecution should not be vested with the grand jury because of the secrecy of their proceedings, their political irresponsibility, and their lack of expertise in understanding complex federal crimes and statutes. *Supra* at 182. He also interpreted Rule 48 (a) of the Federal Rules of Criminal Procedure to give unlimited discretion to the U.S. Attorney to dismiss indictments once issued. *Supra* at 182. Although Judge Brown mentioned that his approach preserved the "time proved wisdom of separation of powers," *supra*, at 185, he carefully avoided resting his decision upon these grounds. Thus, contrary to that which the opponents to the authorization of judicial appointment of the Special Prosecutor assert, the *Cox* case *does not* hold that a court may not constitutionally compel a U.S. Attorney to sign a grand jury indictment.

V. Conclusion

The Special Prosecutor's responsibilities, as presently contemplated, include serving as counsel to the grand jury, prosecutor of the indictments issued by the grand jury, and as a resource for congressional committees. As such, his appointment is one which the Supreme Court must have had in mind in *Siebold* when it stated that "the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress. And, looking at the subject in a practical light, it is, perhaps, better it should rest there, than that the country should be harrassed by the endless controversies to which a more specific direction on the subject might have given rise." *Supra*. The selection of Judiciary by the Congress as the appointing authority is authorized by the explicit language of Article II, § 2, cl. 2, its legislative authority, and the case law regarding the power of appointment and limitations upon the President's power of removal. Thus, the delegation to the Judiciary is clearly constitutional.

ARGUMENT

Basic to our constitutional framework is the principle that ours is a government of expressed and not general powers. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Accordingly, the determination of the authority of Congress to enact the legislation contemplated turns upon the words of the constitution and their meaning as intended by the framers and interpreted by the courts. The manner in which officers of the United States, including a Special Prosecutor, are appointed is controlled by Article II, § 2., cl. 2., which provides:

> [The President] shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, Judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law. *But the Congress may, by law, vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.* (emphasis added).

The constitutionality of the congressional delegation of the authority to appoint a Special Prosecutor to the District Court depends on the meaning of the term "inferior officers" in Article II, § 2, cl. 2. The use of the term "inferior officers" raises two questions: (1) Does it mean persons who are not specifically required by the Constitution to be appointed by the President with the advice and consent of the Senate, or does it mean persons who do not exercise an important function, but only ministerial duties; and (2) Does it mean that the persons appointed must be those whose functions are ancillary to those of the appointing authority, or does it mean that the persons appointed must be those who are subordinate to the appointing authority or only subject to the disciplinary authority exercised by that person?

An examination of the language of Article II, § 2, cl. 2, the history of its adoption, and the case law that exists support the view that the term "inferior

officer"; (1) means persons who are not required by the Constitution to be appointed by the President with the advice and consent of the Senate; and (2) modifies the clause authorizing the appointment of other officers whose appointments are not provided for in the Constitution. And contrary to what the opponents of the legislation assert, the term "inferior officers" does not mean: (1) lower level employees who may only exercise ministerial duties; or (2) persons who are to be subordinate to the appointing authority or only subject to the appointing official's disciplinary authority.

I. The Language of Article II, § 2, cl. 2.

If it were appropriate to interpret the term "inferior officers" in isolation, it might be reasonable to conclude that it was intended to mean a person who exercises purely ministerial duties, and that it limited the congressional delegation of appointment authority to those who are subordinate to the appointing official. *Collins v. United States*, 14 Ct. Cl. 568, 574 (1878). But this is not how statutes or the Constitution are to be interpreted. More than the literal meaning of isolated words must be looked to. Instead consideration must be given to the total corpus of pertinent law, *Boys Market, Inc., v. Retail Clerks' Union, Local 770*, 398 U.S. 235, 250 (1970); *Richards v. United States*, 369 U.S. 1, 11 (1962); *Maestro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270 (1956); *United States v. Hutcheson*, 312 U.S. 219, 235 (1941), and must not be done in a way which does violence to the literal wording of the specific provision which is to be interpreted. *Utah Junk Co. v. Porter*, 328 U.S. 39 (1946). When viewed from this perspective, the language of Article II, § 2, cl. 2. almost if not conclusively establishes that the framers did not intend any such meaning by using the words "inferior officers" in Article II.

The language of Article II explicitly requires the appointment of Ambassadors, Public Ministers and Consuls, and Judges of the Supreme Court, to be appointed by the President by and with the consent of the Senate, and other officers of the United States when other provisions of the Constitution so require. The term "Ambassador" is so clear as not to require definition, but time has clouded the understanding of the terms "Ministers and Consuls." However, at the time the Constitution was drafted, a Public Minister was understood to be "a person appointed by the chief of state to act for him in a particular department of government; one entrusted with the administration of state . . . ". Oxford English Dictionary, Vol. 6 p. 473 (1961). "Consul" was used as the "English appellation of various foreign officials", Oxford English Dictionary, Vol. 2, p. 884 (1961), and by the time of the Constitution's adoption was refined to mean "an agent appointed and commissioned by a sovereign state to reside in a foreign town or port, to protect the interests of its traders and other subjects there, and to assist in all matters pertaining to the commercial relations between the two countries. Oxford English Dictionary, Vol. 2, p. 884 (1961).

Having required Presidential appointment and Senate confirmation of these officers, Article II leaves it to the Congress to specify what other offices of the United States are to be created. By providing that "Congress may by law, vest the appointment of *such* inferior officers . . . in the President alone, in the courts of law, or in the heads of departments," a literal reading of Article II leads to the inescapable conclusion that "such inferior officers" refers to those offices the appointment to which are not otherwise provided for in the Constitution or are created by statute. The contrary interpretation, that inferior officers means the subordinates of the appointing authority, does injustice to the language of the provision since it leaves the term "such" as surplus language which the Supreme Court has repeatedly stated cannot be rationally assumed. *Platt v. Union Pacific Ry. Co.*, 99 U.S. 48 (1878); *Singer v. United States*, 323 U.S. 338 (1944). Moreover, such an interpretation requires a hermetic sealing off of the performance of separate functions which is impossible to achieve, *Waymen v. Southard*, 23 U.S. 1 (1825) (Opinion of Justice Marshall); *Humphrey's Executor v. United States*, 295 U.S. 602, (1935); *Wiener v. United States*, 357 U.S. 347 (1958), and ignores the phrase which delegates to Congress the authority to confer the appointment power upon the persons listed "as they [Congress] think proper."

II. The History of Article II, § 2, cl. 2.

Ordinarily when a constitutional or statutory provision is explicit, it is inappropriate to go beyond the language of the text. *United States* v. *Great Northern Ry. Co.*, 343 U.S. 562 (1952), rehearing den., 344 U.S. 848 (1952). Quite frequently however, the history of a provision is often the most fruitful source of instruction as to the proper interpretation of a provision, *Florida* v. *United States*,

362 U.S. 145, rehearing den., 362 U.S. 972 (1960), and is often used to buttress even the most clear language in situations such as this. *Harrison v. Northern Trust Co.*, 317 U.S. 476 (1943).

When the inquiry is carried beyond the language of Article II, § 2, cl. 2., into the history of its adoption at the Constitutional Convention, whatever doubts as to the intent that survived consideration of the bare language should be wholly dissipated.

The debates on the Constitution on the power to appoint United States officers are not explicit as to the meaning of the term "such inferior officers." What is revealed, however, is that the sentiments which lead to the enactment of Article II, § 2, cl. 2., in its final form support the interpretation that the term "such inferior officers" was intended to include all those below heads of departments. As originally proposed and referred to the Committee on Detail, the appointment of all officers was to rest with the executive unless otherwise provided for. I Farrand, *The Records of the Constitutional Convention of 1787*, pp. 226, 230, 236 (Virginia Plan), 244 (New Jersey Plan), 63, 67 (Committee of the Whole, June 1, 1787), 22, 33, 117, 121, 132, 141, (Convention July 17 and 26) [hereinafter Farrand]. The Committee of Detail amended the language by inserting at the end of the delegation of authority to "appoint to offices in cases not otherwise provided for" the phrase "in the Constitution" in order to clarify that the appointment withheld by the Constitution. II Farrand, p. 185 (Report of Committee of Detail, August 6, 1787).

This delegation of unlimited authority to appoint officers of the United States precipitated strong objections. Mr. Sherman objected that the blanket delegation to the executive of the power "to appoint officers in cases not otherwise provided for in the Constitution" was delegating unfettered discretion to the executive which was potentially corrupting and moved to insert "or by law" after the word "Constitution," in order to provide for a legislative check upon the power of appointment. II Farrand, p. 405. Before a vote was taken on this motion, a motion was made by Mr. Madison and passed, substituting the term "to offices" for "officers" in order to preclude the possibility of the executive appointing officers without a previous creation of the offices by Congress. II Farrand, p. 405. Mr. Sherman's motion was then defeated. II Farrand, p. 405. A substitute motion by Mr. Dickenson was then offered and adopted which struck the clause reported by the Committee of Detail from the draft of the Constitution and inserted, "and shall appoint to all offices established by the Constitution, except in cases herein otherwise provided for, and to all offices which may hereafter be created by law." II Farrand, p. 398, 405.

The draft was then referred to a Special Committee which altered the language adopted by the Convention and, on September 4, 1787, recommended that the executive "shall nominate and by and with the consent of the Senate shall appoint ambassadors, and other public ministers, Judges of the Supreme Court, and all other Officers of the United States. whose appointments are not otherwise herein provided for." II Farrand, p. 499. This recommended substitute was accepted by the Convention with the term "and consuls," inserted after "ministers" on September 7, 1787. II Farrand, p. 533.

During the debate on the recommendation of the Special Committee, arguments were advanced against involving the Senate in the appointment of officers on the United States. II Farrand, p. 539. Nevertheless. the Convention did so, and the effect of this substitute was to extend the power of appointment to all offices of the United States and not limit it to only those which were mentioned in the Constitution, and to require Senate confirmaion of all such appointments.

Objections similar to those made to the draft of the Committee of Detail were raised to this proposal. A motion was made by Mr. Gerry to provide that no officer was to be appointed except to offices created by the Constitution or by law. It was rejected as unnecessary on September 8, 1787. II Farrand, p. 550, 545. On September 15, 1787, the Convention reversed itself, however, and added after the words "provided for" the words "and which shall be established by law" so as to remove any doubts that the appointment of other officers was to extend only to those created by law. II Farrand, p. 621. Moreover, that same day Gouverneur Morris moved to add at the end of the appointment power provision "but the Congress may by law vest the appointment of such inferior officers as they think proper, in the President alone, in the Courts of Law, or in the heads of departments." Mr. Madison observed that if the provision was necessary at all, superior officers below heads of departments ought in some cases to have the same authority to appoint lesser officers. The motion was initially defeated on equal

division but at the urging of those who felt that it was too essential to be omitted, it was revived and passed. II Farrand, p. 627–628.

Thus what has been revealed by this history is that there were two distinct pressures operating at the Constitutional Convention. One distrusted authorizing participation of a body of individuals, such as the Senate, in the appointment of United States officers because they felt one individual who could visibly be held responsible should make the decision. II Farrand, pp. 538–539. The other view strongly opposed delegating exclusive power of appointment to the executive because this might lead to the establishment of dictatorial power. II Farrand, p. 405. These two apparently conflicting positions coalesced around Article II, § 2, cl. 2., and support the conclusion that Article II, § 2, cl. 2., requires the appointment by and with the advice and consent of the Senate of Ambassadors, other Public Ministers and Consuls, and Judges of the Supreme Court. The remaining officers were to be appointed by the President alone, the Courts of Law or heads of departments as Congress deemed appropriate, unless the Constitution provided otherwise. The fact that the Convention did not adopt Mr. Madison's proposal to extend the authority below that of heads of departments, II Farrand, p. 627, and the fact that Gouverneur Morris' language was added immediately after the executive power of appointment was extended to all other officers of the United States, whose offices were not established by the Constitution but were contemplated to be created by statute, support the conclusion that their appointment, including that of Special Prosecutor, was intended to be made by the President alone, the courts of law, heads of departments, as Congress in its wisdom determines. Consequently, the history of the clause's development illuminates its meaning, and it is apparent that Congress was to be reserved the authority to determine by whom appointments below that of department heads were to be made and that the term "inferior officers" in no way was intended as a limitation upon which of the three named bodies Congress was to select from in conferring the power of appointment.

This is a conclusion supported by constitutional scholars. For example, Justice Story in his commentaries on the Constitution stated:

> "The other part of the clause, while it leaves to the president the appointment to all offices, not otherwise provided for, enables congress to vest the appointment of such inferior officers, as they may think proper, in the president, in the courts of law, or in the heads of departments. The propriety of this discretionary power in congress, to some extent, cannot well be questioned. If any discretion should be allowed, its limits could hardly admit of being exactly defined; and it might fairly be left to congress to act according to the lights of experience. It is difficult to foresee, or to provide for all the combinations of circumstances, which might vary the right to appoint in such cases. In one age the appointment might be most proper in the president; and in another age, in a department.
>
> In the practical course of the government there does not seem to have been any exact line drawn, who are and who are not to be deemed inferior officers, in the sense of the constitution, whose appointment does not necessarily require the concurrence of the Senate."

Joseph Story, *Commentaries on the Constitution of the United States*, pp. 394–398 (Little Brown 1858); see also, W. Rawle, *A View of the Constitution*, p. 164 (2nd ed. 1829); but see Corwin, *The President: Office and Powers 1787–1957*, pp. 75–76 (4th ed. 1957). And it is a view which is uniformly supported by the case law.

III. The Judicial Precedents

In the leading case of *Ex parte Siebold*, 100 U.S. 371, (1879), the Supreme Court was faced with a claim that the power to appoint supervisors of elections, which Congress vested in the courts, was not authorized by Article II, § 2, cl. 2, since the power to vest the authority to appoint in the courts related only to offices concerned exclusively with the administration of the Judiciary. In rejecting this argument, and supporting the interpretation revealed by the language and the history of Article II, the Supreme Court stated:

> ". . . It is, no doubt, usual and proper to vest the appointment of such inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution; and, if there were, it would be difficult in many cases to determine to which department an office properly belonged. Take that of Marshal, for instance. He is an executive officer, whose appointment, in

ordinary cases, is left to the President and Senate. But if Congress should, as it might, vest the appointment elsewhere, it would be questionable whether it should be in the President alone, in the Department of Justice, or in the courts; and, in the case of a vacancy, Congress has in fact passed a law bestowing the temporary appointment of the Marshal upon the justice of the circuit in which the district where the vacancy occurs is situated.

But as the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress. And, looking at the subject in a practical light, it is, perhaps, better it should rest there, than that the country should be harassed by the endless controversies to which a more specific direction on this subject might have given rise. The observation in the case of Hennen, to which reference is made, *Ex parte Hennen*, 13 Pet. 258, that the appointing power in the clause referred to "was, no doubt, intended to be exercised by the department of the government to which the official to be appointed most appropriately belonged," was not intended to define the constitutional power of Congress in this regard, but rather to express the law or rule by which it should be governed. The cases in which the courts have declined to exercise certain duties imposed by Congress, stand upon a different consideration from that which applies in the present case. The Law of 1792, 1 Stat. at L. 243, which required the circuit courts to examine claims of revolutionary pensions, and the Law of 1849, 9 Stat. at L. 414, authorizing the District Judge of Florida to examine and ajudicate upon claims for injuries suffered by the inhabitants of Florida from the American Army in 1812, were rightfully held to impose upon the courts powers not judicial, and were, therefore, void. But the duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts; and in the present case there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void. It cannot be affirmed that the appointment of the officers in question could, with any greater propriety, and certainly not with equal regard to convenience, have been assigned to any other depositary of official power capable of exercising it. Neither the President, nor any head of department, could have been equally competent to the task.

In our judgment, Congress had the power to vest the appointment of the supervisors in question in the circuit courts." 100 U.S. at 397–398.

Ex parte Siebold, supra, has been consistently cited approvingly by the Supreme Court. Moreover, there is no case that has held the delegation of the appointment power to a court or the judges of a court unconstitutional. Conversely, the appointments that have been so vested have uniformly been upheld, revealing a long established view of the extent to which the appointive power may be conferred upon the judiciary. See e.g., *Hobson v. Hansen*, 265 F. Supp. 902, 914 (D.C. D.C. 1967). For example, Congress has empowered the district courts to appoint clerks of the district courts, 28 U.S.C. § 751; to appoint referees in bankruptcy, 11 U.S.C. § 62; to appoint United States commissioners, 28 U.S.C. § 631; to appoint supervisors of federal elections, 16 Stat. 433; to appoint members of the Board of Education of the District of Columbia. D.C. Code § 31–101 (1961 Ed.); and to appoint temporary United States Attorneys, 28 U.S.C. § 546.

Moreover, the above mentioned statutes conferring appointive power upon a court or judges of a court have been upheld as valid exercises of congressional power under Article II, § 2, cl. 2. See *In re Hennen*, 13 Pet. 230 (1839) (Clerks of the District Courts); *Birch v. Steele*, 165 F. 577, 586 (5th Cir. 1908) (Referees in bankruptcy); *Rice v. Ames*, 180 U.S. 371, 378, 21 S. Ct. 406 (1901), *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 353, 51 S. Ct. 153 (1931), *In re Circuit Ct.* 65 F. 314 (C.C. W.D.N.R. 1894) (United States Commissioners); *Ex parte Siebold*, 100 U.S. 371 (1880). (Supervisors of federal elections); *Hobson v. Hansen*, 265 F. Supp. 902, 912–916 (D.C. D.C. 1967) (Members of the Board of Election of the District of Columbia); and *United States v. Solomon*, 216 F. Supp. 835 (S.D. N.Y. 1963) (United States Attorneys).

Four of these cases are of particular significance and are reviewed extensively at this point to further demonstrate that by using the term "such inferior officers", the framers of the Constitution did not intend to limit such appointment to those who exercised purely ministerial duties nor to limit the delegation of the appointment of authority to those for whom the office appointed is to be subordinate.

In *Rice* v. *Ames*, 180 U.S. 371, 21 S. Ct. 406 (1900), the Appelants had been brought before a commissioner who denied their motion to dismiss the com-

plaint and ordered them to stand committed to await the action of the proper authorities. Appellants filed for a writ of habeas corpus in the District Court which was denied and they appealed to the Supreme Court. As grounds for dismissal Appellants argued, *inter alia*, that Congress was without the constitutional power to confer upon a district judge the authority to appoint commissioners who have the authority to arrest, imprison or bail offenders, and exercise all other powers as may be conferred upon them. The Supreme Court summarily dismissed this claim stating:

> ". . . We are unable to appreciate the force of this objection. Congress having provided for commissioners, who are not judges in the constitutional sense, had a perfect right under Art. 2, § 2, cl. 2, of the Constitution, to invest the district or circuit courts with the power of appointment . . . We know of no authority holding that Congress may not vest the courts with this power, and we are reluctant to create one." 180 U.S. at 378, 21 S. Ct. at 409.

In *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 51 S. Ct. 153 (1931) the Supreme Court was again faced with a challenge to the constitutional power of Congress to confer upon courts the authority to appoint commissioners. In upholding the constitutionality of the statute the Court stated:

> "United States commissioners are inferior officers. (citation omitted). The Act of May 28, 1896, 29 Stat. 184, abolished commissioners of the circuit courts, authorized each district court to appoint United States commissioners, gave to them the same powers and duties that commissioners of the circuit courts had, required such appointments to be entered of record to the district courts, provided that the commissioners should hold their office subject to removal by the court appointing them (28 U.S. Code, § 526 [28 USCA § 529]). They are authorized by statute in respect of numerous matters and the relations between them and the district courts vary as do their official acts." 282 U.S. at 353.

The Court, in stressing the relationship to the District Court of the commissioner outlined the powers of the commissioners. These powers included the authority to arrest and imprison, or bail for trial, 18 U.S.C. § 591, to issue warrants for and examine persons charged with being fugitives from justice, 18 U.S.C., § 651, to hold to security of peace and for good behavior, 28 U.S.C. § 392, and, similar to the authority of a Special Prosecutor, authority *to institute prosecutions under laws relating to the elective franchise* and to appoint persons to execute warrants thereunder, 8 U.S.C. § 49, 51, 282 U.S. at 353, n. 2, 51 S. Ct. 156.

In *United States v. Solomon*, 216 F. Supp. 835 (S.D. N.Y. 1963), the defendants challenged their information, after waiver of indictment, on the ground that the appointment of the temporary United States Attorney under 28 U.S.C. § 506 by the District Court violated the doctrine of separation of powers. The District Court reviewed the doctrine of separation of powers and concluded that it did not preclude the appointment of a temporary United States Attorney by the District Court:

> "Although the powers of government under the United States Constitution are divided into the legislative, the executive and judicial, there is no complete separation of powers by conferring the whole of any class of functions exclusively upon the department primarily empowered to exercise them and by limiting those exercisable by it to those belonging to that class." Rottschaefer Constitutional Law, 45 (1939). See also Willis, supra at 130–177.
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> "Chief Justice Vanderbilt of the Supreme Court of New Jersey, in 1953 wrote: The division of government into three branches does not imply as its critics would have us think, three watertight compartments. Montesquieu, as we have seen, knew better; the three departments, he said, must move 'in concert.'" (Emphasis supplied). Vanderbilt, op. cit. supra at 50. The isolation of these powers is not intended and any completed division between departments is impossible. Note, Constitutional Law, Separation of Powers, 38 Yale L.J. 114 (1928); 16 C.J.S. Constitutional Law § 105, p. 486 and cases cited.
>
> "Chief Justice Vanderbilt also pointed out the many non-judicial functions performed by judges from colonial times to and including the present. Vanderbilt, *The Doctrine of the Separation of Powers and Its Present Day Significance* 113–120 (1953).
>
> As already appears, although the doctrine of separation of powers is a most salutary doctrine, it was never rigidly engrafted upon the Constitu-

tion. Its application therefore must be subordinated to the particular provisions of that instrument in this instance as to methods of appointment." 216 F. Supp. at 838–841.

Accordingly, the Court held that Article II, § 2, cl. 2, which provides that Congress may by law vest the appointment of inferior officers, as it thinks proper, in the President alone, in the courts, or in the heads of departments, authorized the vesting of the power to appoint temporary United States Attorneys in the courts.

In *Hobson* v. *Hansen*, 265 F. Supp 902 (D.C.D.C. 1967), plaintiffs brought suit for declaratory judgment and an injunction forbidding exercise of authority by members of the Board of Education of the District of Columbia on the ground that the statute under which they had been appointed was unconstitutional. The Three Judge District Court held the consitutional provision empowering Congress to exercise exclusive legislation in all cases whatsoever over the District of Columbia, Article I, § 8, cl. 17, and the constitutional provision authorizing Congress by law to vest the appointment of inferior officers, as it thinks proper, in the President alone, in the courts of law, or in the heads of departments. Article II, § 2, cl. 2, authorized Congress to enact a statute authorizing the District of Columbia judges for the District of Columbia to appoint members of the Board of Education for the District of Columbia.

In reviewing Article II, § 2, cl. 2, the Court held that the provision:

> "[w]as a deliberate decision by the Framers to enable Congress in its wisdom to authorize "the Courts of Law" to share with the executive the appointing power of federal officers.
>
> Mr. Justice Story approved the provision in his Commentaries:
>
> The propriety of this discretionary power in Congress, to some extent, cannot well be questioned. If any discretion should be allowed, its limits could hardly admit of being exactly defined; and it might fairly be left to Congress to act according to the lights of experience. It is difficult to foresee or to provide for all the combinations of circumstances which might vary the right to appoint in such cases. In one age the appointment might be most proper in the President; in another age, in a department. 2 Story, Commentaries on the Constitution of the United States 360–62 (5th Ed. 1891)." 265 F. Supp. at 911, 912.

In the course of its opinion the Court answered the charge that Congress could only authorize the appointment of officers exercising exclusively judicial functions.

> "The contention is made, however, that the provision is not to be read literally, that *In The Matter of Hennen*, 38 U.S. (13 Pet.) 230, 10 L. Ed. 138, the Supreme Court construed the appointive power of "the Courts of Law" to include only officers related in some manner to the judicial function. In *Hennen* the United States District Court for the Eastern District of Louisiana had appointed a clerk of court. The language of the Court relied upon by plaintiffs is the following:
>
> The appointing power here designated, [Article II, § 2] in the latter part of the section, was, no doubt, intended to be exercised by the department of the government to which the to be appointed most appropriately belonged. The appointment of clerks of courts properly belongs to the courts of law; and that a clerk is one of the inferior officers contemplated by this provision in the constitution cannot be questioned.
>
> 38 U.S. (13 Pet.) at 257–258.
>
> "This statement was not a decision by the Court that Congress could confer upon "the Courts of Law" the power to appoint only officers concerned with the administration of justice. *Ex parte Siebold*, 100 U.S., 371 25 L. Ed. 717, explicitly refutes such an interpretation of *Hennen*. In *Siebold* the question was whether Congress could constitutionally confer upon the United States Circuit Court of that period (1879) authority to appoint supervisors of a congressional election. It was contended Congress could not do so since the duties of the supervisors were entirely executive in character. The Court answered:
>
> It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution;

and, if there were, it would be difficult in many cases to determine to which department an office properly belonged.

"The above mentioned officials, appointed by the courts as prescribed by Congress, may be thought to be concerned with the administration of justice. Even if this were altogether correct, it does not follow that Congress is so constrained in resorting for help to a court or its judges. Though the policy followed by Congress is indicated by the use it makes of its authority, Article II is couched in terms of discretion; and Congress has not considered it can empower judges to appoint only officers concerned with the administration of justice.

The limitation which is referred to in *Siebold* is not an affirmative requirement that the duty of the officer be related to the administration of justice. It is a negative requirement that the duty may not have 'such incongruity' with the judicial function as would void the power sought to be conferred." 265 F. Supp. at 912–914.

Circuit Judge J. Skelly Wright dissented from the decision of his brethren in *Hobson v. Hansen, supra*. In so doing, however, he made it clear that even under the more narrow definition of "inferior officers" he advocated the authorization of an appointment of a special prosecutor would be permissible under Article II, § 2, cl. 2.

"Article II unquestionably empowers Congress to confide in the courts control over the appointment of ancillary officials in the judicial branch.

If historic congressional practice is germane to the constitutional question, it impressively supports the narrower construction of Article II; for, apart from § 101 and passing by the supervisors with moot status in *Siebold*, we are cited no instances, past or present, in which Congress found it necessary or proper to impose on federal courts the responsibility for appointing federal officials whose duties are unconnected with the judicial function. This tradition in Congress is in exact harmony with the insistent doctrine of our law, articulated by Article III and constitutional history, that the federal judiciary refrain from indulging in nonjudicial activities. This doctrine and the policies encircling it should be instrumental in resolving whatever ambiguity inheres in Article II." 265 F. Supp. at 920–922.

Judge Wright recognized, however, that "inferior officers" was not restricted to ministerial officers who were wholly under the supervision and control of the courts. In reviewing the statutory arrangement in *Siebold*, Judge Wright was careful to demonstrate that the activities of the appointees in that case were ancillary to the judicial process, and not subordinate to the courts, but still satisfied his interpretation of "inferior officers" in Article II § 2, cl. 2:

"Under the amendments to the Enforcement Act 16 Stat. 433 (1871), Rev. Stat. Tit. XXVI (1875), these supervisors were to do no more than witness congressional elections to find out whether voting qualifications were evenhandedly applied. Apparently they were then to report irregularities to the House of Representatives, for use as evidence if the House were requested to exercise its constitutional responsibility of judging the outcome of congressional elections. U.S. Const., Art. I, § 5, cl. 1. When the House so sits to judge elections, it exercises a function which is characteristically judicial; its procedures, then and now, contemplate the submission of complaint and answer and provide opportunity to secure depositions, Act. of Feb. 19, 1851, ch. XI, 9 Stat. 568, as amended, 2 U.S.C. § 201–226 (1964); and it is expected to make findings of fact and apply rules of law. See Scharpf, Judicial Review and the political Question—A Functional Analysis, 75 Yale L. J. 517, 539–540 (1966). The Enforcement Act itself gave circuit courts jurisdiction to count ballots and declare the winners in state and municipal elections contaminated by alleged deprivations of the right to vote on account of race. Section 23, ch. CXIV, 16 Stat. 146 (1870), the progenitor of 28 U.S.C. § 1322 (1964). The supervisors were, then, auxiliary to the administration of justice. Certainly they had no legislative or administrative responsibility for developing policy." 265 F. Supp. at 921, n.

Accordingly, in Judge Wright's view to qualify as an "inferior officer" the office to be filled must be ancilliary to the judicial branch, and that "inferior officers" are not limited to those which constitute the ministerial staff of the Courts.

It cannot seriously be argued that the prosecutor is not an officer of the court, not counsel to the grand jury, and is not subject to the disciplinary power of the Court. See, *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 352–353, 51

S. Ct. 153, 156–157 (1931); *United States v. Smyth*, 14 F. supp. 282, 306 (N.D. Calif. 1952); *In Silvester*, 41 F. 2nd, 231, 236 (S.D.N.Y. 1930); *United States v. Maresco*, 266 F. 713, 717 (D.C.D.C.). Consequently, it cannot be seriously argued that the functions of a Special Prosecutor are not ancillary to the judiciary and that a Special Prosecutor does not qualify as an "inferior officer" even under Judge Wright's test precluding appointment by the court.

IV. The Executive's Obligation to Take Care that the Laws are Faithfully Executed

It has been argued that two provisions of the Constitution delegate to the President the exclusive authority to appoint and to remove officers of the United States. Article II, § 1, provides that the "[e]xecutive power shall be vested in a President of the United States." Article II, § 3 provides that the President "shall take care that the laws be faithfully executed . . " From this the opponents of legislation providing for a judicially appointed Special Prosecutor argue that the President is delegated all executive power, that the appointment and removal is executive and unconfined, and that, therefore, the President may exercise unfettered discretion to appoint and remove officers of the United States.

This argument assumes too much and ignores other constitutional provisions, such as Article II, § 2, cl. 2., a long standing practice of Congressional establishment of offices of the United States, and the case law regarding removal of officers appointed by heads of departments.

Article I, § 1 vests all legislative powers in the Congress of the United States, and Article I, § 8 authorizes Congress to enact "all laws which shall be necessary and proper for carrying into execution" the powers conferred upon the United States government.

In the Constitutional provisions just cited, is found not only the answer to the general line of argument in respect to the President's duties and their implications pursued by the opponents, but support for the legislation authorizing a Special prosecutor. The President is sworn to "preserve, protect, and defend the constitution." That oath has great significance. The sections which follow that prescribing the oath (§§ 2,2, Art. I) prescribe the duties and fix the powers of the President. But one very prominent feature of the Constitution which he is sworn to preserve, and which the whole body of the judiciary are bound to enforce, is the closing paragraph of Article I, § 8, in which it is declared that "the congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the constitution in the government of the United States, or in any department or officer thereof. Article I, § 8 is that which contains the germ of all the implied powers under the Constitution. It is that which has preserved the equilibrium between the three co-ordinate branches, as partitioned by the Constitution. While it is the President's duty to take care that the laws be faithfully executed, it is not his duty to make laws or a law of the United States. The laws he is to see executed are manifestly those contained in the Constitution and those enacted by Congress, whose duty it is to make all laws necessary and proper for carrying into execution the powers of those tribunals. See e.g. *Cunningham v. Neagle*, 135 U.S. 1, 83–84, 10 S. Ct. 658, 675 (1890) (Lamar J. dissenting).

Congress is delegated by the Constitution control over enforcement of the laws of the United States and the authority to structure the institutions and mechanisms by which the laws are to be enforced. For example, when the National Environmental Policy Act, 83 Stat. 852, 42 U.S.C. §§ 4321. 4331–4335, 4341–4347, was enacted, jurisdiction to enforce numerous anti-pollution laws, which had formerly been dispersed among a number of agencies, was concentrated in a new agency, the Environmental Protection Agency, pursuant to an Executive reorganization plan which was approved by Congress. When the Federal Trade Commission Act was enacted, 38 Stat. 717, 15 U.S.C. §§ 41–51, Congress provided that enforcement of the Act would be committed to the newly established administrative agency. Establishment of an independent prosecutor by statute who would have jurisdiction over a specified area would be analogous to the creation of law enforcement agencies in the past and would be clearly constitutional. Indeed, the words of Article II give the Executive no more power than to enforce the "laws" as written by Congress and he is not free to comply with some laws and ignore others.

The Constitution does not specify the departments by which the business of the Executive branch will be transacted, and the creation of such agencies is the

preorgative of Congress, as was recognized by Attorney General Cushing, as long ago as 1854:

> "[T]he Constitution does not specify the subordinate, ministerial, or administrative functionaries, by whose agency or counsels the details of the public business are to be transacted. It recognizes the existence of such official agents and advisors, in saying, that the President 'may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices'; and these officers are again recognized by the Constitution in the clause which vests the appointment of certain inferior officers 'in the heads of departments'; and it leaves the number of the organization of those departments to be determined by Congress." 6 Op. Atty. Gen. 326, 327 (1854).

The authority to commence prosecution has never been exclusively reserved to the Attorney General on constitutional grounds. The present practice by which administrative agencies refer all criminal prosecutions to the Department of Justice is a consequence of Executive Order No. 6166 of June 10, 1933, issued pursuant to authority granted by an Act of June 30, 1932 C. 314, 47 Stat. 383, 413 as amended by an Act of March 3, 1933, C. 212, 47 Stat. 1489, 1517. In § 5 of that Order, President Roosevelt ordered that "the functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States . . . now exercised by any agency or officer, are transferred to the Department of Justice." The statute authorizing this reorganization of government departments sought to consolidate procedures and thereby reduce expenditures. The transfer of prosecutorial power to the Attorney General from the agencies was founded not on the doctrine of separation of powers but on the exigencies of economic crisis.

The flexibility of the present system is attested to by the opening phrase of 28 U.S.C. § 516 (1966): "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency or officer thereof is a party or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General." According to the notes accompanying this statute, the opening phrase may apply to future exceptions.

Congressional supremacy over the organization of and distribution of functions within the Executive branch is also demonstrated by the legislation governing reorganizations of the Executive branch, contained in Title 5, Chapter 9 of the United States Code. These provisions allow the President the power to examine the efficiency of government operations and to propose plans for the restructuring of Executive departments and agencies, but it gives either House of Congress authority to veto a proposed reorganization by passing, within 60 days, "a resolution stating in substance that the House does not favor the reorganization plan." 5 U.S.C. § 906(a).

The assertion that the mere grant of executive power confers upon the President the unfettered power of appointment is also clearly inconsistent with those statutes, dating back to the foundation of the government, which restrict the exercise by the President of the power of nomination of officers of the United States, although nothing in the Constitution explicitly authorizes Congress to do so.

> ". . . Congress has, from time to time, restricted the President's selection by the requirement of citizenship. It has limited the power of nomination by providing that the office may be held only by a resident of the United States; of a state; of a particular state; of a particular district; of a particular territory; of the District of Columbia; of a particular foreign country. It has limited the power of nomination further by prescribing specific professional attainments, or occupational experience. It has, in other cases, prescribed the test of examinations. It has imposed the requirement of age; of sex; of races; of property; and of habitual temperance in the use of intoxicating liquors. Congress has imposed like restrictions on the power of nomination by requiring political representation; or that the selection be made on a nonpartisan basis. It has required, in some cases, that the representation be industrial; in others, that it be geographic. It has at times required that the President's nominees be taken from, or include, representatives from particular branches or departments of the government. By still other statutes, Congress has confined the President's selection to a small number of persons to be named by others." *Myers v. United States*, 272 U.S. 52, 265–274, 47 S. Ct. 21, 75–78 (Brandeis dissenting).

Many of these statutes impose limitations upon the appointment of attorneys

representing various governmental agencies. See *e.g.* Attorney for the Court of Private Land Claims, 26 Stat. 854, 855 (March 3, 1891); Attorney of Hawaii, 42 Stat. 108, 116 (July 9, 1921); Assistant Attorney General of the United States, 11 Stat. 410, 420 (March 2, 1859); Solicitor General and Assistant Attorneys General, 16 Stat. 162 (June 22, 1870). Of particular significance, however, is that the First Judiciary Act of 1789 limited the President's power of appointment of the Attorney General and District Attorneys to individuals learned in the law. 1 Stat. 73, 92 (Sept. 24, 1789). The First Judiciary Act was enacted in the First Congress, two years after the constitutional convention and included among its members those who had been members of the convention. Consequently, it is a guide to interpreting the meaning of the Constitution, see *e.g. Myers* v. *United States*, 272 U.S. 52, 136, 47 S. Ct. 21, 32 (1926), revealing that the appointment of government prosecutors was not intended to be solely within the discretion of the President.

Thus these statutes, which reveal a continuous practice from the founding of the repubic, present a legislative practice established by concurrent affirmative action of Congress and the President, which refutes the absolute claim of exclusive Presidential authority to appoint officers of the United States.

V. The Supreme Court Removal Cases

Similarly, the assertion that the mere grant of executive powers by the Constitution confers upon the President the unrestricted power of appointment, is inconsistent with those cases which uphold restrictions upon Presidential power of removal.

In *Myers* v. *United States*, 272 U.S. 52, 47 S. Ct. 21 (1926), the Supreme Court was requested to rule on whether the President had the constitutional authority to remove a postmaster of the first class, whom he had appointed by and with the consent of the Senate, when the statute, creating the office and providing for Presidential appointment required Senate acquiescence in such removal. In an opinion written by Chief Justice Taft, with Justices Brandeis, Holmes and McReynolds dissenting, the Court held that the President could constitutionally do so. Nevertheless, even the majority recognized the power of the Congress under Art. II, § 2, cl. 2, to vest by law "appointment of such inferior officers as they think proper, in the President alone, in the courts of law, or in the heads of departments:"

> "These words it has been held by the Court, give to Congress the power to limit and regulate removal of such inferior officers by heads of departments when it exercises its constitutional power to lodge the power of appointment with them. *United States v. Perkins*, 116 U.S. 483, 6 S. Ct. 449, 450. . . ." 272 U.S. at 127, 47 S. Ct. at 28–29.

The majority, moreover, recognized that with regard to those officers deemed to be superior, the President is subject to certain limitations:

> "The duties of the heads of departments and bureaus in which the discretion of the President is exercised and which we have described are the most important in the whole field of executive action . . .
>
> ". . . Of course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance. Then there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence on control." 272 U.S. at 134–135, 47 S. Ct. at 31.

The Court did go on, however, to say that the President could remove the officer subsequent to the decision, on the grounds that the exercise of discretion entrusted to the officer had not on the whole been intelligently or wisely exercised. 272 U.S. at 135, 47 S. Ct. at 31. But this observation was specifically rejected in the subsequent landmark case of *Humphrey's Executor v. United States*, 295 U.S. 602, 55 S. Ct. 869 (1934):

> ". . . [T]he narrow point actually decided [in *Myers v. United States*] was only that the President had the power to remove a postmaster of the first class without the advice and consent of the Senate as required by act of Congress. In the course of the opinion of the court, expressions occur which tend to support the governments contention [that the President may at will remove Commissioners of the Federal Trade Commission], but these are beyond the point involved and, therefore, do not come within the rule of stare decisis. Insofar as they are out of harmony with the views here

set forth these expressions are disapproved." 295 U.S. at 627, 55 S. Ct. at 873.

The Court went on to point out the differences between a postmaster and the Federal Trade Commission. In doing so, the Court explained why the President may constitutionally be removed from participation in either the appointment or the removal of the Special Prosecutor:

> "The office of a postmaster is so essentially unlike the office now involved that the decision in the *Myers* case cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the *Myers* case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is. Putting aside dicta, which may be followed if sufficiently persuasive but which are not controlling, the necessary reach of the decision goes far enough to include all purely executive officers. It goes no farther. . . .
>
> "The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standards therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. In administering the provisions of the statute in respect of "unfair methods of competition"—that is to say in filling in and administering the details embodied by that general standard—the commission acts in part quasi-legislatively and quasi-judicially. In making investigations and reports thereon for the information of Congress under § 6, in aid of the legislative power, it acts as a legislative agency. Under § 7, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary. To the extent that it exercises any executive functions—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government.
>
> ". . . We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties, independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will." 295 U.S. at 627–629, 55 S. Ct. at 873–874.

Subsequent to the decision in *Humphrey's Executor* the Supreme Court had occasion to review *Myers*, *supra*, and *Humphrey's Executor*, *supra*. In an opinion written by Justice Frankfurter, a unanimous Court stated:

> "The assumption was short-lived that the *Myers* case recognized the President's inherent constitutional power to remove officials, no matter what the relation of the executive to the discharge of their duties and no matter what restrictions Congress may have imposed regarding the nature of their tenure. The versatility of circumstances often mocks a natural desire for definiteness. Within less than ten years a unanimous Court, in *Humphrey's Executor* v. *United States*, 295 U.S. 602, 55 S. Ct. 869, 79 L. Ed. 1611, narrowly confined the scope of the *Myers* decision to include only 'all purely executive officers.' 295 U.S. at page 628, 55 S. Ct. at page 874. The Court explicitly 'disapproved' the expressions in *Myers* supporting the President's inherent constitutional power to remove members of quasi-judicial bodies. 295 U.S. at pages 626–627, 55 S. Ct. at pages 873–874." *Wiener* v. *U.S.*, 357 U.S. 349, 352, 78 S. Ct. 1275 (1958).

Consequently, in determining the constitutionality of congressional limitation upon removal of officers of the United States, *Myers*, *supra*, and *Humphrey's*

Executor, supra, must be read together. In *Myers, supra*, the Supreme Court recognized an inherent power in the President to remove those who he appointed by and with the consent of the Senate. In *Humphrey's Executor*, however, the Supreme Court restricted his removal power to those officers that are purely executive.

Between what was decided in *Myers, supra* and what was held in *Humphrey's Executor, supra*, there remains an area left for future consideration and determination as to which category applies to the facts and circumstances of a particular situation. *Morgan v. Tennessee Valley Authority*, 115 F. 2d 990, 992 (6th Cir. 1940), cert. denied. 312 U.S. 201, 61 S. Ct. 806 ( ). Nevertheless, it is clear that the Special Prosecutor would fall within the rule of *Humphrey's Executor, supra*. As presently contemplated the Special Prosecutor will have the responsibility: (1) to conduct all grand jury proceedings and represent it in obtaining documents and witnesses in its investigation; (2) to frame and sign indictments and the filing of presentments; (3) to conduct all criminal prosecutions and appeals; (4) to deal with and appear before Congressional committees having jurisdiction over matters within the scope of his authority; (5) to provide such information, documents and other evidence as may be necessary and appropriate to enable any such committee to exercise its responsibilities; and (6) to submit a final report to the Chief Judge of the United States District Court for the District of Columbia, to the Speaker of the House of Representatives and to the President Pro Tempore of the Senate. Thus the Special Prosecutor, similar to the Federal Trade Commission, is charged with duties related to the executive, legislative and judiciary, and his status should be controlled by the holding in *Humphrey's Executor, supra*, and not *Myers, supra*.

VI. United States v. Cox

Opponents to the delegation of authority to appoint a Special Prosecutor to the courts cite *United States v. Cox*, 342 F. 2d 167 (5th Cir. 1965), cert. den., 85 S. Ct. 1767 (1965) for the proposition that the Separation of Power's precludes such a judicial appointment. In so arguing, the opponents misread that opinion or misrepresent what was decided.

In *United States v. Cox, supra*, the Court of Appeals for the Fifth Circuit was asked to decide whether a U.S. Attorney could be held in contempt for failing to comply with a court order directing him to prepare and sign indictments for perjury pursuant to a request by a legally constituted grand jury. By a four to three majority, the Court held that a U.S. Attorney could not be compelled to sign an indictment issued by a grand jury and thereby revised the contempt order. The four judges so holding, however, issued three separate opinions. *Supra* at 169. Judge Jones wrote the majority opinion with Judge Tuttle joining him, and Judge Brown and Judge Wisdom each wrote their own opinion, *supra* at 182, 185, "concurring specially." Judges Bell, River and Gerwin concurred in part and dissented in part, issuing a fourth opinion. *Supra* at 173. A close examination of the four opinions reveals that the actual majority of the court did not endorse the view expressed in the Jones-Tuttle opinion regarding the separation of powers and, therefore, *Cox, supra* does not support the opponents' contentions.

Contrary to the opponents' interpretation of the *Cox* case, a numerical majority of the court did *not* rule that the outcome was constitutionally required. Rather, the constitutional argument based on a theory of separation of powers was only relied on by three of the judges: Judges Jones, Tuttle and Wisdom. It was their belief that the discretion of the U.S. Attorney as representative of the Executive branch in the prosecution of offenses against the United States should be free from interference from the judiciary. As Judge Jones expressed it:

> "It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions." *Supra* at 171.

Judge Wisdom stressed the necessity for the Attorney General to have the exclusive prerogative to prosecute offenses against the United States as a "checks and balances" measure:

> ". . . [T]he power of the executive not to prosecute and therefore not to take steps necessarily leading to prosecution, is the appropriate curb on a grand jury in keeping with the constitutional theory of checks and balances." *Supra* at 190.

Judge Wisdom also expressed the view, however, that:

"The executive's absolute and exclusive discretion to prosecute may be rationalized as an illustration of the doctrine of separation of powers, *but it would have evolved without the doctrine* and exists in countries that do not purport to accept this doctrine." *Supra at 193* (emphasis added).

Judges Bell, River and Gerwin, however, dissented, objecting to the assertion that the grand jury is subservient to the Executive:

"The Attorney General insists that the prosecution of offenses against the United States is an executive function of the Attorney General derived from the executive power vested in the President 'to take care that the laws be faithfully executed.' U.S. Const. Art. II § 3. The short answer is that one of the most fundamental and important of the laws so to be faithfully executed is the clear and explicit provision of the Fifth Amendment to the Constitution that 'No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.'

"The Fifth Amendment adopted the grand jury as it had then been developed in England over the course of many centuries, and made it a part of the fundamental law of the United States for the institution of prosecutions for crime. Thus the grand jury originated long before the doctrine of separation of powers was made the constitutional basis of our frame of government. The same Constitution which separated the three powers of government adopted the institution of the grand jury. It follows that no nice distinction need be drawn as to whether the grand jury may perform some function of the executive department." *Supra* at 177–178.

The dissenters felt that the prosecutor could be required to assist the grand jury in preparing indictments and to sign any indictment that is issued. *Supra* at 179. They conceded that the prosecution could refuse to go forward. *Supra* at 179, but also stated:

". . . It may be that the court, in the interest of justice, may require a showing of good faith, and a statement of some rational basis for dismissal. In the unlikely event of bad faith or irrational action, not here present, it may be that the court could appoint counsel to prosecute the case. In brief, the court may have the same inherent power to administer justice to the government as it does to the defendant." *Supra* at 179.

Judge Brown was the key vote in the *Cox* case. Although he agreed with the decision to revise the contempt order on the grounds that the U.S. Attorney could not be compelled by the Court to *sign* the indictment, he sided with the three dissenting judges to constitute the fourth man in another four to three majority holding that the U.S. Attorney *could* be compelled to aid the grand jury in drafting an indictment in legal form. *Supra* at 182. Also, unlike Judges Jones, Tuttle and Wisdom, Judge Brown did not defend his position on constitutional grounds. Rather, his decision that the U.S. Attorney should be vested with unlimited discretion as to whether prosecution was to be maintained was based on a theory that the responsibility of prosecution should not be vested with the grand jury because of the secrecy of their proceedings, their political irresponsibility and their lack of expertise in understanding complex federal crimes and statutes. *Supra* at 182. He also interpreted Rule 48(a) of the Federal Rules of Criminal Procedure to give unlimited discretion to the U.S. Attorney to dismiss indictments once issued. *Supra* at 182. Although Judge Brown mentioned that his approach preserved the "time proved wisdom of separation of powers," *Supra* at 185, he carefully avoided resting his decision upon these grounds.

Thus, contrary to that which the opponents to the authorization of judicial appointment of the Special Prosecutor assert, the *Cox* case *does not* hold that a court may not constitutionally compel a U.S. Attorney to sign a grand jury indictment.

Of additional significance is the lack of precedent supporting the position taken by Judges Jones and Tuttle that the separation of powers precludes requiring the prosecutors to sign the indictments. In footnote eight a series of cases were cited by Judges Jones and Tuttle purporting to support their position. *Supra* at 171. A reading of those cases, and the references therein, reveals that none of the federal cases nor the references therein were decided on the basis of separation of powers. Instead, the cited federal cases, and those referred to therein, were decided on statutory not constitutional grounds.

The argument that the doctrine of separation of powers precludes congressional

delegation of appointment of a special prosecutor to the judiciary is further undermined by the history of the Federal Rules of Criminal Procedure. In *Cox*, Judges Jones and Tuttle stated that the Rule 7(c), Fed. R. Crim. P., 18 U.S.C., is a recognization of the constitutional power of the executive to permit or not to permit the issuance of an indictment, 342 Fed. at 171, and implied that Rule 48(a), Fed. R. Crim. P., 18 U.S.C., is a recognization of the constitutional authority of the executive to drop a prosecution when it thinks that dismissal is appropriate. In so doing, they overlook, as do the opponents of the legislation which would establish a judicially appointed Special Prosecutor, the fact that these Federal Rules of Criminal Procedure were adopted by the Supreme Court of the United States under authority delegated to it by Congress. 18 U.S.C. § 3771; See also 18 U.S.C. § 3772. Prior to the adoption of Rule 48(a), federal prosecutors were free to enter dismissal of indictments without any action by the Court absent a statutory provision to the contrary. See *Confiscation Cases*, 74 U.S. (7 Wall) 454, 457 (1869). Since the Supreme Court is the authority which adopted these rules, one of which, Rule 48(a) requires judicial approval for dismissal, it is inconceivable how the opponents of legislation authorizing judicial appointment of a Special Prosecutor can support their claim that it is precluded by the doctrine of separation of powers.

The appointment of a Special Prosecutor by the court can clearly be distinguished from the *Cox* case and the mandamus cases which it resembles in that the two raised entirely different issues. In the *Cox* case, the District Court Judge was not allowed to compel the U.S. Attorney to sign the grand jury indictment. The reasons for which courts are reluctant to compel prosecutorial action clearly do not apply to restrict the judicial power of appointment. The various justifications given in favor of prosecutorial discretions include:

(1) the prosecutor should be able to pick a "strong" case to test uncertain law;

(2) federal prosecutors shou'd stand aside in favor of state prosecutions where an individual's conduct has violated both state and federal law, and where the state is willing to prosecute;

(3) the administrative and financial burdens of prosecutor to make some decisions not to prosecute;

(4) insufficient evidence might justify a decision not to prosecute on the ground that public funds would be expended needlessly;

(5) the political process is sufficient to check excessive abuse of discretion.[1]

All of the above five considerations would still be effectively carried out by a court-appointed prosecutor since such an individual would be held to the same standard and policies applicable to an executive-appointed counterpart. In fact, the absence of any possibilty of a conflict-of-interest on the part of an independent Special Prosecutor would only strengthen the policies deemed important by the justifications herein cited.

VI. Conclusion

The Special Prosecutor's responsibilities, as presently contemplated, include serving as counsel to the grand jury, prosecutor of the indictments issued by the grand jury, and as a resource for congressional committees. As such, his appointment is one which the Supreme Court must have had in mind in *Siebold* when it stated that "the selection of the appointing powers, as between the functionaries named, is a matter resting in the discretion of Congress. And, looking at the subject in a practical light it is, perhaps, better it should rest there, than that the country should be harrassed by the endless controversies to which a more specific direction on this subject might have given rise." *Supra*. The selection of Judiciary by the Congress as the appointing authority is authorized by the explicit language of Article II, § 2, cl. 2, its legislative authority, and the case law regarding the power of appointment and limitations upon the President's power of removal. Thus, the delegation to the Judiciary is clearly constitutional.

Mr. HUNGATE. And now we would like to welcome our colleague, Mr. Dennis, who has, I think, two bills relating to this subject. Mr. Dennis is one of the more diligent members of this subcommittee. We are very pleased to hear from you.

[1] "Discretion to Prosecute Federal Civil Rights Crimes" 74 Yale L.J. 1297 at 1301.

TESTIMONY OF HON. DAVID W. DENNIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA

Mr. KASTENMEIER. Mr. Chairman.

Mr. HUNGATE. Yes.

Mr KASTENMEIER. Does our colleague have a prepared statement for us?

Mr. DENNIS. No, I do not.

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

Mr. DENNIS. Thank you, Mr. Chairman.

I appreciate you and my distinguished colleagues giving me this time this morning. I do not have a prepared statement, but I will try to make a brief statement which I hope will be helpful to the committee. And I take the time because I have the hope that I may be helpful to the committee.

At the outset I would like to say that I accept the concept of an independent Special Prosecutor under the presently existing circumstances. As I have sat here with the rest of you on this committee, I have been impressed with the fact that we have, and are facing a constitutional dilemma in arriving at a decision as to what form any Special Prosecutor we might adopt might take. And I have wanted to see whether I could develop something which would allow us to achieve our objective and avoid the constitutional problem insofar as we might do so.

The dilemma is, as I see it, and I really do not think there is much argument about this—we can take one point of view or we can take another, and we can take a brief, and we have got a lot of them, and made a good argument on either side—is that if on the one side we take these bills which give the appointment to the judicial department, we run into all sorts of serious constitutional questions about the separation of powers, the ability of the judicial branch to both appoint and remove an officer, a prosecuting officer who basically, under the federal system is, I think, unquestionably an executive officer.

If, on the other hand, you go over to the more familiar method of a Presidential appointment with advice and consent of the Senate, which I personally have considered in this matter and, in fact, I had a bill drawn along those lines, you then have no problem as to the appointment. You do bring in the Senate for its advice and consent, which I think might be very desirable. But, under the doctrine of the *Myers* case, as you all know, you have a serious problem about whether you can do anything about safeguarding the fairly arbitrary power of the executive to remove.

And while that *Myers* doctrine has been whittled down some in the *Humphrey's* case and in the *Wiener* case, nevertheless we have that Morgan against the TVA also, which says that there is an area between Myers on the one hand and Humphreys on the other, and which more or less says that you have got to determine each case that comes along in order to see where it falls. You cannot say that the *Myers* doctrine is dead, so you have problems there.

Now, I feel that we would like to do—I know I would like to do and I think the committee would like to do—something which

would achieve our objective with as few of these constitutional problems as is necessary. We would like to act, but we would like to act effectively. I assume we are not just trying to go through an exercise of some kind. We would like to do something which will stand up, and which works. So, I have been sitting here trying to resolve in my own mind more or less how to resolve the dilemma, or come closest to resolving it. And it seems to me, and it is my submission to the committee, that the soundest and safest approach, from the constitutional point of view, is to keep this appointment in the executive branch and thereby get the separation of powers problem completely out of the picture, if we can sufficiently safeguard the removal power, and thus more or less solve the other problem.

I think the key to that is in the *Myers* decision itself, because in that decision the Court cited and relied upon, or spoke approvingly of, at any rate, an earlier decision called Perkins against the United States, also a Supreme Court decision. And in that case they had a situation where the Secretary of the Navy had fired a naval cadet, and if he was a naval officer, as they held that he was, then he fell under a statute which said that he could only be discharged through a court-martial, which the Secretary had not given him. But, the Secretary contended it did not make any difference, because he had inherent power of removal, and the Court said in that case that they did not have to pass on what would be the case where the President appointed with the advice and consent of the Senate—and that was the *Myers* case which came later—but that when you were giving the power of appointment to a Department head, such as the Secretary of the Navy, by statute, you could, by the same statute, restrict his powers of removal. Therefore, the Secretary could not fire this man arbitrarily when the statute said he must give him a court-martial, and the discharge was invalid because Congress had hedged him about with a protection. And they said, where you gave the Department head the power of appointment, you could also tell him on what grounds he could remove.

And when Chief Justice Taft decided the *Myers* case he did not overrule that at all; he said, that is all right. He quoted it with approval. He said it is different when it is a Presidential appointment, which he had before him.

Therefore, I have come to the conclusion that if we herewith give the power of appointment to the Attorney General, we can also say that the Attorney General alone can discharge, and that he cannot discharge except for gross impropriety, gross misconduct in office, or anything we want to say; and we can write that in the statute, so that it would not be a matter of grace or a bargain or a compact or anything. It will be the law of the land.

Now, with that idea in mind I have two bills here. The first one is H.R. 11263, which is cosponsored by Mr. Smith, and Mr. Mayne, and also by Mr. Hutchinson, Mr. Butler; and Mr. Cohen was good enough to tell me that if I had spoken to him he would have gone on the bill also.

And this is a reasonably simple approach because what H.R. 11263 essentially does is merely say—of course, it says some other things, but what it essentially does is merely say—that the present Special Prosecuting Attorney now in office cannot be discharged except for gross impropriety, gross misconduct, gross dereliction of duty, or physical

inability to discharge the powers and duties of his office, or by impeachment by the Congress. That would protect the Special Prosecutor now functioning by statute, and would give him by statute all of the protection he has been given by assurances and understandings and so on.

Personally, I think that really does the job. I do not believe you need to do anything more under present circumstances.

The second bill, H.R. 11264, which is cosponsored by Mr. Smith of New York, goes a little further. It sets up an Office of Special Prosecuting Attorney to be appointed by the Attorney General, subject to the advice and consent of the Senate, and then says he can only be discharged by the Attorney General for these same causes. Now, if you want, if you think you need a bill which will set up a new office, this will do it. If you think it is desirable to bring in the senatorial concurrence, which I think has got points, this would do it. And, of course, the gentleman who holds the position at the present could be appointed under this bill, but under this bill he would have to be appointed. And then again, the removal is hedged about and safeguarded.

And my submission to the committee is, without taking up more time except for what questions you may have—I will say also as to the second bill, there is a very similar bill in the U.S. Senate by the distinguished Senator from Ohio, Senator Taft, who seems to have come to more or less the same conclusions by a similar process of reasoning, the two of us working independently—my submission is that these are the best methods that have yet occurred to me, at any rate, to do what we want to do, and effect what we want to effect, and at the same time avoid most of the constitutional problems with which we are otherwise going to be plagued. And on that basis I submit these bills for your consideration.

Thank you.

[The bills referred to: H.R. 11263 and H.R. 11264, follow:]

93D CONGRESS
1ST SESSION

H. R. 11263

IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 6, 1973

Mr. DENNIS (for himself, Mr. SMITH of New York, Mr. MAYNE, Mr. BUTLER, and Mr. HUTCHINSON) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To define the powers and duties and to place restrictions upon the grounds for removal of the Special Prosecutor appointed by the Acting Attorney General of the United States on November 5, 1973, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Special Prosecutor heretofore appointed by the Acting Attorney General of the United States on the 5th day of November 1973, as successor to the former Special Prosecutor who assumed office on May 24, 1973, shall be and is hereby made subject to removal only by the Attorney General (or, if there be none, by the Acting Attorney General) for gross impropriety, gross misconduct, gross dereliction of

duty, or for physical inability to discharge the powers and duties of his office, but for no other cause, or by the Congress pursuant to article II, section 4, of the Constitution. The Attorney General shall give thirty days' notice in writing to the Congress of his intention to remove the Special Prosecutor, setting forth in detail the reasons for such removal. Upon the giving of such notice the Attorney General may suspend the Special Prosecutor and his removal shall be effective thirty days thereafter.

SEC. 2. Anything in the statutes touching the powers and authority of the Attorney General to the contrary notwithstanding, said Special Prosecutor shall be, and he hereby is, charged with the duty and clothed with the full and complete authority to investigate, to prepare, to conduct, and to prosecute any criminal offense arising out of or connected with the unauthorized entry into Democratic National Committee headquarters at the Watergate in 1972, arising out of or connected with the Presidential election of 1972, or any and all other matters heretofore referred—pursuant to regulations of the Attorney General—to the former Special Prosecutor who assumed office on May 24, 1973.

SEC. 3. Said Special Prosecutor shall be compensated at the rate provided for level II of the Executive Schedule under section 5313 of title 5, United States Code, and he may appoint and fix the salaries (at not to exceed the rate

of $36,000 per annum) of such staff and may employ such part-time experts and consultants (at rates not to exceed the per diem equivalent of the rate for GS–18 of the General Schedule established by section 5332 of title 5, United States Code) as he deems necessary to assist him in performing his duties under this Act.

SEC. 4. Upon request of the Special Prosecutor the head of any Federal department or agency shall—

(1) detail, on a reimbursable basis, any of the personnel of such agency; and

(2) provide any relevant information or materials, to the Special Prosecutor to assist him in carrying out his duties under this Act.

Such assistance by the Department of Justice shall include but not be limited to, affording to the Special Prosecutor full access to any records, files, or other materials relevant to matters within his jurisdiction, and use by the Special Prosecutor of the investigative and other services, on a priority basis, of the Federal Bureau of Investigation.

SEC. 5. All materials, tapes, documents, files, work in process, information, and all other property of whatever kind and description relevant to the duties enumerated in section 2 hereof, tangible or intangible, collected by, developed by, or in the possession of the former Special Prosecutor or his staff established pursuant to regulation by the

Attorney General (28 C.F.R. 0.37, rescinded October 24, 1973), shall be delivered into the possession of the Special Prosecutor appointed under this Act.

SEC. 6. The Special Prosecutor shall hold office for a period of three years from and after his appointment and shall carry out his duties hereunder within that three-year period except as may be necessary to complete trial or appellate action on indictments then pending.

SEC. 7. The Special Prosecutor shall have and he is hereby given full authority to undertake any action he deems necessary and proper for the performance of his duties under this Act.

SEC. 8. In the event the Special Prosecutor shall resign or be removed from office before having completed the performance of his duties under this Act, the Attorney General shall promptly appoint a new Special Prosecutor of the highest character and integrity to fulfill those duties, who shall serve subject to the provisions of this Act.

SEC. 9. There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

93D CONGRESS
1ST SESSION

H. R. 11264

IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 6, 1973

Mr. DENNIS (for himself and Mr. SMITH of New York) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To provide for the appointment of a Special Prosecutor, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. The Attorney General of the United States is hereby authorized and directed to appoint, by and with the advice and consent of the Senate, a Special Prosecutor who shall be charged with the duties and clothed with the authority herein below set forth.

SEC. 2. Anything in the statutes touching the powers and authority of the Attorney General to the contrary notwithstanding, said Special Prosecutor shall be, and he hereby is, charged with the duty and clothed with the full and

complete authority to investigate, to prepare, to conduct, and to prosecute any criminal offense arising out of or connected with the unauthorized entry into Democratic National Committee headquarters at the Watergate in 1972, arising out of or connected with the Presidential election of 1972, or any and all other matters heretofore referred—pursuant to regulations of the Attorney General—to the former Special Prosecutor who assumed office on May 24, 1973.

SEC. 3. Said Special Prosecutor shall be compensated at the rate provided for level II of the Executive Schedule under section 5313 of title 5, United States Code, and he may appoint and fix the salaries (at not to exceed the rate of $36,000 per annum) of such staff and may employ such part-time experts and consultants (at rates not to exceed the per diem equivalent of the rate for GS–18 of the General Schedule established by section 5332 of title 5, United States Code) as he deems necessary to assist him in performing his duties under this Act.

SEC. 4. Upon request of the Special Prosecutor the head of any Federal department or agency shall—

(1) detail, on a reimbursable basis, any of the personnel of such agency; and

(2) provide any relevant information or materials, to the Special Prosecutor to assist him in carrying out his duties under this Act.

Such assistance by the Department of Justice shall include but not be limited to, affording to the Special Prosecutor full access to any records, files, or other materials relevant to matters within his jurisdiction, and use by the Special Prosecutor of the investigative and other services, on a priority basis, of the Federal Bureau of Investigation.

SEC. 5. All materials, tapes, documents, files, work in process, information, and all other property of whatever kind and description relevant to the duties enumerated in section 2 hereof, tangible or intangible, collected by, developed by, or in the possession of the former Special Prosecutor or his staff established pursuant to regulation by the Attorney General (28 C.F.R. 0.37, rescinded October 24, 1973), shall be delivered into the possession of the Special Prosecutor appointed under this Act.

SEC. 6. The Special Prosecutor shall hold office for a period of three years from and after his appointment and shall carry out his duties hereunder within that three-year period except as may be necessary to complete trial or appellate action on indictments then pending.

SEC. 7. The Special Prosecutor shall have and he is hereby given full authority to undertake any action he deems necessary and proper for the performance of his duties under this Act.

SEC. 8. The Special Prosecutor may be removed from office by the Attorney General of the United States for gross impropriety, gross misconduct, gross dereliction of duty, or for violation of this Act, but for no other cause, or by Congress pursuant to article II, section 4, of the Constitution. The Attorney General shall give thirty days' notice in writing to the Congress of his intention to remove the Special Prosecutor, setting forth in detail the grounds for such removal. Upon the giving of such notice the Attorney General may suspend the Special Prosecutor and his dismissal shall be finally effective thirty days thereafter.

SEC. 9. If any part of this Act is held invalid, the remainder of the Act shall not be affected thereby. If the provisions of any part of this Act, or the application thereof to any person or circumstances, are held invalid, the provisions of other parts and their application to other persons or circumstances shall not be affected thereby.

SEC. 10. There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

Mr. HUNGATE. Would either or both of these bills place exclusive jurisdiction, over the so-called Watergate and related matters, in the Special Prosecutor?

Mr. DENNIS. Right. They would place in him everything that Mr. Cox had.

Mr. HUNGATE. Plus something that makes it more difficult to fire him?

Mr. DENNIS. Right.

Mr. HUNGATE. Mr. Kastenmeier.

Mr. KASTENMEIER. Mr. Chairman, I appreciate the statement of my colleague. However, in the interest of expedition and insofar as

we are meeting this afternoon on the bill itself, I will defer any colloquy or questions I have until that time.

Mr. HUNGATE. Thank you.

Mr. Smith.

Mr. SMITH. Mr. Chairman, I will likewise defer any colloquy until this afternoon. As a cosponsor of both of these bills I appreciate the work that Mr. Dennis has done in trying to devise a scheme in which we can avoid some of the possible constitutional confrontations that might lie down the road. And I want to compliment and congratulate my colleague for having given this thought and this effort toward coming up with something that will provide some guarantee to the Office of Special Prosecutor, and will reasonably restrict the causes of his removal, and will also avoid some of the constitutional questions that we may have with a court appointed special prosecutor.

Thank you very much.

Mr. HUNGATE. Mr. Edwards.

Mr. EDWARDS. My thanks to our colleague, but I will defer.

Mr. HUNGATE. Mr. Mayne.

Mr. MAYNE. Thank you, Mr. Chairman. I want to compliment you, Mr. Dennis, on the fine work which has gone into the preparation of H.R. 11263. In your remarks you chose to speak only about the safeguards which your bill, 11263, provides against an arbitrary removal of the Special Prosecutor, and, of course, that is a thing of great concern. And it does seem to me that you have included criteria there which are very restrictive and would give a good deal of assurance that the Special Prosecutor could continue in his performance of his duties.

But, I would like to have you speak just briefly about the fact that there are also very detailed provisions in your bill which are, I think, at least the equivalent of the provisions in other bills pending before the committee, to spell out fully what the duty and the authority of the Special Prosecutor will be. In section 2, for example, you specify the very sweeping powers that this Special Prosecutor will have. And in section 4 you set out in detail the duty of all Federal departments and agencies to cooperate completely with the Special Prosecutor, and to supply him with any and all information and documents that he may require in the performance of his duty.

I know that these provisions were very significant to me in persuading me to join you in this approach. Your bill, as I take it, is not just one that protects the Special Prosecutor from dismissal, but also gives him fully as sweeping powers and authority as any of the bills pending before this subcommittee. And I would appreciate your comment on that.

Mr. DENNIS. That is a very just observation, Mr. Mayne, and what you say is absolutely true.

Section 2 gives the Special Prosecutor, under our bill, every authority that Mr. Cox had, that Mr. Jaworski has.

Section 4 requires the cooperation of other departments and particularly that of the Department of Justice.

Section 5 provides that all of the materials and files of the former Special Prosecutor shall be delivered to the Special Prosecutor.

In section 6, and I might mention this as an additional safeguard, we have given the Prosecutor a definite term of office for 3 years, with power to finish up thereafter such appeals and so on as may be

pending. The reason for that is that some of these decisions indicate that a term is an additional protection against arbitrary discharge.

And section 7 says that the Special Prosecutor shall have, and he hereby is given, full authority to undertake any action he deems necessary and proper for the performance of his duties under this Act.

So that I feel that we have clothed him with every power that he needs to do the job. And I thank you for bringing that up.

Mr. MAYNE. And you have not only, as you say, provided that this Special Prosecutor will have every authority that Mr. Cox did, but significantly these powers and authorities are specifically made a matter of statute rather than just being set forth in the so-called charter on which Mr. Cox relied and on which, I take it, Mr. Jaworski is relying at the present time? It would make it a matter of statutory right?

Mr. DENNIS. That is correct, and the matter of discharge for cause is relying at the present time. It would make it a matter of statutory hight.

Mr. MAYNE. Thank you.

Mr. HUNGATE. Mr. Mann.

Mr. MANN. I think the gentleman has made some fine contributions to our thinking on this problem, and I appreciate his sincerity with reference to the constitutional issue.

I would pose this problem. Not everyone in this country has the fine sense of appreciation of the integrity and independence of lawyers, particularly the one to which we indirectly refer today, and certainly your bill will not remove what we know to be a broad based concern among the American people that the acceptance of such an appointment in the manner that it has been made, even in the manner that it is to be made under your proposal, would give rise to an inference that the appointee has accepted or will accept the definition of reasonableness that has been made clear by the President, and by his appointee, the Assistant, or Acting Attorney General. Now, given the response that you and I as lawyers must make to that with our own conscience, how do we explain it to the American people?

Mr. DENNIS. Well, I suppose, Mr. Mann, what you say is part of our dilemma as well as the legal aspect of it that I have already posed. But, I think we will just have to tell the people that, after all, they would not appreciate it very much if we passed something here, and got a lot of headlines, and then it turned out that all of the indictments we brought in were thrown out of court, and that we are trying to really do something and not just grandstand, so to speak. And I know that is what the committee wants to do, and I want to do, and it is what I am trying very hard to do in these bills. And I believe, if we get an honest man appointed here, and I believe we do have one serving at the moment, that this gives him every power and every safeguard that he needs. He can go ahead and do the job.

Now, that is my idea, and I think we can sell that to the people.

Mr. MANN. Well, of course, it is important to us as you readily acknowledge, that the faith of the American people in the system be restored.

Mr. DENNIS. That is right.

Mr. MANN. And I would hope that we could come up with some

system or plan that would remove the taint that arises from an appointment that is, in effect, little different from the one that was previously made.

Mr. DENNIS. Except that it is safeguarded around by the law instead of by what somebody said to somebody else; it is written into the statutes. And also, of course, we have had an experience, and as a practical matter I do not think anyone is going to violate this law if we pass it. If the President does violate it he would be dong a very risky thing as well as a wrong thing.

Mr. MANN. Thank you. Thank you, Mr. Chairman.

Mr. HUNGATE. Ms. Holtzman.

Ms. HOLTZMAN. Well, I certainly wish to expedite these hearings, and I want to thank my colleague for his constitutional analysis, with which I must say I disagree. But, the point I wish to ask you, Mr. Dennis, is that constitutional questions can be raised about virtually all kinds of things, and the question is, how serious those questions are, and how likely they are to be answered negatively, especially in this instance with respect to the constitutionality. Is it not a fact, Mr. Dennis, that aside from Mr. Bork, who is an employee of the executive branch of the Government, the Acting Attorney General, we have not had a single witness tell us that placing the power of appointment in the hands of a court would be clearly unconstitutional?

Mr. DENNIS. I think you have Dean Cramton from Cornell, who testified yesterday, and while he has not been here, of course Professor Bickel of Yale, who is certainly a constitutional authority, has the same point of view, as I understand it. And we all have these learned briefs on both sides of the case; and I think, as a good laywer, you will agree with me that none of these decisions really decide it. They are all nice things to argue from. So, I just say we have one of these cases here where you cannot tell what the result may be, and I think if we can do the job without running that hazard, then we ought to think about it. That is my position.

Ms. HOLTZMAN. Thank you, Mr. Dennis. Thank you, Mr. Chairman.

Mr. HUNGATE. Mr. Hogan.

Mr. HOGAN. Thank you, Mr. Chairman. I will not take a great deal of the witness's time inasmuch as he and I have discussed his proposal in private. But, I want to take this occasion to commend him for the thoughtful analysis of the issues involved, which spawned these two pieces of legislation. I think they go further than any of the legislation before us thus far to answering the objections that have been raised and the doubts that have been raised about the constitutionality of the issues involved.

In addition to that, I would say to my friend from New York, Congresswoman Holtzman, that although he did not testify before this subcommittee he testified before the other, and Elliot Richardson also expressed serious doubts about the constitutionality of the approach of having the courts appoint him. Now, I do not know whether there is or is not a constitutional problem. I know there is serious doubt, and I know that the gentleman from Indiana's approach to this has the least doubt about its constitutionality. I think this meets the need, one bill or the other. It also meets another of the objections which have been raised during the hearings, and that is to get around the removal power by giving the Special Prosecutor a fixed term. I do

not think that is subject to any challenge, and I commend the gentleman, and I look forward to discussing it further with him when we get into markups.

Mr. HUNGATE. Thank you. I will withhold any questions, since I have the privilege of working on the subcommittee with the gentleman. We can discuss this issue in our markup sessions. Thank you very much for your contribution. The gentleman is certainly one of the most thorough attorneys in the Congress, and he always makes a welcome contribution. Thank you, Mr. Dennis.

Mr. DENNIS. I thank the Chairman and my colleagues, and also the distinguished witnesses coming after me, for the time.

Mr. HUNGATE. We will now take a 5-minute recess and then resume with Mr. Leon Jaworski.

Mr. HOGAN. Mr. Chairman, might I suggest that if it has not already been done so, that Mr. Jaworski be given a copy of Mr. Dennis's bills so that we might ask him about those?

Mr. HUNGATE. Certainly. That will be fine.

[A brief recess was taken.]

Mr. HUNGATE. The subcommittee will be in order. We will resume our hearings. The Chair will first recognize briefly our distinguished colleague on the committee from Texas, Mr. Jack Brooks.

Mr. BROOKS. I want to thank you, Mr. Chairman, for your graciously giving me the opportunity to welcome a longtime friend, Leon Jaworski, to this committee. I know him as a highly principled man, and effective and gracious, a very able and capable lawyer. I regret that he has refused in previous administrations service as Attorney General, and Federal judgeship has been dangled before him just like rubies on a chain. And I would say that he did not see fit to accept them and I rather regret that he has acted a little prematurely in accepting this Special Prosecutor job. If he had just waited, I think with his qualities and fairness and decency, and his capable background as a trial lawyer, he would have made a splendid independent prosecutor to permanently resolve this matter.

And I want to again welcome you to our committee, Leon, and say that we will look forward to your distinguishing yourself further here.

Mr. HUNGATE. Thank you very much, Mr. Brooks. None of us could hope to match Jack's eloquent welcome.

Mr. Smith and I, in particular, recall our previous cordial visits with you Mr. Jaworski. I think it would be redundant to recite your distinguished accomplishments. We simply welcome you here and look forward to your testimony.

Mr. Smith, did you wish to comment at this time?

Mr. SMITH. Thank you, Mr. Chairman.

I too just want to say welcome, Mr. Jaworski, before this committee.

Mr. HUNGATE. Mr. Jaworski, you have a prepared statement and without objection it will be made a part of the record at this point. You may proceed as you see fit.

Mr. JAWORSKI. May I first thank you, Mr. Chairman, for the opportunity of being here, and thank my friend of many years, Congressman Brooks, for his very generous statements, and thank you, Mr. Chairman for what you said, and thank Mr. Smith.

The statement that I have prepared is before you. If you wish, Mr. Chairman, I would be willing to read it.

Mr. HUNGATE. That will be fine.

Mr. JAWORSKI. And that way it can be before the entire committee as well as those here.

TESTIMONY OF SPECIAL PROSECUTOR LEON JAWORSKI, WATERGATE SPECIAL PROSECUTION FORCE, U.S. DEPARTMENT OF JUSTICE

Mr. JAWORSKI. Mr. Chairman, I appreciate the opportunity to discuss with the subcommittee my thoughts about legislation dealing with the appointment, tenure and jurisdiction of a special prosecutor.

I should begin by acknowledging that in the very short time since I agreed to accept appointment as Special Prosecutor I have had little opportunity as you can well recognize to study the differences among the various proposals that have been introduced or to consider in depth their relative practical and constitutional advantages. Thus, in my statement I shall not offer any comments on the merits of any particular bills.

But, what I would like to state to the subcommittee is my firm belief that the investigations which have been initiated and conducted by the Watergate Special Prosecution Force over the past 5 months must proceed with all dispatch. For this reason, once I was assured that I would have the independence that I consider indispensable to the proper performance of the duties of Special Prosecutor, I immediately came to Washington to assume direction of the Special Prosecution Force. Since being sworn in on Monday of this week, I have met with each of the task forces of the Special Prosecution Force and have reviewed in great detail the investigations that are underway.

Although it would be improper to comment on the status of any particular investigation or its expected course, I wish to state for the record that I have been extremely impressed with the thoroughness, fairness, and professionalism shown by the staff lawyers during these briefings. I was pleased to learn that, despite the events of the last few weeks, the Special Prosecution Force continued to function and moved forward on a number of important fronts. My directions to each task force were to continue with all pending investigations as vigorously and promptly as possible.

Because of my belief that the public is entitled to have all serious allegations explored and dealt with as promptly as is consistent with the sound administration of justice, I am uncertain whether it is necessary or desirable for Congress to proceed with legislation along the lines being considered by the subcommittee. It seems to me, just as an offhand comment, that the various approaches raise some issues on which reasonable men could differ. There is, therefore, inevitably going to be a good deal of debate before either House settles on any version of legislation dealing with the appointment and tenure of a Special Prosecutor. Other necessary steps before the matter is finally resolved, taken in conjunction with possible judicial proceedings relating to constitutionality, could well stall the effective labors of the Special Prosecutor's Office for an extended period of time.

I think Mr. Dennis touched on this problem. These considerations seem to me to be important because the uncertainties that they involve may have an impact on the ability of the Special Prosecution

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Force to proceed with the continuity that I believe has now been restored.

May I say, I would not have accepted appointment as Special Prosecutor after the firing of Professor Cox had I not received what I consider the most solemn and substantial assurances of my absolute independence. In this regard, I wish to emphasize that the Acting Attorney General has issued regulations defining my authority and jurisdiction in precisely the same terms as were used in defining those of Professor Cox—with what I think is a notable and significant addition of a firm and formal assurance that the President has agreed not to exercise his constitutional power to effect my discharge except in accordance with the consensus of the bipartisan leadership of the House and Senate and the Judiciary Committees of both Houses. In particular, prior to acceptance, I was given unqualified assurance that there would be absolutely no constraints on my freedom to seek any and all evidence, wherever it may be, including the Presidential files, and invoke the judicial process should I consider it necessary.

In my judgment, therefore, I have all of the freedom of action that could be expected of a Special Prosecutor assuming, of course, that the assurances that were given to me would be lived up to, and I am already actively involved in the continued conduct of the investigations initiated by the Special Prosecution Force. I feel confident that with the support and cooperation of the professional staff, whose members I have asked to stay at their posts and continue with their earlier responsibilities, I can effectively perform the duties entrusted to me by the Attorney General with the approval of the President.

Now, of course, Mr. Chairman, I am ready to answer such questions as pertain to this matter, and I welcome the questions so that I can explain how it happened that I accepted the assignment. I have heretofore undertaken a comment upon the assurances that were given me, and I have no reticence to state those to this committee. Thank you, Mr. Chairman.

Mr. HUNGATE. Thank you for your statement, sir.

Mr. Kastenmeier.

Mr. KASTENMEIER. Thank you, Mr. Chairman. I too would like to extend a welcome to Mr. Jaworski, and observe that whatever points of view preceding witnesses have had on the issue or the legislation before us, they have been, as I recall, unanimous in their admiration for you, both as a person and professionally.

Mr. JAWORSKI. Thank you, sir.

Mr. KASTENMEIER. And I appreciate as well that your statement does not take a particularly dogmatic approach to the question which confronts us.

I guess the first question really is, as was reported in the local press, that an article in the Washington Post of last Friday stated that in May "Leon Jaworski was approached about taking the job, but the White House found him unwilling." Is that true? Were you offered the job last May and declined it?

Mr. JAWORSKI. A gentleman who identified himself as the general counsel for Acting Attorney General Richardson, Mr. Richardson having just left his post as Defense Secretary—the gentleman's name was Mr. Hastings, as I recall it—discussed with me for probably an

hour and a quarter the matter of procuring the services of someone for this post. The conversation began by his saying that my name had surfaced in a number of discussions he had had with others and that he wanted to talk with me about the matter generally. I stressed at that time that I felt that the independence of the Prosecutor was a very, very important and significant phase of the undertaking. I was told, as I remember the expression, that the prosecutor would be working within the framework of Justice, meaning the Justice Department, and I did not think that this was the independence that the prosecutor should have, Mr. Kastenmeier. I suggested to him that the caliber of individual that would be obtained would have a direct relationship to the independence that he would have.

Mr. KASTENMEIER. Do you think the situation has changed since then?

Mr. JAWORSKI. I do.

Mr. KASTENMEIER. Let's go on to another point, and that is your statement on page 4, and I quote:

> I was given unqualified assurance there would be absolutely no constraints on my freedom to seek any and all evidence, whatever it may be, including the Preidential files, and invoke the judicial process should I consider it necessary.

And you will recall that on October 26 the President said, in his press conference, and I quote him: "We will not provide Presidential documents to a Special Prosecutor." And as far as invoking the judicial process, he suggested at that time, and I quote: "I do not anticipate we should come to a time when he," meaning the Special Prosecutor, "would consider it necessary to take the President to court. I think that our cooperation will be adequate."

That does not sound as if it is in accord with your understanding of the freedom given you. Has the President's view changed since October 26?

Mr. JAWORSKI. Yes, sir. And I will relate to you what the discussions were. I think it is fair for this committee to know it.

When I was first approached it was by telephone, and I stated that I did not believe that the situation was such that I could respond because of the fear of lack of independence. The conversation was with General Haig. Toward the close of the conversation I agreed to come to Washington to talk with him, and I did it with considerable reluctance, still wondering whether the situation would change. And I told him that unless there were assurances beyond what had been received by Mr. Cox, that I would not be available.

Assurances of substance to which your question was addressed, included the understanding that I would, to use the words of General Haig himself, have the right to sue the President. General Haig discussed the matter with the President and came back and told me that I had that absolute assurance, that there would be no restraint of any type with respect to my exercising the right to proceed according to such judicial process as I conceived to be appropirate and would be available to me.

Mr. KASTENMEIER. I appreciate that. In that meeting you had, as I understand, with General Haig, Mr. Garment, and Mr. Buzhardt, was it entirely unilateral in the sense that they gave you assurances? Did

you not give them any assurances in terms of their interest in protecting the President about how you might conduct your office?

Mr. JAWORSKI. Well, I was not asked about that, very frankly. There was nothing said about how I would conduct the office in the sense of what my duties would be. The important thing is that there would be no restraints imposed upon me. That was the important feature. And let me say to you, sir, that while these other two gentlemen, Mr. Buzhardt and Mr. Garment, did enter into the discussion at a later point, it was rather brief. There was a very lengthy discussion between General Haig and me when only the two of us were present. And it was not until the matter had been tentatively placed in such a posture that I thought I could move forward that there were any discussions with anyone else.

Mr. KASTENMEIER. Thank you, Mr. Jaworski.

Mr. JAWORSKI. You are welcome, sir.

Mr. HUNGATE. Mr. Smith.

Mr. SMITH. Mr. Jaworski, about how many people are there on the special prosecution force, lawyers and investigators?

Mr. JAWORSKI. I have met with all of them, by the way, Mr. Smith. I know the total number who are presently employed, including the secretaries, and they come close to 90. It is up in the eighties. The number of lawyers, I think, is 37. Yes, sir, that confirms my impression that there are 37.

Mr. SMITH. Was this prosecution force employed by your predecessor, Mr. Cox?

Mr. JAWORSKI. Yes, sir.

Mr. SMITH. And is it your intention, Mr. Jaworski, insofar as it is possible to do so, to keep this force intact?

Mr. JAWORSKI. It is. One of the concerns I had, perhaps it was a dual concern, was, first, whether those who are to remain would remain, and second, I did not know but what some substitutions might have to be made. I can tell you frankly that with the experience I have had to date, and we have been extremely busy working from early in the morning until late in the evening, I have met with all of the task forces, I have met with a number of the lawyers individually, and I am happily impressed with the type of men with whom I have so far labored.

Now, one does not reach conclusions that are final in the few days that I have had, of course, to work with them. But, I am giving you my initial impression.

Mr. SMITH. And so far has the task force by and large been willing to stay?

Mr. JAWORSKI. So far as I know, yes; sir. There are several task forces, Mr. Smith, with each task force covering a separate area of investigation. For instance, there is one relating to the Watergate, one relating to the so-called plumbers activities, and so on.

Mr. SMITH. Well, I was talking about the Special Prosecutor's task force as encompassing all the people who are working in your office.

Mr. JAWORSKI. Yes, sir. I hope so. I think so, and as soon as I could after my arrival and after talking with Mr. Ruth, the Deputy, and one or two others, I called the entire staff together and had a talk with them. And I would say, Mr. Smith, from what I know up to the present time, that they are more at ease than they had been, and

feel somewhat relieved, I think, as far as their willingness to stay is concerned. I have heard nothing to the contrary.

Mr. SMITH. Thank you very much, Mr. Jaworski.

During any of your conversations with General Haig or Mr. Buzhardt or Mr. Garment, was it ever suggested to you that you might go easy on the President?

Mr. JAWORSKI. No; it was not, and if that had been suggested, very frankly, that would have ended the conversation.

Mr. SMITH. You would not have taken the job?

Mr. JAWORSKI. I would not have taken it.

Mr. SMITH. Thank you very much, Mr. Jaworski.

Mr. HUNGATE. Mr. Edwards of California.

Mr. EDWARDS. Thank you, Mr. Chairman. And I too welcome Mr. Jaworski as a distinguished lawyer and an American of great integrity.

Mr. JAWORSKI. Thank you, Mr. Edwards.

Mr. EDWARDS. Mr. Jaworski, the White House staff was heavily involved in your selection as it was in the firing of Archibald Cox. Now, the White House staff must think that you are going to perform your duties somewhat differently from Mr. Cox. Otherwise they would not have fired him and picked you. How are you going to be different than Mr. Cox?

Mr. JAWORSKI. I am not entirely certain, I am not entirely certain that they concluded I would do something different from Mr. Cox. Of course, I have no way of knowing what their hopes may have been. As I indicated before, the conversations that led to my agreeing to do this were between General Haig and myself primarily. I would say that the conversations with Mr. Buzhardt and Mr. Garment were just a few minutes, perhaps 10 or 15 minutes, not over that.

I did talk with the Attorney General designate and with Mr. Bork for some period of time also.

Now, getting back to the staff, there was nothing in the discussions that indicated that they expected me to do anything different from what Mr. Cox had done. There was everything in my statement that indicated I was going to do whatever I thought was necessary to be done, and whatever I thought I had the right to do.

The reason that I may have some difference with respect to your conclusion, sir, is that this matter found itself in a different posture by the time that I came. There had already been such conversations over the telephone that there was no need of my coming unless the White House staff was willing to leave me alone and proceed as I thought I should proceed.

Mr. EDWARDS. It has been suggested by one commentator that the White House wants you to forget the plumbers and drop demands for all White House documents with regard to the plumbers. Have they given you any indication that that is their hope?

Mr. JAWORSKI. No, sir, nor is it my intention at this time. I obviously cannot reach final conclusions on matters, but I have reviewed with the task force what is being done in that connection. And at the present time there is no interruption in what is being done.

Mr. EDWARDS. It has also been suggested by one commentator that they want you somewhere along the line to get rid of William H. Merrill, who is apparently one of the heads of the plumbers task force. He

apparently was fairly close to one of the Kennedys a few years ago, and the commentator suggested that this particular person rankles the people in the White House.

Is there anything to that, Mr. Jaworski?

Mr. JAWORSKI. Mr. Merrill is going to be judged according to his performance, Mr. Edwards. I have talked with him on two or three occasions. We talked at length when I reviewed the work of his task force, and the other members of that task force were also present. I have no present intention of doing anything with respect to Mr. Merrill. Obviously the direction in which the investigation goes, and what is done, and our decisions, are decisions that will have to be made in the future.

Mr. EDWARDS. Mr. Richardson suggested in his testimony to the Senate yesterday or the day before that the President should just drop all these claims of executive privilege in the Watergate investigation. He suggested further that this is the only way the Special Prosecutor is going to get to the bottom of these matters, and that then you would not have to keep fighting for Presidential papers like Mr. Cox did. Mr. Cox told this committee that he had a long list of requests of the White House that were ignored over many, many weeks, and that he was never able to get any information about special Project M–1 or Project Odessa.

Mr. JAWORSKI. I have since, without identifying them because I think you would recognize that it would not be proper for me to do so at this juncture, I have sent two communications to the White House calling for information on two matters that are of some significance. I do realize that there has been some information called for that has not yet been furnished.

Now, there was some comment made with respect to that by Mr. Buzhardt who said that the force that was available was one that had many other duties to perform, that they just did not have the manpower to go into many of these things as promptly as they would like to. He mentioned also that many of the matters called for are filed in such a way as to make it difficult to locate them. Now, in the letters that have gone forward I have offered to be of whatever assistance we possibly could, even if they are willing to let us assist in sorting out some of the material that may be in the files, that we would be prepared to do so.

I have offered complete cooperation along that line. I have to realize that asking for what we are seeking does impose something of a burden. I have to realize that. I try to be as reasonable, and will try to be as reasonable as I can. On the other hand, as I pointed out in my communications, we do have a grand jury in session and we need to move forward. If there is anything important in this matter, as I hope they realize, and I think they do realize as I do, it is the fact that the American people do expect some action, and they do expect this matter to move along, and there should be no interruptions. Very frankly this is one of the impelling reasons for my agreeing to go ahead at this time.

Mr. EDWARDS. Thank you, Mr. Jaworski.

Mr. JAWORSKI. Thank you, Mr. Edwards.

Mr. HUNGATE. Mr. Dennis.

Mr. DENNIS. Mr. Jaworski, I fully realize that as you say you have

had no chance to consider these various bills that we have before us. You did have the opportunity to listen to my explanation of my own two measures, such as it may have been. I wonder if based on that you might have any comment on those measures, assuming that we do do something or other in the way of legislation?

Mr. JAWORSKI. I was very impressed, Mr. Dennis. I think they show considerable resourcefulness. And you must know that where I am I would welcome all of the independence and the protection that I possibly could have.

I am not questioning for a moment the assurances that have been given me. You must know that I went into this, however, seeking an independence to whatever extent I could at that time prescribe. And I went as far as I could in outlining the steps and the measures that I thought would give me that independence. I am not prepared to talk about the legality of it, Mr. Dennis. You know so much more about that than I do. Assuming that these are constitutionally acceptable I can certainly see merit, I can certainly see a constructive approach that I can imagine this committee would weigh very carefully.

Mr. DENNIS. I thank you, sir.

In your statement to this committee as I understand it, which you made as a very experienced trial lawyer and a gentleman of standing at the bar, and in the profession, you say that you feel you have been given the assurance of independence you need to go ahead, and that you would not be here if that were not the case.

Mr. JAWORSKI. That is correct, Mr. Dennis.

Mr. DENNIS. I thank you, sir.

Mr. JAWORSKI. Thank you, sir.

Mr. HUNGATE. Mr. Mann.

Mr. MANN. Mr. Jaworski, as you indicated, you sent a very clear message before you arrived. But, the assurances that you have received, I gather, were from General Haig?

Mr. JAWORSKI. They were from General Haig, Mr. Mann, but General Haig told me that he went to the President, and he reviewed them with the President, and that the President approved them. And he came back and told me so. I did not talk with the President myself. There was some question in my mind as to the propriety of it, and it may be that the President had the same thing in his mind. We did not talk directly.

Mr. MANN. You have not talked to him at any stage?

Mr. JAWORSKI. No, sir, I did not.

Mr. MANN. After talking with Mr. Haig, you mentioned that you consulted with Mr. Garment and Mr. Buzhardt. What were their concerns, what different approach from General Haig did they take?

Mr. JAWORSKI. None. General Haig told them what I had insisted upon, and the meeting really with them was very, very brief. What was said that stuck in my mind was what I mentioned a few minutes ago, and that was the complaint about their shortage of manpower to meet requests that had been made. I think they also, one or the other of them, and I think it was Mr. Buzhardt that mentioned that actually there had been more compliance with the production of matters that have been called for than had been indicated by Mr. Cox. Those were about the only two matters that I remember specifically.

Mr. MANN. Now, it is clear how you would handle the important

and direct confrontation on a piece of evidence. You would take it to court through the subpena process. However, Mr. Cox alluded to a certain resistance, a subtle lack of cooperation existing in some areas of government and in governmental departments. Now, let us assume for the purposes of illustration the F.B.I. or the Treasury Department. How would you expect to handle such matters, and who would be heard from with reference to that situation?

Mr. JAWORSKI. Mr. Mann, I would just do whatever I could think of that was legitimate. I would proceed with that just as I would, as I have had to as a trial lawyer over the years in getting evidence. Whatever processes are available to me I would pursue them. And I would like to think I would do it with thoroughness, and that I would do it with fairness.

Mr. MANN. There may be ethical or other problems involved, but I think you can appreciate the fact that our deliberations on this matter may extend for longer than we would like for it to, and it might become important for us to know whether or not you are getting the cooperation that you expect to get. Could we expect some input from you on that point if you run into difficulty?

Mr. JAWORSKI. You certainly could. As a matter of fact, if I am convinced there is any effort not to cooperate, or any dodging of my requests that are unreasonable, I will make it very clear that I think so, and if it is necessary to report it elsewhere I will do so. I do have a committee, as you know, that I can go to in the event that there is some confrontation so that an impasse could be resolved. I look upon that as having considerable value, really, maybe more by way of deterring one from doing just what you have talked about in the event the staff at the White House and we should disagree. I realize that perhaps one of the most difficult matters to really weigh and measure is that relating to the nonproduction of certain things or the delay in production. I have to recognize that there is some reason that perhaps could exist with respect to difficulty in locating some of these matters. I have to realize that there might be difficulties as to the existence of sufficient manpower. But, this is why I had offered to be of whatever help I possibly can, and I certainly expect to exercise all of the rights that I have to obtain these at the earliest practicable time.

Mr. MANN. By reference to the committee you are speaking of the eight members that have been designated in the testimony you just mentioned?

Mr. JAWORSKI. Yes, sir. Yes, sir.

Mr. MANN. You would expect to consult with them or engage their cooperation or perhaps help along this line rather than on a pure dismissal situation?

Mr. JAWORSKI. I think I would. If I felt that there was something that was happening that would lead either to my dismissal or my failure to perform the functions that I am supposed to, I would go to them.

Mr. MANN. Thank you.

Mr. JAWORSKI. Thank you, Mr. Chairman.

Mr. HUNGATE. Mr. Mayne of Iowa.

Mr. MAYNE. Thank you, Mr. Chairman.

Mr. Jaworski, I would like to apologize to you for the unfortunate

malfunctioning of the amplification system during the presentation of your formal statement. I am afraid that during the first half of it it was not amplifying your voice at all, and in the second half there was a buzz which pretty well drowned it out. To the extent that anyone present was not able to hear you, that is a very serious loss and most unfortunate. Fortunately since we have gotten into the question period your voice has been very audible, and with that, I thank you for your appearance here today.

Mr. JAWORSKI. Thank you, Mr. Mayne.

Mr. HUNGATE. Ms. Holtzman.

Ms. HOLTZMAN. Thank you, Mr. Chairman. And I would like to thank Mr. Jaworski for his appearance here today. And I have heard a great deal about your integrity and your capability, and the questions that I am going to be asking really reflect the concern of the American public, not with respect to that, but with respect to the question of your independence.

A Washington Post article recently quoted you as saying the following, and I would like you to comment as to whether or not this is an accurate quote. You are reported as saying:

> There is actually very little chance of conflict of interest because of the narrow scope of the Watergate matter. Nothing involved any of our clients or could possibly involve any of our clients.

Is that an accurate quote?

Mr. JAWORSKI. Well, it is not the entire quote. As far as it goes I think it is accurate. I would be glad to go into that if you wish me to.

Ms. HOLTZMAN. Thank you. I would like to ask you some questions with respect to that. And focusing on the language, "the narrow scope of the Watergate matter," do you consider that the purpose of the Special Prosecutor's Office is to investigate whether or not the President of the United States has committed any illegal acts?

Mr. JAWORSKI. Yes.

Ms. HOLTZMAN. That is within the scope of the Special Prosecutor's Office?

Mr. JAWORSKI. Yes.

Ms. HOLTZMAN. And do you intend to seek whatever materials are necessary, whether they are in the President's files or not, with respect to whether or not he has committed any illegal acts?

Mr. JAWORSKI. I do.

Ms. HOLTZMAN. And do you consider the scope of the investigation of your office to include an investigation into whether or not the President authorized the so-called break-in at Dr. Fielding's office?

Mr. JAWORSKI. Yes. There is a task force presently investigating it, Ms. Holtzman, and the investigation is continuing.

Ms. HOLTZMAN. And you will expect to subpena, if necessary, and obtain all information, whether or not in Presidential files, relevant to whether or not the President did so authorize any break-in?

Mr. JAWORSKI. I do.

Ms. HOLTZMAN. Do you intend to investigate personal expenses in connection with San Clemente? Is this within the scope of the investigation as you see it?

Mr. JAWORSKI. This is the one matter which I have not yet had an opportunity to discuss with Mr. Ruth and with others, Mr. Ruth being the deputy. He has mentioned to me on two or three occasions that

since I arrived here that we would need to get together to have a discussion of that. I do not know what he has in mind, very frankly, but I would say to you there is certainly nothing to keep us from investigating it. I have made no agreements to the contrary, and there are no restraints. This is simply one matter that I am not informed on, and there may be other matters. But certainly this is one because he has mentioned to me that there are areas that he wants to talk about, and he wants to bring in the appropriate ones who have some information on it. And very frankly, we just have not been able to get to it.

Ms. HOLTZMAN. But, you would consider the subject matter to be within the jurisdiction of the Watergate Special Prosecutor's Office?

Mr. JAWORSKI. I would think so. I would think that they come within the matters that were specified by Mr. Bork and elaborated upon by him as to the four areas of jurisdiction.

Ms. HOLTZMAN. Do you consider the question of the so-called milk deal and whether or not there was improper influence on the President with respect to the price supports, that increase, or with respect to changing the import quotas to be within the jurisdiction of the Special Prosecutor's Office?

Mr. JAWORSKI. I have discussed that with the task force already, and it is a matter that is being pursued.

Ms. HOLTZMAN. And do you expect to subpena, and can you give us assurance that you will subpena or obtain all relevant materials, whether or not in Presidential files, related to this so-called milk deal allegation?

Mr. JAWORSKI. We will go to the ultimate in doing that which is necessary to complete that investigation. Whatever is necessary.

Ms. HOLTZMAN. Even if it includes seeking Presidential papers?

Mr. JAWORSKI. Yes.

Ms. HOLTZMAN. Thank you.

Mr. JAWORSKI. Thank you, Ms. Holtzman.

Ms. HOLTZMAN. Mr. Bork testified a day or so ago to this committee that during the conversation at which he was present, at which you, Mr. Haig, Mr. Buzhardt and Mr. Garment were meeting, that you never specifically asked whether or not you would be fired if you sought to obtain Presidential papers. Is Mr. Bork's recollection accurate?

Mr. JAWORSKI. Well, I cannot recall whether that was mentioned at that time. I would like to again point out that that was, at the time that those other two gentlemen were present, was a relatively short period of time. There was a discussion between the Attorney General-designate, Mr. Bork, General Haig and myself, and at which the others were not present. They were just present, as I say, for a relatively short period of time. I do not recall that the subject of my being fired was discussed in those terms. What I was interested in were affirmative assurances and affirmative promises.

Ms. HOLTZMAN. Well, did you at any point ask General Haig or Mr. Bork, did you say to them in words or substance, something along the following lines, "Look, I am going to have to go after the same materials Mr. Cox went after; am I going to be fired if I do so?"

Mr. JAWORSKI. I think it went beyond that. I think I have the right to go after things that Mr. Cox may not have gone after, because I said to them, I want to have no restraints of any kind.

Ms. HOLTZMAN. I understand that, Mr. Jaworski. But, what I asked you was, did you ever say to Mr. Bork or Mr. Haig at any point in words or substance, "I am going after the same materials that Mr. Cox was going after and am I going to be fired if I do so?"

Mr. JAWORSKI. Well, I really could not have said that because I did not know at that time what materials Mr. Cox went after, so I did not say it; no. I took a larger and broader approach.

Ms. HOLTZMAN. Did you ask them, then, in words or substance, the following: "If I go after the same materials as Mr. Cox went after will I be fired?"

Mr. JAWORSKI. Not in those words; no. But I would say that the conversation certainly embodied that because what I said was that I am going to operate without any restraints, and I want your assurance that there will be no restraints. And I received that assurance, and that would embrace what you are talking about.

Ms. HOLTZMAN. But the question was not specifically asked?

Mr. JAWORSKI. Not in those words; no.

Ms. HOLTZMAN. In words or in substance?

Mr. JAWORSKI. No.

Mr. HUNGATE. Mr. Hogan.

Mr. HOGAN. Yes. Thank you, Mr. Chairman.

My colleague from California, Mr. Jaworski, asked if you would do anything differently from Mr. Cox, and I think that there is one thing you ought to try to do a little differently, and that relates to the fact that there is at least the appearance that partisan considerations were given in the hiring of staff. When Mr. Cox was before the committee I detailed for him the Democratic partisan activities of some 11 of his top staff people in the Special Prosecutor's Office. For example, Mr. Edwards alluded to Mr. Merrill, who served as Michigan State Chairman for the 1968 Kennedy for President campaign, and James Vorenberg, who I understand is also a Special Assistant, who also was head of McGovern's task force on crime. And George Frampton, Jr. was a researcher, speechwriter for Sargent Shriver. And Francis J. Martin worked on the staff of two Democratic Congressmen up here. Roger H. Whitten worked in the 1968 Democratic Presidential campaign in the Oregon primary for Kennedy and so on.

Now, I do not say that these individuals cannnot perform their duties in a professional way. But, I do think that if replacements or new people are being hired, they ought to be hired on a nonpolitical basis rather than previous partisan activity, because I think the whole question involved in the Special Prosecutor operation is credibility and the objectivity of the investigation itself, and I submit that that cuts both ways.

So, I might say that that might be something that you ought to apply your attention to, and see what controls might be imposed to insure that partisan zeal does not interfere with objectivity.

Now, having said that, I would like to ask in relation to the legislation before us how long you anticipate the Special Prosecutor activity will go on?

Mr. JAWORSKI. I would certainly hope that it could be completed in a shorter period of time than has been discussed in the past. I told the staff that what I believe our job was not to sacrifice the principles of sound administration of justice, not to sacrifice thoroughness, and

under no circumstances to sacrifice fairness. Consistent with those, those elements, I want to move ahead just as fast as we possibly can. I do like to think that if there is any characteristic that has helped me in the past it has been one of cutting through a lot of detail and getting to the heart of matters and reaching decisions. And I expect to move forward and reach decisions in this matter without any delay that is not required. And I want to assure you that that will be done.

I cannot at this juncture, of course, speculate as to how long the matters may take. Much will depend upon what else may arise that has not been foreseen.

Mr. HOGAN. Well, the reason I ask is, as you, I am sure, are aware, that this subcommittee processed legislation extending the life of the grand jury for 6 months and then a possible additional 6 months. And the lawyers from your staff indicated that they thought things could be wrapped up in 6 months.

Now, that being the case, some of the legislative proposals before us to create this Office of Special Prosecutor might be challenged in the courts on the basis of their unconstitutionality, which would delay the process even more, and by the time we resolved every issue it might be a moot question because your activities might be over.

Mr. JAWORSKI. This is the concern that I expressed in this statement, Mr. Hogan. We must remember that the Special Prosecutor is signing certain charges. The Special Prosecutor is taking certain action, making certain decisions, and if he should be appointed under circumstances that give rise to a possible constitutional attack, you know that this will happen in each case where a defendant is brought to the bar of justice. So, you do have that problem to wrestle with, and this is one of the things that I alluded to.

I want to mention to you, sir, that Mr. Vorenberg is no longer with us.

Mr. HOGAN. Yes; my colleague has just handed me a note that he left with Mr. Cox.

I thank you.

Mr. JAWORSKI. May I also state one other matter, that the biographical background of each of the gentlemen and lady or ladies who are working on the staff is something that will be reviewed. I cannot discuss it with you at this time. All I am able to say is that my introduction to them and my discussions with them up to this time have impressed me with their objectivity. There is certainly the obligation on my part to make certain that each of them does operate properly and professionally, fairly, and I assure you that that will be done.

Mr. HOGAN. Well, I thank you for that assurance, and I do not in any way want to imply a lack of professionalism on the part of the staff. However, as has been said numerous times during the hearings, we are not only concerned with justice, but with the appearance of justice. And I think partisanship relates to that appearance.

Mr. JAWORSKI. You are correct, sir.

Mr. HOGAN. Thank you, Mr. Chairman.

Mr. HUNGATE. Yes. Acting Attorney General Bork has testified. I think, that:

> We have 40 or 50 lawyers over there in that task force who have been working on this case from the beginning, and they are still there. I have urged Mr. Jaworski to keep them there because I think their remaining intact is essential

to the expeditious handling of these cases. I have no qualms whatever that those lawyers and investigators who were operating under Mr. Cox are still doing their job effectively and are going forward.

Mr. JAWORSKI. Yes. I think we have made some progress this week, if I may say so.

Mr. HUNGATE. In your statement you refer to full freedom and independence, absolute independence. I think some of our concern may be in the changeover, similar to the fellow from Missouri who took a trip, and he stopped at a hotel with his wife, and he never had been where they had the meals with the room. And he came down and the bill was $50. And the fellow said, well, that includes the meals. Well, he said, I didn't eat any meals. And he said, well, they were there for you.

So, he subtracted $35 off the bill and said, that is for kissing my wife. the fellow said, I didn't, He said, well, it was there for you.

I think we are concerned about the powers that are there. We all know lawyers are as different as any other people. Some are quiet and some are loud; and some are nitpickers and some are string savers; others will not even write down a bill. I guess it is the concern whether all of those powers will really be used, and in the sense that they thought Mr. Cox was using them.

You mentioned the solemn and substantial assurances of absolute independence. This is a question that a layman would think funny, but a lawyer, I think, would understand. Were those assurances in writing?

Mr. JAWORSKI. No, sir. They were given in a twofold manner, if I may say. First by General Haig, who without urging on my part agreed that he would discuss them with the President so that there would not be any question about it. He went and discussed them with the President. He returned and had another talk with me. This was before we talked with anyone else, and told me that the President had agreed to those assurances.

Mr. HUNGATE. All right. That's my next question. If Mr. Haig should be dismissed, as Richardson was dismissed, are the assurances gone?

Mr. JAWORSKI. I would assume that that depended on what the President's reaction would be. I would immediately go to the congressional committee and would lay the matter before them.

Mr. HUNGATE. Again in the statement, the President has agreed not to exercise his constitutional power to effect the discharge. But, as an attorney, would you not think that he still maintains the constitutional power?

Mr. JAWORSKI. Yes.

Mr. HUNGATE. If he changed his mind and sought to exercise it, that power is his?

Mr. JAWORSKI. Yes, that is correct. I think it would be a breach of the absolute understanding that was had. On the other hand, I also have to realize that I might be guilty of something that would warrant my discharge.

Mr. HUNGATE. Well, always when one of my clients fired me they made a mistake, but it happens.

Thank you very much.

Mr. JAWORSKI. Thank you, Mr. Hungate.

Mr. HUNGATE. Mr. Brooks, do you have any questions?

Mr. BROOKS. I would deeply appreciate the opportunity to ask just one question. Counselor, I read in the yesterday morning Washington Post that:

> The former Attorney General, who quit rather than fire former Watergate Special Prosecutor Archibald Cox, also disclosed that Mr. Nixon called Richardson on July 3rd and told him to order Cox to put out a press release in which Cox would say that he was not investigating matters dealing with the President's properties at San Clemente or Key Biscayne. Richardson said he called Cox, who issued a statement denying he was investigating the President's real estate transactions.

Later in that story he points out that Cox indicated that he was just trying to get some general information for himself and had asked an aide to gather all newspaper clippings on the matter.

Now, my question is, have you been precluded from examining the manner, and the financial transactions involving the acquisition of San Clemente and Key Biscayne by President Nixon?

Mr. JAWORSKI. No, I have not. I will say the subject was not discussed, but when I was assured that I would be operating under no restraints, as I answered in my questions to Ms. Holtzman, I believe that I have the right to go forward as to any appropriate matter of investigation that is within the charter. And as I mentioned, I do not know whether you were here at the time, Congressman Brooks, but this particular question of this area that you are now pointing to is one that my deputy has said he had wanted to discuss with me, along with some other members of the staff, and we are waiting to discuss it. We just have not been able to get to it, very frankly.

Mr. BROOKS. I might suggest that the audit that was announced and released by the White House on the San Clemente property was admittedly an edited audit, and that I would suggest that it might be very helpful to you to get a copy of that unabridged audit from that firm in New York to fully evaluate what did transact out at San Clemente.

Mr. JAWORSKI. Thank you for that suggestion.

Mr. HUNGATE. Mr. Kastenmeier.

Mr. KASTENMEIER. Thank you, Mr. Chairman.

Following up Mr. Hungate's question, I take it you have nothing in writing whatsoever relating to your discussions with General Haig or the other two?

Mr. JAWORSKI. That is correct. The subject really did not come up. I did not ask for it, and they did not offer to give me anything.

Mr. KASTENMEIER. On a different question, you are quoted as saying on November 1 that you will resign from your law firm and give up your directorship in a number of Texas banks and corporations to avoid conflict of interest. It appears that you are really giving up a great deal. How long do you anticipate your assignment will last, as you now see it?

Mr. JAWORSKI. This is rank conjecture, sir, as you realize. It could be anywhere, I would say, from as long as 2 years. I would be surprised if it went beyond that. There would have to be some unforeseen consequences. I would like to think we would wind it up sooner than that. There is no reason why we cannot try these cases rather promptly, because the investigations have been very thorough, and if there are indictments which are returned we should be able to try them very

promptly. And it is just a question then of the time it takes to wind these matters up on appeal.

Mr. KASTENMEIER. I would like to ask you a hypothetical question. Had it come to pass that either the President or the Acting Attorney General, Mr. Bork, had not appointed a Special Prosecutor, and had the Congress established such an office and vested it in the courts of the District of Columbia, and had a judge who was authorized to make an appointment of the Special Prosecutor asked you to take the job, would you have accepted the job offer from such judge?

Mr. JAWORSKI. I would, with the same reluctance that I accepted this one, sir, except that while I do not want to get into the area of discussing my own feelings of conscience about matters, I would have felt a duty to respond had it been presented to me, or had it been presented to me by a judge as it was presented here. This is not anything entirely new. I did this a number of years ago in a matter that was as difficult as this one.

Mr. KASTENMEIER. So, we are to assume that it is not the auspices under which the offer came, but rather the duties entailed in the offer that attracted you?

Mr. JAWORSKI. That is correct, sir. And I might say that General Haig's expression to me was that he was "putting the patriotic monkey on my back." That is exactly the way he phrased it.

Mr. KASTENMEIER. Thank you, Mr. Jaworski.

Mr. JAWORSKI. Thank you, sir.

Mr. HUNGATE. Mr. Smith?

Mr. SMITH. No questions.

Mr. HUNGATE. Mr. Edwards?

Mr. EDWARDS. Thank you, Mr. Chairman. I just have one question.

On August 21, when Mr. Bork was still Solicitor General, he sent a memo to Special Prosecutor Cox suggesting that there be set up a special consultant to monitor national security matters involving the plumbers. And implicit in that was the suggestion that the investigation of the plumbers should be curtailed and limited to strictly criminal matters. Was that subject brought up at any of the meetings, that this special consultant should be set up?

Mr. JAWORSKI. No, sir.

As a matter of fact I had not heard of that before. It seems to me that somewhere in the columns or somewhere, some allusion was made to it but I have not heard of it in a discussion either at the White House or at our offices.

Mr. EDWARDS. Should the proposition be made, can you tell us whether or not you would look upon it affirmatively or negatively?

Mr. JAWORSKI. I beg your pardon, sir?

Mr. EDWARDS. Would you approve of such a proposition, Mr. Jaworski?

Mr. JAWORSKI. Anything that would lighten my burden, I would. Anything that would facilitate my getting whatever I think would be appropriate, I certainly would, yes, sir. And I have not, of course, studied this particular matter, and I do not know anything about it. But I assure you that anything that would aid the matter moving along as it should, I want.

Mr. EDWARDS. Well, it had a hidden trap in it too, that there would

be another person or group of people that would exercise a certain amount of censorship on the information. But, I am sure by your answer and I certainly accept it that you would examine the offer or the suggestion with great care, and if it interferes with your investigation you would turn it down. Is that right?

Mr. JAWORSKI. If it even so much, not only interfered, but if it even so much as slowed it down, and I considered it to be unnecessary, I would turn it down.

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

Mr. HUNGATE. Mr. Dennis.

Mr. DENNIS. Mr. Jaworski, if we should adopt the statute which provided, as my and Mr. Smith's bill does, that the Special Prosecutor shall be and is hereby made subject to removal only by the Attorney General for gross impropriety, gross misconduct, gross dereliction of duty, would that not presumably give the Special Prosecutor some legal rights and legal recource were he arbitrarily discharged for some other reason?

Mr. JAWORSKI. It would, sir. Yes, sir.

Mr. DENNIS. I thank you. That is a point that I wanted to bring out in connection with one of the previous questions.

Mr. HUNGATE. Mr. Mann.

Mr. MANN. No questions.

Mr. HUNGATE. Mr. Mayne.

Mr. MAYNE. No further questions.

Mr. HUNGATE. Ms. Holtzman.

Ms. HOLTZMAN. Thank you, Mr. Chiarman.

Mr. Jaworski, getting back to that quotation I read before, what did you mean when you said "the narrow scope of the Watergate matter?"

Mr. JAWORSKI. And I am glad you asked that, Ms. Holtzman, because we did not get into that, the use of that particular phrase. That came up in connection with a possible conflict of interest of clients.

And I was commenting on the fact that because this scope is relatively narrow, as contrasted with many other matters, that you represent clients in, the many, many activities of clients or of organizations, that I saw a relatively narrow scope as compared with the wide spectrum of representation that a law firm has, and this is all that I really meant by it. I certainly did not mean that it would be narrowed or that I considered its standing within itself per se as to be a narrow one. I did not mean that. I meant it by contrast.

Ms. HOLTZMAN. Well, getting to the second part of that quotation with respect to the supposed conflict of interest, and just to clear the record in that regard, do you, or did you, or does your firm, or did any member of your firm represent any corporation or person who has been or is being investigated by the Watergate grand jury, by the Special Prosecutor's Office, by the Houston grand jury or in connection with the Vesco matter in New York?

Could you answer that?

Mr. JAWORSKI. Yes; I would be glad to answer it. I was pleasantly surprised to find upon reviewing, for instance, the entire file with the task force on those who were assertedly involved in improper campaign contributions that there was only one that I had or our firm previously had any connection with representing. We do not repre-

sent the firm generally, nor do we represent them in this matter, of course. We had represented that firm on a special arrangement at one time.

I wanted to say to you that I immediately told Mr. Ruth that I would disqualify from any connection with that matter, that he would have to handle it. Mr. Ruth responded that fortunately an agreement had already been reached as to the disposition of that matter, and as to what the plea would be and so on. And he said, well, there is no problem with respect to it.

Now, I realize, Ms. Holtzman, that there may be others that could still arise in the future, and if so, I will follow exactly the same pattern. I will take the same action that I took as soon as this one came to my attention. I do not think, perhaps, so far as I am able to tell now, that there are any others under consideration, but one could arise, others could arise.

I should enlarge that answer probably by also saying inasmuch as you alluded to one or two others, that the other areas of concern that you mentioned we have no connection with at all.

Ms. HOLTZMAN. You mean the Houston grand jury or the Vesco, Mitchell, Stans matter in New York?

Mr. JAWORSKI. Right. That's right.

Ms. HOLTZMAN. In connection with your conversation with General Haig, could you tell us the first time that he spoke to you and the date of your meeting or meetings with them?

Mr. JAWORSKI. He spoke to me over the telephone the day before the meeting, and at the meeting date—you must realize that there have been so many things that have happened since then. The meeting date was on Wednesday of last week, so that he spoke to me over the telephone on Tuesday, and I came to Washington on Wednesday morning, and I spent several hours there.

Ms. HOLTZMAN. Thank you. I see my time has run out.

Mr. HUNGATE. Mr. Hogan.

Mr. HOGAN. Mr. Chairman, I have no questions. I just wanted to state that I think the American people are very fortunate indeed to have a man of your caliber who is willing to undertake a difficult assignment at a critical time, and I for one am very favorably impressed with you.

Mr. JAWORSKI. Thank you, Mr. Hogan. I appreciate it.

Mr. HUNGATE. I think counsel has a few questions.

Mr. Hoffman.

Mr. HOFFMAN. Mr. Jaworski, just two or three questions.

Mr. JAWORSKI. Yes, sir.

Mr. HOFFMAN. In Mr. Bork's press conference of October 24, following all the excitement, he said this about the prosecution:

> The President gave me a letter and also said orally that he expected a vigorous prosecution. I believe that and there will be vigorous prosecution. We will go for whatever evidence we need for a complete investigation and successful prosecutions.

Would you, particularly in light of the chairman's question about the possible departure of Mr. Haig, consider it inappropriate to have such a letter directed to you by the President?

Mr. JAWORSKI. I would not consider it inappropriate; no. I chose not to ask for it. I thought that the assurances were sufficient and

given under such circumstances, with specific reference made to these matters and with General Haig coming back and saying that this has been now discussed expressly with the President, and has his unqualified approval, that I did not deem it necessary to ask for anything in writing.

Mr. HOFFMAN. Just one last thing that has bothered me some.

I have before me a copy of a letter from Mr. Nixon to Attorney General Richardson dated October 19. "Dear Elliot:" and the pertinent part:

> I am instructing you to direct Special Prosecutor Archibald Cox, of the Watergate Special Prosecution Force, that he is to make no further attempts by judicial process to obtain tapes, notes, or memoranda of Presidential conversations. I regret the necessity of intruding to this very limited extent on the independence that I promised you with regard to Watergate when I announced your appointment. This would not have been necessary if the Special Prosecutor had agreed to the very reasonable proposal you made to him this week.

That, I think, was the Senator Stennis proposal.

Following that, Mr. Ziegler on October 20, announced Mr. Cox's departure saying, "President Nixon has tonight discharged Archibald Cox. The President took this action because of Mr. Cox's refusal to comply with instructions given him Friday night through Attorney General Richardson," and so forth.

You are satisfied from the conversations you have had with White House staff that, despite the fact that your guidelines are identical, word for word, this would not happen to you?

Mr. JAWORSKI. I have that assurance. Now, that is as far as I could go, but I have that absolute promise, sir.

Mr. HOFFMAN. Thank you very much.

Mr. HUNGATE. Mr. Pauley.

Mr. PAULEY. Thank you, Mr. Chairman.

Mr. Jaworski, I just have a couple of questions. The first relates to a hypothetical situation, but one which has sufficient possibility of becoming real that I am sure you must have given it some consideration. Suppose that the Congress does pass legislation to create an office of an independent special prosecutor to be appointed by the courts, and the courts appointed such a special prosecutor different from yourself. While the issue of the validity of that appointment was being tested, would you intend to carry forward with your own mission and appointment, or would you, while that issue was being tested, suspend your operations?

Mr. JAWORSKI. I do not think the constitutionality or the legality of this appointment that I hold is in question, and since it is not in question—I am talking about from the standpoint of the legality now—I would continue to proceed, because I would think that there would be no possible question that could be raised as to that legality.

Now, I honestly do not know what the situation would be if someone else undertook to act in the interim. I am sure that in the event a different prosecutor were appointed, and there were no questions about the legality of it, although I am looking down the road now and really dealing hypothetically with this matter, I certainly do not want to do anything other than what is the performance of a duty, and the sooner I can come to the end of that performance the more I will enjoy life, and I will embrace it whenever that time comes, however it may come about.

Mr. PAULEY. Thank you.

I have one further question. The chairman and Mr. Hoffman both alluded to the possibility of the gentlemen who gave you your assurance on the White House staff departing. Is not that possibility an argument in favor of an approach such as the one suggested by Mr. Dennis of, in effect, codifying by act of Congress the scope of your duties and responsibilities, and the grounds for your discharge?

Mr. JAWORSKI. I think one has to recognize the value of what Congressman Dennis has proposed. It has some value. That is a safeguard. I personally came to the conclusion that I had been given such assurances—and maybe I am naive—but I accepted those assurances in good faith. They were stressed over and over again. And, accordingly, I felt that I had no good reason, answering from the standpoint of a duty to perform, that I had no good reason to say no.

Mr. PAULEY. Thank you. I have no further questions.

Mr. JAWORSKI. Thank you.

Mr. HUNGATE. Any further questions?

Ms. Holtzman.

Ms. HOLTZMAN. Yes. Thank you, Mr. Chairman.

If you were in Mr. Cox's shoes, would you have accepted the so-called Stennis compromise, or would you have taken the same action he did?

Mr. JAWORSKI. I have to frankly say that I do not know exactly what the compromise was, except what was reported in the newspapers. I have never seen, and did not read it too closely even, and I knew that there was a suggestion made which embodied, as I recall it, the matter of a summary being prepared that would be based upon Senator Stennis' having heard the tapes himself, and having approved it or something to that effect.

Ms. HOLTZMAN. I think so, yes.

Mr. JAWORSKI. I have to answer that only this way, and that is that I would accept no compromise of any kind that did not satisfy me fully that I have precisely what I need in order to continue to investigate and to effectively prosecute.

Ms. HOLTZMAN. Well, asking you a hypothetical, then, if it came down to a challenge or a confrontation with you with respect to Presidential papers, would you accept summaries of Presidential papers or summaries of Presidential tapes?

Mr. JAWORSKI. No; I would want to see the documents.

Ms. HOLTZMAN. Thank you.

Have you personally made any contributions to President Nixon's campaign?

Mr. JAWORSKI. I have made no contribution to his campaign, so I do not need to have myself investigated.

Ms. HOLTZMAN. Thank you very much.

Mr. JAWORSKI. You are welcome.

Ms. HOLTZMAN. With respect to General Haig and the question I was asking you before, on October 29, the New York Times reported that he said, in essence, the following, that he did not believe a new prosecutor would have to make a pledge of any kind not to seek additional White House documents, and quoting General Haig: "Nor do I think he should. And if he was the type that would feel encumbered in that way, he is perhaps not the man that we would want."

That is a quotation from Mr. Haig approximately a day before or 2 days before he spoke to you on the phone. Now, if he felt at that time that a special prosecutor should not be, should not have to feel encumbered by pledging not to seek documents, do you think his attitude changed? Did you discuss in any way with him a pledge not to obtain Presidential documents?

Mr. JAWORSKI. Oh, no. Indeed not. As I have indicated before, Ms. Holtzman, the discussion was that there would be no restraint on me to seek whatever I believed was appropriate.

Now, I had quite a discussion, as I have indicated before, with General Haig over the telephone before I even came to Washington. The tenor of the discussion at the beginning was that there was not any need in my coming because I did not believe that the assurances were there that give the independence that I felt was necessary. I put it on two bases, very frankly. It was not only my own desire for independence, it was also a matter of public acceptance, and I wanted the maximum of whatever I could possibly exact in fairness, and this is the way I approached it. And if I could have thought of anything other than what was asked for I would have asked for it.

Ms. HOLTZMAN. Did you have any reaction when the White House people said to you the reason they had difficulty in complying with Mr. Cox's requests was that they did not have additional staff?

I am under the impression that the President was able to obtain almost $10 million in Federal funds for various additions to his property, and I find it hard to believe that he could not have obtained sufficient funds to comply promptly with the requests of the Special Prosecutor. Did you press the presidential aides with respect to their claims that they did not have sufficient staff?

Mr. JAWORSKI. I was not then acting, Ms. Holtzman, but I have got some requests from them, I mean requests that I have sent to them, and I want, of course, a response consistent with my realization that it does take time, perhaps, to find these matters.

But, there will be some discussions in the event they are not forthcoming.

Ms. HOLTZMAN. Thank you very much. Mr. Jaworski, for your forthrightness. And thank you, Mr. Chairman. I have no other questions.

Mr. HUNGATE. If there are no further questions, the chair will again express its appreciation to you, Mr. Jaworski.

Mr. JAWORSKI. Thank you, Mr. Chairman.

Mr. HUNGATE. Your giving us the privilege to exchange views, and your contribution to the consideration of this problem are most worthwhile.

Mr. JAWORSKI. Thank you, sir. And please be assured I will come back and talk to the committee at any time the committee wishes me to return.

Mr. HUNGATE. This will conclude the hearings at this time.

[Whereupon, at 12 noon, the hearings were concluded.]

[Note: The subcommittee subsequently reported H.R. 11401, introduced by Mr. Hungate, to the Full Committee on the Judiciary. It was reported, with amendments by the full committee, to the Committee of the Whole House on the State of the Union on November 26, 1973. The bill and accompanying report follow:]

93D CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 93-660

INDEPENDENT SPECIAL PROSECUTOR

NOVEMBER 26, 1973.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. HUNGATE, from the Committee on the Judiciary, submitted the following

REPORT

together with

DISSENTING VIEWS, ADDITIONAL VIEWS, AND ADDITIONAL DISSENTING VIEWS

[To accompany H.R. 11401]

The Committee on the Judiciary, to which was referred the bill (H.R. 11401) to provide for, and assure the independence of, a Special Prosecutor, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill do pass.

The amendments are as follows:

1. On page 3, line 5, strike the subsection symbol "(6)" and insert in lieu thereof the subsection symbol "(c)".

2. On page 7, line 24, insert the subsection symbol "(a)" before the word "The", and on page 8, immediately after line 4, insert the following new subsection:

> (b) The Special Prosecutor shall report at least monthly to the chairman and ranking minority member of the House Judiciary Committee such information as may be pertinent to the question of whether impeachable offenses have been committed by the President of the United States. The Special Prosecutor, upon request by the House Judiciary Committee, shall provide to the chairman and the ranking minority member of the committee such information, documents, and other evidence as may be necessary to enable the committee to conduct an investigation or inquiry into whether grounds exist for impeachment of the President of the United States.

3. On page 10, line 9, strike the subsection symbol "(a)".

EXPLANATION OF AMENDMENTS

Amendment number 2 constitutes the only substantive change to the bill as introduced. It adds to section 9 of the bill, which relates to reports to be made by the Special Prosecutor, the requirement that

he report at least monthly to the Chairman and the ranking Republican of the House Judiciary Committee information bearing on whether the President of the United States has committed impeachable offenses. Also, upon request of the Committee on the Judiciary, the Special Prosecutor is required to provide these same Members information, documents, and other evidence as may be necessary to enable the Committee to conduct an investigation or inquiry into whether grounds exist for impeachment of the President.

Amendments number 1 and 3 merely correct printing errors which occurred in printing the bill when introduced. Amendment number 1 changes the erroneous subsection designation "6" to "c" in section 3, and amendment number 3 eliminates the erroneous designation of the text of section 13 as a subsection.

PURPOSE OF THE BILL

The purpose of H.R. 11401 is to provide for the appointment of an independent Special Prosecutor and the creation of an Office of Special Prosecutor, to continue the important work undertaken by former Special Prosecutor Archibald Cox, present Special Prosecutor Leon Jaworski, and the Office of Watergate Special Prosecution Force of the Department of Justice. The Committee is convinced that the only way to assure that the American people will have complete trust and confidence in the aggressiveness and independence of the Special Prosecutor is to make him truly independent of the Executive, give him tenure, and legislate limited grounds for his removal.

BACKGROUND

When Mr. Elliot L. Richardson appeared before the Senate Judiciary Committee to testify in support of his nomination as Attorney General, the first question put to him was, "Did you ever hear of the Watergate affair?" The second question was, ". . . if you are Attorney General, what are you going to do about it?" And the third question—"What about a Special Prosecutor?"

On the fifth day of his Senate testimony, Mr. Richardson presented to the Committee what have come to be known as the guidelines for the Special Prosecutor. Insofar as pertinent to this discussion, they provided that the Special Prosecutor would have "the greatest degree of independence", the "Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions", and the "Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part."

Despite these commitments, Special Prosecutor Cox was illegally discharged on October 20, 1973. See *Nader* v. *Bork*, civil action No. 1954–73, U.S. District Court for the District of Columbia.

On October 23, 1973, the first of many joint resolutions and bills calling for the court appointment of a successor Special Prosecutor was introduced. One-third of the Members of the House have sponsored such legislation, as have one-half of the Members of the Senate.

On November 1, 1973, Acting Attorney General Bork announced his appointment of Mr. Leon Jaworski to succeed Mr. Cox. Later, in testifying before the Committee's Subcommittee on Criminal Justice, Mr.

Bork stated that Mr. Jaworski would operate under guidelines identical (except for one additional safeguard against removal) to those which had applied to Mr. Cox.

After five days of hearings, and receipt of much correspondence, the Subcommittee was convinced that the only way to assure aggressive, completely independent action, the end result of which will be credible with the American people, is to place in the court system the power to appoint and remove a Special Prosecutor. Public confidence in the independence of the prosecutor is even more important for those individuals whom his investigation exonerates. Accordingly, H.R. 11401 was drafted by the Subcommittee and introduced by its Chairman.

SECTION-BY-SECTION ANALYSIS

Section 1 establishes "Special Prosecutor Act of 1973" as the short title of the Act.

Section 2(a) provides that the United States District Court for the District of Columbia, sitting *en banc*, shall appoint a panel of three of its members (referred to throughout the Act as "panel"). A vacancy on the panel is to be filled in the same manner as the original appointment.

Section 2(b) provides that the panel is "empowered to and shall promptly appoint" a Special Prosecutor, who shall head an Office of Special Prosecutor. The panel is also to fill any vacancy that occurs in the position of Special Prosecutor.

Section 2(c) provides that participation in the selection of the panel shall not in and of itself disqualify a judge in any proceeding in which the Office of Special Prosecutor is involved. Service on the panel, however, does disqualify a judge in any proceeding in which the Office of Special Prosecutor is involved.

Section 2(d) provides that the Act should not be construed to preclude the panel from appointing as Special Prosecutor the person serving as Special Prosecutor in the Office of the Watergate Special Prosecution Force in the Department of Justice at the time the panel makes its appointment.

Section 3(a) provides that the Special Prosecutor shall be compensated at the rate provided in level IV of the Executive Schedule under section 5315 of title 5, United States Code. That rate is presently $38,000 per annum.

Section 3(b) provides that the Special Prosecutor may employ and fix the compensation of such personnel in the Office of Special Prosecutor as he reasonably determines to be necessary, without regard to the provisions of the United States Code governing appointments in the competitive service and without regard to provisions relating to classification and General Schedule pay rates. However, the salaries may not exceed the maximum rate for GS–18 (presently $36,000 per annum).

Section 3(c) authorizes the Special Prosecutor to procure the personal services of experts and consultants at rates not to exceed the per diem equivalent of the rate for GS–18.

Section 3(d) authorizes every department or agency of the Federal or District of Columbia government to make available to the Special Prosecutor, on a reimbursable basis, any personnel the Special Prose-

cutor may request. The term "department or agency" in this and succeeding sections is used in the broadest sense to include any office, section, bureau, division, unit or instrumentality of the Federal or District of Columbia government. Section 3(d) further provides that the requested personnel shall be detailed within one week after the date of the request unless the Special Prosecutor designates a later date. A detailed individual's position and grade in his department or agency may not be prejudiced by his service in the Office of Special Prosecutor. Finally, Section 3(d) provides that no person may be detailed to the Special Prosecutor unless he, the person to be detailed, consents.

Section 3(e) provides that for purposes of subchapter III of chapter 73 of title 5, United States Code, the Special Prosecutor and the personnel of the Office of Special Prosecutor are deemed to be employees in an executive agency. The provisions of subchapter III of chapter 73 (the "Hatch Act") relate to political activities by employees in an executive agency. The effect of Section 3(e) is to remove the Special Prosecutor and his employees from politics and political activities.

Section 4(a) gives the Special Prosecutor "exclusive" jurisdiction to investigate and to prosecute in the name of the United States:

(1) offenses arising out of the unauthorized entry in Democratic National Committee headquarters at the Watergate;

(2) all offenses arising out of the 1972 Presidential election for which the Special Prosecutor deems it necessary and appropriate to assume responsibility;

(3) allegations of offenses involving the President, members of the White House staff, or Presidential appointees, except allegations of offenses the Special Prosecutor waives to the jurisdiction of the Department of Justice by letter to the Attorney General setting forth his reasons for such waiver, with a copy of that letter to the panel;

(4) all matters referred by the Attorney General of the United States to the former Special Prosecutor who assumed office on May 24, 1973, or to any of his successors in office; and

(5) such new matters which he consents to have assigned to him by the Attorney General of the United States.

This section restates with minor changes the guidelines applicable to Mr. Cox and Mr. Jaworski. Numbers (1) and (2) are identical to provisions in the previous guidelines. Number (3) has been changed from its predecessor guidelines only in that it allows the Special Prosecutor to waive his jurisdiction over certain offenses to the Department of Justice. The change was made to enable the Special Prosecutor to allocate his resources to the more serious allegations related to his areas of responsibility. It enables him to avoid dealing with such minor matters as traffic tickets issued to Presidential appointees by the Park Police, for example, or even to major matters, such as tax evasion, wholly unrelated to his mandate. Number (4) was added to insure that the Special Prosecutor would have jurisdiction over matters previously referred by the Attorney General to any of the the Special Prosecutors in charge of the Office of Watergate Special Prosecution Force in the Department of Justice. It is the retroactive application of number (5), which is identical to its counterpart in the earlier guidelines.

Section 4(b) authorizes the Special Prosecutor to take any action necessary and proper to perform his functions and carry out the purposes of the Act. By way of illustrating the broad scope of the Special Prosecutor's powers, section 4(b) lists some examples of his powers. In brief, the Special Prosecutor has, within the area of his exclusive jurisdiction, all the powers possessed by the Attorney General with respect to matters within the jurisdiction of the Attorney General and the Department of Justice.

Section 4(c) provides that the Special Prosecutor may continue, and shall become successor counsel for the United States in, all investigations, prosecutions, cases, litigation, and grand jury or other proceedings initiated by the previous Special Prosecutors.

Section 5 authorizes the Special Prosecutor to delegate any of his functions to personnel of the Office of Special Prosecutor and to experts and consultants retained pursuant to Section 3(c).

Section 6(a) provides that all files, records, documents and other materials that relate to matters within the exclusive jurisdiction of the Special Prosecutor, and which are in the possession or control of the Department of Justice, any Special Prosecutor in charge of the Office of Watergate Special Prosecution Force, or any other department or agency of government, are transferred to the Special Prosecutor as of the date on which he takes office.

Section 6(b) authorizes the Special Prosecutor to request from any department or agency of Government such additional files, records, documents and other materials as he deems necessary or appropriate to carry out his duties, functions and responsibilities. The department or agency must furnish the requested materials expeditiously unless a court of competent jurisdiction orders otherwise.

Section 6(c) requires the Special Prosecutor to prevent the unwarranted disclosure of his files, records, documents, physical evidence and other materials obtained or prepared by the Office of Special Prosecutor.

Section 7 authorizes the Administrator of General Services to provide the Special Prosecutor with the offices, supplies, equipment and services furnished to any other agency or instrumentality of the United States.

Section 8 provides that the Office of Special Prosecutor shall terminate three years after the date the panel first appoints a Special Prosecutor, but extends the term as necessary to permit the Office to carry to conclusion litigation pending on the date the office would otherwise expire.

Section 9(a) requires the Special Prosecutor periodically to report the activities of his office "as is appropriate." The qualification "as is appropriate" is necessary because a full and complete disclosure of information might result in prejudicial pretrial publicity, might prematurely disclose the results of an ongoing investigation, or might otherwise be detrimental to an investigation or prosecution. The report is to be submitted to the panel, to the Attorney General, and to the Congress on the first anniversary of the Special Prosecutor taking office; the second anniversary of his taking office; and not later than 30 days after the termination of the Office of Special Prosecutor.

Section 9(b) requires that the Special Prosecutor report, at least monthly to the Chairman and ranking minority Member of the House

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Judiciary Committee such information as may be pertinent to the question whether the President has committed impeachable offenses. Upon request by the House Judiciary Committee, the Special Prosecutor must provide the Chairman and ranking minority Member of the House Judiciary Committee with such information, documents and other evidence as may be necessary to enable the Committee to conduct an investigation or inquiry into whether grounds exist for impeachment of the President.

Section 10 gives the panel sole and exclusive power to remove the Special Prosecutor, and then only for gross dereliction of duty, gross impropriety, or physical or mental inability to discharge the powers and duties of his office.

Section 11 establishes a mechanism that will ensure that a constitutional challenge to the Act will be promptly resolved. A defendant who challenges the validity of any provision of this Act in a criminal case or proceeding must do so by a motion to dismiss, filed not later than 15 days after service of the indictment or information. The motion to dismiss will be heard and decided by a three judge district court convened pursuant to section 2284 of title 28, United States Code, as soon as possible, but not later than 20 days after the filing of the motion. A person who challenges the validity of any provision of the Act in connection with a civil action or proceeding must do so by a motion filed with the appropriate district court. The district court will immediately certify the motion to be heard and determined by a district court of three judges, which court must hear and determine the motion as soon as possible, but in no event later than 20 days after the filing of the motion.

An aggrieved party in either a civil or criminal case may, not later than 15 days after the determination in the district court, file an appeal in the Supreme Court. The Supreme Court is directed to expedite its decision.

Subsection (b) provides that if a motion raises a question that has been previously determined by the Supreme Court, even though the determination occurred in litigation involving other parties, the expedited review procedures of section 11(a) do not apply; normal review procedures do.

Section 12(a) authorizes the appropriation of such sums as are necessary to carry out the purposes of the Act. Further, it authorizes the Special Prosecutor to submit his budget requests directly to Congress, without first submitting them to the Office of Management and Budget. Section 12(b) transfers to the Special Prosecutor the unexpended balances of appropriations and other funds available to the Office of Watergate Special Prosecution Force in the Department of Justice.

Section 13 provides that if any provision of the Act, or its application to any person or circumstance, is found invalid, other provisions of the Act or their application to other persons or circumstances shall not be affected.

CONSTITUTIONAL CONSIDERATIONS

A question has been raised as to the constitutionality of providing for a court appointed Special Prosecutor. The Subcommittee on Criminal Justice called and examined a number of witnesses on that specific

question. Among those who supported the constitutionality of the legislation are former Special Prosecutor Cox, four eminent Constitutional law scholars and teachers—Professor Paul M. Bator of the Harvard University Law School, Professor Gerhard Casper of the University of Chicago Law School, Professor Daniel J. Meador of the University of Virginia Law School, and Professor Paul J. Mishkin of the University of California Law School—Mr. Chesterfield Smith, President of the American Bar Association, and a number of Members of Congress. Beyond this, a number of legal briefs on the subject were presented to the Committee, all of which supported the constitutionality of such an appointment and the provision in the legislation for removal. Only Acting Attorney General Bork and Dean Roger C. Cramton of the Cornell University Law School questioned the constitutionality of providing for a court appointed Special Prosecutor.

I. The Appointing Power

A. Article II, section 2, clause 2 of the Constitution is the primary underpinning which supports the approach of H.R. 11401. This provision reads as follows:

> He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: *but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.* (Emphasis added)

(1) *The Special Prosecutor is an "inferior officer" within the meaning of Article II, Section 2, Clause 2.*

In *United States* v. *Germaine*, 99 U.S. 508 (1878), the Supreme Court said:

> 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 might be inconvenient, it was provided that, in regard to officers inferior to those specifically 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 little doubt.

This case has never been reversed.

(2) *Vesting the appointment of the Special Prosecutor in a court of law is a valid exercise of this Congressional power to provide for the appointment of inferior officers.*

In sustaining the appointment of supervisors of Congressional elections by courts of law, pursuant to legislation enacted by the Congress, the Supreme Court said in *Ex Parte Siebold*, 100 U.S. 371 (1879), at pages 397–398:

> Finally, it is objected that the act of Congress imposes upon the Circuit Court duties not judicial, in requiring them to appoint the supervisors of election, whose duties, it is alleged, are entirely executive in their character. It is contended that no power can be conferred upon the courts of the United States to appoint officers whose duties are not connected with the judicial department of the government.
>
> The Constitution declares that "the Congress may, by law, vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law, or in the heads of departments." It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution; and, if there were, it would be difficult in many cases to determine to which department an office properly belonged. Take that of marshal, for instance. He is an executive officer, whose appointment, in ordinary cases, its left to the President and Senate. But if Congress should, as it might, vest the appointment elsewhere, it would be questionable whether it should be in the President alone, in the Department of Justice, or in the courts. The marshal is pre-eminently the officer of the courts; and, in case of a vacancy, Congress has in fact passed a law bestowing the temporary appointment of the marshal upon the justice of the circuit in which the district where the vacancy occurs is situated.
>
> But as the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress. And, looking at the subject in a practical light, it is perhaps better that it should rest there, than that the country should be harassed by the endless controversies to which a more specific direction on this subject might have given rise. The observation in the case of Hennen, to which reference is made (13 Pet. 258), that the appointing power in the clause referred to "was no doubt intended to be exercised by the department of the government to which the official to be appointed most appropriately belonged," was not intended to define the constitutional power of Congress in this regard, but rather to express the law or rule by which it should be governed. The cases in which the courts have declined to exercise certain duties imposed by Congress, stand upon a different consideration from that which applies in the present case. The law of 1792, which required the circuit courts to examine claims to revolutionary pensions, and the law of 1849, authorizing the district judge of Florida to examine and adjudicate upon claims for injuries suffered by the inhabitants of Florida from the American army in 1812, were rightfully held to impose upon the courts

> powers not judicial, and were, therefore, void. But the duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts; and in the present case there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void. It cannot be affirmed that the appointment of the officers in question could, with any greater propriety, and certainly not with equal regard to convenience, have been assigned to any other depositary of official power capable of exercising it. Neither the President, nor any head of department, could have been equally competent to the task.
>
> In our judgment, Congress had the power to vest the appointment of the supervisors in question in the circuit courts.

The *Siebold* case has never been reversed, nor has the Supreme Court ever watered down its decision; rather the opinion has often been cited with approval. The *Siebold* case stands clearly and unequivocally for the following:

(*a*) Congress can empower the courts to appoint officers whose duties are not judicial.

(*b*) It is impractical to attempt to restrict the power of appointment by a test based on some sort of functional relationship between the appointor and the appointee.

(*c*) The duty to appoint inferior officers when required by law to do so, is a constitutional duty from which a court may be excused only if there is such an "incongruity" in the required duty that the court should or must be excused. In the instant case there clearly is no such incongruity; but there would be an incongruity in the Executive making the appointment of a Special Prosecutor charged with investigating and prosecuting the Executive. In the words of *Siebold*, "Neither the President, nor any head of department, could have been equally competent to the task."

(3) *Other instances of appointments by the courts of non-judicial officers.*

(*a*) Section 546 of title 28, United States Code, provides for the appointment by the courts of United States attorneys. Sustained in *United States* v. *Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963).

(*b*) Section 565 of title 28, United States Code, provides for the appointment by the courts of United States marshals. See *Ex Parte Siebold*, 100 US. 371, 397 (1879).

(*c*) D.C. Code § 31–101 (1973 ed) empowers the courts to fill vacancies on the District of Columbia Board of Education. Sustained in *Hobson* v. *Hansen*, 265 F. Supp. 902 (D.D.C. 1967), appeal dismissed 393 U.S. 801 (1968).

(*d*) The courts regularly appoint defense counsel pursuant to the provisions of the Criminal Justice Act of 1964, as amended (78 Stat 552; 18 U.S.C. 3006A).

(4) *Article I, Section 8, Clause 18, of the Constitution also supports the legislation.*

Article I, Section 8, Clause 18, of the Constitution provides as follows:

> [Congress shall have power] To make all Laws which shall be necessary and proper for carrying into Execution the fore-

> going Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

If, for argument's sake, it is assumed that the prosecution of criminal offenses is an exclusive power of the President, or of the Department of Justice, and they are disabled by conflict of interest from exercising that power, then Congress under the plain language of this clause has full authority to take remedial legislative action. The power is to "make all laws", which should disabuse any argument that the sole Congressional remedy is impeachment and should further support providing for the appointment of the Special Prosecutor by the courts of law under Article II, Section 2, Clause 2.

As Chief Justice Marshall put it in *McCulloch* v. *Maryland*, 4 Wheat 316, 415 (1819), the "necessary and proper clause" is a provision "made in a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."

II. The Removal Power

Giving the Special Prosecutor independence from the President has been analyzed in terms of "separation of powers", in terms of "checks and balances", and in terms of "conflict of interest". What these analyses all come down to, however, is the issue whether the President ought to be able to control the persons responsible for investigating and prosecuting some of his closest and most trusted associates, and perhaps even himself. If Congress determines that it is necessary and proper to restrict the President's removal power in order to assure that the Special Prosecutor will be able to carry out his functions promptly, thoroughly, and fairly, can it validly do so?

The doctrine of separation of powers is not explicitly provided for in the text of the Constitution, but it is considered one of the premises upon which our constitutional system of government rests. The doctrine does not contemplate the complete separation of the different branches of government, but rather it contemplates the sharing of power among them. The doctrine does not demand the creation of three "watertight compartments", but aims to avoid a concentration in one branch of government of power that could be exercised tyrannically (See *United States* v. *Solomon*, 216 F. Supp. 835, 838–9 (S.D. N.Y. 1963) for an excellent, extended discussion.) The proposed Special Prosecutor Act of 1973 is consistent with this concept.

The power to remove an official, in the absence of statutory specification, generally goes with the power to appoint. *In the matter of Hennen*, 13 Pet. 230 (1839). In 1926, however, the Supreme Court limited this rule on the ground that its application to postmasters violated the doctrine of separation of powers. Congress had provided that certain postmasters were to be appointed, and removed, by the President with the advice and consent of the Senate. The Supreme Court struck down the removal provision as invalid, finding that the power to remove an official who performs exclusively executive branch functions rests solely with the President. *Myers* v. *United States*, 272 U.S. 52 (1926).

While the decision in the *Myers* case seemed to preclude restricting the President's removal power in a broad area of appointments, subsequent Supreme Court decisions narrowed the area within which

the President can exercise unfettered discretion. *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), involved the Presidential removal of a commissioner of the Federal Trade Commission, an independent regulatory agency. The Supreme Court held that Congress can restrict the President's removal power if the official involved is not performing purely executive branch functions. In the subsequent case of *Wiener* v. *United States*, 357 U.S. 349 (1958), involving the removal of a member of the War Claims Commission, the Supreme Court held that Congress can restrict the President's removal power if the official's functions require freedom from executive branch interference. Therefore, under the doctrine of separation of powers developed by the Supreme Court in the *Myers*, *Humphrey's Executor*, and *Wiener* cases, Congress may restrict the President's removal power if (1) the Special Prosecutor's functions are not exclusively executive, or (2) the Special Prosecutor's functions require freedom from executive branch interference.

The prosecutorial function in Anglo-American jurisprudence is not, and has not been, purely an executive branch function. At the time of the adoption of the Constitution, private citizens both here and in England, could prosecute criminal charges. The federal government's role in prosecuting violations of federal criminal laws was established by statute, not by the Constitution. See 1 Stat. 92. Further, Congress has also authorized criminal prosecutions by private persons. See, for example, 1 Stat. 112. See also L. White, *The Federalists* 415–16 (1948). That the prosecutorial function is not purely executive is further illustrated by the grand jury system. The grand jury exists outside the executive branch to act as a buffer between private citizens and the executive branch. Unless the grand jury votes to return an indictment charging a crime, a felony prosecution of a private citizen cannot take place (unless, of course, the citizen waives indictment). The Special Prosecutor Act of 1973 gives the Special Prosecutor functions and duties with regard to the grand jury.

The background of events leading to the introduction of H.R. 11401 makes it evident the allegations about violations of federal criminal laws by high officials of the executive branch cannot be fully, impartially and thoroughly investigated by a prosecutor who does not have freedom from executive branch interference. It is just as important to insulate a prosecutor responsible for investigating and prosecuting high executive branch officials from interference by the executive branch, as it is to insulate a member of the War Claims Commission from such interference.

One further element of separation of powers is that, within his sphere of discretion, the Special Prosecutor must be free from judicial (as well as executive) control of his decisions. In *United States* v. *Cox*, 342 F.2d 167 (5th Cir. 1965), the Court of Appeals for the Fifth Circuit held that a court could not compel a United States attorney to sign an indictment when by law the United States attorney was free to decide whether or not he wanted to sign. The Special Prosecutor Act of 1973 does not provide for any supervision of the Special Prosecutor by the district court for the District of Columbia. The Act gives the Special Prosecutor complete freedom of action within his jurisdiction—freedom from judicial as well as executive control.

ESTIMATE OF COST

Pursuant to the requirements of clause 7 of Rule XIII of the Rules of the House of Representatives, the committee estimates that enactment of the bill will result in no increased Federal expenditure beyond that already committed to the existing Office of Watergate Special Prosecution Force—approximately $2.8 million per year.

DISSENTING VIEWS

We are in favor, under existing circumstances, of statutory provision for the appointment of a Special Prosecutor.

We believe, however, that this appointment should be brought about in such a way that the objective can be accomplished with as few Constitutional and legal complications as possible.

We are more interested in the successful prosecution of the guilty than in the promotion of a political issue.

H.R. 11401 does not meet this standard.

Under H.R. 11401 the appointment of a Special Prosecutor is lodged in a panel of three members of the United States District Court for the District of Columbia.

This procedure at once raises grave, and unnecessary, Constitutional questions by vesting in the Judicial Branch of the Government the appointment of an officer of the Executive Branch—a prosecutor, who acts as the agent of the executive in carrying out the executive's constitutional duty of enforcement of the laws. See *United States* v. *Cox*, 342 Fed. (2) 167 (1965).

The Constitutional question is one never definitively decided, but it is one of substance, the existence of which is conceded by every professional witness who testified before the subcommittee.

In this situation it would seem axiomatic that, if it is possible to secure an independent Special Prosecutor without building into our statute this Constitutional problem—which may invalidate every indictment the Prosecutor obtains—this certainly ought to be done.

In addition, H.R. 11401 poses very real practical problems.

Mr. Leon Jaworski, a prominent lawyer of high reputation, is already in office as Special Prosecutor under an appointment which is unquestionably valid. He and his staff—largely inherited from the former Special Prosecutor Mr. Archibald Cox—are already actively engaged in the "Watergate" investigation.

If now a new Special Prosecutor is appointed under H.R. 11401 and the District Court panel does not see fit to appoint this same Mr. Jaworski who is already actively in charge of the investigation, we may well have a situation where we have two rival Special Prosecutors in office during a period of undetermined length while the Constitutional validity of the new Prosecutor's status is determined by litigation, which can only be ultimately resolved by the Supreme Court of the United States. Instead of prosecuting the guilty we may be engaged in a time consuming and unproductive struggle over jurisdiction between prosecutorial rivals.

In addition, there is certainly a very good chance that H.R. 11401, which is subject to very substantive Constitutional objection, may, if passed, meet a Presidential veto on that very ground. In that case there

is also a real possibility that the passage of this bill will prove to be an exercise in legislative futility.

The normal way in which to appoint an executive officer is by an executive appointment. Such an appointment under Article II, section 2 of the Constitution may be by the President, with advice and consent of the Senate, or it may be by a Department Head. In either case, and as long as the appointment of the executive officer is kept in the executive branch, we avoid the Constitutional problem, already posed, which inescapably arises when we attempt, as in H.R. 11401, (also in alleged reliance upon the provisions of Article II, section 2) to place an executive appointment in the hands of the courts.

The only difficulty with this approach, under the unusual circumstances we now face, is that under the doctrine of *Myers* v. *United States*, 272 U.S. 52 (1926), it is not possible, in the case of a Presidential appointment, to restrict by statute the power of Presidential removal, and while later cases have cast some doubt upon the limits and extent of this doctrine it may well still apply in the case of a Presidential appointment of a prosecuting officer.

An earlier Supreme Court opinion, *United States* v. *Perkins*, 116 U.S. 483 (1886), which is cited with approval in the *Myers* decision, seems to give us a satisfactory answer to this dilemma, for the Court there held that if Congress delegates the power of appointment to a Department Head and vests that Department Head with the power of removal, Congress may, at the same time, "limit and restrict the power of removal as it deems best for the public interest." Thus the Court held in that case that the Secretary of the Navy could discharge a Naval Cadet only by and through a Court-Martial, as provided by an Act of Congress.

In view of all the foregoing considerations we supported in Committee, and will offer as a substitute on the Floor, the provisions of a bill H.R. 11555, which, by statute, clothes Mr. Jaworski the present Special Prosecutor, who was appointed by the Attorney General, with all the powers, jurisdiction, and authority during a three year term of office heretofore given to Mr. Cox by the "guidelines" under which he operated, and which provides, by law, that he can be discharged only "for gross impropriety, gross misconduct, gross dereliction of duty, or for physical inability to discharge the powers and duties of his office, but for no other cause". This measure then further provides that if for any reason it should become necessary to appoint a successor to Mr. Jaworski, that successor shall have all the same powers and all of the statutory safeguards given to Mr. Jaworski, and shall, in addition, in his case, be appointed by the Attorney General "subject to the advice and consent of the Senate". This last provision will ensure a congressional participation in any future appointment, which is not insisted upon in Mr. Jaworski's case, since he is already in office and actively functioning, and his appointment seems to have met with very general approval.

For reasons stated it is our belief that the substitute bill outlined above will assure an independent Special Prosecutor free of the serious Constitutional and practical objections which surround the Committee bill, H.R. 11401. We therefore dissent from the action of the Commit-

tee rejecting the substitute, taken on a 21–17 vote, and we urge the House to support our substitute proposal.

DAVID W. DENNIS.
ROBERT MCCLORY.
JOSEPH J. MARAZITI.
TRENT LOTT.
HAMILTON FISH, Jr.
WILLIAM J. KEATING.
HENRY P. SMITH III.
WILEY MAYNE.
LAWRENCE J. HOGAN.
TOM RAILSBACK.
M. CALDWELL BUTLER.
CHARLES W. SANDMAN, Jr.
WILLIAM S. COHEN.
CARLOS J. MOORHEAD.
EDWARD HUTCHINSON.

ADDITIONAL VIEWS OF HON. WALTER FLOWERS

Although I concur generally with the dissenting views expressed by my colleagues, I would emphasize several other facts.

These facts are practical considerations which taken with the other views expressed before compelled me to support the substitute measure.

First of all, the current special prosecutor, Mr. Jaworski, is on the job now, working with the cooperation and assistance of his predecessor's staff. Whether by veto or court test through the appellate process, there is certainly evidence that a substantial time delay is a fact to be recognized under the Committee Bill. In my judgment, further delay could be seriously prejudicial to the course of justice in this whole matter.

Of significance, too, is the fact that the substitute, if adopted in the House, would command the bipartisan support of a large majority of the members, where the Committee Bill's support is not so certain. An additional fact, which has arisen since our Committee's consideration, is the expressed wish by a number of judges in the District of Columbia that this proposed legislation not provide for a "court appointed" special prosecutor.

Therefore, I shall support the substitute approach which would further insulate and protect the present Prosecutor and allow him to go forward expeditiously in his investigation and prosecution.

WALTER FLOWERS.

ADDITIONAL DISSENTING VIEWS

The fatal flaw in H.R. 11401, in our view, is not in the objectives sought to be fostered by the bill, but in the means used to try to attain those goals. All of us desire, just as strongly as do those in the Committee who supported the bill, a full and fair investigation of the Watergate affair and related matters by an independent Special Prosecutor, the prosecution of any malefactor whom such an investigation discloses has committed an offense against the laws of the United States, and, no less importantly, the exoneration of any person as to whom a thorough investigation reveals no substantial evidence of participation in any such offense. Nor do we oppose the basic concept of legislation to bolster the independence of a Special Prosecutor by giving him a fixed term of office, carefully circumscribing the grounds for which he may be lawfully removed, and endowing him with all necessary jurisdiction, powers, and duties to carry out his functions. On the contrary, the substitute bill whose provisions we supported in the Committee, H.R. 11555, and which we intend to support before the House, would do all these things.

Where we differ with the majority of our colleagues on the Committee, and differ fundamentally, is over the issue of whether a Special Prosecutor can or should be appointed by the Judicial Branch. In our judgment, for the Congress by statute to place the appointment of a Special Prosecutor in the courts, as H.R. 11401 proposes to do, not only needlessly raises constitutional questions of the gravest magnitude, but also has the harmful consequence of substantially delaying, until all questions as to the validity of the appointment and powers of such a Special Prosecutor can be treated and resolved by the Supreme Court, the very investigations and prosecutions that the citizens of this country wish expedited and that now are being carried forward under the direction of the present Special Prosecutor, Mr. Leon Jaworski, and his able staff. It is the very real possibility that H.R. 11401 would be declared invalid by the courts plus the likelihood that the delays necessarily occasioned by H.R. 11401 will jeopardize the success of the Watergate investigations and prosecutions, by rendering evidence stale and harder to obtain, and by demoralizing the Special Prosecution Force that currently is in vigorous operation, that has caused us to conclude that the court appointment approach embodied in H.R. 11401 is seriously defective and should not be followed.

At the nub of the matter is the constitutional question of the validity of the scheme providing for the court appointment of a Special Prosecutor, for it is from the dubiety of that approach that most of our reasons for opposing the bill derive. An examination of the legal issues is thus appropriate.

The legal issues are really two: first, is the appointment of a prosecutor, pursuant to statute, by the Judicial Branch valid? And second, even if valid, can such a prosecutor, consistent with the constitutional

doctrine of separation of powers, be given the authority, exclusive of the Executive Branch, to perform basic prosecutive functions such as signing indictments, granting immunity, bargaining for a plea, trying or arguing cases in the courts, and making recommendations as to sentence?

With respect to these issues, the provisions of the Constitution most directly in point are: Article II, Section 2; Article II, Section 3; and Article III, Section 1. The first of these provisions (Article II, Section 2) speaks specifically of the appointment power and states in pertinent part:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

A literal reading of this clause by itself might seem to indicate that the Congress has unfettered discretion to vest the appointment of inferior officers of the United States either in the President alone, in the courts, or in a head of a department. Such an interpretation, however, is patently incorrect since it would effectively permit the Congress to destroy the independence and power of either the Judicial or Executive Branch, for example, by vesting the appointment of Supreme Court law clerks in the President or by vesting the appointment of all inferior executive officers, such as postmasters, in the Supreme Court. Not surprisingly, none of the eminent legal scholars who testified before the Subcommittee was willing to endorse such an interpretation of this clause. Rather, all agreed that the clause of Article II, Section 2 in question must be read in the light of the doctrine of the separation of powers implicit in other specific provisions such as Article II, Section 3 of the Constitution which requires that the President "take Care that the Laws be faithfully executed," and Article III of the Constitution, which vests the "judicial Power", and no other, in the Supreme Court and in such inferior courts as the Congress may establish.

What then is the scope of Congress' power under Article II, Section 2 to vest the appointment of inferior officers in the courts, and does it extend to the appointment of a prosecutor? No decision supplies a clear answer and it is here that the scholars differ. Some things, to be sure, are settled. Thus it has been determined that the clause allows the Congress to place the appointment of subordinate officials of particular branches in the heads of those branches, so that, for example, statutes may validly vest the courts with the power to appoint court commissioners or clerks. See *Rice* v. *Ames*, 180 U.S. 371 (1901); *In the matter of Hennen*, 13 Pet. 230 (1893). The Supreme Court has also held that the clause is not strictly limited in this way and permits the Congress, in some situations, to vest the appointment of officers performing non-judicial functions in the courts. See *Ex*

Parte Siebold, 100 U.S. 371 (1839). In *Siebold* the Court upheld a statute which authorized the federal courts to appoint officers to supervise certain federal elections. *Siebold* is the authority most heavily relied on by the proponents of H.R. 11401 to support the thesis that court appointment of a Special Prosecutor would not be invalid. However, as the reason for its holding, the Court in *Siebold* observed that (100 U.S., at 398):

> * * * the duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the court; and in the present case there is not such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void. It cannot be affirmed that the appointment of the officers in question could, with any greater propriety, and certainly not with equal regard to convenience, have been assigned to any other depositary of official power capable of exercising it. Neither the President, nor any head of department, would have been equally competent to the task.

Considered in the light of this rationale, *Siebold*, far from supporting the position of those who advocate the approach taken in H.R. 11401, in fact indicates the probable invalidity of that bill and that approach. This is so because, from the beginning of the Republic, the prosecution of offenses, consistently with the Constitution's admonition that the President shall "take care that the Laws be faithfully executed," has been a function of the Executive Branch. Moreover, officers appointed by the President or the Attorney General have throughout our nation's history been traditionally responsible for investigating and prosecuting allegations of wrongdoing by persons within the Executive Branch itself, including high officials thereof and, most recently, a Vice President of the United States. Hence, it is our conclusion that a statute vesting the appointment of a prosecutor in the courts would likely be held unconstitutional under the *Siebold* test, as imposing upon the courts an "incongruous" duty, capable with greater "propriety" and "convenience" of being assigned either to the President or, if he be thought an inappropriate "depositary" because of his status as a possible subject of the investigation to be undertaken, to the Attorney General as the head of a department. This was in fact the position of eminent legal scholars such as Roger Cramton, Dean of the Cornell University Law School, and Robert H. Bork, Solicitor General and Acting Attorney General of the United States, in testimony before the Subcommittee.

Proponents of the constitutional validity of the court appointment approach embodied in H.R. 11401 also rely upon statutory precedent such as 28 U.S.C. 546, allowing a district court to fill a vacancy in the office of United States Attorney. This statute was, to be sure, sustained against constitutional challenge in *United States* v. *Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963). However, the statute is addressed to a quite different situation from the one here since the power given to the district courts by law is only an interim one to fill any vacancy in the office; the President, by filling the vacancy, can divest the appointee of the court of his job. Moreover, as the court in *Solomon* recognized,

even without making an appointment of his own, the President under 28 U.S.C. 541(c) is empowered instantly to remove any United States Attorney whom the court may appoint.

We submit, therefore, that at a minimum it is clear that the proponents of H.R. 11401 can point to no firm basis for believing that the appointment of a Special Prosecutor by the courts will pass constitutional muster. Beyond that, although we recognize that there is room for disagreement, it is our belief that when the matter is considered in the light of the separation of powers principle and the rationale of the *Siebold* case itself, the probable outcome of any court test of the validity of the court appointment of a Special Prosecutor under H.R. 11401 or any similar bill would be a holding by the Supreme Court that the appointment was unconstitutional.

Even assuming, however, that we are wrong and that court appointment of a Special Prosecutor is not per se unlawful, the further issue remains whether such a prosecutor could, consistently with the separation of powers doctrine, perform basic prosecutive functions. If, as we believe, he could not lawfully sign indictments, grant immunity, try cases in the courts, and make other basic prosecutive judgments, his appointment by the courts would be a meaningless gesture and various provisions of H.R. 11401 purporting to confer such powers upon the Special Prosecutor would be invalid.

There is considerable case authority to support the proposition that the prosecution of offenses is a purely Executive Branch function that must be exercised by an official of that Branch. In *Springer* v. *Philippine Islands*, 277 U.S. 189, 202 (1928), the Court stated in the course of a general discussion:

> 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. * * *

See also *Ponzi* v. *Fessenden*, 258 U.S. 254, 262 (1922). This quotation from *Springer* was, to be sure, dictum, and the Supreme Court has never squarely decided whether the prosecution of offenses may be removed from the Executive Branch and placed in an officer appointed by and responsible to the judiciary. However, at the court of appeals level, there is ample authority to the effect that fundamental decisions such as whether to prosecute an individual and for what offense are decisions reserved to the Executive Branch as an inherent part of the principle of separation of powers. In the leading case of *United States* v. *Cox*, 342 F.2d 167 (5th Cir. 1965), cert. denied, 381 U.S. 985, for example, the court held that a United States Attorney could not be compelled by a court to sign an indictment initiating the prosecution of offenses against the United States. The Court stated as its rationale for this holding (342 F.2d, at 171):

> The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause. Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an execu-

> tive official of the Government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.* * *

See also *Newman* v. *United States*, 382 F.2d 479 (D.C. Cir. 1967), where the court, through then Judge (now Chief Justice) Burger, held that it had no power to review the determination of the prosecution not to accept a plea to a lesser included offense: and see *United States* v. *Bland*, 472 F.2d 1329, 1335–1336, (D.C. Cir. 1972) (no power in court to review prosecutor's decision whether to proceed against a sixteen-year-old as an adult). We recognize, of course, that it is possible to read *Cox* and the other cited cases narrowly, as holding only that when a prosecutor is appointed, the courts may not interfere with his prosecutorial exercise of judgment. Some (though by no means all) of the scholars who testified before the Subcommittee endorsed this narrow reading. However, in our view, the above quoted language from *Cox* renders this construction strained, and, even if *Cox* can be distinguished, it still leaves proponents of H.R. 11401 without any positive case authority to counteract the dictum in *Springer* indicating that their bill is unconstitutional.

Nor can proponents of the court-appointment approach derive support—as some attempted to do in the Subcommittee—from the enactment in 1790 of a statute (1 Stat. 112) allegedly permitting private persons to bring prosecutions for larceny in the then federal territories. In the first place, as Acting Attorney General Bork pointed out to the Subcommittee, it is by no means clear that the statute authorized private prosecutions; all the reported decisions under the statute appear to have involved prosecutions by United States Attorneys. Secondly, even assuming that the Act authorized certain private prosecutions in the federal territories at a time when a governmental structure did not exist or existed only in skeletal form, that fact in no way supports the proposition that the Constitution permits a general transfer of prosecution functions from the Executive Branch to the Judicial Branch as contemplated by H.R. 11401.

In conclusion, we are convinced that the existing precedents render it highly dubious that an officer appointed by and to serve in the Judicial Branch can be constitutionally vested with full prosecutive powers to carry out the investigations and prosecutions with respect to the Watergate matter that the nation justifiably expects will be swiftly accomplished.

We have dwelled at length on the constitutional questions surrounding a court appointment approach in order to illustrate the substantial degree of risk that, in our judgment, the Congress would run that H.R. 11401 or any similar measure, if enacted, would be held invalid by the Supreme Court. It is evident that we, as representatives of the people, would be doing the country a profound disservice by impulsively reacting to the public clamor and unrest about the Watergate affair and the recent firing of the former Special Prosecutor, Mr. Cox, by passing legislation that, several months later, the Supreme Court is compelled

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to declare unconstitutional. The result of such precipitous action by the Congress would only be to extend the Watergate trauma for a further indefinite period, while doing nothing to insure the full and fair investigation and prosecution of offenses arising from that incident that we all desire. Consequently it is vitally important, in our view, precisely *because* of the allegations that persons in the Executive Branch have acted unconstitutionally in regard to Watergate, that we as the Legislative Branch take pains to respond to that problem in a manner clearly within our powers under the Constitution, so that by our action we may relieve some of the tautness in the now tensely stretched fabric of our political system.

Apart from the hazard that H.R. 11401 would be declared unconstitutional by the courts, there are other significant disadvantages to a court-appointment approach that make passage of that bill unwise. Thus even if the final result of litigation about the validity of H.R. 11401 were to sustain the appointment and powers of the Special Prosecutor thereunder, the attendant delay occasioned by the resolution of those issues, will, as mentioned in the Dissenting Views to this report, necessarily have injurious consequences—not only in terms of the impact on the country of postponing the investigations and prosecutions for the period of the litigation, but also in terms of potential damage to the ability of the Special Prosecutor to keep his staff intact throughout that prolonged dormant period, and to the ability of the Special Prosecutor and his staff to unearth, at that late date, all of the pertinent facts and evidence. In addition we should remember that it was only recently that we in the House approved legislation to extend the life of the Watergate grand jury for a further period of six months to one year. That grand jury has already been in existence for eighteen months. Any further extension beyond that just recently approved would place a most onerous burden on the members of that grand jury, whose intimate knowledge of the case it is, nonetheless, most important to utilize. It therefore behooves the Congress to pass legislation in regard to a Special Prosecutor that will clearly enable the Watergate grand injury investigation to be completed before its life as extended expires. H.R. 11401, because of the delays it will foster, is not such legislation.

Finally, we point out that H.R. 11401, if valid, would pose vexing problems arising from the fact that the country would then have two federal prosecutive arms—the Department of Justice, which would have exclusive jurisdiction within its sphere, and the court-appointed Special Prosecutor, who under H.R. 11401 would have exclusive jurisdiction within the rather vaguely defined areas entrusted to his office. Because cases are bound to arise that are close to the jurisdictional line, there will inevitably ensue perplexing dilemmas as to immunization of witnesses and overlapping investigations. Indeed a not unlikely result of enacting H.R. 11401 is the unhappy prospect of court dismissals of indictments brought by the Department of Justice and the Special Prosecutor, based on good faith errors on their part as to which of them had the lawful prosecutive authority.

Only the absence of a viable alternative to insuring the independence of a Special Prosecutor could conceivably justify the Congress in determining to run the substantial risk of passing an invalid law, and to

suffer the harmful consequences heretofore enumerated, that all would flow from the enactment of H.R. 11401 vesting the appointment of a Special Prosecutor in the courts. Yet, as explained in the Dissenting Views accompanying this report, a clearly viable and practical alternative to such action does exist in H.R. 11555, whose provisions were offered as a substitute for H.R. 11401 in the Committee. There is no need in these Additional Dissenting Views to elaborate upon the legality and practicality of H.R. 11555, as that has been ably done in the Dissenting Views alluded to above. We note only that further support for the constitutionality and wisdom of the approach taken in that bill may be found in the recent Memorandum opinion of Judge Gesell of the United States District Court for the District of Columbia, in the case of *Nader v. Bork*, Civil Action No. 1954–73, decided on November 14, 1973. On page 7 of his Memorandum, in speaking of the power of Congress to control the grounds on which the former Special Prosecutor, Mr. Cox, could be removed, Judge Gesell stated that:

> The Attorney General derived his authority to hire Mr. Cox and to fix his term of service from various Acts of Congress. 5 U.S.C. 301; 28 U.S.C. 509, 510. Congress therefore had the power directly to limit the circumstances under which Mr. Cox could be discharged, see *United States v. Perkins*, 116 U.S. 483 (1886), and to delegate that power to the Attorney General, see *Service v. Dulles*, 354 U.S. 363 (1957).

It is clear that Mr. Leon Jaworski, who is presently serving as Special Prosecutor, appointed by the Acting Attorney General, is in the same position as was Mr. Cox with respect to the ability of the Congress legislatively to prescribe the grounds for his removal. Accordingly, there can be no question but that H.R. 11555, which would, *inter alia*, prescribe just such grounds, is constitutional.

Even more significant that Judge Gesell's bolstering of the legal analysis supporting the approach in H.R. 11555 are his final remarks underscoring the lack of wisdom of following the legislative path supported by the Committee, and his plainly stated preference for the approach taken in H.R. 11555. The judge stated, at pages 9–10 of his opinion:

> The Court recognizes that this case emanates in part from congressional concern as to how best to prevent future Executive interference with the Watergate investigation. Although these are times of stress, they call for caution as well as decisive action. The suggestion that the Judiciary be given responsibility for the appointment and supervision of a new Watergate Special Prosecutor, for example, is most unfortunate. Congress has it within its own power to enact appropriate and legally enforceable protections against any effort to thwart the Watergate inquiry. The Courts must remain neutral. Their duties are not prosecutorial. If Congress feels that laws should be enacted to prevent Executive interference with the Watergate Special Prosecutor, the solution lies in legislation enhancing and protecting that office as it is now established and not by following a course that places incompatible duties upon this particular Court. As Judge Learned Hand

warned in *United States v. Marzano*, 149 F.2d 923, 926 (1945): "Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge."

The Washington Post of November 15, 1973, reported that similar sentiments were expressed by Chief Judge Sirica and quoted him as saying:

> I think Judge Gesell is right. I do not know of any judge who thinks [court appointment of a Special Prosecutor] is a good idea.

We hope that our colleagues in the House and the Committee will heed these words by judges sitting on the very court in which the Committee bill, H.R. 11401, would place the responsibility for appointing a Special Prosecutor.

Accordingly, for all the reasons herein stated, we urge that the Committee bill be defeated and that the substitute bill, H.R. 11555, to be offered on the Floor of the House, be passed.

ROBERT MCCLORY.
M. CALDWELL BUTLER.
TRENT LOTT.
CARLOS J. MOORHEAD.
JOSEPH J. MARAZITI.
WILLIAM S. COHEN.
WILEY MAYNE.
WILLIAM J. KEATING.
HENRY P. SMITH III.
DAVID W. DENNIS.
HAMILTON FISH, Jr.
LAWRENCE J. HOGAN.
EDWARD HUTCHINSON.
CHARLES W. SANDMAN, Jr.

Union Calendar No. 287

93D CONGRESS
1ST SESSION

H. R. 11401

[Report No. 93–660]

IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 12, 1973

Mr. HUNGATE introduced the following bill; which was referred to the Committee on the Judiciary

NOVEMBER 26, 1973

Reported with amendments, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Omit the part struck through and insert the part printed in italic]

A BILL

To provide for, and assure the independence of, a Special Prosecutor, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Special Prosecutor Act of 1973".

APPOINTMENT OF SPECIAL PROSECUTOR

SEC. 2. (a) The United States District Court for the District of Columbia, sitting en banc, shall appoint a panel of three of its members, hereinafter in this Act referred to as

"panel". Any vacancy on the panel shall be filled in the same manner as the original appointment.

(b) The panel is empowered to and shall promptly appoint a Special Prosecutor, who shall head an Office of Special Prosecutor, and to fill any vacancy which may occur in the position of Special Prosecutor.

(c) Participation in the selection of the panel shall not in and of itself disqualify a judge in any proceeding in which the Office of Special Prosecutor is involved. However, a judge who serves on the panel is disqualified from participating in any proceeding in which the Office of Special Prosecutor is involved.

(d) Nothing in this Act shall be construed to preclude the panel from appointing as Special Prosecutor a person who is serving as special prosecutor in the United States Department of Justice.

COMPENSATION AND STAFFING

SEC. 3. (a) The Special Prosecutor shall be compensated at the rate provided for level IV of the Executive Schedule under section 5315 of title 5, United States Code.

(b) The Special Prosecutor may employ and fix the compensation of personnel in the Office of Special Prosecutor as he reasonably determines to be necessary, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and with-

out regard to chapter 51 and subchapter III of chapter 53 of such title (relating to classification and General Schedule pay rates), but at rates not to exceed the maximum rate for GS–18 of the General Schedule under section 5332 of title 5, United States Code.

~~(6)~~ *(c)* The Special Prosecutor may procure personal services of experts and consultants, as authorized by section 3109 of title 5, United States Code, at rates not to exceed the per diem equivalent of the rate for GS–18 of the General Schedule established by section 5332 of title 5, United States Code.

(d) Every department or agency of the Federal or District of Columbia government is authorized to make available to the Special Prosecutor, on a reimbursable basis, any personnel the Special Prosecutor may request. Requested personnel shall be detailed within one week after the date of the request unless the Special Prosecutor designates a later date. An individual's position and grade in his department or agency shall not be prejudiced by his being detailed to the Special Prosecutor. No person shall be detailed to the Special Prosecutor without his consent.

(e) For the purposes of subchapter III of chapter 73 of title 5, United States Code, the Special Prosecutor and the personnel of the Office of Special Prosecutor shall be deemed employees in an executive agency.

JURISDICTION AND AUTHORITY OF SPECIAL PROSECUTOR

SEC. 4. (a) The Special Prosecutor has exclusive jurisdiction to investigate and to prosecute in the name of the United States—

(1) offenses arising out of the unauthorized entry in Democratic National Committee headquarters at the Watergate;

(2) all offenses arising out of the 1972 Presidential election for which the Special Prosecutor deems it necessary and appropriate to assume responsibility;

(3) allegations of offenses involving the President, members of the White House staff, or Presidential appointees, except allegations of offenses the Special Prosecutor waives to the jurisdiction of the Department of Justice by letter to the Attorney General setting forth his reasons for such waiver, with a copy of that letter to the panel;

(4) all matters referred by the Attorney General of the United States to the former Special Prosecutor who assumed office on May 24, 1973, or to any of his successors in office; and

(5) such new matters which he consents to have assigned to him by the Attorney General of the United States.

(b) The Special Prosecutor is authorized to take any

action necessary and proper to perform his functions and carry out the purposes of this Act, including—

(1) issuing instructions to the Federal Bureau of Investigation and other domestic investigative agencies of the United States for the collection and delivery solely to the Office of Special Prosecutor of information and evidence bearing on matters within the jurisdiction of the Special Prosecutor, and for safeguarding the integrity and inviolability of all files, records, documents, physical evidence, and other materials obtained or prepared by the Special Prosecutor;

(2) conducting proceedings before grand juries;

(3) framing and signing indictments;

(4) signing and filing informations;

(5) contesting the assertion of executive privilege or any other testimonial or evidentiary privilege;

(6) conducting and arguing appeals in the United States Supreme Court, notwithstanding the provisions of section 518 of title 28, United States Code;

(7) instituting, defending, and conducting civil and criminal litigation in any court; and

(8) exclusively performing the functions conferred upon the Attorney General of the United States under part V of title 18, United States Code (relating to im-

munity of witnesses), with respect to any matter within his exclusive jurisdiction.

(c) All investigations, prosecutions, cases, litigation, and grand jury or other proceedings initiated by the Special Prosecutor appointed May 24, 1973, or by his successors in office, may be continued by the Special Prosecutor appointed pursuant to this Act, and the Special Prosecutor appointed pursuant to this Act shall become successor counsel for the United States in all such proceedings.

DELEGATION

SEC. 5. The Special Prosecutor is authorized to delegate any of his functions to personnel of the Office of Special Prosecutor, and to experts and consultants retained pursuant to section 3 (c).

TRANSFER AND ACQUISITION OF FILES AND INFORMATION

SEC. 6. (a) All files, records, documents, and other materials in the possession or control of the Department of Justice, any previous Special Prosecutor, or any other department or agency of Government, which relate to matters within the exclusive jurisdiction of the Specal Prosecutor appointed under this Act, are transferred to the Special Prosecutor as of the date on which he takes office.

(b) The Special Prosecutor is authorized to request from any department or agency of Government any additional files, records, documents, or other materials which he

may deem necessary or appropriate to the conduct of his duties, functions, and responsibilities under this Act, and each department or agency shall furnish such materials to him expeditiously, unless a court of competent jurisdiction shall order otherwise.

(c) The Special Prosecutor shall keep inviolate and safeguard from unwarranted disclosure all files, records, documents, physical evidence, and other materials obtained or prepared by the Office of Special Prosecutor.

GENERAL SERVICES ADMINISTRATION

SEC. 7. The Administrator of General Services shall furnish the Special Prosecutor with such offices, equipment, supplies, and services as are authorized to be furnished to any agency or instrumentality of the United States.

SPECIAL PROSECUTOR'S TERM OF OFFICE

SEC. 8. (a) The Office of Special Prosecutor shall terminate three years after the date the panel first appoints a Special Prosecutor.

(b) Notwithstanding the provisions of subsection (a), the Office of Special Prosecutor is authorized to carry to conclusion litigation pending on the date such office would otherwise expire.

REPORTS

SEC. 9. *(a)* The Special Prosecutor shall make as full and complete a report of the activities of his office as is appropriate to the panel, to the Attorney General of the

United States, and to the Congress, on the first and second anniversaries of his taking office and not later than thirty days after the termination of the Office of Special Prosecutor.

(b) The Special Prosecutor shall report at least monthly to the chairman and ranking minority member of the House Judiciary Committee such information as may be pertinent to the question of whether impeachable offenses have been committed by the President of the United States. The Special Prosecutor, upon request by the House Judiciary Committee, shall provide to the chairman and the ranking minority member of the Committee such information, documents, and other evidence as may be necessary to enable the committee to conduct an investigation or inquiry into whether grounds exist for impeachment of the President of the United States.

REMOVAL OF SPECIAL PROSECUTOR

SEC. 10. The panel has the sole and exclusive power to remove the Special Prosecutor. The only grounds for removal are gross dereliction of duty, gross impropriety, or physical or mental inability to discharge the powers and duties of his office.

EXPEDITED REVIEW PROCEDURE

SEC. 11. (a) The sole and exclusive procedure for the review of the validity of any provision of this Act shall be as follows:

(1) Any defendant who challenges the validity of

this Act in a criminal case or proceeding shall file a motion to discuss not later than fifteen days after service of the indictment or information. Such motion shall be heard and determined by a district court of three judges, convened pursuant to section 2284 of title 28, United States Code, as soon as possible but in no case later than twenty days after the filing of the motion.

(2) Any person who challenges the validity of this Act in connection with a civil action or proceeding shall do so by motion filed with the appropriate United States district court. The district court shall immediately certify such motion to be heard and determined by a district court of three judges convened pursuant to section 2284 of title 28, United States Code, as soon as possible but in no case later than twenty days after the filing of the motion.

(3) Not later than fifteen days after the determination of the district court of three judges under paragraph (1) or (2) of this section, any party may file an appeal from that determination in the United States Supreme Court. The Supreme Court shall expedite to the greatest extent possible its decision on such appeal.

(b) The expedited review procedure of this section shall not apply to any challenge to the validity of any provision of this Act insofar as any question presented shall have been

previously determined by the Supreme Court, notwithstanding that the previous determination occurred in litigation involving other parties.

FUNDING

SEC. 12. (a) There are authorized to be appropriated such sums as are necessary to carry out the purposes of this Act, and, notwithstanding any other provision of law, the Special Prosecutor shall submit directly to the Congress requests for such funds as he considers necessary to carry out his responsibilities under this Act.

(b) Unexpended balances of appropriations and other funds available or to be made available in connection with the functions of the Office of Watergate Special Prosecution Force in the Department of Justice are transferred to the Special Prosecutor appointed under this Act.

SEVERABILITY

SEC. 13. ~~(a)~~ If the provisions of any part of this Act, or the application thereof to any person or circumstances, are held invalid, the provisions of other parts and their application to other persons or circumstances shall not be affected thereby.

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