

**TESTIMONY BY COMMON CAUSE/PENNSYLVANIA  
SUPPORTING PASSAGE OF AN  
INDEPENDENT COUNSEL AUTHORIZATION ACT**

**May 5, 1994  
Harrisburg, Pennsylvania**

Common Cause/Pennsylvania appreciates this opportunity to present its views to the House Judiciary Committee on the need to enact an Independent Counsel statute.

Representing approximately 14,000 Pennsylvanians, Common Cause/PA is a public interest advocacy organization whose members are committed to improving the openness, accountability and responsiveness of our government institutions.

As you may know, Common Cause/National Chairman Emeritus, Archibald Cox, was the first independent counsel in the Watergate affair. This quite naturally has led our organization to have an elevated interest in securing an effective, credible, and fair independent counsel statute at the federal level. In his testimony before the U.S. Senate, Mr. Cox clearly identified the need for, and value of, the independent counsel mechanism:

**"The pressures, the tensions of divided loyalty are too much for any man, and as honorable and conscientious as any individual might be, the public could never feel entirely easy about the vigor and thoroughness with which the investigation was pursued. Some outside person is absolutely essential."**



The threshold issue in the debate over an Independent Counsel statute, in the matter at hand, is the question of whether the Office of Attorney General can credibly investigate itself. The answer to that question is found in the final report of the Watergate Special Prosecution Force which stated: "No one who has watched 'Watergate' unfold can doubt that the Justice Department has difficulty investigating and prosecuting high officials, or that an independent prosecutor is freer to act according to politically neutral principals of fairness and justice." The Senate Watergate Committee also noted that prior to the appointment of a special prosecutor, the Department of Justice had been passing information about the investigation directly to those under investigation.

We believe the Independent Counsel provisions of the Ethics in Government Act have worked well over their 15 year history, and apparently Congress concurs. It has been utilized judiciously, being invoked only 12 times in 14 years. We are delighted to report that prospects for reauthorization of the federal provisions appear to be excellent, having passed the Senate 76 to 21 last year, and the House 356 to 56 this year. Passage of a conference report is anticipated in the near future.

The proposal now before this committee recognizes that Pennsylvania, with an independently elected Attorney General, can have an effective Independent Counsel with a much narrower scope of jurisdiction. Because the U.S. Attorney General is a presidential appointee, the federal Independent Counsel must have much broader jurisdictional boundaries covering the entire executive branch of government. However, with an elected Attorney General, that office is sufficiently independent, in theory, to

credibly investigate allegations of wrong-doing in the executive branch. Under such circumstances, the Independent Counsel can be restricted to investigations and prosecutions that cover the Office of Attorney General.

Even if officials from the Office of Attorney General involved in an investigation strived to proceed with an investigation without regard to their relations with an individual under investigation, the appearance of a potential conflict is bound to undermine the credibility of the investigation. By assuring the public that an impartial investigation will occur, the mechanism also helps to ensure that the public will accept as fair and credible any decision not to proceed against a high-ranking public official.

Some adversaries of the Independent Counsel concept may contend that if there is a potential conflict of interest for the Office of the Attorney General, an investigation or prosecution could be turned over to a District Attorney or the U.S. Attorney. These arguments are seriously flawed. If the alleged activity goes beyond one county, a district attorney would lack jurisdiction. It is our understanding that activities such as burglary rings, which are often multi-county in nature, are the types activities which routinely are referred to the Attorney General because of their multiple jurisdiction problems. Furthermore, the demands of an investigation of the Attorney General's office could exceed the resources available to a District Attorney. Likewise, the office of U.S. Attorney may lack statutory jurisdiction, or may be too overburdened to pursue allegations of wrong-doing within the Office of Attorney General. In either of these scenarios, political loyalties of a District Attorney or U.S. Attorney could affect their decision to pursue a case.

We commend the drafters of HB-2741 for recognizing the public has a need to be ensured that the state's top law enforcement agency is characterized by its integrity, and that under certain extraordinary circumstances an independent counsel is the only reasonable alternative for protecting the public interest. The thoroughness of the proposal brings a variety of strengths. These include alternative triggering mechanisms designed to prevent political efforts from derailing investigations, coverage of personnel who leave the employment of the current Attorney General, and coverage of associated political campaign personnel. The proposal also provides reasonable confidentiality to protect employees of the Office of Attorney General from political witch hunts, and provides broad-based operational and fiscal accountability through the Special Independent Prosecutor's Panel and legislative oversight. Other important provisions include procedures designed to prevent appointment of an Independent Counsel who would be likely to abuse his or her powers, prohibitions against the Independent Counsel and his or her staff from abusing their positions to generate future employment opportunities, and instructions for the maintenance of important records.

The bill also recognizes that there will be times when the Attorney General will want to request an Independent Counsel in order to promote the integrity of an investigation. Furthermore the bill recognizes that conflicts of interest affecting judgement, motivation, and performance can be wide-ranging, and can be "personal, financial, or political" in nature.

Based on the draft language of HB-2741, Common Cause would like to make some suggestions, in the spirit of delivering a quality Independent Counsel statute.

- 1.) In Section 301 (b) the Committee may want to add a provision to stagger the terms of members of the Special Independent Prosecutor's Panel. This would add strength and continuity to the panel.
  
- 2.) One weakness in the proposal is the failure to provide an adequate safety valve for a case where there may be collusion between a Governor and an Attorney General (especially in cases where they may be of the same political party). Section 302 (d)(2) provides the General Counsel almost exclusive power to initiate the process through preliminary screening and the appointment of the Special Investigative Counsel. The Special Investigative Counsel appointed by the General Counsel ultimately controls the initiation of an investigation through his or her power to recommend against the appointment of an Independent Council, a recommendation which may not be overruled by the three-judge Special Independent Prosecutor's Panel according to sections 304 (a) and 310 (c). Although this problem is mitigated somewhat by Section 309 (b), whereby members of the Judiciary Committee may request the General Counsel to appoint a Special Investigative Counsel, there is no mandate for General Counsel to comply with the lawmakers' request. Furthermore, in a case of collusion there is nothing to stop the General Counsel from appointing a political ally who understands the mission at hand is to indicate to the panel no Independent Counsel is necessary, with full knowledge that the panel can not overturn the recommendation.

3.) Section 504 (b) addresses the "Payment of and reports on expenditures of independent counsel". This subsection appears to be misplaced since Section 504 deals with "Assistance of Pennsylvania State Police." Section 504 (b) should be recast as a separate section to avoid any misunderstanding regarding budgetary allocations.

4.) Section 513 provides for the "Removal of independent counsel and termination of office." Subsection (b)(2) requires the Special Independent Prosecutor's Panel, on its own motion, to determine whether to terminate the operations of an independent counsel within two years of its appointment, or when expenditures have reached \$2,000,000.

This provision, which has been identified as a response to the duration and cost of the Iran-Contra investigation conducted by Independent Counsel Lawrence Walsh, may not be appropriate. As currently drafted, this provision could damage the independence of the Independent Counsel. It could provide entree for those at risk in an investigation to pressure the Panel for the premature termination of an investigation or prosecution.

The basic criticisms of the cost and duration of Iran-contra investigation are shown to be unfounded upon close examination. In fact, the Iran-contra scandal investigation provides us with a clear lesson about the necessity of the Independent Counsel law. While the Iran-contra investigation took longer than any other independent counsel investigation (over five years), other complex investigations undertaken by the Justice Department have taken similar periods of time. For example,

the Justice Department's "Ill-Wind" investigation of fraud in defense procurement has taken over five years and is still on-going. Yet those criticizing the Walsh investigation do not seem similarly concerned about the length of this investigation.

Most Independent Counsel investigations that have taken place have been completed in the same kind of time frame as other investigations of "white-collar" crimes under "regular" Department of Justice procedures. However, as the final Watergate Report noted about white collar crimes: "Because of the large numbers of people involved and the complexity of the cases, this process [investigating and prosecuting 'white-collar' crimes] is usually far more laborious and time-consuming than the investigation of most other types of crimes."

The provision for requiring time frames for the periodic review of the activities of the Independent Counsel is reasonable. However, it must be structured in such a manner as to guarantee that any review will not interfere with current investigations. Furthermore, it must be structured so that the review can not be used as a political tool for derailing sensitive investigations and prosecutions.

5.) Improved requirements for public disclosure of the activities of the Independent Counsel, especially in the area of general accounting, would enhance the credibility of this legislation. Common Cause recognizes the need for confidentiality during the investigative process. But at the close of an investigation, the results and general accounting should be made public.

## CONCLUSIONS

Enactment of an Independent Counsel statute can be an extremely valuable reform for promoting government accountability. It must be designed to prevent the inherent conflict that arises when the Office of Attorney General is required to investigate individuals which work in that office, or the integrity of investigations conducted by such individuals from being damaged by personal, financial, or political conflicts of interest. In pursuing the passage of an Independent Counsel statute, it is essential that the General Assembly demonstrate a commitment to the rule of law and the notion that even the most powerful officials in our state government are subject to the rule of law.

The Governing Board of Common Cause/PA, therefore, urges the Committee and the House to pass a credible and tough, yet fair Independent Counsel law modeled upon the federal act. House Bill 2741, introduced by representatives Piccola and Caltagirone, and cosponsored by more than two dozen other representatives, appears to offer a reasonable framework for this effort, and is designed to ensure that there is a credible system for holding Pennsylvania's highest-level law enforcement officials accountable for criminal wrong-doing.



HIGHLIGHTS OF HOUSE BILL 2741Two ways to commence investigation under the Independent Counsel Authorization Act:

(1) Attorney General may request the General Counsel to the Governor to appoint a Special Investigative Counsel to conduct a preliminary investigation when Attorney General determines that his own investigation and prosecution would result in a personal, financial, or political conflict of interest.

(2) General Counsel to Governor receives information that Attorney General or any Assistant Attorney General or member of his senior staff or chairman/treasurer of Attorney General's campaign committee has committed a felony or misdemeanor of the first degree.

If charges are leveled at Attorney General or his office:

- General Counsel has 30 days to determine whether information is reliable and specific. If General Counsel decides the information is not reliable and specific, he closes the matter. If the information is credible, General Counsel appoints a Special Investigative Counsel to conduct a preliminary investigation.

- The Special Investigative Counsel has 90 days to conduct a preliminary investigation to determine whether further investigation is warranted. If further investigation is not warranted, the Special Investigative Counsel can close the matter and an Independent Counsel will not be appointed.

- If Special Investigative Counsel determines that further investigation is warranted, Special Investigative Counsel applies to a three judge Special Independent Prosecutor's Panel for appointment of an Independent Counsel. The Panel has 30 days to make the appointment. The Panel determines whom would be an appropriate choice and the scope of the Independent Counsel's jurisdiction.

- Independent Counsel has all powers of the Attorney General, including the authority to: convene grand juries; grant immunity to witnesses; apply for warrants, subpoenas, and court orders; and frame indictments. The Independent Counsel has the power to dismiss any matter within his prosecutorial jurisdiction before prosecution.

If Attorney General requests appointment of Independent Counsel due to conflict of interest:

- The General Counsel appoints a Special Investigative Counsel to conduct a preliminary investigation. The Special Investigative Counsel has 90 days to determine whether further investigation is warranted.

- If the Special Investigative Counsel determines further investigation is warranted, the Special Investigative Counsel applies to the Panel for the appointment of an Independent Counsel. The Panel has 30 days to make the appointment.

Under both investigative scenarios, the Judiciary Committee of the Senate or House may request that the General Counsel appoint a Special Investigative Counsel to begin a preliminary investigation. The General Counsel must submit a report to the requesting Committee within 30 days as to whether the Special Investigative Counsel has begun or will begin an investigation.