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94-9 **AUTHORITY TO ISSUE FINAL REPORT
BY SPECIAL PROSECUTOR**

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BEFORE THE

SUBCOMMITTEE ON CRIMINAL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

NINETY-FOURTH CONGRESS

FIRST SESSION

ON

TO PROVIDE THE OFFICE OF THE WATERGATE SPECIAL
PROSECUTION FORCE WITH THE AUTHORITY TO ISSUE A
FULL AND COMPLETE FINAL REPORT ON ITS INVESTIGATION
INTO WATERGATE AND RELATED MATTERS

JANUARY 30, 1975

Serial No. 9



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BY SPECIAL PROSECUTOR

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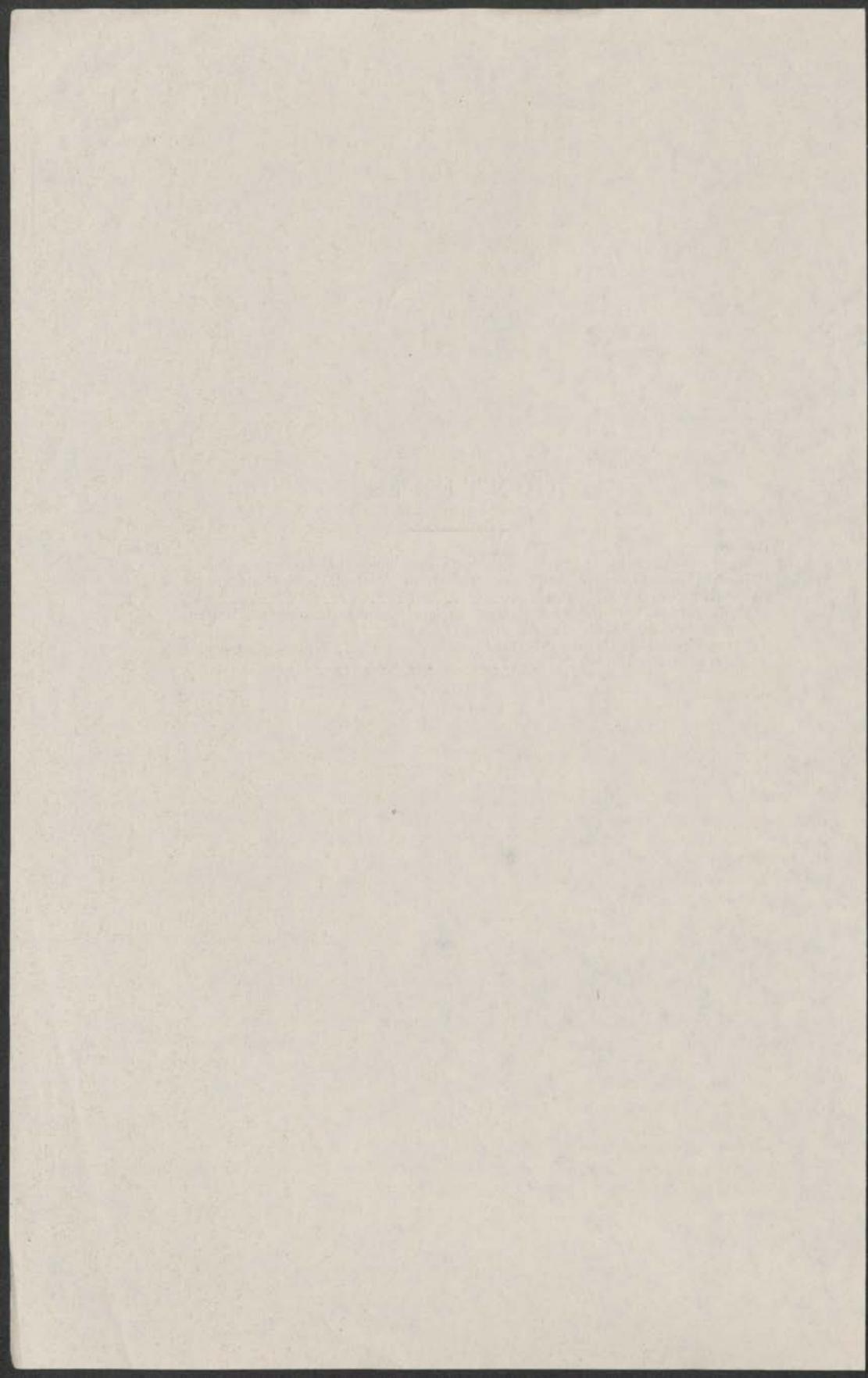
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CONTENTS

Witnesses—	Page
Henry Ruth, Special Prosecutor, Watergate Special Prosecution Force	2
Leon Jaworski, Former Special Prosecutor, Watergate Special Prosecution Force	2
Prof. James Vorenberg, Assistant to the Special Prosecutor, Watergate Special Prosecution Force	2
Peter Kreindler, Counsel to the Special Prosecutor, Watergate Special Prosecution Force	2



AUTHORITY TO ISSUE FINAL REPORT BY SPECIAL PROSECUTOR

THURSDAY, JANUARY 30, 1975

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

The subcommittee met, pursuant to notice, at 9:40 a.m., in room 2141, Rayburn House Office Building, Hon. William L. Hungate [chairman of the subcommittee] presiding.

Present: Representatives Hungate, Mann, Thornton, Holtzman, Hyde, and Hutchinson [ranking minority member of the full committee].

Also present: Robert J. Trainor, counsel; Stephen P. Lynch, research assistant; Constantine J. Gekas, associate counsel.

Mr. HUNGATE. The subcommittee will be in order.

We welcome today Mr. Henry Ruth, the Special Prosecutor, Leon Jaworski, the former Special Prosecutor, and Prof. James Vorenberg, Assistant to the Special Prosecutor.

Today, the Subcommittee on Criminal Justice of the Judiciary Committee is considering legislation seeking to provide the Office of the Watergate Special Prosecution Force with the authority to issue a full and complete final report on its investigation into Watergate and related matters. Much of the legislation concerning this issue was initially introduced in the House and referred to this subcommittee in the 93d Congress following President Ford's pardon of former President Nixon.

Several of the sponsors of these proposals appeared before the subcommittee during the previous session of Congress. They were unanimous in stating that their overriding purpose in introducing legislation on this issue was to insure that a complete record of Watergate and its related events is made public.

This committee, along with other congressional committees, has issued volumes of testimony, documents and reports on the subject of Watergate. The most recent Watergate trial did much to chronicle the events leading to the break-in and its coverup. While this information has substantially added to the public's understanding of Watergate, many continue to question whether the full and complete story of Watergate and related events has been publicly recorded. Many of these are hoping that the final report to be issued by the Special Prosecutor, as required by Department of Justice Order 551-73, will detail the full and complete story of Watergate and other investigations undertaken by the Special Prosecutor's office.

Questions have developed concerning the present authority of the Office of the Watergate Special Prosecution Force to prepare and issue such a thorough report. In addition, the subcommittee has heard testimony expressing concern over the possible violations of due process should such a report be published. In order to confront these problems directly, the subcommittee has invited Special Prosecutor Henry Ruth, former Special Prosecutor Leon Jaworski, and Assistant to the Special Prosecutor James Vorenberg to offer testimony on these issues. I want to welcome these three distinguished attorneys and thank them for their willingness to assist the subcommittee in its consideration of this important matter. These distinguished public servants and the office they represent have performed their sensitive duties with diligence and fairness. Because of this, a lamentable chapter in our Nation's history has at the same time demonstrated the strength and viability of our institutions.

Shakespeare, in "King Lear," counsels us as to the danger of "undivulged crimes unwhipped of justice." The Special Prosecutor's final report, when filed, may or may not divulge any new crimes, but as long as the real victims of Watergate—the American people—do not have all the available facts, it will be justice which has been whipped. That was not the intention of Congress in establishing the Special Prosecutor's office. The Congress may be a beast, as has been said, but it is a just beast.

We welcome you, gentlemen, and you may proceed as you see fit.

Mr. HUTCHINSON, do you care to make any opening statement?

Mr. HUTCHINSON. No, Mr. Chairman.

Mr. HUNGATE. Well, then proceed, Mr. Ruth.

TESTIMONY OF HENRY RUTH, SPECIAL PROSECUTOR, WATERGATE SPECIAL PROSECUTION FORCE, ACCOMPANIED BY LEON JAWORSKI, FORMER WATERGATE SPECIAL PROSECUTOR; PROF. JAMES VORENBERG, ASSISTANT TO THE SPECIAL PROSECUTOR; AND PETER KREINDLER, COUNSEL

Mr. RUTH. Mr. Chairman, I appreciate the opportunity to appear before this subcommittee to present my views on proposed legislation that would require the Special Prosecutor to issue a detailed evidentiary report on former President Richard Nixon's involvement in any offense against the United States.

At the outset, Mr. Chairman, I want to thank you and the subcommittee members for your past support and your continuing interest in the work of the Watergate Special Prosecution Force.

As this subcommittee is aware, the Office's charter states that:

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.

Pursuant to this provision, we have issued periodic public status reports of the various prosecutions and other matters handled by the Office and we will issue a final report upon the termination of our responsibilities.

The proposed legislation that is the subject of this hearing requires release by a prosecutor's office of raw evidence involving Mr. Nixon.

Presumably, the rationale of such a requirement is the American public's need to know the nature and quality of any possible corruption in the highest office of the land from 1969 to 1974. I think it appropriate first to examine the existing record already available to the Congress and the American people.

To a large extent, the goal of public disclosure as to the so-called Watergate coverup has been accomplished by the impeachment hearings and conclusions of the House Judiciary Committee, the hearings of the Senate Select Committee on Presidential Campaign Activities and the information made public by the Special Prosecutor's Office through normal judicial channels. As you know, this information includes the grand jury report submitted by court order to the House Judiciary Committee and the introduction into evidence at the recent Watergate trial of the available White House tapes of conversations central to the obstruction of justice charges in which Mr. Nixon had been named as an unindicted co-conspirator. The transcripts of those tapes are now public.

As to non-Watergate matters, the trial in July 1974 as to the break-in at the office of Daniel Ellsberg's psychiatrist, Dr. Fielding, revealed much of the available evidence as to that activity by the so-called White House plumbers group. Several civil suits have also revealed much information about many non-Watergate matters. And finally, both the impeachment proceedings and the Senate Select Committee hearings referred to above involved extensive inquiry, and a subsequent massive public release of materials, relating to allegations other than the Watergate break-in and coverup.

As to remaining issues warranting public disclosure, the recently enacted Presidential Recordings and Materials Preservation Act, Public Law 93-526, designed to preserve the tapes and millions of documents of the Nixon administration, enables the American public to gain access to voluminous data not now available even to the special prosecution force. The act requires the Administrator of General Services to issue regulations in March to provide controlled public access to these materials, with a view toward providing the public—in the words of the act—" * * * the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term 'Watergate.'" Mr. Nixon is attacking the constitutionality of this act in the court system.

With this background of extensive information already in the public domain or already legislated to become public, one must address the question whether a prosecutor, absent the normal procedural and substantive safeguards of a judicial proceeding, should be required to take the radical step of releasing raw investigative files or issuing a detailed evidentiary report about the possible complicity of one individual, a former President now pardoned for any offense. One must address this question also in the knowledge that it is virtually impossible to release evidence just as to this one person. A President operates primarily through the actions of others, and a report as to Mr. Nixon necessarily would involve release of raw evidence and allegations as to many other persons.

As a person and a citizen, I understand and sympathize with the desire to make public all the available facts concerning former President Nixon's possible involvement in matters under investigation by

our office. But I must answer the question at hand first with a firm eye on the necessary and desirable limitations that our freedom and our ideals place upon the awesome powers of a prosecutor. I believe that Congress always has been attuned acutely to the nature of these limitations. The need for constant checks on the power of investigative and prosecutive arms of the Government is now reflected by current congressional inquiries into protection of privacy and into possible abuses of the intelligence function.

As a prosecution office, we have never read our charter as permitting the dissemination of evidence involving specific individuals gathered during the course of our investigations, and I have doubts about the legality of any legislation which authorizes such conduct. One consequence of such a law is definite. The issuance by the Special Prosecutor of an evidentiary report on the activities of individuals not formally charged in a court of law would be the subject of extended litigation. Here are the problems I foresee.

Much of the documentary evidence now in our files has been gathered pursuant to a grand jury or trial subpoena and much of the oral testimony exists in reported form only in grand jury minutes. Under traditional legal principles, evidence received in that manner—for a particular purpose—normally may not be used for a wholly separate purpose unconnected with any judicial proceeding. Further compounding this problem is the fact that much of the relevant material, such as tape recordings of Presidential conversations, would be almost surely enveloped in extensive litigation after challenges filed in court on the basis of Executive privilege.

For example, in *United States v. Nixon*, 418 U.S. 683, 94 Sup. Ct. 3090 (1974), the Supreme Court did not hold that the tape recordings and other items subpoenaed from the President for the Watergate conspiracy trial were unprivileged; rather, the Court ruled unanimously that the materials were presumptively privileged from disclosure but that the particularized need for evidence relevant to a criminal proceeding in that instance was of sufficient force to outweigh the privilege. The Court specifically disclaimed deciding whether the privilege would prevail in other contexts where the demonstrated need for disclosure was not as compelling. We need not discuss who may assert the privilege—what is clear is that this office has no power to waive it, and, unless it is waived, we would not be free under *United States v. Nixon* to disclose publicly any taped conversations that remain confidential.

An equally if not more important potential problem, in my view, concerns notions of fundamental fairness which form the core of the fifth amendment right to due process of law. The traditional role of a prosecutor is to conduct investigations leading to the possible presentation of criminal charges for adjudication by the courts with all attendant safeguards for individual rights. The prosecutor is to be as advocate, not a judge. I doubt that the Congress should authorize any prosecutor, no matter how laudible the apparent objective, to issue an ad hoc public report on an individual's possible criminal activity.

But several of the bills referred to this subcommittee would allow the Special Prosecutor the unrestrained authority to issue accusatory, public reports, unconnected with any judicial or grand jury proceed-

ing. And this mandate would issue as to Mr. Nixon who already has been the subject of one grand jury report and concerning whom great quantities of information, referred to above, have already been released to the public in various forums. Historically, the grand jury has served to protect citizens against overreaching or unfair accusations by a Federal prosecutor. On those rare occasions when a grand jury believes it legitimate to issue a report of the evidence it has heard, such as occurred during the impeachment inquiry, those persons adversely affected have been given the opportunity in court to seek its suppression prior to any public dissemination. Indeed, in the Omnibus Crime Control Act passed by Congress in 1970, "special grand juries" were authorized to issue public reports about organized crime and official corruption only after following a complex procedure designed to protect due process rights. See 18 U.S.C. sec. 3333. Before any report is published, a court must determine that it is supported by evidence and that all affected individuals have had an opportunity to respond to charges. I would be surprised if the normal restraints on a grand jury's issuance of an evidentiary report could be circumvented merely by authorizing the prosecutor to publish the evidence on his own.

Moreover, I would be hesitant to suffer any compromise of the normal status accorded a prosecutor's investigatory files, which Congress consistently has recognized in the Freedom of Information Act. See 5 U.S.C. sec. 552(b)(7). Several citizens have confided in our Office on the implicit understanding that the evidence they were providing would not become public except when necessary in the context of a judicial proceeding. In many instances, these witnesses appeared before the grand jury and received the additional assurance offered by the normal rules of grand jury secrecy. In addition, it should be remembered that there exists evidence in our files, as in every prosecutor's files, which is extremely damaging to certain persons, but which is essentially uncorroborated or does not support criminal prosecution. Nevertheless, publication of this evidence would "punish" these individuals without any procedures to protect their rights.

We view our final report as dealing principally with the history, administration, and organization of our office, both internally and in its dealings with the Department of Justice and other organs of the Federal Government; the background and implementation of office policies concerning such areas as initiation of prosecution, plea negotiation, and immunity, as well as a summary of the major substantive work of each of our offices task forces. We also anticipate that the final report will include evaluations and recommendations, to the extent that our experience and degree of expertise would make such impressions useful.

In the face of the many public disclosures about "Watergate" which already have been made, and of the even more voluminous disclosures which eventually will occur under the Presidential Recordings and Materials Preservation Act, I strongly question the necessity or desirability of requiring the Watergate special prosecution force to issue an evidentiary report such as has been proposed, especially in light of what I perceive to be the weighty legal objections to—and the extremely unfortunate precedent of—that action.

Thank you, Mr. Chairman.

Mr. HUNGATE. Thank you, Mr. Ruth.

Mr. JAWORSKI, would you care to make a statement now?

Mr. JAWORSKI. Mr. Chairman and members of the committee, I do not have a prepared text. I am familiar and have been familiar with Mr. Ruth's views on this subject because frankly we discussed it before I left here.

I also discussed the subject at some length with Mr. Vorenberg. I do not think there is any difference of opinion in our views. If I were to say anything in addition to what Mr. Ruth has pointed out, it probably would be that, during my days as special prosecutor I was given information on a large number of occasions that was quite confidential and I received it under the promise that it would not be revealed unless it became necessary to do so in a criminal proceeding.

I, perhaps, should add that I listened to some tape recordings at the White House that have not been made public and that former President Nixon permitted me to listen to under the assurance that I would keep the matter confidential. His purpose in letting me listen to them, Mr. Chairman, was to convince me that they had no relationship to the charges that were being brought and the matters that were under investigation by the grand jury or grand juries.

I listened to a number of these tape recordings, I do not think I would be authorized to disclose what they contained and this presents a problem. If we were to write a full and comprehensive report, there are many discussions that I had that were under the assurance of confidence. So I would be in a dilemma of either not disclosing something that I knew and yet would be attempting to say that I was making a full report of all that I knew, or to take the other hand, I would be then engaging in the disclosure of something I had promised I would not divulge.

I would like to emphasize one additional matter, Mr. Chairman. That is, I think we do have to draw a distinction between the type of report that a commission or a committee might make and that which a prosecutor makes. I think there is a very distinctive difference in the two functions. I just do not believe that the filing of a report on matters that did not involve the filing of charges is a part of the prosecution function and this is where I draw a strong line in between what has been proposed in these bills and what I believe our function is under the charter under which we operated.

Thank you very much, Mr. Chairman.

Mr. HUNGATE. Thank you, Mr. Vorenberg?

Mr. VORENBERG. I have no prepared statement. I would like to simply go over a couple of observations really in support of what Mr. Ruth and Mr. Jaworski have said.

From the vantage point of somebody who has had for some time now special responsibility for worrying about what should be in the report of the special prosecutor, it seems to me it boils down to the one that Mr. Ruth talked about, and that is, essentially, a balance between the importance of fullest possible disclosure of all the facts, and in evaluating that one has to look at not only what has already come out, but what is likely to come out under the Presidential Materials Reporting Act and the other means Mr. Ruth has talked about.

The other side of the balance, even though it may be more subtle, and seems to me to be enormously important, is the unfairness that is involved in a prosecutor releasing raw data that he has obtained in the way that Mr. Ruth has described.

It seems to me that if the Watergate special prosecution office, which has had all of the support, has been the focus of so much attention in this country, cannot establish and hold decent standards for protecting the rights of individuals as well as its work in investigation and prosecution, it raises very serious problems for the administration of justice generally.

As somebody who teaches criminal law and who worries a lot about the already very broad power of prosecutors in this country, it seems to me it would establish a very dangerous precedent if this office which has been set up under these circumstances were to cross what I think is an extremely important protective line.

For that reason I fully support what Mr. Ruth has said.

Mr. HUNGATE. Thank you, gentlemen.

The questioning will proceed under the 5-minute rule and the Chair recognizes the Congresswoman from New York.

Mr. RUTH. Mr. Chairman, could I introduce the gentleman to my left, Peter Kreindler, who is my counsel and counsel to the Watergate Special Prosecution Force.

Mr. HUNGATE. We welcome you. Did you have a statement you would like to make?

Mr. KREINDLER. No, sir.

Mr. HUNGATE. Ms. Holtzman.

Ms. HOLTZMAN. Thank you, Mr. Chairman. I would like to welcome all of you and also Mr. Vorenberg who taught at Harvard Law School when I was there.

I have a final question that is rather brief but goes to the heart of some of the assertions you have made here.

You claim that publishing evidence that you have accumulated with respect to President Nixon's misconduct would somehow violate some rights that he may have, and I am extremely curious about this assertion you make, because it seems to me that when former President Nixon accepted a pardon he waived his right to have these allegations, this evidence, tested in a criminal forum. He had a right to that—all of us would have acknowledged it—but he waived that right when he accepted the pardon. And so it seems to me that your concern is really not a substantial concern, as you assert it.

Would you care to comment on that?

Mr. RUTH. Well, when you say he waived the rights by accepting a pardon I think he only does that in your words because you use those words.

There is nothing implicit in the pardon that implies a waiver of any other constitutional right.

Ms. HOLTZMAN. What is this constitutional right that you say he has here?

Mr. RUTH. I think what we are looking at is the basic fifth amendment right to due process of law, and when you say to test a criminal offense in a court of law, that isn't what these statutes, as I understand them, that are proposed here say. They say publish all the evidence which tells about any involvement by Mr. Nixon in any offense.

I don't know what involvement means.

Does that mean that as one walked in our door and made an allegation that Mr. Nixon did this or did that under those bills I would have to release that?

Now, if you are talking about evidence—

Ms. HOLTZMAN. Could I interrupt you because I don't think you are really answering my question?

Mr. RUTH. I am in the middle of my answer if you let me finish.

Ms. HOLTZMAN. I would like to know what rights you think are being violated here, in view of the fact that Mr. Nixon has accepted a pardon. I am not talking about your problems with the word "involvement" or how you would deal with those problems in figuring out how to write a report. I would like to know how you answer that question.

Mr. RUTH. Well, as I understand the law, that any citizen, including Mr. Nixon, who is a citizen, has the right not to have a prosecutor release on the public record evidence in his files unless a balancing procedure is gone through where the public need is measured against the possible damage to an individual.

Now I know what is in a prosecutor's files as to any particular individual. Much of it is pure allegation, much of it is totally uncorroborated, much of it cannot be proved by preponderance of the evidence let alone beyond a reasonable doubt. And to just allow evidence to be released as to any individual no matter who said what, whether it's untested, I think you get into a fifth amendment problem and you certainly end up in a court of law.

Ms. HOLTZMAN. But you have missed the point I made because Mr. Nixon waived his right to have these allegations proved against him beyond a reasonable doubt, and that seems to me to be the crux of the matter.

Mr. RUTH. You are assuming that every allegation in our files would have ended up as a formal accusation against Mr. Nixon.

That is not true.

Ms. HOLTZMAN. I can't imagine this report calls for you to include information that you think is totally unfounded and that you would have a problem—

Mr. RUTH. Then you would have to interpret it.

Mr. HUNGATE. Would it be possible, Mr. Ruth, that there might be a different standard or different problem as to Mr. Nixon who has been pardoned, and to other individuals mentioned in the investigation as to possible criminal activity?

Mr. JAWORSKI. That is what I wanted to address myself to briefly. I understand the point that you make. So much of this doesn't relate to Mr. Nixon at all.

For instance, what I addressed myself to in the matters that I heard involved dozens, actually dozens of other people and their rights are very much at stake. If we are going to make a full report and if we were to comment on all of the different things that were charged, many of which I think were absolutely wrong, as a matter of fact, then we would be invading the rights of third parties. It is not just a case of Mr. Nixon.

I agree with Mr. Ruth; I think that he still has his rights. Just because he received a pardon doesn't authorize us to go ahead and

comment on certain things that we may have looked into and found no basis for charges.

Ms. HOLTZMAN. May I ask you this question then? I don't think the point is that he received a pardon. I think the point is he accepted a pardon. Second, is your argument that you as prosecutors can't write a report but that a commission using the same evidence could write a report? Is that the argument—are you saying that it is a violation of due process if you people write a report but it is not a violation of due process if a commission writes a report? Let's leave aside for the moment the question of the third party rights because in my judgment that is a much more serious question than this one that you have presented.

Mr. JAWORSKI. I think you would be in violation on both counts whether a commission did it or whether we did it. I was merely pointing out there were some areas that perhaps a commission or a committee could go into properly and that a prosecutor doesn't go into.

Mr. HUNGATE. Mr. Vorenberg.

Mr. VORENBERG. I am rather puzzled by the suggestion that the acceptance of a pardon carries with it the waiver of these due-process rights.

I suppose it is conceivable as a matter of law that President Ford could have conditioned the pardon on the release of certain information. I am not at the moment dealing with whether that would have been a valid condition or not. But I don't understand the notion that the acceptance of the pardon carries with it a wholesale waiver of every fifth amendment or other due process right that apparently has.

Ms. HOLTZMAN. No, I didn't say it waived all of his rights. What I am suggesting—and it is obvious you haven't thought about it because I think your argument reflects the fact that you haven't—what I am suggesting is the fact that he accepted a pardon meant that he waived his right to have these charges presented against him in a court of law, and to be found guilty with respect to these charges beyond a reasonable doubt. So these charges, or the allegations with respect to him, need not be presented within the context of a criminal proceeding. It seems to me that he has waived his right to demand that kind of due process by accepting a pardon. You keep saying that he has these "rights," but I haven't heard you define what they are.

Mr. VORENBERG. I am simply puzzled, I don't know what the source of that waiver is, where you find that.

It seems to me it may be true that he has waived his right to a trial but that waiver does not carry with it a waiver of the right to every other protection against the raw release of material.

Ms. HOLTZMAN. What is a raw release of material?

Mr. VORENBERG. The release of material from the prosecutor's files, which, but for the waiver that you seem to think exists here, would be unfair and I think unconstitutional.

Ms. HOLTZMAN. You accept the argument that it would be equally unconstitutional for a commission to put forward these materials that they found with respect—

Mr. VORENBERG. I think it makes a great difference whether the commission is putting forward materials from the Special Prosecutor's

files and, materials that it may obtain, let's say, by a process of eminent domain, Government ownership—

Ms. HOLTZMAN. Is it a constitutional difference?

Mr. VORENBERG [continuing]. Because I think the difference is the process by which they were obtained. Materials that were part of the official files of the White House and have not been obtained through the legal processes of the prosecutor are in a different status than materials that have been obtained by subpoena and the other ways that Mr. Ruth has described.

Mr. HUNGATE. Mr. Vorenberg, is there not a case that holds you have to accept a pardon for it to be effective?

Mr. VORENBERG. Yes.

Mr. HUNGATE. That would have to be done. So then the question would be what the consequence of that acceptance would be? In other words, a pardon doesn't happen unless you accept it; is that right?

Mr. VORENBERG. Yes, but I think the acceptance does not carry with it a complete waiver of rights of every kind. Nobody could say that by accepting the pardon Mr. Nixon obligated himself to go on television every 5 minutes for the next 5 years and say I am guilty, I am guilty. That might have been built in as a condition.

Mr. HUNGATE. Some feel that once would be nice. [Laughter.]

Mr. VORENBERG. Some people might say that should have been built in as a condition but it wasn't, and if we are talking as lawyers it seems to me we ought to at least ask ourselves where the waiver comes from.

Mr. HUNGATE. Mr. Jaworski, just two things before we go on here.

As I understand it, President Nixon, then President Nixon, asked you to come down to listen to certain tapes on the promise that you would not divulge the information you heard therein, to establish that these tapes had nothing to do with the investigation underway. That is how I understand it?

Mr. JAWORSKI. That in substance is correct.

There is one additional factor I should mention. The nature of the conversations were highly embarrassing. Some of them related to men who were then in public office and some of them are still in public office. He wanted to demonstrate that they did not relate to the matters that we had under investigation but he certainly didn't intend that what had been said about these men in some of the conversations should be made public.

Mr. HUNGATE. The only thing I am thinking, if I could get that condition out of a prosecutor, that is when I would let him hear the one where I robbed the bank. But as I understand your general testimony there is nothing in there that concerns you particularly of a criminal nature, or other substantial nature.

Mr. JAWORSKI. That is correct, that is the reason they weren't used.

May I make this illustration. I think, for instance, that the testimony with respect to the Watergate coverup, as it is generally termed, is complete. I don't think you are going to find very much on that subject that hasn't been made public through the trial. I said this a number of weeks ago and I still believe that to be true.

Now, former President Nixon was named an unindicted coconspirator and as a consequence all of the testimony relating to what he had done that the prosecutor wanted to use, and I think he used everything that he had, came out during the course of that trial, so there is not very much else that can be added to it.

I think there is an instance where appropriately the evidence has been revealed.

Mr. HUNGATE. As I take your position from your testimony you would employ a great deal of caution; if the grand jury is not going to indict somebody you are not a grand jury report issuer, printing a report and making comments on a bunch of things on which they had not seen fit to indict.

Mr. JAWORSKI. I think that is right. If you will recall, the grand jury did make a report that went to the House Judiciary Committee. You remember it was a report that was very carefully drafted. It was not accusatory. I think the courts would not have permitted that particular report to have gone to your committee, sir, had it not been that it was nonaccusatory in nature. As a matter of fact, the court, when the case was argued last, laid stress upon that particular point. The court felt it was appropriate matter to go to the House Judiciary Committee because it was simply a presentation of evidence and in no sense made any accusation or any charges.

Mr. HUNGATE. There is a precedent, however wise or unwise it might be, is there not, of grand juries making reports when they declined to indict? Sometimes the reports are rather harsh or the individual mentioned, or of the conditions described as when they describe jail conditions or how they are running a country or how they are running something else. Perhaps the Black Panther grand jury report is an example.

Mr. JAWORSKI. There is another factor that was in existence, which I think is very important to remember. That is that the House Judiciary Committee was then sitting in an impeachment inquiry. This is what really made it proper in my judgment and I think the courts laid much importance on that very fact.

Mr. HUNGATE. Did Mr. Nixon permit you to listen to tapes heretofore not disclosed for the purpose of attempting to establish his noninvolvement in Watergate and the coverup.

Mr. JAWORSKI. It didn't happen just that way. We asked for certain tape recordings that we thought might have something that would be of not only interest to us but of consequence and that might be appropriate evidence to use. He did not want to release those tape recordings and we talked in terms of moving to subpoena them. Former President Nixon then through General Haig advised me that he was willing for me personally to listen to them to convince me that they did not contain material that related to any of the matters that we had under investigation. I did listen to them and I concluded that he was right.

Mr. HUNGATE. Thank you, sir.

One final matter, my time is out.

Mr. Ruth, I think primarily this goes to you. As I understand it, from your testimony, some of your concern as to what you could or could not release is related to rule 6(e) of the Federal Rules of Criminal Procedure, title 18, section 19. We all have these in the back

of our heads. Title 19, section 1905; title 26, section 7213, and section 7107 of the American Bar Association Code of Ethics and Professional Responsibility, section 1102 of that, problems of defamation, where you may have slander in a grand jury proceeding, as long as it is non perjurous it might be permissible there although it might create liability if released elsewhere, and the problems of executive privilege.

Are these some of the constraints with which you are struggling?

Mr. RUTH. Yes, sir, particularly that much of the evidence, I don't want to give the impression in any way that we have file rooms of evidence showing Mr. Nixon's involvement in offenses either way, but much of the evidence is obtained by grand jury subpoena and by trial subpoena, and there are cases in the federal system as to what has to be done with evidence once you have used it for the purpose for which it was obtained.

Mr. HUNGATE. Mr. Hyde.

Mr. HYDE. Mr. Ruth, I have read through these bills that were before the last Congress and we have a draft here of a proposed bill. What they do is to require your office to make a full and complete report. Such report shall include detailed information.

Now, if this were to become law you would have to decide what that word "information" means. Does it mean, as you have said, "raw accusations," "unevaluated charges" no matter how wild or how unfounded?

As I read this I think you would have to provide information no matter from what source or no matter how spurious it might appear to be on its face. You would have to make all of that public?

Would that be your evaluation?

Mr. RUTH. Well, if I was resisting the idea of releasing raw evidence, I would have to look at the legislative intent, at the whole record, and try to figure out what the appropriate committee and debate on the floor indicates that such a bill intended. But if it was that broad I guess I would assume that that was the intent.

I must say we would be in court in about an hour.

Mr. HYDE. Right. Do you know of any precedent in jurisprudence for a prosecutor revealing all accusations and all memorabilia and charges and phone calls that are noted, and just everything that has come to his attention about an individual?

Mr. RUTH. The only precedent that I know of, Congressman, is the special grand juries and those reports as to individuals are limited to public officials still in office where a report as to an individual, which must go to a court and be approved by a court, is permissible for having that official in office disciplined, suspended or removed.

Mr. HYDE. It would be impossible for you to comply with provisions of this law without involving other persons beyond Mr. Nixon; isn't that true?

Mr. RUTH. Absolutely.

Mr. HYDE. What becomes of their rights of due process when you have to reveal unevaluated raw data that had come to your attention?

Mr. RUTH. I assume they would be part of the trail of people into the courthouse, Congressman.

Mr. HYDE. You see an endless process of litigation, do you not, on behalf of people whose names would need to be mentioned, no matter how they were involved in the situation.

Mr. RUTH. Yes, it would be litigation where the court would try to balance the public need for the information being released versus the harm to any individual rights.

Mr. HYDE. One of the problems, as I recall, with Mr. Cox, Archibald Cox, was Executive interference in the performance of his duties.

Would it be a fair characterization that this type of legislation could be interpreted to be congressional interference in the performance of your duties?

Mr. RUTH. Well, I think as one could construct an argument that separation of powers problems get involved but I am not much for Executive privilege. I am not sure I would rely on that.

Mr. HYDE. Well, I am not talking about Executive privilege, I am talking about interference.

As I understand, Mr. Cox's problems were that the Executive didn't like the way he was doing his job and was trying to suggest a better way to do it. I view this proposed legislation as the Congress telling you what to do and how to do it and it seems so to me you people should be left alone. The highest and best use of our office should be to do it the way you see fit rather than having, whether it's Congress or the Executive, looking over your shoulder, saying, "Here, you release this, don't release this." I characterize this as potential congressional interference with your job.

Mr. RUTH. I would not do that, Congressman, because I think there is such a legitimate interest in trying to figure out what kind of reforms are needed, as we all look at Watergate, that any legitimate way of testing what happened and what is needed is something I want to help. On the other hand, I am terribly concerned about the precedent because I don't know who tomorrow's villain is going to be and I don't know who tomorrow's prosecutor is going to be and I don't know what kind of reports are going to be asked for from tomorrow's prosecutor about tomorrow's villains. That is where my eye is.

Mr. HYDE. Revealing unevaluated and raw data? That really is not the function of a prosecutor, is it?

Mr. RUTH. Evaluation only in the sense that the prosecutor decides what to present to a grand jury, yes.

Mr. HYDE. Right, a grand jury or in a court of law, in a judicial proceeding or a proceeding leading to a judicial proceeding.

You are not a public relations man for any point of view or conduit for raw information.

Mr. RUTH. I think it is obvious I am not a public relations man, Congressman.

Mr. HYDE. To your credit.

Would some of the information that these bills seek to get from you, be classified as presumptively privileged under the *United States v. Nixon* case?

Mr. RUTH. Well, any materials that would fall within the Presidential privilege because obtained from the White House and relating to conversations between the President and his aides would be presumptively privileged under *United States v. Nixon*. Then you get into the balancing question that is raised in the opinion of the Chief Justice, and on that issue we have the circuit court of appeals here in the District establishing the point where the Senate Select Committee asked for Dean-Nixon tapes and were turned down because the court

said there was a presumptive privilege but on balance the public need that the Senate Select Committee had for the tapes could not be overcome by the infringements on the privilege.

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

Mr. HUNGATE. I recognize the guide wires that restrict you, I think, in these Federal statutes that we alluded to earlier.

In line with what we are covering now, has it not been held on occasion when testimony or data is sought for its own sake rather than to learn what took place before the grand jury, that its not a valid defense to disclosure that the same information was revealed to a grand jury or the same documents had been or presently were being examined by a grand jury.

Mr. RUTH. I think it is correct that documents can have an independent existence even though presented to a grand jury, yes. It usually is whether the release of those documents are for the purpose of tracking the grand jury investigation. If that is the case they fall within rule 6(e).

Mr. HUNGATE. Mr. Thornton.

Mr. THORNTON. Thank you, Mr. Chairman.

Mr. Ruth, assuming that a good purpose would be served by a complete disclosure of the evidence or material which is in your hands, and assuming further that the questions of law which are involved might be resolved, would it be helpful to have legislation directing the special prosecutor to prepare a report under the direction of such legislation, or could you do so under the present grant of authority?

Mr. RUTH. Well, our charter, Congressman Thornton, allows a final report and I think the only stumbling block that we are talking about today is whether evidence as to individuals should be in that report. I think the report can include findings and recommendations about possible abuses of power or lack thereof by particular agencies, and we can send that to various oversight committees, but where I am drawing the line, and I think Mr. Jaworski and Mr. Vorenberg, is on the release of evidence as to individuals. I do think that the Presidential Recordings and Materials Preservation Act—

Mr. THORNTON. To help me understand, does your objection run to putting the evidence together in an accusatory fashion leading to conclusions as to guilt or innocence of the parties, or is it to the release of factual material which is in your hands, without such legal conclusions being drawn?

Mr. RUTH. Well, as to any case, Congressman Thornton, I suppose different individuals could state facts in different ways so that they would directly point to an opposite conclusion even though they are both using the same facts. It is very difficult to state particularly as to whether an individual is involved in an offense unless you state, as you do in a court of law, the prosecutor presents his side and then you get somebody to present the defense side and then a jury makes up its mind. So I don't see how in terms of a factual report a prosecutor should be able to speak other than through a grand jury and a court of law because you also have the question what really happened because you also have witnesses say this happened and a witness will say it didn't happen, and the juries usually make up their mind about who is right and the prosecutor in releasing evidence would necessarily per force be required to decide who is believable and who isn't and those are functions prosecutors aren't supposed to do publicly.

Mr. THORNTON. Do you recognize a distinction between furnishing to the Congress, pursuant to legislation, factual material requested by that legislation, as contrasted with the release of factual information to the public generally or without authorization from Congress.

Mr. RUTH. Yes, Congress can also subpoena Justice Department files for a valid legislative purpose.

Mr. THORNTON. Do you anticipate that any additional indictments or charges may be brought by your office relating to the materials which you have on hand, or can you speak to that at this moment?

Mr. RUTH. Well, we are finishing a number of investigations and I would be reluctant, Congressman, to say at this point whether they would be successful prosecutions or insufficient of evidence for prosecution.

Mr. THORNTON. But some investigations are continuing.

Mr. RUTH. Absolutely, yes, sir.

Mr. THORNTON. And the answer to that question has not yet then been determined?

Mr. RUTH. No, sir, although I would expect some action.

Mr. THORNTON. I have no further questions.

Mr. HUNGATE. Thank you, Mr. Hutchinson.

Mr. HUTCHINSON. Thank you, Mr. Chairman, for permitting me to participate with your subcommittee this morning.

I have only a single question, and that is whether the bills that the subcommittee has before it and is considering are perhaps not unprecedented in their thrust.

Do any of you know of any law on the books which directs a prosecutor to make a public report and the substance of it.

Mr. RUTH. I am not aware of any precedent, Congressman Hutchinson.

Mr. JAWORSKI. May I comment?

Mr. HUTCHINSON. Yes.

Mr. JAWORSKI. It occurred to me as the dialog was progressing a few minutes ago that perhaps this committee would want to have before it a copy of the American Bar Association's Standards on Criminal Justice that pertain to the prosecution functions. These standards were developed over a period of years through the participation of judges and prosecutors and defense counsel. They set forth in great detail just what the prosecution function should be and I think that when you read those standards you will find that what is proposed here is far afield from what the prosecutor's job is supposed to be.

I think it would be helpful if these were made a part of your record, Mr. Chairman.

Mr. HUNGATE. If you supply them to us, without objection that would be made part of the record at this point.

Mr. JAWORSKI. Thank you. I am sure Mr. Ruth has a copy in his office. I am sure he consults it from time to time just as I did.

[A copy of the American Bar Association's "Standards on Criminal Justice" has been retained in committee files.]

Mr. HUTCHINSON. I have no further questions and I thank you for the response.

Mr. HUNGATE. In discussing the report question and the nature of the report possible interference, its a part of the charter, is it not,

that the prosecutor shall upon completion of his statements submit a final report to the appropriate persons or entities of the Congress?

Mr. RUTH. Yes, and we intend to do so.

Mr. HUNGATE. We won't want to lose 414 to 3 as we passed one something like that so there is some congressional input.

Mr. RUTH. Congressman, there has been tremendous congressional help to our office as well, particularly on the night of October 20, 1973.

Mr. HUNGATE. Well, I doubt if the full obligation of the Congress in the responsible performance of its office is fully publicly understood but do you suppose it will be seen in time what an outstanding job has been done by your office—with as much fairness as possible?

Ms. Holtzman.

Ms. HOLTZMAN. Thank you, Mr. Chairman.

Are you taking the position that tapes which Richard Nixon made during the time he was President are privileged, and do you think, therefore, that this tapes bill that Congress has enacted is unconstitutional?

Mr. RUTH. No, the only position taken in here is the fact that we have no right to waive that privilege.

Ms. HOLTZMAN. Do you have the privilege?

Mr. RUTH. In fact we are in court now under the Presidential Recording Act contesting Mr. Nixon in asserting that privilege.

Ms. HOLTZMAN. Do you claim that he has the privilege in this case? What position is your office taking?

Mr. RUTH. We are maintaining in that litigation that a former President doesn't have executive privilege against an incumbent President. I feel very strongly about that.

Ms. HOLTZMAN. Thank you. Is that position you're taking here before us now?

Mr. RUTH. My only position is that we don't have the right to waive; our only right is to go into court and make an argument, under *United States v. Nixon*.

Ms. HOLTZMAN. You're not saying, of course, if Congress asked you to make public the materials you have on the tapes, you're not saying Congress would be asking you to do something unconstitutional, are you?

Mr. RUTH. No. What I am saying is——

Ms. HOLTZMAN. The act itself is——

Mr. RUTH. I would have to go to the current Chief Executive to find out if he wanted to exercise the privilege.

Ms. HOLTZMAN. I see. But you're not saying Richard Nixon has a privilege with respect to these?

Mr. RUTH. As I say, we are already in court arguing that he does not.

Ms. HOLTZMAN. Thank you. That is not quite the implication, I think of the testimony here with respect to the existence of privileges regarding this material. But in any event I would like to ask you one other question, and that goes to the point that you are raising here with respect to the issuance of a report. As I see it, the reluctance has to do with the fact that your activities ought to take the form and be conducted in the forum of a criminal prosecution; otherwise it is improper to release evidence. Along those lines, since this question is before us today, I would like to know whether or not you intend to

institute any prosecutions with respect to Richard Nixon, whether you are pursuing that in any respect at this time, or whether you have abandoned that conclusively. And in your response I would like very much for you to address yourself to the following.

I know and I agree that President Ford has a plenary power with respect to pardons but I also know, and I think you are aware, of the fact that pardons are lawful only when they are lawfully exercised. I would like to know whether you have any intentions of challenging the pardon or prosecuting Richard Nixon with respect to the period of time covered by pardon or the period of time prior to the pardon or the period of time subsequent to the pardon.

Mr. RUTH. Congresswoman Holtzman, we have done extensive research and this decision was initially made by Mr. Jaworski when he was special prosecutor. I agree with that decision and I have no intention of prosecuting or attempting to prosecute Mr. Nixon for an offense covered by the time that is mentioned in the pardon. This decision was made, Mr. Jaworski has stated extensively, on the basis of extensive legal research that we did in our office, which came to the conclusion that the possibility of successfully challenging the pardon was so small as not to justify the initiation of a prosecution.

Ms. HOLTZMAN. Did you do any factual research to reach that conclusion?

Mr. RUTH. I don't understand the question.

Ms. HOLTZMAN. Well, my question contained the proposition that a pardon is lawful if it is lawfully exercised. That is, in part, a legal question and, in part, a factual question. I want to know whether you have done any factual inquiry into whether or not the pardon was lawfully exercised, to make the judgment that you make today.

Mr. RUTH. Well, Mr. Jaworski would have more knowledge of the fact of what happened at the time but if you are asking are we investigating whether there was a prior deal between President Ford and Mr. Nixon; no.

Ms. HOLTZMAN. I wasn't asking that specifically. I was asking you whether you had done any factual research to reach your legal conclusions?

Is the answer no?

Mr. HUNGATE. Anybody else care to comment on that?

Ms. HOLTZMAN. I would like to have an answer from Mr. Ruth. Is the answer no?

Mr. RUTH. We are aware of the facts stated in various hearings and we have talked with people. We have had no grand jury hearings.

Ms. HOLTZMAN. I also asked for the period of time not covered by the pardon. Do you feel yourself precluded in that area as well?

Mr. RUTH. Well, the jurisdiction of our office only extends from January 20, 1969.

Ms. HOLTZMAN. To?

Mr. JAWORSKI. May I make a comment for the record?

Mr. HUNGATE. Yes.

Mr. JAWORSKI. As Mr. Ruth stated, I had reached a decision after considerable research that there was no basis in my judgment for attacking the pardon.

The Supreme Court of the United States just a few weeks ago came out with a decision, the opinion was written by the Chief Justice, in

which the pronouncement was made that before a pardon could be attacked you would have to find a limitation to the right to pardon in the Constitution. I find none in the Constitution. So it seems to me that the question is moot, if I may suggest, because I think that if you read that U.S. Supreme Court decision you will find that the problem really has been laid to rest.

Mr. HUNGATE. Let me. Is this a private fight or can any Irishman get in here.

I wonder, could it be likened to bringing a suit on a note and the fellow pleads payment, but he has to plead the payment, then the court decides as to whether the payment is adequate or is inadequate. I have a faint recollection of some case somewhere that sort of indicated that, that if you pardon somebody prospectively or in the wrong manner then he can be indicted or charged and it is then his duty to plead the pardon and the court will then determine whether it is any good or not.

Mr. Vorenberg, have you ever heard of such a case or is that probable.

Mr. VORENBERG. I think that is the way the validity of pardon would be tested, that it would have to be pleaded in defense.

Mr. JAWORSKI. But may I comment on that, Mr. Chairman?

Mr. HUNGATE. Yes.

Mr. JAWORSKI. As an officer of the court and as a prosecutor I would never bring a suit nor let a charge be filed in which I did not have personal confidence. I would expect the court to ask me whether I in good faith am representing to the court that this particular charge has a basis in law and I would then expect to answer no, because that is my conclusion.

Mr. HUNGATE. Well, on a suit on a note you would be in a position when you said he paid it you investigated and believed it had been paid and you believed the defense was sufficient, you would not be bringing the case if you thought the payment had been made and shown?

Mr. JAWORSKI. If I in fact had known the payment had been made I would feel I owed it to the court to make a representation.

Mr. HUNGATE. So if this case has your professional determination and study, you believe the pardon was properly issued, you might feel it frivolous or at least improper to bring a criminal action when you were certain.

Mr. JAWORSKI. You have stated it exactly as I feel, Mr. Chairman.

Mr. HUNGATE. Mr. Mann.

Mr. MANN. Thank you. Since you have been dealing rather extensively with the Presidential Recordings and Preservations Act, what do you foresee as the method by which these tapes may eventually be made public?

Mr. RUTH. Under that act, sir, the Administrator of GSA has to issue regulations in 3 months which become official regulations if not challenged in the Congress in the subsequent 3 months, and those regulations will have to specify as required by the act how the administrator is going to release all evidence as to abuses of power which are grouped under the generic term "Watergate," is the way the act puts it. So the Administrator of GSA is in the position of putting together those proposed regulations.

Mr. MANN. Has your office been asked any direct input into those regulations?

Mr. RUTH. We helped draft the initial regulations which were put out shortly after the bill was signed by the President in order to try to implement the November agreement we made with the White House allowing us access to the tapes and documents. Despite that agreement we have been held up in court because of Mr. Nixon's suit.

Mr. MANN. As I read your statement with reference to the final report that your office is going to make, I get the impression that you do not intend to give any factual synopsis with reference to any given case, or the whole case for that matter.

Mr. RUTH. Well, I think the testimony addresses the problem of release of evidence as to individuals. As to what happened and possible abuses of power by agencies, and probably analysis of that, and probably recommendations, that would be included in the final report.

Mr. MANN. Now with respect to the question of release of evidence concerning individuals, I do not want to be overly simplistic about it, but we are talking about a person who is now immune, I think, and I know that with reference to the release of the grand jury report and transmission, which the request was joined in by our office, I think, the court said with reference to the report, it renders no moral or social judgments, the report is a simple and straightforward compilation of information gathered by the grand jury and no more.

Now, would it be possible to extrapolate from the evidence developed by your office, evidence that would not infringe upon the rights of third parties, or a report for that matter that renders no moral or social judgments but is a simple and straightforward compilation of information, in the word of the court order, with reference to the grand jury report?

Mr. RUTH. Well, again, if you are talking about one individual, I think you probably saw that in the impeachment hearings, Mr. Doar and Mr. St. Clair both working from the same facts came to totally opposite conclusions, depending on how the material was presented by each side. And as to what happened say in the Watergate coverup, I suppose the trial transcript is the best evidence of that combined with all the Senate select committee's and your own hearings here in the impeachment inquiry. I am not sure what a prosecutor's report can add to that.

Mr. MANN. I guess one of my hangups is that I know as a member of the impeachment panel I did not have all of the evidence, I had not nearly all of the evidence you had, some I did have, the trial of course has disclosed some that we didn't have. But what else is there, what do you have that no one has had, what do you have that can contribute to the judgment of history that is not going to become available through these channels that have been referred to, the trial and the impeachment process or the Presidential Recording Act?

Mr. RUTH. Well, of course, the tapes that we got through the Supreme Court decision we did not have at the time of your impeachment hearings. They came at about the time of your vote.

I think I indicated earlier in terms of the Watergate coverup, and Mr. Jaworski stated this as well, that as to Mr. Nixon, you are just not going to find that much more.

I remember everybody wanted a smoking gun and they got the smoking gun. We do not have 10 more smoking guns lying around our office. And in terms of what happened, there is a great question in my mind, particularly for a legislative purpose or public understanding of problems, how much incremental evidence really adds to understanding, or does incremental evidence really make people focus on it rather than what does it mean and what do we do about it? So I would say as to the Watergate coverup there is nothing lying around our office that is going to ring a whole new spectrum of understanding of what happened or the problems. Indeed, I think that would only come if under the Presidential Materials Act somebody sat down and played every tape, and that is going to be fought in court because of the obvious privacy problems.

Mr. MANN. Well, I tend to agree with you with reference to the incremental evidence, as to who is going to analyze it, but we can be assured that the chronicles are going to come out of the woodwork and study and analyze and correlate and publish as long as we live and that additional evidence, if there is anything significant whatsoever, would be available to that ultimate story.

Mr. RUTH. Congressman, let me just say we obviously have not had a great amount of time to focus on our final report, and as I said earlier, I feel very strongly that abuses of power should become public so people know about it and can figure out what to do about it. We will continue to focus on this problem but we are strongly balancing it, and I feel so strongly about this, the precedent value of releasing raw evidence, and once you do it to one person that becomes the precedent and then next year's villain and the next year's villain—who knows what that would lead to?

Mr. MANN. Thank you, Mr. Chairman.

Mr. HUNGATE. The gentleman from Illinois, Mr. Hyde.

Mr. HYDE. Mr. Ruth, as I read your charter the Special Prosecutor may from time to time make public 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 Congress.

Now, I assume with confidence that you are going to issue a final report at the appropriate time and it will be a complete report and at the same time it would not trample on a lot of other peoples' right of due process. Is that not true?

Mr. RUTH. I hope so, Congressman. That would be our effort. But also I would add that we want to include the maximum amount of information that we think is proper.

Mr. HYDE. And you are going to do that?

Mr. RUTH. Yes, sir.

Mr. HYDE. All right. Legislation of the sort before us here will not assist you in that performance of this function, will it?

Mr. RUTH. Well, as to the specific bills pending of which I am aware, I have the problems that are indicated in my testimony.

Mr. HYDE. I accept that. Thank you.

Mr. HUNGATE. Mr. Thornton.

Mr. THORNTON. I have no questions.

Mr. HUNGATE. The concluding paragraph in the statement, Mr. Ruth, says in part, even more voluminous news disclosures will occur under the Presidential Record and Materials Preservation Act.

That is what we have referred to as the tapes act. The constitutionality of that has not as yet been determined. Is that right?

Mr. RUTH. No, sir; it is involved in two lawsuits at the present. The second one asking for a three-judge court to determine the constitutionality.

Mr. HUNGATE. And if that case should be determined that that is unconstitutional, then we will have lost a great deal of our potential relief as appropriated here?

Mr. RUTH. Well, a lot of the same issues that are being litigated in those two law suits, Congressman, would also be litigated with the legislation pending here.

Mr. HUNGATE. Mr. Jaworski, as I understand it, you consider the pardoning power the exclusive prerogative of the Executive?

Mr. JAWORSKI. I am sorry, sir, I did not get the full question.

Mr. HUNGATE. The pardoning power, do you consider that to be the exclusive prerogative of the Executive?

Mr. JAWORSKI. I did, yes sir. And I have been reinforced I think in it by the opinion that the U.S. Supreme Court recently released relating to a pardon that was granted during the days of President Eisenhower.

Mr. HUNGATE. And in your judgment does acceptance of the pardon indicate culpability?

Mr. JAWORSKI. I cannot conceive of an individual accepting a pardon unless he feels there is culpability, because I do not think it is something you want to hang on the wall like you would a diploma from a college or such as that.

Mr. HUNGATE. That reminds me of an inappropriate story, but go ahead.

You gentlemen, I suppose, would have had access probably to as much or more of the information in the Special Prosecutor's office. I suppose none of it was denied you that had in your own office; you had access to study any tapes acquired or any other information, is that correct, in the Office of the Special Prosecutor during the time of your incumbency?

Mr. JAWORSKI. Yes, sir.

Mr. HUNGATE. And in your judgment, I ask you as a panel, is there any substantial significant information at this point that has been denied the public that will not be contained in your final report?

Mr. JAWORSKI. The only thing I would say is that I know of some information that may be termed to be juicy, but I do not know that it is particularly significant, it certainly is not significant as far as the bringing of charges are concerned. It is information that people like to hear about and talk about and some of it probably falls actually under the heading of national security. But the information that I had reference to may be determined significant, but not insofar as our work is concerned. Not insofar as bringing of charges are concerned. I think that is the test.

Mr. HUNGATE. Well, I suppose when you start an investigation you do not know what you will find in total. Is there information there that would abet the Nation and public interest to make public although it is unrelated to a criminal prosecution, and for which you would think you would need additional statutory authority to reveal it?

Mr. JAWORSKI. I think that this particular information, I had reference to, that it would be wholly improper to reveal it, it relates to individuals about whom comments were made and who had no opportunity to defend themselves in the course of the conversations in which these comments were made. I just do not see wherein there could be any appropriate authority for releasing something of that kind.

Mr. HUNGATE. Mr. Ruth, at this point how many tapes, White House Nixon or Watergate tapes have you acquired, the number?

Mr. RUTH. I think the total is 61, Congressman.

Mr. HUNGATE. I have seen a figure of 64.

Mr. RUTH. 61 Watergate tapes and approximately 35 were played at the Watergate trial.

Mr. HUNGATE. And that includes all of those that the Judiciary Committee heard, I assume, plus some they did not hear. Is that a fair statement?

Mr. RUTH. Yes, sir, we acquired all the tapes pursuant to the subpoena that ended up in the Supreme Court. We did not play them all at the trial for obvious trial reasons. Some of them did not have the impact or the relevance.

Mr. HUNGATE. Cumulative?

Mr. RUTH. Yes, sir some of them were cumulative, in lawyer's words, yes, sir.

Mr. HUNGATE. Now, Mr. Jaworski.

Mr. RUTH. Congressman, could I clarify something. I think you asked whether we had access to all of the tapes.

The only tapes and documents we have gotten from the White House are those primarily through subpoena and some things through cooperation. But if you are talking about the 42 million documents of Mr. Nixon or everything relevant, we have never had free access to those.

Mr. HUNGATE. I did not phrase my question clearly. I was concerned with the ones your office has and I assume you and Mr. Jaworski had all of those available to you?

Mr. RUTH. Yes, sir.

Mr. HUNGATE. Insofar as any one person on this coast would know what is involved in the Watergate and the surrounding problems, you would have that information available to you, so if you told us that you thought we had substantially made public the things that affected the Government and the Nation's interest, you would be a pretty good source.

Mr. RUTH. Well the problem I have is even for every criminal case you make, you might get a hundred allegations, Congressman. If the 99 allegations had been true, people should have known about them. Now you go so far.

Mr. HUNGATE. Let me interrupt there. Of course, in a prosecutor's office many of us on this committee have had that experience, you throw some of that stuff out, you do not believe it yourself, you may be wrong.

Mr. RUTH. There are also times when you believe it, but you cannot prove it.

Mr. HUNGATE. Yes.

Mr. JAWORSKI. May I make this comment. It may be of a little help. During the days when the honeymoon was on, I am talking about my personal honeymoon with the White House, which didn't last very long, I was permitted to have someone over there for the purpose of going into files and filing cabinets taking out those things we thought had some relevance. So yet a number of documents were seen that we never asked for because we just did not think that they were material to our investigation.

Similarly, the tape recordings I alluded to that I listened to, I didn't ask for, and so we never had them.

It just so happens that I know something of what was said and one of the matters that I specified when I left is that I would be available to help write this report. I intended to do that on my own time and without any compensation.

Mr. Vorenberg will have the primary responsibility and Mr. Ruth, of course, will have supervisory responsibility and he will make his contributions, but certainly those things that I can be of assistance and properly let be a part of the report, I intend to help, but there are some matters I would feel wholly improper for me to disclose and I think there is no authority for me to disclose them and I do not think the authority can be given.

Mr. HUNGATE. Let me make another example, the lawyer examining a title, then I assume everything will go wrong that could be wrong.

Now, assuming that the so-called tapes' statute is declared unconstitutional, I believe, Mr. Jaworski, you have stated earlier that you would like to see all tape recordings you have obtained as a result of the Supreme Court decision made public and I take it that would be 61 that we just talked about and many of which have not been made public. Is that still your position? And if additional legislation were needed to accomplish this, assuming this statute is declared unconstitutional, then you would, I take it, favor additional legislation to make sure this occurs.

Mr. JAWORSKI. It would not offend me at all for these particular recordings to be made public. In fact, I think that most of them have, as Mr. Ruth indicated and as you by your question indicated, are either probably duplications or cumulative in some instances. In some instances they just do not have any value. What we did, we subpoenaed every single tape recording that we thought would shed light on the inquiry and we were able to do that because we had the benefit of logs and we knew what conversations took place, and when, and so we went about issuing these subpoenas.

But after hearing some of them it was found that they just were immaterial, frankly, they did not shed any light on the inquiry. But as far as those, sir, that you are asking about, I see no reason why they should not be made public. Most of them have been.

Mr. HUNGATE. I take it when we say made public, I mean in the sense of the free press. We do not dictate to them when they were dignified or undignified.

Mr. JAWORSKI. Yes, sir.

Mr. HUNGATE. That would keep me from discussing anything.

Mr. JAWORSKI. Right.

Mr. HUNGATE. Mr. Vorenberg.

Mr. VORENBERG. I think in one respect, Mr. Chairman, the assurance that you have been seeking that everything that could be of any possible public interest will come to light is really an assurance that we cannot give as far as the report is concerned. If there were only one set of interests here, if all we had to be concerned with was the public's value of the public of knowing, then there would be no reason not to kind of throw open all of the files, but there really is no way that I think at any point, this would be true when we write the report, that we can say everything that somebody in this country might want to know about, something will be there.

Mr. HUNGATE. May I interrupt just a moment and really go back to Mr. Ruth's comment earlier. I do not think we are talking about things that a prosecutor examines and decides. I really do not believe it or he raises a more difficult question, whether you believe it and cannot prove it. I suppose you have to stop there if you may believe it and do not have enough to prove it where you are satisfied in your own mind and think you have at least, maybe not beyond a reasonable doubt, but have substantial proof that you do believe and think you can prove at least to the civil degree of convincing then, I take it your problem is balancing the public interest against the individual right.

Mr. VORENBERG. To put the problem more specifically, the only way a prosecutor ought to speak about people under investigation, people who are suspect, is through the grand jury and the formal charges process. And where for any number of reasons an investigation does not lead to that, where the prosecutor has taken that step, it would be just a form of massive abuse of an individual's rights for the prosecutor to say well, we will split the difference. We would not prosecute but we will tell the public what we know about this information.

Mr. HUNGATE. As I have sought to indicate, grand juries, not too frequently do that sort of thing. Do they not; they say we find that the jail conditions are criminal and this guy is this and that and they do not indict anybody but they make a big public statement. I am not sure that is a good thing to do.

Mr. VORENBERG. It seems to me that is really a fairly separate function of the grand jury have an accusatory function and separate investigative functions where they are not focusing on a potential individual defendant.

Mr. HUNGATE. I would suggest perhaps this special prosecutor has a special function, which is to prosecute where called for, and shall on completion of it assimilate a final report.

Now, is that not the area in which we now find ourselves, that we do have a special situation and a report is called for, and let me finish this. I do not think that most of the Congress, you can not speak for most of the Congress, particularly not this year, but pursuant to the prosecution about from time to time making public statements or report, and Mr. Ruth's statement we have issued periodic status report of various prosecutions and other matters handled by the officer and will issue a final report—what I am saying, when a Congressman thinks of a report, I think he thinks of something not this big, something like that, that has an introduction and history and finding and conclusion and recommendation, and I do not think we have had anything of that kind to date.

Mr. VORENBERG. No, but you will. Mr. Ruth has said we do envision that that is what the report will be. The area in issue here is the question of raw data involving individuals.

Mr. HUNGATE. Mr. Thornton.

Mr. THORNTON. I am concerned that I may have heard two distinct and contradictory rationales as to the reason that legislation is not called for. On one hand, it has been expressed that no material, evidentiary material is involved here and the reluctance to include it in a report is against making an accusatory statement or drawing a legal analysis leading to conclusions of guilt. That rationale seems to me to contradict the theory that because of the effect that a pardon had upon a failure to prosecute, that some material which would have been useful and relevant in a prosecution, and which would have been made public, must now be restricted.

Now, my question is, which factual situation exists? Do we have material that would have been useful and would have been made public if this pardon had not occurred, or are we dealing with material or allegations which are of no consequence?

I do not think you can rest upon both of these positions.

Mr. JAWORSKI. May I answer that, sir?

I can speak, of course, only during the time that I served in the office, but I have no difficulty with that question at all because what I believe was obtained and was useful and had any probative force at all was used in the coverup trial. I think it has been made public, except as we said a while ago, where evidence was purely cumulative. So there may be other areas that Mr. Ruth has gone into since my departure, I do not know, but I have no problem, I do not see where pardon, granting of the pardon has affected that situation any at all.

Mr. THORNTON. I must say I find the position that you enunciate the more reasonable and acceptable of the two positions, and yet I am concerned that both arguments have been made.

Mr. HUNGATE. Ms. Holtzman.

Ms. HOLTZMAN. Thank you, Mr. Chairman.

I have two questions to ask you.

One is, how do you deal with the Agnew precedent in terms of your statement that it is inappropriate to make a report in the circumstance in which a person accepted a pardon—which, of course, Mr. Jaworski suggests is not something you hang up on the wall? How do you reconcile your assertion with the precedent of the Justice Department's releasing a very lengthy factual statement regarding Mr. Agnew?

Mr. JAWORSKI. I do not know what the statement said, I did not read it, frankly.

Ms. HOLTZMAN. Perhaps you might.

Mr. RUTH. I think, as I understand it, the statement of fact accompanying Mr. Agnew's plea of nolo contendere was part of the plea in negotiation and I think alludes to something Mr. Vorenberg said, a statement as to the facts could have been made a condition of the pardon but it wasn't and we were not, obviously, consulted on that.

Ms. HOLTZMAN. You mean to say if Mr. Nixon had pleaded guilty that you would not have been in a position to make public at this point the various facts as to which he had pleaded?

Mr. RUTH. We are in that position with many other defendants.

Ms. HOLTZMAN. You are saying that with respect to Mr. Nixon, is that your answer.

Mr. RUTH. I say the plea of guilty in the Agnew case was adopted with the specific agreement that the Government could release a statement of facts. On a normal plea of guilty, the Government if asked by the judge makes a short statement of the facts. The prosecutor does not release all of the facts in any criminal case where there is a plea of guilty.

Ms. HOLTZMAN. So, then, if we were to ask you to release the facts in connection with misconduct on the part of Richard Nixon, would that be unconstitutional?

Mr. RUTH. No, all I am saying that would end up in a court of law and I have great doubts about the success of it. If I am ordered, I will do it, and throw it to the court and people can argue about it for 5 years. That is all I am saying.

Ms. HOLTZMAN. I want to ask you one final question with respect to the pardon and perhaps we do not have time to answer it here, but I certainly hope that in your final report, when you deal with procedural decisions that were made, you will explain your failure to challenge it. The point I am making, and I do not disagree with Mr. Jaworski, is that a pardon can be invalid under common law and well-established precedents for various circumstances. For example, if fraudulent information is given to obtain the pardon, under well-established precedents the pardon is void. This principle goes way back in American precedents and English history. If the pardon is given for improper purpose, it may be void to begin with. That is why I asked you the question about the actual research that you had done. I would like to know your justification for not undertaking some inquiry to understand whether on a factual basis the pardon was valid, to enable you to make the judgment that you make now, that you do not think you can win in court if you test the pardon.

Mr. RUTH. You are saying you want us to explain that in the final report?

Ms. HOLTZMAN. If you could explain it here, I would appreciate it.

Mr. RUTH. Usually a prosecutor does things when there are certain allegations or cases of mischief. I do not know how you viewed that event. I understand the President explained it on the basis that he thought the national interest so required it and it was not based on information about probable sickness or probable innocence or anything else, and in our depositions in the Presidential Recordings and Materials Preservation Act there is testimony which is public about the background of how the document's negotiation went and was not related to the pardon, so there are a number of questions that have been raised and answered but when you talk about running to a grand jury usually you have some sort of allegation or case of mischief.

Ms. HOLTZMAN. But you did not look.

Mr. RUTH. You do not challenge every Presidential act on the idea it is illegal, you have to have some indication, I would think, unless Watergate has gone further than I thought.

Ms. HOLTZMAN. Thank you.

Mr. HUNGATE. The gentleman from Illinois, Mr. Hyde.

Mr. HYDE. Professor Vorenberg, in Mr. Ruth's opening statement he said one must address the question whether a prosecutor, absent normal procedural and substantive safeguards of a judicial proceeding

should be required to take the "radical" step of releasing raw investigative files or issuing a detailed evidentiary report about the probable complicities of one individual. Would you adopt that word, "that radical", what is being asked here about releasing investigative files is a "radical step"?

Mr. VORENBERG. I think it would be radical, if anything a mild word. It would be as far as I know unprecedented in terms of anything a responsible prosecutor has done.

Mr. HYDE. Irresponsible may be a better word?

Mr. VORENBERG. I think it would be irresponsible for a prosecutor to do it on his own. Mr. Ruth has described the dilemma he would face if he were directed by Congress to do it. It seems to me both the suggestions that a prosecution ought to be sought and that there should be raw releases of data, involve a role, a view that the prosecutor's office can be used as a harassing agency. It seems to me that it would be just a radical departure from the notion of a responsible prosecutor for either of those lines to be pursued, so I think I endorse the use of the word radical, but typical of Mr. Ruth, it is understated.

Mr. HYDE. Mr. Jaworski, would you associate yourself with the remarks of Professor Vorenberg if I were to ask the same question?

Mr. JAWORSKI. I would, yes.

Mr. HYDE. Thank you.

Mr. HUNGATE. Mr. Mann?

Mr. MANN. Well, I find it interesting that we are looking for an extreme, an extremely presentable word to describe the endeavor to bring the details of an important event to the benefit of the future of this country and its history. And without attempting to put the blame on anyone, unless it is on the Congress, which I guess is where it is, I think that part of the reason we haven't developed this story better is the existence of the Special Prosecutor's office combined with the coincidence of the pardon and the resignation causing the Congress perhaps prematurely to terminate its search for the details for the benefit of history and the future of this country.

I am well aware of the precedents that govern prosecutions and prosecutors, and certainly concur in the position you take there, but let us not overbroaden the area that we are talking about exempting. We are talking about the President and a presidential pardon. That is the precedent. Let us hope there would not be many such precedents anybody else would have the right to rely upon.

Do you believe that a narrative type report on your part, however we want to describe it, a factual report, involving that evidence that did not go into court, involving that evidence that may have gone into court had there, in spite of Mr. Jaworski's belief that most if not all of it got there, that that can be incorporated in a report would be embargoed for life of the parties involved or the party involved.

I immediately recognize the sensitive aspects of that suggestion, but give me your reaction to it, Mr. Ruth.

Mr. RUTH. I think, Congressman—

Mr. MANN. So far as its constitutionality is concerned and the—

Mr. RUTH. To write something and leave it in our files, I think would be fine. The constitutional issue would arise only when someone sought to publish it. I think a prosecutor's office is a limited way to

bring out the whole truth of what happened in a particular government because necessarily we are looking for specific events against specific Federal criminal statutes and so again we would have something incremental to add, and I suppose our impressions would be quite useful, because we run across things, a lot of us have experienced in the government that we probably did not agree with but did not amount to crimes. I suppose if someone wanted us to leave behind a record of those impressions we would do it and let people fight over publication. But I still think that a fuller exposition would come out if someone stayed on top of litigation of the Presidential Materials Preservation Act, and if that went badly to try to cure any evil in that the court finding so that an act is passed that is constitutional if the court finds it unconstitutional, because then you have the record upon which to make the judgement.

Comparing my own experience in local government in New York City with experience in Washington in the Federal Government, there are too many secrets around here and the best way to do that would be to have the document themselves and not what a particular prosecutor asks for in trying to make a case under a particular statute, against a particular individual over which we had jurisdiction. So it seems to me that the purpose behind the Presidential Recording Act, served I believe what you were talking about and would serve it well. If the act that is passed does not survive the constitutional test then pass one that is constitutional.

I happen to think that regulations can be formulated by the Administrator of GSA that will make that act quite constitutional as passed.

Mr. MANN. Thank you sir.

Mr. HUNGATE. Ms. Holtzman.

Ms. HOLTZMAN. I just would like to comment with respect to one thing. One of the arguments you presented here is that your report would be of incremental benefit anyway, assuming all of the other arguments were taken care of. And I gather that would probably be true with respect to the Watergate coverup that you are referring to.

What about some of the other areas? I know the House Judiciary Committee went into such as abuse of agencies, IRS, wiretapping, and so forth, tax problems and the like. In those areas?

Mr. RUTH. We will include material about those areas and we are talking about how to do that without accusing this or that individual. I think we can talk about what happened in those kinds of abuses without talking about evidence as to a particular individual, or what did not happen. We intend to try to do that because I think in terms of the reporting power in the charter to entities of Congress, I think we have a duty to various oversight committees and to this committee and the full House Judiciary Committee to try to put out as much as we can about what we may have found about abuse of power, not in the context of accusing a particular individual of a crime, and we could do that with the Congress in terms of transmitting it to the Congress for Congress not to publish it or to publish it as it sees fit, but I think we owe that to the Congress.

Ms. HOLTZMAN. What about such areas as taxes, for example which would not necessarily fall within this jurisdiction of agency

oversight, Presidential tax questions, campaign contributions. Would you in some way get into that in your final report?

Mr. RUTH. Well, those matters are still under investigation, it would depend upon whether there was a pending litigation.

Mr. HUNGATE. I think I now have the standard for criminal justice. I believe we will not make it part of the record, we will make it an exhibit. There is more to learn about that.

Mr. JAWORSKI. Do you have the volume that is labeled "Prosecution Functions"?

Mr. HUNGATE. And "Defense Functions." We have it available and we will make it an exhibit.

At the time the pardon of President Nixon was under consideration, apparently a request was made by President Ford for information that may be under investigation related thereto and I understand the pardon was granted before the book came out as to what was under investigation.

My question is, would those 10 areas mentioned in the letter from Mr. Ruth dated September 31, 1974, on that subject, would those 10 areas be dealt with in one way or another in the final report?

Mr. RUTH. Many of them, Congressman, are still under investigation and—

Mr. HUNGATE. Will these investigations, would you issue a final report before the investigations are completed. I suppose that is my question?

Mr. RUTH. That is a problem we have been discussing as to how to handle that and I do not have an answer because appeals go on for 2 years or so but we can handle the general area of what may have happened I suppose without getting into pretrial publicity problems—

Mr. HUNGATE. What we may need—

Mr. RUTH [continuing]. On a particular individual.

Mr. HUNGATE. What we may need then is an interim report as I have discretionary authority to give and then with the final report coming in after as you indicate, appeals go on for years, is that possible?

Mr. RUTH. Well, I think possibly as much that is useful as could be said except for the factual issue could be said in a report when the investigations are completed and not have to wait for 2 years.

Mr. HUNGATE. That raises the question, what would be a reasonable time to anticipate release of the final report?

Mr. RUTH. I would hope to have a final complete report sometime this year.

Mr. HUNGATE. That would be made available, I understand from the statements, to the Judiciary Committee and perhaps other entities of the Congress, is that correct?

Mr. RUTH. Yes, sir, there may be information we might want to transmit that would not be in the report.

Mr. HYDE. Mr. Chairman, I just want to commend Mr. Ruth and Mr. Jaworski and Professor Vorenberg for not only their testimony today but for the performance of the very distasteful duty in this entire Watergate mess with real professionalism and real dedication to principle. I think the vitality of the Constitution is served by

their performance and I think the label Watergate ought not to repeal the fifth amendment requirements of due process and equal protection of law. I think these gentlemen are in the trenches seeing that that does not happen. I commend them and I have every confidence that the national interest will be served when their job is through and their report is issued.

Thank you.

Mr. HUNGATE. Thank you.

One last query. Did I understand correctly that you said there may be some information you would wish to transmit to Congress that would not be in the final report?

Mr. RUTH. I just say that prospectively, I have nothing in mind at the moment. I am just trying to list all points.

Mr. HUNGATE. Gentlemen, on behalf of the committee and on behalf of the Congress, again we would express our appreciation for the fine job that you have done and I think you will find us willing to do whatever we can do on this end to bring this investigation to a satisfactory and thorough conclusion.

The committee will stand adjourned subject to the call of the Chair.

[Whereupon at 11:30 a.m. the subcommittee was adjourned subject to the call of the Chair.]



