NOMINATION OF ELLIOT L. RICHARDSON TO BE ATTORNEY GENERAL

WEDNESDAY, MAY 9, 1973

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 10:40 a.m., in room 2228, Dirksen Senate Office Building, Senator James O. Eastland (chairman) presiding.

Present: Senators Eastland, Ervin, Hart, Kennedy, Bayh, Burdick, Hruska, Fong, Scott, Thurmond, Cook, Mathias, and Gurney.

Also present: John H. Holloman, chief counsel, and Francis C. Rosenberger, professional staff member.

The CHAIRMAN. The committee will come to order.

This hearing is on the nomination of Elliot L. Richardson, of Massachusetts, to be Attorney General. Notice of the hearing appeared in the Congressional Record on May 2, 1973. By blue slip. Senator Kennedy and Senator Brooke approved the nomination.

The Chair will recognize you, Senator Kennedy.

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM MASSACHUSETTS

Senator KENNEDY. Thank you very much, Mr. Chairman.

If I may, with the indulgence of the committee, I will mention a story of what is taking place in Washington these days. It is a bit facetious but, to a great extent, it has truth to it. It is that every morning all the limousines that are assigned to members of the Cabinet travel out to Elliot Richardson's house and see which limousine he gets into. This has truth to it because Secretary Richardson has shown, over a really distinguished career, from his days at Harvard College and the Harvard Law School in his pursuit of the study of law, a very extraordinary ability and, of course, an unmatched integrity. From the time that he first served President Eisenhower as Assistant Secretary of HEW and his service to a distinguished Senator, Leverett Saltonstall, to the time he was called upon by the people of Massachusetts as Lieutenant Governor and as attorney general, and later as Under Secretary of State and Secretary of HEW and Secretary of Defense, and now with the confidence of the President as the designate as Attorney General, his career has been a distinguished one.

The citizens of the Commonwealth of Massachusetts have expressed their support and confidence when he has gone to them to seek public support and public confidence, and their judgment has been shared

by many of those who have been in the highest positions of government in the national scene. So I am indeed proud to present a man of such ability and fundamental integrity as the Secretary of Defense, Elliot Richardson, and look forward to the exchange that he will have here this morning as this committee inquires into matters of great importance.

He understands that this committee has explored issues with other nominees and pursued its responsibility in a full and complete manner, and I am completely satisfied that he recognizes our responsibility in this area and welcomes it. So it is really a great pleasure for me to have the opportunity as the Senator from the State to present a person that Massachusetts is indeed proud of.

The CHAIRMAN. Thank you.

Senator Brooke.

STATEMENT OF HON. EDWARD M. BROOKE, A U.S. SENATOR FROM MASSACHUSETTS

Senator BROOKE. Mr. Chairman and members of the committee, I am indeed pleased to present Elliot L. Richardson as the nominee for the high position of Attorney General of the United States.

I will not repeat all that my senior colleague has said about Elliot Richardson. Suffice it to say that he has the legal scholarship. He was editor in chief of the Harvard Law Review. He practiced law in one of the most prestigious law firms in the Commonwealth of Massachusetts, Ropes & Gray. He has served, as has been said, as Lieutenant Governor, and as my successor as attorney general of Massachusetts. He has had legislative experience serving in the office of the distinguished Leverett Saltonstall. He served with many of you here for many years. He has served in many high places in government, in State and in Federal Government. This is the fourth time that I have had the high privilege of introducing him to committees of the Senate for his confirmation: first before the Foreign Relations Committee when he was named as Under Secretary of State, and before the committees for HEW, the Defense Department, and now, of course, for the position as Attorney General.

Elliot Richardson comes before you at a time of crisis in confidence in our Government and he is a man not only who has the legal scholarship and the legal ability, as he has proved, but he has the integrity and he has independence of judgment. The times call for that integrity. The times demand that independence of judgment.

He has already stated before the Nation his intentions in this very serious matter which will be given high priority as the Attorney General of the Nation. I think, in his testimony before you, you will be convinced not only is he uniquely equipped by academic training and by legal experience to take this position at this time but also because of his independent judgment.

The times also call for a toughness of mind and Elliot possesses that toughness of mind. He has been called a man for all occasions. There is certainly no occasion that is more important to our Nation's history than the occasion which presents itself at this time and over which he will have to exercise independent judgment.

So it is my pleasure and honor that I introduce him to you with full confidence in his ability to serve his Nation in this important post at this important time.

I thank you, Mr. Chairman and members of the committee.

The CHAIRMAN. Will you stand up, please, sir?

Do you solemnly swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Secretary RICHARDSON. I do.

The CHAIRMAN. Mr. Richardson, you have a biography there before you. If it is correct, we will place it in the record.

TESTIMONY OF ELLIOT L. RICHARDSON, SECRETARY OF DEFENSE, NOMINEE TO BE ATTORNEY GENERAL

Secretary RICHARDSON. I do not see it here, but I understand one has been furnished to the committee.

Yes, Mr. Chairman, this is correct—a correct biographical summary.

The CHAIRMAN. It will be placed in the record.

[The biographical data referred to follows:]

ELLIOT LEE RICHARDSON

Born: July 20, 1920, Boston, Mass.
Legal residence: Massachusetts.
Marital status: married; three children.
Education:
1937–41, Harvard College, Cambridge, Mass. A.B. degree, cum laude.
1941–42 Harvard Law School.
1946–47 LL.B., cum laude.
Bar: 1950, Massachusetts.
Military Service: August 1942—December 1945, (active duty) U.S. Army, first Lieutenant.
Employment:
October 1947–July 1948, law clerk to Judge Learned Hand, U.S. Court of Appeals, New York City.
July 1948–July 1949, law clerk to Associate Justice of the Supreme Court, Felix Frankfurter.
1949–53, Ropes, Gray, Best, Coolidge & Rugg; Boston, Mass., Associate.
1953–54, Assistant clerk to Senator Leverett Saltonstall of Massachusetts.
1955–56, Assistant to Gov. Christian A. Herter, of Massachusetts.
1957–1959, Assistant Secretary for Legislation, Department of Health, Education and Welfare, Washington, D.C.; April to July 1958, Acting Secretary.
1959–61, Department of Justice, U.S. attorney, district of Massachusetts.
1961, 1963, and 1964, Ropes & Gray, Boston, Mass., attorney; partner.
1964–67, Lieutenant Governor of the State of Massachusetts.
1967–69, attorney general for the State of Massachusetts.
1969–70, Under Secretary of State, Department of State.
1970–February 1973, Secretary of Health, Education, and Welfare.
February 1973 to present, Secretary of Defense.
Office: Pentagon, Washington, D.C. 20301 (room 3E880).
Home: 1100 Crest Lane, McLean, Va. 22010; and 56 Sargent Crossway, Brookline, Mass.

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—and I am deeply conscious of the gravity of that responsibility at this time and, I may add, deeply grateful, also, for the generous words that have just been uttered by both the very distinguished Senators of my native State—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?

Secretary RICHARDSON. I believe, Mr. Chairman and members of the committee, that in the interest, first of all, of vesting the active direction of these investigations and prosecutions in the hands of the most capable possible person, and in the interest, also, of creating the maximum possible degree of public confidence in the integrity of the process, I should designate a highly qualified and experienced individual of high character and broad experience for the role of special prosecutor in the Watergate case and related matters.

The CHAIRMAN. Now, do you expect the Judiciary Committee of the Senate to check this individual?

Secretary RICHARDSON. Yes, Mr. Chairman. I think it would be desirable in order to establish as firm a basis of confidence as possible, that the individual whom I select be of the character and qualifications I just mentioned; and that he appear before this committee, if invited to appear, to be interrogated at whatever length the committee felt appropriate in order to satisfy itself that he is such a person.

The CHAIRMAN. Then, if he did not get the endorsement of the committee, of course, he would not serve, would he?

Secretary RICHARDSON. No. I would feel that the very purpose of his selection insofar as it was designed to create confidence in the integrity of the investigative and probative process would in that case have been demonstrated not to be fulfilled. I would, therefore, feel obliged to select another individual.

Perhaps, Mr. Chairman, however, it would be useful at this point if I described the process that I am pursuing in seeking such an individual, because I firmly believe that by the time that process has been completed and the individual has been named, he will be a person who, after being interrogated by this committee, will satisfy it that he is a man of great probity, character, courage, and ability.

Since it became clear to me that the right course would be to name a special prosecutor, I have been seeking recommendations for this individual from a great many sources. I have consulted the president of the American Bar Association and asked him to submit names, which he has done. We have consulted also the president of the American College of Trial Lawyers and other organizations of the bar, judges, prosecuting attorneys, and practicing lawyers. Suggestions have come to me from Members of the Senate and the House and from various individuals in private life. Altogether, to date, some 80 to 100 individuals have been consulted and a large number of names has been assembled. There is a good deal of overlap among these names.

My contemplated next step, which I hope to be able to take very soon, is to draw up a list in order of priority among these individuals, to submit that list for further comment to the president of the American Bar Association, to the president of the American College of Trial

Lawyers, and to certain other individuals, among whom I would expect to include, with his permission, the former Chief Justice, Earl Warren. I would ask them for their further comment on these individuals, and I would then adopt an order in which to proceed to ask these individuals to accept what will undoubtedly be a very demanding responsibility. On that basis, I would select the first individual on the list who is willing to undertake the responsibility and then announce the name and request that this committee invite him to be heard.

The CHAIRMAN. Then if the committee decided to report that name to the Senate for a resolution of the sense of the Senate that he qualifies, you would favor that course, too, would you not?

Secretary RICHARDSON. I would welcome that course, Mr. Chairman.

The CHAIRMAN. In fact, then, it is really the Senate's problem, is it not?

Secretary RICHARDSON. In the sense that the Senate would be exercising its own independent judgment as to his qualities and qualifications, and in the sense also that if the Senate should not concur in this recommendation, I would respect that judgment and feel obligated to pose another selection.

The CHAIRMAN. Senator Ervin?

Senator ERVIN. Senator Stevenson of Illinois has introduced a resolution which would request you to appoint an independent special prosecutor. This resolution recites that in order to have a special prosecutor with the desirable independence, you should confer upon the special prosecutor these powers: First, final authority over questions of convening and conducting proceedings before grand juries, subpenaing witnesses, initiating prosecutions, framing indictments, and seeking in court grants and immunity from prosecution for witnesses.

Would you confer upon a special prosecutor such power?

Secretary RICHARDSON. I would expect, Senator Ervin, to delegate to him responsibility for the investigation and prosecution of the Watergate case and related matters. Exactly what the related matters are would have to be left open in order to delegate to him specifically responsibility for things that may prove to be related but as to which neither he nor I would have information at the outset.

My understanding of the law is that the Attorney General must retain ultimate responsibility for all matters falling within the jurisdiction of his department. I would expect to do that. Indeed, it would not seem to me to serve the primary purpose of my designation as Attorney General at this stage if I did not do so.

On the other hand, in selecting a special prosecutor of the caliber I have tried briefly to sketch, I would be selecting an individual in whom I had total confidence and I would make clear to him that he was exercising, consistent only with my ultimate responsibility as Attorney General, independent authority to take the necessary action.

Senator ERVIN. I do not believe that this would result in the independence of the special prosecutor. It might tempt Congress to follow the precedent that it adopted in respect to the Teapot Dome matter when it took the entire matter out of the hands of the Department of Justice and put it in a special prosecutor nominated by the President subject to Senate confirmation.

Secretary RICHARDSON. I think it is a question, Senator Ervin, for this committee and the Senate to consider whether the course I have

described is on balance wiser than the alternative of creating, in effect, a wholly independent agency. It is not clear to me how such an agency would function. It is unclear in the first instance exactly what the scope of responsibility would be and what would be the interrelationship between an area of investigation conferred by law upon that individual and other matters later emerging. I believe he should be in a position where, as an individual with the title, I would expect, of Special Assistant Attorney General, he could call upon the full resources of the Department of Justice: and he could, thereby, do the job better than could be done if, in effect, a new agency were created, with all the problems of staffing and jurisdiction that that would entail. In any event, from my own standpoint, the position of Attorney General mandatorily requires the acceptance of ultimate responsibility. I would expect, in being willing to delegate responsibility to a Special Assistant Attorney General for this purpose, not only to have confidence in him but to back him up, and I would hope that that combination—both whatever confidence the Senate may have in my own integrity plus its confidence in the integrity of the individual given authority by me—would prove sufficient. If in the wisdom of the Senate it is determined that this combination is not sufficient, I would feel that no sufficient purpose would be served by my becoming Attorney General to justify my resignation as Secretary of Defense.

Senator ERVIN. Well, I will just read and you can make comments to the extent you wish to on the other things which Senator Stevenson's resolution contemplates as essential to the independence of the special prosecutor. He says the special prosecutor should have final authority over the selection of an adequate staff of attorneys; investigators and other personnel answerable only to himself; that he should have assurance that the investigatory and other resources of the Department of Justice and funds to defray all expenses incurred in connection with the activities of the special prosecutor will remain available for the time necessary to complete the investigation and prosecute any offenders.

He should have assurance that he would not be subject to removal from his position except for malfeasance in office.

He should receive assurance that he will enjoy full access to relevant documents and personnel of the Department of Justice and all other officials and agencies of the executive branch, and assurance that the special prosecutor can freely, and upon their request, appear before, consult with, and cooperate in other respects with all congressional committees having jurisdiction over any aspect of the special prosecutor's activities.

Would you care to comment on any of those? I would be glad to have you do so.

Secretary RICHARDSON. I believe that the special prosecutor should have all of the responsibility and all of the support that is set forth in that series of propositions in Senator Stevenson's resolution. The one thing that does seem to me important to maintain, as I have said, is the proposition that the Attorney General retains ultimate responsibility. But in practice, the individual chosen would have to be a person of such stature, character, courage and integrity that I would, in the first instance, want to give him the responsibility for this investigation and he should undertake that job only with that understanding. Nevertheless, insofar as he would be acting under a Depart-

ment appointment, he should have also whatever reinforcement I can give by retaining ultimate responsibility for whatever he does.

Senator ERVIN. I would like to ask you a few questions with reference to immunity of witnesses. As you undoubtedly know, under the Constitution, it is the duty of the Federal prosecutory authorities to prosecute in the Federal courts persons who are charged with crimes for the purpose of determining their guilt and for the purpose of enabling the court to impose punishment on those who are convicted.

Also, pursuant to its constitutional authority, Congress has established a congressional committee—the Senate Select Committee on Presidential Activities, Presidential Campaign Activities—which has authority to conduct an investigation to determine whether existing laws are adequate to cope with things that happened which may be revealed by testimony before the committee or for the purpose of determining whether these laws should be strengthened or new laws should be enacted. As I see it, the authority of the courts to determine guilt and innocence and the authority of the Senate committee as an arm of the Senate to determine whether new laws should be enacted and to conduct the necessary investigation to shed light on that subject are coequal.

The committee has to have witnesses and section 6002 of title 18 of the United States Code provides that: "Whenever a witness refuses on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before"—and I leave out some agencies not concerned—"either House of Congress, a joint committee of the two Houses, or a committee or subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination—but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

As I construe the statute, if the person presiding over a congressional committee, conducting an authorized investigation, communicates to a witness who pleads the fifth amendment, an order, which I will call attention to in just a moment, then the witness has to testify, and neither the evidence he gives before the congressional committee nor the fruits thereof can be used against him in the prosecution of a criminal case except for perjury in these excepted instances.

As I construe the statute further, the granting of the immunity by a congressional committee by this statute does not prevent the Department of Justice or the District Attorney from prosecuting the witness on the basis of any information he has outside of what the witness communicates to the congressional committee. In other words, the immunity is a use immunity and not an immunity from prosecution. So it would not handicap the Department of Justice in prosecuting the criminal case subsequently against that witness.

The order that is referred to in section 6002 is set forth in section 6005 of title 18 of the United States Code and it provides as follows: "(a) In the case of any individual who has been or may be called to testify or provide other information in any proceeding before either

House of Congress or any committee or any subcommittee of either House or any joint committee of the two Houses, a U.S. district court shall issue in accordance with subsection (b) of this section, upon the request of a duly authorized representative of the House of Congress or the committee concerned, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part."

Then, reading subsection (b)—I am going to leave out the part under the (1) because it is not relevant to my purpose—"(b) Before issuing an order under subsection (a) of this section, a U.S. district court shall find that in the case of a proceeding before a committee or a subcommittee of either House of Congress or a joint committee of both Houses, the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee."

Then, the statute provides: "Ten days or more prior to the day upon which the request for such an order was made, the Attorney General will serve with a notice of intention to request the order." And (c), "Upon application to the Attorney General, the U.S. district court shall defer the issuance of any order under subsection (a) of this section for such period not longer than 20 days from the day of the request for such order as the Attorney General may specify."

Now, my interpretation of that section is this: It is the mandatory duty of the district judge to issue this order if he finds that two conditions exist. The first is that two-thirds of the members of the congressional committee have voted to request the immunity; and second, that the congressional committee has notified the Attorney General—given him notice of their intention to apply to the district court for such order. Then it is the mandatory duty of the district judge to grant that request for order for immunity subject only to the fact that the Attorney General can request him to delay acting on it for an additional period not to exceed 20 days.

As I construe this statute, there is no discretion reposed in the district judge whatever. He has to issue the order ultimately; and there is no discretion reposed in the Attorney General except to tell the committee that it ought not to request it. He cannot veto the action of the committee.

I would like to know what the attitude of the Department of Justice in cases where the Senate Select Committee on Presidential Campaign Activities has acted would be in respect to waiving this 10-day notice and the 20-day period of possible delay?

Secretary RICHARDSON. Senator Ervin, you have touched on what could be an area of considerable difficulty not only in the context of granting immunity, but in general in terms of indictment and subsequent trial as between the responsibilities and jurisdiction of your committee on the one side and the Department of Justice, special prosecutor, and U.S. attorneys, with law enforcement responsibilities, on the other. The only possible way to achieve a fair and constructive outcome, it seems to me, is through full and fair communication between the special prosecutor and you and the ranking member of your committee.

Now, it would give me considerable trouble and I think it ought to give the special prosecutor considerable trouble if you proceeded

under section 6002, which does not even contain a notice provision, which I take it you could do if the witness were willing to testify subject to the grant of immunity. I take it you only reach section 6005 if the witness, notwithstanding an offer of immunity, has refused to testify so that you then need to go to court and get an order directing him to testify.

It would give me considerable problem if the committee were to proceed without any notice to the special prosecutor under section 6002 even if the witness were willing. Under section 6005, the only question you have asked me is with respect to compressing the time involved and as to that, since I would expect to rely on the special prosecutor in the whole matter of grants and immunity so far as the Department of Justice is concerned, I would rely on him on this question also.

Senator ERVIN. You do not mean that you think that the committee ought to give a notice to the prosecutor or the Attorney General that on a certain day, it is going to vote on the question of whether two-thirds of its members want to make the request of the district judge?

Secretary RICHARDSON. Well, I do not think it needs to be 10 days. I think there ought to be notice.

You made the point earlier, Senator Ervin, that since section 6002 says that the information may not be used in the prosecution of the individual, this would not hamper prosecution, because the prosecution could use information to the same effect derived from some other source.

If I were defense counsel for an individual in that situation, I would endeavor mightily to show that the Government's evidence was tainted by the coincidence that the same information will be given to a congressional committee and that it could not legitimately be used. This kind of problem arises often with respect to sources of evidence and I do not believe, therefore, that it would be desirable for one hand not to let the other know what it was doing with respect to an action that could have the consequence of immunizing an individual against prosecution.

Senator ERVIN. We have tried thus far to cooperate with the Department of Justice. The Department of Justice has manifested a willingness to waive these requirements in the case of insignificant witnesses, but has informed us that it will not waive the 30 days notice in the case of two witnesses that we consider very significant. And as I construe this statute, the only requirement is that two-thirds of the committee shall vote to request the order and it shall appeal to the court at 10 days notice to the Attorney General that they are going to apply for the order. Then it is the mandatory duty of the judge to issue the order subject only to the fact that the Attorney General can delay the entry of the order for 30 days. In other words, this statute gives the Attorney General only power to obstruct the work of the committee and to postpone the committee's access to this witness for 30 days.

Secretary RICHARDSON. To be sure, Senator. But what is involved here could be a very serious problem with respect to a given individual. Suppose that a special prosecutor believed that this witness, if named as a defendant in an indictment as a co-conspirator, would testify on the understanding that his willingness to testify would be taken into consideration at the point of disposition of the case, and that it was,

therefore, not necessary to immunize that person from prosecution. If in the meanwhile, the committee, in order to obtain his testimony, had immunized him, the practical possibility then of proceeding against him in a criminal case could well be foreclosed.

In the circumstances, therefore, it seems to me that, first of all, there should, of course, be cooperation, but that the question of whether or not in that case to delay under the statute is a question that the special prosecutor should have the opportunity to consider in the event that a grand jury might be on the point of indicting the given individual in the meanwhile.

Senator ERVIN. But under the statute as I construe it, even if the prosecutor entertained that opinion, the only thing he can do is to obstruct for 30 days—rather, obstruct for 20 days, really—the decision of the committee to take such action, or for the judge to enter an order and the committee to take such action as he sees fit. He has no power to do anything except to delay it.

Secretary RICHARDSON. I appreciate that and I am not trying to anticipate in advance what the special prosecutor might decide to do. I am merely calling attention to what seem to me to be significant issues in this situation and to say to you that I do not believe that I can appropriately and in advance, on behalf of an unnamed individual, not yet vested with this responsibility, say in blank that he would not under any circumstances invoke whatever powers of delay are permitted by this statute.

Senator ERVIN. Of course, the power is not given by the law to the unnamed prosecutor. The power is given to the Attorney General.

Secretary RICHARDSON. Yes; but we are assuming for this purpose that I would have delegated to him responsibilities involving immunization of witnesses from the standpoint of the Department of Justice.

Senator ERVIN. Well, frankly, the Department of Justice has had this matter ever since the morning of the 18th day of June of last year and I think it is more important to this country for this whole subject to be clarified, without any of the limitations and restrictions that apply to the court which can only receive evidence which tends to prove or disprove the allegations in a bill of indictment, than it is for one or two or three people to go to jail. That is my attitude toward the matter. I think that is more important and I hope we will get cooperation. For the life of me, I cannot understand why we can get a waiver of the time limitation in respect to insignificant witnesses but are unable to get a waiver of the time limitation with respect to witnesses who according to the information we have are of great importance.

Secretary RICHARDSON. I can only say that in general, Senator, as I am sure you are perhaps better aware than I, prosecutors do not like to immunize witnesses from whom they can get the same testimony in some other way if they can also be named, prosecuted, and sentenced.

Senator ERVIN. My point does not deal with immunization of witnesses by prosecutors, but only with the use of immunity for a congressional committee.

Secretary RICHARDSON. Yes; but there is a practical problem, as I said earlier, and I think it is a serious practical problem, that if an individual has been immunized by a congressional committee it may

be impossible to show that the Government has obtained that information in some other way. The individual at that point has no incentive at all to be a Government witness in the actual trial of the case, because as far as he is concerned, he has given information and now the Government, in effect, has no basis on which it could possibly convict him of anything.

Senator ERVIN. I do not see that the difficulty is so great, because this would prevent the Government in the criminal action merely from presenting the testimony that the witness gives before the congressional committee and such evidence as it gets as a result of that information. If they have witnesses who know of their own knowledge, independent of these matters, facts which show the guilt of the witness who has been immunized by the congressional committee, there is no problem at all.

Secretary RICHARDSON. And the hooker in that, Senator, of course, is the word "merely." The Government could get the information by immunizing him, perhaps, too, in which case there would be no problem as to who did it, the committee or the prosecution. But the Government's position may be, we can get this testimony from this man as a witness without immunizing him at all if we name him as a defendant and proceed against him.

He may be willing to testify solely in the hope that if he is a cooperative witness the judge at the point of disposition will take that into account in sentencing. In that event, the Government, if left to itself, would not immunize the witness at all. If he has been immunized, then he has, in effect, disclosed the information under circumstances in which the Government may in effect be barred from proceeding against him.

Senator ERVIN. But the executive branch of the Government—that is, the Department of Justice and Attorney General—cannot keep the committee from getting this immunization order from the judge. All it can do is delay it for a few days. Frankly, I think it is essential for the Senate committee to proceed with dispatch on this and I am not willing—I am speaking just as one individual member of the select committee—I am not willing for us to postpone this until the Department of Justice has proceeded with all of its activities. The last lingering echo of Gabriel's horn may tremble into ultimate silence before that is done because justice often travels on leaden feet.

Secretary RICHARDSON. Senator, I think we have been dealing perhaps a little bit too much in abstractions. I am not Attorney General. I have no direct authority over the Department of Justice. If I am confirmed and take office and appoint the special prosecutor I would delegate responsibilities to him in this area and at that point he would be dealing with you on this issue. I am sure that he would want to be as cooperative as possible and I cannot, obviously, predict what his position would be in a particular situation.

Senator ERVIN. Well, I hope we get good cooperation because my observation and study of history convinces me that the Government functions much better when its several branches pour a little oil of helpfulness and cooperation on the joints of the law and the joints of the Constitution. I hope that this will occur after your confirmation as Attorney General.

Secretary RICHARDSON. I fully share that view, Senator Ervin, and in this particular situation, I would fully agree, also, that there is a

larger public interest at stake than that simply of indicting, prosecuting, and sentencing any given individual.

Senator HART. Mr. Secretary, welcome to the committee, and congratulations, I suppose, are in order.

Secretary RICHARDSON. Thank you, Senator Hart. I can understand your doubt on that question.

Senator HART. I suppose I view it with mixed feelings.

The eloquent testimony provided us by our two colleagues from Massachusetts with respect to your ability and integrity, I am sure, is richly earned. Though we have never been closely associated, everyone I know who has associated with you speaks with equal eloquence as to your integrity and your legal knowledge, and at least this member of the committee is not shaken by your earlier association with such libertarians as Learned Hand and Felix Frankfurter. [Laughter.]

Secretary RICHARDSON. They have come to be regarded as "conservatives" with respect to judicial philosophy in the course of time and, whatever the applicability of the label, it is certainly true that my own viewpoint was heavily influenced by their teaching.

Senator HART. I am sure the hearings will deal with various aspects of the Department of Justice and the fashion in which you would anticipate directing it, but as our chairman indicated there is a looming preoccupation with one feature and that, I take it, is the thing we should first address ourselves to: the Watergate.

I think that until we have an agreement on the ground rules establishing the independence of this special prosecutor we ought not to move to confirmation.

Normally, I hesitate putting any such kind of precondition on any nomination because it suggests a lack of confidence in the nominee. I think I voted to advise and consent to every Cabinet nomination that has come before this committee, whoever the President, after having satisfied myself as to the intelligence and integrity of the nominee. I have consistently taken the position that the President is charged with the execution of the laws and if he says this is the man I need, that is the man he should have. But this, indeed, is not the normal moment. We are concerned with more than giving a President his man. We are concerned with giving the people a reason to believe that all the facts of Watergate and its associated events will be made public. We are concerned with restoring public confidence in the government necessary to make our system work and, if possible, in the administration currently in office.

If the polls are correct, more than 50 percent of Americans believe the President's ability to govern has been damaged as a result of Watergate. Regardless of how one views the policies and the programs of this administration, one should not pretend that 3½ years of government drift would be a very good thing. Under these circumstances, we face a sort of Hobson's choice. If we are to regain the faith of the public, an unfettered investigation of Watergate must be pursued, even with the knowledge that such an investigation could develop information that would damage the confidence of the public, the confidence that we seek to restore. That is one reason we call our system fragile. It is one of the many things that those who took part in Watergate never understood.

But we must press ahead with this development of the facts and in a way in which the public will believe that it is being done and ultimately has been done. So appearance becomes as important as facts and appearance requires that the investigation be insulated as much as possible from any hint of coverup through control by this administration, and from any tainted partisanship through influence from the democratically controlled Congress, too.

Now it is easier to call for than to insure the independence of a prosecutor, but certain steps can be taken toward that end, and just as did Senator Ervin, I would like to visit with you on certain of the means that seem to me likely to achieve that.

You said that you would have to have ultimate responsibility for the action of this independent prosecutor, final responsibility. How can he have that independence if you have the final responsibility for an investigation that involves your administration?

Secretary RICHARDSON. I think the answer to that, Senator Hart, rests first upon the terms of the responsibility delegated to the independent prosecutor; second, on the confidence that is placed in his own character and integrity; third, on whatever confidence this committee and the American people feel is appropriately placed in my assurances that he will be acting independently. The final clause of the insurance policy, I suppose, is the awareness that having undertaken solemn obligations as Attorney General, having selected an individual possessing the characteristics that I know we would all want to see in a special prosecutor, having delegated to him a defined area of responsibility, if then and despite all of this, I as Attorney General should in any way exercise to the slightest degree any improper influence in the course of this handling of these matters, it would be understood and should be understood that he would immediately and publicly make that known. I cannot imagine a person of the kind that I am presently seeking undertaking this responsibility without having this kind of assurance and without being the kind of person who would so act.

Senator HART. But that is to say that he can air disputes in public, which is sort of like saying we will have oversight from the underground, we will surface it, and we will be back in the daily newspapers—and doing what to the confidence of the people of the country with respect to the pursuit of truth?

Secretary RICHARDSON. Senator, I feel very clear that this is not a situation in which it is practical to create what is in effect a separate statutory agency.

Senator HART. Mr. Secretary, I will say that I tend to reject that approach, too. I prefer to see the assistant in the Justice Department, but I want to see him there without final decision in your hands.

Secretary RICHARDSON. Well, I do not think you can have it both ways, with due respect, Senator Hart. The law requires that the Attorney General have ultimate responsibility.

Senator HART. President Nixon just publicly commended Attorney General Kleindienst for recusing himself in the matter of so many personal friends. Why cannot you do that with respect to Watergate?

Secretary RICHARDSON. If I felt, Senator Hart, there were any basis for my recusing myself or dis ualifying myself for my responsi-

bility in this or related matters, it would make no sense for me to be here.

Senator HART. I think there is both a personal and an institutional basis for recusing one's self.

Secretary RICHARDSON. In that event, my nomination should be rejected.

Senator HART. Not at all; indeed, you can permit the special assistant to function as is the case with an assistant who assumes full responsibility because the chief recuses himself.

Secretary RICHARDSON. No; I do not think the situation—let me put it this way. If I were to undertake the attorney generalship on a basis that made me feel that I could not accept ultimate responsibility for matters in which the authority to take the necessary action will be delegated, then it would seem to me that in the circumstances, it would not be appropriate for me to undertake the Attorney Generalship at all. It is not simply a matter of needing to have someone in the position of Attorney General who will mind the store with respect to all other matters; it is a question of whether or not——

Senator HART. Mr. Secretary, I am not able to hear your answer.

Secretary RICHARDSON. I was trying to think out an answer, Senator Hart, and I paused on the proposition that if I were sufficiently in this situation with individuals alleged or suspected to be involved in it in such a way that I would not be in a position and did not feel that I was in a position to accept ultimate responsibility, then it would seem to me to serve little purpose at this stage in the history of the Department of Justice for me to undertake the Attorney Generalship at all. I think this is a question that is, in effect, before this committee. I would not wish to go over there without accepting the responsibilities of the office.

That does not mean that I am not prepared to delegate independent authority to a special prosecutor. I am and I would. But I feel that as Attorney General of the United States, I must ultimately be answerable for what the Department of Justice does, including being answerable for what the special prosecutor does.

Senator HART. The office of the Attorney General is an important one to the Nation quite apart from Watergate and I have every reason to believe, and do believe, that you could bring to that office great strength and talent. The problem of Watergate, perhaps not equally important in the long run, is critically important at the moment, and I believe that it could more effectively be resolved by a special assistant whose decisions would be final with respect to that one subject. That is my opinion, my point, my concern.

I do not know to what extent you have worked with some of the individuals in the White House during the period you were in HEW; certainly to some extent on policy, on budget. I am not suggesting that you know Mr. Maridan or Mr. Mitchell as closely as Mr. Kleindienst, did, but they are not unknown to you. But regardless of the personal relationships which might be the basis for a decision to recuse, you will become the head of the Department of Justice by appointment of the President, which Department would be investigating itself, in the final judgment, if you retain final judgment. This is the hangup. It is for that reason that I suggest that you would be institutionally suspect or that there is institutional grounds for recusing.

If the special prosecutor does not have the ultimate say with respect to Watergate, why should he take the job or why should you appoint one?

Secretary RICHARDSON. It is a question, I think, Senator Hart, of the definition of a responsibility exercised by someone to whom independent authority to do a job has been delegated, versus, in effect, the creation of a situation in which I as Attorney General would from the outset be saying I abdicate all responsibility in this matter. That I would not be prepared to do. On the other hand, I would be prepared and would intend to give the individual selected as special prosecutor the authority to do the job given to him. The confidence of the Senate and the public that he would do that and that he had that power would have to rest, as far as I am concerned, on whatever confidence it placed in me on the one side and beyond that, and more especially, the confidence it placed in him.

Senator HART. If we can place ourselves—and we kid ourselves thinking that we do it very well sometimes—but if we can place ourselves in the shoes of the public of this country: suppose that you see it differently from the special prosecutor on some aspect of the conduct of Watergate, and there are bona fides on both sides, in that situation, how do you think the public will see it? Who is the administration's man and who is their man? Is that not the way they are going to look at this thing? And do they not have a right, given the experiences we have had, to look at it that way?

Secretary RICHARDSON. I have only two comments on that.

In the first instance, I would expect, having delegated responsibility on the basis I have tried to suggest, I would not expect, in a matter of judgment, simply to interpose my own judgment. The judgment of the special prosecutor would have to have great momentum for respect so far as I was concerned and because the special prosecutor would have been given delegated responsibilities and because he would be the man dealing from day to day with these matters, he would for practical purposes be in a position to do what he thought needed to be done.

The only other comment I have is that, of course, any Attorney General is, in one sense of the word, "the administration's man," having been nominated by the President and serving as part of the administration. In my own case, I could be regarded as the "administration's man" insofar as I have been a part of this administration from the beginning. On the other hand, in the fundamental sense, I do not regard myself as anyone's man.

Senator HART. Mr. Secretary, I am as uncomfortable pursuing that theme as you are. I can testify that I believe you would be your man. I buy that. But there are a couple of hundred million people who do not know you and me from Adam's off ox and what are they going to do? I have that responsibility as Senator of this committee.

Secretary RICHARDSON. I understand that and I am not trying to influence the committee's judgment with respect to what course to pursue with respect to this nomination. I am simply saying to you that if I felt I could not accept the Attorney Generalship except on a basis which, from the outset, disqualified me from any ultimate responsibility whatever in these matters, then I should not accept the appointment at all.

Senator ERVIN [presiding]. There is a roll call vote on the Senate floor now. The chairman asked that when we recess, I recess the committee until 3 o'clock. I do not think there would be much use in coming back before then, so the committee will now stand in recess until 3 o'clock.

[Whereupon, at 12 noon, the committee was recessed until 3 p.m. of the same day.]

AFTERNOON SESSION

Senator HART (presiding). The committee will be in order.

Mr. Secretary, we apologize to you. I am authorized by the chairman, Mr. Eastland, to explain that while he is unable to be here, we should resume and continue until about 5 o'clock. We will then return at 10:30 tomorrow morning. The reason for this interruption, as I am sure you understand, has been a series of votes on the Senate floor.

The chairman also properly commented that he and Senator Ervin and the Senator from Michigan, all Democrats, have had an opportunity to participate and that, just as soon as possible, opportunity should be given the minority membership, and I intend that it shall. Yet our own discussion, perhaps to the disservice of both of us, was left hanging in midair at noon.

Let me see if I can wrap it up at least for the time being where which stood at noon You intend to select and appoint a special prosecutor possessed of all of the desirable characteristics, and having done that, you and we and the public can repose trust and confidence in his activities and decisions, and that, really, we should not be alarmed or have concern about the reservation which you feel an obligation to attach, namely, that while you never expect to have to exercise it, given the character of the special prosecutor, nonetheless, that there should be reserved to you as the Attorney General the right to make final decision which might or might not constitute overriding his.

If we are in fact going to have that kind of eminent figure conducting the Watergate matter, why not give him final authority and discretion in the area?

At lunch, or shortly after lunch, one of my colleagues, whom I respect very much, suggested that the special prosecutor could go off the deep end and conduct an investigation in a blatantly improper way, or plumber it up, foul it up. He was concerned that that kind of special prosecutor would be free of any check. But if, in the unlikely event he performed in that fashion, you would be able to replace him—at least, you could displace him—just as the President can replace you if he feels that you are going haywire in some manner.

It is true that you would be constrained in removing him, just as the President would be constrained in removing his own Attorney General, by the need to have a persuasive reason which the public would accept. But there would be no lack of authority to remove him.

So I would conclude our interrupted discussion by inquiring if you could not agree to the conditions of the Stevenson resolution, which I think would remove all shadow of doubt about the appearance of the administration controlling the investigation. I repeat, it is the appearance that worries me, not the fact.

TESTIMONY OF ELLIOT L. RICHARDSON—Resumed

Secretary RICHARDSON. Let me first say, Senator Hart, that I appreciate the clarity and fairness with which you have summarized the situation as of the conclusion of our colloquy this morning. I think I can best comment on that summary, particularly the conclusion you derive from it, by going back to the point at which you remarked, "Now, if we are going to have the kind of eminent figure conducting this matter in the way that we would expect him to do so, why not then give him final authority?" It is true, you went on to point out, quoting someone with whom you discussed this at lunch, that he might go haywire, but the protection against that is that he could be removed for a persuasive reason.

I would, as I perceive it, going back to that same point, ask instead if we are going to have a person of that kind of eminence and with the qualities that we can, I am sure, agree he ought to have, then for the Attorney General to retain the ultimate responsibility which that post vests in him by law would not seem to threaten the confidence that again, I am sure, we both agree is a major objective, both of my appointment and of this appointment.

We touched this morning on the fact that since the law does repose ultimate responsibility for the affairs of the Department of Justice in the Attorney General and that the only way, without changing the law—and that would not seem, on its face, desirable—of avoiding that problem would be for the Attorney General to disqualify himself. I will not repeat now the reasons why I do not believe that would be a wise course.

So we have a situation that really, I suppose, comes down to quite a narrow difference. It may even be characterized as a difference of expressing the kind of authority and independence reposed in this man. I would feel that even though he were given full or complete authority—and I would not object to that kind of characterization—that to deal in terms of a finality of authority in which I had no ultimate responsibility at all would imply that there was no communication, no consultive relationship, no opportunity for the exercise of any judgment whatever so far as I was concerned. I would think that the individual in that position, dealing as he would be with matters, some perhaps obviously falling within his jurisdiction and clearly subject to his delegated authority, would find still others—for example, in the field of campaign contributions—that ought to remain within the ordinary processes of the Criminal Division, but which were the kinds of things in which there ought to be communication.

There is mentioned, for example, in the language of the Stevenson resolution, cooperation with congressional committees. I think from the standpoint of the Department of Justice, there are very real considerations that could arise along the lines that were touched on this morning by Senator Ervin, in which, as Attorney General, dealing in a range of matters with the Congress, it is important that I have some voice. It seems to me that the confidence of the Congress and the public can rest, really, on the fact that there is a sort of double guarantee inherent in my exercise of the responsibilities as Attorney General subject to the clear delegation of authority to an individual

who, both by virtue of that delegation and by virtue of his own qualities as a human being, adds an element that I could not provide alone, particularly given my own participation in this administration. And it seems to me there is an element of strength in that combination which can provide the degree of reassurance that I think you rightly emphasize is a common objective.

Senator HART. Mr. Secretary, I am comfortable, and others can speak for themselves on this, but I have no trouble anticipating and expecting that there would be the very broadest consultation as the circumstances would indicate, and exchange of information, the offering of counsel and suggestions. But after all of that has occurred, there will be instances when a decision must be made, whether it relates to a claim of privilege, or indeed the question of who shall and who shall not be indicted, and all of this, there will be occasions when a decision must be reached, and it is at this point that I think the approach that I have expressed a desire to see followed gives us sort of an added bonus that when that decision is made, if it is made in final fashion by the outside special, you have removed from public debate and concern any apprehensions that it is a decision, if you will, by the administration.

I again assure you that this is not intended in an offensive fashion.

Secretary RICHARDSON. I understand.

Senator HART. I am talking about the appearance.

Well, we can get back to this.

Senator Fong?

Senator FONG. Thank you, Mr. Chairman.

Mr. Secretary, I want to congratulate you upon your nomination and say that you are really in a very unique position. You have been nominated for this position as Attorney General and you still hold the position of Secretary of Defense, is that not correct?

Secretary RICHARDSON. Yes; that is correct, Senator.

Senator FONG. You have stated that you will continue to regard yourself as having the ultimate responsibility of the actions of the special prosecutor, as he is called, when he is appointed. Is that not true?

Secretary RICHARDSON. Yes.

Senator FONG. Now, when we talk about an independent prosecutor, you are really referring to his actions and what he does. I understand you to have said you will give him a lot of leeway, but that you, as Attorney General, still consider that you have ultimate responsibility of supervision over him, is that correct?

Secretary RICHARDSON. Yes, in the sense that anyone who delegates responsibility does not thereby abdicate it. Senator Hart, I think very fairly, pointed out that the likelihood in fact that I would second-guess or interpose an independent judgment or overrule a decision by a special prosecutor is extremely remote.

Senator FONG. Yes.

Secretary RICHARDSON. At the same time, however, the law does vest ultimate responsibility for matters within the jurisdiction of the Department of Justice in the Attorney General. What I am saying in effect is if I am to be Attorney General and if the Senate sees fit to confirm me in that job, then it is that job I should take subject to the achievement of understandings with the special prosecutor that will in

fact give him all the independent authority he needs to do the job that I am asking him to do, which this committee would expect him to do, and which the public interest requires.

Senator FONG. In other words, the job carries with it the responsibility of being responsible for your independent special prosecutor?

Secretary RICHARDSON. Yes, it does. And I would be, even though the Senate, for example, should, as I hope it will, vote to express its confidence in him, I would not expect by virtue of that that the Senate had taken responsibility for the selection. I would have.

Senator FONG. As the statute now stands, do you have the ultimate responsibility for him?

Secretary RICHARDSON. Yes.

Senator FONG. To change that, Congress would have to enact a new law, is that correct?

Secretary RICHARDSON. That is my understanding, Senator Fong.

Senator FONG. Yes. Without such a new statute to take away that responsibility from you, you maintain that ultimate responsibility?

Secretary RICHARDSON. Yes.

Senator FONG. Now, this prosecutor, although you call him an independent special prosecutor, from your standpoint and from the way you view it, he will be subject to you?

Secretary RICHARDSON. Yes, in this ultimate sense.

Senator FONG. Well, you have given us assurances that you will give him wide scope of authority. Undoubtedly, you will select a man who will have the capacity, the ability and the integrity to do the right thing?

Secretary RICHARDSON. Yes.

Senator FONG. And the approval of the Senate?

Secretary RICHARDSON. Yes.

Senator FONG. So that when he is appointed, there will be no question as to his ability, as to his integrity, as to his character, and as to what he will do as a prosecutor?

Secretary RICHARDSON. That, I think, is a very accurate summary, Senator Fong.

Senator FONG. Now, suppose you selected such a man and he were to appoint a very partisan man, say from the Democratic Party, that you know is very, very partisan. You would have the ultimate responsibility to say "no," would you not?

Secretary RICHARDSON. Yes; although I think that one respect in which I would be prepared to agree that he could have final authority would be in the selection of his own staff. I might in that case raise some question, but I will be prepared in this respect to accept the terms of Senator Stevenson's resolution subject to some practical understanding that there were limits on his ability to draft people from other key jobs in the Department.

Senator FONG. Knowing the type of man whom you would appoint and knowing the type of man the Senate committee would approve, are you saying that you do not feel that there is any possibility that he would appoint a very partisan assistant?

Secretary RICHARDSON. No; I do not really think so. This is, I think, illustrative of the remoteness of the likelihood that in any respect, I would in fact intervene.

Senator FONG. Mr. Secretary, I worked with you in the Health, Education, and Welfare Appropriations Committee. I worked with you on the Defense Appropriations Committee. I am satisfied that you can do a very fine job as Attorney General and that you will do everything possible to uncover the whole truth in what has been known as "the Watergate case." I have listened to your responses to my colleagues and I am satisfied that you are able to do the job.

I have no further questions.

Secretary RICHARDSON. Thank you very much. I appreciate that very generous expression of confidence.

Senator HART. The Senator from Massachusetts.

Senator KENNEDY. Mr. Secretary, we have a time problem because there is another vote on the Senate floor. I will be glad to do whatever the Chair would like. We can either get started or go over until tomorrow.

If we do have time, I have some questions. There are two very brief matters that I am interested in. One is the Krogh affair reported in the Washington Post this morning. I wonder if you had any immediate reaction to that? If that will take some time—we have another 4 or 5 minutes and then we will have to leave.

Secretary RICHARDSON. I could make a brief statement on it.

Senator KENNEDY. Whatever you think.

Secretary RICHARDSON. Would Senator Hart, in his capacity as acting chairman, like first to decide what you want to do? Any way of proceeding is agreeable to me.

Senator HART. I am reaching for a coin and can't find it. [Laughter.]

I would suggest that Senator Kennedy proceed until the 5-minute warning, at which point we will adjourn for the day and Senator Kennedy can resume in the morning.

Secretary RICHARDSON. That is all right with me.

On the matter of Egil—if that is how you pronounce it—Krogh, he is a person whom I have known primarily in connection with matters involving the coordination of Government-wide activities in the area of drug abuse before the Special Action Office was set up. He, at his request, came to see me a week ago yesterday. He, it turned out, wanted to inform me that he had had responsibility for the so-called plumbing operation in the White House and had direct responsibility for actions involving the break-in in the office of the psychiatrist of Mr. Ellsberg. I told him that as Attorney General-designate, I did not feel that it was appropriate for him to tell me anything that he had not already told others or that was inconsistent with any advice of counsel that he may have had. What concerned him apparently was the question of whether he should file an affidavit with the judge presiding over the Ellsberg case who had been seeking information about the Ellsberg break-in insofar as this might bear upon prejudicing the case.

In brief, I told him that while I could not advise him personally, I believed that it would be in the public interest for all the information that bore on that episode that could help the judge to reach a decision to be made available to him.

Senator KENNEDY. There was just one more part of that I would like to get into. We are going to have to vote, so we will come back and complete that question. The Chair has announced that we will go into other areas and then we will adjourn.

[Recess.]

Senator KENNEDY [presiding]. The committee will come to order.

Mr. Secretary, the Krogh matter that we were talking about just prior to the vote, I think you indicated to the committee that a week ago, approximately, Mr. Krogh came and talked with you about, as I understand, the impact of his testimony upon the prosecution of the case. Could you indicate to the committee why Mr. Krogh came to see you? Did he indicate that when he came?

Secretary RICHARDSON. I had just been designated as Attorney General. The impression had been created, I think in part by the President's statement of the night before, that I would immediately, in effect, assume responsibilities for this matter. I have in fact been only in a position to begin to become informed. I have not undertaken to exercise direct responsibility in the Justice Department. But I think it was on this basis, at any rate, that he came to me anticipating that I would have responsibility in the matter. I felt that, subject to his understanding that I was not giving him personal advice, I could express an overall point of view. That point of view was that the only course to be pursued in this connection was that of responding fully to questions by the judge about responsibility for the Ellsberg break-in. The bearing on the Ellsberg case, of course, was that had information been obtained from that break-in, it might have in turn become the basis for evidence presented by the Government in the course of the prosecution and this would have been tainted evidence. This would be for the judge's inquiry and Mr. Krogh was clearly in a position to provide information about the break-in.

Senator KENNEDY. As I gather from your conversation with him, then, you urged him to be frank and open and candid and to tell what he knew?

Secretary RICHARDSON. This was certainly the point of view I tried to express, although, as I say, I was attempting to draw a line between an expression of a personal point of view and a matter which fell short of advising him.

After all, his disclosure would amount, in effect, to a confession by him of complicity in a criminal act and, as a potential Attorney General, it seemed to me improper for me to give him advice. I say that only in qualification of the word "urged."

Senator KENNEDY. Well, did you think that he was coming to talk to you because you were a friend of his or associate or knew of him, or because you were going to head up the investigation? Or because you were, in effect, the President's lawyer?

Secretary RICHARDSON. It was clear he was coming to me as the Attorney General-designate with responsibility for investigations and prosecution. He was interested in what was the right thing to do, no question about that. I am sure he would not have come to me otherwise. We have never had any discussions of any personal matters of any kind before that and he was not an individual with whom I have had many dealings. As I said, those I had had were principally in connection with coordination of drug abuse prevention and rehabilitation.

Senator KENNEDY. At any time in the conversation, did he indicate to you that he had been advised not to tell the full story?

Secretary RICHARDSON. He was concerned with what he understood to be a general injunction with respect to the disclosure of the matters involving national security. Actually, as he, I think, did not know at the time, John Ehrlichman had already, on the preceding Friday, filed

an affidavit or memorandum with Judge Byrne which, in general, did disclose certain things with respect to the break-in and which gave specific circumstances and which specifically named Krogh. He obviously did not know that at the time he talked to me, and I did not know it, either.

I was aware that the President had directed or at least approved the disclosure of information to the court.

Senator KENNEDY. Do you know which information he directed be disclosed?

Secretary RICHARDSON. The President was advised by the Attorney General that the——

Senator KENNEDY. Mr. Kleindienst?

Secretary RICHARDSON. Mr. Kleindienst, and the Chief of the Criminal Division, Mr. Petersen, that information bearing on the break-in was relevant to the Ellsberg case, and he directed that the court be informed of actions by White House personnel in connection with the break-in.

Senator KENNEDY. If this was the President's position, then why would Mr. Krogh have felt any kind of restraint by the general injunction, that he would have to come and talk to you?

Secretary RICHARDSON. I think he was proceeding on the basis of an understanding which by then had become obsolete. He did not know that at the time he came to me.

Senator KENNEDY. Were you a part of the decision to make available the information or did you urge the President to take that step?

Secretary RICHARDSON. No, he had already taken that step before I had any idea that I would be involved in this. I was a participant in discussions following the discussion with Krogh, which dealt generally with the further implementation of this policy as it applied to any individuals who had any information bearing on the Ellsberg break-in.

Senator KENNEDY. Well, what does that mean? Was there still a debate at that time as to what was going to be made available?

Secretary RICHARDSON. I think the best way to put it would be to say that there were a number of individuals involved, and while the Attorney General's office had been directed to furnish information to the court, the application of this policy in individual cases had not yet reached all those who were, in one way or another, involved. My only part in this was that I was consulted with respect to the follow-through, in effect, of this policy.

Senator KENNEDY. In the newspaper story, and I would ask consent that the full story appear in the record, it was indicated that John Ehrlichman attempted to persuade Mr. Krogh not to disclose what he knew about the break-in of the psychiatrist's office. Did Mr. Krogh at any time during that conversation indicate that Mr. Ehrlichman attempted to persuade him not to disclose that information?

Secretary RICHARDSON. Not that I recall.

[The article referred to follows:]

"HORRIFIED" AIDES BALKED: NIXON ASKED DATA WITHHELD

(By Carl Bernstein and Bob Woodward)

President Nixon attempted to prevent the Justice Department from providing information on the burglary of the office of Daniel Ellsberg's psychiatrist to the Los Angeles court where Ellsberg is on trial, according to sources close to the Watergate investigation.

The sources reported that the President urged Attorney General-designate Elliot Richardson and Deputy Assistant Attorney General Henry E. Petersen, who had been supervising the Watergate probe, not to provide the information on grounds that it might adversely affect "national security."

The President's advice was rejected by both men, one of whom was described as "horrified" and the other as "deeply shaken" by Mr. Nixon's action.

One source said Richardson was disbelieving of the President's position at first and that the Attorney General-designate reacted "as if he were struck by a thunderbolt . . . His internal reaction was that it is inconceivable for him to think that there can be any coverup of any kind."

Petersen, another source reported, "didn't know what to do he was so upset. He had to get this straightened out so he could live with his own children."

In addition to the President's action, the sources reported that Mr. Nixon's former principal deputy for domestic policy, John Ehrlichman, attempted to persuade Egil Krogh Jr. not to disclose what he knew about the break-in at the psychiatrist's office. Several sources yesterday quoted Ehrlichman as telling Krogh: "The President doesn't want any more of this to surface for national security reasons."

The account of the President's alleged attempt to prevent release of the Justice Department information on the Ellsberg burglary, first reported by The New York Times yesterday, was confirmed by five sources, among them officials at the White House and the Justice Department, as well as lawyers involved in the Watergate case

All the sources provided essentially the same account and variously described the President's action as "an attempt to keep the lid on" and "a message that he didn't want this thing to surface." All confirmed Ehrlichman's action as well.

One White House official, who said he was not familiar with all the facts surrounding the matter, said he believed the President acted out of "genuine concern about national security."

The Post's sources said the President's interest in the matter began on April 15, when he was informed by Deputy Assistant Attorney General Petersen that the Watergate prosecutors had prepared a memorandum detailing the involvement of two of the convicted Watergate conspirators in the Ellsberg break-in. The memorandum was to be submitted to the judge in the Pentagon Papers trial.

At that time, the sources reported, Mr. Nixon urged Petersen for "national security reasons" not to forward the memorandum to the Los Angeles court where Ellsberg is on trial for leaking the Pentagon Papers to the press.

Petersen, in the words of one source, "knew he couldn't live with the situation" if he withheld information that the psychiatrist's office had been broken into by a team supervised by Watergate conspirators E. Howard Hunt Jr. and G. Gordon Liddy.

After two days, all the sources reported, Petersen, a career civil servant praised by colleagues for his record of integrity, sought assistance and advice from then Attorney General Richard G. Kleindienst.

Kleindienst, the sources said, agreed with Petersen that it would be improper to follow the President's recommendation and said he would personally take the matter to Mr. Nixon.

When Mr. Nixon was confronted with Kleindienst's arguments that the material must be forwarded to the judge in the Ellsberg trial, the President relented and the memo was sent, the sources said.

On April 26, the government prosecutor in the Ellsberg case submitted the memorandum to Federal Judge W. Matt Byrne Jr. The next day, the judge released the information about the burglary at the psychiatrist's office, causing a furor at the Ellsberg trial. The judge also ordered immediate government inquiry into the circumstances of the burglary, which reportedly angered some officials at the White House and the Justice Department.

That afternoon, Ehrlichman was interviewed by the FBI at his White House office and told agents he had been responsible for ordering a secret White House investigation into the background of Ellsberg. Ehrlichman also told the agents that the investigation was headed by his deputy, Egil Krogh, and David Young, who resigned three weeks ago from his position as a National Security Council aide assigned to Ehrlichman's office.

On Sunday, April 29, President Nixon asked Richardson to replace resigning Attorney General Kleindienst as a means of restoring confidence in the Justice Department and to preside over the department's Watergate investigation.

Richardson, The Post's sources said, was told by the President that he would have "an absolutely free hand" in supervising the investigation. At this point, the sources told slightly differing versions. All, however, agreed that the President also told Richardson—at a minimum—that certain "national security matters" should remain secret in the Watergate investigation.

"Nixon told Richardson to keep the Pentagon Papers out of the Watergate investigation," one source said flatly.

Another said: "It wasn't that explicit; in fact, Richardson at first wasn't completely clear about the implications of what the President said. It was vague, but the message was that the President didn't want some national security matters disclosed in the investigation."

The next night, in the President's television address to the nation on the Watergate affair, Mr. Nixon said of Richardson: "I have given him absolute authority to make all decisions bearing upon the prosecution of the Watergate case and related matters . . . Whatever may appear to have been the case before . . . justice will be pursued fairly, fully and impartially, no matter who is involved."

Shortly before the President spoke, however, Ehrlichman conveyed to Krogh what he described as "a message from the President," according to The Post's sources.

"Ehrlichman said the President didn't want any more to surface about the Ellsberg investigation," one source said. "He (Ehrlichman) was emphatic that he was speaking for the President."

Specifically what the President did not want disclosed, the sources said, was Krogh's knowledge that the CIA had provided assistance in the break-in of the office of Ellsberg's psychiatrist, and other activities by the White House in trying to determine the source of news leaks deemed harmful to the administration.

On the same Monday that President Nixon was working on his Watergate speech, the sources said, Richardson lunched with Krogh, who described the presidential message conveyed by Ehrlichman.

Krogh also told Richardson all he knew about the White House operation aimed at Ellsberg and that he (Krogh) "was driven by a moral compulsion that this was the right thing to do, not to cover it up but to tell all and stand the consequences," according to one source.

All the sources reported that Richardson at this point became adamant about avoiding the President's request to prevent release of information surrounding the Ellsberg operation.

"Richardson told Krogh that he had already gotten the message from the President and made it clear he wasn't going to abide by it," one source said. "He made it clear he intended to countermand the President and just would not obey. He said he would just not heed that order."

Another source said Richardson told Krogh: "I'm not going to participate in a cover-up because it will destroy my role in the Watergate investigation . . . The truth has got to come out."

One of the sources suggested that Krogh's remarks triggered Richardson's recollection of what he had been told by the President regarding "national security matters" and said that Richardson suddenly "expressed horror."

Following the meeting with Krogh, the sources said, Richardson discussed the matter with Assistant Attorney General Petersen, who told him of the President's earlier action in attempting to prevent release of the burglary information.

Petersen, one source said, told Richardson that "this has to be straightened out and that he (Petersen) couldn't live with what the President wanted to do. Henry asked Richardson for help and Richardson backed him up."

Both men, all the sources reported, decided that they would have nothing to do with the advice tendered by either the President or Ehrlichman and conveyed their decision to Mr. Nixon.

Exactly how the message was conveyed could not be determined, but one source said Richardson personally discussed the matter with the President and that Mr. Nixon agreed that there should be no further attempts at preventing release of the Ellsberg material.

All of the sources said that at no time did Mr. Nixon suggest any reason except "national security" for preventing release of the information.

On Thursday, the White House delivered guidelines to Krogh expressing the White House position that witnesses testifying in Watergate proceedings "are restricted from testifying as to matters relating to national security."

Krogh, who received a copy of the guidelines, signed an affidavit the next day detailing his knowledge in which he acknowledged full responsibility for the break-in at the office of Ellsberg's psychiatrist.

Secretary RICHARDSON. In any event, this presumably would have had to have been at a stage antedating Mr. Ehrlichman's own disclosure, which had been, as it turned out, the previous Friday, or before I had been approached at all about accepting the Attorney Generalship.

Senator KENNEDY. Well, certainly, that is the effect in terms of timing, as you have mentioned. But I am interested actually in the conversation. Could you in any way relate to the best of your ability the conversation that took place between Mr. Krogh and yourself?

Secretary RICHARDSON. Mr. Krogh, as I said, was concerned with what he ought to do.

Senator KENNEDY. Could we get that somewhat more precisely, about what the alternatives were that he was considering?

Secretary RICHARDSON. He was considering such alternatives as making a public statement, being brought before a grand jury, filing an affidavit with the court, and whether there were any inhibitions on his doing this deriving from considerations of national security. He certainly had the impression that there were some such constraints. He felt that he ought to make a full disclosure by some process.

As I said, since I might shortly thereafter find myself in an adversary relationship to him—of course, I had no idea, when he asked to see me, what it was going to be about—I made clear to him that I did not feel that I could advise him whether to disclose or by what means, and I asked him not to tell me anything about it—this was by way, in effect, of warning him about his rights—not to give me information about what he had done that he was not clear in his own mind that he wanted to give or that he had not given to others.

So he then proceeded to tell me about what he knew about the Ellsberg break-in in substantially the terms and the language that he has since used in his affidavit.

Senator KENNEDY. After you told him not to tell you, counseled him not to tell you, he went ahead and told you?

Secretary RICHARDSON. No, I told him not to tell me anything that he had not already told others or that he was not prepared to, or about which he was not confident on the basis of his own perception of his own interests and in the light of any advice that he had from counsel. He then, in effect, elected to repeat to me what I gathered also by that time he had told others and what he has, in fact, since stated in his affidavit filed with the court.

Senator KENNEDY. Did he indicate to you what constraints he felt he was under? Did he spell that out in his conversation with you?

Secretary RICHARDSON. As I say, he was worried about the problem of national security. He had understood that this so-called "plumbing" operation he was involved in was one that concerned national security—set up, I think, as well established by now in the public record, including his own confirmation hearings for appointment to the Department of Transportation, to plug leaks; but it identified sources of leaks, and this is how it came to be known as a "plumbing" operation, and there was a concern surrounding this that had national security implications. At least, this was his perception of it.

Senator KENNEDY. You mean, you had the impression that because of his involvement in the break-in, he thought that that was a national security question, too? I mean, is that the impression he was trying to leave with you, that he thought because he was to testify about

that particular matter, and only that matter, that he was somewhat confused or he felt some kind of sufficient restraint from a national security point of view where he would have to come to talk with you about it?

Secretary RICHARDSON. The alleged purpose of the break-in, as he described it to me, was to find information that in some way would shed light on the series of leaks that had taken place up to the point leading to the establishment of the plumbing operation itself.

Senator KENNEDY. Could you be any more specific about what particular part of his operation he thought was violating national security?

Secretary RICHARDSON. His operation was?

Senator KENNEDY. About what part of his operation was actually violating national security?

Secretary RICHARDSON. It was not a question of the violation of national security by his operation. His operation, as he perceived it, was designed to protect the national security by identifying sources of leaks that had been prejudicial to the national security. So as he saw it, at least as he described it to me, the break-in itself had been designed to further the objective of finding out about leaks.

Senator KENNEDY. And he thought that if he revealed his involvement in it, it somehow might violate, I think what you said was the general injunction about national security that had been laid down, is that correct?

Secretary RICHARDSON. Yes. As I said, by the time he actually saw me, it had been recognized, apparently, that that was not a sufficient basis for nondisclosure in that case.

Senator KENNEDY. Who had set out the criteria for the national security in the White House about this operation? Did he indicate that to you?

Secretary RICHARDSON. He had evidently been told at the very beginning when this was set up that its purpose was to further national security interests and that it should be kept on that account highly confidential.

Senator KENNEDY. Did he, at any time during the conversation, indicate to you that Mr. Ehrlichman had advised him not to tell the whole story, or any part of the story?

Secretary RICHARDSON. I do not recall his saying that. He certainly had from some White House source a feeling that disclosure by him would be inconsistent with ground rules then in effect, but I cannot recall and I do not remember asking from what source he got that direction.

Senator KENNEDY. Could it have been Mr. Ehrlichman?

Secretary RICHARDSON. It could have been Mr. Ehrlichman, and certainly, the establishment of this operation in the first instance was one that was known to the President and which was designed by him to find out how and by what routes information was being disclosed in connection with a number of things like the SALT negotiations, for example, that were matters of considerable concern.

Senator KENNEDY. Just so that I can better understand, you said that he related to you that some White House source had told him not to relate everything, or words to that effect? The best that you can, could you tell us exactly what he said on that? That some White House source said "I should not tell everything"?

Secretary RICHARDSON. I know that he believed that there were constraints generally applicable to the activities of the so-called "plumbing" operation, including this break-in. I think he believed that there were genuine national security implications in this situation, and he was, in effect, coming to me for personal advice which, as I have said, I did not think I could give. What I did try to convey to him was a general attitude toward what seemed to me the overriding importance of full disclosure in the context of the Ellsberg proceedings.

Senator KENNEDY. But did you get the impression that other than the general injunction which you have already mentioned earlier in response to the question, and beyond the general constraints applicable, that there was a White House source that told him that it was better not to tell all that he knew about this?

Secretary RICHARDSON. I do not—I cannot honestly say that he had been told with respect to this specific situation or this particular context not to do so, because——

Senator KENNEDY. Well, what did the White House——

Secretary RICHARDSON. Because the President had already, by that time, directed disclosure to the Ellsberg judge, Judge Byrne. So the question then was what was the right thing to do in the immediate circumstances.

Senator KENNEDY. Of course, you did not know that at that time, did you, about Ehrlichman's statement to Judge Byrne?

Secretary RICHARDSON. I did not know about Ehrlichman's statement. I did know in general that the President had directed disclosure of the White House involvement in the Ellsberg break-in, because the President told me he had directed that disclosure when I talked with him on the previous Sunday.

Senator KENNEDY. In fairness, Mr. Richardson, I would like to read the appropriate part of this story and get your reaction:

> The sources reported that the President urged Attorney General-designate Richardson and Deputy Assistant Attorney General Petersen, who had been supervising the Watergate probe, not to provide the information on the grounds that it might adversely affect "national security." The President's advice was rejected by both men, one of whom was described as "horrified" and the other as "deeply shaken" by Mr. Nixon's action.

Secretary RICHARDSON. That is not accurate, as far as my memory of the situation is concerned. The only communication I had with the President on this subject was when he told me on Sunday that he had directed information to be filed with Judge Byrne. I had no communication with him or from him after that. And there was never any suggestion that came to me that disclosure should not be made.

Senator KENNEDY. Well, were you aware whether it came to anybody else?

Secretary RICHARDSON. No. I do know that before, for some period before the decision to give information to the court had been made, there was a kind of blanket groundrule or injunction with respect to disclosures with regard to the plumbing operation, including the Ellsberg case, or so I understood from Krogh, and I have also since learned that from other sources as well. But from Sunday——

Senator KENNEDY. Which Sunday is that?

Secretary RICHARDSON. A week ago Sunday, when the President asked me if I would be willing to have my name submitted to the Senate as Attorney General; from Sunday to date, no one, neither

the President nor anyone acting on his behalf, has suggested that information on this subject be withheld, on national security or any other grounds.

Senator KENNEDY. Why do you think Krogh came to you, if it was just a question of the national security implications of this? Why would he have come to you? Can you indicate any other reason?

Secretary RICHARDSON. No. As I say, he had evidently made up his mind that he ought to make this disclosure. It was a difficult decision for a person in his situation, knowing that in doing so, he was thereby admitting his participation in a violation of the California law. But he had, as far as I could see, already crossed that bridge and the only remaining concern he had was whether, if he made this disclosure, he would in some way be prejudicing what he perceived to be or had been told were national security concerns. My own view was, and I think the attitude I sought to convey to him was, that I thought that the public interest would be better served by disclosure than any conceivable or alleged national security aspect of this matter could be.

Senator KENNEDY. That story in the Post this morning alleged that even the President himself had attempted to try to withhold information. Are you ready to categorically deny that? I mean just in fairness to the way this story was presented and your name was mentioned?

Secretary RICHARDSON. I cannot categorically deny any aspect of it antedating a week ago Sunday. I can't say, and I have no knowledge of what may have been said before that about the disclosure or nondisclosure of any aspect of this. I can say that from that date forward, I saw no indication that the President took any action, or certainly not to me or through anyone else to me, that suggested that he was seeking to prevent or to constrain this disclosure.

I did have the understanding that the President believed that with regard to the effect of the plumbing operation generally there were genuine national security concerns and that constraint on that account ought to be applicable to activities under that heading. But that was a point of view, so far as I am aware, that antedated the President's own understanding that the prosecution of the Ellsberg case itself might be tainted by the break-in, and as soon as he became aware of this, he directed or approved the disclosure to the court.

In other words, what I am saying in essence is that it was my understanding that this was a general activity believed to be subject to restraints on disclosures for some considerable time—presumably from its inception up until some time not long before the second memo from the President. But by that time, in this specific context, initial disclosures had already been made.

Senator KENNEDY. Did you have anything to do with the lifting of the lid, so to speak, in terms of the disclosures themselves? Or that general injunction?

Secretary RICHARDSON. Well, we have already been over the ground with respect to Krogh. I had nothing to do with Ehrlichman's statement filed with the court, which, as it turns out, had already been filed the previous Friday. I did have something to do with a general directive to FBI agents to pursue the taking of depositions from all individuals who had been identified as having anything to do with this. Several of them had been named in the Ehrlichman affidavit, which I first learned about, I guess, perhaps Wednesday, but after the conversation with

Krogh. And my part in that was in consultation with Assistant Attorney General Henry Petersen and FBI Director Bill Ruckelshaus to assure that the FBI agents pursued the taking of these depositions as rapidly as possible so that the information could be filed with Judge Byrne.

Senator KENNEDY. You indicated in an earlier exchange that you understood the President felt there were national security implications surrounding the whole plumbing operation and that there were general constraints which were applicable and that at some time, the President lifted those restraints as it related to the plumbing operation. Can you tell us to the best of your knowledge when that was done and whether, at any time while the constraints were applicable or in force, any attempts that you know about, were made to prevent information from getting out and appearing in court of law?

Secretary RICHARDSON. The only real knowledge I have of this is that the decision to file information about White House involvement in the Ellsberg break-in was made during the week following April 15. I am not sure what day. It was around the middle of the week, and it was based on a recommendation to the President by Attorney General Kleindienst and Mr. Petersen.

Senator KENNEDY. Were you involved in any way in that circumstance?

Secretary RICHARDSON. No; I had no inkling of any role in all of this until I was called by Secretary Rogers a week ago last Saturday and by the President the following day. In fact, I had been too busy at the Department of Defense even to follow all of this very closely in the newspapers

Senator KENNEDY. That was made sometime during the week of the 15th, was it?

Secretary RICHARDSON. Yes.

Senator KENNEDY. And Krogh came to see you the week of the 29th?

Secretary RICHARDSON. Yes, I guess that is so.

Senator KENNEDY. That was 2 weeks after the constraints were lifted?

Secretary RICHARDSON. It was 2 weeks after a statement had been filed with the court dealing generally with White House involvement in this. I think the question of what individuals would make specific disclosures to the court from that point took awhile to get across, and as late as a week ago today, the actions of FBI agents in pursuing individuals whose names were gradually turned up as having been involved in this in some way was still an issue. At any rate, that was the first step, apart from the conversation with Krogh, in which I had any direct part.

Senator KENNEDY. Senator Mathias, I just wanted to get into this one area that I indicated while the other members were here. I do not know whether there is something you would like to develop on this particular matter that we have gone into?

Senator MATHIAS. No, not at this time.

Senator KENNEDY. Otherwise, we will recess.

Senator MATHIAS. Thank you very much, Mr. Chairman. I will reserve my questions for tomorrow.

The CHAIRMAN. The committee is recessed until 10:30 tomorrow.

[Whereupon, at 5:20 p.m. the committee was adjourned until Thursday, May 10, 1973, at 10:30 a.m.]

95-389—73——3

NOMINATION OF ELLIOT L. RICHARDSON TO BE ATTORNEY GENERAL

THURSDAY, MAY 10, 1973

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to recess, at 10:35 a.m., in room 2228, Dirksen Senate Office Building, Senator James O. Eastland (chairman) presiding.

Present: Senators Eastland, Kennedy, Bayh, Tunney, Hruska, Scott, Thurmond, and Cook.

Also present: John H. Holloman, chief counsel, and Francis C. Rosenberger, professional staff member.

The CHAIRMAN. Let us have order.

Senator KENNEDY. Good morning, Mr. Secretary.

TESTIMONY OF ELLIOT L. RICHARDSON—Resumed

Senator KENNEDY. At the time that Attorney General Kleindienst resigned, he wrote a letter of resignation and I would like to read to you just one sentence of that. I am interested in your reaction to it—whether it establishes the kind of standard that you would want established, and how you view your own situation, if you do agree that that is a reasonable standard.

He stated that:

> Those disclosures informed me, for the first time, that persons with whom I had had close personal and professional associations could be involved in conduct violative of the laws of the United States. Fair and impartial enforcement of the law requires that a person who has not had such intimate relationships be the Attorney General of the United States.

I am interested in determining whether you agree that that is a fair rule or fair standard to establish?

Secretary RICHARDSON. I think it needs to be understood, Senator Kennedy, in the context of Mr. Kleindienst's personal situation and his personal feeling about it. Disqualification in any given situation is essentially a personal matter. I do not think it is possible to adopt abstract standards. Even these terms that he has used in the sentence that yon quoted—"close personal and professional associations," "persons with whom I have had intimate relationships"—reflect his sense of the closeness and intimacy of those relationships and the bearing they had on his ability to be independent in the conduct of his responsibilities as Attorney General which is, I think, an essentially personal thing. So far as I am concerned, and this is a matter as to which I have

searched my own conscience, I do not feel that I have had relationships with anyone involved in this case with the degree of closeness or intimacy that would impair my ability to do the job that I would be undertaking to do.

I do think that the situation is one in which confidence can be enhanced by a special prosecutor. I do believe that if I were the prosecutor, I would do it and do it right, but I do not, in fact, intend to be the prosecutor. I intend simply as Attorney General to retain a degree of ultimate responsibility, as I said yesterday, that would, however, not interfere with the opportunity of a special prosecutor to exercise independent judgment.

Now, it is this combination, both of my own sense of my ability to be objective and fair and to carry out without fear or favor the obligations of the office, combined with my intention to be associated with a special prosecutor of independent integrity and recognized stature which leads me to believe that this job can be done as it should be done.

Senator KENNEDY. That standard which you have outlined here would apply to the names which have commonly appeared, I imagine, in the newspapers. Of course, it is difficult to look down the road as to who might come up on the horizon. But as I gather from what you have stated here, both in relationship to the particular people who have been mentioned in the newspaper reports or, for that matter to any other names that may come up, you are satisfied that you can still fulfill your responsibility?

Secretary RICHARDSON. Yes; yes, sir, I am.

Senator KENNEDY. Probably no task facing you during these next few days is going to be as significant and as important as the selection of the individual who will serve as the special investigator—to such a great extent, I think, that the ability to convince someone to assume that responsibility will be determined by the kind of support and authority that he is able to receive from you or, if it is necessary, from additional legislative enactment. In your statement last Monday, you indicated that you would give him "all the independence, authority, and staff support needed to carry out the tasks entrusted to him." Then yesterday, I think in your exchange with Senator Hart, you indicated that you would retain at least the ultimate and final responsibility. You had indicated in your Monday statement that he would be reporting to you and only to you, and then yesterday you indicated a strong commitment that you would bear the ultimate and final responsibility for his actions.

What I would like to do this morning, if we could, is just find out whether this is really a semantic difference or a substantive one. I think that is going to be absolutely essential to delineate before one could expect that you would be able to get the kind of prosecutor that is essential to do the job. So I would like to just review some matters to which I am sure you have given thought to see if we cannot find out whether there really is a difference or whether it is a semantic difference, a distinction without a difference.

On the question of the powers which you intend to grant to the special prosecutor, will the prosecutor be able to grant immunity freely in the development of his prosecution, or will he have to talk with you and consult with you about whom he will grant immunity to?

Secretary RICHARDSON. No, he would not have to talk with me in

order to grant immunity. The special prosecutor would be given charge of the case, leaving open for the moment just what the area of the case is. I would expect, as I said yesterday, however, that he would, in general, keep me informed of what was going on, that he would consult with me in situations in which he felt that a tough call had to be made or as to which he wanted my judgment, that he would be available to hear any thoughts or suggestions I had.

I agree with you that the kind of person we are talking about enlisting for this role would have to feel a sufficient degree of independent authority to justify his taking it. And to some extent, perhaps, we are talking about a semantic difference. We are talking, at any rate, about what I have referred to as the ultimate responsibility of the Attorney General under the law. We are talking at the same time about the practical responsibility of any person who would undertake this special assignment.

I just do not really believe that in practice, the kind of person we are talking about and the kind of person I think I am—are going to deal in a kind of way that involves any suggestive pressure on my part. First of all, I would not do it; second of all, if he felt that I was doing it, he ought to quit. That just is not going to happen.

Further, I would suggest, consistent with my previous suggestion to the chairman and to the committee, that it may wish, and I think it will wish, to talk with this man. By that time, of course, he will have had to develop his own specific understanding of the terms and conditions under which he has taken the job and the committee would then have an opportunity to satisfy itself further on that score in direct discussion with him.

I might add that I have been developing what you might call a more specific set of conditions and understanding under which he would work. I have not tried to put it in final form because I thought that this individual ought to have some say about exactly what is said. I have taken into account, for example, the language of the Stevenson resolution and there is almost nothing in the Stevenson resolution that I would have any problem with, except this one that we keep coming back to having to do with the characterization in some way of what would seem to be the ultimate authority that should be preserved in the Office of the Attorney General, whoever he is.

Senator KENNEDY. Well, I think this has become the sticking point—the ultimate authority and how it relates to what I imagine would be the day-to-day conduct of the investigation itself. In other words, any time that the special prosecutor is interested in granting any immunity, he will feel that you would at least expect him to come and consult with you.

Secretary RICHARDSON. No, not necessarily. If he felt clear that it ought to be done, he would have the authority to do it.

Senator KENNEDY. Well, are you going to expect him, if he does not desire to do so, to come and consult and inform you, or will he be able to go ahead and extend the immunity himself without that?

Secretary RICHARDSON. He would be able to go ahead and do it. I would expect him to tell me that he had done it or intended to do it. But I would not say to him that you have to have my approval. He does not technically have to have it, I guess, as the language of the statute may indicate.

Senator KENNEDY. He would not be required to consult even with the Assistant Attorney General then?

Secretary RICHARDSON. Well, I would not think this man would want to have an Assistant Attorney General interposed as a layer between himself and the Attorney General.

Senator KENNEDY. Well, in other words, are you going to have to sign all the immunity applications? Or are you going to ask us to give some kind of legislative authority to permit him to grant the immunity?

Secretary RICHARDSON. You know, I think in the meanwhile, as I said yesterday, he could expect that I would automatically provide the approval that is required by the statute, which is essentially a pro forma matter. At any rate, that should not be a sticking point, if it is desirable to have a legislative change.

What I am talking about here is the question of whether I am the Attorney General of the United States or not, really. The statute itself is quite clear about this. I do not think that unless you amend the law creating the position of Attorney General, there is any way that I could legally give any special prosecutor final authority.

This really is not involved. The practical aspects of it, it seems to me, are going to be such that this committee and the American people can and should have confidence in him. As I said a moment ago, you will have the opportunity for further assurance on that score at the point when you do have the hearing for the special prosecutor himself.

Senator KENNEDY. Well, we are trying to find out what representations you are going to make to the various candidates——

Secretary RICHARDSON. Yes.

Senator KENNEDY [continuing]. As to the nature and scope of their authority. We will, as you pointed out yesterday, have the chance to talk with the nominee about his understanding, but what I am trying to find out is what you are representing to them as their range of authority.

Secretary RICHARDSON. Yes, I think that is a very pertinent inquiry and I am trying to answer that.

Senator KENNEDY. You have indicated that you would want to know which individuals would be granted immunity. Why?

Secretary RICHARDSON. I would not require advance notice in the sense that I would insist upon the opportunity to veto, but I would want to be kept informed in general of what was going on.

Senator KENNEDY. For what purpose?

Secretary RICHARDSON. Because of what, as I said a moment ago, seems to me the ultimate responsibility I would bear, the ultimate accountability I would have for the fairness and integrity of what was done.

I think the American people would have here what is essentially an insurance policy with three mutually reinforcing clauses. The first is the confidence, whatever degree it may have, in my own integrity and responsibility. To whatever extent that needed reinforcement, it would be reinforced by the specific terms under which the special prosecutor operated—this is what we are talking about now. And the third, and I think in many ways most important of all, is the integrity and character of the special prosecutor himself. That is a three-plied policy in which I think people would be and should be justified in having full confidence.

Senator KENNEDY. But do you think that as far as the American people are concerned, the ultimate responsibility and accountability for the investigation should lie with the Attorney General or with the special prosecutor?

Secretary RICHARDSON. I think that it is a somewhat artificial question in terms of any issues affecting the integrity of the process, because while I have been insisting and would insist that as Attorney General, I retain ultimate responsibility for the Department of Justice, including whatever goes on, the special prosecutor would have independent authority and he would be a man of independent character. So should there arise a situation in which there was a showdown as to doing it one way or doing it another, I do not believe that there is a 1 percent chance of that happening. Nonetheless, in that case, any individual deserving to be given this role would himself then feel some responsibility of his own, an ultimate responsibility of his own, to bring the matter to public attention by whatever means he saw fit. He would certainly understand that from the beginning. Indeed, I think it goes without saying.

Let me make a distinction which may help, Senator Kennedy. I have been talking about ultimate responsibility. That is a word, I think, that should be distinguished from the authority or the responsibility to do a job. I am saying that as Attorney General of the United States. I cannot duck and would not wish to duck ultimate responsibility for the way these cases are conducted. That does not mean that I want to stick my fingers into the day-to-day conduct of negotiations and prosecutions when I have enlisted for that purpose an individual in whom I had confidence, in whom by that time it would have been established that the Senate had confidence. I am not going to tell him how to do his job, but I am going to say to him, I stand back of what you are doing, and that is an aspect of the exercise of ultimate responsibility, as well as I am going to say to him, "If I think you are going off the deep end, I am going to tell you; and if you think I am wrong, at that point, we will have reached a crisis, and you can decide what you are going to do."

I do not think that is going to happen, but I need to be in a position where, if I take this job at all, I have what I refer to as "ultimate responsibility." I think that can and should be distinguished from the authority to do a job for which a person has been specifically recruited and for which he knows that the Senate and I repose in him full confidence.

Senator KENNEDY. Now, say he views a particular matter, whether it is the question of immunity or the choice of individuals for prosecution or the handling of some investigation, in a certain way, and you view it in another way. What are his remedies? Is his remedy just to go public, as you mentioned here; or if you come to some kind of impasse, will it go his way rather than your way?

Secretary RICHARDSON. As a practical matter, on issues of judgment, it would go his way, for a whole lot of reasons, including the intimacy of his knowledge of the situation, and including this fact that I had asked him to do a job and repose confidence in his ability to do it.

So if he said, this is the way I think it should be, I am sorry, Mr. Attorney General, but I think you are wrong, I would back him in his decision. It would be only an extreme case. As I said yesterday,

any recommendation or any judgment he made would have great momentum for respect as far as I was concerned. I would not, merely because I had a differing opinion, intervene or overrule him.

Senator KENNEDY. Suppose we are talking about the extreme case.

Secretary RICHARDSON. The extreme case is the 1 percent possibility that you referred to a moment ago, and in that event—there would be a situation in which I thought he was egregiously wrong, I thought that what he was doing was destructive of the public interest—I think at that point, you know, if it reached that point, there would have to be some kind of parting of the ways.

Senator KENNEDY. You mean you would fire him?

Secretary RICHARDSON. That would be true whether the language of his contract said "final authority" or whatever.

He might resign or I might fire him. I do not know. But I think that it would certainly have by that point reached a situation which would otherwise be untenable.

Senator KENNEDY. In the area of prosecution, will he have the complete authority and responsibility for determining whom he prosecuted and at what location? What I am thinking of is the *Segretti* case in Florida, with the indictment reportedly upon the basis of the testimony given by Benz.

Secretary RICHARDSON. Yes.

Senator KENNEDY. I am wondering if the prosecutor himself will have the ultimate responsibility in deciding who is going to be prosecuted and where this prosecution will take place.

Secretary RICHARDSON. The short answer is "Yes."

In the case specifically of Segretti, we have here an example, I think, of the definition of the scope of his jurisdiction. This is one of the reasons why I think it is important, as I mentioned yesterday to Senator Hart, that he be in the Department of Justice, because it is going to be necessary to assign, in effect, areas of the prosecutor's responsibility, or it may be necessary, depending upon what emerges. The *Segretti* case and the *Watergate* case, I take it, are separable in one sense, although related in others.

I would, just not to leave any doubt in this matter, ask him to take responsibility for the Segretti case because White House personnel were involved. I think that is a basis. It is probably the single most important common denominator in determining what cases he should have.

Might I go back to one point?

Senator KENNEDY. Yes.

Secretary RICHARDSON. You used in one moment the phrase "complete responsibility" and in another, "ultimate responsibility." I do not have much trouble with the phrase "complete responsibility," because I can delegate complete responsibility. I cannot delegate ultimate responsibility.

Senator KENNEDY. Well, I am trying to understand the distinction, and in understanding the distinction, to see whether your definition is similar to the President's, when he said, in his statement to the American people on April 30, that he felt he bore an ultimate responsibility vis-a-vis the Watergate affair because of the particular people that were involved in the White House. This was obviously a very all-encompassing and general statement at the time and the President was

willing to indicate to the public that this was something he was prepared to accept. I'm trying to understand whether you view your ultimate responsibility in that sense and under that kind of general definition, or whether you feel the responsibility to be kept very specifically informed of the development of the prosecution, to be consulted in the application of questions of immunity and the prosecution of the various cases, or to express your view on what definition of executive privilege you would be willing to accept, or about any relationship, perhaps, which this independent prosecutor might have with the FBI?

Secretary RICHARDSON. I do not think I can very clearly respond to your suggested comparison with the President's use of the phrase. I can say that when I refer to being informed, being consulted, having the opportunity to communicate views of my own, I am not saying that I would insist upon being consulted, or do not do it before you check with me. I am talking about a general kind of contact under which the special prosecutor understands that I am available for consultation, that I am free to give him any views I have, and that I want to be kept in general touch with what is going on. That, it seems to me, that much is a prerequisite, really, to my being in a position to say I have ultimate responsibility. It does not mean, however, that I would interfere with the day-to-day direction of his area of specific responsibility.

Senator KENNEDY. Well, would you feel a responsibility to keep the President informed, for example?

Secretary RICHARDSON. No, and indeed, the President has told me that he does not want to be informed, that there is—I think it is clear that in this situation, so far as the conduct of these cases is concerned, the relationship between myself and the Department of Justice, the special prosecutor, and the White House should be an arm's length relationship.

Senator KENNEDY. Well, say the prosecutor found some individual who was in a sensitive position and who was involved in Watergate. Would you feel then that the special prosecutor should inform the President or would you feel that you should inform the President?

Secretary RICHARDSON. I am not sure that the special prosecutor should inform the President, and it may be that it would be undesirable to inform the President at all. My understanding of my responsibility alone, quite apart from the special prosecutor, is that, as I said at the very beginning and as I said in the announcement that I intended to appoint a special prosecutor, the President has said that I am to have authority over these investigations and prosecutions, that I am to press them to a conclusion no matter who is hurt. I would do that even if I did not have a special prosecutor. But I believe it is better to have one.

For one thing, the Attorney General has much too much to do, as you well know, to be in a position of day-to-day direction of detailed investigations. In any event, I do agree that there can be a contribution to public confidence through the appointment of a special prosecutor, as I have previously said. There would be no understanding or requirement or expectation on the part of the President that he would be informed or notified of any action, no matter who was involved.

Whether or not to do it in a given case would have to be an ad hoc judgment and in that respect, I would give great weight to the views of the special prosecutor himself.

Senator KENNEDY. You would give "great weight," but would he have the final say or would you?

Secretary RICHARDSON. I think I would have to have final say on that one.

Senator KENNEDY. You would reserve the right to inform the President or the White House about some individual that might be in a sensitive position or continue in a responsible position who might be involved in some aspect of the case? You would reserve that right to yourself?

Secretary RICHARDSON. I think if it was a matter that he brought to me—he would not have to bring it to me in the first instance.

Senator KENNEDY. Well, if he thought that since someone is continuing to serve in a responsible position, the President ought to know about it?

Secretary RICHARDSON. If that were his recommendation, this would be no problem.

Senator KENNEDY. In the Stevenson resolution, in part D, it says "assurance that he will not be subject to removal from his position except for malfeasance in office." Just a few moments ago, you gave what you felt would be the conditions which might serve to either fire or remove any special prosecutor. Does the Stevenson language, "except for malfeasance in office," fall within your definition or your understanding?

Secretary RICHARDSON. Yes, I may just say for the record at this point that I have no problem with any of the Stevenson resolution in general thrust. There are a number of cases in which there would, I think, be some difficulties administratively, which we do not need to go into now. But in this particular respect, I think that this assurance is valid.

I might add that if I were writing it, I would add the words "malfeasance or gross incompetence." I cannot conceive that either one would over occur unless the man had a mental breakdown or something. We would be choosing an individual, in the first instance, from the whole of the United States who had established a recognized reputation for competence in the first instance and for probity in the second and, of course, gross incompetence and malfeasance represent the opposite, you might say the extremes in the lack of the very qualities he has to have to begin with.

Senator KENNEDY. But in the provisions of the Stevenson resolution are there any powers you feel the special prosecutor should not have, other than those which you outlined that are administratively going to present some difficulty?

Secretary RICHARDSON. No.

Senator KENNEDY. As far as the scope of authority goes, when you talk to any of these potential prosecutors you are willing to indicate that that represents, at least in part or in whole—I do not know whether you want to make other additions to it—the kind of authority that a special prosecutor would have?

Secretary RICHARDSON. I think it is in general subject to, as I said, some administrative problems. I think it is a very good outline of the kinds of responsibilities and assurances he should have.

The sole problem I have with it is the one we have been talking about at some length and I would expect to use an outline like this with perhaps some additions or modifications.

I am not quite in a position to submit it to the committee this morning. I think it should be discussed with the individual. But when he comes before you, I think he ought to have in hand in writing an outline of his responsibilities and an enumeration of assurances which will be quite close to this, but which may have some additions.

Let me give you, lest there be misunderstanding, an example of an administrative problem. Final authority over the selection of an adequate staff of attorneys, investigative and other personnel, answerable only to himself—that presents no problem except to the extent that literally construed, he would be able to co-opt an attorney engaged in an important antitrust matter, for instance. I think he should have final authority over his staff in the sense that he should not have to take anybody he does not want and he should be able to have anybody he does want, provided he can get him in the sense that the man is available.

Again the clause about defray all expenses seems to imply that there has been an earmarked amount, and I think it would be difficult to earmark. But on the other hand, I do not disagree with the sense of it. I think he should have the understanding that he would have available whatever financial support is needed to do his job.

Senator KENNEDY. On that, is it his view of what he thinks he needs, or is that your view of what you think he needs?

Secretary RICHARDSON. Well, I would say his view in the first instance. I do not think it would be likely that there would be any argument about this. Certainly, he would have to feel that nothing he intended to do was hampered by a lack of funds and he would be entitled to that assurance.

Senator KENNEDY. Let me ask how you perceive the relationship between the special prosecutor and the FBI? Are you concerned at all that Mr. Ruckelshaus had worked in the Justice Department for a period of time with a number of the figures that have been identified in this particular event? Do you believe that any arrangement that would be made with the FBI ought at least to include a general order within the FBI itself that any of the requests made by this special prosecutor should receive the immediate attention of the FBI? Do you think Mr. Ruckelshaus ought to be informed or kept informed?

Secretary RICHARDSON. Yes, I think one of the things that should be done is that there should be issued a directive to the FBI to extend full cooperation and that the special prosecutor would, in effect, have call upon such agents as he needed.

Senator KENNEDY. Directly?

Secretary RICHARDSON. He would be able and he should have the opportunity, again consistent with any other responsibilities that he might have, to select specific individuals from among the staff of agents whom he wished to have detailed to his investigation.

Senator KENNEDY. Well, then what is his relationship with the Director? Does he have to notify the Director every time he wants some kind of a service performed?

Secretary RICHARDSON. No. My thought on this has been that he would have a kind of strike force, to borrow the term that has been used, or a special prosecution force, and that each of the Assistant Attorneys General, the Acting Director of the Federal Bureau of Investigation, U.S. attorneys, and other officers of the Department would detail such personnel and provide such other assistance to the Special Assistant Attorney General as he may request. Personnel detailed would, for the duration of the detail, be responsible to the Special Assistant Attorney General and ultimately to the Attorney General, but to no other officer of the Department.

Senator KENNEDY. What is this that you are reading from now?

Secretary RICHARDSON. This is a preliminary draft of the terms of the job that I said I had been working on, but which is not final, because I think it should be the subject of discussion with the individual, because, as you correctly pointed out in the beginning, he needs to feel that he has the right kind of support and assurances. But when it is in final form, as I said, I will expect him to bring it before you.

Senator KENNEDY. But as I understand from what you have mentioned, at least from the working paper, after these men are assigned to him within the Department or the FBI, they will be responsible to the special prosecutor and only to him, is that correct?

Secretary RICHARDSON. Yes.

Senator KENNEDY. On the issue of executive privilege, I think you are probably familiar with the general guidelines that have been announced by the Executive Office. I would ask that the guidelines be printed in the record, Mr. Chairman.

[The guidelines referred to follow:]

MAY 3, 1973.

The President desires that the invocation of Executive Privilege be held to a minimum. Specifically:

1. Past and present members of the President's staff questioned by the FBI, the Ervin Committee, or a Grand Jury should invoke the privilege only in connection with conversations with the President, conversations among themselves (involving communications with the President) and as to Presidential papers. Presidential papers are all documents produced or received by the President or any member of the White House staff in connection with his official duties.

2. Witnesses are restricted from testifying as to matters relating to national security not by executive privilege, but by laws (prohibiting the disclosure of classified information (e.g., some of the incidents which gave rise to concern over leaks). The applicability of such laws should therefore be determined by each witness and his own counsel.

3. White House Counsel will not be present at FBI interviews or at the Grand Jury and, therefore, will not invoke the privilege in the first instance. (If a dispute as to privilege arises between a witness and the FBI or the Grand Jury, the matter may be referred to White House Counsel for a statement of the President's position.)

MAY 4, 1973.

The following is a supplement to the Memorandum of May 3, 1973 regarding the invocation of Executive Privilege:

"White House Counsel will be present at informal interviews of White House personnel by Ervin Committee Staff, but only for the purpose of observing and taking notes. Privilege will be invoked by White House Counsel, if at all, only in connection with formal hearings before the Ervin Committee."

Senator KENNEDY. Included in those guidelines—I am primarily interested in paragraph 1. "Past and present members of the President's staff questioned by the FBI, the Ervin Committee, or a Grand Jury should invoke the privilege only in connection with conversations with the President, conversations among themselves—involving communications with the President—and"—this is the relevant part—"as to Presidential papers. Presidential papers are all documents produced or received by the President or any member of the White House staff in connection with his official duties."

Suppose the special prosecutor is not willing to accept that definition?

Secretary RICHARDSON. We would have a legal issue there with respect to how to go about getting the papers. This is an example of the possibility of an adversary relationship that we touched on a little while ago in the context when, as I said, it is recognized that in these matters, there would have to be maintained an arm's length relationship. It is impossible, I think, to know in advance what processes would have to be used. In any event, I would hope that this problem will not arise and from all I have seen and from the President's statements, he intends that whatever should be made public in terms of the public interest in these investigations should be disclosed.

I think it should be noted with respect to these guidelines that the opportunity is reserved in the very last sentence, which says that, "If a dispute as to privilege arises between a witness and the FBI or the Grand Jury, the matter may be referred to White House counsel for a statement of the President's position."

I take it what that means is that in any case where a witness invokes the privilege before the FBI or the grand jury and the special prosecutor believes that it should not have been invoked, that issue has to go back automatically to the President's counsel and the President's counsel or the President himself is specifically given the opportunity at that point to waive it. I would expect that that would, as a practical matter, in most instances, be the result. I cannot say, obviously, just because I do not know, how any given matter would be acted on.

In any event, your question is in effect, suppose special counsel advises that the President decide to stand on the privilege and the special prosecutor believes that it should not be invoked. Then the matter, as I view it, would have to be ruled on by a judge having jurisdiction in the matter.

Senator KENNEDY. Well, within the guidelines to the executive departments put out by the administration in 1969, it gives very broad discretion to the Attorney General:

> If the department head and the Attorney General agree, in accordance with the policy set forth above, that executive privilege shall not be invoked in the circumstances, the information shall be released to the inquiring congressional agency.

It gives very broad authority in this area to the Attorney General and I am interested in what hat you are going to wear. According to the 1969 memorandum, which sets forth the administration's position on executive privilege and which gives you considerable authority to indicate when executive privilege would be invoked, if the special prosecutor comes to you and says, "We think this is being much too

narrowly construed," you would have the rather generous authority to release the material. But which hat are you going to wear?

Secretary RICHARDSON. The 1969 guidelines, of course, were written without anticipation of the kind of situation that we are dealing with here. The assumption of the 1969 guidelines was that the Attorney General was acting as the lawyer for the executive branch in advising the President on an issue of executive privilege. In the present context, the President, with whatever independent advice, including the advice of White House counsel, he may wish to call upon, would have to make the call on whether or not to invoke privilege. In that case, if the special prosecutor believed that the public interest required the testimony of the witness, I would expect, as I said, that he would seek in the court the adjudication of the issue whether, (*a*) the privilege was properly invoked, and (*b*) even if so, whether there was some public interest that compelled, nevertheless, that the testimony be produced.

I will not repeat here, and I do not imagine you want to repeat here, either, the whole colloquy about my relationship to the special prosecutor. This is simply another example of a case in which the judgment and authority of the special prosecutor could be assumed to have, for all practical purposes, complete authority.

The CHAIRMAN. The Chair is going to have to leave for a few minutes. Senator Scott will be recognized next and we will recess from 12 to 2 o'clock.

Senator KENNEDY [presiding]. Those guidelines were reissued, as I understand it, subsequent to March 12, subsequent to President Nixon's statement, which continues to give the Attorney General a major role in actually determining the exercise of the executive privilege. I want to give Senator Scott some time, but I would like to go into just one other area, Mr. Secretary. That is the scope of the special prosecutor's territory.

We talked just a little bit yesterday about the election finance violations. Do you see that that would be included within the scope of the prosecutor's responsibility?

Secretary RICHARDSON. I expect to give him responsibility for any investigations and prosecutions involving violations of the campaign laws where it was alleged or suspected that White House personnel or any major appointee of the administration was involved. I am told that there are some 3,000 campaign law matters now pending in the Department. The bulk of those, it seems to me obvious, should continue to be within the jurisdiction of the Civil Division.

Senator KENNEDY. Well, what about the committee, the CREEP reporting violations? Would they be included?

Secretary RICHARDSON. Yes.

Senator KENNEDY. They would be included in the special prosecutor's responsibility?

Secretary RICHARDSON. Yes, certainly.

Senator KENNEDY. Do you know whether the milk fund case or the Vesco case would be included?

Secretary RICHARDSON. I do not know enough about them.

Senator KENNEDY. You had some association with the Committee for Reelecting the President during the course of the last campaign: did you not? Could you just very briefly outline that relationship?

Secretary RICHARDSON. I was one of the Cabinet officers who, in the role of so-called surrogate, made speeches around the country, appeared on interview programs, occasionally college campuses, and so on. I talked about the achievements of the administration in fields of your interest in the Committee on Labor and Public Welfare and things like that. It was a campaign role which put our best foot forward.

Senator KENNEDY. I know some other Attorneys General that had been involved in political activities as well.

Secretary RICHARDSON. It has certainly not been unknown.

Senator KENNEDY. You have been kind enough to supply to me your scheduling programs which show contact with the Committee to Reelect the President. I suppose the question is, given the fact of your association with the Committee to Reelect the President, what reluctance you might have in seeing that their reporting violations are going to be fully aired by the special counsel and whether you feel, given your association with the committee in the past, whether this presents the kind of problem that was outlined in Mr. Kleindienst's resignation letter.

Secretary RICHARDSON. I would have no hesitancy. Indeed, Senator Kennedy, the implication, of course, in a lot of the questions—I am not speaking in any resentment of this; the questioning has been perfectly fair—but its implication, nevertheless, is that because I have been a part of the administration, or in this case because I was a surrogate and my scheduling was handled by the Committee to Reelect personnel, that I might go easy or I might be tempted to go easy. Actually, my feeling is the opposite. I do not want to get dramatic about it, or melodramatic, but I am among a great many Republicans, including Republican office holders, who feel betrayed by the shoddy standards of morals displayed by people whose activities have recently come to light. So that feeling, at least, puts me in a position where, let's say, it at least compensates for, if it does not more than offset—it should not more than offset, but it certainly in my mind and conscience at least neutralizes—any feeling I might otherwise have arising out of prior associations.

Senator KENNEDY. As was stated by Senator Hart, I do not think that there is anyone on the committee who could possibly doubt your sincerity in that statement or your basic willingness and fundamental integrity to pursue it. I suppose the question is, again as it was raised by Senator Hart, whether the people around the country are going to want to accept your objectivity when they know that you appeared at various functions of the Committee to Reelect the President, that they helped to arrange your schedule and they developed your own appearances through the course of the campaign—and whether people are going to feel that you are going to press this as completely as it should be pressed.

Secretary RICHARDSON. I understand, and I think it is a fair question, and I have tried to answer it as best I can.

I hope I did not leave any imputation that no one has suggested that there have been a lot of very mature, very decent and capable people working for the committee and people with whom my office

dealt or whom I had any contact with who were charged with handling the scheduling of surrogates. Let me put it the other way around: None of them has been suggested to be implicated in any way and we can and must continue to operate on the basis that no one is guilty until so proven.

Senator KENNEDY. Do you also see the inclusion within the scope of the jurisdiction of the political espionage and sabotage and coverup conspiracies as well?

Secretary RICHARDSON. Yes.

Senator KENNEDY. The alleged destruction of the wiretap records of the FBI?

Secretary RICHARDSON. That would have to be included based on what limited information I have had about it.

Senator KENNEDY. And how do you view the grossest kind of wrongdoing or coverup by the high government officials or the misuse of facilities or positions, and so forth? How will you direct the prosecutor to make that information public? Or will you?

Secretary RICHARDSON. I would not attempt to direct him in such a matter.

Senator KENNEDY. How would you guide him? If he comes to you and says he found this kind of information that perhaps does not violate the law, but obviously is just that much short of it. It is the grossest kind of wrongdoing or malfeasance or misfeasance in terms of public trust. What should he do about that type of information? Will he file it with the court or will he be willing to make that public, or what will be the construction or his understanding?

Secretary RICHARDSON. My understanding with him would have to be, or his understanding with me, as in other areas, that his own judgment or recommendations would have to be entitled to very great weight or, as I said before, great momentum for respect. This kind of thing can present, of course, very difficult issues insofar as damage to individuals can be concerned in cases where there are allegations, but where they do not add up to proof, and I do not think any general rule can be laid down. I think it would have to be a matter of balancing public interest at the time, including the interest of the public in full knowledge, with a decent regard for the reputations of individuals.

Senator KENNEDY. The inclusion of activities that were prior to the campaign—the noncampaign activities by some of the conspirators while in government, would that be included as well?

Secretary RICHARDSON. I think so, if I understand what you are saying. I would like just to go back for a moment to a point I made earlier: namely, that it seems to me that given the variety of acts or activities that have come to light lately, the only common denominator that seems to me relevant in deciding what the scope of the jurisdiction of the special prosecutor should be is the involvement of White House personnel, major administration appointees, or, as you have added and I agree, people who were part of the Committee to Reelect.

Senator KENNEDY. Both within the campaign, the CREEP campaign and——

Secretary RICHARDSON. Yes, Senator Kennedy—to put it another way, what is involved here is a situation in which the confidence in the conduct of governmental and political processes has reached a crisis stage. A special prosecutor should be charged with responsibility for

matters that affect that confidence. So this, I think, is in the broadest sense the touchstone that should determine what areas are assigned to him.

Senator SCOTT. Would the Secretary defer for a minute?

I wonder whether the Senator from Massachusetts would let me have 10 minutes? I have been here for 2 days and it is difficult for me to get back.

Senator KENNEDY. I will conclude, Senator Scott.

Mr. Secretary, as I mentioned at the outset and as you have recognized in your willingness to permit or urge the special prosecutor to appear before the committee to outline some memorandum of understanding, you can see why it's important for us to at least be aware of the kinds of responsibilities and the scope and the power of this special attorney, from your point of view and what is being represented to the special attorney himself.

Secretary RICHARDSON. Absolutely.

Senator KENNEDY. I think it is terribly important even in relationship to the kind of special attorney that would be willing to accept the responsibility. It is for these reasons that we wanted to get into these particular matters.

Secretary RICHARDSON. I fully agree, Senator Kennedy, and I welcomed and do welcome the opportunity to respond to these questions. I hope that this colloquy has been useful to the record. I think so.

Senator KENNEDY. Senator Scott?

Senator SCOTT. Thank you, Mr. Kennedy.

Mr. Secretary, we are discussing here at length, as we should, the element of trust. I think you know that I feel that we ought to extend to you as much trust as we do to each other. That is very considerable. We have had your assurances that the special prosecutor will have the approval of the Senate, that the guidelines under which he operates the Senate will have an opportunity to approve. We have quite rightly been discussing the scope and independence of the special prosecutor. I think we are concerned as to what comes out of this process at the end and what we are anxious to clarify is what happens to the report of the special prosecutor.

In other words, at some point, that distinguished American will have been selected after you have consulted with those people you have mentioned and others, including the former Chief Justice of the United States, will make findings, perhaps findings of fact and findings of law, and recommendations. I think the Senate wants to be assured that when, notwithstanding the legal responsibilities which that should place on you as well as the Constitution, and notwithstanding the necessity for you to make available facilities and to continue with consultative assistance, that the report of the special prosecutor will be public, that it will be reported fully to the American people, that the recommendations of the prosecutor will not in any way be interfered with; and that such prosecutor's recommendations, if they lead to prosecution, will proceed normally through the judicial process. I take it that that is what you are trying to achieve, is it not?

Secretary RICHARDSON. Yes, it is, Senator Scott.

Senator SCOTT. Now, the President this morning made it clear to me that he will in no way intervene in the selection of the prosecutor

nor in the conduct of his office, nor in his final report; that the investigation must proceed without fear or favor to the full and complete truth and toward the final fixing of responsibility through the judicial process. That is not a quote, but it is a just paraphrase. I agree with that and I am sure that you agree with it.

I feel that the Senate is being made so integrally a part of this whole proceeding that the American people are going to draw the conclusions that no one will permit the truth to be aborted and that there is no conceivable way by which the development of the full truth can or should be prevented.

We have only one other alternative if we can come to a full understanding of what you and the special prosecutor regard as your civil function. The other alternative would be a statute establishing a new agency, a new prosecutorial system. It would involve bills in both Houses, it would involve hearings, it would involve debate, and then it would involve a long process by which it would be determined who should be selected, individually or in a group, to serve in that capacity. There would be no opportunity for judicial review, there would be no opportunity for the processes of dissent except within that group if it were more than one person. There would be no way by which the personal ambitions of anyone who might have been so selected through the political process could deter him and such a person would be unique in our modern system, it seems to me, after the lapse of 6, 8, or 10 weeks in his selection.

Now, I do not think time is working with us. The events are moving apace. It seems to me essential that we get on with the resolution of this whole dirty business and get the whole truth without any fear or favor to any person anywhere.

I have made the statement I did because I am satisfied that that is the way the President feels about it. I am not quoting him on the special agent or the special law, but as to the rest of it, I am sure I believe him and I hope this committee will move promptly with the confirmation; I hope you will move promptly with the selection of the special prosecutor, and that that person will be of such an identity that the Senate and the American people will instantly recognize his capacity and his character and his competence and trustworthiness. In our system of government, we have to start somewhere in the process of making it work. I think we start with a trusted Attorney General-designate; we start with a trusted special prosecutor; we start with the assurances that the President of the United States wishes a complete, total, absolute and utter investigation to the end, to the truth, and to the ultimate consequences. And I believe that is what the American people want and I would assume that you agree with that.

Secretary RICHARDSON. I fully agree, Senator Scott. I think you have very sensibly, and I think wisely, summarized the situation we are in in a way that has brought to bear its setting as well as the specifics that we have been discussing here today, and I think that has been a very useful contribution to this discussion.

Senator SCOTT. Thank you, Mr. Richardson.

I again make the point because it can't be made too often that no elected public official has been involved with this scandalous affair, that no elected public official has condoned it, that it has been con-

demned and primarily by the members of my own party, that all of us share with you the determination that whoever is guilty should be punished, that there should be no presumption of guilt until guilt has been proved, if it is proved, in a judicial proceeding. So I believe that this committee will find a way to be satisfied that you have not the slightest intention of interfering or interdicting any action by the special prosecutor which would lead him to the preparation of a full, independent, fair and uninfluenced final series of recommendations. That is what I want to be sure of.

Secretary RICHARDSON. You can certainly have that assurance, Senator Scott. Those are the very objectives that I know we all share. Certainly they are the objectives with which I would, if confirmed, undertake the responsibilities of the Attorney Generalship.

Senator SCOTT. I thank you very much, Mr. Secretary.

Thank you, Senator Kennedy.

Senator KENNEDY. In accordance with the chairman's statement, we will recess now and reconvene at 2 o'clock.

[Whereupon, at 11:55 a.m., the committee was recessed until 2 p.m. of the same day.]

AFTERNOON SESSION

Senator BAYH [presiding]. We will reconvene our hearings.

Mr. Attorney General-designate, I once again apologize for this delay to which you have been subjected as the result of the normal legislative process. I know the past few hours have not been the most comfortable hours of your life.

I have been impressed, sitting and listening, as well as going over the transcript, with some of the things that have been said, both on your side of the witness table and on this side of the witness table, which make it rather obvious to me that there is a deep concern and a deep understanding by all of us of the severity of the challenge which presently confronts our basic governmental institutions and the important role which you as Attorney General will play in resisting that challenge and seeing that justice is meted out, that the innocent are protected and the guilty are convicted, and that the public confidence in the entire governmental process is restored.

I have been involved in two or three or four others that at the moment seemed monumental matters before this committee. Indeed, I think the station involved and the issues involved were of significant importance. But the times were different. Issues tend to take on the complexity of the times. We are not only talking about justice and our confidence in the system, but, as Senator Hart has discussed with a certain amount of detail in this and other nominations before this committee, we are also equally concerned about the appearance of justice and public confidence in the system. I am sure that I do not need to discuss in detail the content of the Code of Judicial Conduct with a former practicing attorney and editor of the Harvard Law Review. We both realize that those canons of legal ethics stress the appearance just about as much as they do the letter of the law.

Having said that and having also complimented you, sir, on what I feel has been a direct and sincere approach to the problem which confronts us all, let me try to clarify, at least in my own mind as well as in the record, some of the points which may still be up in the air.

I hope not to replow a lot of the same ground that has been covered by my colleagues, but perhaps we will have to touch on some of it in order to lay the foundation for questions which I might feel are necessary to fill in areas which have not been adequately covered.

It seems that one of the basic concerns or basic differences of opinion which has properly occupied the minds of some of the members of this committee as well as yourself, sir, was the problem of distinguishing between real and meaningful authority and of drawing the lines which have been described on other occasions as complete authority and final authority. I have been searching for a definition that will indicate where the line of complete authority, which you are anxious and willing to grant to the special prosecutor, ends and your final authority to make determinations begins. I have a series of very quick, pointed questions that will attempt to define that a bit.

Would you care to make any comment other than that which you have already made about where you feel the complete authority which you would give to the special prosecutor would start and your final authority would begin?

TESTIMONY OF ELLIOT L. RICHARDSON—Resumed

Secretary RICHARDSON. I do not think I could much improve in abstract terms, Senator Bayh, from what I have said already. I think perhaps it would contribute more at this stage if I did seek to respond as best I can to the series of specific questions which you just mentioned.

Senator BAYH. Let me do that, then, because although we have a rather good picture of the landscape, perhaps we need to put some leaves on the trees.

During general discussions of this authority problem both here and in private, you have sincerely emphasized your intention to free the hands of the special prosecutor. You want to give the appearance of freedom from and lack of influence on the part of those who may indeed be found culpable in the future. But let me deal with specifics.

If all goes well and there are no differences of opinion between yourself, sir, and the special prosecutor, it seems to me that we would not have a problem. So in order to define where the one authority begins and the other one stops, let me suppose there are differences of opinion between you and the special prosecutor in the following circumstances. Then I would like you, for our record, to describe who would have the authority—not in terms of complete authority or final authority, but in terms of who will make the decision.

If there is a difference between you and the special prosecutor as to the nature and the scope of grand jury proceedings, who will have the final determination?

Secretary RICHARDSON. I guess perhaps, Senator, one general observation is necessary. You said, in framing the question, if there is a difference between me and the special prosecutor, who would make the decision. The only answer I can honestly give you to the question as framed in that way is the special prosecutor, because the question implies that it is just a difference and I think I have already indicated that on any question of judgment——

Senator BAYH. Let me rephrase the question, because I am not talking about nit-picking differences here. I think "nature and scope,"

by their very definition, are rather large and encompassing words. Let us suppose there is a significant difference, or several differences, in which the special prosecutor wants to proceed down one avenue of investigation, wants to broaden or narrow the scope, and you on the other hand feel that this is not appropriate. Who will have the final determination with respect to that definition of the nature and scope of grand jury proceedings?

Secretary RICHARDSON. I will feel that if his judgment was reasonably supported and understandable in terms of his more intimate knowledge of the situation on the whole, that his judgment should prevail. I would not in that situation interpose my own.

Senator BAYH. I do not want to nit-pick here, but you qualified the answer and I would like to proceed further.

You said, "If his judgment is reasonable." Who would make the determination as to whether his judgment is reasonable under those circumstances?

Secretary RICHARDSON. I think what has to be expressed here, and I am afraid we do have to get into a kind of generalized statement, is that, as I said earlier, his judgment would have great momentum for respect, somewhat like the reserved power of a court to intervene in governmental administrative proceedings where the administrative agency is behaving arbitrarily or capriciously. If I thought, and I can scarcely imagine that it would be otherwise, that he was acting on a basis that reflected a responsible, professional judgment within the scope of the authority and the jurisdiction vested in him, I would not interpose my own judgment. I would respect his judgment. The decision, therefore, would be his.

Senator BAYH. Well, the qualification that you describe is very closely akin to appellate review, and that is final and determinative. So in essence, you are saying——

Secretary RICHARDSON. Yes, it is. But this is what I have been trying to say about ultimate responsibility as distinguished from, to repeat, the authority to do the job. I would not expect to second-guess him. And it would only be in an extreme situation, which I have just now tried to characterize in terms of the substantial finality of administrative proceedings.

Senator BAYH. Could you give us a specific example that might be more akin to the specific problems we are talking about now?

Secretary RICHARDSON. Yes. I remember when I was U.S. attorney, the toughest problems I had were questions of whether the evidence that I expected to be able to present to a court justified the return of an indictment against a potential defendant. You bring all the witnesses before the grand jury and you know that if you ask the grand jury to return the indictment, they will. You then have the question of whether you should ask for this.

Now, this is a tough call, or it can be, as you know. And you have to call upon your own sense of fairness as well as upon your knowledge of the evidence. Now, in a matter of that kind, I would not think of intervening or influencing the judgment of the special prosecutor. That is quite a practical example of his actual responsibility as to which I would not second-guess him.

Take another, given the present state of the law, the power to immunize a witness, which has come up. The question of whether to

immunize the witness, of course, involves some of the issues we touched on yesterday in the colloquy with Senator Ervin. In that kind of judgment call, his decision would be, in practice, final, because it is a judgment call. As I have repeatedly said, I would not second-guess that kind of call.

So you really have to imagine a situation where the man is really behaving totally out of the kind of character that we attribute to him before I would interpose my own judgment. Nevertheless, and to repeat again, I would still feel that I was ultimately responsible in the sense that this was a man acting in the name of the United States, holding an appointment in the Department of Justice. I would feel that I was exercising responsibility when I said I am not going to intervene; this is his job.

Senator BAYH. But in the specific area that you just referred to, if there were differences of opinion between you and the special prosecutor about the nature and scope of immunity which should be granted, the special prosecutor would be the one to make the final determination on that?

Secretary RICHARDSON. Yes, always assuming that it is a judgment as to which reasonable people could differ. In that case, his view would prevail because I had given him the job, because I had confidence in him, because he knew more about it than I did, and because, in the setting in which he would be acting, I think it would be inappropriate for me to substitute my judgment.

Senator BAYH. Both as far as the nature and scope of the grand jury proceedings and the nature and scope of immunity, you do a magnificent case of making me very confident and secure. Then you add one more sentence and sort of pull a trapdoor. You and I might be convinced that you, as the Attorney General, could make a totally objective determination as to when the prosecutor was acting reasonably. Yet you insist on putting in that one caveat even in response to specifics.

Secretary RICHARDSON. Yes, I do. But if I may—I am repeating myself quite a lot—I think that is the caveat that has to be there if I am to be Attorney General at all. I think, however, that it is a caveat which, as I have repeatedly tried to say, is not in practice going to create problems. If the situation is one where it could, either I am being arbitrary or he is. If it is his judgment that I am being arbitrary, he would have the duty to make that known and to take any steps that he thought appropriate. If I thought he was, I would have to make some decision as to what I thought was indicated.

But I think that the nature of the situation is such that given the kind of person we are seeking, given the kind of person I believe I am, the likelihood of this is extremely remote.

Senator BAYH. Well, I think it is, too, but you and I have been in public life long enough, to know that the true test of the law, just like the true test of a sailboat, is not when the sky is clear. The true test is when the weather is stormy and when there is a significant confrontation.

I was thinking just the other night that one of the first baptisms of fire I got involved in as far as the legislative process is concerned dealt with the 25th amendment on Presidential succession. It was relatively easy for us to come to a conclusion as to what should be done if the

President was unable to declare his own disability or did declare his disability. But then when you get into a situation where the President says one thing and the Cabinet says another——

The CHAIRMAN [presiding]. That is a roll call vote. We will recess and come back.

[Recess.]

Senator BAYH. [presiding]. We will continue.

To get back to the specifics, we were talking, when the vote bell rang, about irresponsible acts of the special prosecutor which would require you to exercise final authority and counter his decision. If you had a prosecutor who was conducting himself in such a way that he would not meet the test that you establish, would it not be apparent enough to the public generally that you should exercise the authority to remove such an irresponsible prosecutor? Thus you could give him a complete authority which would be the same as final authority while he was in office. However, if he became irresponsible you would be able to remove him and obtain a replacement.

Secretary RICHARDSON. The point is, Senator Bayh, that I could not legally as Attorney General give him final authority in accord with the statute creating the office and defining its function. So it would seem to me, therefore, that the final result should be experienced the other way around.

Senator BAYH. This is the first time that I have heard you suggest that this is just a legal reservation. In referring to the appeals process, you inferred that there might be circumstances that would cause you to make judgmental decisions that would go beyond the legal niceties of the specific authority you have as Attorney General. As I said in my conversation with you personally, I understand the position you are in legally. However, from an operating standpoint, it would seem to me that you could, for all intents and purposes, let him do all the operating with the understanding that he could not exercise the legal authority which you alone as Attorney General possess. If he became unreasonable, you could just discharge him?

Secretary RICHARDSON. I do not quarrel with that formulation of the situation at all. "For all intents and purposes" is the phrase you used there and that is exactly what I have been trying to convey. For all intents and purposes, or as I put it earlier, for all practical purposes, he would have final authority. But it seems to me that in terms of the formulation of his responsibility, that while I am prepared to make clear this practical result, I have also felt that I could not properly abandon the ultimate responsibility vested in the office of Attorney General.

Senator BAYH. Well, I am not sure, considering the other things that have been said, that your answer fully satisfies my concern.

Let me ask you——

Secretary RICHARDSON. You mean that does not fully express what you meant? Because I have just agreed with it.

Senator BAYH. I fear that, in light of everything you said before, my definition of those words would be different from yours.

Secretary RICHARDSON. You mean there could be something wrong if I agreed with you? Could there be something wrong?

Senator BAYH. You say right now that you agree with my definition of what the special prosecutor's authority should be, but you empha-

size "for all intents and purposes" and you are not willing to change what you said earlier about the reference to the court and the appeals process.

Secretary RICHARDSON. No; because I felt you had very well restated the matter for me; in slightly different words but to the same effect, that is what I have been trying to say.

Senator BAYH. I was using my definition of the words, but I'm not sure of yours.

Let's try to nail down a couple more specifics.

Suppose the special prosecutor thought that justice required him to subpena White House files and, in your judgment, this should not occur. Who would have the final authority to make that determination?

Secretary RICHARDSON. Well, again, I would give you the same answer. He would have the power delegated to him to take action necessary to do his job. In a case like this, if he felt that this was necessary, I would have to feel that his doing so was beyond the pale of responsible judgment before I would interfere with him.

Senator BAYH. Well, I will not repeat what I said earlier, but I wish you would just leave that "responsible judgment" clause off.

Secretary RICHARDSON. Well, I think again here, now, we are only dealing with what could be in that specific situation—there would be presumably an adversary relationship, unless, of course, the White House, as it might, voluntarily agreed to furnish paper or furnish the answer, whatever they were. It is a question of asking the witness, the potential witness, to furnish information. I cannot conceive any basis on which I would intervene as a practical matter. The witness and any person alleged to be involved in that situation would have the benefit of counsel, and if there were a dispute, it could, I believe, and should, be adjudicated by the court having jurisdiction. The assertion of the right or a claim to reach evidence should certainly be within the scope of the responsibilities of the special prosecutor.

Senator BAYH. You could look at the ultimate problem. Suppose the prosecutor determined it was necessary to get the President's affidavit or to have his testimony personally. Would that be the kind of determination that he could make?

Secretary RICHARDSON. Yes, In that case, I think if there were any problem with it at all, it would be a problem raised by counsel to the President.

Senator BAYH. Let me move on to another area. I think you said in answer to a question of one of my colleagues who preceded me that you felt that you had no relationship with any of the individuals who might be under investigation that would give you pause to consider serving as Attorney General. For that reason, you decided not to follow the same course of action that Attorney General Kleindienst did, or at least not to waive authority over the Watergate case. Could you tell me quickly how you arrived at that decision, the specific standards you used?

Secretary RICHARDSON. My earlier answer to that, Senator Bayh, was in the context of the comment on a sentence quoted from Attorney General Kleindienst's letter of resignation, which Senator Kennedy had used as a way of eliciting my attitude on this point. In that answer, I pointed to the words which referred to the closeness or the intimacy of the relationship that Attorney General Kleindienst

felt he had with individuals who were alleged to have some involvement in these matters. I said that I do not feel that I have had a degree of closeness or intimacy which gives me concern on this.

These are individuals with whom I have worked, with whom I have been on good terms. I have known them in various settings, including social contacts. But where an oath of office requiring full and fair enforcement of the law is concerned, I would not feel inhibited in doing my own job by any past relationship.

I do think that the public is entitled to an additional measure of reassurance as to the integrity of the process, and that, of course, is why I would propose to appoint a special prosecutor.

Nevertheless, even if no special prosecutor were appointed, I would have felt able to do this job and do it right myself as Attorney General, quite apart from any other consideration.

In any event, I do not ask anyone to rely solely on my assessment of my personal attitude or fitness to do this job alone. I ask them to judge it on the basis of whatever may be their assessment of my own objectivity, fairness, fearlessness, together with, as I said earlier, the reassurance that derives from the fact that I would not in fact be conducting these investigations or prosecutions directly, but rather, would have delegated responsibility.

Senator BAYH. Yes. I asked the question and perhaps I am overly sensitive about the appearance situation, having gone through the toughest battle of my life up to that time over a Supreme Court nominee whom I felt had unintentionally become involved in what the majority of the Senate felt was a conflict of interest, a problem which is totally apart from yours. But the appearance of propriety is perhaps even more important now, the appearance of objectivity is as important as the actual fact. I, for one, am convinced that you are determined in your own mind to be objective. Unfortunately, there are a lot of people out there who have not had a chance to sit down across the table and talk to Elliot Richardson and elicit his responses to questions. They are aware that Mr. Kleindienst was the immediate subordinate of Mr. Mitchell, and that, thus, he felt compelled to resign as Attorney General.

Am I wrong in my assessment of the organizational chart to make a reasonable comparison with the fact that as Secretary of HEW, you did report to Mr. Ehrlichman as the White House chief of domestic affairs? It is that kind of thing which sort of clouds the picture a bit as far as the appearance of total objectivity. Does that concern you at all, or any relationships you might have had with Mr. Haldeman or Mr. Dean or Mr. Mitchell or Mr. Stans or some of the others?

Secretary RICHARDSON. It has concerned me to the extent that I have felt that it required a careful search of my own conscience to determine whether or not I could properly undertake this responsibility. As I have said, I believe that I can conscientiously do so. But I am sensitive to the considerations of appearance that you have alluded to and that have been previously referred to. That is the principal reason why I have proposed the appointment of a special prosecutor.

Senator BAYH. Could I ask one more question on this, and then I want to get on.

Secretary RICHARDSON. May I add one more point?

Senator BAYH. Please.

Secretary RICHARDSON. I am not sure that the issue should turn on shadings of distinction, but I think there is considerable distinction between the daily intimacy of a relationship between a Cabinet department head and his deputy and the relationship between a Cabinet head and a member of the President's staff. I do not accept the characterization "reporting to" Mr. Ehrlichman as descriptive of the relationship I had with him.

Senator BAYH. Well, what was your relationship with him, then?

Secretary RICHARDSON. He was the Executive Director of the Domestic Council.

Senator BAYH. Were you a member of that Council?

Secretary RICHARDSON. I was a member of it: the President is chairman of it. Since the Domestic Council is concerned with, among other things, the kinds of issues that HEW was concerned with, there were frequent occasions to deal with him on these matters.

Senator BAYH. Let me ask one last question in this area of concern. I will start off by saying that I think that all of us here understand that our number one goal is restoring faith in justice. Could you tell me, if that is the number one goal, what does your presence in the investigation as Attorney General, with final authority as we have described it, add to the ability of our governmental process to reach that goal that is not more than offset by the possible appearance of less than a totally free, independent special prosecutor? What unique quality is contributed by your refusing to say absolutely and unqualifiedly that a special prosecutor has complete freedom?

Secretary RICHARDSON. I think this is essentially for the committee to say in the light of all they know about me and in the light of what I have said about the independence and the authority that would be vested in the special prosecutor and in the light of the committee's assessment of his own character and reputation. I have had a considerable degree of experience in the area committed to the responsibility of the Attorney General. I have served as U.S. attorney, and as U.S. attorney I investigated and prosecuted matters involving considerable sensitivity, potential pressure. Although I had been Assistant Secretary in the Eisenhower administration in the Department of HEW, I prosecuted Bernard Goldfine for income tax evasion and won a conviction in that case.

I investigated land tag frauds in the Massachusetts Federal highway program which involved many prominent figures in the Massachusetts business and political scene. I was involved in an extensive investigation which led to the uncovering of massive corruption. Later, as Attorney General of the State, I developed what I believe to have been the most effective organized crime investigating and prosecuting unit in any State.

So I have some real background for this kind of job and some demonstrated ability to deal with somewhat analogous situations. Although not on this scale of national significance, nevertheless, it is relevant experience.

Senator BAYH. I assume that the special prosecutor would be one who had similar experience, and thus, it would not be necessary to duplicate it.

Secretary RICHARDSON. That is true. But it means, in effect, that when you ask why should I be here at all, this, together with some proven competence as an administrator and as an individual able to deal with significant issues of national policy, are reasons why I have been nominated. The question before this committee is whether they think the combination of my background and experience, any assessment you make of my personal integrity, coupled with your understanding of the role of the special prosecutor, give you sufficient confidence that the job is going to be done and done right.

Senator BAYH. I mentioned that I am impressed with your qualifications and your sincerity. I am just trying to weigh out the pluses of providing a special prosecutor against the negatives inherent in your position.

Secretary RICHARDSON. I fully respect that and I think what you are doing is in the public interest in raising these questions. I have no reservation on that score whatsoever. And I mean what I say when I say that I think this is a question that the committee, or individual members of the committee, should resolve in its own mind.

Senator BAYH. Our discussion has centered primarily on Mr. Ehrlichman. In looking at the names of some other people who have been mentioned—Mr. Haldeman, Mr. Dean, Mr. Stans, Mr. Mardian, Mr. Colson, and Mr. Mitchell—I would ask whether you had any relationship with any of those men or others that would cause concern?

Secretary RICHARDSON. To me, no. I have known Mr. Colson longer in time than any of the others. I was legislative assistant to Senator Leverett Saltonstall in 1953 and 1954. I first met Mr. Colson when he was a member of the Senator's staff in 1959 and 1969. I have seen him off and on since then. I have had some relationships with him, some dealings with him on matters arising when I was at HEW.

The others I have known and dealt with on various matters since I have been in this administration. I think it is fair to say that of all the people who have been mentioned, I had more frequent contact with Mr. Ehrlichman than with any of the others, and we have already covered that relationship.

Senator BAYH. Could you be a little more specific than you have been in the past about the timing of the appointment of the special prosecutor?

Secretary RICHARDSON. Well, not much. We are at the point now of submitting the list of finalists, for lack of a better word, to the presidents of the major bar associations and to others, including, as I said, former Chief Justice Warren. That should mean, therefore, that I would be in a position, hopefully, by tomorrow or the next day, to get in touch with these individuals directly, starting at the top of the list. I mean by "these individuals" people on the list.

I might make one amendment. Since I went into the procedure yesterday, I think I said then that I planned to arrange the names on the list in some order of priority. I now think that I should arrange them simply in alphabetical order and then ask these people to give me their judgment as to the priority. On that basis I would base the final list and start at the top of the list. Of course, if the first person asked agrees to do it, that would shorten the period.

I ought to add one other point, though, that I left out yesterday. I have been thinking about it since. It would seem to me, the more we

have been pursuing this effort, it is a more necessary step than I had believed it might be. That is, that I believe that an FBI inquiry should be requested before an individual is named. While it is only a precaution, I think it is a necessary precaution. That will take some time.

Senator BAYH. What is the estimate? Are we talking about 1 week, 2 weeks, 3 weeks, 4 weeks?

Secretary RICHARDSON. I would ask them to give this absolute top priority. I am sure they will cooperate in this. And I would hope that if we could have agreement by some person to do the job so I could get his name to the FBI by early Monday, that they could finish by the end of the week.

Senator KENNEDY [presiding]. Would the Senator yield?

Senator BAYH. Yes.

Senator KENNEDY. Is there any reason why you could not give us the list? You are giving it to the heads of the bar association; why can you not give it to the Senate Judiciary Committee?

Secretary RICHARDSON. There is no reason I could not give you the list following my contact with these bar association heads and others.

Senator KENNEDY. But I mean you are asking the bar association to give their advice on it; why not ask the Judiciary Committee?

Secretary RICHARDSON. I would like to think about that. I certainly have no problem with asking individual members of the Judiciary Committee. I am not sure that it would be a good idea at that stage to make the list public.

Senator KENNEDY. Why not?

Secretary RICHARDSON. The only concern I can see is that none of these people have been approached at this point. They do not know whether their names are on the list or not.

Senator KENNEDY. How could they be anything but complimented by being one of four or five names on the list? How could they have anything but the highest regard for being considered for perhaps one of the most important opportunities for public service that has come in this country and certainly in this century. How could anyone feel anything but complimented by being on the list?

Maybe we could not agree on the particular order. Maybe there would be a difference in view of it, but perhaps not. Perhaps it would be otherwise.

Should not the judgment of the members of both sides of the aisle in this be carefully considered by you, just as the former bar association presidents or others?

Secretary RICHARDSON. I certainly would be willing to invite comment by members of the committee.

Senator KENNEDY. How will we know—how can we comment if we do not get the list?

Secretary RICHARDSON. I think it is one thing to comment by members of the committee individually. I think it is quite another at that stage to ask the committee as such, on a list of six to eight names, to take any formal action as a body. That could create considerable problems.

Senator KENNEDY. Well, could you not make the list available to the members of the committee and then solicit their views even on a part of it?

Secretary RICHARDSON. Yes, I could do that. I would be glad to do that.

Senator KENNEDY. Thank you.

Senator BAYH. Concerning the prosecutor and the powers that he would be given, do you intend that he have the power necessary to intervene and affect the course of action of proceedings that may already be in process elsewhere in the country with respect to the individuals involved in his investigation? I note that two principals were indicted today in proceedings going on elsewhere. It seems to me that if we really want justice to prevail, we want somebody, maybe the special prosecutor, to have the authority to see to it that all these cases are pursued consistently and diligently. Unless he had the authority to intervene, that might not always be the case.

Secretary RICHARDSON. I agree with that. He ought to have more than the authority to intervene, in my view. He ought to have all the authority that would normally be vested in the Chief of the Criminal Division with respect to the type of cases—and I tried to characterize those earlier today—wherever in the country, that fall within the area delegated to him.

Senator BAYH. In considering the executive privilege problem, I listened to and read the description you gave to Senator Kennedy regarding the course of action to be followed by the special prosecutor. In the event the executive privilege question were raised, he could ask for it to be waived by the White House, and then, if privilege were not waived, he would ask for a judicial determination. Is that a fair assessment?

Secretary RICHARDSON. Yes, it is.

Senator BAYH. Well, in trying to determine what ground rules the special prosecutor would apply himself, would he be bound by the ground rules of executive privilege as laid down by the White House?

Secretary RICHARDSON. No. And, of course, the White House has not laid down any ground rules applicable to when it would waive the privilege. The scope of the privilege is, I take it, much broader than the scope of the situations in which it would be insisted upon.

Senator BAYH. What would be the criteria used by the special prosecutor in determining how far to pursue and when to ask for judicial determination of privilege?

Secretary RICHARDSON. In the first instance, I assume—certainly it is what I would do in his shoes—I would first seek to determine whether I believed that the privilege had properly been invoked. I would ask, in effect, does the privilege extend to this type of information, and in his position he should draw that line narrowly and be prepared to argue, if he believed that were so, that the line had been drawn too widely, that the privilege did not apply.

I would secondly argue, and I would expect him to argue in that case, that in any event it should be waived.

And finally, this would be an issue ultimately for the court, whether weighing the public interest involved, there could nevertheless be asserted a basis on which to require the testimony.

This brings us to a legal issue that I cannot give the answer to, really, what would the court do in that case? But, in any event, what I am saying is that the prosecutor should, in my view, if he be-

lieves the evidence is important, press to get it by all the legal means available to him.

Senator BAYH. Well, would he have the final determination, then, as well as the complete authority? Would he have the final authority in the area of determining when to proceed with all diligence?

Secretary RICHARDSON. Yes. And as I said earlier, in this case the fact that he believed the evidence was material on the one side and the fact that the White House would have the opportunity to be represented by a counsel if there were any problems—means to me that this is an area where I would have no occasion at all to interpose any independent judgment.

Senator BAYH. This morning, in discussing campaign violations with Senator Kennedy, you suggested that prosecution of most of the violations of the act should be left to the Justice Department. As I recall, you specified White House staff members who may be involved, the personnel of the Comittee to Reelect the President, and administration officials, as the individuals whose campaign violations would be the responsibility of the special prosecutor. Is that a fair assessment of that testimony?

Secretary RICHARDSON. Yes.

Senator BAYH. I wonder about one individual that I am not sure fits in there at all, and I wonder how you could broaden the authority. I do not know that this is relevant, but suppose you had someone like Mr. Kalmbach, who I do not think fits into any of those categories and may not be involved at all, but certainly has had his name bandied around a little bit. Suppose you have someone like that who has not been on the payroll of any of those other three categories. Is the special prosecutor going to have the power to proceed against that individual, or will that be left to the Justice Department?

Secretary RICHARDSON. No, he ought to have responsibility in such a matter, very clearly, I think. As I said earlier, if there is any common denominator that ought to run through or characterize the matters delegated to him, it would be some sort of White House involvement, and in the case of Mr. Kalmbach, he has apparently acted in some capacity as counsel to the President.

Senator BAYH. Let me ask you a question or two relative to the discussion yesterday with Senator Kennedy concerning your lunch with Mr. Krogh. I want to refer here to a specific response, in which you said you were informed that the decision to turn over the memorandum in question to Judge Byrne was made sometime during the week of April 15.

Is that accurate?

Secretary RICHARDSON. Yes, although I checked since yesterday and I find that the decision was made later than that. It was made about, I think, on April 24.

Senator BAYH [presiding]. May I ask you to tell the committee what information you found overnight that changed the date by a good week as far as the decision is concerned? I think this is relevant, inasmuch as there have been allegations that there was some pressure being exerted to keep a report from being made at all. The time span between the middle of the week of April 15, say April 17 or 18, and April 26, when it was finally received by Judge Byrne, makes one ask the question: Why did it take so long?

Secretary RICHARDSON. What happened was that—I checked my notes, that is how I found the difference in the date—what happened, I believe, was that the Assistant Attorney General in the *Watergate* case, Mr. Silbert, on April 18 brought to the attention of Henry Petersen, the Chief of the Criminal Division, who had been given general support for all Watergate matters or related matters, that John Dean had given him, Silbert, information about the break-in.

Henry Petersen checked around to see if any information deriving from the break-in had found its way into the *Ellsberg* case. He got negative answers to that, so he has told me, and he reported this to the Attorney General, I think on the 24th. The Attorney General and he concluded that they should bring to the attention of the President their judgment that the circumstances then called for calling the situation to the attention of Judge Byrne. On April 25, notice of it was sent to Judge Byrne.

Senator BAYH. Then the decision was not made the week of April 15, as we discussed yesterday?

As I recall the conversation between you and Senator Kennedy yesterday, you said that Mr. Krogh had the opinion that national security data was involved in this situation and should not be made public. Is that accurate?

Secretary RICHARDSON. I said that Krogh had a general understanding that the matters he was working on in the plumbing operation were matters that affected the national security. His affidavit goes into this to considerably greater length than he did in his conversation with me.

The Ellsberg psychiatrist break-in was an act undertaken as part of the plumbing operation. So he felt that it was subject to a general injunction against disclosures of these national security-related activities.

Senator BAYH. Did he indicate any specific conversations he had, or when you had lunch did he mention to you the precise time it had been brought to his attention?

Secretary RICHARDSON. No, he did not. I should perhaps have anticipated yesterday that this would come up, but I had not checked my notes before yesterday's hearing. I have since checked them and he did not mention any data or any specific source of this, except that the President was the original source of the understanding, of his understanding, that they were matters involving the national security.

Of course, he knew that, in any event, from the specific leaks that he was asked to investigate. Whether there was any subsequent conversation with anyone which applied specifically to the break-in itself, I do not know.

Senator BAYH. But it was his opinion that the ultimate authority on whether or not to disclose was the President himself?

Secretary RICHARDSON. Ultimately, yes, and originally. But I do not know, and he did not tell me that this was true with respect to the break-in. So far as I know from any other source, the President did not know about the break-in until some fairly recent date, but exactly when, I am not sure.

Senator BAYH. In his discussion with you, did Mr. Krogh distinguish between the kind of information that he was under orders not to disclose and that which could be disclosed? We had one bit of infor-

mation involving a break-in and another bit of information involving CIA involvement. It seems to me the latter might very much be a matter of national security and the previous matter might not.

Secretary RICHARDSON. He did not draw any such distinction, no. Since yesterday, I have also read his affidavit and the affidavit is, although certainly more detailed, entirely consistent with what he said to me. The affidavit does explain more fully than he did to me what he meant by the national security relationship of all this. I am not aware of any, he did not make to me any distinction between CIA or any other aspects of it.

As I understand it, the only relation CIA had to it was with respect to furnishing cameras and perhaps other equipment, and that was incidental to the break-in operation.

Senator BAYH. Let me ask you one matter that involves another duty that you will have as Attorney General. I have thought long and hard about whether to proceed on it or not, but I do not know how else to get some action. It involves testimony that took place before this committee earlier, in which promises had been made. Of course, you had nothing to do with those promises. Others did who are no longer with us. I would like to see if it is possible for you in good conscience to make the commitment that some of these other gentlemen made but have not honored. I bring it up now only because I am very sensitive about the criticism that has been heaped on Congress that we have not been diligent in protecting our rights. This is an area where we have had disagreement with the executive branch.

Let me just cite from the record so that I will not get the dates wrong, and then ask you to comment. See if you can do what your predecessor promised.

In June 1972, at the conclusion of the hearings that this committee conducted on the nomination of your predecessor, the Judiciary Committee, by, I think, unanimous vote, referred the record of those hearings to the Justice Department for review as to any perjury that might have been committed. The committee asked for a report of this investigation in, I think it was, 30 days. On July 31, 1972, the chairman received a letter from Deputy Assistant Attorney General Shapiro saying that the review was incomplete but was receiving priority treatment.

On October 2, 1972, feeling that anything receiving priority treatment should have been finished by then, I personally addressed a letter to the Attorney General. I requested that a report of the investigation be forwarded to the committee. To this date, I have received no reply whatsoever to that letter.

On March 7, 1973, just a short time ago, during the course of the committee hearing on the nomination of Mr. Gray, Senator Byrd asked Mr. Gray about the progress of the investigation and Mr. Gray replied, and I quote: "Our investigation is virtually complete and full reports have been furnished to the Department."

Mr. Gray further testified that the matters had not been referred to the FBI—he had not even had it—until December 5, 1972, over 5 months after the committee's request.

In spite of Mr. Gray's testimony, thereafter the Chicago Sun-Times reported on March 29, 1973, that it had contacted at least six potentially important witnesses and none of them had even been interviewed by the FBI or by the Department of Justice. These included names such as Geneen, Reinecke, Hunt, Sloan, and Hune. Now, I am concerned about this.

The testimony that we had from Mr. Mitchell, in response to certain questions by Mr. Kennedy relative to party responsibility, denied any responsibility. This is in direct conflict with what he had said publicly about certain meetings which he held, and in which meetings he now admits that the subject matter of bugging had come up. This testimony is in the transcript, and I don't believe I have to read it to you.

Now, I would like to ask you, Mr. Richardson, if you can give us any status report on this investigation, or if you can give us a date or reasonable estimate as to when the committee can get the results of this investigation? We feel it may indicate that there is a definite possibility that perjury was committed before a committee of the U.S. Senate by an official of the executive branch.

Secretary RICHARDSON. I certainly can't give you an immediate commitment as to when it can be done, Senator Bayh, because I really do not know anything about it. But I will find out and get back to you on this in a few days with a specific estimate of what remains to be done and when it can be done.

Senator BAYH. Thank you very much, Mr. Richardson.

The CHAIRMAN (presiding). Senator Thurmond?

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Secretary, you have been here for some time and I will be very brief.

Do I conclude from what you have said that you have decided, made a decision, to appoint a special prosecutor in the event you are confirmed to handle the Watergate matter?

Secretary RICHARDSON. Yes, that is correct, Senator.

Senator THURMOND. Or are you considering it?

Secretary RICHARDSON. No, I have definitely decided to do it.

Senator THURMOND. You have definitely decided to do it.

Now, as I construe, under our structure of government—where the Congress makes the law, the executive branch administers the law, the judicial branch interprets the law—a responsibility of this kind falls in the executive branch and falls in the Justice Department. Is that correct?

Secretary RICHARDSON. Yes, I believe it is.

Senator THURMOND. So it is the responsibility of the Attorney General, who is head of the Justice Department, to perform a duty of this kind?

Secretary RICHARDSON. Yes.

Senator THURMOND. The law imposes this upon you, as I construe it; you have no question of choosing whether you do it or not, the law imposes this burden upon you. Is that the way you construe it?

Secretary RICHARDSON. Yes, it is.

Senator THURMOND. The only other alternative would be for the Congress to pass a special law and set up a special agency to provide for the handling of the Watergate affair. Is that your opinion?

Secretary RICHARDSON. Yes, that is my opinion, Senator Thurmond.

Senator THURMOND. And your recommendation is that you be allowed to handle it under the present law and that you will appoint an independent special prosecutor?

Secretary RICHARDSON. That is correct.

Senator THURMOND. I presume if that is done, of course, you will choose a man whom you feel is objective and will first seek the truth?

Secretary RICHARDSON. Yes, absolutely.

Senator THURMOND. And that you will choose a man who is fearless and fair?

Secretary RICHARDSON. That is absolutely right.

Senator THURMOND. Now, if this matter were taken out of the hands of the Justice Department and were turned over to a special agency created by the Congress, then who would make the appointment of a special prosecutor in such a case? It would either be the President or the Attorney General, I presume?

Secretary RICHARDSON. Yes, I must say I do not know any other way to create an appointing authority.

Senator THURMOND. In other words, any way you look at it, either you or the President ultimately would have to choose the special prosecutor?

Secretary RICHARDSON. Yes.

Senator THURMOND. Am I not right?

Secretary RICHARDSON. Yes, that follows.

Senator THURMOND. So those people would have felt that the President had around him some people who might be indicted and would feel that possibly he was close to those people, would they not be as well satisfied if you made the appointment?

Secretary RICHARDSON. I think that is true, Senator Thurmond, subject, of course, to the understanding that I previously described, that this committee would have the opportunity to interrogate him and that I would welcome a resolution by the Senate expressing its confidence in him.

Senator THURMOND. In other words, the person you choose would be allowed to come before the Senate and be questioned if the Senate Judiciary Committee decided to do so?

Secretary RICHARDSON. Yes.

Senator THURMOND. In fact, you would like for that to be done? Would you like to take the Senate into this matter as a partnership with you?

Secretary RICHARDSON. I would. I think that would help achieve the objective of confidence in the process which I know from all the previous colloquy with this committee is our common goal.

Senator THURMOND. And if there were serious objection on the part of the members of this committee to the person you chose, would you feel, even though you may not have to, would you feel that it is a part of wisdom and discretion that you choose someone else who would meet the approval of this committee?

Secretary RICHARDSON. That is correct, Senator Thurmond. I think it puts it very well, as a matter of fact.

Senator THURMOND. Mr. Secretary, I just want to say that I have the utmost confidence in you and your integrity and it is my judgment that whoever you choose will be a suitable person who, as I described, will be a person who will seek the truth and who will be fearless and fair. I presume that it would be your desire that that person, in seeking the truth, would shield no one and would show no discrimination against anyone, and would prosecute this case regardless of who was affected in any way, shape, or form?

Secretary RICHARDSON. Exactly.

Senator THURMOND. I have no other questions, Mr. Chairman.

The CHAIRMAN. We will recess now subject to the call of the Chair.

[Whereupon, at 4:30 p.m., the committee was adjourned, subject to the call of the Chair.]

NOMINATION OF ELLIOT L. RICHARDSON TO BE ATTORNEY GENERAL

MONDAY, MAY 14, 1973

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to recess, at 10:40 a.m., in room 2228, Dirksen Senate Office Building, Senator Philip A. Hart (chairman) presiding.

Present: Senators Hart, Kennedy, Bayh, Byrd (of West Virginia), Tunney, Hruska, Scott, Thurmond, Cook, Mathias, and Gurney.

Also present: John H. Holloman, chief counsel, and Francis C. Rosenberger, professional staff member.

Senator HART. The hearing will be in order.

Good morning, Mr. Secretary.

TESTIMONY OF ELLIOT L. RICHARDSON—Resumed

Secretary RICHARDSON. Good morning, Senator.

Senator HART. The Senator from California.

Senator TUNNEY. Thank you, Mr. Chairman.

Mr. Secretary, over this past weekend, you attempted to contact several and presumably all members of this committee to share with them privately a short list of potential nominees for the special prosecutor. It is my understanding that you sent this same list to the president of the ABA, to the president of the American Trial Lawyers Association, and the former Chief Justice, Earl Warren, pursuant to a plan that you outlined before this committee on May 9.

I would also add that your activities over the weekend seemed to me to be consistent with your statement on May 10 that you would share the names with members of the committee. I apppreciate your doing that.

However, as I indicated to you on the telephone last evening, I have doubts that even the best nominee in the world could perform under ground rules as I perceive them to have been set forth thus far in your testimony before the committee. You have stated repeatedly to every Senator of this committee who has questioned you that you must retain ultimate responsibility for the decisions of the special prosecutor. A number of Senators have argued against this position—Senator Ervin, for example, cited to you the example of the Teapot Dome matter, when Congress took the whole issue out of the hands of the Department of Justice and put it in a special prosecutor nominated by a new President, because President Harding had died, and made these men subject to Senate confirmation.

In the words of the joint resolution in that case, the special prosecutor:

> Shall have charge and control of the prosecution of such litigation, anything in the statutes touching the powers of the Attorney General or the Department of Justice to the contrary notwithstanding.

Senator Hart went on to talk at length about appearances and, as he put it, in my opinion very well, on page 33 of the transcript:

> Senator HART. I do not know to what extent you have worked with some of the individuals in the White House during the period you were in HEW; certainly to some extent on policy, on budget. I am not suggesting that you know Mr. Mardian or Mr. Mitchell as closely as Mr. Kleindienst did, but they are not unknown to you. But regardless of the personal relationships which might be the basis for a decision to recuse, you will become the head of the Department of Justice by appointment of the President, which department would be investigating itself in final judgment if you retain final judgment. This is the hangup. It is for that reason that I suggest that you would be institutionally suspect or that there is institutional grounds for recusing. If the special prosecutor does not have the ultimate say with respect to Watergate, why take the job or why appoint one?

I would like to add an additional angle to Senator Hart's point. If the President is in no way implicated in the planning or cover up of what has now come to be known as the Watergate disaster, he does deserve a clean bill of health from someone who owes him nothing and who the American people understand owes him nothing. It seems to me that unless we can establish ground rules for the special prosecutor which give him complete, final, and ultimate responsibility for his decisions, no matter who takes the job, he will have inadequate tools. Thus to me, it is premature to comment upon your choice of names or to confirm you or your nominee until we have the ground rules that I suggest.

Do you have any comment on that?

Secretary RICHARDSON. Yes, Senator Tunney. I think the committee is entitled to be satisfied as to the ground rules, and a good deal of the colloquy since Senator Hart opened up this subject has been devoted to just that question. I have also, in the light of the discussions with members of the committee, been working on a refined version of the initial ground rules I started with. I think that the committee should have before it when it interrogates the recommended special prosecutor a piece of paper setting forth what is in effect his job description and which deals specifically with the issue of his independence.

Just to restate once more the elements of the problem, we have a statutory position of the Attorney General which does, in effect, give ultimate responsibility to the Department of Justice, to the Attorney General. Second, we have some very strong practical reasons why it is not desirable to create a special new agency. I will not go into those considerations now, but I think they are important and Senator Hart evidently agreed that this was so at the point where we were first discussing this issue.

That takes you, then, to the question of whether as Attorney General, I should not in effect be disqualified, since this would be the only remaining means whereby I could be divested of ultimate statutory responsibility; hence the discussion as to whether or not I should recuse myself.

I gave reasons then why I did not feel that I should disqualify myself. Whether or not I think an individual should be disqualified in dealing with a given matter does, in the end, I think, turn on the matter of whether or not he feels that he lacks the degree of objectivity necessary to deal with it fairly and impartially. I could not honestly disqualify myself in this instance. Indeed, I felt that I were disqualified, as I said at the time, I should not have allowed my name to be submitted as the nominee for Attorney General at all.

So that takes you, then, to where we are now. That is, how can we, consistent with the ultimate statutory responsibility of the Attorney General, nevertheless give the special prosecutor a degree of independent authority sufficient to be satisfying to you and the committee and be satisfying to the general public that he really does have the authority he needs to do the job, and a lot of discussion since has been focused on that issue.

Now, I drew a distinction at one point between ultimate authority and full authority. I have been developing language which would, in effect, make clear that the special prosecutor would have full authority to do the job entrusted to him and this leads you then to what do you mean by reservations of ultimate authority? This is the subject developed at some length, most recently in colloquy with Senator Bayh. And I said in effect that so long as the special prosecutor was dealing within the scope of the subject matter delegated to him and as long as he was dealing with it in a responsible way, I would have no reason to interfere and would not undertake to second-guess him; that he would, for all practical purposes, be in full charge and that the only conceivable kind of situation in which I might interpose my judgment is where he was in fact acting arbitrarily or in some manner beyond the pale of reasonable judgment.

I said that was a likelihood so remote as to be practically inconceivable, given the character and background of any individual who would be chosen for this job.

That is where it stands as of the moment. As I said, I think that before—at least no later than—the time when you interrogate any person nominated for this role, you should have before you, and I would expect to have no later than that, a written outline of the duties and responsibilities that this individual would have.

Senator TUNNEY. And as I understand it, you believe that the individual should participate in the drafting of this written understanding?

Secretary RICHARDSON. Yes. I think he should have the opportunity to make some changes in it and be satisfied that he does have a sufficient degree of authority to do the job.

Senator TUNNEY. And it would be my assumption that we on this committee would have access to that written understanding prior to the time of your confirmation.

Secretary RICHARDSON. That is, of course, up to the committee and the Senate. I would make it available to you, as I said, no later than the time when the nominee appears before you. And I think at this rate, it is unlikely that I would have been confirmed by then and it may be that the Senate would feel that it would not want to act before then. If so, then, of course, you would have seen this first.

I could—well, let me pause there.

I go back to one detail in your outline of the procedure followed which I think I should correct for the record. I did tell you that I proposed to invite comment by former Chief Justice Earl Warren and I did so, but he declined. He said that while as a retired Chief Justice he could no longer sit on the Supreme Court of the United States, he is available to serve, to sit on any other matter, and he felt that in view of this, it is conceivable that he might be asked to sit on a matter arising out of these investigations, so he did not wish to be consulted.

Senator TUNNEY. Mr. Secretary, from what I understand from your testimony today and what you said prior to today, you would in no way, in either your written understanding with the special prosecutor or thereafter, try or attempt to preclude an investigation by the special prosecutor of any potential relationship of the President himself to the facts that are being developed.

Secretary RICHARDSON. That is correct, I did say that.

Senator TUNNEY. And he necessarily would have the authority to proceed with the investigation as he determined necessary in relation to this specific point, the President's involvement or lack of involvement?

Secretary RICHARDSON. Yes.

Senator TUNNEY. And I think it is clear to you that every member of this committee is most sincerely hopeful and desirous that such investigation would indicate the President was in no way involved, either prior to or subsequent to the fact of Watergate, and was not involved with any coverup. But it is important, I think, that we have an understanding that this special prosecutor would not be inhibited in any way in his investigation.

Secretary RICHARDSON. Absolutely. I also said in this connection that the special prosecutor would be solely responsible for dealing with any issue, of executive privilege, subsequent to the extent that it might require, of course, adjudication by a court, and that in this context, I thought that the issue under all circumstances could appropriately be dealt with in that way without any involvement on my part, because the special prosecutor would be charged with finding out all the facts and a responsibility to do that, and insofar as any claim of privilege is concerned, the President would be represented by his own counsel.

Senator TUNNEY. I would just like to make sure that I understand that response clearly. Traditionally, it is the Attorney General of the United States that interprets for the executive branch the dimensions of executive privilege; is that not correct?

Secretary RICHARDSON. Yes, it is correct.

Senator TUNNEY. In this particular instance, however, it would be the counsel to the President who would make this interpretation rather than you as it relates to this specific investigation?

Secretary RICHARDSON. That is correct.

Senator TUNNEY. And from the point of view of the investigation and a potential challenge to the interpretation of executive privilege that was made by the President's counsel, it would be the special prosecutor that would develop the legal theory or make the decision as to whether or not the executive privilege claim to the special counsel by the President was an accurate reflection of the law?

Secretary RICHARDSON. Exactly. And if the special prosecutor concluded that the claim of privilege was not adequately founded, then he could, on his own initiative, proceed by whatever he felt to be appropriate court action to procure an answer to the question.

Senator TUNNEY. Throughout your testimony, you have repeated that the law mandatorily requires you to take the ultimate responsibility for the special prosecutor. What law are you referring to there?

Secretary RICHARDSON. This is the statute which gives responsibility for the administration of the Department of Justice to the Attorney General.

Senator TUNNEY. Do you have any specific references there?

Secretary RICHARDSON. It is 28 U.S.C. section 516 and section 519. Section 516 says—

> Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to the officers of the Department of Justice, under the direction of the Attorney General.

Section 519 says—

> Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States Attorneys, Assistant United States Attorneys, and special attorneys appointed under Section 543 of this Title in the discharge of their respective duties.

Now, of course, you could otherwise authorize by law, but that brings us back to the problems of what kind of a separate authority is vested in the special prosecutor. The problems here become problems essentially of practicality with respect to other personnel of the Criminal Division; how does he get and exercise direction over them?

What about the Federal Bureau of Investigation? What about the U.S. attorneys and so on?

So I think there are good reasons why practically, since we cannot define precisely in advance very well exactly the areas of the man's jurisdiction or know clearly enough just what the staffing requirements are, it is better that he be in a position where he is in effect exercising full delegated authority over these matters. I would expect that the job description would stress his powers in terms of the full authority, which I think is not inconsistent with the statutory language I read to you.

Senator TUNNEY. As I understand your testimony, you feel that you can recuse yourself from the decision as to whether or not executive privilege should apply in any specific case, and yet you feel reluctant to rescue yourself from the entire case on the grounds that you have statutory responsibilities.

Secretary RICHARDSON. No, I would not put it quite this way. It is not a question of recusing myself, which I take it means disqualifying myself. It is a question, really, of what residual role rests in the Attorney General in the situation where authority has been delegated to somebody to do a job.

Now, in the practical situation, this man would have the authority to do what he needs to do. I have said that I would want to be kept generally informed, that he ought to feel free to consult me, but that in reaching a given judgment about whether to indict or whether to grant immunity and so on, he would not have to do so; that I would

not undertake to exercise any veto power over what he did. So that the executive privilege simply becomes a special case of this and there, it seems to me that given the fact that the President would be represented by his counsel and that the privilege is peculiar to him as Chief Executive in any case, there would be no basis for my saying as to this that I would expect to exercise any specific responsibility at all.

In the case, on the other hand, where the issue is one of judgment internal to the Department, where no opportunity exists for people affected to be represented in the decision, I would not, as I said, insist on being consulted, but I would feel that it was appropriate if the special prosecutor wished to do so, to consult me, and I would feel free to give him my views.

But, we keep coming back to the point, and I think we should keep coming back to the point, that I am not going to tell this man how to do his job.

Senator TUNNEY. Well, that leads into another question which I had, and it is based on a letter that was published in the New York Times, Sunday, May 6, 1973, written by W. Houston Kenyon, Jr. I would like to have it included in the record at this point.

Senator HART. Without objection.

Senator TUNNEY. I would like to read from it:

To the Editor: The demand that President Nixon appoint an "independent prosecutor," as in the Teapot Dome case, is not answered by his appointment of Elliot Richardson as Attorney General.

Watergate and Teapot Dome are horses of a totally different color. In Teapot Dome there was no evidence and no credible rumor that any of the bribe money reached the pocket of President Harding. A wise Providence removed him from the scene before the ugly story began to break. The appointment of an "independent prosecutor" became the duty of his successor, Calvin Coolidge.

Coolidge discharged that duty by appointing a two-man team—Atlee Pomerene, ex-Senator from a Western state (Democrat), and Owen J. Roberts, experienced Philadelphia trial lawyer (Republican). Neither of these men had been in any way identified with the Harding Administration or with Coolidge. The results of their prosecutions commanded total public respect.

Watergate is different. Here the charges of criminal activity involve the President's immediate circle of personal advisers. His only reply has been an earnest television assertion that he was an innocent bystander to these events and wholly unaware of the action being taken by his advisers to advance his interest.

The inescapable new fact in Watergate, not present in Teapot Dome, is that the charges of illegal action lead so close to the Oval Room of the White House as to put Richard Nixon personally in the dock of history as one suspected of complicity in one or both aspects of the illegal actions.

Elliot Richardson, while a man of ability, experience in government and high moral principle, is one of the Washington coterie of devoted men who have served Mr. Nixon faithfully in the posts assigned to them. If Mr. Richardson were, after lengthy investigation, to assure the nation that he could find no evidence implicating Mr. Nixon with knowledge of Watergate or the cover-up, it would be unlikely that this assurance would be accepted by all hands as the last word on the subject.

Thus, it devolves upon the legislative branch to provide the independent prosecutor for which the situation so urgently calls. The precedent of a joint Democratic-Republican team where the individuals are independent and not connected with the Administration or the President, shows what would restore the President's credibility and public respect if it were able to conclude that there is no evidence to implicate the President personally.

If Mr. Nixon is well advised, and his innocence can be established, he should welcome the appointment of such a bipartisan team under legislative auspices.

Mr. Houston Kenyon, who was a special assistant to the Attorney General under President Coolidge and was in charge of the Government's investigation and court action in the Salt Creek case which

came out of the Teapot Dome, has suggested that the Congress should appoint the special prosecutor.

What are your thoughts on the points that Mr. Kenyon makes, one with respect to your ability to give to the country satisfaction that the President is not involved after a thorough investigation, and secondly with respect to the importance of the Congress appointing the special prosecutor?

Secretary RICHARDSON. One, I would feel able to do an honest job of investigation and render an honest report or take whatever other actions were required including the initiation of the prosecution.

But second, I recognize the need for a greater degree of public assurance on this score because I have been a part of this administration. This is the reason fundamentally why, in the first instance, I have proposed the appointment of a special prosecutor.

Third, I would not in any case therefore, given the appointment of a special prosecutor, expect the Congress or the American people to rely on my assurances that the President or anyone else had not been involved in, guilty of, or implicated in some wrongdoing.

The assurance on this score would have to rest on the character and integrity of the special prosecutor himself. There may be some need at some eventual stage in this for a final report that does involve participation by several people who could review the minutes of the grand jury proceedings, the transcripts of evidence taken in court, the reports of investigations, and the conduct of the special prosecutor. This seems to me a question that is still quite a long way down the road, but it is a possibly desirable step, partly because the criminal processes in themselves are not a complete and wholly accurate way of developing all the facts. One of the problems inherent, of course, in the criminal process is that there must be proof of guilt beyond a reasonable doubt. As a prosecutor myself, I have always believed that the fairest standard of determination of whether or not to seek an indictment was whether the evidence would have been sufficient if presented in open court and if not rebutted to justify the judge's submitting the case to the jury. Now, these can be quite difficult determinations. And of course, they are determinations required by considerations of fairness in the criminal process. But it might be desirable at some eventual stage for a report to be made that was not directed toward the objective of the prosecution at all.

At any rate, these are basically my thoughts on this and I think that the end to be sought is clear. That is that the special prosecutor must have a degree of authority and responsibility and independence, and staff resources that can, taken together, give confidence that he is going to be in a position to do this job.

Senator TUNNEY. Title 28 of the United States Code, section 515, discusses the authority for legal proceedings under (a):

> The Attorney General or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal; including grand jury proceedings and proceedings before committing magistrates, which U.S. attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

In reading that, I do not see a requirement that the Attorney General retain ultimate responsibility over decisions, but as I understand your answer, you do.

Secretary RICHARDSON. I am sorry, what language were you reading?

Senator TUNNEY. I was quoting from title 28, United States Code, section 515. I have it down here.

Secretary RICHARDSON. Yes, that is the one I was reading from. Here it is.

Well, I read from 516 and 519.

Senator TUNNEY. Right. I am reading from 515.

Secretary RICHARDSON. Yes, I have that here.

Well, of course, this is the section that I would use in vesting authority in the special prosecutor.

Senator TUNNEY. Well, the question is whether or not there is an implied provision there that the ultimate responsibility or authority should rest with the Attorney General in this kind of a situation.

Secretary RICHARDSON. Well, it says, "Or any attorney specially appointed by the Attorney General under law." I think the answer to this is that the person specially appointed under law must, in some sense, be exercising authority delegated to him. I think it can be a full grant of authority and I would propose such. But I do not think it is a grant of authority that divests the grantor of the delegated authority from ultimate responsibility. I have tried to keep a distinction here between the ultimate responsibility vested in the Attorney General of the United States and the authority of this man to do the job. So I take these sections read together.

To put it another way, the very act of delegation, I think by definition, is one which is distinguishable from the abdication of responsibility, and this is really what this is about. The delegator of authority in any situation that I know of cannot thereby divest himself from responsibility ultimately for what the person exercising delegated authority does.

Again, I have tried in these hearings to make clear that if I have appointed somebody and given him full authority, I would retain ultimate responsibility not simply regarding the manner in which he exercised his delegated power, but in standing back of what he did.

Well, I think I have said it.

Senator TUNNEY. But conceptually, if it is true that once you are confirmed by the Senate, you are the Attorney General, you can be dismissed by the President and you have the power to dismiss the special prosecutor, then the President has the power to dismiss the special prosecutor, too, has he not?

Secretary RICHARDSON. No. No, that does not follow. He could dismiss me, but the special prosecutor would be my appointee, in this case an appointee who, although not technically confirmed by the Senate, would still have been the subject of full opportunity for the Senate to satisfy itself as to his qualifications. And if I were directed to fire him and I refused, and I would refuse in the absence of some overwhelming evidence of cause, then the President's only recourse would be to replace me.

Now, again, these are things that in the present circumstances are so remotely possible as to be practically inconceivable.

Let us look at the situation overall. The President is in a situation now—and I believe this to be so, both on the basis of what he said to me and what he has said repeatedly publicly—in which he is pledged

to a full and thorough investigation. He is pledged to cooperate in assuring that all the facts emerge.

Now, on top of that, he said that, I am proposing the nomination of Elliot Richardson as Attorney General because I think you can have some added assurance that I mean what I say which you can base on his record and reputation. If it is necessary in addition to that to provide the ultimate reassurance deriving from the appointment of a special prosecutor, he would have the authority to do that—and I said that I should do that. I believe I should, for all the reasons we have been into.

Now, in those circumstances, given the kinds of public interest at stake, for the President to intervene in the matter of the appointment or the way the special prosecutor does his job and so on, would be totally at variance with the whole approach he set forth. It just will not happen.

I said the other day that at this stage, it seemed necessary to me to deal with the White House institutionally at arms length as between the Attorney General and the White House and the President himself, and this is a reason why, as Attorney General, I should not exercise the responsibility normal to that office of giving advice on claims of executive privilege, for instance. I would deal with the President's counsel, whoever he is—presently Mr. Buzhardt—as I would deal with counsel for a party in proceedings involving the Department of Justice. And of course, the special prosecutor would so deal with him.

Senator TUNNEY. The question has arisen of appointing a two-headed prosecutorial team. Mr. Kenyon makes that suggestion in his letter to the New York Times. Other suggestions have been made that there ought to be an investigation similar to the Teapot Dome case. What are your thoughts on that?

Secretary RICHARDSON. Well, I just think it is a difficult way to operate. I think if I go ahead and propose one person, and if that person should want some way of sharing or broadening the base of responsibility, I would not object to it and would be willing to make the appointment. But here we have a situation in which there are investigations or indictments and in which there conceivably could be further indictments, involving a number of Federal districts, each with a U.S. attorney. The special prosecutor is substituted, for purposes of dealing with those U.S. attorneys and their staffs, for the Attorney General and the Chief of the Criminal Division. He is acting, in effect, as a higher authority for purposes of a number of different prosecutions. He has the right to intervene, he has the right to overrule a U.S. attorney. He can step into any phase of court proceedings.

Now, I think shared responsibility would be difficult practically. I think there are examples in which it has been attempted to deal with that kind of responsibility by subdividing it that have not always worked well. I would think that the special prosecutor who had to get the agreement of somebody else for every major decision would be subject to considerable delays and so on. If they saw eye to eye, presumably, there would be no problem. But it could be quite difficult practically.

Senator TUNNEY. Mr. Secretary, with regard to your list, have you consulted with any present or former White House aides in preparing your list of potential nominees as special prosecutor?

Secretary RICHARDSON. No.

Senator TUNNEY. Have you consulted with the President?

Secretary RICHARDSON. No.

Senator TUNNEY. Have any of the people that I have just mentioned—White House aides, the President—attempted to offer you advice?

Secretary RICHARDSON. They have passed me two or three names that I was asked to consider. Names have come from a great many sources, over 100. Actually, no names suggested by anyone in the White House lasted as long as the final 10 or a dozen names, not because their names had come from the White House, but because, for other reasons, they failed to meet what I thought were the applicable criteria.

Senator TUNNEY. So none of the names on the final list were suggested by anyone in the White House?

Secretary RICHARDSON. That is right.

Senator TUNNEY. Do you have anyone in the Justice Department helping you on this matter?

Secretary RICHARDSON. I have gotten some help from Mr. Dufner. Mr. Dixon, the head of the Office of Legal Counsel, has provided help in connection with questions involving the powers and responsibilities of the Attorney General, and Mr. McSweeney has been helpful in matters arising in connection with these hearings. And some members of the Department of Justice have been asked for comments on individuals who have been suggested for the position of special prosecutor who served at some point in the Department of Justice. Their comments have been sought because they knew the recommended individuals and worked with them, as anyone else would be consulted who had reason to know about the character and qualifications of a possible appointee.

That is about the limit of it. The main reliance I have placed for help in developing this list has been on my former associate, the present General Counsel of HEW, Wilmot Hastings, whom I have borrowed with the acquiescence of Secretary Weinberger for this purpose.

Senator TUNNEY. Have you received any instructions from present or former aides at the White House or the President himself concerning the scope of the prosecutor's duties?

Secretary RICHARDSON. None at all. I have had no communication with anybody presently in or working for the White House, nor anybody who formerly did.

Senator TUNNEY. Discussions or consultations?

Secretary RICHARDSON. No, I have had no communication with anyone in the White House on this whole subject, except on a few incidental things that have come along in which I have dealt with the counsel to the President. For instance, with respect to the FBI's proceeding with the interrogation of individuals associated with the Ellsberg break-in. It was important in that connection to assure that this would go forward without any impediment arising out of the claims of national security.

Senator TUNNEY. Was that Leonard Garment?

Secretary Richardson. There was no suggestion by him that there should be any dallying. To the contrary, his position was that the facts should be fully developed and submitted to Judge Byrne.

Senator TUNNEY. What is going to be the nature of the working relationship between the special prosecutor as you envision it and the Watergate prosecutor, Earl Silbert and Seymour Glanzer, who have been directing the prosecutions now?

Secretary RICHARDSON. That is something he will have to determine for himself, based on his review of the case and the grand jury transcripts.

Senator TUNNEY. He will have the power to make that decision as to what the working relationship will be or should be?

Secretary RICHARDSON. Yes.

Senator TUNNEY. And will all the investigations that are presently going on now be merged under the overall direction of the special prosecutor, including the break-in of the phychiatrist's office in the Ellsberg case?

Secretary RICHARDSON. Yes. He will, in effect, assume authority over all of them. He will have to decide what kind of administrative relationship he wants to have to them. In the case of the break-in, I do not know just what problems of Federal authority now remain. At any rate, he would be in charge to the extent that there is any further action to be taken.

Senator TUNNEY. What about the FBI's records that are missing on the wiretapping as it relates to the Ellsberg case? Have you given any instructions or made your views known to personnel at the Department of Justice as to what kind of investigation you want to have proceed to find out where these records went?

Secretary RICHARDSON. I have made my views known, namely that the effort to find them should be pressed. It has been pressed. And I believe that Mr. Ruckelshaus will have some public announcement on this sometime soon.

Senator TUNNEY. The next question is how soon?

Secretary RICHARDSON. I really do not know. This is, as far as I am concerned, his business. He is in charge of the FBI and I have no direct responsibility over the Department of Justice or the FBI at this stage. I can only say that I think he wants to have a full and complete and coherent account of what happened and what the results of the investigation have been so that when he makes a statement of it, it will be a complete statement. I just do not know how soon that will be.

Senator TUNNEY. I would assume that once the special prosecutor has been appointed, he would have overall charge of any criminal prosecutions arising from the fact that these records have been lost or perhaps destroyed, or whatever else might have happened to them?

Secretary RICHARDSON. Well, I should tell you, I guess, lest I leave this misleading statement, the records have been found.

Senator TUNNEY. What if the special prosecutor discovers there has been procrastination and obfuscation or laxity on the part of any people working in the Justice Department or the FBI relating to the coverup, or any other governmental agency. Will he have a free hand to disclose his findings or to seek and get dismissal of such individuals and to continue the investigatiton and proceed with the prosecution, if necessary?

Secretary RICHARDSON. Yes. I am glad you used the phrase "free hand to disclose," because I think one of the important protections that the public interest has in this situation is the right of the special prosecutor to make any public disclosure that he believes he should. As I said at the very beginning of these hearings, if, for example, and I can guarantee that as far as I am concerned, this will not happen, but if he should at any time feel that he was being subjected to any sort of attempt to sell him on a particular point of view or to influence his course of action in any way that he thought was wrong, he could and in my judgment should make this public.

Senator TUNNEY. What recourse is open to the special prosecutor if he discovers that he cannot do his job effectively because of efforts to conceal information on the part of any person, resignation?

Secretary RICHARDSON. Well, I think he has a three-stage recourse. One is to complain to me and ask me to tell whoever is responsible to lay off. If that does not work, and as far as I am concerned I can again guarantee you that it will, but just to spell this out, if it does not, he can call a press conference and make public his letter of complaint and in those circumstances, I would think that the congressional and public reaction would be pretty effective. And of course, his third and final recourse would be to resign with a loud noise. I would think that would precipitate a considerable crisis also.

Senator TUNNEY. Would executive privilege apply to him?

Secretary RICHARDSON. No, certainly not.

Executive privilege can be claimed, but normally, it applies to the power of the President. There are some examples that I do not think come within the phrase "executive privilege" in which there is normally no public disclosure of Government documents; for example, working papers. These rest on a different level. We do not need to go into that.

But anyway, no, he has to understand and you have to understand that he makes the call on what is to be made public.

Senator TUNNEY. The only reason I suggested that is because the present Attorney General offered a proposition to the Senate that executive privilege could be deemed to apply to all employees of the Federal Government, some 2½ million, and that the only recourse of the Congress was to impeach the President. I am glad to hear that you do not subscribe to such a broad theory.

Secretary RICHARDSON. Well, I think Mr. Kleindienst was saying, in effect, that if a Federal employee were told by the President not to appear before a congressional committee, that directive would, in effect, be final, because there was no way of getting it adjudicated. I do not know about that. In any event, that situation cannot arise here.

Senator TUNNEY. In answer to a question by Senator Bayh on May 10, you said that if the special prosecutor wanted the President's affidavit or testimony, the President's counsel and not you would handle the decision as to executive privilege. You have repeated that here today, and that you would see the President's counsel. You do not feel that there is any conflict of interest on your part, being the Attorney General, with the responsibilities that you have as Attorney General with respect to defining the limitations of executive privilege, either in a specific instance or a broad, categorical basis, and your responsibilities as Attorney General, having ultimate responsibility for

the prosecution and the investigation of the matters relating to Watergate?

Secretary RICHARDSON. No. If I follow the question, I think there would be a conflict of interest if I, as Attorney General, undertook both to exercise the role under the old guidelines with respect to executive privilege generally and with respect to advising the President on when a claim of privilege properly lies; and also to exercise any kind of responsibility, however residual, over the conduct and investigation of the prosecutions in matter involving White House people.

So this is why I have said that with respect to the exercise of privilege in these matters, the President would have to look for advice solely to his own counsel and not to me.

Senator TUNNEY. At this moment, who is responsible in the Justice Department for the Watergate investigation?

Secretary RICHARDSON. The Assistant Attorney General heading the Criminal Division, Mr. Henry Petersen, has overall responsibility delegated by the Attorney General, and under him, of course, is the U.S. attorney.

I say "under." In some respects, the U.S. attorneys have, by understanding and tradition, a considerable degree of independence. In any event, there is the U.S. attorney in the District of Columbia and then Henry Petersen.

Senator TUNNEY. What will Mr. Petersen's relationship be with the special prosecutor?

Secretary RICHARDSON. All of the special prosecutor's responsibilities will be carved out from the area normally under the jurisdiction of the Criminal Division and turned over to the special prosecutor. In other words, as to these matters, Henry Petersen would no longer be responsible.

Again, I would like to make clear as I did in my original statement that I do not intend in proposing to do this, or in proposing a special prosecutor, to cast any reflections on the integrity of Mr. Petersen or anybody on his staff, or anybody in the U.S. attorney's office, for that matter. But I think that if the special prosecutor is to do the kind of job we have been talking about, he should have full authority and not have to report to anybody but me and to me only within the limitations that I have tried to make clear.

Senator TUNNEY. But Mr. Petersen would be working, presumably, with the special prosecutor, as an assistant to him?

Secretary RICHARDSON. No, no, anything under the special prosecutor would be wholly under him. He might want to consult Henry Petersen because of Henry Petersen's long experience in legal issues arising out of grand jury proceedings and so on, but he would have no day-to-day working relationship in these matters with Petersen.

Senator TUNNEY. So Petersen would be off the case, so to speak?

Secretary RICHARDSON. Yes. There would be some areas of potential overlap or some cases where it might be necessary to decide who had the responsibility—for instance, some new case on campaign contributions, if one arose. They might have to get together on whether or not this should be turned over to the special prosecutor because it in some way related to other cases he had, or whether it should be considered to be, in effect, an "ordinary" case falling within the normal jurisdiction of the Criminal Division.

Senator TUNNEY. What resources and physical facilities will be put at the special prosecutor's disposal?

Secretary RICHARDSON. In this, he would have to decide, with whatever help and advice he could get, how much of a staff under his direct control he needed. He would be in a position, in any event, to call on services of departmental attorneys on an ad hoc basis, and this is one of the reasons for having him in the Department of Justice. He would also be able to call on the FBI to the extent needed. He would be working, as I said earlier, with the U.S. attorneys and their staffs.

So what he would have to do in the very beginning, I would assume—what I would do in his shoes anyway—would be to collect quickly a small staff in which he had full confidence, people of his own sole choice, and then try to get as rapidly as possible an overview of all these cases, an assessment of the capabilities of the people in charge of them now, and then, out of all this, he could begin to develop an organizational staffing pattern, and begin to fill in the slots.

He would have final authority over the selection of people. In this respect, as I have said already, I have no problem with the Stevenson resolution, except, of course, that he could not draft people in the sense of obligating service. They would have to be available.

Senator TUNNEY. What steps would be taken to see to it that incriminating evidence, files, documents, and other vital materials contributing to disclosure would be protected?

Secretary RICHARDSON. He could, of course, in any manner as to which he assumed responsibility, require whatever safeguarding of records thought appropriate. In my own view—I did not quite get to this part of your question in an earlier question—I would think he would want to operate out of premises separate from the rest of the Department of Justice. I would think that in that case, he would take whatever steps he thought necessary to protect the records he had there.

Senator TUNNEY. We have already discussed that the special prosecutor's inquiries naturally would involve possible violations by personnel working in various Federal agencies—CIA, FBI, State Department, et cetera. Now, what about your conception as to the information that may be withheld for national security reasons by these other agencies and the ability of the special prosecutor to get at these documents if he feels that it is necessary?

Secretary RICHARDSON. Well, I think he is entitled to expect cooperation and I think that the attitude of people in other department agencies at this stage is that they should cooperate, because there are at stake public interests in getting the full story of what has been going on that transcend any other consideration, at least any other that I know of. I think he can expect that response. If that does not happen in a given instance, then he would have to see what resources are available to him, including power of subpena and so on, exercisable through a grand jury.

Senator TUNNEY. Well, I am thinking of the testimony that you gave the other day when you said that in the Ellsberg case, the President felt that national security interests were at a stake. It is possible that certain agencies or individuals might claim that national security interests were at stake and thereby prevent the special prosecutor from obtaining the materials that he felt were necessary to conduct his investigation. As I understand your testimony today, you do not feel

that such a claim would be binding on the special prosecutor as it relates to the investigation that he is conducting?

Secretary RICHARDSON. Well, I have two comments. One, I think the Ellsberg case is a good example, because while it is true that the feeling that this involved national security problems and should, therefore, be treated on that basis was certainly the President's feeling for some period of time, nevertheless, the way things broke in the actual Ellsberg trial made it necessary to make disclosures, which indeed were made. So now all of that either is or is going to be fully disclosed. The Krogh affidavit itself is a pretty full account, as far as I know. At least, he purports to give full disclosure notwithstanding any national security concerns. I think this is going to be the attitude from here out with respect to questions like this.

If a national security concern is asserted as a reason for not making a disclosure, then the special prosecutor would have to decide how to challenge that. He would have various legal methods of doing so.

Senator TUNNEY. What we are really saying, then, is that the special prosecutor has got to be given a top secret clearance and he has to have a full maximum security clearance which would give him the right to have access to any documents, are we not?

Secretary RICHARDSON. Yes.

Senator TUNNEY. Is the White House presently conducting an investigation, a separate investigation, on Watergate?

Secretary RICHARDSON. Not that I know of.

Senator TUNNEY. And the White House's request to return the Dean documents, as reported in the papers, is an attempt to do what, then?

Secretary RICHARDSON. As I understand it, it is based on the proposition, one, that the classified papers involved are Presidential papers, in the sense that any paper of a Presidential staff member, including Presidential counsel, is a Presidential paper; and secondly, that they are classified and that being so, the President or somebody acting on his behalf should have some opportunity to assess whatever prejudice to the national security, if any, might result from their disclosure.

As I understand the motion, it is in effect that the papers be turned over to the U.S. attorney and that the White House have some opportunity to know what is in them, but not to take them out of the hands of the U.S. attorney.

Senator TUNNEY. Well, during the Ellsberg case, Judge Matt Byrne apparently was offered the directorship of the FBI. Do you know whether prosecutors Earl Silbert or Seymour Glanzer were offered judgeships or any other special appointment?

Secretary RICHARDSON. Not that I know of. I mean I just do not know. I have not heard of any.

Senator TUNNEY. It would not be proper for them to be offered any such appointment at this time, would it, or hereafter while the case is proceeding?

Secretary RICHARDSON. No, it would not.

Senator TUNNEY. Mr. Gray, the former Acting FBI Director, is on the record now as having told Senate investigators that he explicitly informed the President on July 5, 1972, 18 days after the Watergate break-in, that he was confused by what appeared to be CIA involvement in the Watergate bugging and some of the instructions he had

received from White House aides. Gray has said further that he warned the President that White House aides were trying to impede the investigation by the FBI, then just begun. Did Mr. Gray speak to you about this matter at any time in the past expressing to you his concerns?

Secretary RICHARDSON. No, I have not had any conversation with Mr. Gray about any aspects of this matter at all.

Senator TUNNEY. You have not spoken to Mr. Gray at all?

Secretary RICHARDSON. No. The last time I talked to him was about expediting the FBI investigation of some appointee. That was a year ago.

Senator TUNNEY. Have you discussed this matter with Mr. Kleindienst or Mr. Mitchell?

Secretary RICHARDSON. No, not at all. I have not had any communication for quite a while with Mr. Mitchell. On the day the President asked me to Camp David to talk about this appointment, Mr. Kleindienst told me about the circumstances which had led him to disqualify himself. But I have not talked with him since then about any aspect of the Watergate matter or any of these cases.

Senator TUNNEY. Were you aware of the fact at the time that you agreed to accept the appointment as Attorney General that Mr. Gray had informed the President on July 5, 1972, that he was confused by the CIA's involvement in the Watergate bugging?

Secretary RICHARDSON. No.

Senator TUNNEY. So it was news to you when you read it in the newspapers?

Secretary RICHARDSON. That is right.

Senator TUNNEY. You told Senator Bayh that the investigation of the disappearance of the records of the wiretaps in the Ellsberg case would be within the scope of the special prosecutor's duties. This morning, on a television news program, a commentator, accompanied by Mr. Ellsberg, outlined an extraordinary account of what the Ellsberg case was really about. According to the story as I understood it, the prosecution of Ellsberg was really another part of the alleged "dirty tricks" campaign against leading Democratic contenders. At the time, the prime target was Senator Muskie, then the front runner. According to the story, those close to Muskie were wiretapped, allegedly because of connections to Ellsberg in this regard, and Morton Halprin's phone was bugged. Apparently, this was only recently uncovered by investigators, with involvement running so high, according to the description by Mr. Ellsberg, that a decision was made by the Government at the highest level to voluntarily blow up the Ellsberg case in order to keep the truth from coming out?

Do you have any information on that?

Secretary RICHARDSON. Very little. I really, I think, do not have enough to comment on that account as you have summarized it. I regard it somewhat skeptically, but I only regard it skeptically because the only information I have is consistent with the assertion that the Ellsberg case—or at least the Ellsberg break-in—was all part of the so-called plumbing operation. But I have not done any investigating of my own. About all I know has been from, one, the Krogh affidavit; and, two, some conversations with Mr. Ruckelshaus about the FBI's efforts to find the records of this surveillance.

Senator TUNNEY. And so the fact that the records were not turned over to the court, which apparently precipitated the judge's decision to rule the mistrial, in no way was a plan, to your knowledge, to blow up the case just to wipe it out before there were additional disclosures that would be embarrassing?

Secretary RICHARDSON. No, I do not think so. I have talked twice to Mr. Ruckelshaus about the effort to find the papers and all I know is that we both thought that this effort should be pushed as rapidly as possible.

Senator TUNNEY. Well, someone handed me a note that at 2:00 p.m. today, Mr. Ruckelshaus apparently has a press conference scheduled.

Secretary RICHARDSON. Well, that may well be the occasion when he might well make this statement. I did not know when he was going to do it.

Senator TUNNEY. Thank you very much, Mr. Secretary.

Thank you very much, Mr. Chairman.

Secretary RICHARDSON. Thank you, Senator Tunney.

Let me just say, Mr. Chairman and Senator Tunney, that I appreciate this opportunity. Some of it has been restatement, but nevertheless, this colloquy as a whole does very comprehensively deal with the kinds of questions I know concern this committee and the Senate. I apppreciate the opportunity.

Senator TUNNEY. Thank you very much for being so responsive.

Senator HART. The Senator from Kentucky.

Senator COOK. Thank you very much, Mr. Chairman.

Mr. Secretary, I do have some questions to ask you.

Senator HART. Will the Senator yield for just a moment?

The Senator from Kentucky has been very patient over the days and it might be helpful if we agreed now as to when he might emit recess for lunch so that you could plan your questions. I have no preference. Do you?

Senator COOK. Mr. Chairman, I do not think I will take over 15 or 20 minutes.

Senator HART. Proceed until you complete, then.

Senator COOK. Mr. Secretary, let me first say before I get into specific questions that I made it very clear to you in my discussions when your name was announced as the nominee for the Attorney General that I had great faith in you as an individual, that you and I are friends, and that I felt that you would thoroughly pursue this Watergate matter. But in my own mind as a member of this committee and knowing the ordeals that we have been through since I have been here, I probably would have been much happier had the President of the United States named someone else who had not been involved in "the official family," had not been a surrogate, as both you and I were, and who had the same credentials and the same degree of integrity that you have to conduct this. I thought that if this were the case, we would not find ourselves in a position of debating prosecutors, and debating the independence of prosecutors.

However, I must say I have been delighted and have been totally reassured in your discussions relative to the commission that you would give to a special prosecutor. In that degree, I think all of us on the committee have to understand that when we talk about independence, we in effect created a degree of a special prosecutor when

the Senate of the United States adopted S. Res. 60. We do have the independence of the Senate Committee on the Watergate if we will read the resolution, the degree of independence, its availability to subpena, its availability to hold hearings, its availability to go into all of the matters involving the entire 1972 Presidential campaign. So in effect, the special prosecutor, whoever he may be, will also have to operate in light of the fact that the so-called Ervin committee will continue in operation, will continue its hearings, will continue to investigate so that they will be parallel in nature.

Do you not agree with that?

Secretary RICHARDSON. Yes, I do. I think that is a substantial additional reassurance to the American people. I think that there are some problems in that connection that have to be worked out in terms of the relative responsibilities of the committee and the special prosecutor, at least in the matter of timing and so on.

Senator COOK. In regard to some of the problems that may occur, I would like to talk to you about some of the discussions brought up on the very first day about sections 6002 through 6005 of title 18. It came as a surprise to me when Senator Ervin asked the Attorney General whether he would consider waiving the 20-day provision under section (c) of 6005. May I state to you, Mr. Secretary, that I was also rather amazed when Senator Ervin said that he was not willing to have anything postponed until the Department of Justice has proceeded with all of its activities. We heard then, "Because the last lingering echo of Gabriel's horn may tremble into silence before it is done, because justice often travels on leaden feet."

I would say to you, Mr. Secretary, that I would hope you would not agree to any proposal to waive that 20-day provision. This is, for a very, very sincere reason on my part. I do not want the entire Watergate matter tried before a committee of the Congress, when everyone could then remove themselves from that committee and if they are indicted or if they are subjected to the possibility of indictment, plead immunity. It is this Senator's opinion that anybody who violated the law within the framework of the 1972 Presidential election, or within the scope of Watergate, and if he is found guilty, he ought to go to jail. I do not want anyone to find a haven before a special committee of the Senate as a result of his testimony by reason of subpena which would put him in a position where he could plead immunity, then go before the court with a battery of lawyers pleading that he had testified against his interests before a committee of the Congress and thereby plead immunity before the court.

I might suggest, Mr. Secretary, that if you are confirmed, a grand jury can bring a lot of indictments in a 20-day period and I would not want to see an entourage of witnesses wanting to come before the Senate committee and exposing all of their sins so that they need not have to do so in the event that they might be considered or might be subject to indictment. I would hope, Mr. Secretary, that if you are Attorney General of the United States, you would feel the same way.

Secretary RICHARDSON. Senator Cook, I think you have put your finger on a very significant problem. I referred to it in response to Senator Ervin when this came up on the first morning of this hearing.

The special prosecutor will have to deal directly with that issue immediately upon taking office. I do not believe that it is a matter consistently with the kind of responsibility that I think should be vested

in him, that I should try to deal with. But I do agree that the question of the immunization of any witness is one of the most important and sensitive that will have to be dealt with and there will have to be considered the question, for what purpose—testimony before the Senate committee or for purposes of sustaining indictments and providing necessary proof of guilt?

Senator COOK. I might say that I could not agree with the Secretary more that the American people are entitled and should know all of it, every bit of it, but I would hate to have the American people in a position where they found out all about it and as a result of it, everybody was so immunized that not a soul had to pay the penalty under the law that is prescribed as a result of these activities. I think that would be a shameful episode, not only for the Congress of the United States, but it certainly would be an abdication of judicial responsibility under the best authority of the court system of the United States.

Secretary RICHARDSON. I agree with you, Senator Cook, that the American public would never understand a situation where, despite the disclosures of what was done wrong, no one ever was tried, sentenced, and sent to jail. This means, therefore, that the special prosecutor will have to have a very firm, clear understanding with the committee on the right of the processes of justice to go forward on the one side and the public interest in full disclosure on the other. I hope that a sound and reasonable accommodation of these interests will be reached.

Senator COOK. May I discuss with you just a minute this question of full responsibility and ultimate responsibility? As I listened to all of the questions that have been asked of you, one has to view his own authority and his own responsibilities in the positions that he has held. When I was on the bench, I had many, many courts below me. It was my responsibility to sign literally thousands of orders as a result of the actions of those judges that were appointed by me and subject to my commission. I did not interfere in any way with the operation of those respective courts. But it was also my ultimate responsibility in regard to those orders, and it was ultimately this individual who was responsible to the order that was signed and the action that was taken by an inferior judge.

Now, it seems to me that this is the way you have at least analyzed at this end your distinction between ultimate responsibility and full responsibility. Those judges that were appointed by me had full responsibility, but the ultimate responsibility to sign those orders and make those orders fully implementable under the judicial system was the responsibility of this individual.

Now, do you look at your scope of authority and ultimate responsibility in the selection of a special prosecutor in this light?

Secretary RICHARDSON. Yes. I think that puts it very well, Senator Cook. It is really that kind of independence that I think a special prosecutor should have and as I understand the relationship you had to the judges of the lower courts, the similarity is very close.

Senator COOK. I might also say that, in listening to Senator Tunney and listening to the other Senators in the past few days, I feel that in their attempts to totally isolate a prosecutor, I think we would put the burden on us and not on you, Mr. Secretary. That burden is that if we feel that a prosecutor will not be sufficiently isolated by you, then obviously, the Senate should take the initiative. The Senate will

have to legislate, the Senate will have to create, the Senate will have to appropriate, the same way as it did during the Coolidge administration. Obviously, if this committee is not satisfied, then the Senate should set up an independent prosecutor as a matter of law. But it would seem to this Senator that unless the Senate is willing to take this action, then obviously, the ultimate authority of the Attorney General of the United States or the ultimate authority of any member of this panel in relation to his own staff stands in the same light.

So I would suggest that the commission that you will prepare for a special prosecutor ought to be made very clear to the members of this committee. I might suggest that if I were under consideration, there would be a lot of things that an Attorney General might put in that letter that he would not want to put in it. I say that because as the prosecutor I would demand it and I would suspect that you are under that type of understanding with the individuals that you may have interviewed that have come under consideration.

Secretary RICHARDSON. That is all correct, Senator Cook, and as I have said, the commission will be as clear as it can be made and it will have to be satisfactory to the special prosecutor himself, and it will come under the scrutiny of this committee.

Senator COOK. I might say Mr. Secretary, that you and I talked on Sunday. You talked to most of the members of the committee. I recall at least the agreement that you and I had that the names that you gave to me would be kept in confidence and I said to you at that time that that was rather a difficult thing to do with all the members of the Judiciary Committee. I was correct. I noticed that the Baltimore Sun had the names of the people that you had talked to. So I might suggest to you that even with the committee responsibility and with the obligations that we might have, we do have our own problems.

Mr. Secretary, I might also say to you that in the delegation of responsibilities to a special prosecutor, you are aware that under 6005, the request for an additional 20 days on the issuance of a request for a subpena to a Federal judge is the sole and exclusive responsibility of the Attorney General. This is unlike section 6003, where such actions can be taken by the U.S. attorney with the approval of the Attorney General, the Deputy Attorney General, or any independent Assistant Attorney General. Under the request for a 20-day stay, this request must come from the Attorney General and only from the Attorney General. It is not in the nature of a right that can be delegated by you. Are you willing to say to this committee that on the request of the special prosecutor for the extension of 20 days because of an investigation that he is carrying out, because of matters that may presently be either involved in a case that he is trying or involved in an investigation before a grand jury, that you will extend him the courtesy of issuing these orders at his request for a 20-day stay?

Secretary RICHARDSON. Yes, I would do that, Senator Cook.

Let me just add this. This, I think, is a good, very concrete example of the kind of thing that will arise in the carrying out of the responsibilities that I have been attempting to delineate; and in this instance, I think that the special prosecutor should have a clear understanding that in any event where he asked me to carry out this statutory responsibility, I will do so as a matter of course.

Senator COOK. I would hope so, Mr. Secretary, because the very organic nature of the judicial system requires that we preserve that system. This case should not be tried before a Senate committee and tried before the headlines of the United States and not tried before judicial tribunals that can in fact impose penalties.

I want to make, Mr. Chairman, just in closing, one more emphatic statement. That is that those who are guility in this situation, Mr. Secretary, if in fact they are found guilty, they have to pay their penalty to this system and they have to pay their penalty to this society, and they have to go to jail if that is the dictate of the judicial sysem. They should not be absolved by any pleading of immunity because of the activities of any committee of the U.S. Congress.

This Senator would certainly not be satisfied and I know the American people would not be satisfied with that.

Senator HRUSKA. Will the Senator yield on the point of immunity?

Senator COOK. Yes.

Senator HRUSKA. First of all, I should like to indicate that I subscribe to the views expressed by the Senator from Kentucky on this point. We should be grateful for his bringing to our attention and emphasizing it in this fashion. The statute on the granting of immunity, which was discussed by the Senator from North Carolina on the first day of these hearings, is readily susceptible to conjecture and misunderstanding. There is a provision which provides for a 10-day period in which the Attorney General can consider transmitting the request of a congressional committee for immunity of a given witness. There is also the provision for the 20-day extension of that period.

There are a number of reasons, why, the Attorney General should be consulted. There is also a reason why he is given 10 days in the original instance and 20 days, if desired, for complying with the request of the congressional committee. One of those reasons is that through his subordinate law enforcement officials, particularly the Chief of the Criminal Division, the Attorney General may receive reports concerning activities that are going on in grand juries and in other inquiries, and therefore, he may have special information regarding the witnesses who are applying for immunity. It is incumbent upon the Attorney General to weigh that information and to inform the chairman of the congressional committee, if such be the case, whether the Department of Justice believes that it has sufficient evidence clearly and independently of what that applicant for immunity might furnish in order to successfully prosecute him.

Furthermore, in the present situation there might be pending in the Department of Justice a more serious crime than the bugging of the Democratic National Headquarters at the Watergate. Suppose it developed that one of these witnesses had indulged in activity or in conduct which makes him susceptible and vulnerable to a charge of treason, for example. Would it not be a very cheap price to pay for one to come and reveal such activity in the course of testimony before a congressional committee and get immunity which would insulate him against an even more serious crime than is involved with any of the other defendants against whom he is purveying this testimony?

That is the purpose and the rationale of that law. It is a law that is not of many years derivation, perhaps 5 years in its revised, codified form. The discussions of that bill will show that to be so.

Senator COOK. May I say to the Senator from Nebraska that this bill came out of our committee in 1970, as amended.

Senator HRUSKA. Exactly. And it had been considered for 2 years prior to that time. It is one of the products of the commission on title 18 of the code and it is one of the fruits of the labors of that Pat Brown commission, on which this Senate had four members, incidentally. And the speaking Senator is one of those members and I recall well the discussion.

Now, then, to have that recent legislative background disregarded and to ask you, Mr. Attorney General, to waive that 20-day period, I would be asking you to become simply a ministerial messenger boy conveying a request of a congressional committee to the court. Such a waiver would deny and repudiate the spirit and the letter of the statute that we are talking about and the spirit and the letter of that statute. That statute is geared to the proposition of the administration of justice in a full, evenhanded manner rather than in some capricious fashion which will allow some guilty to escape and others to be called upon to pay the full penalty. And I hope that as we go along, we will see that evenhanded approach taken in deliberations of this committee.

Mr. Secretary, I do not know whether you would have any comment on this. I have no particular questions. If you have any special comment, however, I will be happy to hear from you.

Secretary RICHARDSON. My only comment, Senator Hruska, is that these are considerations that should be given full weight. So far as this specific case is concerned, the special prosecutor and not myself would be in a position to do this and I think it is one of the earliest situations that he would have to get fully on top of in order to have a considered judgment.

Senator COOK. May I say, Mr. Secretary, there is not any question that the statutes under title 18 with regard to immunity are extremely important. They are extremely important to the prosecution of cases. I am not saying that it is not going to be necessary to extend a degree of immunity, either within the framework of the senatorial committee or within the framework of the judicial process. But I would also suggest that it would be this individual's opinion that if anyone came up here before the committee and came under subpena and he thought that he could be subject to indictment or he thought that there was a degree of guilt that ultimately would be revealed, it would be this individual's idea that good legal counsel would tell him to go up there and perform a good light opera and proceed to open up his heart on everything that he could conceivably get in that record. Then, when and if he was compelled to answer to a judicial indictment, the first activity of his legal counsel would be to plead immunity. And I would not want these cases held in abeyance while he pleaded numerous motions for immunity for prospective defendants because of their extended conversation and extended deliberations before a committee of the Congress of the United States. I think we would be cheating the judicial system, frankly, and I think we would be cheating the American public, because they demand that the situation be answered, they demand that those who are responsible be indicted. They demand that those responsible be tried; and they demand that whatever penalties must be paid thereby be paid by the individuals who have seen fit to almost desecrate our political system. The political system, as

we know it, in the United States. For those people who did not feel they could believe in the American people to make a choice and decided that they were somehow or other going to effect that choice through devious means, this Senator is one individual who wants every one of them to go to jail.

Secretary RICHARDSON. Those are all, I think, very powerful considerations, Senator Cook, that would, as I said, have to enter into this and I would hope that this could be done on a basis of full mutual cooperation and understanding as between the special prosecutor and the Senate committee.

There is one other aspect of this that has not been touched on. It is also a matter of concern. That is that the immunized witness would not be in a position to testify under circumstances in which he would not be subject to cross-examination——

Senator COOK. That is correct.

Secretary RICHARDSON [continuing]. As he would be if he were a witness in open court, and any individual whose own activities and reputation were affected by any such testimony would not be in a situation where he or she would have a right to be heard or to cross-examine. And these, I think, are also factors that deserve to be considered.

Senator HRUSKA. If the Senator will yield further, my remarks a little bit ago were limited pretty much to the situation of the congressional committee requesting the Attorney General to transmit a request for immunity to the district court. That, however, is not the only purpose nor the only thrust of the immunity statute. There are also those instances where the Attorney General will present his own request for immunity to being granted to a witness in whose testimony he is interested for the purpose of further prosecution. But the same guidelines apply in both instances, in that all of the factors known to the Attorney General must be taken into consideration and his discretion accordingly employed.

Senator COOK. Well, as the Senator knows, there is considerable debate and the question has not been totally judicially resolved in regard to the interpretation of what one refers to as a use immunity and the immunity for prosecution. I would suggest that there is a big enough gap in that particular area that I am afraid we would find ourselves fighting a multitude of motions before we could get down to the trial on the merits. I think what we really need here is a series of trials on the merits.

I might also suggest, Mr. Secretary, that it is this Senator's opinion that regardless of the merits of some of these cases, I think the prosecutor is going to find himself in a position where he is going to have to try just about everyone of these cases whether he wants to or not. I think the American public is going to demand that it be done.

Thank you, Mr. Chairman.

Secretary RICHARDSON. I understand the point.

Thank you, Senator Cook.

Senator HART. The Senator from Massachusetts.

Senator KENNEDY. Mr. Secretary, I will not be able to be here this afternoon, but one of the matters that the Senator from Kentucky mentioned—he is here and he can correct me if I am wrong—is that

he views the special prosecutor as having a relationship between the Senator and his staff?

Did the Senator mention that at all?

Senator COOK. Oh, no, I did not; not at all.

Senator KENNEDY. I thought that was part of it.

Senator COOK. May I say to the Senator from Massachusetts that I view the special prosecutor and I think the Secretary views the special prosecutor in relation to his testimony, in answer to your questions and Senator Bayh's and Senator Tunney's, as extending to that individual under a commission every degree of authority that he can extend to him to try these cases and bring this to an ultimate conclusion. However, the Attorney General of the United States has the ultimate responsibility in this matter, just as we consider that each one of us has the ultimate responsibility for the activities regardless of the independence that we may wish to give to anybody who works in our campaigns or works in our offices or anywhere else. But I view that ultimate responsibility that he has testified to in relation to that degree of ultimate responsibility that this individual had when he was on the bench in relation to his lower courts.

Secretary RICHARDSON. May I just interject, lest there be any misunderstanding, Senator Cook, I think that the kind of ultimate responsibility that I visualize may be less than you have as a judge having jurisdiction over lower courts. I testified the other day in response to Senator Bayh that I would expect to interpose my own judgment only in a situation where the special prosecutor had acted arbitrarily or capriciously and not simply because I disagreed with him as a matter of judgment. That, I said, I thought was a very remote possibility. I do not know the scope of your authority well enough to know whether you may also have had the power to reverse a lower court judge simply because you thought he was wrong. I would not, in any event, expect to substitute my own judgment for that of the special prosecutor simply because I thought he was wrong.

Senator COOK. My only recourse would have been to have failed to sign those final orders that were then appealable above me. Obviously, if I had done that, then I would have shown that I did not have faith in the individual whom I had appointed to pursue that particular responsibility.

Senator BAYH. Would the Senator yield, the Senator from Massachusetts yield?

Senator KENNEDY. Sure.

Senator BAYH. I hesitate to interject myself here, but inasmuch as I think the Senator from Kentucky very accurately expressed the place I was trying to get our distinguished Attorney General-designate to go last week, I would like to get a comment directed at Senator Cook's description of the powers given to the special prosecutor before he got to the discussion of his duties as a judge. Would you concur with his assessment that you are giving to the special prosecutor all of the powers necessary to pursue the case and carry out the investigation subject only to your final authority that the job be done accurately?

I mean the way the Senator from Kentucky described it, I thought that was exactly where I felt we ought to go. In fact, you yourself almost said that and at one time, I think did, and then maybe pulled that trapdoor that I referred to last week, when you suggested that

this was sort of a legal responsibility that could not be delegated, but that the operational, decisionmaking authority was going to be given to that special prosecutor.

Now, pardon me for interjecting.

Secretary RICHARDSON. That is right, and I think I have made that clear.

Senator KENNEDY. Well, the only point I would make here, Mr. Secretary, is that I think a number of us have gone around and around on the issue and we have tried to define what the actual, ultimate responsibility means. I think we have had a variety of different questions by the members of the committee in areas that they may be concerned about as presenting some particular problems on that subject matter. It just seems to me that over the course of the morning Senator Tunney, Senator Cook, Senator Bayh, Senator Hart, and others have all underlined the importance of that written document that is going to be worked out between you and the special prosecutor. It seems to me, having listened during these hearings for these few days, that you have been extremely responsive to the different particular questions which have come from the members of the committee and they have covered a wide variety of different areas, to try to get at the ultimate definition of "ultimate responsibility." But it seems to me that, until we have that particular material outlined as a basis of agreement between you and the special prosecutor, we will be continuing to ask questions about the different areas, but we will probably have to be going over that in some detail again as to the meaning of that.

Secretary RICHARDSON. I think it would be appropriate that you do that, Senator Kennedy.

Senator COOK. May I say, Mr. Secretary, before you answer further, it was at least my feelings, Senator Kennedy, when I talked in terms of the commission that would be given to the special prosecutor, without any equivocation, that that commission would be in writing.

Senator HRUSKA. But it would have to be in compliance with the statute, of course, unless we wanted to legislate to change the statute, as you indicated.

Senator COOK. The authority of the Attorney General is vested by statute and I do not think he can go beyond that authority and I do not think there is any question about that by any member of the committee.

Secretary RICHARDSON. One way of getting to the commission earlier, Senator Kennedy, so the committee will have it before the special prosecutor comes here for interrogation, is that I make it available to you as soon as I have been able to go over it with him and assure that it includes any provisions that he wants to have in it. Then I could transmit it to the committee and you would have in advance an opportunity to look it over before he actually appears.

Senator KENNEDY. The only questions then, I suppose, will be specific questions about the various clauses and parts of the agreement, and we will have his interpretation of what it means. I suppose it is also important that we have your interpretation before hand about those provisions. Do you not agree with me on this?

Secretary RICHARDSON. It occurred to me that you might come to that conclusion and I had decided that if you did, I would offer to

come back or to give you a letter based on whether the colloquy with the appointee permitted me to say I endorse, support, and will carry out the understandings that were expressed, or by some other appropriate means, to close the circle by giving you the necessary assurance following the hearing for the prosecutor that I stand back of the result hammered out in the course of that colloquy. I would be glad to do that. I think it would help some.

Senator KENNEDY. As the Attorney General or the Attorney General designate?

Secretary RICHARDSON. Well, that is up to the committee and the Senate.

Senator KENNEDY. Do you have any preference?

Secretary RICHARDSON. I am trying to move as rapidly as I can. As you know from our telephone conversations on this point, it depends on whether I get an affirmative answer from the person on the top of my list. If so, then it can proceed more rapidly. If I have to go down the list, it could take longer. But at any rate, I will—whether it comes before or after, I think, should be for the Senate to decide.

Senator KENNEDY. I am wondering whether it would be better for you just to be working on that particular document now rather than even going through the process of responding to questions up here. Would it be expediting the process for you, instead of coming back this afternoon, to select and make sure you have the special prosecutor and iron out these details?

Secretary RICHARDSON. Well, there is not a whole lot I can do right now. I need to have somebody who says he will do the job, who can then say whether or not the draft needs amendment.

Senator KENNEDY. Thank you very much.

Senator HART. Not to introduce a note of further uncertainty, but in the last few minutes, I have been wondering which is chicken and which is egg? How can you get a fellow to say yes, I will take the job, until you show him the contract?

Secretary RICHARDSON. Oh, I would show it to him.

Senator HART. You will have it?

Secretary RICHARDSON. Oh, yes. I have a draft now which I think is pretty good and I would promptly give it to anyone I was approaching on this and ask for comments or suggestions.

Senator HART. I am almost sorry I raised the question, because it opens others. Maybe the best ballplayer will not sign the contract because the figure is not right, but you would still want to get the best ballplayer. What if the contract is in such form that the very best would feel unable to accept? Again, I opened it. I did not mean to. But it follows logically.

Secretary RICHARDSON. No, that is a perfectly good question. I have thought about that some, too. I would, in effect, be saying to him, well, does this look OK to you? Does it give you a clear enough grant of authority? And if he said, no, I think it needs to be clarified or strengthened in a given respect, I would—I do not mean that I would automatically go along. We might discuss it. But I do not want to lose anybody on the ground that he thinks the role is too restricted. I can only say that I am planning to be pretty flexible on that score, because if I think that the individual I am talking to is really the right

person for this job, I will want to get him. I hope this will not arise, because I think that what I am proposing really does provide full independence, consistent entirely with everything that has been discussed here.

We took another look at the draft and made some changes in it, for example, following the colloquy with Senator Bayh the other day. So you are raising, you are pointing to a contingency that I hope will not occur.

Senator HART. I hope by asking the question, I have not caused it to.

Secretary RICHARDSON. Not at all.

Senator HART. I would be the most unlikely fellow at the bar to be asked to do this job, but if I were asked to do it, I would want a clearer understanding than I have had after listening to you and Senator Cook, you and me, as to really what happens if I decided that I want to take a particular course of action in connection with an indictment or a grant of immunity. I would not consider the contract one I would sign unless it was clear explicitly that the only thing you could do to me if you disagreed with that decision was fire me. I would want to be sure that I could do exactly what I wanted to do and omit everything I wanted to omit, subject only to being fired.

You might think that something I wanted to do represented irresponsibility or going off the deep end, but I would want the contract to say all you can do about it is fire me. Is that not the way the contract you anticipate, that is the draft that the fellow is going to get?

Secretary RICHARDSON. It does not say it quite that way in its present version. But as I said the other day, that is really what it comes down to. If I am saying I am not going to second-guess you, I am not going to interpose my own judgment, this is your call, then anything within the boundaries represented by capriciousness on the one extreme and arbitrariness or a sheer mental aberration on the other is fully legitimate. If the special prosecutor persists in what I would regard as an arbitrary, capricious, or totally irrational manner, the only possible outcome at that point would be, then, his resignation or my firing him.

Senator HART. Senator Kennedy?

Senator KENNEDY. Secretary Richardson, you indicated that you had a rough draft of the agreement. Is there any reason that we could not examine it?

Senator HRUSKA. If the Senator will yield, may I ask would that be on a confidential basis like the disclosure of the names was made yesterday?

Secretary RICHARDSON. I think it would be, if it were done, desirable to achieve some confidentiality, although there is no secret about it. I just think that before getting into negotiations over language, it would be better, in dealing with the committee on this, for me to have it in the form that the special prosecutor is satisfied with and I am satisfied with, and seek the judgment of the members of the committee at that point. I just think it is a more orderly way to proceed. I have no other basis of hesitancy at this stage. If an individual Senator made a particular point of wanting to see it, he could see it.

Senator KENNEDY Thank you.

Senator HART. We are adjourned to resume at 2:30 p.m.

[Whereupon at 12:45 p.m., the committee was recessed until 2:30 p.m. the same day.]

AFTERNOON SESSION

Senator HART [presiding]. The committee will be in order.

Mr. Secretary, if we may delay a moment, I think Senator Bayh has been delayed just outside.

The Senator from Indiana.

Senator BAYH. Mr. Secretary, I do not want to go back over the same old ground. Inasmuch as the ground that we have plowed has been apparently helpful to you in the grasping of the ground rules of authority, I would like to touch on some of these matters again, as well as bring in another item or two that I think relate to the overall picture of the Attorney General, the overall authority and responsibility of the Attorney General. I think realistically, Watergate is the first responsibility and it is the item that is in everybody's mind now, but as you, yourself, said, that is not the only responsibility that an attorney general will have.

This morning, as I recall the discussion with Senator Tunney, he asked if anybody at the White House or if the President had approached you relative to suggestions for special prosecutor. Would you care to respond to that question once again, please?

TESTIMONY OF ELLIOT L. RICHARDSON—Resumed

Secretary RICHARDSON. Yes, I said that, to the best of my recollection, two names—I only recall two specifically—had been in effect passed on to me and there was no suggestion that they were to receive any special consideration over and above or different from names that I received from any other source. I received them on the same basis as I have received suggestions from a number of people, including members of this committee. They were simply dropped into the hopper and subjected to the same sort of scrutiny with respect to the kind of criteria I was trying to apply that any others were subjected to. In each case, although they were both men of stature and probity, I felt that they were a little short in terms of the kind of legal experience that seemed to me important. They are both lawyers. They were dropped before the list was narrowed down to about 10 or 12. And of course, they were not on the list of four that I have since submitted to the members of this committee.

Senator BAYH. Would you care to tell the committee for the record who suggested the names?

Secretary RICHARDSON. One of them came from General Haig, and I think the other one came from Len Garment, but I have not checked any source that could confirm that since it came up this morning.

Senator BAYH. To use the old cliche, did you call them or did they call you?

Secretary RICHARDSON. They called me. In one case, I think the call was actually to a member of my staff, who passed the name on to me.

Senator BAYH. Have you had any further discussion with them about either the two names they mentioned?

Secretary RICHARDSON. No, I have not personally, but the same staff member called Haig back to tell that the names had been dropped because they did not satisfy the kind of criteria that I was seeking to apply.

As I say, they were distinguished individuals; they were both Democrats; they were both people who had had no association whatever with the administration. But I thought that they did not have quite enough trial or prosecutorial experience.

Senator BAYH. As one who will shortly, I trust, be the number one law enforcement official in the country, who is by your definition the ultimate authority for pursuing the Watergate case, however that ultimate authority may be defined, does it concern you any that you have people down at the White House advising you on this matter? That is question 1.

Question 2, Do you have any obligation to take into consideration the desires of those parties or others in the executive branch and ultimately the President; and do you have the responsibility. Question 3, to report back to them? If a staff member feels inclined to tell Mr. Garment and General Haig that X and Y have been dropped, do they or you have a responsibility to either advise the President and his close White House staff of the choices, or to clear them with him, or them?

Secretary RICHARDSON. One, I did not feel that I was being given any advice. They were simply names passed on to be added to a list which included by that time at least a hundred names. I did not think I had any obligation to report back. I have not transmitted to anybody at the White House the names of the four individuals who are presently under consideration, and I feel no obligation to consult anyone in the White House about my selection from among those names and will not do so.

Just to repeat, I have not had any communication with anybody in the White House at all about the narrowing down of the list of 100 to 12 or from 12 to 4 at any point. I have not thought that that was appropriate or desirable.

On the other hand, I saw no reason not to put on the overall list names that came from that source, as I have from other sources. I do not think in deference to the stature of these individuals that it would be appropriate for me to disclose their names here, but I think you would agree that they are men of considerable stature and independence.

So as I say, I saw nothing wrong with simply adding their names to the list, but I would have considered it improper to seek advice or to consult.

Senator BAYH. You do not feel that it would be fair to them or the process to disclose the names of the two that were recommended by Mr. Garment and Mr. Haig?

Secretary RICHARDSON. Well, I think it is just a question of fairness to them. I have no personal objection and I would be glad to give you and Senator Hart as acting chairman these names. Then you can decide whether you thought they should be made public. If I might approach the bench, or if you insist now, I will disclose them.

Senator BAYH. I only go through this line of questioning because I think it is a matter of legislative concern. I would not want to see you

tarred by the indiscretions of certain White House aides. Thus I think to get the matter out, obviously, some of our friends in the press have done a better job than members of the committee finding out this information in advance. So to give you a chance to clarify it, I thought it was in the best interest of the full story and of your candidacy.

Secretary RICHARDSON. Let me go back and reemphasize a couple of things.

One is that the President made it emphatically clear that the responsibility for selection would be mine. Nothing had been said to me by anyone on his staff which I regarded as in any way seeking to undercut that general directive. Nothing has been said that seemed to imply that I should give any special weight to these suggestions. They were passed on, I take it, principally in the thought that they were names that I might not have thought of in the process and deserved to be on any comprehensive list. There was no element of inconsistency whatever with the general understanding I have and had that my responsibility would be to make a purely, wholly independent selection from among all the available candidates.

Now, if the chairman feels that it is appropriate to make the disclosures—I have not contacted either person, either man; I am sure it would be a surprise to them to know that their names ever figured in this——

Senator HART. I think that any member of the committee who feels it desirable to obtain information fairly can ask the information of you, Mr. Secretary, to be provided on or off the record, as you see fit. My reluctance, quite frankly, is that, one, White House personnel should make suggestions as to who shall investigate the White House shows a singular lack of sensitivity: two, though insensitive, they may have named two very fine members of the bar, and for me—unless they want to be disclosed, I would not make it necessary—I would want to be sure that you were not going to recommend ultimately either of them. If we can get that assurance.

Secretary RICHARDSON. Yes, I have given you that assurance—well, I have not quite. I have said that they were not on the list of 12 distilled from the original 100 or so and they are not, therefore, on the remaining 4. But I will give you the further assurance that if I should have to go beyond the 4 to the 12, I still would not reach them and I can give you the further assurance that they will not be reached.

Senator BAYH. I will not pursue this. My only reason for asking it was the feeling that there would be one certain way to still the concerns of the doubting Thomases, and that would be to mention the names. I have not disclosed the four names that you were kind enough to consult with me on, and I will say publicly that I do appreciate the way this matter was handled.

Secretary RICHARDSON. Well, may I ask, could we declare a brief recess while I tell you both who they are and let you and the ranking member who is here now decide. I do not like to have this left in a manner that might leave it questionable. So if I might come up for a moment.

Senator HART. We will recess briefly.

[Recess.]

Senator HART. The committee will be in order.

Mr. Secretary, the ranking Republican member, the Senator from Indiana, and I have had a very brief discussion with you off the record, and I think the fairest way to put it is in view of the circumstances, would you think it helpful to state for the record the two lawyers who were suggested to you by White House sources?

Secretary RICHARDSON. In the circumstances, Mr. Chairman, I will be glad to do so. First is the former Governor of California, Chairman of the Commission on the Revision of the Federal Penal Code, Edmund G. (Pat) Brown. The second is former Governor of Missouri, Warren Hearnes.

Senator HART. Thank you.

Secretary RICHARDSON. I believe he is running for re-election now.

Senator BAYH. May I move on to another line of questioning?

Secretary RICHARDSON. By all means.

Senator HRUSKA. Would the Senator yield?

Senator BAYH. Yes.

Senator HRUSKA. Would this not be a good place in the record for the nominee to tell us what he can about the telephone calls and other contacts he had with members of the Judiciary Committee over the weekend? Reference has been made to it and it is nothing secret in that it pertained to official business. Those parts that are supposed to remain confidential can, but I think in order to avoid anything attaching by way of suspicion to indicate that it was a surreptitious act done by the dark of the Moon, that maybe even that positions of high preferment been promised and other such conjecture arise in the minds of some, would it not be well to lay it before the committee and make it a part of the record?

Secretary RICHARDSON. I would be very glad to, with the understanding of the Chair.

As the committee will recall, on Thursday afternoon, when I referred to seeking the judgment of the presidents of the bar associations on the final list of those whose names survived the review of the original list, Senator Kennedy suggested that it would be appropriate for me also to consult the members of the committee itself, and I agreed to do this. I concluded after thinking about it Friday that the best way to do it would be, first, to call the individuals involved so that they knew that this was being done. I thought it barely possible that even though I requested confidentiality, the names might somehow get out and I wanted them to know in advance that they were under consideration. So I made calls during the day on Friday for that purpose and ended up with a list of four who were the four best on the list, as I saw it, that I had.

During the course of the day, there were three individuals who declined to be considered for what were obviously compelling reasons, and so on Saturday, I started calling the members of the committee and completed those calls last night. In each case, I reviewed for them the names in alphabetical order, together with the salient biographical facts about each, and invited any comments that the committee member had.

On that basis, I have now placed the names in order of priority with the idea of going to the top man first and seeing if he would take the job. If he refuses, well, then, we will go to the second and so on.

I hope very much that the top man will decide to do it. But I think they are all good. They are all very highly qualified and I think that this was the uniform reaction of the members of the committee, that it is a good list and that these are outstanding individuals, all highly qualified.

Senator BAYH. Though I have not and do not intend to violate the confidence, I felt that this was relevant to our conversation Saturday morning, inasmuch as one story that I read did contain the names of two individuals who are presently serving as members of the judicial branch of our Government; and inasmuch as the names which may be considered that were not on that list might also include members of the judiciary, is it possible for a member of the judicial branch to serve as special prosecutor investigating possible indiscretions within the executive branch? Does that present a problem? I only bring this to your attention inasmuch as you surely have thought about it. Is there anything that this committee perhaps should consider to make it possible for the man who you might feel would be the best to serve without this being a hindrance to him?

Secretary RICHARDSON. My considered view, Senator Bayh, is that the man could not retain his judicial post and also serve as the special prosecutor.

Senator BAYH. There is a difference in the Warren Commission, of course, where we had the Supreme Court Chief Justice serving in a sort of ad hoc capacity. I know that that is not the same situation.

Excuse me for interrupting.

Secretary RICHARDSON. No, I do not think it is. I think in that instance, where the process was purely fact-finding, the problem of separation of powers, if not nonexistent, at least is much easier than where the judge is being asked to serve as a prosecutor. So I have been proceding on the assumption that any judge would have to resign, and he would have to do so with the understanding that he could not expect to receive consideration for any subsequent judicial appointment by this administration; in the case of a sitting Federal judge, not even reappointment to the same bench from which he came.

I was not clear first about the last conclusion, but in thinking about it, it would seem to me that a judge who would resign from the district court and retain the hope of returning by appointment of this administration might still have or be thought to have a possible reward for cooperative behavior lying at the end of the road, and rather than allow that concern to subsist, I would make clear that if he were to resign to do this, it would have to be with no understanding whatever as to the future.

Senator BAYH. You feel that it would be incumbent upon him to resign? He could not be suspended for some special task?

Secretary RICHARDSON. No, I do not think so. I feel quite clear about that. We have sought a good deal of advice on that point. I think it is a closer question with respect to a retired judge. Even there, I think he would have to resign.

Senator BAYH. This morning, my colleague from Nebraska suggested that you should be very careful about granting immunity because someone might be involved in committing treason. I note in the definition of treason in the Constitution, it is a rather narrowly de-

scribed crime. Is there anything that has developed so far which we may not be aware of which would go so far as treason?

Secretary RICHARDSON. Not that I know of.

Senator BAYH. I think the admonition of the Senator from Nebraska is, as is usually the case, appropriate, but I just wondered if there was something there that perhaps we should be aware of.

In checking the paper and what records the staff and I have had at our disposal there are four or possibly five different Federal grand jury proceedings now going on in connection with the Watergate and related events—here in Washington, in Florida, in Houston, New York, and possibly California. Five individuals have been indicted—Segretti, Mitchell, Stans, Vesco, and Sears. Do you think it would be appropriate for a freeze to be implemented on further indictments, as well as the grants of immunity, until this special prosecutor can begin operating, since these decisions are critical in the overall, complete development of the case?

In looking back at some of the questions that I had asked and wanting to use this second opportunity to share thoughts with you, I want to plug up some of the holes in our exchange to make sure that we had a watertight record. As I recall, you said you thought the special prosecutor should have—great authority in the decisionmaking in these individual cases. We did not get to the question of whether something done between now and then might prejudice this. Have you given some thought to that, Mr. Secretary?

Secretary RICHARDSON. Yes, I have, Senator Bayh. I do not see any way in which this can be done under present circumstances. A U.S. attorney, for example, who is ready to obtain an indictment is concerned lest there be leaks. He may feel that it is important for any of a number of reasons to proceed rapidly. I am certainly not in a position at this stage to exercise any independent judgment in such a matter, and I do not think it would be desirable simply to issue a blanket request to hold things up for an indefinite period. So it seems to me that the only possible answer is that matters will have to take their own course until such time as the special prosecutor is appointed and qualifies and is able to inform himself as to the current situation in all these cases and then decide what action he believes should be taken in the light of circumstances as they then exist.

Senator BAYH. Is it necessary to make decisions at the district court level relative to who should be granted immunity? Perhaps to broaden the question as well as to ask a specific question, tell us once again the authority you feel the special prosecutor would have relative to getting involved in the district court cases and seeing that they were handled in such a way that would enhance the chances of his successfully pursuing his job.

Secretary RICHARDSON. The special prosecutor would, in effect, step into the shoes of the Attorney General and the Chief of the Criminal Division with respect to these cases. That means he would have the authority as an original matter if no indictment had yet been returned in a given case to exercise an independent judgment about whether or not the evidence was sufficient, and so on. This is the kind of thing on which routinely, U.S. attorneys consult the Chief of the Criminal Division, who, of course, is exercising the responsibility delegated to

him by the Attorney General. Once the special prosecutor has been appointed and his area of jurisdiction has been carved out and transferred from the Criminal Division to him, he would in effect, therefore, be doing the kind of job in relation to these cases that I said the Chief of the Criminal Division ordnarily does. But I do not see any way that we can or should try to alter the course that events would otherwise take between now and then.

Senator BAYH. Let me refer to a specific example of the kind of thing that might take place. Suppose the special prosecutor, on taking the rolls and looking at a particular indictment that had been brought against Mr. X in State Y, made the determination that the facts contained or that the charges made there were not as serious as they should have been. Would he have the authority to dismiss that case and bring more serious charges against the defendant?

Secretary RICHARDSON. Yes, he would have that authority.

Senator BAYH. Thank you.

May I go down this road, stepping on a few new stones or on the same ones revisited after your discussion with Senator Tunney. In the light of our conversation and our discussion the other day, you had readdressed yourself to the provisions as to the authority of the special prosecutor. If there are things that you said in response to the specific questions that I addressed to you, sir, that may, in the light of the weekend and everything that has happened, plus a reflection on your own part, give you the desire to define this authority in a little different manner, I would like to give you that opportunity to do so. You mention the relationship between you and the special prosecutor being similar to that between the administrative agency and a court applying the abuse of discretion standard. There have been a number of different decisions that have been involved here, but I note that one widely quoted judicial definition of this standard is that of Judge Magruder of the sixth circuit in the case of *McBee* v. *Bomar*, 296 Fed. 2d 295 in 1961. This is a case that I note keeps cropping up as authority. Judge Magruder there said that abuse of discretion is, and I quote, "A clear error of judgment in the conclusion * * * reached upon a weighing of the relevant factors."

Now, does that accurately reflect the way you really perceive the relationship of the special prosecutor? Does this not suggest that the special prosecutor should have a wider discretion than your definition that you would not intervene as long as the action was one on which reasonable men can differ?

Secretary RICHARDSON. Yes.

Senator BAYH. I am trying to be helpful, although I know sitting there and answering these questions is not an easy task, but I want to make sure we know where we are going. You kept coming back to that trapdoor and using the word "unreasonable." I am not too sure that Judge Magruder would go that far.

Secretary RICHARDSON. I am not sure that I understand, Senator Bayh, what you mean by "not going that far." You mean that he would give greater or less weight to the administrative agencies——

Senator BAYH. It would seem to me that he would give more authority to the special prosecutor than you, by your own definition.

Secretary RICHARDSON. You think he would give greater weight to

the agency's judgment than I would give according to the formulation that I previously used?

Senator BAYH. Well, let me just put it this way: I have read what Judge Magruder said. I would like to know once again what Elliot Richardson is saying in the light of that often quoted thing. I will read it one more time: "A clear error of judgment in the conclusion * * * reached upon the weighing of the relevant factors."

Your words are more important than Judge Magruder's right now, but you did refer to this relationship and that is one case which is widely quoted relative to that relation.

Secretary RICHARDSON. Yes. Well, I would expect to give the special prosecutor a degree of authority, if anything, greater than that, and I think what I have said, although I have expressed it in slightly different words on different occasions, has been pretty consistent. I have said that I would not second-guess him, that I would not substitute my own judgment for his. Now, the phrase "a clear error of judgment" could be construed to mean that the reviewing court's judgment would be substituted where the reviewing judge simply thought that the administrative agency was wrong, clearly wrong. I would not go that far.

In other words, I might think that the special prosecutor was clearly wrong and still not substitute my own judgment. I said that he would have to verge on the point of an arbitrary or capricious or irrational act before I would do so. So if anything, then, as I visualize it, the special prosecutor's judgment would carry greater weight than is attributed to the administrative tribunal in the formulation you quoted.

Senator BAYH. I appreciate that appraisal. I must say I concur with it.

Could I, at the risk of being repetitive, ask you to try to quickly give us specific examples in the areas which we discussed the other day. Could you take those one at a time to give us an example of what, how you define "arbitrary" and "capricious" and "totally unreasonable?"

As I mentioned earlier in the colloquy you were having with Senator Cook and Senator Kennedy, I really do not have problems, myself, with the term "ultimate authority," if ultimate authority is more or less a pro forma maintenance of authority as described in the statute. There is no way you can shuck it; it is yours. And if all of the decisions, the actual working, operating decisions, are deemed the special prosecutor's and he makes all those, I am relieved. And I would not want to play games, I would not want to be semantical about the term "ultimate authority." It would ease my mind and perhaps others of those on the committee if they are so concerned.

I would ask you if you could, if you feel it is possible, to give us an example of when the special prosecutor would go over the line as far as the nature and scope of grand jury proceedings.

Secretary RICHARDSON. In the case of seeking an indictment, for example, he would have full authority to determine whether the evidence was sufficient to support the indictment of any individual. This is often a tough judgment call and is a good example of the kind of thing in which he would have, so far as I was concerned, full authority to make the call. Now, it is impossible to define a situation where he might be acting irrationally; but an extreme case, for instance, would be where he was proceeding on the uncorroborated hearsay of one witness. That

might seem to me so flagrantly insufficient as to amount to an arbitrary act. No responsible individual of the kind we are talking about here would ask a grand jury to indict on that basis, and if he did, the grand jury, of course, if it understands its function, should refuse to indict. But that is an example of what I would consider to be an extreme case.

Senator BAYH. Then that is very consistent with the response you gave to me the other day when you said, "In that case, his view would prevail because I had given him the job because I had confidence in him because he knew more about it than I did"——

Secretary RICHARDSON. Yes.

Senator BAYH [continuing]. "And because in the setting in which we would be acting, I think it would be inappropriate for me to substitute my judgment."

Now are we talking about final authority as to the nature and scope of the grand jury proceedings?

Secretary RICHARDSON. Yes. To take another example, for example, the grant of immunity.

Senator BAYH. Please.

Secretary RICHARDSON. He should have full and independent authority to determine when, in order to obtain sufficient evidence on which to proceed, he should seek an order from a court requiring testimony in exchange for immunity. This again is the kind of judgment that somebody who is in direct charge of a prosecution is uniquely in a position to make. I would not undertake in any way to look over his shoulder or to monitor or to second-guess his exercise of that judgment.

The question of whether or not to contest the assertion of executive privilege is one we have already covered, I think, very clearly.

Whether to take direct responsibility for the prosecution of a case in a given Federal district and take it out of the hands of the U.S. Attorney in that district would be another kind of judgment in which he should have the same degree of independent authority. Whether an understanding of any sort should be communicated to a witness that in consideration of his giving testimony this would be taken into account in recommendations made to the judge at the time of disposition, the same should apply. This is the kind of discretionary judgment that belongs in the hands of the prosecutor.

Whether to indict for a lesser charge, the same. And, I might add, too—this is a more recent conclusion that I only began to look at in the last day or so—we had a colloquy, you will recall, about what cases would come within his jurisdiction, and I have concluded that with respect to, for example, all offenses arising out of the 1972 Presidential election, he should have the opportunity to determine whether or not to assume the responsibility for such a case.

Senator BAYH. All cases arising——

Secretary RICHARDSON. All offenses arising out of the 1972 Presidential election.

Senator BAYH. This would be not only the political espionage, but the fund raising efforts, as well as the specifics of the Watergate case and——

Secretary RICHARDSON. Yes. You will recall that in our colloquy the other day, I pointed out that there have been at least 3,000—or so I was told by the Criminal Division—cases involving all political par-

ties in which some question of compliance with the campaign contribution reporting requirements had been raised. I said that any that did not fall under the jurisdiction of the special prosecutor would presumably remain within the jurisdiction of the Criminal Division. So you get then the question of who decides which cases go to the special prosecutor and which stay with the Criminal Division. My present conclusion is that the special prosecutor himself should decide that.

Senator BAYH. Would this include, Mr. Secretary, various activities of the so-called "plumbing operation?"

Secretary RICHARDSON. That phrase would not govern that particular issue, but it——

Senator BAYH. Could we just sort of put it in context?

Secretary RICHARDSON. I have previously said, I think, that it should be understood from the outset that he would have jurisdiction of any case that arose out of this or any investigation that seemed indicated. That would have to be dealt with separately, though, not as a specific delegation from the outset.

Senator BAYH. But in your judgment, the instructions of authority would give the special prosecutor the opportunity to pursue any violations that resulted from this so-called "plumbing operation"?

Secretary RICHARDSON. Yes, definitely. As I said the other day, the common denominators that ought to apply in determining what he has jurisdiction over would be any involvement by White House personnel, present or former, any activity relating to the Committee to Reelect the President, any activity involving a major appointee, past or present, of this administration which in any way was related to the conduct of the campaign.

Senator BAYH. As I recall it, not to put words in your mouth, but we also later expanded that definition to include close associates or private individuals like Mr. Kalmbach or perhaps even personal friends that do not have an official capacity in any of the previously named organizations. Is that accurate?

Secretary RICHARDSON. Yes. The phrase I used about the authority of the special prosecutor over all offenses arising out of the election as to which he would have unilateral opportunity to exercise or assert jurisdiction presumably would cover those also.

Senator BAYH. Your redefinition is being very helpful to me, I may say. I do not know whether it is being helpful to anybody else, but it is to me. So let me ask one further question.

The special prosecutor would have the determination, then, in looking at the various alleged incidents that have been brought to our attention to determine what weight to give to national security and whether to pursue or not to pursue them—that would be his determination?

Secretary RICHARDSON. Yes.

Senator BAYH. And whether "national security" was a valid excuse or not on the part of one or more of the participants?

Secretary RICHARDSON. He would determine that in the first instance. If he met an assertion to the contrary by some party to the case, some actual or potential defendant, then presumably, the issue might have to be adjudicated by a court. But so far as the prosecution is concerned, he would make that determination.

Senator BAYH. That has been very helpful, Mr. Secretary. I think you have really done a creditable job of narrowing the line of final authority.

Secretary RICHARDSON. Well, I think it is fair to say that these discussions have been helpful to me in terms of pointing up issues. I think that the general line I have taken has been a consistent one in terms of trying to maintain what I have referred to as the ultimate statutory responsibility of the Attorney General. On the other hand, I think we have developed a record that helps to make much more concrete where the line ought to be drawn than it would have been otherwise.

Senator BAYH. I share your assessment. It has been helpful to me as well.

Let me deal with two other areas, if I might, Mr. Secretary, that I think were very much a part of your responsibilities. They are also very current relative to a vote which I must take tomorrow in the Appropriations Committee as to funds to participate or permit our country to continue to participate in certain types of military activity. As I am sure you are aware, the testimony which you made May 6, 1973, before the Senate Defense Appropriations Subcommittee has been reported rather frequently in the press. I do not remember the specific quotes, but as I recall at least reading it, the general thrust of your testimony was reported to have been that regardless of what the Congress does to cut off funds, we are going to be able to and will continue the bombing in Cambodia, because that is in our national interest and that the administration would, nevertheless, continue the bombing even if there was denied transfer of authority of the, I think it was $500 million.

Now, as the Attorney General of the United States, do you personally feel that this kind of defiance of the legally expressed will of the Congress that munitions not be utilized in pursuit of a certain kind of foreign policy activity, that it should be flagrantly ignored and that the present policy should be pursued, that a technicality should be sought out that would prohibit the very expressed will of Congress from being carried out?

To me, let me say as a member of the legislative branch, that issue and one other issue that I want to touch on very quickly here perhaps will have a greater consequence on the division of powers in our country than the Watergate situation. Watergate is front page news right now but this other business is going on underneath the big headlines and in the final analysis, they could change the structure of our Government more significantly.

Secretary RICHARDSON. That is one of those "I am glad you asked me that" questions, Senator.

There has been some very bad and inaccurate reporting of what I said on this score. At least—let's see, looking around this room—one or two members of this committee are also members of the Appropriations Committee and heard my testimony on this.

Senator BAYH. May I read—just permit me to interrupt—the specific part of your testimony that concerns me—not what I have read in the newspaper—is in the last page, on page 8, where it says:

It must be emphasized again, however, that the denial of requested authority will not impact on U.S. air operations in Cambodia but across-the-board on operations of our base line forces worldwide.

Secretary RICHARDSON. Yes; well, as I say, I welcome the opportunity again to try to clear this up. I was testifying in support of a request for the transfer authority. That is, for authority to transfer the power to obligate funds from one account to another within the DOD budget. For a combination of reasons, including inflation in food prices, currency devaluation, and a higher than anticipated rate of activity in Southeast Asia, we had drawn down the operations and maintenance and personnel accounts in the Department of Defense at a rate more rapid than was anticipated when the appropriations were granted and enacted. So we needed—we now need—transfer authority, in effect, to enable us to continue to make obligations of the kind covered by those accounts—things like fuel necessary for the steaming times of naval vessels, for flight training, and so on—and although a reason why the accounts have been drawn down was, in part, activity in Southeast Asia, the transfer authority was not in large part needed for that purpose in the future. As my testimony said, only about $25 million of the total $500 million would be involved in Southeast Asia.

So what I was trying to get across to the Congress is that even if the transfer authority were denied, that would not in itself stop the bombing. I did not want there to be any issue of credibility arising if the transfer authority were denied and then the Congress saw the bombing was still going on.

But I also testified that the Congress could, by appropriate language, cut off funds for bombing. I was saying if that is what you want to do, you have to do it some other way and that the mere denial of transfer authority will not in itself accomplish it.

Is that clear?

Senator BAYH. Yes; yes, I understand that. Let me again try to be specific or get a specific answer to a specific question. Suppose the Case-Church or Church-Case amendment passed, which denies the use of any appropriated funds for continuation of the bombing activity over Cambodia. Would you advise the President of the United States in the event that passed and became a law, that he should no longer continue the operation after that had passed and that had become the law?

Secretary RICHARDSON. I would so advise him, at least as to any funds that it purported to cover. I have not actually read the language, and I think language could be written that would wholly cut off the bombing, and so testified before the Appropriations Committee a week ago today.

May I, Mr. Chairman, if there is no objection, ask to have inserted at this point in the record excerpts from that testimony?

Senator HART. It would be very useful.

Secretary RICHARDSON. I said in effect at the time that language could certainly be written that would do this and on which I would so advise the President.

[The excerpts referred to follow:]

SECOND SUPPLEMENTAL APPROPRIATIONS FOR FISCAL YEAR 1973

MONDAY, MAY 7, 1973

U.S. SENATE,
SUBCOMMITTEE ON THE DEPARTMENT OF DEFENSE,
Washington, D.C.

The committee met at 2:05 p.m. in room S–128, the Capitol, Hon. John L. McClellan (chairman) presiding.

Present: Senators McClellan, Bible, Byrd (of West Virginia), Mansfield, Proxmire, Inouye, Hollings, Eagleton, Chiles, Young, Cotton, Case, Fong, Brooke, Hatfield, Mathias, Schweiker, Bellmon; also present, Senators Symington and Thurmond.

DEPARTMENT OF DEFENSE

SECTION 735—TRANSFER AUTHORITY

STATEMENT OF HON. ELLIOT L. RICHARDSON, SECRETARY OF DEFENSE

ACCOMPANIED BY:

HON. JOHN O. MARSH, JR., ASSISTANT SECRETARY OF DEFENSE (LEGISLATIVE AFFAIRS)

DON R. BRAZIER, ACTING ASSISTANT SECRETARY OF DEFENSE (COMPTROLLER)

LT. GEN. GEORGE M. SEIGNIOUS II, DIRECTOR, JOINT STAFF

STATEMENT BY CHAIRMAN

Chairman MCCLELLAN. We will come to order.

The Chair will make this brief statement.

The pending supplemental appropriation bill contains an administration request to increase the transfer authority contained in section 735 of the Department of Defense Appropriation Act by $500 million, from $750 million to $1.25 billion.

The Defense Committee has heard testimony in support of this request from representatives of the Department of Defense. In view of the increasing concern in the Congress over this provision, and particularly with respect to the Southeast Asia portion of this $500 million, estimated to be from $150 to $200 million, the Secretary of Defense requested an opportunity to appear before this subcommittee, along with Adm. Thomas Moorer, Chairman of the Joint Chiefs of Staffs, to testify in support of this request.

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Chairman MCCLELLAN. I am about through and others will have questions along these lines. One other question is this: you are confronted and the administration is confronted with this reality possibly, and that is that the American people want our troops out and that the Congress will no longer support appropriations to fund such operations. Now, where are we if that is the true situation? Will it be the policy of the administration to proceed anyhow with continuing operations, as are now in progress, or will it be the administration's considered judgment to follow the only other alternative of prosecuting the war further with respect to trying to compel Hanoi to abide by the terms of the cease-fire agreement?

Secretary RICHARDSON. I am sure, Mr. Chairman, that the administration would not proceed in defiance of any clear-cut congressional action intended to terminate the authority to use funds for continued operations in Cambodia.

I do want to emphasize, as I have earlier, that congressional action on the transfer authority itself would not be so interpreted by us.

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Senator COTTON. You have said that nothing since January 27 has happened to change the authority or at least the justification of the President's continuing hostilities. If Congress did put this limitation on, that would be something that would happen since January 27 that the President would certainly have to take into consideration, is it not?

Secretary RICHARDSON. Yes. I am sure that is right, Senator Cotton.

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Senator COTTON. Do you think that if we put a limitation on this, that no money shall be spent of this transfer in Southeast Asia—I know perfectly well you have to pay your bills over there and I know perfectly well the administration has to pay up commitments—wouldn't you think that if Congress rather strongly cast that vote that it would have a very distinct effect on the President?

Secretary RICHARDSON. Yes; I think it would, Senator Cotton.

Senator COTTON. What do you think he would do about it?

Secretary RICHARDSON. I probably should not try to pronounce judgments on language I have not seen. A lot could turn on precisely what it said. I have no doubt that language could be drawn that would establish a restriction on the right to obligate funds for the continued support of the air activity. I think it is important to make clear, though, that a significant portion of the continuing obligations to support Southeast Asia would not be for the purpose of supporting air activities over Cambodia but for the forces that are maintained in air fields in Thailand and on ships in the area. These costs would go on even if there were no air activity, and it would be important in any event to try to assure that the language did not prevent our supporting those forces.

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Senator INOUYE. Knowing what you know about the present military situation, about their leadership, about their dedication, about their unwillingness to fight, how long are we willing to continue our air strikes?

General SEIGNIOUS. Mr. Secretary, I think possibly you had better take that question on.

Secretary RICHARDSON. This is essentially the question that I tried to answer when it was raised earlier by the chairman.

I can only say that continuing support induces Hanoi to comply with the agreement, and the prospect of our support will have to be indefinite.

We would, of course, from time to time have to assess the question of whether or not to continue it, and the Congress would have to be part of that process.

I think we should develop a periodic accounting to the Congress. Our case for the moment, at least, rests heavily on the current efforts to achieve compliance that are being made through diplomatic channels.

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Senator INOUYE. Would your answer be the same if this Congress of the United States added perhaps an amendment to this bill which said none of these funds will be used for the bombing of Cambodia? Would you still continue bombing?

Secretary RICHARDSON. The short answer is "No." The actual terms of the language—I am sure that the Senate could write language that had the effect which was intended, and which would be complied with by the administration to terminate bombing.

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Senator SCHWEIKER. Since it [the transfer authority bill] won't be determinative in supplying the money you are saying you will bomb anyway whether you get the gas or not?

Secretary RICHARDSON. That is correct. I am not saying we will. I am saying that the denial of the transfer authority will not control the answer to that question.

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Senator SCHWEIKER.. You may say that, Mr. Secretary. But the courts have ruled very specifically, in exact language, that when Congress votes an appropriation for war they are de facto giving their support to the war and declaring war by that mechanism. That is the only reason the administration has been conducting an allegedly "legal war."

The thing you are discounting is the very way in which the courts have given you authority to start a war.

Secretary RICHARDSON. Senator Schweiker, we are asking you to make transfers as between DOD accounts. That is all that is before you. The transfers would be made into the O. & M. and personnel accounts. We do not want to mislead you into thinking that the authority we are seeking to make these transfers is determinative one way or another with respect to the continued conduct of U.S. air activity in Cambodia. We have never represented that it was, and although this impression has arisen, my statement is directed toward dispelling it.

Senator SCHWEIKER. If I recall Mr. Secretary, when you came before the Armed Services Committee, the rationale was that we had troops and prisoners there. We certainly are not using that one any more.

All I am saying is that the courts disagree with your position. The courts very clearly say when Congress votes this kind of authority they, in essence, give silent consent or public consent to the war. That is what the courts have ruled. It may well be different from your position. I think it is a very relevant point.

Secretary RICHARDSON. No, I am sorry, Senator Schweiker. The point is that if we ask for money for the war and the Congress granted it, then we could say the Congress had, in effect, ratified, approved, or in some sense created legislative history acquiescing in the continued conduct of the war. That is the very same point that Senator Proxmire raised earlier. I said that we would not, in this instance, try to convert a vote in support of the transfer authority into a vote in ratification and approval of the war, because the transfer authority has so little to do with the war.

If, however, an amendment were proposed to the transfer authority which said you can't transfer any of this money for any purpose associated with the war, and that was rejected, then we could have a basis in legislative history for saying that the Congress had, in some sense, ratified or acquiesced in it.

But the approval of the transfer authority would not, in my view, constitute in itself a significant basis for arguing that the Congress had acquiesced in what we were doing. I would continue to argue as I said a moment ago that the President's authority rested on the basis that it had on January 27.

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Senator BELLMON. How does the Congress take it [the President's authority to continue air operations in Cambodia] away?

Secretary RICHARDSON. It could take it away by some action saying that we could not spend any more money, or obligate any more funds, or use personnel and so on for the pursuit of continued air activity over Cambodia, or any other form of combat action in that area. I did not intend to volunteer the language which you could use, but I am sure you could have derived it from other sources than myself.

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Senator BAYH. Could I ask one other question that is closely related to this only in the domestic field that deals with the concern some of us have with regard to the delicate balance of the authority being tipped rather precipitously? There have been three court decisions, and I am sure you are aware of them—one is relative to highway funds, *State Highway Commission* v. *Volpe;* one involving OEO, and *Federation of Government Employees* v. *Phillips*; the most recent one was relative to EPA funds, the *City of New York* v. *Ruckelshaus*—in which the district court involved ruled against the executive branch's action to cease one program and to withhold appropriated funds in another. Could you tell me, if you are the Attorney General of the United States, given this background of these three courts, how would you advise the President to proceed in the future on impounding funds for libraries, for regional mental health centers, in certain other domestic areas without being specific? If you would like, I can give you the whole shopping list. I do not want to do that. I just want to get your idea about the general legal advice you are going to give the President as to whether he should cease and desist this impounding of funds that had been appropriated. That is question No. 1.

Question No. 2. Do you know if the Government intends to appeal any of the three cases I just referred to?

Secretary RICHARDSON. On question No. 1, I really have not had an adequate opportunity to study the cases to give you an answer as to what my advice would be. Certainly, it had always been supposed, I thought, that the President had some power with respect to the rate

of obligation of funds. Now, it would take more knowledge of the reasoning and the arguments and so on that went into these cases and the statutory language that appropriated the money and so on for me to answer.

As to the second part of it, I do not know what the present view of the Justice Department people is on this.

Senator HART. If the Senator could suspend at that point, we could recess to catch that vote and resume.

Senator BAYH. Mr. Chairman, I will follow you. I have just one quick question.

Have you had any chance to check the progress of that Department perjury investigation that I asked you about relative to the ITT hearings? You said we would have it in a few days. I do not want to put that in with the Watergate situation, but I am very sensitive about it.

Secretary RICHARDSON. All I have done is get word over there with respect to the commitment I made to you, but I do not expect to be in a position to give you any report on that until after I have gotten over there and have some real right to review the whole record. I am in a somewhat anomalous position at the present time in terms of dealing with the Department. I am not in charge. I could ask to have records available and so on. I am sure they would brief me as requested. But I have felt that with respect to a matter of this kind, I really ought to be in a position of some authority.

Senator BAYH. I do not think you ought to be held accountable for the indiscretion of those who preceded you.

Secretary RICHARDSON. Let's say the clock is running—since I made that commitment to you.

Senator BAYH. Fine; I trust you are keeping a different clock than those who preceded you.

Secretary RICHARDSON. But I have not actually seen anything on it yet.

Senator BAYH. That is not necessarily comforting, but it is certainly not your fault if there is nothing there to be seen.

Senator HART. We will recess to resume after we vote.

[Recess.]

Senator HART. The committee will be in order.

Pending the return of the Senator from Indiana, the Senator from Nebraska is going to question.

Senator HRUSKA. Mr. Secretary, I have listened with interest to the discussion of the different bodies of Government that are involving themselves in prosecuting any wrongdoing relating to the Presidential election of 1972. It was the suggestion of one of our Senators that four or five grand juries are now working at various locations within the Republic on different activities and aspects. At least four Senate committees are working on it—the Ervin-Baker committee, the Appropriations Committee, the Armed Services Committee, this Judiciary Committee. And out of all this activity there are a great many decisions which are being made and events transpiring. The more we move along in that procession of events, of course, the less there is for any special prosecutor to work on if and when he is finally approved, installed, and empowered to go ahead.

With that as a background, I would like to ask you just what is the role of urgency in the matter of confirmation of an Attorney General, whether it is before or after the designation and approval of a special

prosecutor? Is the simple running of the clock of concern to us to the extent that we should be interested in making as much progress as quickly as we can in this committee?

Secretary RICHARDSON. I think very clearly, Senator Hruska, the situation is urgent, for the reasons you have touched on. A great many things are underway, gathering momentum. Decisions are being made from day to day. This means that the special prosecutor, when he is appointed and when he has received the approval of the Senate, will have to catch a moving train. So it is important that he get aboard as soon as possible in order to take charge.

The kind of decisions that are urgent include some we have discussed already. They include questions of immunity. They include indictments that are in the process of being developed, and there may be other activities that will require judgment growing out of various aspects of this whole situation, some of which have come to light lately. So I think clearly the public interest would be served by his being in a position to act as soon as possible.

Senator HRUSKA. Of course, in due time, with indictments that may come out—some have already been returned—trials will be scheduled, and there will come a time when the element of double jeopardy will come into the picture in the event of another attempted arraignment, indictment and arraignment upon charges that are now being processed by other grand juries. Would that also be a factor?

Secretary RICHARDSON. Yes; it would. I think that the double jeopardy problem, of course, arises with respect to any proceedings that are initiated and then, for some reason, aborted. If that happened, the special prosecutor would be barred from taking further action.

Senator HRUSKA. That is right.

Secretary RICHARDSON. So he ought to be in a position to exercise direct responsibility.

Senator HRUSKA. So that unless action is taken fairly promptly, we will find that the options of a special prosecutor will be considerably narrowed. He will be precluded from any attempts that he might make in one direction or another, because developments have come and gone, events have occurred, and certain factors become things of the past as time goes on.

I suggest that we may find that our present deliberations will be a contributing factor to a highly impaired functioning of any special prosecutor that might come along.

Secretary RICHARDSON. I think this is a matter of serious concern, Senator Hruska. Of course, as Senator Bayh's earlier questions brought out, he could go beyond any action that had been taken in the sense that if he felt that an indictment charged lesser offenses than the evidence warranted or failed to include people who should have been included, he could seek new indictments. But in the case of the grant of immunity, for example, he could not undo that. In the case of any trial that began and resulted in a dismissal after the initiation of the trial, there would be nothing he could do to erase the action to that point and jeopardy would have attached.

So there are a lot of reasons why he should get on the job as soon as possible.

Senator HRUSKA. Thank you very much.

Mr. Chairman, I note a vote is in progress. Perhaps we had better respond to it.

Senator HART. Well, what about the opposite of the coin, though, if indeed there are anticipated problems flowing from action taken before the special prosecutor is designated? In the charge—if that in fact is true, what damage would be done if, to forestall the damage that you and Senator Hruska were talking about, the Department took no action for the immediate future?

Secretary RICHARDSON. This is a matter that really comes under the heading that we discussed a little while ago, of whether or not there should be some sort of freeze. The problem is that there really is no one in a position effectively to direct this. I certainly do not want to be in the position of telling the Chief of the Criminal Division or any U.S. attorney not to go ahead. That would be presuming, first of all, ultimate favorable action by the committee and by the Senate.

In the second place, I am not in a position in which I can appropriately ask for all the information bearing on the questions of judgment that are currently under consideration.

And finally, even if I were given all the information, I really would not have time to absorb it, because I still have residual responsibilities at the Department of Defense.

In one case, for example, where I was asked if I wished to exercise some judgment of this kind, I said no, I do not; matters must proceed as they would in the ordinary course, and the people who have responsibility now will have to exercise that responsibility.

Senator HART. Well, someone is in charge now?

Secretary RICHARDSON. Yes.

Senator HART. And he is aware of the problems, both in going forward and in, as you say, freezing. I am not suggesting that you should undertake to seek to influence it one way or the other. But someone is there.

Secretary RICHARDSON. I do not want to leave the record implying that what is being done now is being done wrongly. I have no reason to believe that it is. The point is simply that, as Senator Hruska brings out, the more judgments and decisions that are made from day to day, the more we will be beyond the opportunity of the special prosecutor to exercise an independent judgment when he does come on board.

Senator HART. Yes; and while we cannot conclude this and still catch this vote that has just been signaled for the second time, does that not suggest to the person in charge the prudence of reserving judgments for a brief period of time?

Secretary RICHARDSON. I would think that that person, whether Henry Petersen or the U.S. attorney, at least might take this into account. He would then have to call it as he sees it in the light of the situation as a whole, including whatever may seem to him considerations of urgency bearing on his going forward promptly.

Senator HART. Mr. Secretary, thank you for your patience today. At the direction of the chairman, Mr. Eastland, we are resuming at 10:30 tomorrow morning. We are now adjourned.

Secretary RICHARDSON. Thank you, Senator Hart.

[Whereupon, at 4:25 p.m., the committee was adjourned, to reconvene Tuesday, May 15, 1973, at 10:30 a.m.]

95-389—73——8

NOMINATION OF ELLIOT L. RICHARDSON TO BE ATTORNEY GENERAL

TUESDAY, MAY 15, 1973

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to recess, at 10:40 a.m., in room 2228, Dirksen Senate Office Building, Senator James O. Eastland (chairman) presiding.

Present: Senators Eastland, Ervin, Hart, Kennedy, Tunney, Hruska, Scott, Mathias, and Gurney.

Also present: John H. Holloman, chief counsel, and Francis C. Rosenberger, professional staff member.

The CHAIRMAN. The committee will come to order.

Senator Ervin?

Senator ERVIN. Mr. Chairman.

Mr. Secretary, my question is this: Can you advise the committee whether or not the Department of Justice and the district attorney expect to withhold the presentation of indictments to the grand jury in the pending matter until the special prosecutor is appointed?

TESTIMONY OF ELLIOT L. RICHARDSON—Resumed

Secretary RICHARDSON. The answer to that, Senator Ervin, is no. As far as I am aware, the Department and the U.S. attorney will proceed at their own pace, without regard to the pendency either of my nomination or the prospect of the appointment of the special prosecutor.

Senator ERVIN. Well, is it not rather difficult to see how the special prosecutor is going to be independent if he is required to prosecute indictments drawn by somebody other than himself?

Secretary RICHARDSON. He will have to deal with the situation he finds in this as in other respects. As colloquy with Senator Hruska yesterday developed, a great many things are in process. There is no way, practically, whereby they can be frozen in place. There is no sure basis on which to predict either when I will be confirmed and therefore in a position to appoint a special prosecutor nor to predict when I will have a special prosecutor who can be examined by this committee, no way to predict how rapidly the Senate will act, either upon my confirmation or upon a sense of the Senate resolution with respect to the qualifications of the prosecutor.

Senator ERVIN. Well, as a distinguished lawyer, you know that no evidence can be presented in a criminal prosecution except evidence which tends to prove or disprove the allegations of a bill of indictment or evidence which tends to show what the credibility of the witness is, is that not true?

Secretary RICHARDSON. Yes.

Senator ERVIN. Then if the special prosecutor comes in and has to prosecute cases on bills of indictment returned before he becomes special prosecutor, he has no independence as to the kind of evidence he is going to present or as to the parties that he is going to prosecute.

Secretary RICHARDSON. Well, of course, an indictment does not attach jeopardy to any defendant. An indictment can be withdrawn, rewritten, re-presented; new defendants can be added; defendants can be dropped; charges can be increased or reduced depending upon the judgment of the special prosecutor. It would be awkward, to be sure, and could create problems, but he would have the power to do that if, in his judgment, it was required.

Senator ERVIN. He would have the power. But he would start out with indictments drawn by someone else. If he exercised independent judgment and decided that there ought to have been different indictments drawn than the ones that were drawn, he would be somewhat embarrassed by having to repudiate the work of those who preceded him, would he not?

Secretary RICHARDSON. This could happen. On the other hand, the only alternative is for me, in a position of no direct responsibility over the Department of Justice whatsoever, to tell a U.S. attorney through the chief of the Criminal Division that he ought to slow down or not do something, and I do not know the evidence. I have not asked for nor do I have any right to see the transcript of the grand jury proceedings. I do not even know what the considerations of time pressure may be. So it seems to me there is no help for the situation but to proceed as rapidly as circumstances permit in the selection, examination, and if possible, the approval of the special prosecutor.

Senator ERVIN. And that leaves the control of affairs until the special prosecutor is appointed, in the hands of officials who are being deprived of the authority to act in this field.

Secretary RICHARDSON. The short answer is yes; that is to say, it leaves it in the hands of the people who have that responsibility now. I have no reason to believe that the special prosecutor would displace any U.S. attorney or his staff. He might or might not do so, but his own responsibilities would extend beyond the Watergate case in the District of Columbia and include, as I have indicated earlier, a number of other cases also. So he could decide that he wished to continue to work with the U.S. attorneys and their staffs who are acting now.

Senator ERVIN. Well, if he should decide to do that, I see no value in appointing a special prosecutor.

Secretary RICHARDSON. He would assume overall responsibility, authority, for the conduct of cases involving allegations against White House personnel and personnel acting for the Committee to Re-Elect the President, as well as certain other matters that might appropriately be assigned to him. He would have, under the law, the power to assume the direction of any case. He would have ultimate responsibility for determinations as to who should be indicted, charges on which they are indicted, grants of immunity, and really, all the significant questions of judgment that arise in any one of these cases.

Senator ERVIN. Well, if he were going to exercise independent judgment, it would require a substantial amount of delay, would it not?

Secretary RICHARDSON. He would have to decide whether or not to delay, recognizing that at best, he comes in while the things are in progress, anyway. A lot of water is over the dam no matter what as of the day he comes in. So he will, for better or worse, have to deal with these situations as he finds them.

Senator ERVIN. It would seem to me that, if he is going to retain the present personnel that have had charge of this investigation since the 18th day of June last year, you might as well not appoint a special prosecutor. I thought that the reason for a special prosecutor was to preclude those who have been assigned this task by the administration from continuing with such responsibilities.

Secretary RICHARDSON. Well, I do not assume that the U.S. attorney was assigned the task by the administration. He was the U.S. attorney who happened to be here.

Senator ERVIN. The U.S. attorney and his assistants hold office at the pleasure of the President.

Secretary RICHARDSON. Yes.

Senator ERVIN. The President heads the administration.

Secretary RICHARDSON. That is true. I simply am not in a position to prejudge the question of whether a special prosecutor would or would not see fit to supersede the U.S. attorney of the District of Columbia or the U.S. attorney in any of the other cases over which he would have——

Senator ERVIN. Who is the head of the Justice Department at this particular moment?

Secretary RICHARDSON. Attorney General Kleindienst is the head of the Department. He has disqualified himself from acting with respect to any matter involving people with whom he had prior close personal and professional associations so that for purposes of all these matters, the acting head is chief of the Criminal Division, Henry Petersen.

Senator ERVIN. And he is the same man who has had direct charge of this proceeding from the beginning, is he not?

Secretary RICHARDSON. He has exercised, as I understand it, the role normal to the chief of the Criminal Division from the beginning; that is, I take it, a kind of supervisory role over the work of the U.S. attorneys, a source of ultimate judgment, advice, and decision on the kinds of tough questions that come to him.

Senator ERVIN. I would characterize it—maybe a distinction without a difference—but I would characterize the head of the Criminal Division as a directing authority rather than a supervising authority, from my experience and practice in the Federal courts.

Secretary RICHARDSON. I would certainly accept that term. In any event, he has the overall responsibility now and that, of course, will continue to be the case until the special prosecutor takes office.

The CHAIRMAN. The Senator from Pennsylvania?

Senator SCOTT. Mr. Chairman, I really waited for Senator Mathias. I did not want him to miss his opportunity, because sometimes Senators wait for hours and can only be here at certain times and then have to go to a committee. He has had to leave for Appropriations, so I will take up only the brief time it takes to refer again to what Secretary Richardson said yesterday about the special prosecutor.

You used the phrase that the special prosecutor will have to catch a moving train. I think that is inevitable in the process, but I think it also stresses the importance of naming a special prosecutor and having him appear and appear with the written guidelines and then indicate whether those guidelines meet with his approval or whether he wishes a different guideline and whether or not he can satisfy the committee that his authority is such that he could move through every step of the proceedings without interference with his function, including his final action and recommendations. Would it not take, since we are thinking in terms of the analogy of the moving train, would it not take a statutory or statutorial created prosecutor that much longer to catch this moving train so that he might, after the expiration of 8, 10, 12, or 14 weeks, probably catch the last car on that train and have to move up?

Secretary RICHARDSON. I think that is a very vivid way of putting it, Senator Scott. He might change the image a little bit. He might say that he would really have to assemble a new group of cars and find an engine and get it going from the freight yard and out on to the track, really from scratch.

Senator SCOTT. And thereafter spend most of his time avoiding collision with other moving trains.

Secretary RICHARDSON. Precisely.

Senator SCOTT. I have no other questions at this time, Mr. Secretary. I simply want to stress the impracticality of pursuing one further course where we have a course before us and there is a very general unlikelihood that this committee will be able to satisfy itself through the character and personality and training of the special prosecutor, through his commitment and integrity, and through his assurances that this committee necessarily will have to have. I have no other questions.

Secretary RICHARDSON. Thank you, Senator Scott.

The CHAIRMAN. Mr. Secretary, what is the background of Warren Christopher?

Secretary RICHARDSON. Mr. Christopher is a former Deputy Attorney General of the United States, Mr. Chairman, as you know. He served during the Johnson administration under Attorney General Katzenback and Attorney General Clark. He served as the Director of the Commission appoined by the then Governor of California to investigate the circumstances leading to the Watts riot. He has been an active trial lawyer and is presently the head of the litigation department of the Los Angeles firm of O'Melveny and Myers. He is, I believe, an honor graduate of the Stanford Law School.

The CHAIRMAN. Senator Kennedy?

Senator KENNEDY. Thank you.

To whom is the head of the Criminal Division reporting on his investigations into the Watergate at the present time?

Secretary RICHARDSON. No one. He is in charge.

Senator KENNEDY. Well, the regulations point out that "subject to the general supervision and direction of the Attorney General, the following prescribed matters are assigned to and shall be conducted, handled, or supervised by the Assistant Attorney General in charge of the Criminal Division," but it says "subject to the general supervision and direction of the Attorney General."

Secretary RICHARDSON. Well, of course, Senator Kennedy, as you recall from the first discussion I had with Senator Hart, this supervision ceases when the Attorney General disqualifies himself or recuses himself on some personal ground. And since Attorney General Kleindienst has done that, he is not exercising the role he normally would.

I explained at that time that if I were confirmed and took office, I would not feel that I could or should disqualify myself. At any rate, the result of Attorney General Kleindienst's withdrawal of himself or insulation of himself from all aspects of the Watergate matter and related matters is that for this purpose, Henry Petersen is, to all practical purposes, the Acting Attorney General.

Of course, the Deputy, Dean Sneed, has some relationship, I suppose, but to the best of my knowledge and belief, he has not been playing an active role in connection with these matters.

Senator KENNEDY. You have no doubt that you can divest yourself of all responsibility for a particular matter where for some reason, you may wish to disqualify yourself?

Secretary RICHARDSON. Oh, I think that is perfectly possible. I remember when I was appointed U.S. attorney in Boston, I found that among the pending cases was an indictment against a man whom I had represented at an earlier stage in administrative proceedings before the SEC, so I filed with the judge to whom this case had been assigned a letter saying, in effect, that I proposed to insulate myself entirely from any aspect of that case, that the U.S. attorney trying it would not communicate with me about it, and so on. And this is possible in a matter where there is a real conflict of interest.

Senator KENNEDY. You are aware of the fact that John Mitchell disqualified himself in matters involving the Warner-Lambert firm, and as I understand it, the Deputy Attorney General had final authority in that case.

Secretary RICHARDSON. Yes. I was not aware of that specific situation, but when I say yes, I have no doubt.

Senator KENNEDY. And that Mitchell also bowed out of all the ITT antitrust cases and Kleindienst handled those.

Secretary RICHARDSON. So I understand.

Senator KENNEDY. Now, what would have happened in those cases if Kleindienst had been disqualified?

Secretary RICHARDSON. If Kleindienst also had been disqualified?

Senator KENNEDY. Yes.

Secretary RICHARDSON. Well, I suppose that in the case of the ITT matter, final responsibility would have rested on the shoulders of the chief of the Antitrust Division.

Senator KENNEDY. Well, in those cases—Warner-Lambert and ITT and Watergate—where the Attorney General had disqualified himself, would the Attorney General still have what you call the ultimate responsibility, since those with actual responsibility were his subordinates or were exercising power as delegated by him?

Secretary RICHARDSON. No, he would not. This, of course, is the reason why at the beginning of these hearings, Senator Hart proposed as a solution that I disqualify myself. I explained then why I do not propose to do that. But it is the only way, other than by statutory change, that I could escape ultimate responsibility.

Senator KENNEDY. Now, at the time of the Teapot Dome, they passed a joint resolution that said in the last paragraph "And the President

is further authorized and directed to appoint by and with the advice and consent of the Senate special counsel who shall have charge and control of the prosecution of such litigation, anything in the statutes touching the powers of the Attorney General of the Department of Justice to the contrary notwithstanding."

Is your reluctance due to the existing statutes which prohibit you from doing it, or would you want us if we could—and I imagine it could be done rather easily and quickly—to pass similar language saying that anything in the statute touching the powers of the Attorney General or the Department of Justice to the contrary notwithstanding?

Secretary RICHARDSON. I think that the situation would involve a great many practical problems in applying this. It would be unclear, for example, what the impact of that was with respect to the responsibilities of the Attorney General in cases of the immunization of witnesses. It would be unclear what was meant by that with respect to the assignment and direction of agents of the Federal Bureau of Investigation or the ability to call upon the personnel of the Department in order to expedite the handling of a given matter on an ad hoc basis. It would be difficult to draw with precision in advance a definition of the areas over which the special prosecutor should have special jurisdiction—which cases, for example, arising under the campaign contribution laws. These, I think, are all reasons why the attempt to carve out a separate statutory function has been up to now generally felt not to be a practical course. It is obviously a possible course and yet, I think, on balance, in the present circumstances, it would create a great many of the kinds of problems that Senator Scott touched on a few moments ago in referring to the analogy of the moving train.

You have here a situation where there are cases united only by one common thread; namely, some sort of relationship to White House staff or Committee to Reelect the President. They are otherwise quite different and this is true with respect, for example, to the Florida District Court case on Segretti, the New York Southern District case on Vesco, possible need to follow up disclosures with respect to electronic surveillance and burglary in the Ellsberg case, and so on.

Senator KENNEDY. Of course, you have, I think, indicated in earlier responses that you felt that the special prosecutor would be making the decision with regard to immunization and contacting directly the FBI itself, to the development of this strike force that you mentioned, and also to the kind of latitude that would be given in areas directly related to the investigation. I am trying to find out whether that "ultimate responsibility" is something that you feel compelled to accept because of the statutory responsibility at the present time, or whether that is something that you want in addition, or whether we cannot, by adopting language similar to the language in that resolution which I mentioned, still maintain for practical purposes the special prosecutor within the Justice Department, but to the extent that you felt some inhibitions by statute to assume this, as you define it, "ultimate responsibility," that you would perhaps be relieved of any responsibility other than that which perhaps you have outlined, the possibility of perhaps firing the special prosecutor for gross malfeasance, and limited to that only.

Secretary RICHARDSON. The existing statutory situation is certainly a major factor and for reasons that I just tried to explain, because simply to adopt language comparable to that which you cited from the Teapot Dome precedent leaves unresolved a lot of practical questions as to its application.

But beyond that, I do have the feeling that if I am to be Attorney General, it can only be on the basis that I shall be Attorney General for all the purposes that are presently set forth in the laws. I should either be confirmed to the job defined in the law or, as far as I am concerned, not become Attorney General.

Now, that does not mean, as I have repeatedly explained—and perhaps the record is overburdened already with this—that I would not delegate full authority to deal with these cases. As you know, I would do that. But I do not propose to become Attorney General without being responsible ultimately for what the special prosecutor does or does not do. He would be exercising a delegated function, with full authority to perform that function, but nevertheless, I would expect to retain ultimate accountability for what was done by him.

Senator KENNEDY. That is going back to what I know you have gone into and I know you have been responsive on—questions about the ultimate accountability or responsibility. I would like to ask you this: Would it not meet that particular definition if, say, the special prosecutor just notified you after he made decisions in relation to immunization or prosecutorial investigations or other areas of the conduct of the investigation? Or do you feel that he has to notify you before? Does it not meet your criterion of ultimate responsibility if, after he makes a decision, he just notifies you of such decision?

Secretary RICHARDSON. I have already made clear that he would be under no obligation to inform me in advance of a decision or to seek my approval of a decision. I would want to be, as I have said, generally informed. But I would not want him to operate on the basis of some ground rule that barred him from consulting me in advance if he saw fit to. He would have to have, as I have said, the understanding that I would not interpose my own judgment merely because I did not agree with him. He would know that. But with that awareness, I think he ought to feel free to communicate with me before or after the event as he saw fit.

Senator KENNEDY. Should he feel expected to or obligated to communicate with you?

Secretary RICHARDSON. He would be neither. Aside from keeping me generally informed of what he was doing in the performance of his delegated authority, the question of when or whether to consult me or whether to bring to my attention any particular development would be his responsibility.

Senator KENNEDY. Could he meet that responsibility by just giving you periodic reports as to general progress, or would you expect more?

Secretary RICHARDSON. That might be adequate for most purposes. On that score, it seems to me inappropriate to try to prescribe rigidly in advance. I think that the important thing is that he enter upon his role with the clear understanding that he has the full authority to carry it out and in so doing, to make judgments about how best to do it, including how best to communicate with me.

Senator KENNEDY. Are we any closer to announcement of a special prosecutor?

Secretary RICHARDSON. Well, we are somewhat closer, but I cannot give a precise estimate.

Senator KENNEDY. Will we have his name within the next couple of days?

Secretary RICHARDSON. Well, I certainly hope so, but I cannot guarantee it.

Senator KENNEDY. What about the document itself, the working draft document of the agreement?

Secretary RICHARDSON. That is gradually being, I think, clarified and improved pending the opportunity for the individual finally selected to have his input.

Senator KENNEDY. Is it your present intention to release publicly both the document and the name at the same time?

Secretary RICHARDSON. Yes.

Senator KENNEDY. And prior to that, will the individual members of this committee have a chance to examine the document before you release it in a general manner?

Secretary RICHARDSON. That is correct.

Senator KENNEDY. If I could go into just a couple of other areas, Mr. Richardson. On the question of the warmaking powers—I understand that you touched on it yesterday in the late afternoon. I have not had a chance to review your complete response, I have just seen it very briefly.

Is there any question in your own mind that Congress, through appropriate language in an appropriation bill, can end the financial support for the bombing in Cambodia?

Secretary RICHARDSON. No.

Senator KENNEDY. On either the present supplemental appropriation or, I believe it is the State Department appropriaion? I do not know whether you are familiar in detail with the particular language of the Church-Case amendment. But do you have any question in your own mind that that would be the effect of an acceptance by the House of Representatives and the Senate of the United States?

Secretary RICHARDSON. It is true, Senator Kennedy, that I have not given it any real detailed study—in fact, I am not sure that I have even seen the language of the Church-Case amendment itself. I have testified before the Appropriations Committee, however, a week ago yesterday that in my opinion, language could certainly be drawn that would have the effect of cutting off all funds for the continuation of air activity over Cambodia or any other form of combat activity in Southeast Asia.

Senator KENNEDY. The Church-Case amendment said no appropriation past or future could be used to finance the involvement of military forces in or over or from the shores of North Vietnam, South Vietnam, Laos or Cambodia, unless specifically authorized hereafter by Congress. Would you think that would do the trick?

Secretary RICHARDSON. It sounds like it.

Senator KENNEDY. Well, now——

Secretary RICHARDSON. As a lawyer who is sometimes careful, I suppose I should say that that is my horseback reaction to it.

Senator KENNEDY. Now, the House adopted some language, I believe it was last Thursday, and Mr. Ziegler said on that, "We, of course,

observed the vote of the Congress yesterday. We will continue with the policy which we feel is the right policy, and that is to provide support to the Government of Cambodia at their request. If at some time in the future, the funds are not available, the Congress will have to assume the responsibility in that matter."

That comment certainly would not be an accurate—or would you consider it to be an accurate statement of the authority of the executive branch if the Church-Case amendments, as I have read them to you, were accepted by the House and Senate?

Secretary RICHARDSON. In my opinion, no. Mr. Ziegler was referring to language that was restricted in its application to funds appropriated under the supplemental bill itself.

Senator KENNEDY. If language of this description were actually incorporated into the law, you have indicated that that would be enough if the language is what it appears to be, to end the authority for the continuation of bombing in Cambodia. Would you feel that there was any responsibility or any obligation to end it immediately, given the view of the Congress and the Senate, or would you feel that the President could continue the expenditures of funding that might exist in the appropriations from a previous year? Would you feel that there was a moral obligation on the part of executive, given the clear statement by the House and Senate that there ought to be an ending, a termination of the funding then? Would you feel, or would you advise the President, that he should continue, even with this kind of admonition, because the language itself only applies perhaps to any supplemental appropriation?

Secretary RICHARDSON. I would have to give that a good deal more thought, Senator Kennedy. The question in any event, of course, is subdivisible into the strictly legal question and the question of comity, for lack of a better word, between the executive and legislative branches of the Government. And I think it would need to be looked at in both lights.

There would, in any case, be purely practical questions arising out of a question of whether there were in fact funds that could be obligated from any prior appropriation that would have to be looked at. Because although there might be, for example, munitions acquired under a previous year's appropriation bill that could be expended, if the only fuel oil that existed were fuel oil acquired under the current bill, then the fact that it is possible to use one type of materiel from an earlier year would not affect the outcome, since without the fuel to fly the planes, to carry the bombs, nothing could happen. So there are at least these three aspects of it that would have to be looked at very thoroughly.

Senator KENNEDY. Well, if the Congress made a clear statement about the ending of any funding for the war in Cambodia, and if it became law, would you feel that there was an obligation, or would you at least advise the President that there was an obligation, to terminate even the funding which could exist in the pipeline—that this declaration by Congress and the Senate was sufficiently persuasive that there ought to be an end? Or would your guidance to him be that he ought to examine all the different kinds of possibilities to see if he can find some other kind of funding that exists in the pipeline or other sources so he can continue the policy?

Secretary RICHARDSON. Well, as I say, I think we tried to identify the elements of the situation that I would have to look at in giving any such advice—legal, those of congressional relations, and the conduct of government business on a basis in which both branches are required to work together and certainly, the purely practical administrative problem. I do not think I can or should try to frame in a hypothetical situation at this point what my ultimate advice would be.

Senator KENNEDY. If this amendment for one reason or another were defeated on the floor of the Senate, your purportedly stated position, and I quote, is that "We then would be justified in viewing that vote at least to acquiesce in the policy of bombing of Cambodia."

Secretary RICHARDSON. I think that is a fair conclusion. I made that statement originally in trying to get across the point that a vote granting transfer authority, which we were seeking and are seeking, should not be construed by the administration as affecting authority to continue bombing one way or another. I made that point because although the need for the transfer authority arose in large part because of a higher than anticipated rate of activity in Southeast Asia, the actual use of the transfer authority would not significantly affect Southeast Asia. So it was for this reason that I said that I did not believe that the enactment or granting of the transfer authority could fairly be used as a basis for resting the claim that the Congress had acquiesced.

But I went on to say that if an amendment were proposed to restrict the use of funds for the war and that were rejected, then there would be some basis for using that legislative history as indicative of congressional acquiescence. And I think that is a fair conclusion.

Senator KENNEDY. But again, just to repeat an earlier question, there is no doubt in your own mind of the ability or the power of Congress to terminate the funding for that specific effort in Cambodia on the supplemental, by the language of the Case-Church amendment, or by any other. You do not question in your own mind the power of Congress to do it in the Cambodia situation?

Secretary RICHARDSON. That is correct.

Senator KENNEDY. Another matter, Mr. Secretary. As you remember, Senator Hughes was very much concerned about the way that General Lavelle's case was handled by the Defense Department, and I believe in an exchange with you, he asked that the case be reviewed. In the course of the hearings on that case in the Committee on Armed Services on March 2 and 9, Senator Hughes mentioned that he thought the Air Force had identified at least five unauthorized missions in which false reports had been confirmed and that there had been clear violations of the Uniform Code of Military Justice. Then he went into considerable specificity on the particular charges that had been made and the violations of the Code of Military Justice. He asked you to review that case and how it had been handled. Then in the report, there is a letter from you to Senator Hughes.

I would ask that both Senator Hughes' statement and the Secretary's response be included in the record, Mr. Chairman.

The CHAIRMAN. Without objection, so ordered.

[The above referred to statements follow:]

THE SECRETARY OF DEFENSE,
Washington, D.C., March 20, 1973.

HON. HAROLD E. HUGHES,
U.S. Senate, Washington, D.C.

DEAR SENATOR HUGHES: As you requested during the Senate hearings on my confirmation, I have reviewed the Department's handling of the case of General Lavelle and the matters associated therewith.

My review reveals that the question of disciplinary action under the Uniform Code of Military Justice (UCMJ) was considered by appropriate authorities three separate times.

Initially, when the Air Force Inspector General made his initial report to the Chief of Staff of the Air Force in March 1972, General Ryan considered a range of types of action which might be appropriate. One of the courses considered was charges under the UCMJ against General Lavelle. General Ryan recommended rejection of this course, and his recommendation was considered and approved by both the Secretary of Air Force and the Secretary of Defense.

Subsequently in June 1972, formal charges were preferred against General Lavelle by other members of the Air Force. These charges were carefully evaluated by the Secretary of Air Force against all of the information then available from the full investigation conducted between early April 1972 and October 1972. Based on this evaluation, the Secretary of Air Force dismissed the charges on October 24, 1972.

On November 3, 1972, Air Force Sergeant Lonnie Franks filed formal charges against General Lavelle and 23 other Air Force personnel. For the third time the matter was reviewed, a supplemental investigation conducted and the charges re-evaluated. The charges filed by Sergeant Franks were dismissed on November 21, 1972.

My review revealed no indication that there was other than a thorough, objective handling of the matter on each occasion it was considered. I have concluded that it would be neither appropriate nor useful to reopen this matter.

With kindest regards,

Sincerely,

ELLIOT RICHARDSON.

STATEMENT BY SENATOR HAROLD E. HUGHES BEFORE THE ARMED SERVICES COMMITTEE, MARCH 29, 1973

I deeply appreciate the committee's patience in allowing me time to review the pending nominations and the testimony which has been taken in this case.

The Lavelle case brought to light two grave issues of command and control—first, the violation of clear standing orders regarding protective reaction strikes; and second, the attempt to conceal these violations by making false official statements and reports.

While I am still troubled at the breakdown in command and control which permitted pilots to violate the "crystal clear" rules of engagement, I think that in considering men for promotion we have to pay special attention to the issue of false reports—a clear violation of Article 107 of the Uniform Code of Military Justice.

Last week, Mr. Buzhardt told the committee that men who made false reports cannot now be punished because of the difficulty in proving an "intent to deceive." Nevertheless, some men did sign false reports, while at the same time approving true reports for back-channel communication.

I can appreciate the technical legal problems which make prosecution difficult, but I, for one, could not rest easy if I thought that one of these men who knowingly made a false report might one day become Chairman of the Joint Chiefs of Staff.

Consequently, I want to examine and make an individual judgment on the promotion of any man who did knowingly make a false report or statement, regardless of whether he could be prosecuted. To decide *not to punish* a man for his actions is one thing, but it is quite another thing to reward him with higher rank and our confidence.

During the past week, my staff and I, with the assistance of the committee staff, have gone over in some detail many of the documents that were made available to the committee, and this is what we found.

1. The Air Force has identified at least five unauthorized missions in which false reports have been confirmed.

2. Sergeant Lonnie Franks told this committee that falsification extended to the types of targets, the coordinates, the time, and the bomb damage assessment. The committee has several of the admittedly falsified reports in its files—and I can show you where the reports contain the accurate BDA of, say, trucks, while triple-A is listed in parentheses for inclusion in the subsequent reports.

3. My staff compared the names of the available reports with those on the identified list of 160 Air Force men and concluded that probably none of them signed a false report. Ten of them *might* have been pilots or back-seaters on unauthorized missions, but we had only last names on the reports and needed further information on this point.

In any event, apparently none of these men whose names are before us actually signed or initialed one of the false reports.

It was my opinion, however, that this tentative conclusion required confirmation by the Defense Department since only the Department has access to all of the relevant information.

Accordingly, I wrote to the Secretary of Defense, asking him to certify that none of these men did knowingly sign or initial a false report or make a false official statement.

In order to examine more closely and accurately the involvement of any future nominees, I also asked him to provide the Committee with the names of all those who participated in the five missions identified as ones in which false reports were definitely made.

In addition, I asked him to identify present and future nominees who served in the 432nd Tactical Reconnaissance Wing during the period in question. This is the only unit known to have falsified operational reports.

This morning, I received a letter from Mr. Buzhardt answering in detail my letter of yesterday. I am grateful for the prompt reply.

Since Mr. Buzhardt says that the Defense Department "has no information that any of the nominees signed or initialled a false official report or made a false official statement," I support prompt committee and Senate approval of these nominations, provided there are no other objections which have come to the committee's attention.

I am pleased to note that Mr. Buzhardt will continue to furnish the committee with information on this matter, which presumably means certification of future nominees in the same manner he has given us a certification with respect to those pending before us. If this is done, we shall be in a much better position to evaluate the merits of men whom we are asked to confirm.

I have had time only to glance over the reports regarding what organizational and procedural changes have been made by DOD to prevent a recurrence of similar incidents in the future. My tentative judgment is that additional steps are imperative to insure adequate command and control and discipline. I hope to consult with you further about this at some other time.

U.S. SENATE,
COMMITTEE ON ARMED SERVICES,
Washington, D.C., March 28, 1973.

HON. ELLIOT L. RICHARDSON,
Secretary of Defense, Department of Defense,
The Pentagon, Washington, D.C.

DEAR MR. SECRETARY: I have your letter of March 20, 1973, in which you state that you have concluded that it would be neither appropriate nor useful to reopen the Defense Department's investigation into unauthorized air strikes in Southeast Asia and falsification of reports and documents to conceal them.

The authority to bring charges against members of the military for violation of the Uniform Code of Military Justice lies with the Department of Defense. The Senate, on the other hand, has a duty under the Constitution to examine the qualifications of military officers for promotion to higher rank and to advise and consent to each promotion. To assist me, the Armed Services Committee, and the Senate in carrying out this responsibility, I request your cooperation in providing us with certain information, in addition to the assistance you are already providing in this regard.

You have identified for the Committee, at my request, 185 officers nominated for promotion who participated in combat air operations of the Air Force and Navy in Southeast Asia during the period of acknowledged unauthorized air strikes, from November 1, 1971, to April 1, 1972. As to these nominees, I would appreciate having the following:

1. A list of those who served with the 432nd Tactical Reconnaissance Wing at Udorn Royal Thai Air Force Base, Thailand; and

2. Your certification as to which, if any, of the 185 officers knowingly signed or initialed a false official report or made false official statements in connection with the unauthorized air strikes.

Testimony by Defense Department witnesses divulged that at least five unauthorized air strikes have been identified by your investigation. General Ryan is quoted in the hearing record of the House Armed Services Investigating Subcommittee on June 12, 1972, as follows:

"I know of four in which the results were not as reported on the Op Rep–3s and Op Rep–4s that were submitted . . . One on February 25, 1972, four F–4s, another on February 25, 1972, eight F–4s. Another on February 25, 1972, five F–4s . . . One on March 4, 1972, nine F–4s."

In a written report submitted to the Senate Armed Services Committee by General Ryan, another instance of falsification was reported as follows:

"On the 23 January 1972 mission to Dong Hoi Airfield, the evidence appears to establish rather conclusively that no enemy reaction was observed, and that the initial voice (Pinnacle) report so indicated. The Op. Rep. 3, as well as the Op. Rep. 4 and 5, however, reported enemy AAA fire and SAM radar activation."

Since your investigation has confirmed false reporting in these instances, I request that you identify for the Committee the members of the Air Force who participated in these missions and, in addition, those whose names or initials appear on the false official reports which you have confirmed.

To further confirm the sufficiency of the Department's investigation, I would appreciate knowing how many depositions and written statements were taken from witnesses and the dates on which they were signed by the witnesses. In addition, I request that you provide the Committee with copies of such statements, to the extent that doing so would not violate the confidentiality of the Inspector General's investigation or impair his ability to carry out the duties and responsibilities of his office.

I want to emphasize that receipt of this information will not conclude my efforts to insure that the Senate has all possible information about officers nominated for promotion before consenting thereto.

Therefore, I request that you arrange to continue furnishing the Committee the reports from the Air Force and Navy as to which, if any, officers on any promotion list participated in combat air operations in Southeast Asia during the period of November 1, 1971, to April 1, 1972. In addition, I request that, in connection with these reports, you certify as to which, if any, of the officers so listed knowingly signed or initialled a false official report or made false official statements in connection with unauthorized air strikes. Further, I would appreciate your identifying which, if any, of such officers served with the 432nd Tactical Reconnaissance Wing during the period in question.

I will be grateful for your continued assistance in this regard.

Sincerely,

HAROLD E. HUGHES.

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE,
Washington, D.C., March 28, 1973.

Hon. HAROLD E. HUGHES,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HUGHES: Secretary Richardson has asked me to respond to your letter of March 28, 1973.

Among the nominees for promotion pending before the Senate Armed Services Committee who were previously designated as having been assigned to a position involving air operation in Southeast Asia during the period November 1, 1971, to April 1, 1972, those assigned to the 432nd Tactical Fighter Wing were the following:

ON LIST FOR PROMOTION TO TEMPORARY RANK OF COLONEL

[Names on file with Committee.]

ON LIST FOR PROMOTION TO PERMANENT RANK OF 1ST LT.

[Names on file with Committee.]

We have no information that any of the nominees signed or initialed a false official report or made a false official statement in connection with the unauthorized air missions in question.

A brief review of the procedures may be useful to you in understanding the reporting system, and the data which are available to us. Two types of formated operational reports are involved—Operation Reports No. 3 (Op. Rep. 3's) and Operational Reports No. 4 (Op. Rep. 4's). The Op. Rep. 3's, sometime referred to as "Pinnacles" were oral reports radioed from the pilot of the lead aircraft of a flight on exiting the target area to the 7th Air Force command center. This was a brief, coded, initial report which indicated whether ordnance was expended on the mission, whether there was enemy reaction, and whether all aircraft in the flight were returning. Upon recovery of the flight, one, two or three of the participating crew members (depending on the number of aircraft in the flight) reported to the intelligence center of the organization located on the base at which the mission recovered. The crew member, or members, were interrogated by either an officer or enlisted intelligence specialist. The answers were noted on a mission sheet in pen or pencil by the interrogator. Upon completion of the debriefing, the crew member debriefed usually initialed the mission sheet. The intelligence office then prepared a formated report from which showed, largely by symbol and abbreviation, the originating unit, addresses and pertinent data about the mission. This report, an Op. Rep. 4, was then transmitted electrically to a large number of addressees. At 7th Air Force, the data from the Op. Rep. 4 was computer formated and fed into a computer. The Op. Rep. 4 was not signed or initialed by any one. The Op. Rep. 3's were "perishable," that is, usually retained for only a short time by recipients, as the Op. Rep. 4's provided more complete data. The mission sheets prepared by the debriefers were used only as worksheets, and are also normally retained for only brief periods. The "permanent" records are the data base extracted from the Op. Rep. 4's and stored in a computer.

When the investigation was made of allegations of unauthorized missions, some mission debriefing sheets covering some of the missions in question were extant, but most had been destroyed in the normal course. Copies of the mission debriefing sheets available were provided the Committee on Armed Services during the hearings last year. As an examination of these mission debriefing sheets show, the full and complete data on these missions were on the mission debriefing sheets, and in fact, the supplementary reports (SPECATS) submitted to the Commander, 7th Air Force, during this period were obviously also prepared from the same mission debriefing sheets.

With respect to the missions cited by General Ryan which you quote in your letter, mission debriefing sheets were available. As noted above, these sheets contain the full and complete information about the missions involved insofar as we have been able to ascertain. Also, these mission debriefing sheets are the only remaining documentary evidence extant of the personnel who participated in the particular missions. These sheets indicate that the personnel participating in the missions cited by General Ryan were the following: (None of these persons are on a pending promotion list.)

NAME, MISSION DATE, AND NUMBER OF AIRCRAFT

[Names on file with Committee.]

The mission debriefing sheets for the missions cited by General Ryan were initialed by the following: (None of these persons are on a pending promotion list.)

[Names on file with Committee.]

With respect to the 23 January 1972 mission to Dong Hoi Airfield, no mission debriefing sheet was available. We were to establish from the statements of General Lavelle and from interrogation of other personnel, particularly General Slay, what happened in connection with the "Pinnacle" report (General Lavelle's testimony on this point appears at page 7 of your Committees hearings and that

of General Slay appears at page 290–291.) General Lavelle had ordered a strike on Dong Hoi Airfield. As I pointed out in my testimony before the Committee last week, the Rules of Engagement were issued over the signature and by authority of the Commander, 7th Air Force, and, insofar as operating personnel were aware, the Commander, 7th Air Force, could have had authority to suspend the rules for specially authorized strikes, as had been the case earlier for operations PRIZE BULL (Sept., 1971) and PROUD DEEP (Dec. 26–30, 1971). Upon exiting the target at Dong Hoi, the leader of the flight made his "Pinnacle" report to 7th Air Force Headquarters Command Post, where General Lavelle was sitting and listening. The report indicated that the flight had expended its ordnance and that there had been *no* enemy reaction. General Lavelle testified that he then directed that the report be "corrected" to indicate an enemy reaction. He also directed that any time a flight flew over targets in North Vietnam, there was an enemy reaction and that all reports filed would so indicate. General Lavelle's orders were communicated to the Commander of the 432nd Tactical Reconnaissance Wing. As is clearly indicated in the testimony, the report of the January 23, 1972, mission to Dong Hoi was *accurately* and *correctly* reported by the mission leader and was ordered changed by General Lavelle when he received it at 7th Air Force.

The investigation conducted by the Air Force Inspector General and the investigation conducted jointly by the offices of the Secretary of Defense, Secretary of Air Force and the Chairman of the Joint Chiefs of Staff were factual inquiries, not criminal investigations. Accordingly, depositions or signed statements were not normally taken from the many personnel interrogated. In the initial stages of his investigation, the Air Force Inspector General obtained signed statements from three persons: Colonel Gabriel, Lt. Colonel Glendenning and Captain Murray, all on March 14, 1972. As you know, both Colonel Gabriel and Captain Murray testified before the Senate Armed Services Committee. Lt. Colonel Glendenning was interviewed here in Washington by the Committee staff. As you recognize in your letter, and as was previously determined by the Committee during the course of its hearings, release of these statements would operate to the prejudice of the Inspector General's system. Had the facts elicited by these investigations provided evidence that offenses under the Uniform Code of Military Justice should be pursued, criminal investigators would have been assigned to the case. As we have previously indicated, however, such was not the case, and no criminal investigation techniques were employed. Subordinates to the Commander, 7th Air Force, had no basis upon which to question either the legality of the orders issued by General Lavelle for missions or the authority of General Lavelle from his superiors to issue such orders. General Lavelle's orders did not violate the laws of war, such as those contained in the Geneva and Hague Conventions. Nor is there evidence of an intent to deceive by the crews who were debriefed following the missions in question, as evidenced by the fact that they provided accurate information on the missions in which they participated.

As you know, the testimony by the Senate Armed Services Committee, confirmed by the Department's investigations, indicates that although as many as 28 escorted reconnaissance strikes were flown under directions which were not in accord with the operating authorities given the Commander, 7th Air Force, there is no evidence that all, or even a majority of them were actually flown in violation of those operating authorities, since an enemy reaction was experienced on many of them. There is no way to determine exactly on how many or on which specific missions there was in fact no enemy fire.

The Department will continue to furnish to the Committee any information requested in connection with this matter to the extent it is available to the Department.

We sincerely hope that the information furnished herein and the large volume previously provided, together with the extensive testimony taken by the Committee will make it possible for the Committee expeditiously to act favorably on the nominations pending before the Committee.

Sincerely,

J. FRED BUZHARDT.

Senator KENNEDY. You have indicated that "I have concluded that it would be neither appropriate nor useful to open up this matter." I was wondering how you reached that decision. Your letter in response to Mr. Hughes is rather a brief one.

Secretary RICHARDSON. In order to reply to Senator Hughes, the course I followed was generally this: First, I asked for a summary of the procedures that had been followed; that is, the successive stages that the case had been through. I also asked for a summary of what the evidence showed, what had happened, what he was charged with or alleged to have done wrong.

I concluded on the basis of the first of these steps that, roughly speaking, what had happened was that successive authorities had reviewed the allegations or charges against him and had concluded that they would be unlikely to stand up in terms of the proof of violation of any criminal provision of the Military Criminal Code. This was, in effect, like reviewing the work of a grand jury that had refused to indict and it seemed to me in the circumstances that for a new Secretary of Defense, in the face of these successive reviews of the evidence, to undertake to develop a purely independent judgment on this evidence would not, as I said, be appropriate.

It was a matter that, so far as I could see, had been correctly handled in the procedural sense. All aspects of it had been fully considered, and there was no basis on the facts whereby it was possible to say that the people who had looked at it before were so far off base that I would be justified in reopening it.

Senator KENNEDY. But there had been the violation of clear standing orders regarding the protective reaction strikes, as I understand it. There were two charges and that was one. The second was attempts to conceal these violations by making false official statements to the courts. Those were the two.

Secretary RICHARDSON. Those were the charges and those were the charges that were examined, but it is very easy to state a charge simply, but the evidence to sustain it by no means is so simple. They were unable to establish, for example, whether a plane picked up on the radar screen of the North Vietnamese forces automatically was in a situation where protective reaction was justified. This involves the ranges of the radar screen and whether or not you are talking about the perimeter acquisition radars or whether you are talking about the localized radars that lock on to the plane for purposes of directing fire from ground batteries against it. The contention of General Lavelle was that protective reaction was justified whenever the wider range radar screen picked up the plane. He essentially based his defense on this interpretation of the ground rules.

Well, now, I do not think many people agreed with his interpretation, but the issue was whether or not he was subject to criminal prosecution.

That is the kind of thing—that is just a glimpse of the kind of issue—that was examined here. It seemed to me that after three or four or two, whatever it was—I do not now remember exactly, but there were exhaustive examinations of the issue by the people responsible for determining whether or not criminal proceedings should go forward—that for me, at that late date, to start it all over again was not justified.

Senator KENNEDY. You say that you applied a presumption of regularity?

Secretary RICHARDSON. No, I did not. I said that the first question was whether or not there had been regularity in the manner in which

the case was handled and I could find no indication to the contrary. I did not say that there was a presumption of regularity, but I looked to determine whether or not there was any apparent irregularity and could not find any.

Senator KENNEDY. You will remember that the sergeant, Lonnie Francis, I believe, told the committee that falsification extended to the types of targets, coordinates, and bomb damage assessment and other testimony as well. But you were convinced that there was not sufficient evidence to move ahead on any other basis against General Lavelle other than his retirement?

Secretary RICHARDSON. Yes. I would have to check the chronology of this—I do not have it vividly in mind—but at any rate, I think it was after the two reviews of the evidence, one of them accumulated by the charges filed by the sergeant himself. The Office of the Secretary of Defense undertook its own very intensive fact-gathering effort and personnel were dispatched to Vietnam who compiled detailed summaries of all the records involving each of these flights, just the manner in which they were reported and so on. There is no question that there were departures from normal practice in the manner of reporting.

As I understand it, General Lavelle's counsel had a lot of reasons for this. I did not feel that, in the circumstances, it was my role to try to make up my own mind whether the reasons were good or not.

Senator KENNEDY. Are you, as you assume this ultimate responsibility on the Watergate affair, starting off with any kind of presumption of regularity on Watergate? Would you have applied that presumption last summer? Would you say that if there had ever been such a presumption, it has been rebutted by the recent revelations?

Secretary RICHARDSON. I was among the many people who did not take it very seriously at first. It looked to me, as I remarked publicly at the time, like a bush league operation.

And I think I thought of it very much in terms that many people did as the Watergate caper. My own sense of the seriousness of that situation has certainly deepened in the meanwhile, as disclosures have come about and as it has been identified as a situation belonging in a larger setting. And this state, it has, of course, reached a point where serious issues of confidence in political and governmental processes have been raised. It is therefore, on that basis now that the matter must be pursued and it would be on that basis that I would exercise that kind of ultimate role that we have been talking about.

I would not, of course, as you know, be directing activity in the prosecutorial sense. I would, however, as my approach to the selection of the special prosecutor I hope indicates, charge that person with the undertaking of a very far-reaching public responsibility.

Senator KENNEDY. Is the person that you intend to select examining the guidelines now, at the present time?

Secretary RICHARDSON. Yes. At least one of them is.

Senator KENNEDY. Would that be the one that is on the top of your list?

Secretary RICHARDSON. Yes. My assumption has been that I would approach these people in turn.

Senator KENNEDY. Will you let us know if he turns it down because he does not feel that the guidelines give him sufficient flexibility?

Secretary RICHARDSON. Yes. I would do that. That has not been a problem, to my knowledge. And of course, each of the individuals I approached in the first instance, each of these four people, were in general aware of the overall position that has emerged from these hearings. None of them raised any question on that score, nor did any of the individuals who for various personal reasons asked not to be considered at all. So I am not aware of this as an obstacle at the present time.

Senator KENNEDY. As we go through the consideration of the guidelines with the prospective special prosecutor, if there are several changes that seem to be desirable, at least from his viewpoint, would you have any hesitancy in making adjustments or changes that he thought would be useful or helpful to him in fulfilling those responsibilities?

Secretary RICHARDSON. I lost the last part of the question.

Senator KENNEDY. Well, if he thought that such changes would be helpful to him in fulfilling his grant of power or his responsibility?

Secretary RICHARDSON. The individual I already approached made what I thought were good suggestions. I think they will have been useful in the improvement of the document whether or not he turns out to accept the appointment. I think they would be regarded as good changes by any other person, including this committee.

Whatever helps to clarify and make more specific the general understanding that has emerged from these hearings would be not only acceptable but welcome, from my point of view. I think it should be clear, however, that the document will track the general framework that we have been discussing. It has gone through successive stages, or at least editorial revisions, sometimes taking directly into account discussions with members of this committee.

Senator KENNEDY. Well, I suppose that there may be some useful suggestions by the members of this committee just as there have been useful and constructive suggestions by the persons that you have talked to about the prospective nominee. Do I understand your view that if this helps to clarify the responsibility as far as this committee's understanding, that you would not have any hesitancy in making those kinds of adjustments or changes?

Secretary RICHARDSON. No; I prefer, as I said yesterday, to wait before making the paper publicly available until after I have been able to announce the selection of the special prosecutor. At that point, it may turn out that individual members of the committee will have useful suggestions. It may be that the hearing that is held for the special prosecutor and the discussion between members of the committee and that individual will develop ideas that could improve it further. And as I said, meanwhile, any member of the committee who particularly wants to see the paper before then can have it. I would rather not extend a general invitation because of the problems that are always inherent in trying to draft things on the basis of involving participation by a large group, particularly before it is in a form that I feel personally satisfied with and that I know the special prosecutor is satisfied with.

Senator KENNEDY. Have you represented to the special prosecutor that there has been a meeting of the minds, on this particular issue of responsibility, between the Judiciary Committee and yourself?

Secretary RICHARDSON. I haven't—no, I haven't felt that I was in a position to draw that conclusion. I have said that the paper has been clarified and made more specific, and in some respects, more inclusive as a consequence of discussions with the committee. But I haven't tried to reach any general verdict as to the committee's views.

Senator KENNEDY. Just one other area. Mr. Richardson, are you aware of the plight of the Fort Worth Five, the citizens that are now spending time—I think they are into approximately the 9th month—in jail in Texas on the questions of their alleged involvement in some kind of illegal activity supposedly in New York City? I have not had a chance to inquire at meetings with you, when we did have a chance to talk, about some of the Indian legal questions, some of your views on wiretapping, and also about the Fort Worth Five. But I will write you a note. I have had the opportunity to do so with Mr. Petersen and others, but I think it is really quite clear that this certainly would appear as one of the violations of the whole grand jury process. I would like to have your personal attention on that particular question. But I will elicit your views on it at another time.

Secretary RICHARDSON. I would be glad to, but I do not know enough about it to give any worthwhile comment at this point.

Senator KENNEDY. Thank you, Mr. Chairman.

Senator GURNEY. Mr. Chairman, may I ask a question?

The CHAIRMAN. Certainly.

Senator GURNEY. Mr. Secretary, I wonder if we can go back over this Lavelle question a little bit. I do not quite understand it. Did this all begin when the Sergeant accused the General of unauthorized bombing?

Secretary RICHARDSON. I honestly do not remember, Senator Gurney, which came first. There was an official Air Force examination of the question of whether he should be tried on any criminal charge and then the Sergeant filed charges, as he was within his right to do, under the Uniform Code of Military Justice. So that involved a second review of the charges and of the evidence alleged to sustain those charges. But I do not remember for sure which came first. I think the Air Force proceeding was first and then charges. In any event, the matter was reviewed twice, I think.

Senator GURNEY. When did this occur, the approximate time?

Secretary RICHARDSON. Well, I guess it was in 1971 or 1972.

Senator GURNEY. Can you tell the committee generally the procedures involved and what witnesses were called—I mean numbers? What I am interested in is the scope of the inquiry, the whole inquiry.

Secretary RICHARDSON. I do not have any idea of the number of witnesses. It was certainly a very thorough inquiry. Then when congressional committees became interested in whether or not justice had been carried out, a new and extremely exhaustive review or compilation of all the facts was undertaken. All I saw, really, was a summary which detailed sortie by sortie exactly what happened, in all sorties flown under General Lavelle's command—what the munition was, the report of the aircraft commanders, and a lot of other details for each sortie flown, all with an effort to determine whether or not he was observing the rules of engagement. This is really all I can tell you clearly at this point.

I might add that congressional committees, both the Senate Armed Services Committee and the House Armed Services Committee, did go into all this at great length, as I think you know, and I think in general, although there were some differences between the branches on this, at least there is now before each Committee a very full record.

Senator GURNEY. That actually was one of the questions I had intended to ask you. My recollection is that both the Senate and the House Committees looked into this not only to find out what happened, but also to determine whether the Air Force and the Defense Department had made a proper judgment and disposition of the case. Is not that your recollection, too?

Secretary RICHARDSON. Yes.

Senator GURNEY. And there was no recommendation—well, let me ask you. Did either committee of the House or Senate, Armed Services Committee, make any recommendation to the Air Force or the Defense Department or any criticism of the course of action that they did pursue and the decision that they made?

Secretary RICHARDSON. No, not to my knowledge.

I think my recollection is that the House committees concluded that the matter had been properly handled. My impression is that there was a less clear-cut affirmative reaction on the part of the Senate, but I am sure there was no finding or conclusion that the matter had been improperly handled and clearly no impression of the judgment that the Air Force should proceed further.

Senator GURNEY. And as I understand your answers to the questions posed by Senator Kennedy, in view of your review of the file and of your informing yourself of the exhaustive study by the Air Force and the Defense Department, as well as the two congressional committees of the Senate and House, it did not occur to you that it was proper to reopen this whole thing all over again. Is that true?

Secretary RICHARDSON. That is exactly right, yes, sir.

Senator GURNEY. Thank you.

That is all, Mr. Chairman.

The CHAIRMAN. Senator Tunney?

Senator TUNNEY. Thank you, Mr. Chairman.

The CHAIRMAN. We are going to recess at 12 o'clock until 2.

Senator TUNNEY. Mr. Attorney General, did President Nixon, in your conversation with him when he asked you to be Attorney General, ask you to retain ultimate responsibility for the investigation?

Secretary RICHARDSON. No, he did not. The kind of discussion we have had to this point during this hearing on relative responsibilities and so on, has been the result of, I think, a good deal more examination of the implications of my doing this job than either the President or I went into at that point.

Senator TUNNEY. Did you suggest to him then or at any subsequent time that you would in fact retain the ultimate responsibility as a basic criterion for service as Attorney General?

Secretary RICHARDSON. No. The matter came up in the Cabinet meeting of last week, after these hearings were underway, but I had no discussion before that. He did, at the very first meeting I had with him, the only meeting I have had alone with him or at which my becoming Attorney General was the principal subject of discussion, he did make clear that he expected me to determine whether or not, in my best judgment, a special prosecutor should be appointed.

Senator TUNNEY. But when you discussed with him the question of whether or not a special prosecutor should be appointed, was it subsumed that you would retain ultimate responsibility?

Secretary RICHARDSON. Well, I think while it wasn't expressed, I certainly understood that he felt that by appointing me as Attorney General, there would be some contribution to public confidence in the integrity of whatever investigations or prosecutions were undertaken by the Department, merely because he thought that I would be regarded as a person of integrity. So it was certainly implicit in our conversation that the question of whether or not to appoint a special prosecutor was to be looked at in terms of the additional contribution to public confidence that that could bring about. Had he suggested to me that he would like to have me succeed an Attorney General who had resigned because of prior associations with individuals implicated in these charges and substitute myself for him under the same limitations on his role, I would have said in that case that it would seem to me pointless to appoint me. No such suggestion was made.

Senator TUNNEY. So in other words, it is your feeling now that if you were to give ultimate responsibility to the special prosecutor for the purposes of investigating matters related to Watergate and prosecuting of individuals who are considered to be sufficiently suspect, that in some way, you would be breaking faith with the President insofar as your understanding of what your responsibilities were to be as Attorney General?

Secretary RICHARDSON. I would not put it quite that way, Senator Tunney. I would feel that whatever expectation he had that I would contribute something to public confidence in this process would have been disappointed. This would be true both as to him and as to myself. But I would not and I do not think he would look at it as breaking faith. It would mean simply the failure of an objective in the appointment. There would remain the legal problem, of course. Let me say, lest the record be unclear, the question of ultimate responsibility rests in the first instance on the fact that it would require a change of law for the Attorney General to be divested of it.

The CHAIRMAN. We will recess until 2 o'clock.

[Whereupon at 12 noon, the committee was recessed until 2 p.m. of the same day.]

AFTERNOON SESSION

The CHAIRMAN. The committee will come to order.

Senator Mathias.

Senator MATHIAS. Thank you very much, Mr. Chairman.

Mr. Secretary, in the several days of these hearings, there has been a considerable amount of conversation about the guidelines under which the special prosecutor would operate. As I have reviewed the transcript of the record, it would appear to me that you have described yourself as being in substantial agreement with most of the Stevenson formula. But I think you have said that there were some minor exceptions in which you did not agree to the Stevenson formula. I wonder if you could be specific as to what those exceptions may be.

TESTIMONY OF ELLIOT L. RICHARDSON—Resumed

Secretary RICHARDSON. I would be glad to, Senator Mathias. I would have to amend that because of the language of your question.

The CHAIRMAN. Just a moment. There is a vote. It is the Hathaway amendment. You can answer it when we get back.

[Recess.]

The CHAIRMAN. Let's have order.

Senator Mathias?

Senator MATHIAS. Thank you, Mr. Chairman.

Mr. Secretary, when the bell rang, I had raised the question of your agreement with principles set forth in the Stevenson formula in Senate Resolution 109 and had raised with you the question as to whether you had any exceptions to that formula?

Secretary RICHARDSON. Yes, Senator Mathias. I will be glad to respond to that.

I have only one significant problem with the terms of the resolution and that is with respect to the use of the word "final" as applied to authority in the first operative clause. This, of course, brings into question the very issues that have been the subject of prolonged discussion before this committee. I have really nothing new to say on that.

The problem of the use of the word "final" is that it would seem to me to require a new statute conferring such authority. This would not be a simple statute. It would require straightening out authorities with regard not only to the direct responsibility of the special prosecutor for these investigations, it would require also finding what the investigations are. It would require dealing with the resources available to him in terms of both the money and people; it would require dealing also with relations between the special prosecutor and the U.S. attorneys. It might well require dealing with particular issues like the power to grant immunity. All of this, in turn, would lead to intolerable delay independent of the question of who ultimately is Attorney General.

And finally, it would, I think, raise a significant question with respect to the issue of to whom the special prosecutor would be ultimately responsible. In the case of the Teapot Dome matter, the legislation adopted by the Congress provided for the special prosecutors to be responsible to the President and under the Constitution, if the special prosecutor were not responsible to the Attorney General in some ultimate way or to the Deputy Attorney General, then he could, I believe, be responsible only to the President constitutionally, since Executive power is vested in the President, and since it has been ruled by the Supreme Court that the conduct of investigations and prosecutions as defined by the law are executive branch functions. These are all reasons why, in my view, the word "full" should be substituted for the word "final", in order to make clear that full authority had been delegated to the special prosecutor, subject, however, only to the role vested by statute in the Attorney General, as I have previously tried to explain.

There are some administrative respects in which I think the language could be clearer, but these are not of major importance.

Senator MATHIAS. Well, then, what you are really saying is that under our constitutional system, it is not possible just to launch this

special prosecutor into space and have him orbiting around completely on his own, but that if he is to be responsible to someone, it will be either to the President or to the Attorney General and Congress then must make up its mind as to which it thinks is preferable.

Secretary RICHARDSON. Yes, Senator Mathias, I think that states the matter very succinctly and accurately.

Senator MATHIAS. And in no other major respect do you differ from the Stevenson formula?

Secretary RICHARDSON. That is correct.

Senator MATHIAS. Now, turning to some of the other departmental business, it seems to me extremely important, not only in its long-term aspects but in the light of developments of recent months. I am wondering if you could describe for the committee your feeling about the proper relationship between the Department of Justice and the Federal Bureau of Investigation and particularly your feeling about steps that can be taken to insure on the one hand the independence of the FBI and on the other hand, its accountability.

Secretary RICHARDSON. Certainly those two words, Senator Mathias, "independence" and "accountability" are important in trying to define the role of the FBI and its relationship to the Attorney General. The FBI is, of course, in the Department of Justice and the statute would seem to give the Attorney General again an ultimate responsibility over the role of the FBI. He presumably has a relationship to the FBI and to its Director comparable to the normal relationship between a department head and the head of an agency within that department. In the case, however, of the FBI, there is a need for public confidence in the independence of the investigative process. There should be confidence that it is conducted without any flavor of partisan bias, that it should be not only professionally competent but fair. It should be scrupulously conscientious where the rights of individuals are concerned. And all of these are considerations that make it important that the Director be and feel and be perceived as an individual of courage as well as personal integrity. He must be a standup guy and he must inculcate within the FBI as an investigative service a sense of pride in fulfilling these professional standards.

The Attorney General, I think, can help by giving the Director of the FBI the feeling that he is so regarded by backing him up in situations where he perhaps, under public criticism, is adhering to what he considers to be standards that ought to govern the institution.

The Attorney General can help in terms of strengthening the conditions of employment internally within the FBI that can help to enhance morale.

Where specific investigations are concerned, there has to be full mutual understanding and cooperation between the Director of the FBI, the Attorney General, the heads of the various divisions of the Department of Justice, and the U.S. attorneys. As you know, of course, a great deal of investigation is conducted in the field in aid of matters being handled directly by U.S. attorneys, with very little immediate involvement, if any, by the Department in Washington. The FBI is the investigative arm of the whole Department, including U.S. attorneys. So unless there is close cooperation and mutual confidence, this simply cannot work effectively.

Senator MATHIAS. Well, if the relationship existed as you describe it, I am not sure that the hypothetical case that I outlined would occur. But if there were a situation in which the Director of the FBI perceived a problem, a serious problem, and he reported it to the Attorney General, who did not agree with him either as to the facts or as to the magnitude of the problem, but the Director was so convinced that he was right that he thought the President should be apprised of it, would you feel that the Director should have an opportunity to communicate his concern to the President?

Secretary RICHARDSON. In the ordinary course, certainly. I think that any individual who is a Presidential appointee, and of course, Directors by law after J. Edgar Hoover will now be Presidential appointees, should have the opportunity to report to the head of the executive branch, in this case, the man who appointed him. Now, as a matter of practice, in an executive department where things are working as they should, the head of the FBI would presumably inform the Attorney General in the first instance that he proposed to see the President. An Attorney General in those circumstances who tried to deter him from doing so, I think, would create an internal crisis in the Department which presumably would have to come to some form of showdown between them.

Senator MATHIAS. I would agree with you. It seems to me that if that situation should develop, the Attorney General, however strongly he might disagree, would want the Director to take his views to the President and then he might offer a conflicting opinion which he might have of his own.

Secretary RICHARDSON. I agree. The situation is somewhat analogous to the relationship between the Secretary of Defense and the chief of one of the uniformed services, except that in that instance, it is clear by statute that the head of one of the uniformed services has the right to go directly to the President. If things are working as they should, he would inform the service Secretary and the Secretary of Defense. But in any event, it is clearly desirable that the Chief of Staff of the Army or Air Force or the Chief of Naval Operations or the Chairman of the Joint Chiefs should have the opportunity to deal directly with the Commander in Chief. I think that essentially is the understanding you should also apply to the Director of the FBI.

Senator MATHIAS. I agree with you and I am questioning whether or not the same sort of statutory guarantee should not exist in this case, not only for this particular kind of circumstance, but whether there oughtn't to be a firm statutory basis for the FBI and several other areas. Let me suggest two of them.

One is the question of domestic surveillance. There is some dispute as to the authority of the FBI to conduct domestic surveillance.

Secretary RICHARDSON. You are speaking of electronic surveillance?

Senator MATHIAS. Yes. There is very clear authority for the FBI to undertake surveillance in the case of espionage and crime and violent unrest, attempts to overthrow the Government by violence. There is, however, no clear statutory authority for domestic surveillance; that is, political activities which may be suspect but which are not overt attempts to overthrow the Government by violence. According to some constitutional and legal authorities, the FBI's activities in the area of such domestic surveillance is based solely upon Executive orders

that were issued during the state of emergency which was declared by President Roosevelt in 1939.

Now, this takes some historical research and I am not asking you to give us any opinion off the cuff, but I would like to call your attention to this situation and to suggest that you consider what legislation might be necessary if in fact, these domestic activities of the FBI are based solely on an Executive order of 1939 based upon the state of emergency which existed prior to World War II.

Secretary RICHARDSON. Had you finished?

Senator MATHIAS. Yes. If you have any comment on that——

Secretary RICHARDSON. Only that I think that the point is clearly an important one. You are correct in your surmise that I do not know enough about it to have an immediate opinion to offer. It certainly is an area that deserves consideration.

I am aware, of course, of the work you have been doing yourself with respect to emergency powers and the question of what powers have been exercised pursuant to the declaration of the state of emergency that ought to be continued as part of the normal basis under which Government business is conducted on and after the end of the emergency has been promulgated. This, of course, is a question that arises under that heading.

Senator MATHIAS. Assuming these facts are correct as I have stated them, would not you think it would be desirable to regularize this situation so that there are progressive standards, statutory standards, which assist the FBI by advising them where they are and where they can go, which I think can help the Congress to do its job of overseeing the activities of the FBI, because there is a known standard to which it is expected to adhere.

Secretary RICHARDSON. The answer to that, I think, is clearly "Yes."

I remember very well, just to interject one personal experience, the one time I ever visited J. Edgar Hoover in his office. I was U.S. attorney for Massachusetts at the time and it was essentially a courtesy call, but he made two points that I remember very vividly. The first was that it was essential to keep the FBI out of the business of evaluating information developed by its investigations and from drawing legal conclusions from this information; that to undertake to do that could distort the investigative process.

The second point he made was that the FBI should never become a national police force. And he pointed to a list of statutes he had on his desk, each of which specifically conferred investigative authority on the FBI with respect to a particular crime under the U.S. Penal Code. And he thought that was the way it should be. He thought perhaps the list, if anything, was too long but that in any event, jurisdiction of the FBI should be conferred on an ad hoc, case-by-case basis in order to insure that it did not become an investigative agency with, in fact, a roving commission.

That, of course, is consistent with your point.

Senator MATHIAS. That is exactly the point I am making. I think there ought to be very precise statutory authority.

Secretary RICHARDSON. I think the people would be somewhat surprised to know how concerned J. Edgar Hoover was lest a national investigative agency acquire or have thrust upon it excessive power.

Senator MATHIAS. Mr. Chairman, do you want to proceed for a few more minutes or shall we wait until the 5-minute warning?

Senator HART [presiding]. I did not realize there was a vote. Let us suspend and vote and we will return.

[Recess.]

The CHAIRMAN. Let's have order.

Senator MATHIAS. Mr. Secretary, in pursuing further the question of a better statutory basis for the FBI, let me turn your attention to the criminal intelligence data bank. This is, as you know, a computerized body of information into which there can be inputs and from which there can be readouts of various stations around the country by the various Federal, local, and State police authorities and which has a very large number of profiles of individuals. I have been concerned for a long time that there is no philosophical guideline as to who holds the key to the data bank, who can use the key and withdraw information from it. I have felt that the Congress, very frankly, was delinquent in its duty to oversee this important function which can affect the right of privacy of every citizen in the country. And there are, of course, cases where employment agencies, credit bureaus, and other nonofficial private institutions have gotten information of this sort. I wonder what steps you would take as Attorney General to safeguard the right of the public?

Secretary RICHARDSON. First, Senator Mathias, I need to know more about what the present ground rules are and whether even what ground rules do exist are being stretched or used. This is a subject that I have had a considerable amount of interest in, because as attorney general of Massachusetts, I worked then with the law enforcement agencies of the State and registry of motor vehicles in setting up a computerized data bank of this kind and we ran right off into problems of the access to the information and potential abuses of access.

Since then, as Secretary of HEW, I established a committee of prominent people from all over the country to explore the problems of automatic data processing of information about people. This was triggered by concerns about the potential abuses of social security numbers, but we decided to broaden the scope of the committee to include all of the questions of access to personal information stored in data banks.

There is, of course, an opportunity for safeguarding such information that does not exist with respect to ordinary typed or handwritten files, because no one who looks at a tape can get any information from it. This means in turn that it is possible to provide keys, coded keys to the tape that can be made available only to those who have a genuine need or justification to know. I think it is by that route that it should be possible to safeguard information in the criminal intelligence files from unauthorized access.

There is on the other hand, I think, a real public interest in the utilization of automatic data processing systems for law enforcement, because not only of their comprehensiveness but the speed with which access to information can be obtained and because they offer the means of correlating information that can be much more effective than correlating information in ordinary files.

Senator MATHIAS. I recently visited the Maryland State Police and saw one of their units which connects them into the system. They were describing its usefulness and its value in police work.

Secretary RICHARDSON. There is one respect, of course, in which the rights of individuals can be enhanced through real time access to information; for example, if a motorist is stopped or if someone has been observed running down a back alley under what is to police officers suspicious circumstances. If you have a fully automated real time system, it is possible for the police officer in a minimm amount of time to find out whether such an individual may be wanted.

Senator MATHIAS. Then I would assume that you would be willing to appoint a similar citizens' committee to examine the Federal system and its links with State and local systems to insure that there were guarantees of that sort?

Secretary RICHARDSON. Yes, I would.

Senator MATHIAS. All right, just finally, to make assurance doubly sure, I am going back for a minute to the question of the special prosecutor. As I review the record, you seem to have said that having once delegated the powers that are described in the Stevenson formula to the prosecutor, you will not intervene except in one of three instances: where the prosecutor was—I think you used the word egregiously—wrong, where he was arbitrary, or where he was acting capriciously. Is that still your view?

Secretary RICHARDSON. Yes, it is.

Senator MATHIAS. And you would not intervene under other circumstances?

Secretary RICHARDSON. That is correct.

Senator MATHIAS. Thank you very much, Mr. Secretary.

Senator HART. Mr. Chairman?

The CHAIRMAN. Senator Hart?

Senator HART. What is arbitrary? Who decides? You are reserving the right to make that decision?

Secretary RICHARDSON. Yes.

Senator HART. Is that creation of a free agent to investigate the White House?

Secretary RICHARDSON. I am sorry, I did not get the last part of that question.

Senator HART. Well, the last part was sort of oratorical.

If you reserve the right to determine what is or is not arbitrary on the part of the special prosecutor, you are removing from him his freedom—you would say freedom to be arbitrary. I would say his freedom to do what he thought the facts required of him.

Secretary RICHARDSON. Well, we would be going, I think, back over a good deal of ground. If it is a question of judgment, falling anywhere within the range between arbitrary and capricious conduct at one end or sheer irrationality at the other, the mere fact that I disagreed with him would not, it seems to me, justify intervention. So, as you pointed out yesterday, what we are really talking about is a kind of situation in which intervention would only occur as a practical matter where the role or the relationship had been so severely strained as to result either in his resignation or his dismissal.

As I said earlier, this is an exceedingly remote circumstance, because by definition, the man will be, in the first instance, as has been established by my own inquiries and by this committee's inquiries, a man of high integrity, strength of character, professional experience, and judgment, and that any such individual would behave arbitrarily or capriciously is so unlikely as, I think, that the possibility would be virtually disregarded.

We are only having to go into this, after all, because it bears on the question of what do I mean by ultimate responsibility. It is for that reason solely that we need to explore the matter. But as I have repeatedly emphasized, the special prosecutor would be within the range of his delegative authority free to exercise independent judgment.

Senator MATHIAS. Let me suggest to the Senator from Michigan that there may be a way in which we could resolve this, and I think it is a very useful question you raise. "Arbitrary" is a word of art which has been defined by the courts a number of times; actions of officials have been held to be invalid because they were arbitrary. Now, is that the kind of definition of "arbitrary" we are talking about?

Secretary RICHARDSON. That is, Senator Mathias. I used the words "arbitrary" and "capricious" because they are words of art. They apply in situations, for example, where an extraordinary writ will lie and where a court will intervene to compel or to restrain action otherwise normally vested in a public official. And, of course, it is called an extraordinary writ because it is designed for extreme circumstances.

Senator HART. Well, normally, the suggestions from the Senator from Maryland are very helpful, but perhaps not in this case. I will try to explain why.

Sure, "arbitrary" is defined by the courts on a case-by-case, argument-by-argument, disagreement-by-disagreement basis. It is sort of sui generis. And what I want to find out is, if the man that is proposed to investigate Watergate and its ramifications is going to be able to operate freely up to the point that either the President or his Attorney General feels they want to can him, or whether they are going to argue about who is arbitrary and reserve to either the President or the Attorney General the right to override him.

Senator MATHIAS. We are right back, really, at the point that the Secretary described the one divergence with the Stevenson formula, which was the difference between complete authority and final authority.

Senator HART. Would the Senator from Maryland agree that there could be no more significant agreement than the one we are now developing?

Senator MATHIAS. And it is the one that the Secretary has, I think, himself signaled to us as the key to the whole business.

Senator HART. All right. And as I get the Secretary, in part, let me say, he has this concern because of the restrictions he reads in the law, that the statute, unless changed—well, it says that you will be the final—the conduct of litigation is reserved to the Department of Justice under the direction of the Attorney General. And in reply to Senator Mathias' question, as you have on other occasions, you have explained that you feel this bars you from creating a special assistant with full power, final power.

Now, I sense this may be regarded by many as repetitious, and perhaps we can resolve it when we are presented the specific proposal that you offer to the person who will be designated the special assistant. I suppose that our exchanges may have been helpful, as you have indicated, in sharpening up, making more precise that written agreement. But we will continue, I suppose, to have to dance around this thing until we see it in writing. I would want to see it in writing before I assumed the responsibility of confirming.

I would think that anyone you go to with the offer of the job would want to, if not see it in writing, have a very clear understanding of what authority to have.

Well, to test whether the law in fact prevents you creating a special assistant with full and final authority, let me go through it this way: That statute that I just read from, excerpted from, has been on the books for a considerable period of time.

Senator HRUSKA. What is its citation?

Senator HART. It is 516 of title 28. Reference also should be made to 515 and 510.

But it was clear that one of your predecessors, John Mitchell, delegated full and final responsibility in the ITT antitrust case to Mr. Kleindienst. Now, he did that because of a conflict. I want to emphasize that I am not now talking about whether you should regard yourself as having a personal conflict because of associations with persons in the administration or not. I am simply citing that instance of an Attorney General who stepped aside completely, and over the years, that has occurred—I would guess, over a 10-year period it probably occurs a dozen times. That is a wild guess and I am subject to be corrected if anybody can find the records. But there have been instances, and let us examine the particular Mitchell-Kleindienst-ITT one, probe this duty of the Attorney General to retain final control.

Mr. Secretary, is it your understanding that even though John Mitchell had taken himself out of the ITT antitrust litigation, that he did or was required to retain the power to override decisions made by Kleindienst if he thought them arbitrary, beyond the pale, stupid? Or was the only thing he could do about it removing Mr. Kleindienst?

Secretary RICHARDSON. I think that where you have a basis for disqualification, whatever it is, the necessary practical consequence is to give final authority to the next person in the chain of command, subject, of course, to the President of the United States. In the case of Attorney General Mitchell and the ITT, the second man in line was the Deputy, Mr. Kleindienst, and in normal situations where the Secretary or rather, the Attorney General, disqualified himself, it would be the Deputy who, under departmental regulations, at least, becomes acting for that purpose. And if there were a basis for disqualification or if I were in effect to disqualify myself in this matter, then presumably, under existing regulations, the Deputy would be acting. If he disqualified himself, and I do not know any reason why he should, then presumably the special prosecutor would be responsible only to the President. I know of no way constitutionally whereby any individual who has been vested with prosecutorial responsibility can be removed from responsibility to a superior within the executive branch. There is at least one Supreme Court decision which holds the functions

of investigation and prosecution to be executive branch functions. Paul Bator in a piece in the New York Times today, raises the same point. I think these are facts also which need to be considered.

Senator HART. Well, Professor Bator, all he was reminding us today was that we cannot create a prosecutor outside the Executive. But I return to the Mitchell-Kleindienst-ITT thing and ask if that does not represent an example in support of the proposition that one is not required to retain final decision in a matter before the Justice Department as a matter of law.

Secretary RICHARDSON. One could renounce it, and where he is disqualified, there really is no alternative. But this brings us, really, back to the beginning of our colloquy on the first day. I really have to examine the question of whether I should be disqualified, and I have given the answer, essentially, that the law requires the Attorney General, as I understand it, unless he is disqualified, at least to exercise some form of ultimate responsibility. In any event, if I felt that I should be wholly barred from any communication in this matter or any ultimate responsibility at all, even in this statutory sense, then I should neither have been proposed for this nomination nor should I be confirmed.

Senator HART. Well, that does bring us back to our very first few minutes of exchange.

Make an assumption that the people of this country are not sure what went on, that some of them indicate they believe that the President himself was either careless or callous following upon the break-in of Watergate. Inescapably, the Attorney General of that President would not be regarded by a person with those reservations and concerns as one on whom they could count to develop an answer to their problem and their concern. That the President's Attorney General is part of the institution of the Executive. I do not know whether there has ever been a disqualification that could be described as an institutional one, but I think there should be, because the appearance makes unlikely the acceptance by that very large segment of the public that I have described of a finding that the President was neither callous nor careless. I believe that if the facts led to the involvement of the President, Elliot Richardson, whether he had a special prosecutor or not, would name the President. The real problem is if the facts do not involve the President, who will believe Elliot Richardson when he says they do not? What we are after, and I think there is no more serious duty on this Senate, is to attempt to create the appearance that will provide acceptance by the people of this country of this kind of conclusion.

Now, I ask you again if there is anything under the law that would prevent you describing this problem, establishing a special prosecutor who will have full and final authority to seek the answer to the problem I have named without any veto power by you, without any influence by you, without any suggestion or direction? And if he goes off the deep end, fire him.

Secretary RICHARDSON. Well, I have already said, Senator, that the measure of the ultimate responsibility I am talking about is the responsibility in the first instance for selecting him and commending him to this committee and the Senate, and for taking action should he in effect go off the deep end. The kinds of action that I have characterized as arbitrary or capricious or irrational or egregiously wrong are all

actions which are symptomatic of going off the deep end and it would only be in that event that any action on my part would be called for, except to the extent that the man chooses to consult me and to the extent that I would feel some obligation to keep informed. If it is a question of total insulation, then it would seem to me that there has been no purpose served by the effort to bring to bear what I have referred to as in effect a three-layered insurance policy—a four-layered one if you add the Ervin committee—the elements of which are myself, the full authority conferred on the special prosecutor, and the character of that individual himself. I think that is in a way a greater measure of assurance of integrity and fairness in the ultimate result than might be reached in some other way.

In any event, it is important to consider the alternatives. I do not see how, practically, a totally independent authority can be created. We have discussed that before. If it were and if it is, as I believe it would be, part of the executive branch, it would in any event be responsible to the President, in whom ultimate Executive authority is vested.

So, then, the question is, How is the public to have confidence? I have already referred to what it seems to me is a combination of safeguards sufficient to provide that confidence. Beyond that, when it comes to a question of whether or not a negative can be proved—that is, that an accused is not guilty—it is one thing to have a standard of proof that has to be overcome in order for a guilt to be established. Many people, however, of course, confuse a not guilty verdict with a declaration of innocence. It is not.

Now, if what is needed here is a declaration of innocence, no special prosecutor can provide that. There has to be then invoked some other mechanism. The Ervin committee could be such a mechanism. I heard yesterday the possibility that it might be desirable at some subsequent stage when the special prosecutor has substantially completed or fully completed his job, that some panel be created that could review the whole record of what he did, and I think that that might be desirable no matter how his function is constituted or to whom he reports.

Any man given that job is going to face the difficult decision whether, in a given instance, a particular person suspected or alleged to be involved in wrongdoing should not be indicted or whether, indictment having been brought, the case ought later to be dismissed because the evidence anticipated did not add up or because more effective rebuttal witnesses were produced than anticipated. It is much easier for a prosecutor to seek and get indictments and to barge ahead without regard to the reputations and rights of individuals than it is for him to decline prosecution or to stop further progress of a criminal proceeding. Even a special prosecutor, even one operating under an independent agency, who had to take that decision in a given case, might in time come to be regarded as in some way subject to suspicion. So if it is a negative that has to be proved in the end, then, as I say, it may require some eventual separate, new mechanism to approximate that result.

The CHAIRMAN. We are going to recess subject to the call of the Chair.

Senator HART. Could I ask that there be printed in the record Professor Bator's article?

The CHAIRMAN. We will put that in the record.

[The above referred to article follows:]

A WATERGATE 'WARREN COMMISSION'

(By Paul M. Bator)

CAMBRIDGE, MASS.—Ambiguities and confusions abound in the discussions of an independent prosecutor in the Watergate case.

There is, first, the question of what it is that we want. Is it simply an impartial and independent investigation and airing of the facts? If so, what we need is not a special prosecutor appointed by the Attorney General but a person or group appointed to function as a commission of inquiry as, for instance, the Warren Commission. Such a person or group can be made completely independent of the executive branch and given subpoena and other necessary powers.

But this it not what is primarily talked about. What is sought is, a prosecutor whose purpose in making an investigation would be to determine whether criminal charges should be brought and, in the event, to press them.

But if this is what is in mind, then the extent to which we can or should demand independence may be limited. It is highly doubtful that the function of bringing criminal prosecutions on behalf of the United States can be taken away from the executive branch of the Government. The Constitution vests executive power in the President and commands him to take "care that the laws be faithfully executed." The enforcement of Federal criminal law is a central part of the function of executing the laws. For the Congress or anyone else to purport to create an agency wholly independent from the executive branch with power to enforce the criminal law would probably be unconstitutional. It may also be unwise.

The Watergate prosecutor should be independent but he must also be accountable. There should be someone to pass on his performance with power (to put it brutally) to fire him. Until impeached, the President (or his officers) must retain that authority.

Elliot Richardson, nominated to be Attorney General, is therefore on sound ground when he insists that the independent prosecutor must ultimately be accountable to and subject to the authority of the Attorney General and the President.

But this does not mean that the prosecutor cannot be given wide de facto independence. Mr. Richardson should draft instructions which make it clear that the prosecutor may proceed to subpoena (and procure immunity for) witnesses and to seek indictments without advance clearance from him. Indeed, it would be quite legitimate and desirable to instruct the prosecutor to engage in no advance consultations with Mr. Richardson. But this is not the equivalent of total independence. The prosecutor should be required to report from time to time to the Attorney General, who must retain the power to appraise his performance and to fire him if necessary.

I appreciate that even this creates an uncomfortable dilemma. Many do not trust the President in this matter: how can they trust the prosecutor if he is in any way accountable to the President? My answer is that to some extent the dilemma is unsolvable: under our Constitution, lack of confidence in the Presidency does not justify creating an extraconstitutional independent prosecuting authority. Notice, however, that the solvent of public opinion alleviates the dilemma: the best guarantee of the prosecutor's independence will be his ability to say to the public that the President (or Mr. Richardson) is interfering with the impartial execution of his functions.

And one aspect—perhaps the most significant aspect—of the dilemma is, I believe, solvable. The executive branch is not the proper authority to pass on the question whether the President should be impeached. It would be proper, I believe, to insulate from the executive's authority evidence discovered by the prosecutor bearing on Presidential misconduct. Mr. Richardson should instruct the prosecutor to transmit any such evidence directly to the House of Representatives, which should authorize its Judiciary Committee (or create a select committee) to receive and consider it.

The CHAIRMAN. We are recessed to the call of the Chair now. It won't be tomorrow.

[Whereupon at 4:15 p.m., the committee recessed subject to the call of the Chair.]