

Special Prosecutor Legislation, 1977

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THE WHITE HOUSE
WASHINGTON
September 15, 1977

FILE

MEMORANDUM FOR: THE PRESIDENT
FROM: BOB LIPSHUTZ
STU EIZENSTAT
SUBJECT: Special Prosecutor Legislation

Attached is a letter from Senator Ribicoff, seeking confirmation of your support for special prosecutor legislation, and a proposed response to the letter. This memorandum provides background regarding the Ribicoff letter, and seeks your guidance on the question of what course the Administration should pursue in the House on the special prosecutor issue. This question has become especially sensitive because it relates both to the KCIA and Lance investigations.

1. The Ribicoff Letter

As you know, just prior to Senate passage of S. 555, the Public Officials Integrity Act, an amendment was inserted in the special prosecutor title of the bill which would in effect mandate appointment of a special prosecutor for the Korean matter. Senator Ribicoff, chief sponsor of the bill, has indicated that he will accede to removal of that provision in conference, if a special prosecutor bill without the provision passes the House. In his letter he seeks your assurance that you will press for House passage of such a bill as part of the overall ethics package (comparable to S. 555) which Administration forces are helping to produce. His concern is that the Administration and the House leadership will let the special prosecutor bill now before a House Judiciary Subcommittee rest for this session, while enacting the rest of the ethics package, to avoid battles over anticipated Republican efforts to add a KCIA amendment similar to the provision in the Senate bill.

As you will note, the proposed response to Senator Ribicoff states in general terms that the Administration will continue to work for passage of an acceptable special prosecutor title. The Attorney General has read and approves this response.

2. Special Prosecutor Title of S. 555

Before signing the proposed response to Senator Ribicoff, and before deciding on our course in the House, you should be aware of the substance of the special prosecutor legislation. The Senate bill establishes a procedure for judicial appointment of special prosecutors to investigate and prosecute alleged criminal offenses by the President, the Vice President, members of the Cabinet, Level IV officials of the Executive Office of the President, and certain other high Executive Branch and campaign officials. Under this procedure if the Attorney General receives "specific information" that any of the above individuals "may have violated any Federal criminal law," he is to conduct an investigation of up to 120 days. If he then determines that the matter is so unsubstantiated that no further investigation or prosecution is warranted, he may terminate the matter. If he cannot make such a finding, then he is to apply to a special judicial panel (five federal judges named by the Chief Justice) for the appointment by the panel of a special prosecutor to take over the case. (A decision by the Attorney General that the allegations do not warrant further action can be reviewed or reversed by the judicial panel only if the political or personal interests of the President, the Attorney General, or the President's party would be affected by the outcome of the case.)

It is important to note that the procedure prescribed by the bill must be initiated and completed regarding allegations not only against incumbent office-holders, but for "[a]ny individual who held [the specified offices] during the term of the President in office on the date the Attorney General receives [the allegations]." Further, the bill applies to any alleged violations of any federal criminal law (other than those concerning petty offenses)--regardless of whether such offenses were related to the official's public role or occurred during his incumbency. Hence, the bill, if enacted in its Senate-passed form, will require that the prescribed procedure be followed in Bert Lance's case, even if no charges are forwarded concerning Bert's conduct since January 1977, and even if Bert were to resign prior to its enactment. (The special prosecutor bill before the House is similar except that it applies to a more restricted set of offenses--at least some of which cover allegations at issue in the Lance case.)

The theory behind this broad coverage is that the purpose of appointing a special prosecutor is to ensure an impartial investigation and prosecution, for the benefit of both the

public and the defendant (and because the factors which may make the Attorney General appear not to be impartial will be present whenever a high Presidential appointee is targeted, whatever the allegations against him).

Once the judicial panel appoints the special prosecutor and defines its jurisdiction, the special prosecutor is given complete charge of the case and all Justice Department activities in regard to the matter are suspended. The case then proceeds under the special prosecutor's exclusive direction until he determines not to prosecute, or if he secures an indictment, until the judicial process runs its normal course. If the special prosecutor determines not to prosecute, he must file a detailed report with the judicial panel, and he may submit reports to Congress at such times and containing only such information as he deems appropriate.

After submission of a report to the judicial panel upon the completion of his investigation, the special prosecutor's term of office terminates. It may be terminated by the Attorney General only under extraordinary circumstances.

3. Status of the Legislation

In response to the Administration's request and the Speaker's direction, House Committees are giving expedited consideration to the various portions of the ethics-in-government package contained in your May 3 message to Congress and in S. 555. (These are, in addition to the special prosecutor title, provisions requiring (1) financial disclosure by high government officials, (2) creation of an Office of Government Ethics in the Civil Service Commission, and (3) strengthened criminal prohibitions against abuses of the revolving door practice.) However, the special prosecutor portion, which in the House takes the form of a separate bill, has not been marked up either in Subcommittee or the full Judiciary Committee.

A separate Judiciary Subcommittee is currently marking up other parts of the ethics package. The Speaker has instructed all the Committees concerned with the matter to complete action by September 22. It is our understanding that the Subcommittee having jurisdiction over the special prosecutor bill will mark it up and report it, only if instructed to do so by the Speaker and by Chairman Rodino.

4. Our Position in the House

The question which you must decide is whether to authorize a representative to ask the Speaker and Chairman Rodino to

have the special prosecutor bill marked up and reported to the Rules Committee along with the rest of the ethics package.

Our staffs have spoken briefly with a member of the Speaker's staff, who reports that he believes that the Speaker is likely to prefer not to mark up the special prosecutor bill--out of fear that a fight will immediately be generated, both in Committee and eventually on the House floor, over proposals to insert a KCIA provision similar to that now in S. 555. The Speaker's staff believes that attempts to add a KCIA rider can be defeated--the evident vigor of the Justice Department's prosecution is a strong argument in our favor--but the battle would produce unfavorable publicity.

Despite this estimate of the Speaker's reluctance--which we believe to be accurate--we believe that we have no choice but to seek consideration and enactment of the special prosecutor bill and thus respond positively to Senator Ribicoff's letter to you. This recommendation is based on the following considerations:

- If it becomes publicly understood that we are in effect letting the special prosecutor proposal die, while pressing hard for enactment of the rest of the ethics bill, this will be perceived as an about-face on your strong public commitment to the special prosecutor principle and may be incorrectly perceived as an effort to avoid appointment of a special prosecutor to handle the allegations concerning Bert Lance.
- Senators Ribicoff and Percy, among others, are intimately familiar with the state of these matters in the House, and very likely to go public with criticism of our inaction on the special prosecutor issue. (Senator Ribicoff's staff has reported to us that he intends to speak with the Speaker and Chairman Rodino to urge them to report out a special prosecutor bill immediately, but we believe he has not yet done so.)
- Especially if a public controversy arises over the failure of the Judiciary Committee to complete action on the special prosecutor bill, a special prosecutor amendment to the ethics bill--or an independent bill--is likely to be introduced on the floor, which may be less sound than the current bill.

-- Finally, we strongly believe that establishment of a special prosecutor procedure is far more likely to be fair to potential targets of his jurisdiction. This is so because a special prosecutor will have the stature to resist efforts by Congress to divulge information about ongoing cases (witness leaks from the current KCIA investigation to Congress and thereafter to the Press), and because, a special prosecutor will have unique public credibility to drop a case which is without merit--without risking charges against himself and his superiors, including the President, that the decision was biased.

The proposed response to Senator Ribicoff reemphasizes your commitment to special prosecutor legislation in general but opposes appointment of one for the KCIA case.

ABRAHAM RIBICOFF, CONN., CHAIRMAN

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United States Senate

COMMITTEE ON
GOVERNMENTAL AFFAIRS
WASHINGTON, D.C. 20510

RICHARD A. WEGMAN
CHIEF COUNSEL AND STAFF DIRECTOR

Lipshutz
-2 AUG 1977

August 1, 1977

The President
The White House
Washington, D. C.

Dear Mr. President:

As you know, I was very pleased that the ethics proposals which I have sponsored for years and your proposals in this area were molded together in S. 555, the Public Officials Integrity Act, and passed by the Senate. The handling of this legislation in the Senate was a model of how the Congress and the Administration can work together to enact effective legislation.

The one provision in this comprehensive legislation which I understand the Administration is not pleased with is the amendment added on the Senate floor with respect to a special prosecutor to handle the Korean investigation. As you know, when this amendment was proposed on the Senate floor, we were informed by the White House Congressional liaison staff that the Administration had no position on that amendment. Therefore, the managers of the bill, Senator Percy and I, decided to accept the amendment rather than to precipitate a floor fight on that question.

In recent days, there have been indications that the Administration may be wavering in its commitment to support this legislation and is willing to postpone action on the special prosecutor title until prosecutions in the Korean investigation are completed. This position, I am informed, could effectively block progress on this legislation in the House.

I believe that such a policy would be unwise.

The President

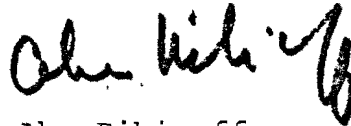
August 1, 1977

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Mr. President, we are no happier than you about the Korean matter. However, in the Senate we made numerous changes in this legislation at the request of your Administration in order to obtain the vigorous Administration support which we did receive. The Korean special prosecutor amendment was only accepted after we received assurances that the Administration did not oppose it.

I hope that this matter does not result in Administration action which will effectively prevent the House from completing action on the Public Officials Integrity Act this year.

Sincerely,

A handwritten signature in dark ink, appearing to read "Abe Ribicoff", with a stylized flourish at the end.

Abe Ribicoff

THE WHITE HOUSE

WASHINGTON

To Senator Abe Ribicoff

Thank you for your recent letter concerning the Public Officials Integrity Act, S. 555. I share your appreciation for the cooperation between the Government Affairs Committee and the Administration which led to Senate passage of this important legislation on June 27. Administration representatives are now working with the various concerned committees in the House to achieve House passage of similar comprehensive ethics-in-government legislation in the current session.

My commitment remains strong to enactment of legislation along the lines of the special prosecutor provisions of Title I of S. 555. As you know, that commitment was first stated during last year's campaign, and it has since been reaffirmed by my May 3 message to the Congress on ethics in government, when I announced my "support for legislation to authorize appointment of a temporary Special Prosecutor to handle cases of misconduct by high-ranking Executive Branch officials."

At the same time, I believe, as I have stated previously, that appointment of a special prosecutor for the Korean matter would impede the very vigorous and thorough pursuit of that case being conducted by the Department of Justice. Accordingly, as you note, the Administration strongly opposes the provision of S. 555 relating to appointment of a special prosecutor for the Korean case. I regret the misunderstanding that led to acquiescence in this provision.

There is one other feature of Title I which I would like to mention. The Administration continues to oppose the provisions of that title which would create a statutory Office of Government Crimes with a Presidentially appointed director within the Department of Justice.

I expect and hope that sound ethics legislation can be adopted, covering each of the areas set forth in my May 3 message to the Congress, and meeting the criteria I have stated. We will continue to work toward that end with you and your staff, as well as with the House, through the remaining weeks of the session.

Sincerely,

Honorable Abraham Ribicoff
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D. C. 20510