

# The Genesis of the Independent Counsel Statute

by

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## 1. Introduction

The Independent Counsel Act was inspired by the perceived lesson of Watergate. Participants in the events of those days typically saw that lesson as follows: when faced with malfeasance at the highest level of government, the system failed. Our highest elected officials were implicated in the scandal, and the Department of Justice had proven itself incapable of adequate response. In confirming Elliot Richardson as the next Attorney General, Congress demanded appointment of a special prosecutor, and Archibald Cox was so appointed. However, the Saturday Night Massacre proved that the special prosecutor still served at the whim of the President. The resulting crisis, many concluded, demonstrated that the system needed change so that it could better respond to the next crisis. The Independent Counsel Act was the solution to the problem, establishing an in-place mechanism outside the Justice Department for the investigation and prosecution of high level government crimes.<sup>1</sup>

Two decades later, Watergate is again cited for its lessons. Increasingly, though, Watergate is seen as demonstrating just the opposite, namely, that the system worked. Viewed through this prism, Cox had indeed been fired, but public outrage and pressure from Congress successfully forced President Nixon to appoint Leon Jaworski as his replacement. Jaworski and subsequent Watergate special prosecutors had the necessary independence to do their work. Nixon was forced to resign; his aides were prosecuted and convicted. The system was shaken, but it righted itself. According to this view, the Independent Counsel Act was not only unnecessary; it has become the problem, undermining confidence in the Justice Department and unleashing prosecutions without the usual executive branch constraints.<sup>2</sup>

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<sup>1</sup> See, e.g., S. Rep. No. 94-823, 94th Cong., 2d Sess. 3 (1976) (referring to an American Bar Association study, "history has taught us that the existing system permits extreme situations to develop which mandate the ad hoc appointment of a special prosecutor long after one should have been appointed."); *Removing Politics From the Administration of Justice: Hearings on S.2803 and S. 2978 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 2 (1974) (opening statement of Sen. Ervin) ("I am not among those who believe that Watergate and the attendant events prove that our system of government has an inherent weakness. I do believe, however, that we must initiate some additional checks and balances, so as to prevent the misuse the system of administration of law.").

<sup>2</sup> See e.g., Testimony of Janet Reno, Attorney General before the Senate Committee on Governmental Affairs, March 17, 1999 ("Perhaps the real lesson of our nation's experience with the Special Prosecutor during Watergate is not that the old system was broken -- but that it worked."); Cass R. Sunstein, *Bad Incentives and Bad Institutions*, 86 Geo. L.J. 2267, 2281 (1998) ("Archibald Cox was made independent by Justice Department regulations. After Robert Bork fired Cox, Leon Jaworski was appointed, did his job well, and President Nixon had to resign. The system worked. And there was no Independent Counsel act. The true lesson of the Watergate scandal is that political safeguards and ordinary prosecutors are perfectly sufficient."); Julie O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 Am. Crim. L. Rev. 463, 505-06 ("According to congressional wisdom, it

(continued...)

Since different perceptions of the lessons of Watergate are an element of the current debate, it remains important to understand how the special prosecution system came into being during Watergate and what alternatives the Congress considered when that experience was fresh in everyone's mind.

## 2. Fashioning a Remedy Amidst the Crisis: The Watergate Special Prosecutors

Prosecution of the Watergate burglars initially was handled through the U.S. Attorney's Office for the District of Columbia. From the start, however, top officials in the Justice Department played a role in the case. John Dean, former White House counsel, recalled that within days of the break-in he expressed his fears to the Chief of the Justice Department's Criminal Division, Assistant Attorney General Henry Petersen as follows: "I don't believe the White House can stand a wide-open investigation . . . [t]here are all kinds of things over there that could blow up in our face." According to Dean, Petersen explained that he had advised Earl Silbert, the assistant U.S. attorney prosecuting the case, that "he's investigating a break-in . . . He knows better than to wander off beyond his authority into other things." Although Petersen then urged him to tell the President "to cut his losses cleanly and get it over with," Dean felt some relief: "White House vulnerability had just diminished, I thought, reviewing the meeting." John W. Dean, III, *Blind Ambition* 112 (1976).

The Criminal Division chief's recollection of the conversation with Dean was somewhat different. He acknowledged telling Dean there would be "no fishing expedition." He also testified that he advised Dean that the President should "instruct the Attorney General publicly to run an all-out investigation and let the devil take the hindmost." *The Watergate Hearings: Break-in and Cover-up, Proceedings of the Senate Select Committee on Presidential Activities* as edited by the staff of the New York Times 644 (1973).

Dean's version of that discussion was apparently relayed from Mitchell to Haldeman, who in turn reported it to Nixon:

**HALDEMAN:** Another thing I didn't know that Mitchell told me is that John Dean . . . went in to [Criminal Division Chief] Petersen and laid out the whole scenario to him of what actually happened, who is involved and where it all fit. Now, on the basis of that, Petersen is working with that knowledge, directing the investigation along the channels that will not produce the kind of answers we don't want produced. Petersen also feels that the fact that there were some lines in this case that ran to the White House is very beneficial because that has slowed them down in pursuing things, because they all are of the view that they don't want to indict the White House, they only want to indict the –

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was this 'Saturday Night Massacre' that shattered public confidence in our system of justice,' necessitating the enactment of the IC statute. What is overlooked is the fact that the system subsequently worked as it should, . . . In other words, the political costs of interference created its own checks and balances."); Terry Eastland, *Ethics, Politics and the Independent Counsel: Executive Power, Executive Vice 1789-1989*, at 19 (1989) ("the traditional means of responding to allegations of executive misconduct were employed in Watergate. Criminal investigation and prosecution by regular and special prosecutors took place, as did congressional investigation, as did an impeachment inquiry. . . . The traditional means worked. They worked in the sense that they ran their natural course and produced results consistent with public opinion."); *but see* Testimony of Ken Gormley, Senate Committee on Governmental Affairs on the Reauthorization of the Independent Counsel Act, March 24, 1999 ("After spending seven years studying, and writing about, the events of Watergate -- particularly those involving the tenure of the first Watergate Special Prosecutor Archibald Cox -- I can tell you that President Nixon came very close to succeeding in his plan to abort the Watergate investigation entirely. Although it is true that after Cox's firing during the "Saturday Night Massacre," the American public rose up and President Nixon was ultimately forced to disgorge the subpoenaed tapes, this story almost had a different ending.").

they want to tighten up that case on that criminal act and limit it to that to the degree that they can. . . .

July 20, 1972: The President and Haldeman, 3:16 - 4:02 P.M., Executive Office Building, published in Stanley I. Kutler, *Abuse of Power* 102 (1997) (containing transcriptions of some 201 hours of Nixon's taped conversations which were released by the National Archives to the public in November 1996).

Any reassurances aside, the White House kept its sights on the Justice Department, doing what it could to contain the investigation. For example, Emery writes:

. . . Dean claimed to have "braced" [a term used to mean that he ensured the person would put the White House's interests "first and last"] the attorney general over the past months on the potential problems to the White House from what the FBI and the prosecutors were doing, and what the trial meant. And, more significantly, he had told Kleindienst that if he saw him "going down the wrong track, I'm going to have [to] tell you why."

Fred Emery, *Watergate: The Corruption of American Politics and the Fall of Richard Nixon* 253; *see also id.* at 172, 196, 251-53, 302-03, 349-53.

Nixon himself acknowledged his hands-on role, albeit casting himself as having fully cooperated with the Justice Department to achieve an aggressive search for the truth. In his April 1974 address to the nation, he described how a year earlier, on April 15, 1973, he met with Kleindienst and then with Petersen. Nixon explained that Kleindienst had "quite properly removed himself from the case," due to his close ties with those involved, and they agreed that "Assistant Attorney General Henry Petersen, the head of the Criminal Division, a Democrat and career prosecutor, should be placed in complete charge of the investigation." Nixon continued: "From the time Mr. Petersen took charge, the case was solidly within the criminal justice system, pursued personally by the Nation's top professional prosecutor with the active, personal assistance of the President of the United States." Quoting his own words excerpted from a number of his taped conversations, he told the country: "I made clear there was to be no coverup."

However, a better picture of the President's and top advisors' "active, personal assistance" to the Justice Department emerges from amongst the conversations transcribed by Kutler in his *Abuse of Power: The New Nixon Tapes*.

For a time, the Administration had reason to hope that the investigation would not stray beyond the role of the burglars themselves. Two of the accused burglars were tried in January 1973, and three others pleaded guilty, but no evidence of involvement by others was revealed. However, digging by the *Washington Post*, coupled with revelations by one of the convicted and soon to be sentenced burglars, James McCord, to Judge John J. Sirica, yielded mounting evidence of a conspiracy that involved persons higher in the government. Petersen "was himself getting deeply restless." Emery, *supra*, at 349. After initially agreeing to Nixon's request for "a little sheet of paper" evaluating the prosecution's case against Haldeman, Petersen refused because the information would contain grand jury material. Kutler, *supra*, at 338, 348.

As events unfolded, Nixon himself mulled over the option of appointing a special commission to investigate the matter.

In an April 30, 1973 televised address, Nixon announced the resignations of Attorney General Richard H. Kleindienst, H.R. Haldeman, and John Ehrlichman, and the dismissal of White House Counsel John Dean. Nixon explained that Kleindienst's resignation was due, not to any personal involvement in the matter, but to the fact that he had "been a close personal and professional associate of some of those who are involved in this case." During a

phone conversation with Haldeman that evening, Nixon, vowed that he would "never, never, never, never" again discuss Watergate.<sup>3</sup>

During the same address, the President announced his nomination of Secretary of Defense Elliot Richardson to replace Kleindienst as Attorney General. Nixon stated that Richardson would have full charge of the case, with authority to appoint a special supervising prosecutor if he thought it appropriate:

As the new Attorney General, I have today named Elliot Richardson, a man of unimpeachable integrity and rigorously high principle. I have directed him to do everything necessary to ensure that the Department of Justice has the confidence and the trust of every law-abiding person in this country.

I have given him absolute authority to make all decisions bearing upon the prosecution of the Watergate case and related matters. I have instructed him that if he should consider it appropriate, he has the authority to name a special supervising prosecutor for matters arising out of the case.

*See Chronology of Watergate Developments in 1973, 1973 Cong. Q. Almanac 1015-16 (1974).*

President Nixon's announcement dominated the news, confirming for the public and Congress that the Watergate matter had reached into the White House.

In a phone conversation that night after the speech, Nixon told Richardson: "Do what you want, and I'll back you to the hilt," but only after confiding his own preference on the appointment of a special prosecutor: "The point is, I'm not sure you should have one." In phone conversations the next day, Nixon's discomfort with the appointment of a special prosecutor is readily apparent. Speaking with Richardson, he continued to reiterate that the decision was Richardson's. He wanted Richardson to know, however, that he thought that Henry Petersen, head of the Justice Department's Criminal Division, "would make sense" for the job.

Petersen would later testify that he believed that the Watergate investigation need not have been placed in the hands of a special prosecutor:

We would have broken that case wide open and we would have done it in the most difficult of circumstances. And do you know what happened? That case was snatched out from under us when we had it 90 per cent complete with a recognition of the Senate of the United States that we can't trust those guys down there, and we would have made that case . . . and we would have convicted those people and immunized them and we would have gotten a breakthrough. . . .

The Watergate Hearings: Break-in and Cover-up, Proceedings of the Senate Select Committee on Presidential Activities as edited by the staff of the New York Times 650 (1973). The Senate Select Committee, however, would conclude otherwise, describing Petersen's role as that of:

a conduit for a constant flow of information from the grand jury and the prosecutors first to Dean and then to the President. The transcripts also demonstrate that the President kept

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<sup>3</sup> Nixon was, of course, far from through with the subject of Watergate. Before resigning, he twice again addressed the nation at length on the subject. In an August 15, 1973 address to the nation, Nixon again denied any involvement and explained his refusal to turn over recordings of his conversations to the Special Prosecutor. In an April 29, 1974 address, he discussed the transcripts of the tapes which he would produce the next day in response to the House Judiciary Committee's subpoena.

Haldeman and Ehrlichman informed of what he learned from Petersen. Petersen's conduct raised a serious question as to whether high Department of Justice officials can effectively administer criminal justice where White House personnel, or the President himself, are the subjects of the investigation. The conflict of interest is apparent . . .

*Final Report of the Senate Select Committee on Presidential Campaign Activities*, S. Rep. No. 93-981, 93d Cong., 2d Sess. 80 (1974).

#### **a. The Richardson/Cox Hearings and Special Prosecutor Guidelines**

The President's statement that he had authorized Richardson to appoint a special prosecutor, should he so choose, did not satisfy Congress. On May 1, 1973, the day after Nixon's televised address, the Senate passed Senate Resolution 105 by voice vote, resolving that it was the sense of the Senate that the President designate an individual from outside the executive branch to serve as special prosecutor in the Watergate case and submit the name of his designee to the Senate for a resolution of approval. 119 Cong. Rec. 13729 (1973). Senator Charles Percy, who introduced the resolution, found precedent in the Teapot Dome scandal of the 1920s. There, President Coolidge, urged on by a joint resolution of Congress calling for appointment of special counsel independent from the Justice Department, appointed two such special counsel, one a Republican and the other a Democrat, to investigate charges that Secretary of the Interior Albert Fall and others had fraudulently leased the Navy's oil reserves. An article from the *Christian Science Monitor*, which Senator Percy placed in the *Record*, drew the connection to the Watergate affair:

[Teapot Dome] points the way we think might well be followed in the Watergate affair. As in the Teapot Dome case the prosecution should be taken out of the Department of Justice and put in hands which are either bipartisan or palpably nonpartisan. Above all, the prosecution must be divorced from the White House. . . .

The process of setting up a convincing and satisfying housecleaning might well start, as in the Teapot Dome case, with a joint resolution by the Congress.

*Id.* at 13721 (1973).

As Senators from both parties urged adoption of S. Res. 105, none of them questioned the honesty, integrity or ability of Richardson. Instead, he was uniformly praised. However, Senator Percy, as others, raised the question that would later frame the debate: "Should the executive branch investigate itself? I do not think so, and neither, I am convinced, do a majority of my colleagues." *Id.* John Williams, the former Senator from Delaware, was suggested as well- suited for the position of special prosecutor. *Id.* at 13719- 20, 13722.

Even before his confirmation hearings began, Richardson announced that he would select a special prosecutor to investigate Watergate and offered the Senate the opportunity to evaluate and informally confirm his choice before it became final. *Chronology of Watergate Developments in 1973*, 1973 Cong. Q. Almanac 1017 (1974).

On May 9, 1973, Richardson appeared before the Senate Judiciary Committee for his confirmation hearing. The committee immediately made its intentions clear. Watergate required immediate attention, and Congress would not rely on the Justice Department to provide it. A special prosecutor from outside the Justice Department would have to be appointed. Chairman James Eastland opened as follows:

**The CHAIRMAN.** Did you ever hear of the Watergate affair? [Laughter.]

**Secretary RICHARDSON.** Yes, Mr. Chairman.

**The CHAIRMAN.** All right. Now, if you are Attorney General, what are you going to do about it? [Laughter.] **Secretary RICHARDSON.** If, Mr. Chairman, I am confirmed by the Senate of the United States . . . I would undertake that responsibility determined to pursue the truth wherever it may lead. I have examined my conscience on that score. I am

satisfied that I am prepared to do that without fear or favor, and with regard solely to the public interest.

**The CHAIRMAN:** What about a special prosecutor?

Nomination of Elliot L. Richardson to be Attorney General, Before the Senate Committee on the Judiciary, 93d Cong., 1st Sess. 3-4 (1973).

Discussion turned immediately to how best to secure the necessary independence to such a prosecutor. Certain members suggested that Richardson should confer upon the special prosecutor "final authority" over proceedings before "grand juries, subpoenaing witnesses, initiating prosecutions framing indictments, and seeking in court grants and immunity from prosecution for witnesses."

Richardson demurred, holding firm to his view that although he would delegate to such a prosecutor responsibility for the investigation and prosecution of Watergate and related matters, the statute creating the Office of Attorney General required that he "retain ultimate responsibility for all matters falling within the jurisdiction of his department." *Id.* at 4.

Senator Ervin questioned whether Richardson's approach would result in sufficient independence, suggesting that Congress might be tempted instead to follow the Teapot Dome approach, taking the entire matter "out of the hands of the Department of Justice" and placing it in a special prosecutor nominated by the President and confirmed by the Senate. *Id.* Meanwhile, at the White House, Nixon and his advisers ruminated over who might be chosen.

Over the course of six days, Richardson, Archibald Cox, whom Richardson had named as his choice for special prosecutor, and the Judiciary Committee hammered out the details of how such an outside prosecutor's independence could be secured. Working through the issues with a document prepared by Richardson entitled "Duties and Responsibilities of the Special Prosecutor," they reached a consensus that framed the debate and laid the groundwork for many of the provisions that would become law some five years later, in the Independent Counsel Act. *Id.* at a-46.

The document's "guidelines," made public in final form on May 21, gave Cox "full authority" to investigate and prosecute not only offenses arising out of the Watergate burglary, but more broadly:

all offenses arising out of the 1972 presidential election for which the special prosecutor deems it necessary and appropriate to assume responsibility, allegations involving the President, members of the White House staff, or presidential appointees, and any other matters which he consents to have assigned to him by the Attorney General.

*Id.* at 144-45.

With respect to the particular administrative and investigative powers of the special prosecutor, the guidelines --

- gave the Special Prosecutor full authority to assemble his own staff, on a full or part-time basis;
- provided him access to personnel or other assistance from the Justice Department and such funds "as he may reasonably require," with his budget requests to "receive the highest priority;"
- subjected the Special Prosecutor and his task force "to the administrative regulations and policies of the Department of Justice" except as otherwise specified or mutually agreed between the Special Prosecutor and the Attorney General;

- permitted the Special Prosecutor to make public such statements or reports as he deems appropriate and required him "upon completion of his assignment [to] submit a final report to the appropriate persons or entities of Congress;" and
- directed the Special Prosecutor to carry out these responsibilities, with the full support of the Justice Department "until such times as, in his judgment, he has completed them or until a date mutually agreed upon between the Attorney General and himself."

Having detailed the prosecutor's duties, the guidelines dealt with the competing interests of independence and accountability as follows:

In exercising this authority, the Special Prosecutor will have the greatest degree of independence that is consistent with the Attorney General's statutory accountability . . . . The Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions. The Special Prosecutor will determine whether and to what extent he will inform or consult with the Attorney General about the conduct of his duties and responsibilities. The Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part.

*Id.* at 145.

Richardson's nomination hearings thus provided Congress with a fortuitous opportunity to play a role both in selecting a special prosecutor and in fashioning the charter under which he would serve. On May 23, 1973, Richardson was confirmed as Attorney General. The Watergate Special Prosecution Force, headed by Cox, was established through a Justice Department regulation, Att'y Gen. Order No. 517-573, 38 Fed. Reg. 14,688 (1973), pursuant to statutory authority.

#### **b. The Senate Select Committee on Presidential Campaign Activities**

On May 17, 1973, the Senate Select Committee on Presidential Campaign Activities, established unanimously by S. Res. 60, began its hearings. 119 Cong. Rec. 3849-50 (1973). Its Chairman was Senator Sam J. Ervin, Jr. of North Carolina; Senator Howard H. Baker, Jr. of Tennessee was its Vice Chairman. Its mandate was "to make a 'complete' investigation and study 'of the extent . . . to which illegal, improper, or unethical activities' occurred in the 1972 Presidential campaign and election and to determine whether new legislation is needed "to safeguard the electoral process by which the President of the United States is chosen." Final Report of the Senate Select Committee on Presidential Campaign Activities, Introduction, S. Rep. No. 93-981, 93d Cong., 2d Sess. v (1974).

The Committee's hearings on the Watergate break-in and coverup, televised daily throughout that summer, played a critical role both in unearthing the facts of the Watergate scandal and in raising public awareness. From June 25th through 29th, John Dean, under a grant of limited immunity, testified and became the first witness to implicate the President in the coverup. On July 16, the public learned that beginning in 1971, all of Nixon's White House and Executive Office Building office conversations -- including the conversations about which Dean had testified -- had been taped. As the Committee's Final Report stated, "its public hearings awakened the public to the perils posed by the Watergate affair to the integrity of the electoral process and our democratic form of government." *Id.* at xxxii.

#### **c. The Saturday Night Massacre**

Cox's tenure lasted five months. If the conversations captured on Nixon's tapes are any indication, Nixon and Attorney General Richardson only rarely spoke with one another about the Cox investigation. In one meeting, on May 25, 1973, the two briefly discussed where Cox would be housed, and then Nixon forecasted the constitutional crisis to come. Telling Richardson that they would have to stand firm on executive privilege, Nixon stated: "if you ever break into the President's papers, Elliot, we'd have a hell of a problem here . . . ." May 25, 1973: The President and Richardson, in Kutler, at 557-58. Richardson later affirmed that he and the President had spoken

little about the scope of Cox's investigation, but that "[t]here was certainly a feeling in the White House on the part of the President and members of the President's staff that this was a ravenous beast whose appetite was inexhaustible and I have, I think, a memorandum which was prepared for me to use in discussions with Mr. Cox that deals with the problem of the indefiniteness of the scope of his jurisdiction." See Special Prosecutor: Hearings Before the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 272; 316-17 (1973).

Nixon grew increasingly frustrated with his Attorney General. In June, General Alexander M. Haig, Jr., Chief of Staff in the wake of Haldeman's departure, "had a good talk with Richardson" about the scope of the charter that Congress had given to Cox. As relayed by Haig, Richardson told him: "I feel I can serve the President best by keeping a distance between the President and myself." Nixon's aggrieved response: "By God, the Attorney General of the United States is one of the President's top legal advisers, now doggone it, he can't do that . . ." June 11, 1973: *The President and Haig*, in Kutler at 597.

Talking to his aide, Chuck Colson, two nights later, Nixon continued to vent his displeasure with Richardson. Telling Colson that Haig "has brought [Richardson] on the carpet, Nixon continued: "He either, he either shapes up -- he's either the Attorney General for the President of the United States or he's out. . . . And I'd put him out damn fast, too." June 13, 1973: *The President and Colson*, *id.* at 607.

As for Cox, the notion that he should be fired was not long in coming. The President and his advisors first heartened one another with the idea that Cox is "not an effective guy," *id.* at 556, but as early as June, confrontation was clearly on the way. Buzhardt had met with Cox and reported back to Nixon:

**BUZHARDT:** . . . First, let me characterize the conversation. It was civil. Perhaps we had the -- I had the impression that it was two people talking to themselves, if you will, me on one channel and him on another channel, with our statements obviously in conflict, our positions, but nobody wanting to precipitate a --

**PRESIDENT NIXON:** Confrontation.

**BUZHARDT:** --confrontation at this meeting. So we went in, sort of defining positions. . . . That's right, exploring positions. He made it clear early . . . that he was of the position, having been confirmed on the basis of his guidelines, that he would have the jurisdiction as set out in his guidelines, he would have access across the board, and trying to establish himself more or less as outside the constitutional structure. . . . He made it plain that he would like, well, he said in the meeting he would like to have access to all the documents, just rather plainly. At that point I told him . . . that that was impossible, that he would not have access to the files, and I explained what our position was on that. . . .

**PRESIDENT NIXON:** The law cannot go beyond the Constitution.

**BUZHARDT:** There's a plain separation of powers issue. . . . I made it perfectly clear also that there was a question about precisely what was his purpose. . . . I explained that it's clearly understandable (unintelligible) whose purpose was to get the President. He had no jurisdiction, as far as I was concerned, for getting the President. If that was his purpose, we would make it clear to start with we're perfectly prepared and ready, if that were his purpose or turned out to be his purpose, to engage in conflict, no problem.

**PRESIDENT NIXON:** Did he state his position?

**BUZHARDT:** He said, well, he guessed there was some difference on the question of whether he was out to get the President or whether he was authorized to investigate allegations against the President; and the latter he was undertaking, the former was another matter and could only be determined after.

**PRESIDENT NIXON:** His answer was affirmative?

**BUZHARDT:** His answer was in the affirmative. . . .

**PRESIDENT NIXON:** You also indicated confidence that he couldn't get the President on the merits, didn't you?

**BUZHARDT:** Yes, sir, I told him he would not have you-- I told him not only he couldn't get you on the merits, that we would win, but also I had no intention as a procedural matter of having you treated as a defendant when you responded to specific charges by anybody . . . .

*Id.* at 589, 591.

The next day, Nixon suggested to Haig that "it might not be beyond the pale, Al, to think in terms of it may be in our interest to get him out of there," *id.* at 591, and by July, Nixon was confiding: "We're gonna hang Cox at the proper time. . . . If he continues this harassment. . . . He hasn't been brought down there to conduct an investigation. . . . He's down there for the purpose of conducting this prosecution." *Id.* at 626. Press Secretary Ron Ziegler added his encouragement: "Archibald Cox will not be remembered." *Id.* at 627. By July 12, Nixon was telling Haig: "Let me say that as far as the presidency is concerned, I am so disgusted with Cox in the press that I'm about to let him go next, next week anyway. I don't know if it's right or if it's wrong, but believe me here, we're fighting a desperate battle . . . ." *Id.* at 631-32.

By the end of October, confrontation between president and prosecutor had produced a true crisis. Nixon had refused to produce presidential tape recordings and official records sought by Cox. The D.C. Circuit upheld Cox's right to obtain the materials. *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973). In a flurry of correspondence, Cox refused an offer of compromise, Nixon ordered that Cox be fired, and on October 20, both Attorney General Richardson and his deputy, William Ruckelshaus, refused to fire Cox and resigned. Cox was then removed by Acting Attorney General Robert Bork. FBI agents sealed off the offices and files of Cox's prosecution team, as well as those of Richardson and Ruckelshaus. Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*, *Wash. Post*, Oct. 21, 1973, at A1. Two days later, Acting Attorney General Bork announced that the Watergate investigation would now be conducted from within the Justice Department, with Henry Petersen, assistant attorney general in charge of the criminal division, replacing Cox as its head. 1973 Cong. Q. Almanac 1039 (1974).

The outpouring of public outrage that followed what became known as the Saturday Night Massacre "convinced Congress that it must act to insure an independent investigation in this case and set the stage for the discussion of a long-term solution for future cases." Katy J. Harriger, *The History of the Independent Counsel Provisions: How the Past Informs the Current Debate*, 49 *Mercer L. Rev.* 489, 495. Harriger writes:

According to Western Union, the number of telegrams that arrived in Washington after the "massacre" was the "heaviest volume on record." . . . By Monday, 150,000 telegrams arrived in the District. Ten thousand went to the White House, the rest to the Watergate Special Prosecution Force ("WSPF") and Congress. Ten days later the number had risen to 450,000 . . . ."

*Id.* at 495 & n. 24.

Within days of the firing, both Houses of Congress began hearings on establishing a Special Prosecutor's office whose independence in investigating and prosecuting the Watergate offenses could be secured. In the House, hearings began on October 29 and concluded on November 8, 1973.<sup>4</sup> Senate hearings began on October 29 and concluded on November 20, 1973.<sup>5</sup>

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<sup>4</sup> *Special Prosecutor and Watergate Grand Jury Legislation: Hearings on H.R. 10937 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973).

<sup>5</sup> *Special Prosecutor: Hearings Before the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973).

In both the Senate and the House, those hearings focused on bills which provided for judicial appointment and removal of a Watergate special prosecutor. In the House, H.R. 11401, provided for the United States District Court for the District of Columbia, sitting en banc, to appoint three of its members who would then appoint a special prosecutor to investigate and prosecute the Watergate matter. The special prosecutor was removable only by the court, and "then only for gross dereliction of duty, gross impropriety, or physical or mental inability . . . ." H.R. Rep. No. 660, 93d Cong., 1st Sess. 3, 6 (1973). With "minor changes," the bill restated the guidelines which had been established for Cox. *Id.* at 4.

In the Senate, attention was focused on S. 2611, a bill introduced by Birch Bayh and a bipartisan group of 52 other Senators. It provided for essentially the same appointment and removal process as did H.R. 11401. In reporting the bill, a majority of the Senate Judiciary Committee stated that a "court-appointed special prosecutor removable only by the court" would create an office "completely independent from the executive offices he is to investigate." S. Rep. No. 93-595, 93d Cong., 1st Sess. 2, 8 (1973).

Cox, too, had concluded that a special prosecutor should be appointed by a court, not the Attorney General. Back before the Senate Judiciary Committee in the wake of his firing, Cox testified that he now believed that a new statute was necessary, one which created a special prosecutor who had not been appointed by the Attorney General. He explained:

As to the future, my view is that there is need to reestablish by statute an independent office of special prosecutor with roughly the jurisdiction, powers, responsibilities, and independence at least as great as that which was contemplated under the guidelines developed last May . . . .

. . .

In my opinion, this kind of independence simply cannot be had by someone appointed by the Attorney General and subject to him and the President. I say that for institutional reasons. I would say it without regard to who were the incumbents of those offices. It is in no sense a judgment upon the individual men. . . .

. . .

The first [reason] is the need, familiar to all of us, to avoid divided loyalties, conflicts of interest. It is, I think, too much to ask of any man as special prosecutor, or any man as Attorney General, or of any President for that matter, that the man, the special prosecutor, both serve as part of an administration and as part of the team and at the same time investigate individuals and their conduct who either are or have been part of the administration. It just tears the institutions or the individuals apart.

*Special Prosecutor: Hearings Before the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 13-14 (1973).

After recounting difficulties he had faced, including White House refusals to release documents pertinent to his investigation and his perceptions that Richardson had come under pressure from the White House, *id.* at 12-19, Cox concluded: "In my view, and given the present circumstances and the functions that the Special Prosecutor would have, to wit, investigating wrongdoing in the executive branch, appointment by the district court would be the wisest, wisest by a good deal, I think." *Id.* at 19. Cox expressed his view that such an arrangement would be constitutional but recognized that there was room for doubt: "the question might be whether the committee and ultimately the Congress wished to take that risk." *Id.* Others questioned the bill's constitutionality. For example, Acting Attorney General Robert Bork contended that the proposed legislation would "alter the fundamental distribution of powers dictated by the Constitution." *Id.* at 451. Elliot Richardson testified as well, discussing from his vantage point, issues of independence, *id.* at 259-60, 271-76, 316-18, and recommending:

that the preferable approach would be to provide for the appointment of a Special Prosecutor by the President subject to confirmation by the Senate, and to provide in the statute creating the position subject to Senate confirmation that he could be removed only for extraordinary improprieties, to use the phrase that was embodied in the original Cox charter.

*Id.* at 239. Included in the record was correspondence among Richardson, Cox, the White House and Congress pertaining to jurisdictional issues during Cox's investigation. See Ken Gormley, *An Original Model of the Independent Counsel Act*, 97 Mich. L. Rev. 601, 609 (1998) ("Besides Cox himself, Senators Adlai E. Stevenson III (D--Ill.) and Robert Taft, Jr. (R--Ohio), Acting Attorney General Robert H. Bork, Harvard Law Professor Paul Freund, Chicago Law Professor Philip B. Kurland, former Attorney General Elliot Richardson, and a spectrum of other luminaries paraded through the Capital to offer guidance.").

Members of the U.S. District Court for the District of Columbia also weighed in, voicing their opposition to legislation, such as S. 2611, which would vest the power to appoint a special prosecutor in the their court. In *Nader v. Bork*, 366 F. Supp. 104, 109 (D.D.C. 1973), Judge Gerhard Gesell described the idea of court appointment as "most unfortunate" He wrote: "The Courts must remain neutral. Their duties are not prosecutorial. . . . the solution lies in legislation enhancing and protecting that office as it is now established and not by following a course that places incompatible duties upon this particular Court." Chief Judge John Sirica of the U.S. District Court for the District Columbia wrote to the Chairman of the Senate Judiciary Committee that he was in "full agreement with Judge Gesell's statement and advised that eight judges in his court likewise disapproved of the proposed procedure. S. Rep. No. 93-595, 93d Cong., 1st Sess. 10 (1973).

With hearings on special prosecutor bills continuing in both houses and the work of the Senate Watergate Committee continuing, the affair moved to yet another congressional stage. On October 30, the House Judiciary Committee held its first meeting to discuss procedures for investigating whether President Nixon should be impeached. *Chronology of Watergate Developments in 1973*, 1973 Cong. Q. Almanac 1041 (1974).

#### **d. Jaworski Replaces Cox as Watergate Special Prosecutor**

The next day, on October 31, Nixon designated Leon Jaworski to replace Cox, thus abandoning the attempt to have the investigation handled from within Justice. Jaworski describes himself as a very reluctant conscript to the position. After an initial phone call from General Alexander Haig, during which Jaworski expressed his skepticism as to Haig's promises of independence and Haig's voice moved from "urgency" to "what might be desperation," Jaworski agreed to fly to Washington. Haig spoke with Jaworski, bringing in Acting Attorney General Bork and Attorney General Designate Saxbe, followed by White House lawyers Fred Buzhardt and Leonard Garment and advisors Melvin Laird and Bryce Harlow, to "clinch" the deal. Jaworski declined Haig's invitations that he speak with President Nixon. *Leon Jaworski, The Right and the Power* 3-6 (1976).

The Watergate Special Prosecution Force was reestablished through an order of Acting Attorney General Bork, incorporating the Cox guidelines with respect to the duties and responsibilities of the Special Prosecutor, and further delegating certain specific functions "for the purpose of illustrating the authority entrusted to the Special Prosecutor."<sup>6</sup> More significantly, the new regulation amended the removal provision, which had previously specified only that the Special Prosecutor would not be removed except for extraordinary improprieties.

In an effort to prevent another Saturday Night Massacre and curtail presidential interference with the Special Prosecutor's work, the amended provision in effect gave specified members of Congress a veto over any effort by the President to either dismiss Jaworski or limit his jurisdiction:

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<sup>6</sup> Att'y Gen. Order No. 551-73, 28 Fed. Reg. 30,738 (1973), reprinted in *Special Prosecutor: Hearings Before the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 261-63 (1973). The three specified functions were: (a) to conduct any kind of legal proceeding, including grand jury proceedings, which United States Attorney are authorized to conduct; (b) to approve or disapprove disclosure of information in response to a subpoena or other order and (c) to apply for and exercise the authority vested in the Attorney General relating to immunity of witnesses in Congressional proceedings. *Id.* at 261, § 0.38.

In accordance with assurances given by the President to the Attorney General that the President will not exercise his Constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence that he is hereby given, (1) the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part and without the President's first consulting the Majority and the Minority Leaders and Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action, and (2) the jurisdiction of the Special Prosecutor will not be limited without the President's first consulting with such Members of Congress and ascertaining that their consensus is in accord with his proposed action.

Att'y Gen. Order No. 554-73, reprinted in *Special Prosecutor: Hearings Before the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 575 (1973).

Jaworski himself learned of the new provision from Alexander Haig, as Haig importuned him to take the position of Special Prosecutor: "Haig said that President Nixon had authorized that the charter and guidelines be enlarged. He offered a new formula: assurance from the President of complete independence of action" and a stipulation not to discharge him absent a "consensus" from the eight individuals who comprised the congressional leadership. Although the regulation did not define the term "consensus," Jaworski writes that Haig told him that it "would be defined as six of the eight." Leon Jaworski, *The Right and the Power* 5 (1976).

Before ending its hearings on November 20, 1973, the Senate Judiciary Committee called Jaworski to testify. Under questioning by its members, Jaworski assured them of his independence:

**Senator KENNEDY:** . . . Do you see yourself working for the Executive or working for the Congress?

**Mr. JAWORSKI:** Well, sir, I am not reporting to anyone, not even the Acting Attorney General. And I really think that at least the way I am proceeding--and no one has interfered with it so far--I am acting completely independently. There is no one that knows what I am doing or what my staff is doing. We are not filing reports, we are not calling anyone. And I think I have talked to Mr. Bork probably three times over the telephone.

*Special Prosecutor: Hearings Before the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 586 (1973) (Testimony of Leon A. Jaworski).

Apparently satisfied for the present, Congress did not push forward with legislation giving the court power to appoint a special prosecutor for Watergate. The decision by Senate Democratic leaders to delay indefinitely action on the bill "was viewed as an expression of confidence in Leon Jaworski . . ." However, the bill "was to be placed on the calendar, ready to be called up in case the President began interfering with Jaworski's actions." *Chronology of Watergate Developments in 1973*, 1973 Cong. Q. Almanac 1047 (1974).<sup>7</sup>

On July 27, 29, and 30, 1974, the House Judiciary Committee voted to adopt three articles of impeachment against President Nixon. On August 8, Nixon spoke to the nation and announced his resignation, effective the next

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<sup>7</sup> See Harriger, *The History of the Independent Counsel Provisions: How the Past Informs the Current Debate*, 49 Mercer L. Rev. at 496 ("Congress seemed satisfied with these assurances and stopped talking about creating a judicially appointed office for this case."); Terry Eastland, *Ethics, Politics and the Independent Counsel: Executive Power, Executive Vice 1789-1989*, at 27-28 (1989) ("the new Watergate special prosecutor, Leon Jaworski, was well regarded by the Congress, and for most members it seemed the wiser course to let him continue without the disruption in his work that might occur if special prosecutor legislation was enacted.").

day, on August 9, 1974. On September 8, 1974, President Gerald Ford granted a "full, free, and absolute pardon unto Richard Nixon for all offenses against the United States which he, Richard Nixon, has committed or may have committed or taken part in" from 1969 through the date of his resignation. The Watergate prosecutions were taken to their conclusion by Jaworski and the two Watergate Special Prosecutors, Henry Ruth and Charles Ruff, who succeeded him.

### **3. Five Years of Debate: Whether and How Best to Create an In-Place Mechanism for the Future**

Congress thus decided to allow the Watergate investigation to proceed under the Watergate Special Prosecution Force. It was faced, however, with a long term decision. Should it leave future such crises to the ad hoc approach used in Watergate? Or had Nixon's firing of Cox demonstrated that the time had come to create an in-place, independent mechanism for dealing with criminal misconduct by high-level government officials?

If so, should any such in-place mechanism be a permanent office of the government, either inside or outside the Justice Department, or should it be temporary -- triggered and existing for the duration of a particular investigation? Should a mechanism be established whereby a special prosecutor would be appointed by a court, essentially a new approach to the problem? Or, should appointment be made by a means which had historic precedent, either (1) pursuant to the Attorney General's statutory authority to appoint special counsel, as was utilized in the 1870s to investigate the Whiskey Ring scandals, in the 1950s to investigate the Truman Administration's tax scandals, and most recently, the Watergate scandal; or (2) by the President, subject to Senate confirmation, the means of appointment employed to investigate the Teapot Dome case during the 1920s .

Whether and how best to create an in-place mechanism consumed a full five years, as Congress struggled to reach consensus on how to make any such prosecutor independent yet accountable, in a framework that would not violate the separation of powers. Harriger, *The History of the Independent Counsel Provisions: How the Past Informs the Current Debate*, 49 Mercer L. Rev. at 498.

#### **a. The Search for a Solution Begins in the 93d Congress**

In the months following Cox's firing, 35 different bills with 165 sponsors were introduced in the 93d Congress. *Id.* at 496. A full panoply of approaches was put before the Senate Subcommittee on the Separation of Powers in its ambitiously titled 1974 hearings, "Removing Politics from the Administration of Justice." *Removing Politics From the Administration of Justice: Hearings on S. 2803 and S. 2978 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 93d Cong., 2d Sess. (1974)*. Seventeen witnesses provided testimony over four days of hearings.

Among the more radical surgeries offered was that of Senator Ervin, who proposed making the Justice Department "an independent establishment of the U.S. Government, independent from the President." Senator Ervin's bill, S. 2803, which he viewed as a framework for discussion, provided for presidential appointment and Senate confirmation of the Attorney General, the Deputy Attorney General, and the Solicitor General, each for a six-year term, each removable by the President only for neglect of duty or malfeasance in office. *Id.* at 249-63. Former Attorney General Kleindienst was among those who expressed strong opposition to the Ervin proposal:

I submit to you with respect to the Department of Justice, that there was no defect in it; that there was no failing in that great institution that has brought about some of the tragedies we have been witnessing. But that they are tragedies brought about by men themselves; and that you do not change men by changing the nomenclature of an institution.

*Id.* at 74.

Archibald Cox also voiced his disapproval. While supporting the goal of S. 2803, that the Justice Department should be free of improper influence, he opposed "S. 2803 as "unwise, wasteful of human and financial resources, and probably unconstitutional." Instead, he urged measures to increase confidence in the existent Justice Department. He testified: "The public interest would be better served if we could establish a solid custom of choosing Attorneys General from outside the machinery of political campaigns. This should be no less the concern of the Senate and its Committee on the Judiciary in confirming appointments than of a President in making them." *Id.* at 205.

Many of the proposals discussed at these hearings focused on creating a permanent office of Special Prosecutor, standing ready for the next Watergate and serving as a deterrent to criminal conduct. Ted Sorensen proposed creating by statute an independent office of Counsel General, its head appointed by the president and confirmed by the Senate, for a fifteen-year period, to investigate malfeasance in all three branches. *Id.* at 20.

Lloyd Cutler proposed creation of a continuing office of Public Prosecutor located within the Justice Department but independent of the Attorney General and President. He explained:

We should not be content with a system that requires massive purgatives once a generation. We can and we should seek to create some continuing mechanism that would reduce the chances for this sort of misconduct to occur, and that would increase the chances of detection and enforcement when it does occur. I believe an ongoing institution devoted to the investigation and prosecution of such offenses would do both . . . .

*Id.* at 234-35.

Others questioned the need for a permanent office, concerned that unnecessary investigations would be launched to justify its existence. Senator Alan Cranston, in S. 2978, called for a commission to study the problem, suggesting a few alternatives for a permanent office but wondering: "Do we want a special prosecutor on hand all the time -- looking for some high official to prosecute?" *Id.* at 7; *see also id.* at 264- 70 (text of Cranston bill). Senator Charles Mathias cautioned against creating an "Inquisitor" whose "office could, over a period of time, acquire a connotation which could be as serious as the problems it is meant to cure." *Id.* at 22; *see* Harriger, *The History of the Independent Counsel Provisions: How the Past Informs the Current Debate*, 49 *Mercer L. Rev.* 501 & nn. 46-47.

#### **b. The Senate Watergate Committee Recommends a Permanent Office**

In June 1974, the Watergate Committee issued its report. The committee concluded that rather than respond in an ad hoc fashion during the next national crisis, "[i]t is far better to create a permanent institution now than to consider its wisdom at some future time when emotions may be high and unknown political factors at play." It recommended that Congress enact legislation establishing a Permanent Office of Public Attorney with jurisdiction to prosecute criminal cases in which the executive branch had a real or apparent conflict of interest. Its proposal would have placed the power both to appoint and remove the Public Attorney in the courts. Final Report of the Senate Select Committee on Presidential Campaign Activities, S. Rep. No. 93-981, 93d Cong., 2d Sess. 96 (1974) (Recommendations).

In individual views, Senator Howard Baker agreed that the "Federal Government is poorly equipped for investigating and prosecuting crimes allegedly committed by high-ranking executive branch officials." He wrote:

Prior to the appointment of the Watergate Special Prosecutor, there did not exist within the Department of Justice a division solely and specifically entrusted with the authority to investigate allegations of official misconduct, cloaked with the requisite independence and statutory authority necessary for unimpeded access to Government officials and documents, and I believe the investigation would have proceeded more rapidly and effectively had such an arrangement existed.

*Id.* at 1105. But while agreeing in principle with the committee's report recommending the establishment of a permanent Public Prosecutor, Senator Baker questioned the constitutionality of vesting the appointment in the Judiciary. Instead, he suggested instead that there be a permanent office of Public Prosecutor located within the Justice Department, with "a statutory mandate to investigate and prosecute allegations of governmental misconduct," its head nominated by the President and confirmed by the Senate for a fixed six-year term. *Id.* at 1106.

### **c. The Watergate Special Prosecution Task Force Opposes a Permanent Office**

In contrast, the Watergate Special Prosecution Force (WSPF) opposed the creation of a permanent special prosecutor's office. It argued for better insulation of the Justice Department from partisan politics, appointment of special assistants within the Justice Department for particular investigations, and ad hoc resort to an independent prosecution office such as the Watergate Special Prosecution Force, should one again become necessary:

. . . the Department of Justice must be capable of exercising its prosecution functions free of undue influence or conflicts of interest. At the same time, many of the functions of the Department are legitimate subjects of Presidential concern on a policy level, and the President needs as Attorney General a legal adviser in whom he has full confidence. If the Department [of Justice] is properly insulated from partisan politics and from service to an Administration's purely political interests, it would not seem necessary to take the major institutional step of making the Attorney General's office elective or creating a permanent special prosecutor's office.

*Watergate Special Prosecution Force Report* 136 (1975). WSPF concluded:

WSPF is opposed to the idea of extending the special prosecutor concept on a permanent basis. Central to the question is that fact that such a public officer would be largely immune from the accountability that prosecutors and other public officials constantly face. Lack of accountability of an official on a permanent basis carries a potential for abuse of power that far exceeds any enforcement gains that might ensue. An independent prosecutor reports directly on ongoing investigations to no one and could easily abuse his power with little chance of detection. . . .

*Watergate Special Prosecution Force Report* at 138.

### **d. The Senate Considers Three Alternatives in the 94th Congress**

When the 94th Congress convened, it resumed its search for an in-place mechanism that would pass constitutional muster. In the Senate, the Committee on Governmental Operations conducted hearings and reported S. 495, *The Watergate Reorganization and Reform Act of 1976*. This bill took shape in three distinctly different forms on its way to passage by the Senate, revealing how fluid the debate remained. *Watergate Reorganization and Reform Act of 1975: Hearings on S. 495 and S. 2036 Before the Senate Comm. on Governmental Operations*, 94th Cong., 1st Sess. (1975 - Part 1) and (1976 - Part 2); see Terry Eastland, *Ethics, Politics and the Independent Counsel: Executive Power, Executive Vice 1789-1989*, at 55-56 (1989).

In its initial form, S. 495, like many of the bills in the 93d Congress, would have established a permanent Office of Public Attorney outside the executive branch to investigate malfeasance within the executive branch. The Public Attorney was to be appointed to serve a 5-year, once renewable, term. Appointment was to be by three retired courts of appeals judges who had been designated by the Chief Justice. Hearings, *supra* at 159-95 (1975 - Part 1).

The bill drew strong criticism from both within and outside the Ford Administration. Michael Uhlmann, Assistant Attorney General for the Office of Legislative Affairs, contended that the bill, by placing appointment power in a court, unconstitutionally transferred executive power outside the executive branch. *Id.* at 3-6 (1976 - Part 2). Senator Baker reaffirmed his view that creation of a special division within the Justice Department was the best approach. He cautioned that "we are running the risk of overemphasizing the needs of the moment to the point of

moving away from the Founding Fathers' concept of a strong leadership President, independent of, and on an equal footing with both the Congress and the Federal Judiciary." *Id.* at 22 (1975 - Part 1).

Elliot Richardson wrote to the committee from London, stating that he saw the establishment of a permanent special prosecutor's office as "neither necessary nor desirable." The legislation, he wrote, "assumes that the regularly constituted law enforcement authorities are neither sufficiently competent nor trustworthy to be capable of dealing with the more-or-less routine problems of corruption and abuse of power that have to be dealt with from year to year. I do not believe that this assumption is warranted." *Id.* at 284-85 (1975 - Part 1). So, too, the ABA saw "significant problems created by the establishment of a permanent special prosecutor," among them "the sobering thought" of "the runaway special prosecutor." *Id.* at 417 (1975 - Part 1).

With response to a permanent office having drawn such fire, S. 495 was significantly amended. As unanimously reported in 1976, S. 495 was changed to provide for a temporary rather than permanent special prosecutor. Further, the prosecutor was to be appointed not by a court, but by the Attorney General when, after a preliminary investigation, he determined a need for such appointment. However, the Attorney General's choice of a temporary prosecutor, the scope of the prosecutor's jurisdiction, as well as the Attorney General's decision not to appoint could be overridden by the U.S. Court of Appeals for the District of Columbia in certain circumstances. The power to remove was placed in the Attorney General, who could do so only for "extraordinary improprieties;" de novo review of the decision to remove would be available in the U.S. District Court for the District of Columbia. S. Rep. No. 94-823, 94th Cong., 2d Sess. (1976).

At this stage, S. 495 followed closely the recommendations of the American Bar Association which, in opposing establishment of a permanent office, recommended instead that legislation be enacted authorizing the appointment of a temporary special prosecutor, appointed by either the Attorney General or a special court, under specified circumstances. The primary obligation to appoint a special prosecutor, it concluded, "should reside in the Attorney General." ABA Special Committee to Study Federal Law Enforcement Agencies, *Preventing Improper Influence on Federal Law Enforcement Agencies* 18-19, 107 (1976).

However, the Attorney General or court-appointed temporary prosecutor model was quickly abandoned in the Senate when the Ford administration, which had voiced strong constitutional objections, proposed another approach: a permanent Department of Justice Office of Special Prosecutor, whose head would be appointed by the President and confirmed by the Senate for a limited, nonrenewable term.

In a subsequent House hearing, Attorney General Levi explained the Administration's view that a permanent office of special prosecutor was necessary:

As one approaches the question of the appointment of a special prosecutor today -- for this period -- one alternative would be to merely continue the Watergate Special Prosecutor's office now in place through the orders of the Department until such time as this is seen to be unnecessary. Such an alternative seems insufficient. The order would have to be revised in any event and there would be a strong desire to have it stand in statutory form . . . [which] then becomes an exercise in the creation of a temporary special prosecutor, which can require a trigger mechanism as to when it is used, or comes into being, as in H.R. 14476, or some other kinds of mechanism, presumably not yet tried or developed, as to when the mechanism is no longer necessary.

*Provision for Special Prosecutor: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 31-32 (1976).* The Attorney General recognized that "prevailing wisdom," *id.* at 32, was against creation of a permanent office, but urged that it was preferable to the alternatives. His conclusion: "the failure to have a prosecutor when there is a need for reassurance can further undermine faith." *Id.* at 31.

The key features of S. 495, as amended to accord with the Administration's proposal, included placing the permanent, not temporary, office of special prosecutor within the executive branch rather than outside it. The head of that office would be appointed not by the Attorney General or the court, but by the President and confirmed by the Senate. Further, the prosecutor would be authorized to investigate misconduct by high-ranking officials in all three branches.

Although most prominently, the debate in the 94th Congress concerned how to structure an investigative system for official misconduct, there was also an important current of skepticism about the value of any novel system. In a long letter to Senators Ribicoff and Percy that Senator Hruska placed in the Record, Professor Philip Kurland wrote that S. 495 (as reported) was "unfortunate because it offers as a cure for Watergate ills something that is totally extraneous to the problems uncovered by Watergate. It is dangerous because it affords a potent, new device for what can be described in terms of the pre-Watergate governmental crisis as McCarthyism." 122 Cong. Rec. 23044 (1976).

Kurland argued that true credit for the discovery of Watergate abuses belonged to the press and to the Watergate committee. He feared that the creation of a new prosecutorial system would lead Congress to abdicate its responsibilities by saying: "Please, someone else, perform our job of executive oversight for us?" *Id.* at 23045. He also feared a raft of prosecutorial abuses: "Just imagine if each of the phony McCarthy charges against executive branch officials were to require special prosecutors to investigate and prosecute." *Id.* And he warned that the importance of important cases would be diminished in the volume of a new system:

Moreover, the specter of a large number of special prosecutions will soon overshadow the few important situations where specific remedial action is really required. It will demean the major cases by inclusion of them in a large series of minor ones.

*Id.*

#### **e. Special Prosecutor Legislation Becomes Law in the 95th Congress**

With President Carter's support, special prosecutor legislation finally became law in the 95th Congress. By the middle of June, 1977, the Senate Committee on Governmental Affairs (the new name of the Committee on Governmental Operations) had reported S. 555, the Public Officials Integrity Act of 1977.

A complete departure from S. 495 as the Senate had finally passed it in the 94th Congress, this legislation returned for its approach to the bill in its second incarnation and created an office of temporary special prosecutors, whose investigations would be triggered upon a finding by the Attorney General. It differed, however, from the version of S. 495 that had been reported in the 94th Congress, by providing that all appointments would be made by a court. The Attorney General was to play no role in selecting the special prosecutor but was given the power of removal, upon a showing of "extraordinary impropriety."

Special prosecutor legislation, entitled the Special Prosecutor Act of 1978, was likewise reported favorably by the House Committee on the Judiciary in H.R. Rep. No. 95-1307, 95th Cong., 2d Sess. (1978). Ultimately, both Houses approved S. 555 by large majorities. The Senate passed S. 555, entitled the Public Officials Integrity Act of 1977, on June 27, 1977, by a vote of 74 to 5, 123 Cong. Rec. 21,007 (1977). The House passed its reform bill fifteen months later, on September 27, 1978. The conference report was adopted by voice vote in the Senate on October 7, 1978, 124 Cong. Rec. 34, 526 (1978), and passed by the House on October 12, 1978, by a vote of 370 to 23, 124 Cong. Rec. 36,469 (1978). President Carter signed the bill, which became law as Title VI of the Ethics and Government Act of 1978.

The Supreme Court upheld the constitutionality of the Act in an 8 to 1 decision, with Justice Antonin Scalia dissenting. *Morrison v. Olson*, 488 U.S. 654 (1988). The Act was amended in 1982, 1987, and 1994. Absent reauthorization, the current statute will expire on June 30, 1999.

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