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Statement of the Honorable Edward H. Levi Attorney General of the United States before the House Judiciary Committee, Subcommittee on Criminal Justice concerning H. R. 14476. 9:45 AM. Friday, July 23, 1976. Rayburn House Office Building. Washington, D.C.

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Department of Justice

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STATEMENT

OF

THE HONORABLE EDWARD H. LEVI
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

THE HOUSE JUDICIARY COMMITTEE,
SUBCOMMITTEE ON CRIMINAL JUSTICE

CONCERNING

H.R. 14476

9:45 A.M.
FRIDAY, JULY 23, 1976
RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, D.C.



Mr. Chairman and Members of the Committee:

I appear here today in response to your invitation to comment upon H.R. 14476 which, as you know, provides for appointment of special prosecutors in certain cases and establishes a Division of Government Crimes within the Department of Justice.

H.R. 14476 represents an understandable effort to remove personal or partisan bias -- or the public perception of such bias -- from Federal law enforcement. The effort is an important one. My view is, however, that H.R. 14476 is not the most effective or appropriate means for curing the evils at which it is directed. The President has proposed an alternative to H.R. 14476 which I would also like to discuss with you.

I should like to summarize very quickly the main provisions of H.R. 14476. It provides for the appointment of a temporary special prosecutor for each case in which the President or Attorney General has a conflict of interest or appearance of a conflict. "Conflict of interest" is defined in section 594(c) (1) as "a direct and substantial personal or partisan political interest in the outcome of the proposed criminal investigation or prosecution."

Under the next paragraph, a conflict of interest or its appearance is automatically deemed to exist in all cases

involving the President, the Vice President, any Cabinet officer, an individual in the Executive Office of the President compensated at a rate of Level V or above, the Director of the FBI, and any person who has held such a position in the four years prior to the investigation or prosecution. In cases not involving these stated individuals a conflict of interest or its appearance still may be held to exist under other circumstances and to require the appointment of a special prosecutor. The test would be the direct and substantial personal or partisan interest of the President or Attorney General.

Section 594(a) provides that within thirty days of learning of a matter in which a conflict of interest or appearance of conflict may exist, the Attorney General must file with a special division of three judges of the United States Court of Appeals for the District of Columbia a memorandum, which would be available to the public, setting forth (1) a summary of the allegations received; (2) the results of his preliminary investigation; (3) a summary of the information relating to the possible conflict of interest; and (4) a finding on whether the case is "clearly frivolous" and therefore does not justify any further investigation or prosecution. A decision that an allegation is "clearly frivolous" is not judicially reviewable. It will terminate, unless new allegations or evidence are received, the Court's ability to appoint a special prosecutor. Absent such a finding by the Attorney General, the question of conflict of interest becomes material. When the Attorney General determines that a case does not involve a conflict of interest, the court reviews his

decision de novo and appoints a special*prosecutor if it disagrees with his conclusion. If the Attorney General has determined that the case does involve a conflict of interest or the appearance of a conflict, the Attorney General must appoint a special prosecutor and define his jurisdiction. The court will then review this action to assure that the appointee meets the statutory criteria, including breadth of authority, and may make a superseding appointment.

In addition, Section 594(b) establishes a procedure by which a private citizen may initiate court consideration of the appointment of a special prosecutor thirty days after the citizen has requested the Attorney General to consider such an appointment.

Under section 594(d), no employee of the Federal government, including a special prosecutor, may be appointed a special prosecutor. This requires that a new special prosecutor, if one is to be named, be named for each case. Thus there could and indeed would be a multitude of independent special prosecutors.

Section 595(e) gives a temporary special prosecutor the same authority as the Assistant Attorney General for Government Crimes -- whose authority is not defined in the bill -- and, in addition, empowers him to appeal any court decision without obtaining the Attorney General's approval. Pursuant to section 595(d) (2) a special prosecutor could be removed by the Attorney General only for extraordinary improprieties and then only subject to court review.

In my view, H.R. 14476 is of highly questionable constitutionality. It would create opportunities for actual or apparent partisan influence in law enforcement; publicize and dignify unfounded, scurrilous allegations against public officials; result in the continuing existence of a changing band of multiplicity of special prosecutors; and promote the possibility of unequal justice.

The role of the judiciary under H.R. 14476 raises substantial constitutional questions. These include:

(1) The conferral upon a court of the power to appoint an official who is to perform significant "executive functions" and who is not "inferior" to any other official in the sense of being subject to direction and control;

(2) The assignment to a court of powers (I don't know whether Article II or III), such as the reviewing of Attorney General appointments and decisions, which are unrelated to the constitutionally prescribed function of deciding "cases and controversies."

H.R. 14476 might have several significant unintended effects, which should be recognized. The bill requires that the Attorney General determine whether he or the President has a "direct and substantial personal or partisan interest in the outcome of a proposed criminal investigation or prosecution." It would often be necessary for the Attorney General to consult the President concerning matters which are, under the bill, apparently regarded as particularly sensitive. This would, I think, require checking with the White House with respect to names which might arise, in fact, would arise, in the course of routine criminal investigations -- a kind of checking as to interest which otherwise I should not think the bill would wish to require.

The bill requires that whenever the Attorney General receives an allegation of wrongdoing which is directed against certain high government officials or which would otherwise present a possible conflict of interest, he must file a detailed memorandum describing the charge and the results of the investigation into it with the special court. Any individual who submits an allegation of criminal wrongdoing to the Attorney General has the power to compel a similar reference. No safeguards for confidentiality are set forth.

This procedure enables any individual to convert a private allegation against a high government official into a highly publicized investigation. Charges of this sort could well become the natural corollary and complement to most civil suits involving government officials. The fact that such charges would be disseminated and dignified by the process

established by the bill would inevitably encourage those who wish to use it for partisan or other improper purposes.

In enabling the criminal investigative process to be transformed into a media event each time high state or federal officials or members of Congress are involved, the bill casts aside one of the most decent traditions of our criminal law system. This procedure for spreading improper charges contributes to a public attitude of cynicism and distrust of government officials -- again a problem which the bill is intended to help solve.

I understand that some supporters of H.R. 14476 expected that it would rarely require the appointment of special prosecutors. But so far as we can tell from the definitions used, the contrary would be true. There might, for example, at the present time be twelve investigations where a per se conflict of interest would exist under H.R. 14476. The Criminal Division has located recent or current cases involving at least 40 public officials, in the Executive Branch, the Judiciary and the Congress, in which it would be necessary to determine whether the President or Attorney General have, or appear to have a substantial partisan or personal interest. There are other cases involving campaign contributions or politically active labor unions, or associates of prominent political figures which conceivably under the definition of the bill might trigger the appointment of a special prosecutor.

I realize that the appointment of a temporary special prosecutor would not be required if there is a certification

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of "clearly frivolous" made by the Attorney General. But I believe that in most matters such a certification would be difficult to give after only thirty days of investigation. The wildest allegations often require the most careful investigation and review -- and wild allegations are to be expected. I do not believe any Attorney General with a sense of responsibility and a modicum of sense would give such a certification often.

The cumulative effect of these provisions would be the referral of many matters to numerous special prosecutors. The existence of a multiplicity of special prosecutors each with only one case enhances the likelihood of unequal justice. This kind of a special prosecutor would be subject to formidable public -- and perhaps self-imposed -- pressure to indict in the one case he was appointed to pursue.

Decisions regarding electronic surveillance, immunity and every other area of prosecutorial discretion from plea bargaining to appeals would be made on an ad hoc basis by many special prosecutors who are independent of each other and have not regularly engaged in making such decisions.

These objections to H.R. 14476 have been shared with the Senate Government Operations Committee when it was considering the verbatim counterpart of this bill. Some of these problems can be ameliorated but in my view not cured by relatively simple amendments. But I believe these fundamental constitutional and practical difficulties still remain.

The President has submitted alternative proposed legislation, which I hope this committee will consider along with this bill. The President's proposal would establish a permanent Office of Special Prosecutor to investigate and prosecute criminal wrongdoing committed by high level government officials. The Special Prosecutor would be appointed by the President, by and with the advice and consent of the Senate, for a single three year term. At the end of the term, a new Special Prosecutor would be appointed. An individual would be disqualified for such an appointment if during the five previous years the individual held a high level position of trust on the personal campaign staff of, or in an organization or political party working on behalf of, a candidate for any

elective Federal office.

Any allegation of criminal wrongdoing concerning the President, Vice President, Members of Congress, or persons compensated at the rate of Level I or II of the Executive Schedule would be referred **directly to the** Special Prosecutor for investigation and, if warranted, prosecution. Although allegations involving these officials would have to be referred to the Special Prosecutor, he could decline to assert jurisdiction if the allegation or information has a peripheral or incidental part of an investigation or prosecution already being conducted elsewhere in the Department or if, for some other reason, the Special Prosecutor determined that it would be in the interest of the administration of justice to permit the matter to be handled elsewhere in the Department. In such cases, the Special Prosecutor could establish such procedures as he thought necessary and appropriate to keep him informed of the progress of the investigation or prosecution and at any time he could assume direct responsibility for undertaking the investigation or prosecution.

The Attorney General could also refer to the Special Prosecutor any other allegation involving a violation of criminal law whenever he found that it was in the best interest of the administration of justice. The Special Prosecutor could, however, decline to accept the referral of the allegation. In that event, the allegation would be investigated by the Department of Justice

in the normal course which of course means that the investigation might be under the supervision of the Section on Government Crimes in the Criminal Division or conducted by a United States Attorney's office.

Under the President's proposal, ~~the~~ Special Prosecutor would have plenary authority to investigate and prosecute matters within his jurisdiction, including the authority to appeal adverse judicial rulings. In the event of a disagreement with the Special Prosecutor on an issue of law, the Attorney General would be free to present the views of the United States to the court before which the prosecution or appeal was lodged. In exercising his authority, the Special Prosecutor would not be subject to the direction or control of the Attorney General, except as to those matters which by statute specifically require the Attorney General's personal action, approval, or concurrence.

The President's proposal provides that the grounds for removal of a Special Prosecutor should be, and to the maximum extent permitted by the Constitution shall be, limited to those which constitute extraordinary impropriety.

This approach, I believe, avoids the serious constitutional issues -- I don't say all -- posed by the judicial appointment process set forth in H.R. 14476 by adopting the traditional model for the appointment of officials who perform functions exclusively executive in nature -- nomination by the President and appointment with the advice and consent of the Senate. Other unfortunate consequences of H.R. 14476 are avoided as well. The possibility of multiple special prosecutors being appointed is eliminated. The appointment process is not fraught with vexing problems that arise from the vague standards which trigger the appointment and will not publicize allegations that may ultimately prove to be unfounded, because the appointment is not limited to a specific allegation. Unlike H.R. 14476 which places undue pressure upon a temporary special prosecutor to seek and secure a conviction for the single allegation over which he has jurisdiction, this approach allows the proper exercise of prosecutorial judgments because a permanent special prosecutor will have a broader jurisdiction.

I assume all recognize that in times of the greatest doubt concerning the ability of the administration of justice to function a special prosecutor is necessary. In the past, a special prosecutor has been appointed during at least some of those occasions. I believe it must be recognized that in addition that in those times of lingering concern, following periods of great doubt, a special prosecutor may be a necessary response. The law has to rest upon the confidence and faith of the citizenry. I realize people will judge differently when events cry out for this unusual remedy, or when

the aftermath of such events makes the retention or creation of such a remedy wise public policy. The remedy itself can cause a message of unevenness in the enforcement of the law, unless the remedy itself is perhaps regarded as vestigial, left over from a crisis of the past, or as established in permanent form because that is the way to avoid some of the trauma of prior days. And even then the fact of the remedy may create an unevenness. But the failure to have a special prosecutor when there is a need for reassurance can further undermine faith. The dilemma of the public policy decision is obvious. I believe the prevailing sentiment of those scholars and lawyers who have considered the question over the last two years has been in general against the institution of a permanent special prosecutor. I need hardly remind the Chairman and this committee of those discussions.

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. The attempt to put it in statutory form 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.

A confrontation with these problems and other institutionalized forms for the temporary special prosecutor suggests that it is better to go against what was the prevailing wisdom and to decide that among these alternatives a permanent special prosecutor with succeeding incumbents limited to fixed periods of appointment, and with a defined area of automatic jurisdiction, and further jurisdiction by discretionary referral, is the preferable course.

That is the course which the President has taken and I urge your favorable consideration of the President's proposal.

Mr. Chairman, there are other matters on which I might comment in connection with H.R. 14476, particularly with respect to the proposal for a Division of Government Crimes where the President has proposed an alternate way which recognizes the steps which have been taken under his administration in the Department of Justice to create such units in a way which I believe to be more workable. We can submit these views to you in writing or in further testimony if you desire. But I believe it is the Special Prosecutor point which requires and of course has received the greatest attention.

Mr. Chairman, I found when I came to my present office about a year and a half ago that there was some kind of a

division in Washington between those who had lived through the Watergate experience in this city, and those who like myself had come lately. Perhaps the perspective is different. I am rather sure it is. But the whole country, of course, lived through Watergate. And our constitutional system did work. I assume that whatever the perspective we have we all agree we must learn from the past but not cherish -- or at least overly cherish -- the scars. In saying this I do not mean to detract in the slightest from the awesome concerns of that time nor for that matter from the awesome responsibilities which government, this Committee, and citizenship always carry. I mean rather to suggest the mood with which all of us, I believe, would hope to approach the question of appropriate reforms. I have tried to do this. It has resulted in my own abandonment of the received wisdom against a permanent special prosecutor and in my advocacy for it as against the temporary special prosecutor.