

SPECIAL PROSECUTOR AND WATERGATE GRAND JURY LEGISLATION

HEARINGS BEFORE THE SUBCOMMITTEE ON CRIMINAL JUSTICE OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES NINETY-THIRD CONGRESS

FIRST SESSION

ON

H.J. Res. 784

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

AND

H.R. 10937

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

OCTOBER 20, 81; NOVEMBER 1, 5, 7, AND 8, 1973

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subject which is very painful to me and I know to the members of the subcommittee.

Mr. HUNGATE. Thank you again, sir.

The next witness will be Barbara Jordan, Congresswoman from Texas, and a member of this committee. We are pleased to have you with us. The subcommittee is proceeding under a deadline of 3:45 so the chair would propose we would recess at that time and come back at 4:15.

TESTIMONY OF HON. BARBARA JORDAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Ms. JORDAN. I understand your time constraints, Mr. Chairman, and I certainly will be brief. I can promise you one thing, that I will offer no solutions to your constitutional dilemma which are raised by the creation of a Special Prosecutor. I perhaps may even compound those dilemmas.

I am a cosponsor of the bill you heard testimony on this morning by Mr. Culver and I would urge this subcommittee to enact legislation, authorizing the appointment of an independent prosecutor. It is quite necessary that we do this in the interest of the people who are demanding that an independent investigation be made.

The election which we talk about glibly of 1972 was not the election singularly of a President but it was the people's election and the people of this country have a right to expect a dispassionate investigation of all allegations related to the President and his representatives. I think we have seen ample demonstration that this administration has a gross inability to investigate itself. We have seen several investigations started only to end precipitously with coming to no conclusions. Perhaps we have not understood just how independent prior investigations were supposed to be.

I joined in the cosponsorship of House Joint Resolution 785 because I feel that unless the selection and dismissal of a prosecutor is based outside of the executive branch of the Government, he will not be truly independent. Promises of independence will no longer suffice.

In a real sense I would suggest that maybe we have asked too much of this administration. When the executive branch is both defender and prosecutor, we cannot expect either a dispassionate inquiry or vigorous prosecution.

I think it is unreasonable to expect that this administration or any administration would prosecute itself for criminal acts.

Congress in the past has scrupulously written legislation which avoids the appearance of conflict of interest. We can cite many instances where the Justice Department has investigated the executive branch and has reached definitive and just conclusions. For the most part U.S. attorneys have been diligent in their prosecutions of executive branch personnel. I still would assert, however, that this diligence does not give investigations the aura of fairness or independence which I feel such an investigation should be given. I hope this committee would approve some variation of the pending resolution before it.

Yesterday, I introduced H.R. 11176. This bill would attempt to create a permanent system entitled special judicial prosecutor. The situation that we are in now is that the pending legislation relates only to *Water-*

gate related activities. Are we to have the Congress act each time the executive branch is being investigated? Consequently, the bill which I have introduced, is not inconsistent with the measure before you, and I hope you would give some consideration to this kind of mechanism.

A Federal grand jury investigating activities of an officer in the executive branch could ask the U.S. district court to appoint a special judicial prosecutor. The bill allows for no less than 12 members of the Federal grand jury to submit a request in writing to the district judge seeking the appointment of a special judicial prosecutor to aid and assist the grand jury in its endeavors. The court would be required to appoint a prosecutor who would be answerable to the judicial branch for purposes of tenure and to the grand jury for purposes of the investigation.

The bill would empower district court judges to insure the integrity of files, notes and other records from prior stages in the investigation conducted by the Justice Department for transmittal to the special judicial prosecutor. The special judicial prosecutor would have the same function and powers to decide scope of the inquiry and which witnesses to be called before the grand jury as those enjoyed by U.S. attorneys and other Federal prosecutors. The special judicial prosecutor could be removed only by the appointing judge for extraordinary impropriety. This special judicial prosecutor would be able to stay on the job until he had completed it, until he feels that his investigation has been thorough. Unlike other bills which are pending before this committee, H.R. 11176 would apply to all cases in which, during an investigation of the executive branch, a grand jury feels that its inquiry is being compromised or there appears to be a conflict of interest as between those presenting the investigation to the grand jury and those being investigated.

Our system contains three institutions which investigate and report on illegal conduct—legislative committees, grand juries and the judiciary. Of the three, the grand jury when given adequate powers, in my judgment, is best equipped to undertake a dispassionate investigation. Under normal circumstances a U.S. attorney will oversee the presentation of alleged illegal conduct to the grand jury, but when the U.S. attorney and other officials of the Department of Justice have an interest in the inquiry, the grand jury should have the option of obtaining an independent prosecutor. This action in my bill is not mandated, it merely provides an alternative which the grand jury could invoke.

I believe very strongly that all of the activities which surround the 1972 Presidential campaign should be investigated by a prosecutor who is independent of both the executive and legislative branches of the Government. That is why I urge favorable consideration of House Joint Resolution 785. But I also hope that we will apply the lessons we have learned from the tumultuous past few weeks and favorably consider a bill which would help assure and guarantee that we don't find ourselves in this situation again.

Thank you, Mr. Chairman.

Mr. HUNGATE. Thank you very much for an outstanding presentation and some food for thought for the subcommittee.

Mr. Kastenmeier.

Mr. KASTENMEIER. No, Mr. Chairman, I have no questions of our colleague. I think her presentation is excellent and the bill creating a

permanent office indeed we should regard very seriously, I think it is an excellent suggestion.

Mr. HUNGATE. It seems that Mr. Biester had implied in his presentation a permanent office. Of course he was discussing another bill.

Ms. JORDAN. He was discussing another bill but I did note very carefully Mr. Biester made that point.

Mr. HUNGATE. We hope they are not busier than the Subversive Activities Control Board. But the idea is there.

Mr. DENNIS.

Mr. DENNIS. I would like to congratulate our colleague for a very forthright and well presented statement, and, of course your suggestion for a permanent bill raises larger questions than those really that we have been considering here—possibly raises some more constitutional questions in addition. I would want to think about that some. You rather put by legislation another department in the Government perhaps and whether that can be done and so on I think is worthy of thought, both whether it can be and whether it should be. It raises some rather wide philosophical considerations.

Ms. JORDAN. Yes, sir.

Mr. DENNIS. I would think probably perhaps the committee for immediate purposes might have enough to chew without going quite that far, but that is not to say we should not give it some thought down the road. So I certainly appreciate your appearance and your presentation.

Ms. JORDAN. Thank you, Mr. Dennis.

Mr. HUNGATE. Mr. Edwards.

Mr. EDWARDS. Just one question.

I thank the gentlewoman for her very imaginative testimony. The grand jury gets empaneled by the district judge but then the grand jury thinks the U.S. attorney has a conflict of interest or is not doing an appropriate job so they have a vote and the foreman goes to the district court and says we ought to have a Special Prosecutor; is that right?

Ms. JORDAN. That is the idea.

Mr. EDWARDS. Then down the road when it comes time to investigate an actual prosecution of a particular case, your Special Prosecutor asks the U.S. attorney to sign an indictment and he refuses.

Ms. JORDAN. That certainly is conceivable that that could happen because certainly the U.S. attorney would have to retain his authority to sign the indictments and present minutes but what would occur in the interim is that the instances of illegality would have been raised to the level of awareness of the grand jury and if the special judicial prosecutor had been successful in adducing telling and significant evidence I would think that an Attorney General or U.S. attorney would have great difficulty simply refusing to move if he were confronted with hard facts which were virtually indisputable.

Mr. EDWARDS. I believe that there are some precedents in State law, is that correct, for this type of approach?

Ms. JORDAN. I am sorry. I am getting something from the other ear. Would you repeat the question?

Mr. EDWARDS. Are there not some precedents in State criminal law for such a special prosecutor?

Ms. JORDAN. Yes; there are precedents for that. Going back to your previous question, my bill would allow the special judicial prosecutor to have the power and authority to sign the indictments.

Mr. EDWARDS. That answers my question. Thank you very much.

Mr. HUNGATE. Mr. Mayne.

Mr. MAYNE. Thank you, Mr. Chairman.

I, too, want to congratulate the distinguished gentlewoman from Texas on her very fine statement, particularly with regard to a permanent system.

I noted in your opening remarks that you emphasized the need for speed in this subcommittee reporting out a bill and I think I can assure you that we are going to do our best, but I wish also to note the need for adequate deliberation. I am sure you recognize that there are some serious constitutional problems involved and we want very much to come up with the appointment of a prosecutor that will meet constitutional requirements.

Thank you.

Ms. JORDAN. I would hope that you would move with speed that is consistent in judicious consideration of the very serious nature of this whole problem. I do understand the problem we have.

Mr. MAYNE. Thank you.

Mr. HUNGATE. Ms. Holtzman.

Ms. HOLTZMAN. Thank you, Mr. Chairman.

I want to join with my colleagues in congratulating my colleague from Texas on her very excellent thoughts and statements to us and I simply have one question.

Have you any comments on the alternative methods that have been proposed for the selection of the Special Prosecutor. Can you tell us, if you have any views on this, what dangers or improprieties might you see in the appointment by the President, whether it is from a panel named by the bar association or otherwise, or by the Attorney General, of a Special Prosecutor with regard to the Watergate and Watergate related matters?

Ms. JORDAN. I think, Ms. Holtzman, that we have to find some way to place the appointive power of this Special Prosecutor outside the President. I say this simply because we all well know that when an officer is charged with prosecuting and defending himself he is not liable to act hastily or to act with all open consideration of the problems which he is going to be confronted with.

Now, as to the alternatives presented, how do we do that? If it is constitutionally possible I would favor the approach of placing the appointive power in the hands of a judge—if it is constitutionally possible—and you have heard testimony from persons today who perhaps feel both ways, and I am sure that we could find as many constitutional authorities on one side of this issue as on another, and the only way that it is going to ultimately be resolved is pass a bill and let's hear what the Supreme Court has to say about it.

Mr. HUNGATE. Mr. Hogan.

Mr. HOGAN. I find myself as mesmerized in listening to the gentlewoman from Texas. Her facility with the English language reflects a very brilliant mind and I wish we had more time to probe these points with her.

I share her concern about the need for some entity in which the American people can have confidence and I find myself with an ambivalence in this matter because, as the Congresswoman for Texas has observed, we do have a fairly good record of the Department of Justice

prosecuting its own—one in the recent past of great prominence. And so all my instincts say we ought to stay within the normal and customary system, rather than tinker with this and come up with some new entity only to find out later we have created a lot of problems with that new entity. So I am trying to find some compromise where we can have a prosecutor with the independence to reaffirm the American people's confidence that those guilty will be brought to justice and yet also stay within the confines of the traditional judicial system.

Ms. JORDAN. It is a difficult task. I am glad I am a member of this committee.

Mr. HOGAN. Thank you, Mr. Chairman.

Mr. HUNGATE. I thank you again. We heard testimony this morning that it is important to do justice and also to carry out the appearance of doing justice. I am sure you recognize how that adds to our difficulties in some of these situations.

Thank you very much.

Ms. JORDAN. Thank you, Mr. Chairman.

[The prepared statement of Hon. Barbara Jordan follows:]

STATEMENT OF HON. BARBARA JORDAN, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF TEXAS

The purpose of these remarks is twofold: to urge this subcommittee and the full Committee of the Judiciary to enact legislation authorizing the Court of Appeals for the District of Columbia to appoint a special prosecutor, and to enact legislation which will make it unnecessary for the United States to be both a defendant and prosecutor in the same case.

Last November the American people went to the polls and elected Richard Nixon as the President of the United States. Although Mr. Nixon was elected, it was not his election. The election belonged to the American people. At the very least they have a right to expect a dispassionate investigation of allegations Mr. Nixon and his representatives tampered with their election.

This Administration has amply demonstrated its inability to investigate itself. Mr. Nixon has announced anew as many so-called "impartial and freewheeling investigations" as he has fired investigators.

Mr. Nixon has announced investigations by Mr. Dean and Mr. Ehrlichman. Both Mr. Dean and Mr. Ehrlichman have denied under oath they conducted investigations. Mr. Nixon has announced investigations by Messrs. Gray, Peterson, and Kleindienst. But these three gentlemen have denied under oath that they ever received any such orders from the President. Mr. Nixon has pledged the independence of Mr. Cox. Perhaps we misunderstood just how independent Mr. Nixon wanted Mr. Cox to be. Mr. Cox is so independent he does not even have to report to work.

I am proud to have joined with Mr. Culver in sponsoring House Joint Resolution 785, establishing, within the Judicial Branch special prosecutor. Many proposals have been advanced which purport to guarantee the independence of a special prosecutor, but unless the selection and dismissal, or replacement, of a special prosecutor is independent of the Executive Branch, he will not be truly independent. Promises of independence are no longer sufficient. Independence of a special prosecutor guaranteed by an Act of Congress is within our Constitutional prerogatives and, moreover, is our only recourse. H.J. Res. 785 fulfills these criteria, and should be enacted with all deliberate speed.

In a sense we have asked too much of this Administration. When the Executive Branch is both defendant and prosecutor we should not expect either dispassionate inquiry or vigorous prosecution. It is unreasonable to expect that this Administration or any other would prosecute itself for criminal acts. Congress has scrupulously written legislation which avoids the appearance as well as the fact of a conflict of interest during criminal investigations and prosecutions. However, we have failed to apply such principals to investigations of the Executive Branch, by the Executive Branch.

I fully recognize the Department of Justice has investigated and prosecuted executive branch personnel. During 1972, for instance, a Department of Agricul-

ture official was convicted of defrauding the United States of approximately \$300,000 by causing false invoices to be honored for payment by the U.S. Treasury. The Department of Justice also obtained convictions against a Bureau of Customs chemist and a former postmaster. One of the largest investigative and prosecutive efforts in the history of the Detroit office of the U.S. Attorney was launched into the FHA housing scandal in Detroit.

U.S. Attorneys have, for the most part been diligent and dispassionate in their prosecutions of Executive Branch personnel. The Watergate break-in and campaign irregularities stemming from the 1972 presidential election involve allegations of illegal conduct among the President's closest advisors and campaign officials. Passage of H.J. Res. 785 would guarantee interest of the Watergate investigation but we need a system whereby investigations of executive branch officials can proceed through the investigatory and prosecutory stages without the special intervention of the Congress in each case.

Yesterday I introduced H.R. 11176 which would set up a permanent system whereby a federal grand jury investigating activities of an officer in the Executive Branch could ask the United States District Court to appoint a Special Judicial Prosecutor. The Court would be required to appoint a prosecutor who would be answerable to the Judicial Branch for purposes of tenure and to the grand jury for purposes of the investigation. The bill would empower District Court Judges to insure the integrity of files, notes and other records from prior stages in the investigation conducted under the Justice Department for transmittal to the Special Judicial Prosecutor. The Special Judicial Prosecutor would have the same functions and powers to decide the scope of the inquiry and which witnesses to be called before the grand jury as those enjoyed by U.S. Attorneys and other federal prosecutors.

The Special Judicial Prosecutor could only be removed by the appointing Judge for extraordinary improprieties. The Special Judicial Prosecutor would be able to stay on the job until he feels he has conducted a thorough investigation and prosecution.

Unlike other bills before the Committee, H.R. 11176, would apply to all cases in which, during an investigation of the executive branch, a grand jury, feels that its inquiry is being compromised or that there appears to be a conflict of interest as between those presenting the investigation to the grand jury and those being investigated.

Our system contains three institutions which investigate and report on illegal conduct: legislative committees, grand juries, and the judiciary. Of the three; the grand jury, when given adequate powers, is best equipped to undertake a dispassionate investigation. Under normal circumstances, an U.S. Attorney will oversee the presentation of alleged illegal conduct to the grand jury. But when the U.S. Attorney or other officials of the Department of Justice have an interest in the inquiry, the grand jury should have an option of obtaining an independent prosecutor.

My bill does not mandate any course of action. It merely provides an alternative which the grand jury could invoke.

I believe very strongly that the Watergate break-in and other alleged illegal activities related to the 1972 presidential campaign should be investigated by a prosecutor independent of both the executive and legislative branches of government. That is why I urge you to favorably consider H.J. Res. 785. I also urge you to apply the lessons we have learned from the tumultuous past weeks and favorably consider H.R. 11176 in order that this situation does not occur again.

A BILL to authorize in certain cases the appointment of a special judicial prosecutor and investigators to assist grand juries in the exercise of their powers

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the table of the sections of chapter 215 of title 18, United States Code, is amended by inserting immediately after the item relating to section 3328, the following new item:

"3329. Powers of grand jury; special judicial prosecutor and investigators."

Sec. 2. Title 18, United States Code, is amended by inserting immediately following section 3328 a new section as follows:

"3329. Powers of grand jury; special judicial prosecutor and investigators.

"(a) Any grand jury impaneled before a United States district court may give notice to the court that it wishes to be assisted by a special judicial prosecutor in an inquiry into any activities of an officer in the Executive Branch. Any such

notice shall be given in writing signed by twelve or more members of the grand jury. Such grand jury shall not be discharged by the court prior to the receipt by the court of written notice from the grand jury that such inquiry has been completed.

"(b) Upon receipt of notice pursuant to subsection (a), the United States District Court shall appoint a special Judicial Prosecutor for the purposes and with the powers set forth in this section, and shall not remove or replace said officer except for extraordinary improprieties as an officer of the court.

"(c) Any judge of the United States District Court, after making an appointment or reappointment pursuant to subsection (b) shall excuse himself from presiding over or otherwise participating in any prosecution or other judicial proceeding arising out of the exercise of responsibilities by a Special Judicial Prosecutor appointed by him.

"(d) The United States District Court having jurisdiction over any inquiry into the activities of an officer in the Executive Branch is vested with supervisory jurisdiction to issue and enforce all orders necessary and appropriate to insure the integrity and inviolability of all files, notes, correspondence, memorandums, documents, physical evidence, and other records and work product compiled, obtained or otherwise produced and maintained by the United States District Attorney or any other officer of the Justice Department from the date of impanelment of the grand jury until the appointment of a Special Judicial Prosecutor pursuant to subsection (b).

"(e) The Special Judicial Prosecutor appointed pursuant to this section may without regard to the laws relating to the competitive service, appoint or reappoint such permanent or temporary staff at such salaries (not to exceed the rate of \$36,000 per annum) as may be necessary to assist in the exercise of his responsibilities, and may for that same purpose make use of necessary support services and facilities at Government expense. The United States Department of Justice is authorized and directed to pay the salaries and expenses of the Office of Special Judicial Prosecutor hereunder, all from its general funds including contingency funds. Notwithstanding any other provision of law, any impounding or withholding or other impediment to the provision of such funds shall be unlawful.

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

"(g) The Special Judicial Prosecutor shall have full access to and use of the material described in subsection (d) and shall have power throughout the territory of the United States to compel the production of testimonial and documentary or physical evidence relating to any or all of the subject matter described in subsection (f) of this section. In particular, and without limiting the generality of the foregoing, the Special Judicial Prosecutor shall have full power to—

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

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

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

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

"(h) All offices, departments, and agencies of the Federal Government shall

cooperate fully with requests by the Special Judicial Prosecutor for information and assistance. In particular, the Department of Justice shall assign to the temporary supervision and control of the Special Judicial Prosecutor such personnel as he may reasonably require.

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

"(j) The Special Judicial Prosecutor may from time to time make public such statements or reports, not inconsistent with the rights of any accused or convicted persons, as he deems appropriate; and he shall upon completion of his assignment submit a final report to the United States District Court which empanelled the grand jury in connection with which the Special Judicial Prosecutor was appointed.

"(k) The Special Judicial Prosecutor shall carry out his responsibilities under this section until such time as, in his judgment, he has completed them or until a date mutually agreed upon between the United States District Court Judge who appointed the Special Judicial Prosecutor pursuant to subsection (b) and himself.

"(l) Any judge of the United States District Court, on empanelment of a grand jury, shall charge and inform the grand jury of its rights and duties under this section."

Mr. HUNGATE. The committee will now recess its hearings until 4:15.

[Short recess.]

Mr. HUNGATE. The committee will resume its hearings. We have two witnesses remaining this afternoon. The first is the Honorable John Moss of California, our distinguished colleague. We are pleased to have you with us and appreciate your patience. You have a prepared statement and without objection it will be made part of the record at this point. You may proceed as you see fit.

[The prepared statement of Hon. John E. Moss follows:]

STATEMENT OF HON. JOHN E. MOSS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman and Members of this distinguished Committee:

I appear before you today in support of H.R. 11067 to establish an Independent Office of Special Prosecutor. The purpose of this legislation is to provide for continuation of the investigation and prosecution of criminal activity related to the Watergate matter and other alleged criminal activity pertaining to the 1972 Presidential campaign. I also support House Resolution 784 introduced by Mr. Culver and some 109 co-sponsors. With one or two exceptions it is substantially similar to the legislation I have sponsored.

Mr. Chairman, 185 years ago last month, as he was leaving a meeting of the Constitutional Convention, Benjamin Franklin was asked:

"What do we have, Dr. Franklin?" He replied, "You have a Republic—" "If you can keep it."

That, Mr. Chairman, sums up both the purpose and the urgent necessity for this legislation: to insure that our Republic and its laws will continue to function on behalf of the people; that no individual may be above those laws; and that all those who violate our laws will be brought to justice, notwithstanding the fact that the accused may include persons who now hold or have held the highest positions in the Executive Branch of the government of the United States.

I will not catalog events of the past year relating to the Watergate investigation. Nor will I attempt to review events of the weekend of October 19 through 22. You are familiar with the circumstances surrounding the summary discharge of Special Prosecutor Archibald Cox. And the American people, as evidenced by the greatest mass outpouring of public protest in our history—directed in large part to us as their elected representatives—is both familiar with and deeply troubled by these events.

Viewed in the context of recent allegations of impropriety by officials in the Executive Branch, the President's firing of Special Prosecutor Cox demonstrates the need for this legislation. The President had pledged "full authority" for