

1 COMMONWEALTH OF PENNSYLVANIA  
2 HOUSE OF REPRESENTATIVES  
3 COMMITTEE ON JUDICIARY

4 In re: Independent Counsel Legislation

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6 Stenographic report of proceedings held  
7 in Room 140, Majority Caucus Room, Main  
8 Capitol Building, Harrisburg, Pennsylvania

9 Thursday,  
10 May 5, 1994  
10:00 a.m.

11 HON. THOMAS R. CALTAGIRONE, Chairman

12 MEMBERS OF COMMITTEE ON JUDICIARY

13 Hon. Michael Gruitza                      Hon. Jeffrey Piccola  
14 Hon. Frank LaGrotta                      Hon. Robert D. Reber  
15 Hon. Al Masland

16 APPEARANCES:

17 Sen. David W. Heckler  
18 Hon. Mark B. Cohen  
18 William Andring, Chief Counsel  
19 David Krantz, Executive Director  
19 Richard Scott, Committee Counsel  
20 Mary Woolley, Republican Chief Counsel  
20 Karen Dalton, Republican Counsel

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INDEX

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Page

Hon. David W. Heckler, Prime Sponsor, SB 1707	7
James Tierney, former Special Counsel, Office of Attorney General	33
Sandra Jordan, Dean for Academic Affairs, University of Pittsburgh School of Law, Associate Independent Counsel Iran/Contra 1988-1991, Assistant U.S. Attorney, Western District of PA 1979-1988	69
Joseph C. Kohn, Esq., former Democratic Candidate for Attorney General, 1992	83
William Nast, former Counsel, Joint State Government Commission	92
John Morganelli, District Attorney, Northampton County	121
Robert Sacavage, District Attorney, Northumberland County	122

1                   CHAIRMAN CALTAGIRONE: I'd like to open today's  
2 hearing on the independent counsel legislation. Chairman  
3 Tom Caltagirone, House Judiciary Committee. I'd like to  
4 make an opening statement and then recognize Chairman  
5 Piccola, and then start with the first testifant, Senator  
6 Heckler.

7                   I've been a member of the legislature for the  
8 past 18 years, 10 years on the Judiciary Committee, 6 years  
9 as its chairman. Today's hearing is concerning the issue of  
10 who would investigate discovered misdeeds by the Attorney  
11 General and/or his office. Presently, only local district  
12 attorneys can look into these matters within their  
13 jurisdiction. Some would say that this could be a conflict  
14 of interest, as many of the district attorneys have a close  
15 working relationship with the Attorney General and his or  
16 her office.

17                   We're not here to cast any clouds of misdeeds  
18 upon the present Attorney General. When we find that the  
19 Commonwealth law is lacking in its responsibility to the  
20 people, we are hoping to bridge this missing link. It is my  
21 hope that at the conclusion, an enactment of a piece of  
22 legislation on this issue can be addressed and that it may  
23 never have to be used but that it would be available in case  
24 that it would be needed.

25                   Chairman Piccola.

1                   REPRESENTATIVE PICCOLA: Thank you, Mr.  
2 Chairman.

3                   I don't have any prepared remarks, but I do want  
4 to extend my thanks to you for conducting this hearing on  
5 the subject of independent counsel legislation. As you  
6 know, and I think most everyone here knows, that on April  
7 the 6th of this year I, along with Senator Heckler,  
8 announced that we intended to introduce legislation to amend  
9 the Commonwealth Attorneys Act. The bill that I've  
10 introduced is House Bill No. 2741. You have introduced a  
11 bill, House Bill No. 2672, and I think you're to be  
12 congratulated on beating me to the punch, but my bill is  
13 bigger than your bill, so we'll hear testimony on this issue  
14 to see whether your bill, my bill, or maybe we'll put my  
15 bill into your bill or maybe we'll do Senator Heckler's  
16 bill.

17                   But in all seriousness, I have been involved in  
18 this issue, that being the Commonwealth Attorneys Act, since  
19 before we had an elected Attorney General. I was -- I  
20 served on the Joint State Government Commission task force  
21 that helped to write the Commonwealth Attorneys Act back in  
22 the late 1970s and early 1980s, and this issue has been  
23 around since then.

24                   The impetus for this hearing and the legislation  
25 which is before us is the various high profile cases that

1 have come to the attention of the public and which require  
2 the attention or prosecution or investigation by the State  
3 Attorney General. And it appears to me that in many of  
4 these cases there are conflicts of interest that are  
5 inescapable, and in some cases no fault of the Attorney  
6 General, and that this kind of legislation, creating a  
7 mechanism whereby an independent counsel becomes a  
8 possibility and a procedure is created for the appointment  
9 of independent counsel is absolutely necessary to plug up  
10 that loophole in the Commonwealth Attorneys Act.

11 So I commend you, Mr. Chairman, for having the  
12 foresight to introduce this legislation and to conduct this  
13 hearing, and I look forward to hearing from the witnesses we  
14 have scheduled.

15 CHAIRMAN CALTAGIRONE: Thank you, Chairman  
16 Piccola.

17 Are there any other opening statements from any  
18 other members?

19 Representative Reber.

20 REPRESENTATIVE REBER: Mr. Chairman, I  
21 appreciate the accolades that were just vested upon you and  
22 the committee by Chairman Piccola, but I think I would be  
23 less than honest with myself if I did not say that I have  
24 some concern about the timing of this hearing today and the  
25 timing of a fax transmission notice that I received for a

1 hearing tomorrow. Especially in light of the fact that  
2 there are these particular issues hanging afar for some  
3 period of time.

4 (To news reporters:) Could you please remove the  
5 microphones directly from my face?

6 I in no way am a high level supporter of anyone  
7 that may be tangentially affected by the act, but it really  
8 bothers me, probably being the second ranking member, next  
9 to Minority Chairman Piccola, of the House Judiciary  
10 Committee, having been a member for 14 years, that the  
11 integrity this committee has always had could be conceived,  
12 and I'm not suggesting that it is, but it just bothers me  
13 that we would be in the political environment that is  
14 rapidly approaching to be dealing with this legislation in  
15 this kind of fashion at this particular time, and it just  
16 concerns me to some extent that we as a committee, a  
17 committee that I have held in high esteem, is a committee  
18 that has been very well known for being nonpartisan over the  
19 years in the deliberation of a lot of particulars here in  
20 the Commonwealth of Pennsylvania could at least be accused  
21 of being part of some political agenda to aid and abet or  
22 foster some particular political agenda.

23 I'm not suggesting that that is the case. Let  
24 me make that absolutely clear. With these microphones in my  
25 face, let me make it absolutely clear that I do not foresee

1 that anyone is doing that by intention, but I think we  
2 should consider the ramifications of it. And I would be  
3 remiss, as I said at the outset, that I would not be honest  
4 with myself that I did not say that I have that concern that  
5 this aroma, that this atmosphere that pervades across the  
6 good work that this committee continues to do may in fact be  
7 prejudiced by certain timings on certain things like this,  
8 and I would respectfully submit that for the record, Mr.  
9 Chairman.

10 I thank you for your indulgence.

11 CHAIRMAN CALTAGIRONE: Thank you.

12 Any other comments? If not, we'll get on with  
13 the first testifant, the Honorable David W. Heckler, State  
14 Senator from the 10th Senatorial District, and prime sponsor  
15 of House Bill 1707.

16 SENATOR HECKLER: Good morning, Mr. Chairman.  
17 It's very nice to be back with you, having been proud to  
18 serve as a member of your committee for my years in the  
19 House.

20 As you note, I am Senator David Heckler and I do  
21 represent the 10th Senate District in Bucks County and I am  
22 the prime sponsor of Senate Bill 1707, a bill which would  
23 authorize the appointment of an independent counsel in  
24 Pennsylvania. Although my bill is, of course, not currently  
25 before you, its companion bill, introduced by Representative

1 Piccola, as he indicated, is or soon will be, along with the  
2 legislation which you, Mr. Chairman, have sponsored.

3           Our legislation would authorize the appointment  
4 of an independent counsel in cases where the Attorney  
5 General or a member of his staff is accused of serious  
6 wrongdoing, or in cases in which the Attorney General has a  
7 conflict of interest which would interfere with his or her  
8 ability to represent the people of the Commonwealth  
9 vigorously and impartially. Our bill would not create a  
10 permanent Office of Independent Counsel in Pennsylvania.  
11 Such independent counsel would only be appointed when the  
12 need arose. No permanent bureaucracy would be created.

13           In the absence of this legislation, our  
14 Commonwealth has spent millions of dollars to investigate  
15 the conduct of Justice Larsen and to investigate allegations  
16 of voter fraud in Philadelphia. In each case, these funds  
17 were expended to hire prosecutors outside the Attorney  
18 General's Office because the Attorney General perceived the  
19 existence of a conflict of interest, preventing him from  
20 conducting the investigations themselves.

21           As a former assistant district attorney and  
22 former counsel to the Pennsylvania District Attorneys  
23 Association, I am strongly aware that even the appearance of  
24 a conflict of interest on the part of any prosecutor  
25 undermines the faith our citizens must have in our criminal



1 justice system. With the prosecutor rests the unique  
2 responsibility of representing the interests of the people  
3 of the Commonwealth, as well as the individual victims of  
4 crime. If the impartiality of the prosecutor, any  
5 prosecutor, may fairly be called to question, we risk  
6 destroying every citizen's belief that he or she must obey  
7 the law or be held accountable, and that the same standard  
8 of accountability be applied to the conduct of the rich and  
9 influential as to that of the poor and powerless. If those  
10 charged with enforcing the law are accused of breaking it,  
11 we confront an even greater threat to public confidence.

12           The question then becomes, to whom shall we  
13 entrust the duty to investigate and to prosecute criminals  
14 if the elected prosecutor has a conflict of interest or is  
15 the subject of credible allegations of criminal conduct?  
16 The availability of an independent counsel of unquestioned  
17 independence and integrity in these situations would avoid  
18 the very real danger that public trust in the judicial  
19 process will be lost or seriously eroded.

20           The issue before us today is will Pennsylvania  
21 join the Federal government and nine other States by  
22 enacting an independent counsel statute? We are all familiar  
23 with the Federal Independent Counsel Authorization Act which  
24 was first enacted by Congress in 1978 as part of the Ethics  
25 in Government Act. Much has been written about the Federal

1 law, both in legal literature and the press, because it has  
2 been invoked to investigate many high Federal officials  
3 accused of serious and very notorious violations of the  
4 law. The United States Supreme Court has upheld the statute  
5 in the case of Morrison v. Olsen. We need a similar  
6 mechanism to address conflicts at the State level.

7           Let me give you a brief overview of what other  
8 States have done. For example, Colorado, Indiana, and  
9 Wisconsin allow the appointment of special prosecutors when  
10 conflicts of interest are alleged. In addition, Georgia and  
11 Kentucky provide for the appointment of independent counsels  
12 when State officials are implicated in criminal  
13 investigations. Both Alaska and Delaware have enacted  
14 statutes which enable an independent counsel to prosecute  
15 alleged violations of election law.

16           Our sister State of Delaware used its  
17 independent counsel statute in the past to investigate  
18 alleged violations of the Election Code by its Attorney  
19 General. The case was initiated by the State Election  
20 Commissioner due to alleged violations of the Delaware  
21 Campaign Financing and Disclosure Act by Charles M.  
22 Oberly III, Delaware's Attorney General. The case was  
23 carried all the way to Delaware's highest court in 1987.  
24 The Delaware Supreme Court struck down portions of the law  
25 but upheld the core provision which allowed for the

1 appointment of a special prosecutor to represent Delaware in  
2 an action involving the Attorney General or an Attorney  
3 General candidate. The court stated, and I quote, "The  
4 provision for the appointment of a special prosecutor to  
5 represent the state's interest in an action involving a  
6 candidate for Attorney General serves the salutary purpose  
7 of removing a personal conflict of interest...."

8           Today, Delaware law provides for the appointment  
9 of independent counsel under both its Election Code and its  
10 State ethics law. With respect to the Election Code, an  
11 independent counsel has authority to prosecute any violation  
12 by the Attorney General or any candidate for Attorney  
13 General. Additionally, Delaware's Ethics Commission is  
14 empowered to retain independent counsel when representation  
15 cannot be satisfactorily performed by the Attorney General.  
16 Presumably, such a case would arise if the Attorney General  
17 were accused of violating the ethics law or if he had a  
18 relationship with some suspect which gave rise to a  
19 potential conflict of interest.

20           In 1993, New Jersey passed an independent  
21 counsel statute which is currently being used to investigate  
22 possible criminal misconduct with respect to the awarding of  
23 millions of dollars in State aid to the township of  
24 Lyndhurst, a community located in one of New Jersey's  
25 northern counties. Included in the law was this declaration

1 by the New Jersey General Assembly, quote: "While  
2 recognizing that the Office of Attorney General is the usual  
3 and proper agency to investigate and if necessary, prosecute  
4 allegations of criminal misconduct by government officials,  
5 the alleged facts surrounding the Lyndhurst controversy are  
6 of such a unique nature that...the Attorney General should  
7 be bypassed and an independent counsel appointed." The  
8 legislature's motive behind passing this act is found in the  
9 text of the law: "In order to restore public confidence in  
10 the fairness and impartiality of the criminal justice  
11 system, it is in the public interest that an independent  
12 counsel be appointed...."

13           Today, we in Pennsylvania are surveying the same  
14 ground which the Federal government and nine other States  
15 have traversed. As the New Jersey legislature so eloquently  
16 framed it, the issue is nothing less than the public's  
17 ability to have confidence in the fairness and impartiality  
18 of the criminal justice system. The New Jersey General  
19 Assembly considered these values so important they made them  
20 a part of the law.

21           As in New Jersey, the guiding principle in the  
22 debate surrounding the appointment of an independent counsel  
23 in Pennsylvania should be the trust of the citizens -- I'm  
24 sorry, the trust the citizens must have in their public  
25 officials and in their government in order for a democracy

1 to work. The core issue is integrity and accountability.

2 Today in Pennsylvania a storm of serious  
3 accusations swirls around the Office of Attorney General. A  
4 Federal grand jury has issued subpoenas to high-ranking  
5 members of the Office of Attorney General. The Dauphin  
6 County District Attorney has had to recuse himself and to  
7 appoint two assistant district attorneys from Allegheny  
8 County, at local taxpayer expense, to investigate alleged  
9 criminal violations of election law by the campaign  
10 committee of the Attorney General. The Crime Commission has  
11 issued a report accusing the Attorney General of alleged  
12 serious wrongdoing, and of course I know that that Crime  
13 Commission report has been a matter of concern for this  
14 committee, as well as the public.

15 In fact, yesterday's edition of the Harrisburg  
16 Patriot newspaper reported more disturbing facts regarding  
17 the Crime Commission's investigation of Attorney General  
18 Preate. Nothing could more dramatically illustrate the  
19 need, which has existed for years, for an independent  
20 counsel law in Pennsylvania, both for the benefit of the  
21 Commonwealth and for the benefit, I might add, of the  
22 Attorney General and his staff.

23 According to the Patriot News, and I'm sure that  
24 this is available to the committee, I brought a copy along,  
25 the head of the original video poker probe conducted by then

1 Attorney General LeRoy Zimmerman in 1988-89 approached his  
2 new superiors, hired by incoming Attorney General Preate,  
3 about pursuing the allegations regarding campaign  
4 contributions from illegal video operators. These Preate  
5 senior staffers now claim they do not remember these  
6 conversations, according to the Patriot. Other deputy  
7 attorneys general apparently do remember that the issue was  
8 raised. To quote one of these officials:

9 "We had some discussion on whether or not the  
10 testimony was within the scope of the grand jury."

11 "Yes, that was in December of 1988. He did  
12 mention it to me."

13 The Sixth Statewide Investigative Grand Jury,  
14 which had first encountered these video poker contribution  
15 allegations, came to an end after the beginning of the new  
16 Preate administration. Thereafter, a new Seventh Statewide  
17 Investigative Grand Jury was impaneled by the new Preate  
18 administration. From the information related in the  
19 Harrisburg Patriot, it appears that in the first few months  
20 of the Preate administration, awareness of the campaign  
21 contribution allegations, together with any desire to  
22 investigate them, simply vanished, not to reappear.

23 Specifically, according to the Patriot, before  
24 the termination of the Sixth Investigative Grand Jury, the  
25 new Preate appointees refused to authorize granting immunity

1 to witnesses who could have shed light on the allegations  
2 against Attorney General Preate. Following the resignation  
3 of the prosecutor handling the original investigation in the  
4 summer of 1989, the subsequent Seventh Grand Jury took up  
5 investigation of video poker manufacturers. The Patriot  
6 reports that two illegal video operators, Joseph Kovach and  
7 Gabriel Horvath, along with other video operators, were  
8 immunized and called to testify before the Seventh Grand  
9 Jury but were never questioned regarding the alleged scheme  
10 to raise campaign funds. The new prosecutors evidently  
11 decided not to pose questions about the campaign  
12 contribution issue because it was outside the scope of the  
13 investigation into the manufacturers of the machines, the  
14 Patriot reported. The scope of that investigation was, of  
15 course, established by the submittal documents prepared and  
16 filed by the new Preate appointees.

17           The existence at the time -- at that time back  
18 in 1988 and '89, of legislation of the sort we are  
19 discussing today would have created the opportunity for the  
20 Attorney General and/or his staff to have avoided either  
21 actual conflicts of interest or the appearance of a conflict  
22 of interest by referring such matters to an independently  
23 appointed separate prosecutor.

24           The facts related in this article certainly  
25 dramatically illustrate the conflicts of interest which

1 naturally arise when staffers, employees, are faced with the  
2 prospect of investigating allegations concerning their  
3 superior, their employer. Indeed, Congress first passed the  
4 Federal independent counsel law because of concern about  
5 just this kind of conflict of interest. In Pennsylvania, we  
6 believe that we had addressed the problem of public  
7 confidence in the investigation and prosecution of alleged  
8 government corruption by establishing the Attorney General  
9 as an independent, elected position. Indeed, we have,  
10 except in those cases in which the Attorney General has a  
11 real or perceived conflict of interest, or in those cases in  
12 which he or a member of his staff is alleged to have broken  
13 the law.

14           And I'd like to make an observation, if I could,  
15 from my experience with the district attorneys across the  
16 State. I would suggest, contrary to your opening comment,  
17 Mr. Chairman, that if this law were in place, it would be  
18 used with some regularity and in a fashion very beneficial  
19 to the Attorney General. No elected officer that runs  
20 statewide is going to avoid getting to know in some way or  
21 other a great number of people, whether they are campaign  
22 contributors, friends, people for whom, as in the case of  
23 Justice Larsen, he would have testified for in some  
24 fashion. District attorneys encounter the same difficulty  
25 within their own counties and inevitably, a certain number



1 of the friends, relatives, or whatever, of those people are  
2 going to get involved with scrapes with the law of one sort  
3 or another.

4           It has been a great benefit to the district  
5 attorneys of this Commonwealth over the years to be able to  
6 say when the son-in-law of a friend and campaign ally is  
7 caught for a second DUI, I'm not handling this case. I know  
8 how it should be handled and I would handle it properly, but  
9 rather than have anybody be able to raise the suggestion  
10 that I cut this kid some kind of a break or that his case  
11 was dealt with in some fashion different from the fashion  
12 anybody else's case would be dealt with, I'm going to get  
13 someone else in to prosecute this case who will not be  
14 answerable to me.

15           The Commonwealth Attorneys Act, of course, makes  
16 provision for that, and the Office of Attorney General,  
17 since the position first became elected, has worked very  
18 well with individual district attorneys to arrange  
19 essentially cross-designation of assistant DAs from a nearby  
20 county to handle that case. The key, however, is that that  
21 new assistant district attorney, in handling that particular  
22 case, is not answerable in any way to the district attorney  
23 who has jurisdiction, in whose jurisdiction this alleged  
24 offense was committed and the prosecution is taking place.  
25 And he's not answerable to the district attorney he normally

1 works for because of course that district attorney was  
2 elected in another county. He is, at least in theory,  
3 answerable to the Attorney General because of his  
4 cross-designation.

5           That differs substantially from the situation we  
6 see now, for instance, in Dauphin County, where allegations  
7 have been referred to the Dauphin County district attorney,  
8 he perceives that he has a conflict, I gather from the  
9 newspaper reports I've read, because of prior relationships  
10 he's had with Attorney General Preate. So he has hired two  
11 people from Allegheny County. I have no doubt they're able  
12 prosecutors. It's certainly unclear to me who they work  
13 for, to whom they are actually answerable. And I don't  
14 believe that is clear in the law. They certainly weren't  
15 elected by the people of Dauphin County. They'll certainly  
16 be paid by them. But ultimately, they are being paid from  
17 the budget of the district attorney. Ultimately, if they're  
18 answerable to anyone, they're answerable to the district  
19 attorney, and would normally look to his office for at least  
20 some sorts of support - staff, and so forth.

21           That situation is what unfortunately exists  
22 under the present state of the law only with regard to the  
23 Attorney General. They have a very workable system with  
24 regard to the district attorneys, and so my perception would  
25 be that this law would be used on a fairly regular basis

1 because of the inevitable conflicts that will arise, or at  
2 least apparent conflicts, and this creates the opportunity  
3 to just bring down a Chinese wall, an iron curtain between  
4 the Attorney General or any member of his staff and the  
5 prosecution of that case.

6           We in Pennsylvania should follow the example of  
7 the Federal government and numerous other States in enacting  
8 our own independent counsel law. The citizens of our  
9 Commonwealth and the persons to whom the law would  
10 potentially apply deserve no less.

11           Let me make one other observation, and I think  
12 that Representative Reber's initial comments were  
13 well-taken. There has been repeated criticism of the  
14 timeliness of this legislation as it relates to the  
15 gubernatorial race because the Attorney General is one of  
16 the candidates in the Republican primary. And I'm sure that  
17 Minority Chairman Piccola may comment on this in the course  
18 of the day, but I know that there's been attention to this  
19 legislation, to the drafting of it, the shaping of it, for  
20 some substantial number of months. But just as a matter of  
21 common sense, if this were last year, Mr. Chairman, if this  
22 were next year, there was nobody running for Governor,  
23 nobody's running for anything except township supervisor and  
24 school board, allegations surfacing of the sort that have  
25 been made, without any comment as to the potential validity

1 or absolute invalidity, the surfacing of those allegations  
2 is a subject, given the lack in our law right now, that I'm  
3 sure would be brought to the attention of this committee and  
4 that would be addressed.

5           And it should be noted that obviously right now  
6 this is a matter of concern in a Republican primary. The  
7 folks who have taken the steps to bring these allegations to  
8 the fore are virtually all of your party and not ours, both  
9 with regard to the Department of State and the referral  
10 that's been made to the Dauphin County district attorney,  
11 and to the Federal officials proceeding with their  
12 inquiries.

13           So that the matter is on the table, it's really  
14 a shame that this law was not enacted years ago. It would  
15 have closed the last gap of the many gaps that were closed  
16 when we went to elect an Attorney General instead of  
17 appointing him, and my perception is if this law had been in  
18 place, many of the concerns that are now being raised would  
19 have been able to be avoided by action by the Attorney  
20 General himself.

21           Thank you for inviting me to testify this  
22 morning. I would be happy to respond to any questions.

23           CHAIRMAN CALTAGIRONE: Thank you, Senator  
24 Heckler.

25           Questions?

1 Chairman Reber.

2 REPRESENTATIVE REBER: Sounds good to me.

3 CHAIRMAN CALTAGIRONE: Chairman Piccola.

4 REPRESENTATIVE PICCOLA: I don't have any  
5 questions because Senator Heckler and I have worked  
6 extensively on this issue, and I just would like to comment  
7 and reiterate upon his last comments. And in a way it  
8 responded to what Representative Reber brought up at the  
9 beginning.

10 As we said on April 6 in response to a question,  
11 this issue has been around for many, many, many years. I  
12 raised it last fall when the Attorney General himself sat in  
13 that very chair that you're sitting in, Senator, and asked  
14 him whether he thought independent counsel legislation was  
15 necessary, because at that time he was embroiled in the  
16 Justice Larsen investigation in which he had to bring in  
17 special prosecutors -- not independent counsel, but special  
18 prosecutors -- he was embroiled in a controversial  
19 prosecution in the Second Senatorial District for which he  
20 was being accused of being political. And I asked him  
21 whether or not he thought it would be beneficial for his  
22 office to have a mechanism in place, and we had a colloquy  
23 on that back in November, and I came to the conclusion  
24 during that colloquy that I thought this kind of legislation  
25 was needed, and we began the process at that time of

1 drafting the legislation.

2           So this is not something that is new, it is not  
3 something that is being brought out for the purposes of the  
4 primary. I hope that -- I certainly hope the Chairman is  
5 going to pursue this process beyond Tuesday. It has to be  
6 pursued. It should be pursued.

7           I was rather disturbed, and since we have a  
8 representative from the Attorney General's Office here, I  
9 was rather disturbed the next day to read in the Patriot  
10 some comments questioning our motivation in introducing this  
11 legislation. When the Attorney General called for the  
12 investigation of major oil companies during the Gulf War  
13 when the price of gasoline was going up, I didn't accuse him  
14 of being political. When the Attorney General closed down  
15 an adult book store on Market Street and paraded up and down  
16 Market Street for the TV cameras, I didn't accuse him of  
17 being political. So I would hope that the Attorney General  
18 and his staff will not do the same with you and I. As I  
19 told the Attorney General on many occasions, I call them the  
20 way I see them, and as I see it, this kind of legislation  
21 is absolutely necessary.

22           CHAIRMAN CALTAGIRONE: Thank you, Chairman  
23 Piccola.

24           Representative Reber.

25           REPRESENTATIVE REBER: Mr. Chairman, I don't

1 disagree, again, from the substantive side, and my remarks  
2 had nothing to do with the substantive issue. I think it's  
3 certainly, as Dave -- as Senator Heckler, excuse me, Senator  
4 Heckler.

5           SENATOR HECKLER: Only my wife needs to call me  
6 Senator. Dave is fine. And she's here this morning.

7           REPRESENTATIVE REBER: As Senator David Heckler  
8 said, this is something that has been needed for years.  
9 It's unfortunate that it wasn't part and parcel of our  
10 elected Attorney General concept when it went in so that  
11 would take away from the aroma, the specter of concern.

12           As I think Senator Heckler notes, having sat as  
13 a distinguished member of this committee for many years, we  
14 have often moved in a very bipartisan fashion to advance the  
15 necessary issues that come before the committee under the  
16 specter of criminal justice, and I, as I said at the outset,  
17 I would be remiss and not intellectually honest with myself  
18 if I didn't say that I had some concern. It's not to  
19 suggest this isn't needed. I think it's highly needed. I  
20 think Dave delineated, and in a chronology fashion set forth  
21 many of the reasons why. I only have some concern that  
22 we're dealing with it on the Thursday and Friday before the  
23 primary when the issue has certainly been circumscribed in  
24 many people's minds as a particular issue, and I just don't  
25 like to think or see this particular committee even be

1 suggested as being part of, and that's the only reason I  
2 brought the remark up, Mr. Chairman, and felt that I would  
3 be remiss if I didn't do that.

4 Thank you.

5 CHAIRMAN CALTAGIRONE: Representative Masland.

6 REPRESENTATIVE MASLAND: Thank you, Mr.

7 Chairman.

8 I just want to pick up a little bit on that. I  
9 was at the press conference when this bill was introduced on  
10 April 6, and it's my recollection that the first question  
11 asked by a reporter was whether or not the introduction of  
12 this bill or these bills in the House and Senate were driven  
13 by the current events, as if it is somehow an anomaly to  
14 find a bill in the House and Senate that is driven by the  
15 issues. I have only been here for a year and a half, but I  
16 have yet to see any bill go anywhere or move and do anything  
17 if it is not issue-driven.

18 I do not think that the fact that there may be  
19 current events which give rise to a greater perception of  
20 the need for this bill should be held against this bill.  
21 Yes, it is issue-driven, but everything we consider is  
22 issue-driven.

23 Thank you.

24 CHAIRMAN CALTAGIRONE: Counsel Andring.

25 MR. ANDRING: Yes.



1 BY MR. ANDRING: (Of Sen. Heckler)

2 Q. Senator, Chairman Caltagirone's bill deals  
3 solely with possible criminal conduct on the part of the  
4 Attorney General or his assistants or deputies. From your  
5 testimony, am I correct that you think that a special  
6 prosecutor bill should also encompass areas where there is  
7 potential conflict?

8 A. I certainly do, and as I noted, I think this is  
9 the area in which it would -- if we pass such legislation,  
10 unless the, you know, the next Attorney General we elect is  
11 a hermit, I would anticipate from time to time that it would  
12 be used, in a very salutary way, to the benefit of everybody  
13 concerned to avoid not just real but perceived conflicts of  
14 interest.

15 And to expand on the comments I made before, the  
16 Attorney General recognized at least the perceptual issue  
17 when he chose to pursue the Larsen -- the allegations  
18 against Justice Larsen through the hiring of Mr. Tierney and  
19 Mr. Dennis. Now, he did that and designated them some sort  
20 of special prosecutors, but the fact is that there was no  
21 way in law to completely isolate them from his office. His  
22 office's budget paid, you know, their salaries, they  
23 presumably relied to some degree on the office for support  
24 staff. There was no other legal framework for them to  
25 exist, if you will, and of course the Attorney General, you

1 know, attempted to choose wisely, find people of national  
2 reputation, whose just reputation for personal integrity  
3 would sort of fill that gap or make the leap that we make in  
4 this legislation by establishing a separate line of  
5 accountability, a complete insulation.

6           And so that he did what he could, given the laws  
7 that exist today, but I think he would have been in a better  
8 position, and we all would, not that I'm aware of any  
9 suggestions that the Larsen investigation was in some way  
10 slanted by that situation, but his very need to find people  
11 of national standing in order to fill this role essentially  
12 acknowledges that there's a gap that we need to fill and  
13 that future Attorneys General will be benefitted, will be  
14 more comfortable if we can do that.

15           And I note -- actually, I was somewhat  
16 interested to note in recent accounts in the press that it  
17 appears that Mr. Dennis is now acting as counsel for Mr.  
18 Preate in connection with the pending Federal investigation,  
19 or at least commenting in that fashion, and I think that  
20 raises additional questions. I haven't sat down with the  
21 cannons of ethics about that situation, but I think it  
22 raises additional questions about the -- whether that's the  
23 way to go about things; whether you hire somebody who's  
24 supposed to be sort of screened off from your office, but  
25 they're not really.

1           So that I think there's an even more glaring  
2 need for that, or let's say over time it will be much more  
3 frequently used for that purpose than hopefully than anybody  
4 is making criminal allegations about the Attorney General or  
5 one of his assistants.

6           Q.     Okay, one other question. The criticisms of  
7 special prosecutors frequently focus on the unaccountability  
8 of a special prosecutor. You're substituting a system of a  
9 conflict and accountability for no accountability  
10 whatsoever, and these things can drag on forever, those  
11 types of concerns. Considering that in Pennsylvania we used  
12 to have our prosecutorial power vested solely in the  
13 Governor's Office, in the executive branch, and what you  
14 anticipate would seem to be fairly frequently used, or at  
15 least the potential is there, do you think there would be  
16 any merit in putting this power into the executive branch,  
17 maybe, where we already have the Inspector General's Office,  
18 or for something like that?

19           A.     Well, it is my -- essentially, the power is in  
20 the executive branch primarily in the sense that it is  
21 General Counsel who triggers, who normally triggers this  
22 situation, although we have the opportunity for the General  
23 Assembly to do so. We have the screen from any political  
24 selection or control in the form of the three-judge panel  
25 who actually selects and supervises the scope of the

1 conduct, and really these people are not directly  
2 accountable to anyone in terms of the supervision of their  
3 investigation because we have substituted for the normal  
4 elective process by which we elect our prosecutors the  
5 screening selection by the three-judge panel.

6           We have included in this legislation, I believe  
7 primarily the provisions appear in Chapter 5, a number of  
8 legislative responses which Congress is presently  
9 considering in response to some of the excesses of  
10 Iran/Contra in particular, at least you get a prosecutor  
11 who's sort of a hog on ice and is just off to the races  
12 spending the taxpayers' money and producing very little. We  
13 have specific limitations as to the amount which can be  
14 expended, the ability, the time which the investigation can  
15 continue, and of course you have that supervisory  
16 three-judge panel.

17           So I think those are very real concerns. I  
18 think in the consideration of this legislation the  
19 legislature should look at making sure that we are not  
20 creating a boondoggle, but my sense is that first of all if  
21 it's difficult enough to get one of these folks created, and  
22 generally within the purview of the executive branch, in  
23 fact, I guess the executive branch can prevent this from  
24 happening in any situation. Even if the legislative  
25 committees, there's a provision by which even minority

1 members of a committee can trigger the investigation, the  
2 initial investigation, but I believe if General Counsel  
3 determines ultimately that there's not a proper basis to  
4 proceed, then it doesn't get to the three-judge panel. So I  
5 think we do have executive branch control in that way at  
6 sort of guarding the gates or guarding the purse strings,  
7 and we have a number of restraints built into the system for  
8 expenditures.

9 Q. Thank you.

10 CHAIRMAN CALTAGIRONE: Representative Cohen.

11 BY REPRESENTATIVE COHEN: (Of Sen. Heckler)

12 Q. Dave, as you were discussing, I apologize, I  
13 have not read your bill, but as you were discussing the  
14 scope of authority, it seemed to me that it was potentially  
15 endless, and I wonder if you could delineate, so I and  
16 others will understand, where, I mean, it seems to me like  
17 if Larsen was an appropriate role, investigation that should  
18 be taken away from the Attorney General, how would you  
19 distinguish between who in government the Attorney General  
20 cannot -- I'm sorry, who in government the Attorney General  
21 could investigate?

22 A. Well, when I referred to the Larsen situation,  
23 there's nothing inherent about the fact that, for instance,  
24 Justice Larsen was a Justice of the Supreme Court, which  
25 would have created a problem for the Attorney General. It's

1 my understanding that he believed he had a specific  
2 conflict, or at least the appearance of one, because he had  
3 testified as a character witness, so that there is a  
4 provision of the bill which allows the Attorney General to  
5 trigger its provisions. In other words, he can say, and  
6 what I've been arguing is really that this will be the most  
7 frequent use of the bill. He can say, wait, I want out of  
8 this one, not necessarily because I won't handle it honestly  
9 and properly, but because there is at least the perception  
10 that I won't, let's get somebody else in. If he does, so  
11 that that's what would trigger that situation. If he didn't  
12 believe that he had a conflict or there wasn't an apparent  
13 one, he can investigate everybody in State government.

14           Beyond that, the referring panel, and of course,  
15 this only happens if the General Counsel then approves, but  
16 the referring panel of three judges - one appellate court  
17 judge, one Common Pleas judge -- I'm sorry, one Supreme, one  
18 appellate, one Common Pleas - three judges selected by lot,  
19 have a supervisory role in determining the scope of the  
20 investigation, not unlike the grand jury submission with the  
21 supervising judge. They have the ability to define the  
22 scope of the independent counsel's authority, and the  
23 independent counsel, while he may or she may apply to the  
24 panel for an extension or an expansion of that authority, he  
25 just doesn't get created and he's off to the races

1 investigating anything he finds interesting in the  
2 Commonwealth.

3 Q. Okay.

4 CHAIRMAN CALTAGIRONE: Counsel Scott.

5 BY MR. SCOTT: (Of Sen. Heckler)

6 Q. Senator, two quick questions. One, considering  
7 any request by the General Assembly, the Judiciary  
8 Committee, House or Senate, full committees, could go ahead  
9 and make a request. I'd just like to know your rationale  
10 concerning that even if the full committee doesn't meet,  
11 "the majority of all majority parties members or the  
12 majority of all minority party members could initiate a  
13 request." I would just like to know the rationale?

14 A. Well, I believe that is drawn from Federal  
15 legislation, and I think that this is aimed at the situation  
16 in which it's perceived, and I guess this comes out of the  
17 Watergate experience, Iran/Contra whatever, that if the  
18 majority party is of the same party as in this case the  
19 Attorney General or the President in the national model,  
20 that they're liable, just as a political matter, to close  
21 ranks and cut off the ability to pursue this, so that we're  
22 creating the opportunity for even the minority party or  
23 members of the minority party to at least compel this issue  
24 to be looked at. Not to actually launch an investigation,  
25 but to compel that the counsel, the General Counsel review

1 the matter and be accountable for making the determination.

2 Q. And the second question is after the independent  
3 counsel starts an investigation concerning termination, it's  
4 approximately 2 years in the legislation or \$2 million,  
5 whichever comes first, I think it's what the legislation  
6 says. How did you arrive at that, Senator?

7 A. I believe that that was, again, it's sort of  
8 seat-of-the-pants based on the costs of investigations that  
9 we've seen both federally and in this State in terms of, you  
10 know, extra costs for special counsel. I believe that there  
11 is also the ability to get extensions or the authorization  
12 for additional expenditure, so that this isn't necessarily  
13 a, you know, this isn't the end of the line absolutely.  
14 This is a triggering mechanism that sort of will pull people  
15 up short and say, you know, this is a target and if you can  
16 demonstrate that you need more resources and more time to  
17 complete your task, then it will be available. But granted,  
18 it's an arbitrary number in each case and it's the kind of  
19 thing that this committee may want to hear testimony about  
20 and determine that there's some other magic number that's  
21 appropriate both in terms of time and dollars as a trigger  
22 for that inquiry.

23 Q. Thank you, Senator.

24 CHAIRMAN CALTAGIRONE: Counsel Dalton.

25 MS. DALTON: I just have some information about



1 that specific question that Attorney Scott raised. Right  
2 now Congress is considering S. 24, which is the follow-up to  
3 the Independent Counsel Authorization Act. It contains  
4 specific provisions aimed at addressing what are perceived  
5 as the excesses of the Walsh experience. That language about  
6 the 2 years and the \$2 million comes directly from S. 24,  
7 along with the other cost controls and the other provisions  
8 that tighten up this bill.

9           So I don't mean to differ with you, Senator, but  
10 there was a very specific reason why we included that.

11           SENATOR HECKLER: Thank you.

12           CHAIRMAN CALTAGIRONE: Are there any other  
13 questions?

14           (No response.)

15           CHAIRMAN CALTAGIRONE: Thank you, Senator. We  
16 appreciate your testimony, sir.

17           SENATOR HECKLER: Thank you.

18           CHAIRMAN CALTAGIRONE: At this time, we'll have  
19 the Office of Attorney General representatives testify.

20           MR. TIERNEY: Good morning, Chairman  
21 Caltagirone.

22           CHAIRMAN CALTAGIRONE: Good to see you again.

23           MR. TIERNEY: Nice to see you. I'm very happy  
24 to be back here in beautiful Harrisburg, home of the  
25 Harrisburg Senators, who I think regularly beat the Portland

1 Seadogs, our newest minor league team, and humiliate my  
2 State every day out here on the diamond.

3 I am extraordinarily happy to be back here, and  
4 I hope to be of some assistance to you. I do apologize that  
5 I don't know all the rules of how to distribute testimony in  
6 advance and that kind of thing, so I hope you'll just kind  
7 of forgive me for that.

8 I do have a statement which I typed up on my  
9 laptop last night and this morning and is also a separate  
10 statement for the Office of Attorney General because they're  
11 different. Let me try to see if I hopefully can act for the  
12 committee as a resource on this obviously very emotional  
13 issue.

14 So I'm not here representing the Office of  
15 Attorney General. Their position paper I think I urge for  
16 your personal review, I think you'll find it very  
17 interesting. There are significant parts of it with which I  
18 agree, especially those sections dealing with the possible  
19 constitutionality of this approach. There's been a lot of  
20 litigation around the country relative to separation of  
21 powers, and I think that a more exhaustive review on that  
22 issue would probably be appropriate, and there are also a  
23 few technical issues I would highlight. One of them is I  
24 think the role of the Office of General Counsel I think  
25 should be scrutinized quite carefully. It is an office I

1 understand that really has no criminal experience now in the  
2 new format and yet would be asking, with this legislation,  
3 to make some--

4           REPRESENTATIVE PICCOLA: Excuse me, Mr.  
5 Chairman, if I may interrupt, do we have a copy of that  
6 statement from the Attorney General's Office? I don't have  
7 that.

8           MR. TIERNEY: Right here.

9           CHAIRMAN CALTAGIRONE: We'll have it  
10 distributed.

11           MR. TIERNEY: Here I've started and I've broken  
12 every rule in the Commonwealth.

13           My name is Jim Tierney, and by way of personal  
14 background, I want you to know that for 10 years I served as  
15 the Attorney General of my State, the State of Maine, a  
16 position filled every 2 years in a quite civilized manner:  
17 by a secret vote of the members of the legislature. I was  
18 not elected generally by the public.

19           I served in the Maine legislature for eight  
20 years. I served as the Democratic House Majority Leader  
21 from 1976 until 1980, and I was Attorney General from 1980  
22 until 1990. From 1992 until present, I've also had the  
23 honor of serving as a Special Deputy Attorney General here  
24 in the Commonwealth to investigate the allegations made by  
25 Rolf Larsen against his fellow Justices on the Pennsylvania

1 Supreme Court.

2 I'm very proud of my work and of my colleagues  
3 on behalf of the people of the Commonwealth, and I'm very  
4 pleased to learn that this committee is now considering  
5 Articles of Impeachments along the lines suggested by the  
6 grand jury.

7 You should also know that I am now and have been  
8 a consultant to State Attorneys General across the country  
9 since I've left office. I've lectured at various law  
10 schools. I'm a fellow at the Harvard Law School, and my  
11 usual subject of lecturing is the powers and duties of State  
12 Attorneys General, in which we deal with some detail in with  
13 the kind of issue which this committee I think is very  
14 legitimately trying to grapple with here this morning.

15 And I did note that historically, it might be  
16 interesting, I think one of the problems that this  
17 Commonwealth might be having in grappling with this issue is  
18 that unlike most States, you really only had two elected  
19 State Attorneys General and the relatively short period of  
20 time in which to grapple with these kinds of issues. It's  
21 been 14 or 15 years, but in this world, that's not very  
22 long. Especially the older I get I find periods like that  
23 seem like shorter periods of time as well.

24 So it is a difficult issue and it's difficult to  
25 separate from the personalities and the passions of the

1 moment. Certainly, there will be discussions with the  
2 current Attorney General, already has been. I was privy to  
3 just meet in the hallway Joe Kohn, who we've got a lot of  
4 mutual friends in Democratic politics. I haven't met him,  
5 I've seen his video, I haven't met him, and he's going to be  
6 making some remarks later on which I saw which are  
7 astounding to me, blockbuster remarks which will probably  
8 blow everybody else right off the papers tomorrow. So  
9 there's a lot of passion around this.

10           The second thing I was going to say is I  
11 disagree with part of the Office of Attorney General's  
12 remarks which you have in front of you. Their position is I  
13 think an articulate general opposition to special  
14 prosecutors in general, which is the position primarily  
15 espoused by U.S. Attorney General Thornburgh and by the  
16 Reagan-Bush administration. I disagree with that. I think  
17 that there is a very real place in our Federal system of  
18 government and in areas where there are no alternatives for  
19 special prosecutor, and would be happy to address those in  
20 more detail.

21           Now, as the Counselor mentioned, HB 2741 is  
22 primarily drawn from the Federal issue, and I think that if  
23 I could find my notes and get rid of some other ones, I'll  
24 try to conceptualize this a little bit for you and then  
25 actually to deal with some specificity with the States that

1 Senator Heckler referred to that have counsel bills, because  
2 I didn't know that until this morning, but almost all of  
3 them have been my clients at one point or another, so maybe  
4 I can help clarify some of the reasons and the functions of  
5 how those offices work.

6 I think that a special prosecutor is necessary  
7 and appropriate when it is an absolute last resort. And  
8 that occurs in two situations. The first is when the  
9 regular prosecutor is just simply unable to handle the issue  
10 in front of him. That can be because they lack resources  
11 because of the size and the complexity of the case, or in  
12 some cases it might be that they lack the talent within the  
13 office to handle it. That reason for a special prosecutor  
14 is almost never discussed in these debates.

15 It's the second reason that we've been  
16 discussing this morning, and that is what do you deal when  
17 you deal with an appearance of a conflict of interest? And  
18 this really gets to the gut issue, immediately gets to the  
19 gut issue which is presented whenever, quite honestly, you  
20 elect prosecutors.

21 Now, the Federal model is such that they have  
22 specifically rejected the issue of electing prosecutors,  
23 which is why I think -- they have an unified system of  
24 prosecution. It's why it's there. All the U.S. Attorneys  
25 are appointed by the President, their budget is a unified

1 budget. They have for years with the Department of Justice  
2 worked very hard to create a unified system, and so when  
3 it's necessary to investigate the President of the United  
4 States or a cabinet official, or in some situations a member  
5 of Congress, then there really isn't any other place to go  
6 within the Federal system. You have the Department of  
7 Justice, and that's it. I think there should be an  
8 alternative. There is not one, and so I will support a  
9 special prosecutor in that instance.

10 Now, moving on to the States that were mentioned  
11 by Senator Heckler, that's exactly the situation in Alaska  
12 and that's exactly the situation in New Jersey where the  
13 Attorneys General are not only appointed, but all of the  
14 line prosecutors are also appointed and you have a basically  
15 federalized system of prosecution, and there is no  
16 alternative should an issue arise.

17 For example, the Lyndhurst special prosecutor in  
18 New Jersey came about because then Governor Florio was  
19 accused of doing favors for someone who had been on his  
20 staff. The Attorney General at that time, Bob Donatufoe,  
21 had been appointed by Governor Florio, and so the  
22 Republican-controlled legislature felt they needed a special  
23 prosecutor to get outside that system, because in New Jersey  
24 they do not have the kind of generally elected prosecutors  
25 that you would have in place.

1           And also supported in a State, for example, such  
2 as Delaware, where the Attorney General himself is elected,  
3 indeed, but everyone else in the office, there are no  
4 district attorneys in Delaware. The Attorney General's  
5 Office has original jurisdiction and actually handles all of  
6 the cases that arise. So again, within Delaware, although  
7 the top person is elected, there really is no other source  
8 to go within State government in order to find a way to  
9 bring a prosecutorial case.

10           In Colorado and Wisconsin, Wisconsin is a client  
11 of mine, the Attorney General has absolutely no criminal  
12 jurisdiction at all and has no background or experience  
13 within it. Colorado has only appellate criminal  
14 jurisdiction, which is also the situation in Indiana. And  
15 to a lesser degree in Kentucky. And I don't know anything  
16 about Georgia, so we'll let that go, except they have very  
17 limited criminal jurisdiction.

18           So my point being that a special prosecutor  
19 makes sense when you have an alternative, but here, and I  
20 think I was very fortunate to be able to come into your  
21 State and to conduct this investigation last year. I think  
22 I have some sense of although an outsider, of the  
23 differences here. Because Pennsylvania has explicitly  
24 rejected an unified hierarchal prosecutorial system. And  
25 they have, in short, Pennsylvania likes to elect people. In



1 my State of Maine, the only statewide elected official is  
2 Governor. Pennsylvania, you have a lot of statewide elected  
3 officials, as we all know, including the judiciary.  
4 Pennsylvania has 68 different prosecutorial offices. Each  
5 of the offices is separately answerable to an electorate.  
6 The Attorney General doesn't supervise the district  
7 attorneys. The Attorney General does not control their  
8 budgets. They must come to this body, as the Attorney  
9 General does, to do that. The Attorney General cannot tell  
10 any district attorney what crime to investigate or  
11 prosecute, or what not to investigate or prosecute. Those  
12 decisions are left to the exercise of the discretion of the  
13 district attorney.

14           Now, the Attorney General can review a district  
15 attorney's decision on a matter, or supercede the local DA,  
16 but only under the Commonwealth Attorneys Act if the  
17 Attorney General can demonstrate to a court that the DA has  
18 abused his or her prosecutorial discretion. However, it's  
19 my understanding this morning has never been used in the 13  
20 1/2 years since the act was passed.

21           Now, this act was crafted and the Constitution  
22 was crafted because this State believes in independent DAs.  
23 They believe that prosecutorial decisions -- I'm not sure  
24 that I do, but this State has obviously committed itself  
25 deeply to the fact that prosecutorial decisions should be

1 made by people who are elected to and accountable to the  
2 public. Now, once this State has made that decision and has  
3 lived by it and has reinforced it, it would seem to me that  
4 these bills fly in the face of that culture. That they  
5 basically say, well, we want to do that, we want to have  
6 elected officials making decisions, except in certain  
7 circumstances.

8           Now, the problem with -- nobody really cares  
9 about the certain circumstances when no one notices. These  
10 are big circumstances. These are the big cases. These are  
11 the cases that test your prosecutorial system. These are  
12 the cases that every man, woman, and child in this  
13 Commonwealth will look to in order to determine whether or  
14 not the system works. And these bills basically say, when  
15 the cases get too big, when they get too important, when  
16 they get too close to the bone, we're going to take them  
17 away from elected officials and we're going to give them to  
18 someone else. And as a matter of fact, in the bill it  
19 specifically says that this person, whomever this person  
20 should be, cannot even be an employee of government. It's  
21 like you go out of your way to make sure that no one in  
22 government should be able to make the big decisions about  
23 government itself, and I would say that that is not  
24 philosophically consistent with this State, and I don't  
25 think it makes sense and I don't think it's within the

1 culture of this State.

2           Now, it would not at all surprise me, and I have  
3 no knowledge of how the DAs feel about this particular bill,  
4 but I wouldn't be at all surprised if they all came in and  
5 supported it. Now, this comes from my own experience of 10  
6 years and also from working with AGs around the country is  
7 that, let me tell you something, the last thing a district  
8 attorney or an Attorney General wants to have to deal with  
9 are these kinds of allegations that roll up about someone  
10 they know, someone they think they know, or someone who's  
11 hand they shook, or someone who's picture they had taken  
12 with at an electoral event, and so they would be more than  
13 happy to get rid of it. In most States, those cases are  
14 sent right to the Attorney General. They do not pass go.  
15 And I had one particular DA in my State who enjoyed having  
16 press conference on these cases, announced the person was  
17 obviously guilty, he would never except a plea bargain. He  
18 did, by the way, handle the grand jury. He used to like to  
19 do that part, he used to like to indict them, and then he'd  
20 say, but I have a conflict of interest and I refer it to the  
21 Attorney General, because he just didn't want it.

22           Now, I don't know any of your DAs here in the  
23 State. I think some of them, therefore, might just as soon  
24 have an independent prosecutor because they don't want that  
25 kind of case. But when you put your name on the ballot,

1 ballot, when you put your hand up and get sworn in to be a  
2 district attorney in this State through the electoral  
3 process, I don't think you have the opportunity, same with  
4 the Attorney General, to walk away from the big cases. I  
5 think you've got to do it.

6 Well, I've gone on long enough. I think you  
7 probably have a bunch of questions for me. I want you to  
8 know I'm sadly aware -- I've known over 200 people who have  
9 been the Attorney General of their State. A bunch of them  
10 have gotten in trouble. I can fill you in on each of them  
11 State by State if you're interested in how people have dealt  
12 with particular cases when an Attorney General has been  
13 alleged to have violated the law. I would be happy to do  
14 that. I can also talk to you about what is emerging as a  
15 mechanism in other States. It was actually kind of used in  
16 our case, used now in Ohio, a kind of hybrid that an  
17 Attorney General will bring someone in to work with his  
18 staff, but with the exception of that, I've gone on long  
19 enough. I'd rather answer your questions.

20 CHAIRMAN CALTAGIRONE: Thank you.

21 Chairman Piccola.

22 REPRESENTATIVE PICCOLA: Thank you, Mr.

23 Chairman.

24 BY REPRESENTATIVE PICCOLA: (Of Mr. Tierney)

25 Q. Mr. Tierney, on your last point, I can't more

1 vociferously disagree that we have a culture in this State  
2 that encourages conflict of interest. We simply do not, and  
3 in fact, your appointment as special prosecutor, along with  
4 Mr. Dennis, to investigate the Larsen situation at least on  
5 its face was done because we do not have that culture. That  
6 the Attorney General recognized that he had a conflict of  
7 interest and that he did not want to have in-house people  
8 making that prosecution. You were appointed and Mr. Dennis  
9 was appointed because we don't have that culture.

10 A. Right. No, I hope I didn't say, I obviously was  
11 not working from a carefully crafted text here,  
12 Representative Piccola. Certainly this is not a State which  
13 fosters conflict of interest. What I said was that  
14 prosecutors are elected, and when you're elected, you have  
15 to do the tough things, even if it sometimes means  
16 investigating people that you know. And frankly, the  
17 toughest issues I've had to work through with prosecutors is  
18 not when you've had to prosecute your friends. Most of them  
19 suck it up and frankly do it. The real problem is when  
20 you're forced to have to prosecute someone who might have  
21 been your political enemy, because it's almost impossible in  
22 that situation to get past the kind of attack the other  
23 person will render on usual prosecutorial judgment. Those  
24 are tougher cases.

25 But the system which I was involved with has

1 become the kind of hybrid response to this inherent conflict  
2 when you have elected prosecutors, which is you did it here,  
3 the Attorney General of Ohio is doing it now in the  
4 investigation of their State Auditor in which you do appoint  
5 a special prosecutor who comes in and basically runs a  
6 prosecutorial effort, but you don't give that person  
7 complete control. You don't let that person do everything  
8 because you're an elected official and you ultimately have  
9 to take some responsibility for it.

10 Oh, by the way, one thing I should have  
11 mentioned which I meant to do, I'm down here on my own time  
12 and my own nickle. I follow these things around the  
13 country. I'm not being paid and nobody paid my train fare  
14 or anything else. So I thought I'd get that out before  
15 somebody asked me.

16 Yes, I'm sorry.

17 Q. One of the cases that prompted this kind of  
18 legislation, a more recent case, is the referral by the  
19 Department of State, Election Bureau, to my county's  
20 district attorney, an investigation of the Attorney  
21 General's campaign committee. Now, under your theory, the  
22 way I read your theory, the Attorney General should be  
23 investigating his own campaign committee and potentially  
24 prosecuting them.

25 A. No. The local district attorney should do that.

1 Q. But he can't.

2 A. Well, if he can't, then the provisions exist for  
3 him to bring in a district attorney from another region to  
4 analyze it if there's some conflict because he has a  
5 personal relationship with someone. I really don't know the  
6 local details of that.

7 Q. Well then why should, and that's, I think, why  
8 your testimony, with all due respect, is a little off base,  
9 why should the people of Dauphin County, one medium-sized  
10 county in this State, pay for a prosecution, or an  
11 investigation if it doesn't get to a prosecution, of an  
12 issue that has statewide ramifications? I mean, Dauphin  
13 County, because it happens to house the State Capitol, is  
14 going to get dumped on in many of these instances.

15 A. Well, I can tell you how that's handled in other  
16 States and you might want to consider that as well, because  
17 that's going to be true whenever you have -- whoever is the  
18 district attorney in the State capital is going to have  
19 jurisdiction in these cases in whatever State you happen to  
20 be in, and so that's not unique to the Commonwealth, and  
21 most States resolve that by simply making a -- reflecting  
22 that in the budget, of which States control, and I think you  
23 do here as well, to giving a little extra appropriation to  
24 the DA in the capital city. You don't have to create a new  
25 system to do that. The decisions are still made in the

1 hands of the elected people.

2 Q. But we don't appropriate any money to the DAs.

3 A. Is that done through your counties?

4 Q. That's correct.

5 A. Well, would it be prohibited for to you do  
6 that?

7 Q. Well, I suppose we could probably, we have in  
8 the past appropriated money to counties for the costs of  
9 certain statewide investigations that happen to be used one  
10 county or another, but we do not fund local investigations.

11 A. Well, I'm just saying that's basically a fiscal  
12 issue and I have some sympathy with that, I guess especially  
13 if I was a Representative or a Senator from Dauphin County I  
14 would be especially sensitive to it, and I think that you  
15 could deal with it that way.

16 Are people interested in how other States  
17 have -- what they've done with AGs? That may be something  
18 that you may or may not be interested in.

19 Q. Our counsel has done extensive research and I  
20 think we know, at least I know or have access to knowing  
21 what most every other State has done on this issue.

22 Let me say what I wanted to say before you made  
23 that last point, which I thought was -- I still disagree  
24 with you vociferously, but let me just say that I have the  
25 greatest respect for you and Mr. Dennis, and I think I have



1 expressed that personally and privately and publicly.

2 A. Yes, you have.

3 Q. Because of the manner and method and the conduct  
4 that you both exhibited in the investigation, the Larsen  
5 investigation, grand jury investigation. However, and I was  
6 going to ask you this because I thought maybe you were  
7 representing the Attorney General, apparently you're not, so  
8 I guess you don't have an answer, but in my view, the  
9 Attorney General has cast a cloud over the conduct of that  
10 investigation by hiring Ed Dennis as his personal attorney.  
11 Now, I haven't explored all of -- this just came out within  
12 the last day or two. I was astounded when I read that, but  
13 it does cast, in my view, a cloud over the conduct of that  
14 investigation. Would you have any comment on that?

15 A. Well, I probably don't, except to say I did hear  
16 about it because I get kind of a weekly press package every  
17 week and that's how I learned about it. I actually learned  
18 about it from a reporter and then read the articles, and I  
19 haven't talked to Ed in some time, so I really don't have  
20 any personal knowledge as to why it was done, and I  
21 obviously don't have any knowledge as to how -- what that  
22 has impacted on our work. I certainly hope -- and thank you  
23 for your kind words, and by the way, not just you,  
24 Representative Piccola, but this committee was  
25 extraordinarily supportive to us in some very, very

1 difficult times, and I will always show and I hope the  
2 Commonwealth fully understands it was this committee which  
3 really were champions during some times when this might not  
4 have occurred. I would be remiss if I didn't say that. But  
5 I really don't know the answer to that question, and it's  
6 tough for me to comment on it, I guess.

7 Q. Well, one of the reasons that I think cast a  
8 cloud, wasn't one of the allegations that you and Mr. Dennis  
9 were looking into with the grand jury was the involvement,  
10 and I think Justice Larsen made some allegations, the  
11 involvement of the Attorney General's brother in making ex  
12 parte contact with Justice Larsen?

13 A. Um-hum. And then -- it was interesting when  
14 that issue came in and we addressed it in I think a  
15 footnote, or the grand jury addressed it in a footnote  
16 report. As soon as that, and I'm not sure this is public,  
17 so you may be getting something new on that old chestnut,  
18 when that case came in, I immediately took control of it,  
19 took it away from -- I worked with Ed Dennis, who was with  
20 Morgan, Lewis, and with two partners associated with Morgan,  
21 Lewis, were wonderful people, and as soon as the allegation  
22 came in, I personally took it not only away from Morgan,  
23 Lewis, with their obvious agreement, but I also took it away  
24 from the special prosecutor whom we had hired and I handled  
25 it separately with the State Troopers who were assigned to

1 us. We had an investigative role and we also worked with  
2 State Troopers, and I just created that and made all the  
3 decisions on that decision, so whatever you see, whatever  
4 happened around the prosecutorial decision were mine and  
5 mine alone, because frankly, I am from out of State and I am  
6 an extraordinarily partisan Democrat back in my own life,  
7 and I thought that in part that's why I was here.

8 Q. But you're a Maine Democrat. That doesn't  
9 count.

10 Well, I'm glad to hear that now, but we didn't  
11 know that at the time.

12 A. That's correct, because we, of course, had to  
13 seal that and it was very sensitive and it wasn't the kind  
14 of thing I wanted to pick out, but it's been a year and I  
15 probably can share that part with you.

16 Q. And I think that speaks volumes for this  
17 legislation for truly independent counsel, because isn't it  
18 true that the Attorney General's staff reviewed all of your  
19 work before it was released publicly, isn't that correct?  
20 Wasn't there a review process from people higher up in the  
21 Attorney General's Office? Not the Attorney General  
22 himself.

23 A. Well, to describe it, that's a good question.  
24 And by the way, the decision I made on that particular case,  
25 the day the allegation came in from Justice Larsen, I ruined

1 two State Troopers' day by telling them to get in the car  
2 and heading off to Allentown? Scranton? I'm sorry, I'm  
3 from Maine, I don't remember. Wherever it was, they drove  
4 all the way across the State the next day to find out  
5 exactly what happened in 48 hours, and I had the State  
6 Troopers do that.

7 I forgot your question. Oh, the review  
8 process.

9 Basically we, and Senator Heckler might be  
10 interested in this, we did hire and use our own support  
11 staff to the maximum extent possible, and we did rely on  
12 some of the members of the criminal division who have  
13 extraordinary talent in the backgrounds and procedures of  
14 the State grand jury and we did come to rely on them,  
15 primarily Bob Graci. But in terms of even the actual typing  
16 and the control of our documents, our computer disks, they  
17 were all done out of the appropriation the legislature made  
18 which was set from the regular budget, so we did keep some  
19 separation.

20 What happened as we got towards the end,  
21 Representative Piccola, is we started, as you can imagine,  
22 any investigation gets more active at the end because you  
23 know so much more and you have to go back and recheck,  
24 things start to have significance that you didn't think had  
25 significance eight months before, and that kind of thing.

1 In terms of the review, we basically made decisions, meaning  
2 Ed Dennis and myself, and we became quite close, I stayed at  
3 his house a lot, and we made these decisions ourselves, and  
4 then kind of presented them to the Chief Deputy Attorney  
5 General, and he -- I guess the answer is technically  
6 correct. There was review, but there was not revision. Is  
7 that fair to say? In other words, we kept them informed as  
8 we got towards the end, but they never attempted to change  
9 anything that we had done or recommended within the report.  
10 I guess, so is that a review? I guess it's a review, but  
11 the word "review" in a certain degree might imply that they  
12 were in there saying, you know, do this and don't do that  
13 and change that paragraph, and those decisions were all our  
14 own.

15 Q. They had the power to do that?

16 A. Oh, they certainly did have the power to do  
17 that, that's correct.

18 Q. And it's anybody's guess what would have  
19 happened had they exercised that power?

20 A. Well, that's right. I mean, you know, one of  
21 the sad things, I wish Pennsylvania was the only State that  
22 had problems with the Supreme Court, but in both Nevada and  
23 Rhode Island, they both had very severe problems. Both  
24 those cases were handled by the Attorney General with the  
25 regular staff, and Connecticut as well. And of course, the

1 Federal government had to take up the Chief Justice of the  
2 New York Court of Appeals, which was a real tragedy.

3           So there's been a lot of litigation around high  
4 court, appellate courts in the last year. It's one of the  
5 reasons, when I started here, I used to get these things in  
6 the mail from the American Judica Society, which I never  
7 paid any attention to, which is a group which was designed  
8 to improve the quality of judges in this country. I lived  
9 in Maine. We thought we had a big problem because we had a  
10 judge down east who was drinking a little bit too much.  
11 This was a big crisis in Maine. One judge drinking too much  
12 was a big crisis. Well, since then I've been on the board of  
13 the American Judica Society. I've become kind a zealot on  
14 the subject. I've been back to your Commonwealth three  
15 times. I've given speeches on my own time and my own nickel  
16 in both Pittsburgh and Philadelphia because I'm frankly  
17 afraid that I'm not sure you've gotten your money's worth  
18 yet of what you gave us, and that bothers me a lot, so I'm  
19 still involved with that kind of issue.

20           Q.     The title that you and Mr. Dennis held was not  
21 independent counsel, was it? What was your title?

22           A.     I think it was special counsel.

23           Q.     Special Counsel, or were you hired as Deputy  
24 Attorneys General or Special Deputy Attorneys General?

25           A.     Boy, am I embarrassed. I think I was a Special

1 Deputy Attorney General, Special Counsel. Lots of times I  
2 called myself a special prosecutor because it sounded good.

3 Q. From my perspective, and as I indicated, I have  
4 the greatest respect for you, and still do, and for Mr.  
5 Dennis. The independence of that investigation from the  
6 Office of Attorney General rested solely on your and his  
7 reputation for honesty and integrity, and independence. And  
8 up until the last couple days, there was never any question  
9 in my mind about that. But the hiring of Mr. Dennis as the  
10 personal attorney of the Attorney General now raises a  
11 question. We have reviewed, this committee has reviewed,  
12 the grand jury materials. I see nothing in there that would  
13 undermine my belief that you and he conducted a fair and  
14 impartial investigation. But I think that this issue of  
15 investigating a member of the high court by the Attorney  
16 General, regardless of who is brought in and regardless of  
17 how highly motivated and regardless of the high reputation  
18 and independence that person has, the potential for the  
19 appearance of conflict exists in our system, and I think  
20 we've had a number of high profile cases very recently that  
21 call for a truly independent counsel. And while I certainly  
22 respect your opinion, I feel very strongly that your  
23 conclusions are in error and I come to a separate and  
24 different conclusion, but I do thank you for coming down and  
25 giving us the benefit of your wisdom.

1           A.     Thank you.  Thank you very much.

2                   CHAIRMAN CALTAGIRONE:  Are there other  
3 questions?

4                   Representative Reber.

5                   REPRESENTATIVE REBER:  I think Representative  
6 Masland can attest to the fact that he and I had a sidebar  
7 about this issue about 15 minutes before you and  
8 Representative Piccola had the dialogue vis-a-vis the  
9 potential of the Dauphin County district attorney handling  
10 an independent type investigation.  I guess I'm dating  
11 myself because I seem to remember prior to the establishment  
12 of the Pennsylvania Commonwealth Court where administrative  
13 agency cases, I'm looking over at Bill here, counsel for the  
14 State Government Commission, that those were handled in  
15 my -- or were handled in Dauphin County, which was the seat  
16 that had original jurisdiction of those kind of cases.  Did  
17 we give a line item budget then for any expenses?

18                   MR. NAST:  I believe there were appropriations  
19 after or concurrent with the event.

20                   REPRESENTATIVE REBER:  That was my  
21 recollection.

22                   MR. NAST:  And there were also grand jury  
23 investigations back in the '30s.  Now, that's before my  
24 time.

25                   REPRESENTATIVE REBER:  That's even before my



1 time.

2 REPRESENTATIVE PICCOLA: Mr. Chairman, we also  
3 got a few extra judges, too.

4 REPRESENTATIVE REBER: That's what I'm  
5 thinking. So I guess so many times up here we attempt to  
6 reinvent so many things and really go together in putting  
7 together monumental packages when maybe we don't need them,  
8 and in looking at the various proposals here, I think the  
9 substantive issues to be addressed by them, in my opinion at  
10 least, could be handled specifically by that district  
11 attorney in Dauphin County with a specific line item  
12 appropriation. We're not talking about a plethora of  
13 individuals that theoretically could be brought before that  
14 particular individual, because as I read both, it's  
15 basically zeroed-in on the Attorney General and his staff.  
16 So certainly less consuming in volume than was the case with  
17 the Dauphin County courts when they were hearing  
18 administrative agency appeals from various things from  
19 Racing Commission matters to everything you can think of  
20 back in the pre-'70 era.

21 BY REPRESENTATIVE REBER: (Of Mr. Tierney).

22 Q. Let me ask you this though. If we would go in  
23 that direction, and if we went in that direction with all  
24 necessary appropriations being made available, do you see  
25 where the intent behind the legislation that Senator Heckler

1 talked about, or for that matter that which has been  
2 proffered by the Chairman, or the Chairmen, do you think the  
3 necessary expertise, the necessary investigation, could be  
4 carried out in the same reasonable fashion, the same  
5 quality, as could be done by so called special prosecutor?

6           And I always have problems with special  
7 prosecutors that seem to be specially appointed in a very  
8 charged political background, as opposed to an elected  
9 district attorney who was elected not on the issue and it  
10 comes before him at a later date, had no knowledge prior to  
11 his dangling his name out there to handle the investigation  
12 and prosecution. It just seems to me to be a much more  
13 sanitized process than even the special prosecutor that in  
14 my opinion from what I've seen over the years in the Federal  
15 era is charged with potential questionableness in the  
16 process. Your comments?

17           A. I do. I think that's a response. First of all,  
18 I'm sure the Dauphin District Attorney could do this,  
19 because the legal work that special prosecutors do isn't  
20 terribly legally complex. What's different is who you're  
21 investigating. It's not, I mean, it's the same thing, if  
22 it's a drunk driving or it's a bribery case, I mean, DAs do  
23 those kinds of cases all the time. The only difference is  
24 you're dealing with somebody who everyone knows. So I think  
25 that issue--

1           Q.     But for that matter, if the Attorney General,  
2 whoever he might be, committed a homicide in Dauphin County,  
3 he's a high profile individual, he's going to be  
4 investigated by the district attorney of Dauphin County,  
5 correct?

6           A.     Absolutely.

7           Q.     And what more than a first degree charge can be  
8 any more complicating in my mind, or being high profile?

9           A.     That's right. And they do -- in other words,  
10 that's what they do all the time.

11                     Now, it's interesting, one of the things I found  
12 unique and really had something to do with how I came out on  
13 this issue was that your district attorneys are mentioned in  
14 your Constitution. In other words, all the voters of this  
15 State, after your convention, said, we want our DAs in the  
16 Constitution -- it's not true in my State. The DAs -- this  
17 is a great irony. I was not elected, the DAs were. I  
18 supervised them. They were statutorily created. I could  
19 have actually pulled them out of office, which I was tempted  
20 to do upon occasion. But the point is they're separate.  
21 They're constitutional. They see all kinds of criminal  
22 activities. They're less likely to take a public official  
23 and frankly pillory that person just because they read it in  
24 the newspaper. Because they see lots of cases and they're  
25 accountable and they can separate out the important from the

1 unimportant.

2           And the problem with appearance, just let me  
3 address the other part, you can't get rid of this appearance  
4 of conflict because whoever's ox is going to be gored is  
5 going to scream that there's an appearance. We were talking  
6 here about the Federal system. I think the Federal system is  
7 done well. I think Lawrence Walsh did a pretty good job.  
8 Don't say that to President Bush, don't say that to  
9 President Reagan. Minority Leader Dole has said -- has  
10 ranted and raved about how the Federal system does not work,  
11 and it's a very close fight in the Congress on this issue.

12           Likewise, under this proposal, in one sense it's  
13 sanitized because you have a judicial panel, but the Federal  
14 model has Article III judges. They're appointed for life.  
15 Your judges are elected officials. They're going to be  
16 selected by random to make this decision. Certainly,  
17 someone who's going to be subject to that is going to stand  
18 up and say, I'm the wrong party of the judge who happened to  
19 be named at random, and on and on. The Office of General  
20 Counsel, appointed by the Governor. The Governor is elected  
21 by the people.

22           You can still -- in other words, you can't get  
23 yourself out of this appearance thing if someone's got a big  
24 gun -- I talked to a number of Watergate prosecutors during  
25 our case. I traveled around the country on other things and

1 if there was a Watergate prosecutor in the area, I sat down,  
2 partially because of my historical interest, but also  
3 because, I said, what was it like? And they said, let me  
4 tell you something, it's just like any other case to the  
5 degree when your facts are strong, they attack the process;  
6 and when your facts are weak, they'll attack you. The  
7 facts.

8           So what happens in this situation is if someone  
9 feels a special prosecutor will come down on them, they're  
10 going to attack the process. That's going to be the  
11 easiest. So I would rather have an elected official out  
12 there somewhere, and I think the hybrid situation which we  
13 used here, which is being used in Ohio, makes sense. And in  
14 most States, AGs are being prosecuted by the equivalent of  
15 your Dauphin County DA. The DA in the State capital is the  
16 one who prosecutes State Attorney Generals and their staff,  
17 and some Federal cases. There are also some Federal cases  
18 also.

19           I'm sorry, you give an old politician like me a  
20 chance to give a speech, you know, putting a microphone in  
21 front of me is like putting a drink in front of an  
22 alcoholic. I'm just going to go. So forgive me if I've  
23 taken more of my time than would otherwise be allowed.

24           Q.     Well, that never happened to me.

25           A.     Thank you.

1                   CHAIRMAN CALTAGIRONE: Representative Masland.

2                   REPRESENTATIVE MASLAND: Thank you, Mr.

3 Chairman.

4 BY REPRESENTATIVE MASLAND: (Of Mr. Tierney)

5           Q.       Just to follow up on some things that Chairman  
6 Piccola mentioned, as opposed to Chairman Reber, and I just  
7 wanted to follow up on these things, and I don't want, I  
8 know you just read a couple of articles in the newspaper,  
9 but I think it is relevant dealing with conflicts of  
10 interest, and that's something that we're talking about  
11 today. I don't want to ask you to comment on Attorney  
12 Dennis' employment by the Attorney General's Office, and I'm  
13 not even going to ask you to say whether you would have  
14 accepted employment under the same circumstances that Mr.  
15 Dennis accepted employment by the Attorney General. It's my  
16 understanding from the papers that he's hired to represent  
17 the Attorney General but he is being paid by the Attorney  
18 General's Office. All I'll say is that if I had previously  
19 represented or previously worked for the Attorney General's  
20 Office as a special prosecutor, as you did during the  
21 investigation of Justice Larsen, and then I was asked to  
22 represent the Attorney General personally on a matter  
23 relating to other conflicts and other problems, that would  
24 have raised a red flag immediately in my mind, did raise a  
25 red flag immediately in my mind, and I think I'd have a

1 problem pursuing that. Now, I haven't fully looked at all  
2 the cannons of ethics, but I think that that is a legitimate  
3 question and something that we need to think about in this  
4 overall context.

5           So again, I'm not going to put you on the spot  
6 to comment on your co-special prosecutor, but in my mind  
7 that's an easy call. Now, perhaps maybe I'm a little too  
8 cold-footed about issues such as that, and when there's any  
9 perception of conflict I may be too ready to step aside and  
10 to step back, but I think that that is a legitimate concern,  
11 and I think it's a legitimate concern, as Representative  
12 Piccola said, in light of the Larsen investigation and the  
13 fact that a lot of the weight of that investigation, the  
14 importance of that investigation, rested on the appearance  
15 of you and Mr. Dennis as separate special prosecutors. So I  
16 think that's a legitimate concern.

17           The only other thing I would mention is I agree  
18 with you and as a former district attorney, when the defense  
19 cannot fight the facts, they point the finger at the victim,  
20 and if they can't point the finger at the victim, they point  
21 the finger at the police, or they point the finger at the  
22 process, and I think that that is also a legitimate  
23 concern. Thank you.

24           CHAIRMAN CALTAGIRONE: Senator Heckler.

25           SENATOR HECKLER: Mr. Chairman, thank you very

1 much for not only putting up with my testimony but inviting  
2 me to participate. It is wonderful to be back, and I'm  
3 trying to spread a little bit of the bipartisan spirit of  
4 this committee in the other Chamber, with mixed results.

5 MR. TIERNEY: And Senator, can I just interrupt  
6 something? You might find this of interest. In Maine, all  
7 of our committees are joint committees. We have three  
8 Senators and nine members of the House on every committee.  
9 It cuts down on the hearings. And it also creates a lot of  
10 interesting camaraderie back and forth, and so for whatever,  
11 I'm not surprised to be in a House committee being asked a  
12 question by a Senator. It's routine.

13 BY SENATOR HECKLER: (Of Mr. Tierney)

14 Q. And it really should be more routine.

15 One of the, and I don't want to take up too much  
16 time, but there is a great consciousness in the Senate that  
17 we're not the House at all, and as a recent transplant,  
18 somebody who enjoyed my service here, I find that a little  
19 disconcerting.

20 A. Well, I love the House because I like  
21 representing the people, so that's why I always enjoyed  
22 serving the House as opposed to my State Senate.

23 Q. I see. Well, I'm not sure, I thought I was  
24 supposed to represent people--

25 A. I'm teasing you, Senator. I turned down the



1 Senate seat this time. I'm having too much fun doing what  
2 I'm doing.

3 Q. The one issue, and looking back on my years  
4 doing some of the things that you do for Attorneys General  
5 around the country for our 67 district attorneys, I am a  
6 little bit troubled by what I see as maybe sort of a  
7 cavalier view or approach that you're taking to some of the  
8 situations. I mean, you're perfectly correct that elected  
9 district attorneys would rather not have anybody being able  
10 to raise any allegation of conflict, and of course every  
11 once in a while if there's a way to do it, maybe they'll  
12 want to bail out on the tough case and say, gee, I want to  
13 run this case for sure, let's see what the AG does.

14 But take for example the Dauphin County case  
15 that we've been talking about. It is my understanding, and  
16 I trust somebody will correct me if I'm wrong, that the  
17 gentleman, Mr. Cherry, who is now the district attorney of  
18 Dauphin County, actually worked as a Deputy Attorney General  
19 and that the Attorney General was the keynote speaker at his  
20 swearing-in. I suppose you could, and that's all fine and  
21 that's to everybody's credit. Now a State agency dumps  
22 allegations in his lap, and again, we're not talking about  
23 shoplifting or armed robbery, we're talking about a fairly  
24 arcane body of law that has some criminal sanctions which  
25 are rarely imposed. So you've got just a wonderful

1 opportunity for people to make, you know, to investigate, to  
2 make discretionary judgments and have those discretionary  
3 judgments second-guessed all over the place.

4 I certainly feel if I were in his shoes I would  
5 not, you know, sure, maybe I could suck it up and forget  
6 that I knew Ernie Preate and just forge ahead and either  
7 look the thing over and say, no criminal prosecution, or by  
8 gosh, take it to the wall. But either way the public, some  
9 segment of the public, either those who love or hate Ernie  
10 Preate, are going to be proclaiming from the rooftops that I  
11 went in the bag or that I, you know, I'm doing this for  
12 political reasons, whatever. And I grew up in the '60s,  
13 you're a little bit ahead of me I think, but all this, we  
14 just buried Richard Nixon and so much of this comes out of  
15 Watergate, and that, right or wrong, all of the events up to  
16 and including the pardon destroyed or gave people an excuse  
17 to lose faith in the broader criminal justice system for a  
18 generation.

19 Don't we, if we're going to err, shouldn't we  
20 err on the side of having a mechanism that enables us to be  
21 sanitary in this respect?

22 A. That, I think, is -- along with Representative  
23 Piccola is not a surprise because you co-sponsored the  
24 bill -- is I think the most forceful argument in favor of  
25 your legislation, regardless of all the details on how many

1 judges should be on the panel and all that kind of stuff. I  
2 think that that is the most forceful argument, and as I  
3 said, there are times and there are places and there are  
4 States and there are jurisdictions where I would think that  
5 that would be appropriate.

6 I think that the counterveiling argument against  
7 it, and this is where I kind of come down on the opposite  
8 side is what I said earlier, is that this State is so  
9 committed to the electoral process for all of these  
10 positions that I think it sends the wrong message you take  
11 those big cases away from those people and potentially  
12 subject the people to a different standard of justice. Not  
13 just a special prosecutor but special justice that you get  
14 because you're a public official and you've been held to  
15 some different kind of standard not with the electorate,  
16 where you ought to be, but with the criminal law, which is  
17 supposed to treat all of us the same.

18 And so that kind of issue, I'd rather have that  
19 kind of hard decision in the hands of an elected official in  
20 this State that has that jurisdiction. And I think if you  
21 noticed I said earlier, I kind of slipped it in, I'm not  
22 sure I like the idea of electing all these people that you  
23 elect here. I come from a different world and a different  
24 culture, and I had long discussions with my DAs that maybe  
25 they should be appointed, frankly, by me, and they said,

1 well, it was interesting, they said, well, as long as you  
2 would be appointing, that's fine, but what about the next  
3 guy? And so we would have these not rancorous discussions  
4 but difficult discussions because there aren't any easy  
5 answers. If there would be an easy answer, we wouldn't, I  
6 guess, be here wrestling with this thing. This is an area  
7 where people can disagree because it's a tough issue.

8           So I think you've made a wonderfully powerful  
9 statement, Senator. I just, when I look at it, with all due  
10 respect, I could flip down on the other side and would  
11 rather have that in this State in the hands of elected  
12 officials.

13           Q. Well, I thank you. I hope that you'll be able,  
14 maybe even by the next time you visit we'll be electing  
15 fewer particularly judicial officials, but that remains to  
16 be seen.

17           A. That's going to rip open the sword, but I've  
18 tried so hard to stay away from that issue, but I think you  
19 all know what I feel about that.

20           If I'm done, I'd like to, if I could, thank you  
21 once again for letting me be here with all of you, and to  
22 tell you that I'm actually this year I'm off on a -- maybe  
23 you're interested, maybe you're not -- my newest assignment  
24 could actually strike deep into the hearts of every American  
25 in a way that makes Justice Larsen look like nothing. My

1 newest client is the Major League Baseball Players  
2 Association, where we are working -- don't ask me for  
3 tickets, the owners have the tickets -- I represent the  
4 players, those poor starving baseball players out there who  
5 are trying to get through the day, and we really are, I am  
6 working very hard trying to avoid a baseball strike this  
7 year, so wish me luck and if I succeed, you'll never hear  
8 from me again, and if I fail, you'll probably watch me on  
9 Oprah and Donahue.

10 Thank you very much.

11 REPRESENTATIVE PICCOLA: Phillies are in last  
12 place. We don't care.

13 We hope we won't see you anyway.

14 CHAIRMAN CALTAGIRONE: And for the record, I  
15 just want to add the statement of the Office of the Attorney  
16 General was submitted and is being submitted for the  
17 official record, and that should be noted.

18 (See Appendix for text of prepared statement.)

19 CHAIRMAN CALTAGIRONE: We'll take 5.

20 (Whereupon, a brief recess was taken.)

21 CHAIRMAN CALTAGIRONE: I apologize for  
22 delaying. We'd like to next hear from Sandra Jordan, the  
23 Dean for Academic Affairs, University of Pittsburgh School  
24 of Law, Associate Independent Counsel for the Iran/Contra in  
25 1988 to '91, and the Assistant U.S. Attorney in the Western

1 District of Pennsylvania, 1979 to 1988.

2 MS. JORDAN: Good morning, almost good  
3 afternoon. It is a privilege to be in front of this  
4 legislative body and this Judiciary Committee today to  
5 testify about the proposed independent counsel legislation.

6 I believe one of the reasons that I was asked to  
7 appear today is because in 1991 I wrote an article entitled,  
8 "Classified Information and Conflicts: Balancing the Scales  
9 of Justice After Iran/Contra." This article was published  
10 in the Columbia Law Review, and it stems from my experiences  
11 during 1988 through 1991 when I served as an Associate  
12 Independent Counsel with Lawrence Walsh on the Iran/Contra  
13 prosecution team.

14 From 1979 to 1988, I served as an Assistant  
15 United States Attorney for the Western District of  
16 Pennsylvania, and I specialized in white collar crime  
17 investigations and prosecutions. These experiences gave me  
18 working knowledge of the prosecutive priorities of white  
19 collar crime cases. Currently, I serve as the Associate  
20 Dean for Academic Affairs and professor of law at the  
21 University of Pittsburgh School of Law, where I've been  
22 since 1989. My teaching areas include criminal law,  
23 criminal pretrial advocacy, evidence, and white collar  
24 crimes.

25 During the course of a criminal investigation

1 and prosecution, information may come to the attention of  
2 investigators that implicates members of the executive  
3 branch of government. Congress was well aware of the  
4 conflicts of interest that arise in situations where the  
5 executive was called upon to investigate its own  
6 high-ranking officials. Our country's experiences with  
7 Watergate have convinced most Americans of the need to have  
8 independent investigative and prosecutive oversight in  
9 matters where a conflict of interest arises with the  
10 executive branch of government.

11           The executive branch of government is charged  
12 with the enforcement of the criminal laws. If a member of  
13 the executive branch commits violations of the law, there  
14 exists a conflict regarding who should investigate this  
15 allegation and who should prosecute any resulting criminal  
16 case.

17           The appearance of a conflict of interest exists  
18 because the chief executive appoints the chief law  
19 enforcement official. Where the relationship is a close  
20 one, human nature dictates that one cannot be objective and  
21 impartial where the allegation is against an employer or  
22 close professional colleague. Even in simple matters such  
23 as violations of the law that have no relationship to the  
24 official duties of an executive branch member, an  
25 independent counsel investigation may be warranted because

1 of the appearance of a conflict of interest. Often this  
2 type of criminal wrongdoing falls under the category  
3 commonly called white collar crime, but it need not be so  
4 limited. The question is simple: In situations where  
5 members of the executive branch are subjects of an  
6 investigation, should that same branch continue to conduct  
7 the investigation?

8           The executive branch is charged with the power  
9 to decide whether to prosecute a case, to decline a  
10 prosecution and/or to dismiss a case that has already  
11 begun. The executive branch retains broad discretion in  
12 deciding who to prosecute and what charges to bring.  
13 Declination decisions are not made public, since the  
14 defendant is never brought into the criminal justice system  
15 by being charged with an offense. Cases that are dismissed  
16 after the charges are filed likewise will usually not be  
17 subject to review because the defendant achieves the desired  
18 result of nonprosecution.

19           Prosecutive decisions are not made in a vacuum.  
20 They are the result of discretion, professional judgment,  
21 and several other competing interests. For example, when a  
22 prosecutor decides to decline a case, this matter is not  
23 subject to judicial or legislative review. Perhaps more  
24 significantly, where there has been an allegation of  
25 criminal wrongdoing resulting in criminal charges, the



1 prosecutor can decide, for a variety of reasons, to dismiss  
2 a case. The reasons can range from insufficient evidence,  
3 credibility problems with witnesses, immunity and plea  
4 negotiations.

5           Prosecutorial discretion is an extraordinary  
6 power, to be exercised with the greatest degree of  
7 professionalism and ethical behavior. For this reason, one  
8 cannot be both a close associate or colleague of the person  
9 being investigated and an independent thinking prosecutor  
10 upholding the oath of office. The appearance of a conflict  
11 of interest overrides all other considerations.

12           In such situations, an independent counsel  
13 should be appointed because there is appearance of conflict,  
14 if not an actual conflict of interest. An independent  
15 counsel is warranted even in situations where there is the  
16 appearance of a conflict. Often the public perception that  
17 the system is fair is as important as the fairness of the  
18 system itself.

19           For example, if a high-ranking government  
20 official, a member of the executive branch, becomes a  
21 suspect during the course of an investigation, logic  
22 dictates that the critical prosecutorial decisions should  
23 not be made by a prosecutor who owes his or her allegiance  
24 to the same executive that the high-ranking official owes  
25 his or her loyalty to.

1           In 1978, Congress established a procedure for  
2 the appointment of a temporary special prosecutor to  
3 investigate wrongdoing by high level government officials  
4 where there was a conflict of interest. A conflict of  
5 interest or the appearance thereof in investigating close  
6 personal or political associates of the President or the  
7 Attorney General led Congress to enact provisions for the  
8 temporary appointment of a special prosecutor who would  
9 handle the investigation and prosecution independently of  
10 the Justice Department. It is simply too much to ask any  
11 individual to investigate the superiors, because one who  
12 holds office only during the pleasure of another cannot be  
13 depended upon to maintain an attitude of independence  
14 against the latter as well.

15           Under this post-Watergate legislation, the  
16 Attorney General can petition a three-judge panel to appoint  
17 an independent counsel to investigate allegations of  
18 criminal wrongdoing at the highest levels of government, and  
19 as we've already heard, this law was upheld, it was  
20 constitutional in Morrison v. Olsen.

21           The independent counsel stands in the shoes of  
22 the prosecutor and becomes the representative of the  
23 government for all prosecutions within his or her  
24 jurisdiction. An independent counsel must be truly  
25 independent and able to operate with clear authority to

1 conduct an investigation without interference, supervision,  
2 or control by the executive. An independent counsel must be  
3 able to exercise all investigatory and prosecutive functions  
4 and powers of the Department of Justice. Both in appearance  
5 and reality, the independent counsel must be free from  
6 control or supervision of the Justice Department.

7           The basic purpose of an independent counsel law  
8 is to promote public confidence in the impartial  
9 investigation of the alleged wrongdoings of government  
10 officials. Conflicts of interest are inherent in our system  
11 of government, and the public confidence is served only when  
12 investigations having the appearance of a conflict of  
13 interest are conducted by a person totally outside of the  
14 control of the executive branch.

15           The U.S. Supreme Court has upheld the Federal  
16 law, as I mentioned, in Morrison v. Olsen. The court  
17 reinforced the importance of the system of checks and  
18 balances established in the Constitution.

19           Under the law, the Attorney General must apply  
20 for the appointment of an independent counsel, after  
21 receiving a request to do so. Members of the legislative  
22 bodies may request in writing that the Attorney General  
23 apply for the appointment of an independent counsel. The  
24 Attorney General has the power to apply for the appointment,  
25 and a special division of the court has the authority to

1 make the appointment.

2           Thus, the Federal law contemplates that the  
3 executive must make the decision in the first instance that  
4 an independent counsel is warranted. This decision can  
5 result from a referral from members of the legislative  
6 branch or members of the judiciary or the public.  
7 Regardless of the source of the request, the Attorney  
8 General is asked to consider the appointment of an  
9 independent counsel and must make a decision within 90 days  
10 from receiving a request to do so. Within 90 days, the  
11 Attorney General conducts an investigation to determine  
12 whether there is sufficient evidence to warrant  
13 investigation of a person covered by the act. If that  
14 determination is supported by evidence, the Attorney General  
15 shall apply for the appointment of an independent counsel.  
16 If, on the other hand, there is insufficient support for  
17 such an appointment, the Attorney General must notify the  
18 special division of the court that no further investigation  
19 is warranted.

20           Once prosecutorial power is removed to an  
21 independent counsel, any decisionmaking by the executive  
22 branch in connection with the case is inherently fraught  
23 with conflict. Human experience suggests that the first  
24 reaction to intense scrutiny is self-defense, and the  
25 executive branch therefore may attempt to thwart the

1 investigation or prosecution. For this reason, an  
2 independent counsel must be truly independent and not  
3 subject to the control or whims of an Attorney General.  
4 When criminal wrongdoing is alleged within the highest  
5 levels of government, the lack of an independent prosecutive  
6 decision creates the potential for serious abuse and does  
7 not promote the appearance of fairness within the criminal  
8 justice system.

9           Now, as you're all aware, this particular  
10 legislation had a sunset provision and is currently being  
11 debated so that it will probably be re-enacted shortly.

12           My experiences as both a prosecutor and a law  
13 professor have caused me to believe that, regrettably, there  
14 are instances in our society that warrant the need for an  
15 independent counsel. I defer to the collective wisdom of  
16 this body to determine the specific parameters and  
17 procedures for determining if and when an independent  
18 counsel law should be passed and the implementing  
19 legislation.

20           Thank you for the invitation to appear here  
21 today before you.

22           CHAIRMAN CALTAGIRONE: Thank you.

23           Questions from the panel?

24           Chairman Piccola.

25           REPRESENTATIVE PICCOLA: Chairman, I would just

1 like to thank Professor Jordan for making herself available  
2 for us today and giving us her testimony and also ask that  
3 as this committee moves forward, hopefully moves forward in  
4 the process of refining and further developing this  
5 legislation, if she would be available perhaps by telephone  
6 or fax to provide us with some additional advice as we make  
7 some decisions.

8 MS. JORDAN: I would be pleased to.

9 REPRESENTATIVE PICCOLA: Thank you.

10 BY REPRESENTATIVE PICCOLA: (Of Ms. Jordan).

11 Q. I would also like to ask whether you might have  
12 an opinion, and the issue came up with Mr. Tierney's  
13 testimony, you will recall that Mr. Tierney and Mr. Dennis  
14 were appointed as special prosecutors by the Attorney  
15 General because of the perceived or perhaps actual conflict  
16 of interest that the Attorney General himself had with  
17 Justice Larsen. And they were, of course, appointed to  
18 supervise the activity of the grand jury investigating  
19 Justice Larsen's allegations.

20 What, if any, opinion or view might you have  
21 relative to either the perception or actual independence of  
22 those gentlemen, given the knowledge now that Mr. Dennis  
23 has, for at least a period of time, been hired by the  
24 Attorney General to represent him personally? Does that, in  
25 your view, cast any question over the true independence of

1 Mr. Dennis at the time that the Larsen investigation was  
2 going on?

3 A. Well, I'm not clear on all of the details about  
4 how that representation arose and what the nature of it is,  
5 in fact, having just learned about this, as you have, in the  
6 last few days. But I certainly do know a bit about the  
7 rules of professional conduct, and in speaking in a general  
8 fashion today, there are rules that relate specifically to  
9 conflicts of interest and appearances thereon, so I would  
10 have to refer to that, to those rules and to the facts of  
11 the allegation, I guess, to determine whether or not there  
12 was an actual conflict.

13 Q. Okay.

14 A. But certainly it raises a question, and without  
15 knowing more, I would not have an opinion on whether or not  
16 there is an actual conflict of interest.

17 Q. I thank you. I, too, believe that it does raise  
18 a serious question, and I think we'll have to do some  
19 research on the facts and on the code of conduct.

20 However, as you are aware, the Supreme Court of  
21 Pennsylvania has ordered all of us lawyers to continue our  
22 legal education by taking a certain number of ethics  
23 courses, hours of ethics courses each year, and as I  
24 proceeded over the last 2 years to take mine, the bottom  
25 line was, when in doubt, don't do it. That's the rule that

1 they give us.

2 A. It's the rule of caution.

3 Q. The rule of caution.

4 A. Yes.

5 Q. And I think the rule of caution at least was  
6 violated in that case, but that's obviously my opinion.

7 CHAIRMAN CALTAGIRONE: Counsel Andring.

8 MR. ANDRING: Yes, I just have one question.

9 BY MR. ANDRING: (Of Ms. Jordan)

10 Q. I see that you were involved with the  
11 Iran/Contra investigation for a considerable period of  
12 time. Based on that, do you have any particular thoughts  
13 about an appropriate mechanism or procedure for bringing  
14 these types of independent prosecutions to an appropriate,  
15 speedy conclusion?

16 A. I do have some thoughts on that because I  
17 understand the public's reaction to the perception that  
18 Prosecutor Walsh had just run amuck and was doing things  
19 well beyond the scope of his charge, and in addition, that  
20 he was spending money with no regard to accountability.  
21 Both of those general allegations against him I would  
22 disagree with, having been inside, so to speak. I think his  
23 investigation was different from any of the other kinds of  
24 independent counsel investigations that had come before his  
25 appointment.



1           Specifically, his investigation was one of the  
2 most far-reaching of any of the independent counsels who  
3 have been appointed since then or before them. His  
4 investigation -- so taking that as the first step, you're  
5 talking about an investigation of criminal wrongdoing that  
6 was not limited to one or two people but transcended a  
7 number of people within the executive branch and elsewhere.

8           In addition, the allegations raised  
9 international implications, which necessitated a great deal  
10 of investigation beyond our borders. The usual independent  
11 counsel prosecution doesn't have that as a focus.

12           And I think probably most significantly,  
13 although I could be wrong on this, the investigation  
14 involved classified information. And because of the nature  
15 of the evidence that was perused and studied, we were  
16 required to maintain, dispose of, and keep all of that  
17 evidence in accordance with law. Very unusual. First case  
18 I had ever been involved with -- well, the first case I had  
19 ever been involved with involving that extent of evidence,  
20 classified evidence. So you're talking about a situation  
21 where many of the costs associated with his job were costs  
22 clearly beyond his control. He had no choice in how to  
23 handle that evidence. And we're talking about a great deal  
24 of evidence. It was voluminous, and it had to be treated in  
25 accordance with law, and there were tremendous costs

1 associated with that.

2           So I hesitate to think that you can, as you  
3 consider whether or not you should have a provision for the  
4 conclusion of an independent counsel's jurisdiction, that  
5 is, I've heard that the 2 years or the \$2 million figure  
6 thrown around. I think there is some merit in certainly  
7 having the accountability, that's very important, and  
8 periodic review. But some of the charges that were leveled  
9 against Judge Walsh included that he should just stop at a  
10 certain point, and I know as a prosecutor, and I certainly  
11 know as a person who was on his staff, you just can't do  
12 that when you're in the middle of an investigation. You  
13 have to go where the evidence leads you.

14           And so I would caution this body to be very  
15 careful in saying that an independent counsel investigation,  
16 if you choose to pass such a law, comes to an end after a  
17 certain point.

18           Does that respond to the issue you raised?

19           Q.     Yes.

20           CHAIRMAN CALTAGIRONE: Thank you very much for  
21 your testimony.

22           I'm sorry, Karen. Counsel Dalton

23 BY MS. DALTON: (Of Ms. Jordan)

24           Q.     Hi.

25           A.     Hello.

1           Q.     I just have a couple questions. You just stated  
2 that the avoidance of an appearance of conflict of interest  
3 is just as important as the avoidance of an actual conflict,  
4 and the public's perception of the fairness of the system is  
5 just as important as the fairness of the system itself.  
6 These are reasons why, in your experience, you believe that  
7 Federal independent counsel law is a good thing. Do you  
8 think that these considerations are just as important on the  
9 State level?

10           A.     Yes, I do. Yes, I do. And if I could elaborate  
11 for just a minute, when you talk about the appearance of a  
12 conflict than an actual conflict, actual conflict cases are  
13 easy, I think. When you have the appearance, you have  
14 someone who believes in his or her heart that they can act  
15 objectively and fairly. And it may be that that person can  
16 act objectively and fairly. But the public has difficulty  
17 understanding that that fairness can, in fact, come about  
18 when the person has the close relationship or owes a debt to  
19 the target subject or whatever, potential defendant.

20           Q.     And just one further question. If indeed this  
21 committee and the legislature decides to adopt an  
22 independent counsel statute, and as Senator Heckler reminded  
23 us, there are now three bills currently before this body,  
24 would you recommend that it take the form of the Federal  
25 statute? Of course, tailored to the unique experience of

1 Pennsylvania?

2           A.     I think that law is a good law. I think, and  
3 I'd have to give it some further study, but that's certainly  
4 a good starting point, tailored to the needs of this  
5 Commonwealth. So yes, I would answer that that would be a  
6 good starting point. But there may be things that this body  
7 would like to debate that have proved to be ineffective on  
8 the Federal level, and right now I don't know that I can  
9 point to any specifics, but certainly we have the benefit of  
10 learning through the years what works and what didn't work,  
11 and I would hope that this body, if it chooses to use that  
12 as a basis, takes those things into account as well.

13           Q.     Thank you.

14                   MS. DALTON: Thank you, Mr. Chairman.

15                   CHAIRMAN CALTAGIRONE: Thank you again.

16 Appreciate your testimony.

17                   At this time, I'd like to enter for the record  
18 testimony submitted by Common Cause of Pennsylvania, and  
19 also a statement from Congressman Gekas before the House  
20 Judiciary Committee of the Commonwealth of Pennsylvania, and  
21 I would like to have that entered then for the official  
22 record.

23                   (See Appendix for text of prepared statements.)

24                   CHAIRMAN CALTAGIRONE: At this time we'll hear  
25 from Attorney Joseph C. Kohn.

1           MR. KOHN: Good afternoon, Mr. Chairman, Mr.  
2 Chairman and members of the committee, Counsel. I  
3 appreciate the opportunity to be with this committee today  
4 and present testimony in support of legislation creating a  
5 special prosecutor in Pennsylvania.

6           For the record, my name is Joseph Kohn. Two  
7 years ago I had the privilege of being the nominee of my  
8 political party for the Office of Attorney General, which is  
9 an office I've given considerable thought and study to in  
10 terms of its functions and duty and role in the  
11 Commonwealth. I have been a member of the Bar of  
12 Pennsylvania for 12 years, and using Senator Heckler's  
13 rubric, I'm not a hermit.

14           These hearings--

15           REPRESENTATIVE PICCOLA: Neither is he.

16           MR. KOHN: --do come about 1 1/2 years after I  
17 stood outside of this building and called for legislation  
18 creating the Office of a Special Prosecutor to review the  
19 conduct of the incumbent Attorney General. That proposal  
20 was made to plug a loophole in the Commonwealth Attorneys  
21 Act. As a candidate for public office at that time, my call  
22 for that legislation may have been viewed by some as simply  
23 a political campaign tactic, but a year later this matter  
24 has now reached this committee in the form of the proposals  
25 which are before you. And I think, and I mean this

1 sincerely, it is a sad day for the State of Pennsylvania  
2 that the Office of Attorney General is embroiled in scandal  
3 and in controversy, and that the consideration of what I  
4 think is technical corrective legislation is debated in  
5 those confines. But I do hope that it will not take two  
6 more years for this legislation to become law.

7 I believe the notion of an independent special  
8 prosecutor was good legislation in 1992 when I first  
9 suggested it, and if we had been able to swing a few more  
10 votes when they stopped counting when they got to the paper  
11 ballots and if I were the Attorney General today, I would be  
12 supporting this legislation.

13 The fact of the potential for conflicts of  
14 interest in criminal violations arising in the context of  
15 political campaigns is with us. If we create a special  
16 prosecutor but fail to properly deal with the political  
17 environment in which this office exists, we will create a  
18 law that will leave us several loopholes and one which an  
19 unscrupulous Attorney General in the future could drive a  
20 truck through.

21 I applaud the concept of the special  
22 prosecutor. I do have a few specific suggestions that the  
23 form of that legislation could take. Perhaps, let me offer  
24 a few responses briefly to the testimony that I heard from  
25 Mr. Tierney today. And he has left here, so I don't have

1 the opportunity to thank him for the plug he gave for me,  
2 but I certainly have heard a lot about him, his reputation  
3 preceded him. It's good to see that there are actually  
4 Democratic Attorneys General somewhere in this land, and  
5 he's obviously a good lawyer. Sometimes you can tell the  
6 talent of a lawyer when that lawyer has a difficult case to  
7 argue. The better lawyer looks better. I think Mr. Tierney  
8 was in that situation today. He had a difficult argument  
9 and he did the best he could with it because he is a good  
10 lawyer.

11           And he had this suggestion that somehow it would  
12 be improper to reach for people outside of government to  
13 handle the more difficult or more challenging cases. The  
14 last time I checked, Mr. Tierney and Mr. Dennis were outside  
15 of the government of Pennsylvania, but they didn't object  
16 when they were called in in a difficult and important case.

17           The notion that the various county district  
18 attorneys across this State do an excellent job, are  
19 adequate to handle these kinds of cases, if that were true,  
20 I wonder why the taxpayers of Pennsylvania paid Mr. Tierney  
21 and Mr. Dennis over a million dollars to handle their  
22 investigation.

23           The notion that the elected district attorney  
24 should not be permitted, under the process of this  
25 legislation, to walk away from the big cases, and I think

1 that argument really goes to what Mr. Tierney outlined at  
2 the beginning is one of the needs for special prosecutor  
3 legislation. That is, where there are resource concerns for  
4 the existing prosecutorial offices.

5           The issues that are involved in potential  
6 criminal conduct or corruption in the Office of Attorney  
7 General do have statewide impact. Witnesses would be across  
8 the State. Our district attorneys have a full plate. I'm  
9 sure the Dauphin County assistant DAs have their hands full  
10 with the armed robberies and the murders and the rapes and  
11 these sort of important matters that they have to deal with,  
12 and to spread their resources around the State interviewing  
13 witnesses in Lackawanna County, in Allegheny County, in  
14 Philadelphia County, in connection with these potentially  
15 complicated financial issues, heavy paper cases, which a  
16 political corruption case can be, is simply an unwarranted  
17 drain on the offices of the district attorneys, not because  
18 they'd be afraid to handle or are incapable of handling a  
19 big case.

20           I think the first specific suggestion I would  
21 make is that there be an automatic referral from the State  
22 Board of Elections to the independent special prosecutor in  
23 matters involving violations of the Election Code by the  
24 Office of Attorney General or any campaign committees  
25 associated with the Office of Attorney General. That



1 office, the Board of Elections, first flags the potential  
2 violations of law.

3           In this State we had a situation where the  
4 Election Board noted over \$100,000-some-odd of previously  
5 unreported campaign money by the Attorney General's  
6 committees. There was, I believe, approximately \$100,000 of  
7 unreported expenditures in the 1982 race, including large  
8 chunks of money to the media consultants who buy the media  
9 time, and the State board was simply perplexed. Who would  
10 they refer that to? In the normal course, any other  
11 candidate they would have immediately referred it to the  
12 Attorney General, which they could not do here. So I think  
13 that any law should take care of that more technical item.

14           Second, the special prosecutor law should not be  
15 limited to investigating incumbent Attorneys General. That  
16 is, activities which have occurred during the incumbency. I  
17 believe it's Section 302(C)(4), as I read the bill that I  
18 believe that Senator Heckler is the sponsor of. I think we  
19 must recognize the plain fact that if there are  
20 misrepresentations, illegal conduct for one who is seeking  
21 the Office of Attorney General, who subsequently becomes the  
22 Attorney General, that this prosecutor should have the  
23 authority to investigate that conduct as well.

24           Third, I believe that a special prosecutor law  
25 would be an appropriate place to look into the issue and to

1 address the issue of whether or not the Attorney General can  
2 use the public treasury to pay for the defense of matters  
3 coming to the attention or prosecutions initiated by the  
4 special prosecutor. It's my understanding from newspaper  
5 reports that Attorney General Preate has recently engaged a  
6 private attorney, as has been discussed here this morning,  
7 to represent him in connection with the grand jury  
8 investigation, and it's also my understanding that the  
9 taxpayers of Pennsylvania will be footing the bill for that  
10 representation. Now, as one of those taxpayers, it is  
11 simply ironic to me that some of my tax money is going to be  
12 spent by Mr. Preate to defend him against charges stemming  
13 in part from an election which I was on the other side of.

14               Now, this kind of thing I think can be easily  
15 addressed. Obviously, everyone has the right to  
16 representation of their choice, but if there are specific  
17 charges that involve the political campaign committee, there  
18 could be a specific provision that those not be paid out of  
19 the public treasury. Those don't relate to the duty of  
20 someone acting as the Attorney General, they relate to the  
21 political campaign committee in the process of the  
22 campaign.

23               I had the opportunity, for the first time, this  
24 week to review the proposed legislation that is before you,  
25 and I would be happy to work with the committee and/or staff

1 to address the specific language, some of these suggestions  
2 that I have mentioned today.

3 But beyond these technical amendments to the  
4 special prosecutor law there lies an important policy issue,  
5 one which I do not believe has been fully articulated  
6 today. People of Pennsylvania have a right to know that no  
7 individual can hold himself or herself above the law. In  
8 the absence of a special prosecutor, the confidence of  
9 Pennsylvania is shaken. It's leading to nothing but more  
10 apathy and more cynicism about our political process.

11 Two days ago Mr. Preate was quoted in the  
12 Philadelphia Inquirer commenting on the allegations made  
13 against him, the very allegations which have been discussed  
14 and noted at this hearing today. Mr. Preate said, and I  
15 quote, "I am going to have to be investigated by everybody  
16 because of my Italian name. If I were a black man, an  
17 African-American, this would never have happened to me. If I  
18 were a Jew, this would never have happened," closed quote.

19 This is a statement which is racist, it is a  
20 statement which is anti-Semitic. It implies that somehow  
21 blacks and Jews are given special treatment, are somehow  
22 treated differently in the law, and it panders to those who  
23 view the world as an "us against them."

24 Now, in the absence of a special prosecutor in  
25 this State, Mr. Preate has the license to characterize

1 serious charges made against him as simply political. He  
2 can characterize them in a manner which demeans I believe  
3 not only Jews and African-Americans but Italians throughout  
4 this Commonwealth, and demeans everyone in this State who  
5 does not view the world as one large conspiracy. With a  
6 special prosecutor, Pennsylvanians would view the  
7 allegations that are being made not in the charged political  
8 environment but would understand that it is investigation in  
9 accordance with law based on the facts and based on the  
10 law. It would be an investigation which would be authorized  
11 by African-Americans, by whites, by Jews, gentiles,  
12 Italian-Americans, Irish-Americans, Polish-Americans.  
13 Pennsylvanians of every ethnic background. Those who  
14 already have the privilege of being members of this  
15 legislature.

16           Indeed, to protect people from the very kinds of  
17 ethnic slurs that Mr. Preate has raised in the media, an  
18 office of independent prosecutor should be enacted.

19           So I again thank you for the privilege of being  
20 here. I again offer whatever assistance this able committee  
21 and its staff may require in terms of any technical drafting  
22 of legislation and do urge the passage of a bill authorizing  
23 special prosecutor in this session.

24           Thank you.

25           CHAIRMAN CALTAGIRONE: Thank you.

1 Questions?

2 (No response.)

3 CHAIRMAN CALTAGIRONE: Thank you very much.

4 MR. KOHN: Thank you, Mr. Chairman.

5 CHAIRMAN CALTAGIRONE: Appreciate your  
6 testimony.

7 We'll next here from Bill Nast, representing the  
8 Joint State Government Commission.

9 MR. NAST: Mr. Chairman, I just have to start  
10 with that, I'm not representing the Joint State Government  
11 Commission.

12 CHAIRMAN CALTAGIRONE: You used to work for  
13 them.

14 MR. NAST: I had a long and am very proud of my  
15 affiliation with the Joint State Government Commission. I  
16 was asked to appear here I believe because of Representative  
17 Reber, and I agree is sort of an institutional memory of  
18 past events, particularly in this case the drafting of the  
19 Commonwealth Attorneys Act and the report of elected  
20 Attorney Generals that the Joint State Government Commission  
21 did. If my institutional memory is selective or has holes,  
22 I want you to know that it is only the appearance of  
23 senility and not senility itself. I want to put that the on  
24 the record.

25 I am pleased to have been asked, I want to take

1 you back to 1977 when under a Senate Resolution 61 a task  
2 force of the Joint State Government Commission was  
3 authorized, and I note that of the 18 members of that task  
4 force, I believe there's only one or two still serving, one  
5 may be Representative Piccola may be the only one still  
6 serving. Of that group, four are now judges, one on the  
7 Third Circuit, two of the Commonwealth Court, and one on the  
8 Common Pleas Court but I believe a candidate for the  
9 Commonwealth Court in the last go-around, or earlier one  
10 anyway. I'm sorry, there's only one -- there's three that  
11 are still in the General Assembly, there's only one that's  
12 still serving or now serving on the House Judiciary  
13 Committee. Also Congressman Gekas was a member of that task  
14 force. And also a future speaker and a future President pro  
15 tempore. So it was a very prestigious group that sat and  
16 met with an advisory committee situation where each of the  
17 living Attorney Generals were asked to participate in the  
18 consideration of the Commonwealth Attorneys Act, and about  
19 half of them did.

20           The advisory group that was selected was also a  
21 very prestigious group, and I had the pleasure of serving as  
22 staff to those people in the drafting of the Commonwealth  
23 Attorneys Act.

24           I mention this because there were two major  
25 problems. There were a lot of minor sensitive problems,

1 very sensitive. The two very major sensitive problems of  
2 drafting that act, given the fact that we, along with seven  
3 other States, had always appointed our Attorney Generals and  
4 not elected them prior to the election of May 16, 1978. The  
5 first had to do with the civil matter, which had always been  
6 done by the Governor's lawyer known as the Attorney  
7 General. And that had a lot of ramifications about how that  
8 was to be structured and were very carefully crafted, I  
9 think was the words used earlier, and I think is true,  
10 carefully crafted provisions dealing with that.

11           And the second was the distribution of criminal  
12 jurisdiction between this new elected Attorney General and  
13 the district attorneys. And that was a very delicate  
14 question. A very sensitive issue. One of the reasons  
15 being, as one of the former testifiers pointed out, the  
16 district attorneys are enumerated constitutional officers  
17 with traditional criminal jurisdiction that goes back to  
18 hundreds of years. I probably in 1978 knew more about the  
19 specifics of that. And the district attorneys were very  
20 jealous of their jurisdiction. And those were all issues  
21 that had to be worked out. How do you handle cases that  
22 should involve concurrent jurisdiction? How should you  
23 handle cases that involve certain kinds of crimes? There  
24 are distinctions in the Commonwealth Attorneys Act by the  
25 type of crime that it is. Who has the sort of the initial

1 burden of going forward, as lawyers like to say, who gets  
2 the case first and decides what to do with it? Can that  
3 person pass it off to the Attorney General, or can the  
4 Attorney General pass it off, in appropriate cases, to the  
5 judiciary? Very careful and very different now.

6           And I want to specifically note that in that  
7 connection the language of Section 205 of the Commonwealth  
8 Attorneys Act where it says the Attorney General shall have  
9 is the power to prosecute in any county criminal court, any  
10 county criminal court the following cases: Criminal charges  
11 against State officials or employees affecting the  
12 performance of their public duties or the maintenance of the  
13 public trust, and criminal charges against persons  
14 attempting to influence such State officials or employees or  
15 benefit from such influence or attempt to influence. In  
16 other words, a very carefully worded jurisdictional grant  
17 that dealt with a particular type of crime and a particular  
18 type of person - that is, State officials or employees and  
19 performance of their public duties or maintenance of public  
20 trust.

21           It also provides in subsection A(4) that the  
22 Attorney General may petition the court to supercede a  
23 district attorney in a case where the district attorney had  
24 reason to believe and grounds to believe that the district  
25 attorney was not doing the job.



1           Similarly, in paragraph 5 of subsection (A), the  
2 president judge, on his own motion, could call in the  
3 Attorney General to represent the Commonwealth in  
4 appropriate proceedings, and those, again, were thought to  
5 be the kinds of public corruption kinds of cases.

6           So I mention this for a specific reason. I also  
7 want to call your attention to 205(B), where it says the  
8 Attorney General may refer to the district attorney with his  
9 consent any violation thereof that violates the criminal  
10 laws which would come to his notice. This requires the  
11 consent of the district attorney to take that kind of a  
12 case.

13           And finally, in (D), where it specifically  
14 authorizes the Attorney General to employ such special  
15 deputies as are necessary to prosecute a criminal action,  
16 and that, I believe, was probably the authority that Messrs.  
17 Dennis and Tierney were appointed by General Preate.

18           Now, the reason I mention all this is because,  
19 and I agree with some of what -- I guess I agree with some  
20 of what the prior speakers, all of the prior speakers,  
21 they're not always the same thing, but the prior speakers  
22 testified to. I guess my situation, I certainly agree with  
23 Senator Heckler and Representative Piccola and  
24 Representative Caltagirone that there is a hole in the  
25 current statute. There's no question about that. I suggest

1 that the size of the hole is not as big as is suggested by,  
2 with all due respect, my Representative -- I will vote for  
3 you in the primary, Representative Piccola -- it is not  
4 quite as big--

5 REPRESENTATIVE PICCOLA: I got one.

6 MR. NAST: You got one. You cannot be shut out  
7 in this election.

8 It is not as big as the bill suggests. Why?  
9 Well, because I think there is existing authority for an  
10 Attorney General to say, as Attorney General Preate has  
11 said, that I have a conflict. If the Attorney General says  
12 I have a conflict or an appearance of a conflict, there is a  
13 mechanism for the Attorney General to find a prosecutor,  
14 either a special prosecutor or a request to a district  
15 attorney to handle that case. I think that part of the hole  
16 is not really there.

17 I appreciate that there are some ramifications  
18 of that as to whether this finally dispels the appearance of  
19 conflict or not because of whom they might appoint or  
20 whatever, but they're never ending. As one of the prior  
21 speakers said, there always can be raised a question of  
22 conflict, if that's all that has to be raised. Having been  
23 a defense lawyer, I attest that that might have crossed my  
24 mind on occasion.

25 The second problem I have is I don't think

1 there's -- I think the hole is too large with regard to  
2 felonies and first-class misdemeanors, because I don't think  
3 that that's really what we're talking about. The example  
4 that was given was first-degree murder. I was thinking of  
5 shoplifting. I mean, if the Attorney General walks into --  
6 I mean, it's not included in your bill, but if the Attorney  
7 General walks into a store and shoplifts something and it  
8 gets to the district attorney, I see absolutely no reason  
9 why the district attorney doesn't prosecute the Attorney  
10 General as a shoplifter, and whether that's a misdemeanor or  
11 a second-degree misdemeanor or a third-degree misdemeanor or  
12 a felony, I don't really have a problem in those kind of  
13 cases. I think what we are legitimately concerned about is  
14 this appearance of conflict in the kinds of cases that our  
15 statute talked about, and that was, as I say, our statute,  
16 the Commonwealth Attorneys Act talked about, performance of  
17 public duties or maintenance of the public trust. I would  
18 be inclined to broaden that, I think, to involve campaign  
19 kinds of things because I think they are like that and not  
20 like shoplifting or like murder or whatever.

21           So I think the hole is there. I am not willing  
22 to concede that the hole is as big as the bill suggests.

23           Secondly, I have a great deal of difficulty,  
24 with all due respect, of involving the General Counsel in  
25 this process. The General Counsel, the bill is crafted

1 carefully to keep the General Counsel the hell out of  
2 criminal matters, to make sure that the appointee to the  
3 General Counsel's Office does not come in with a resume of  
4 past criminal prosecutorial functions, that this should be a  
5 civil lawyer who has a difficult enough job, because  
6 granted, a politically attuned civil lawyer to give the best  
7 benefit, the best advice to the Governor and the executive  
8 branch, and I don't think there should be any possible way,  
9 I don't see any reason to bring the General Counsel into  
10 this. I think it's bad to bring the General Counsel into  
11 it. I think it's bad for another reason.

12           The only thing, I'm certainly not speaking for  
13 General Counsel Spiegelman. I haven't discussed it with him  
14 or anybody in his office, but I cannot imagine that they  
15 would even suggest that they have any particular competence  
16 or expertise or knowledge to do this, which means they, in  
17 turn, would have to do as you suggest in the bill, hire a  
18 lawyer to decide whether a lawyer was to be hired, and I  
19 think this is not necessary and I think it has serious  
20 ramifications.

21           Unfortunately, I have philosophical opposition  
22 to career prosecutors, but let's face it, we live in a world  
23 where today we have career prosecutors, and I think  
24 ultimately this kind of a job to fill this hole has to be  
25 done by a career prosecutor that has some independent

1 authority, and I look around for that kind of person and I  
2 come back to, and I admit it's not the best possible  
3 solution, not the only solution, and that is maybe the local  
4 district attorney, maybe the district attorney in Dauphin  
5 County, because it was at one time the Commonwealth Court,  
6 it was at one time the seat of -- I certainly think that  
7 Representative Caltagirone's bill that gives authority to  
8 the district attorney in Dauphin County to proceed or an  
9 attorney to proceed in Dauphin County is necessary.

10           Now, I really want to take very little time. I  
11 want to suggest that I have other problems with specifics in  
12 the bill, but I understood I was not to address those. If  
13 and when the bill goes forward, I would be happy to work  
14 with you or give you some of the suggestions I have for  
15 that.

16           So what is my bottom line? Well, I think that  
17 we should build off the present model, we should have a  
18 special prosecutor in the case of conflicts or appearance of  
19 conflicts involving charges of the Attorney General  
20 directly, that that person should be appointed. I would  
21 suspect probably after an investigation by the Dauphin  
22 County District Attorney's Office, or if the Dauphin County  
23 District Attorney has a conflict, as he did in the election  
24 case, then by someone that he could appoint under existing  
25 authority, or maybe that authority should be clarified under

1 existing law. And then that person, the district attorney  
2 or the appointee of the district attorney, should have the  
3 authority to go to the court, Dauphin County court, ask for  
4 a grand jury, maybe authorize a grand jury in those kind of  
5 cases or look at the investigative grand jury statute to  
6 authorize that kind of a grand jury in that kind of a case.

7           And I think that probably, and I know it may be  
8 precedent setting, but maybe there should be a contingent  
9 budget item in the annual appropriation set aside for these  
10 kind of cases that upon appropriate documentation and  
11 authority, the district attorney of Dauphin County, or  
12 whoever, would know that they were not burdening me as a  
13 taxpayer of Dauphin County with the burden of prosecuting a  
14 major investigation of the Attorney General.

15           If there are any questions -- one other thing I  
16 would say. With all due respect to Professor Jordan, I  
17 think the Federal special prosecutor bill would have worked  
18 fine in Pennsylvania before 1980. I mean, I think it  
19 addresses the situation at the Federal level which today is  
20 like the situation was in Pennsylvania before we had an  
21 elected Attorney General. I think there is no question that  
22 to the extent you want to fill the hole of providing for a  
23 special prosecutor in the case of allegations concerning the  
24 Attorney General, this hole, I think that there's a lot of  
25 things in here that to me only raise issues that trouble me

1 in the bill as it's drafted.

2 If you have any questions, I'll be happy to  
3 answer them.

4 CHAIRMAN CALTAGIRONE: Questions from the panel?  
5 Senator Heckler.

6 SENATOR HECKLER: Thank you, Mr. Chairman. And  
7 I'm delighted we've gotten all the political lawyers out of  
8 the way and--

9 MR. NAST: I don't even know who I'm going to  
10 vote for Tuesday, to be honest with you.

11 SENATOR HECKLER: Well, I thought I would pursue  
12 some of these questions so that Jeff--

13 REPRESENTATIVE PICCOLA: Wait a minute. You're  
14 committed to me.

15 MR. NAST: Other than Representative Piccola.  
16 No, no, I did commit to Representative Piccola.

17 SENATOR HECKLER: Jeff is in the position of  
18 posing hard questions to a constituent. But seriously, with  
19 Dean Jordan's testimony and with yours, we're hearing from  
20 what I like to think of as real lawyers, having abandoned  
21 that claim myself some years ago, I guess.

22 MR. NAST: You put me in a difficult position  
23 with those who would say I was never a real lawyer, but.

24 SENATOR HECKLER: I'm a little distressed  
25 actually to hear that you did defense work, but I think

1 having--

2 MR. NAST: A long time ago.

3 SENATOR HECKLER: --having held career  
4 prosecution in esteem, but in any event, now that I'm done  
5 buttering you up.

6 BY SENATOR HECKLER: (Of Mr. Nast)

7 Q. First off, if we assume that there needs to be  
8 some gatekeeper for this process, and remembering that while  
9 the process is fairly lengthy to describe in the bill, we're  
10 assuming that there's a pretty narrow arena given that we  
11 have an elected Attorney General, given that we don't need  
12 to have this special prosecutor concept apply wholesale to  
13 the executive branch of government, as has proven to be the  
14 case in the Federal system where the AG is appointed.

15 A. Yeah, I don't think this bill should be  
16 broadened to cover anybody else. I certainly could not  
17 agree with you any more. The Attorney General does that.  
18 That's his job.

19 Q. That's right. That's right. That's why, as I  
20 said in my testimony, that's why we decided to elect the AG  
21 to address that.

22 A. Exactly.

23 Q. But given that this gatekeeper is only going to  
24 have to act, presumably, in a relatively limited number of  
25 cases, if it's not going to be the General Counsel for the



1 Commonwealth, who else do you see as an appropriate  
2 gatekeeper?

3       A.     Well, I think that because most of -- well, I'm  
4 assuming, maybe incorrectly, that most of the allegations  
5 involving the Attorney General, because that's what we're  
6 talking about, would occur at the governmental level,  
7 therefore they would probably occur in Dauphin County, or  
8 Dauphin County would be the only appropriate jurisdiction.  
9 I would see it as the district attorney of Dauphin County.

10           Now, I don't know the facts, so if my facts are  
11 wrong, don't hold that against me, but if these campaign  
12 allegations occurred with contributions in Lackawanna  
13 County, or something like that, they were crimes in  
14 Lackawanna County, I don't really see a problem with the  
15 gatekeeper, the initial gatekeeper being the district  
16 attorney of the district wherever these crimes, public  
17 crimes are alleged to have occurred.

18           I would limit the kinds of crimes though. I  
19 would limit it very severely to kinds of -- let's face it.  
20 The Attorney General, whoever the Attorney General is and  
21 whenever they're running for Attorney General or re-election  
22 or Governor or Senator, or whatever, there's going to be  
23 these kinds of allegations. I mean, that's, you know. I  
24 think that there has to be some in-place mechanism to  
25 dispose of the trivial ones, the ones that just don't have

1 any merit at all, and I can't see the General Counsel, who  
2 has no criminal lawyer on their staff, as far as I know, or  
3 maybe they do, but suddenly getting allegations and now  
4 having to beef up their staff, do what? What are you going  
5 to do with it? I know what I would do. I would call up a  
6 criminal lawyer, either a prosecutor or a defense lawyer,  
7 and I would say, I'm hiring you to look into this, because I  
8 don't want to go anywhere near it. Sometimes it will  
9 involve races that I or my boss, the Governor, is involved  
10 or has an interest in. I don't want to go near this thing.

11           So now you're really at the mercy of who the  
12 Counsel General decides to call up. I mean, I think an  
13 elected district attorney in place, and I do agree with Mr.  
14 Tierney, who has a grasp on this idea that like it or not,  
15 we have this long, traditional history of putting this  
16 obligation on an elected district attorney, for better or  
17 worse. We have that. And I didn't think that Mr. Kohn's  
18 dismissal of that was, you know, took into account the  
19 historical significance of that.

20           I do agree also with I guess it was Mr. Tierney  
21 who said, I can understand if the District Attorneys  
22 Association comes in here and supports this, because they  
23 don't like these cases. You know, they certainly don't  
24 want, they would prefer not to have the responsibility to do  
25 this. I'm sure of that.

1           Q.     Well, not only, and I would suspect from my  
2 perspective that they would not only not like them and want  
3 them to go away, but I think at least most of the larger  
4 district attorney's offices in this State have an ongoing,  
5 very positive cooperative relationship with the Office of  
6 Attorney General, one of the, and I believe you heard my  
7 testimony before, I think one of the more positive aspects  
8 of the law has been the ability that has developed to  
9 cross-designate assistant DAs to deal with conflict or  
10 apparent conflict on the part of district attorneys, which  
11 just builds that nice Chinese wall.  Nobody can question the  
12 handling of a particular case, but the person we rely upon  
13 in each of those cases as the check, if you will, and even  
14 if there's not active supervision on a daily basis by the  
15 Attorney General or his immediate subordinates, the ultimate  
16 responsibility that that, let's say if it's Bucks County, an  
17 assistant district attorney from Montgomery County is  
18 cross-designated, he's not answerable to either Alan  
19 Rubenstein or to Mike Marino.  He's answerable to the  
20 Attorney General as to the conduct of that case for which  
21 he's cross-designated.

22           A.     Well, I think we could do something statutorily  
23 to deal with that, don't you?

24           Q.     Well, what I'm saying is that system works  
25 wonderfully, and I would just have some concerns that most

1 of the major offices in the State are going to be on a  
2 constantly ongoing basis having these very positive,  
3 cooperative relationships with the Office of Attorney  
4 General that nobody is going to want to mess up. And again,  
5 it creates a unique situation for Dauphin County. You're  
6 now saying to my constituents that the people of Dauphin  
7 County are not only going to be electing their district  
8 attorneys the same way we do and everybody else does, but  
9 they're going to be electing this super watchdog prosecutor  
10 for the State. And I confess to having some problems with  
11 that.

12           A.       Which was historically what was done. I believe  
13 the Margiotti case in the '30s and some other cases, there  
14 were judge -- former district attorney then Judge Shelly  
15 was, I believe, one of the prosecutors. I don't know  
16 whether Judge Krieder participated in those. But there was  
17 a tradition, history, or whatever, of Dauphin County.

18                   I'm not looking, and I'm sure John Cherry would  
19 disavow everything I say because I don't think he wants the  
20 work, and I don't blame him, but I just see, you know, it's  
21 sort of the problem it's okay, well, let us agree just for  
22 this moment we don't want the General Counsel to do it, we  
23 don't want the DA to do it, okay, so we'll create an office  
24 for special prosecutor. Now, who checks the conflicts of  
25 interest when the special prosecutor has a conflict of

1 interest, or an appearance of a conflict? And then the  
2 person that we create to do that, what if they have an  
3 appearance of a conflict? It seems to me somewhere along  
4 the line you have to say somebody was elected or appointed  
5 or whatever to do something, and they should do it, and live  
6 with it. And you know, hey, it's not forever. Maybe for  
7 two years, four years, whatever. I mean, that's not  
8 forever.

9 Q. Well, if I could just, I didn't mean to engage  
10 in a debate, but just to respond, one of the things that  
11 this law does and I think makes some sense is it parses out  
12 various parts of that responsibility. So assuming we kept  
13 it in the executive branch, and even acknowledging the  
14 objection to General Counsel and saying you're going to hire  
15 some lawyer with criminal knowledge, his only duty or her  
16 only duty is to make sort of a preliminary determination  
17 that there's enough here to justify going forward and  
18 engaging the mechanism. Now, sure, if they say no, that's  
19 always subject to second-guessing, but it's going to be  
20 tough, it seems to me, for them to say no. And again,  
21 assuming they work for a Governor, he's an elected official  
22 whose out there in politics, that means that his feet are  
23 going to be held to the fire if indeed 14 witnesses came in  
24 and say I saw this happen, and the General Counsel says,  
25 well, this isn't enough for me. None of them are credible.

1 That's why we elect prosecutors.

2           My district attorney right now is being  
3 pilloried for his I think correct decision not to prosecute  
4 a police chief for various alleged offenses that occurred  
5 long ago. You know, there's people who are objecting to  
6 that. Ultimately, we are all in this government accountable  
7 to the people. It seems to me here at least we're breaking  
8 out, we're kind of paring down to a rather simple decision  
9 that which the elected or person responsible to the elected  
10 official undertakes, and from that point we're talking about  
11 a three-judge panel. Now again, I don't like the way we  
12 choose judges in this State and I don't consider them  
13 impartial at the appellate level, but.

14           A.     Yeah, I have a real problem with that, too. I  
15 don't think that's a judicial -- I don't think that is the  
16 appropriate way to do it. I think that you have to have a  
17 judge to oversee the investigation or the grand jury or  
18 however and then to try the case. So I mean, I think you  
19 should just have, again, a judge at that local level. If  
20 you give the jurisdiction to the district attorney, I don't  
21 have any problem with the local county judge being the one  
22 who would decide, based on, like somewhat is done, based on  
23 affidavits, or on the State level based on affidavits and a  
24 request for jurisdictional limits so that you don't have a  
25 mad dog in a china shop, and then supervises.

1           So I don't think you need, and by the way, if  
2 you are going to do that, then the way it's done -- if  
3 you're going to do it by lot, then I'd just do it by lot.  
4 Pull all their names in the thing and pull three out and not  
5 provide for new terms or anything else. There's some  
6 complicated provisions in there that I think conflict with  
7 the drawing-by-lot concept. So maybe if you draw it out and  
8 it turns out to be the Attorney General's brother, then you  
9 have to throw that ball away and pick another one, but I  
10 don't think you have to provide for second terms and filling  
11 vacancies and all that. Sort of like reaching in the hat  
12 again.

13           Q.     Thank you.

14                     (Whereupon, Representative Piccola assumed the  
15 Chair.)

16           ACTING CHAIRMAN PICCOLA:   Being the only member  
17 of the House remaining here, I guess I'm in charge.

18           MR. NAST:   Okay.

19           ACTING CHAIRMAN PICCOLA:   And I'll recognize  
20 myself.

21           MR. NAST:   Okay.

22   BY ACTING CHAIRMAN PICCOLA: (Of Mr. Nast)

23           Q.     At the risk of losing a vote on Tuesday, Bill, I  
24 can't disagree with you more about the district attorney of  
25 Dauphin County stepping into the breach in these things.

1 I've been involved in a couple of campaigns to help elect  
2 Dauphin County district attorneys, and the people of Dauphin  
3 County elect them for a variety of reasons, none of which  
4 have to do with the kinds of responsibilities you're  
5 proposing that we put on them, and I'll just give you just  
6 one example, a real life example.

7           This referral of the campaign violations, or  
8 alleged campaign violations, probably prima facie it's a  
9 relatively simple case. The committee filed an amended  
10 report which showed campaign contributions apparently that  
11 were made and not reported earlier. Well, that on its face  
12 I guess is a fairly, "yes, he did," or "no, they didn't."  
13 However, the spin-off from that, you know - Where did this  
14 money come from? Who made the contributions? Why were they  
15 made? Why weren't they reported? - involve all kinds of  
16 technical issues in terms of prosecutorial investigation  
17 that I don't think the Dauphin County district attorney is  
18 equipped to handle, I don't think they should be equipped to  
19 handle it. Certainly not for a statewide campaign. And I  
20 just don't think that burden should be put on Dauphin  
21 County.

22           I don't want to be up here every budget year  
23 fighting for appropriations for Dauphin County to make sure  
24 we're not shortchanged because we've had to handle X number  
25 of special prosecutions. So I just disagree totally that



1 the Dauphin County district attorney can step into this  
2 breach.

3 A. Yeah, I certainly don't want you up here asking  
4 for appropriations to get my tax money back either.

5 Q. Too risky.

6 A. Too risky to start with. My problem is that  
7 same kind of the spin-offs of these relatively simple  
8 allegations are going to be handled by the General Counsel's  
9 Office?

10 Q. No. Are you asking me?

11 A. Yeah.

12 Q. No. If you read the bill, the General Counsel  
13 isn't deciding the case or whether to prosecute the case or  
14 not.

15 A. No, but I'm saying--

16 Q. The Office of General Counsel is merely a  
17 screening mechanism whereby they determine whether suppose--

18 A. No, no, I understand the bill, but what I'm  
19 saying, Representative Piccola, is in this case, I don't  
20 know, did the Election Bureau call the General Counsel's  
21 Office and say, we want to refer this downtown? I don't  
22 know the facts of whether they did or not.

23 Q. Oh, I do.

24 A. I'm just saying, supposing under the bill the  
25 Election Bureau has this problem with this amended reply. I

1 don't know the facts, so I mean, don't hold me to the  
2 facts. I recall some of the things I read in the paper and  
3 I may not recall them correctly, but once they decided they  
4 were going to refer it, supposing under your bill as I  
5 understand it they would refer it to the General Counsel's  
6 Office, who would make a preliminary investigation to decide  
7 whether it was credible, whether it was sufficient. I'm not  
8 sure I know what -- I mean, it's not like probable cause,  
9 and I think even an Attorney General is entitled to some of  
10 the due process that we give ordinary criminals, so I think  
11 there has to be some standard there.

12 Q. Ordinary criminals?

13 A. Or other ones.

14 MR. ANDRING: It's getting worse.

15 MR. NAST: Or whatever. I don't know. Gees,  
16 I don't want that in the newspaper. But you know what I'm  
17 saying. There probably has to be a probable cause standard  
18 or something to go ahead. There has to be something more  
19 than just an allegation. I mean, hell.

20 Now, at that point the General Counsel has to  
21 make, it seems to me, would be incumbent upon any attorney  
22 to make a sufficient enough investigation that they were  
23 satisfied that it was something worth going forward on. And  
24 so don't they have to investigate? Don't they have to have  
25 somebody review these allegations, look at the law, see what

1 the spin-offs might be? If there are no spin-offs, is it a  
2 relatively technical problem? You know, now they have done  
3 all that to decide -- I know that's not what you intend by  
4 your language, but I think that there's an obligation there  
5 for them to at least do that. Then they put into motion the  
6 next step where you go to the three -- no, then you go to  
7 the preliminary, right, you get a counsel appointed  
8 preliminarily to investigate it, and I don't think it works.

9 BY REPRESENTATIVE PICCOLA: (Of Mr. Nast)

10 Q. Well, I think you're getting caught up in the  
11 details of this thing. And maybe what you're suggesting,  
12 what Mr. Kohn suggested is that maybe our procedure is a  
13 little complex for an obvious referral to independent  
14 counsel, and he suggested, and it certainly is a valid point  
15 and I certainly would like to explore his suggestion, that  
16 when it comes to Election Code violations of the Attorney  
17 General's committee or committees associated with the  
18 Attorney General, that that be automatic referral to the  
19 three-judge panel for the, I mean, rather than going through  
20 the process that you're suggesting is duplicative, because  
21 presumably the Office of General Counsel will have advised  
22 the Election Bureau. They're sitting there with them, or  
23 somebody from the Office of General Counsel would be.

24 A. Which creates a conflict.

25 Q. So it would be a duplicative effort if General

1 Counsel refers it to General Counsel, and I think that's  
2 what Mr. Kohn was probably suggesting in part. But I still  
3 don't see, I still don't want the district attorney of  
4 Dauphin County to have it. I think you agree, because you  
5 said there is a hole, that the Attorney General can't do  
6 it.

7 A. I agree.

8 Q. So who's going to do it if we don't have this  
9 mechanism?

10 A. Well, I think you're -- let's look at the  
11 General Counsel's Office from another point of view and come  
12 back to that point. That is, supposing it's not an Election  
13 Bureau kind of thing but supposing it's a flat out  
14 allegation that the Attorney General committed a felony bank  
15 robbery last Thursday. I was there, I saw it, I recognized  
16 him, I've known him for years, whatever, you know. Comes in  
17 to the General Counsel's Office. What's does the -- it  
18 seems to me the General Counsel has to do an investigation.  
19 I mean, is this person sane? Was he there at the place he  
20 said he was? Was he, is he mentally competent? Does he  
21 have any grudges against the Attorney General? I mean,  
22 there's still--

23 Q. Was there a bank, in fact, robbed?

24 A. Yeah, was there a bank robbed?

25 Q. I think you're talking about a lunatic coming in

1 off the street.

2 A. No, no, no, I'm talking about somebody who makes  
3 an allegation of criminal behavior. Isn't there a need for  
4 an investigation? The investigation may be very short if  
5 you called the bank and they say, we weren't robbed, you  
6 know.

7 Q. We do this all the time. Maybe you're not even  
8 aware of it. I'm barely aware of it. But we receive -- I  
9 don't know, counsel or staff would know better, but lots of  
10 petitions to impeach people from all over the Commonwealth.  
11 Those are judges.

12 A. You're going into the impeachment business.

13 Q. They come to the Speaker and they're referred to  
14 the Judiciary Committee and the counsel look at them and  
15 most of them are in the category I think that you're  
16 suggesting right there and they get the appropriate  
17 attention.

18 A. Um-hum. Sure.

19 Q. And I think that's what -- I don't see a problem  
20 with what you're talking about. I mean, obviously, the  
21 Attorney General being high profile is going to attract a  
22 lot of people out there who have these delusions.

23 A. The problem that I see -- I wouldn't have a  
24 problem if the General Counsel's Office did criminal work or  
25 had criminal investigators or had staff or had other people

1 who could screen out these obvious cases and get rid of them  
2 and look into the not-so-obvious cases but still really not  
3 sufficient cases, you know. I see another level of  
4 bureaucracy.

5           Now, what other solution is there? Well, I  
6 guess you could have somebody appoint a district attorney,  
7 it wouldn't necessarily have to be Dauphin County, and  
8 include their appropriate funds for this if you don't. That  
9 might be another way to handle it, but you still have to  
10 have this initial gatekeeper who determines whether or not  
11 there's anything worth going forward on it.

12           Q. Well, like I said, I didn't look at putting the  
13 Office of General Counsel into this as a bureaucratic  
14 problem. I looked at it as more of a screening process that  
15 insured that only those real problems got referred to the  
16 three-judge panel for potential prosecution or  
17 investigation.

18           A. Yeah, I'm worried about the language you used.  
19 I think you just can't, I mean, go back to our bank robbery  
20 case. If you call up, the bank wasn't robbed, there's no  
21 problem. But if you call up and hey, the bank was robbed,  
22 and it was robbed by somebody who has not been caught, who  
23 is approximately the size of the Attorney General, you know,  
24 and so on. I didn't state professionally there's an  
25 incumbency on the person to investigate it to some degree.

1           The other thing I want to say with regard to the  
2 employees of the Attorney General and that, we do have in  
3 place, not only do we have some criminal statutes in place,  
4 adverse interests kinds of things, we also have the rules of  
5 professionalism and ethics that say a conflict, appearance  
6 of conflict, and that kind of thing to deal with those. I  
7 don't have any problem, I don't personally have a problem  
8 with if it's an employee of the Attorney General that the  
9 allegations are made about, and we had a case like that,  
10 you'll recall, in the prior Attorney General's  
11 administration that the Attorney General deal with that  
12 either by saying there's a conflict, I'm going to hire  
13 somebody to do it; there's a conflict, I'm going to ask the  
14 district attorney to do it; or there's no conflict, I'm  
15 going to do it. I mean, they're an elected officer. To the  
16 extent they say that, I don't know if they can do it, but to  
17 the extent they say it, when the allegation of criminality  
18 is not against the Attorney General itself, then I think the  
19 Attorney General still has some kind of prosecutorial  
20 discretion, which only should be accountable in the  
21 political arena and not in a court of law.

22           I questioned the extent of the district  
23 attorney's prosecutorial discretion many years ago in a case  
24 called Commonwealth vs. Kindness, and it was a DUI case in  
25 Dauphin County where I asked District Attorney Zimmerman to

1 be kind to Kindness, and he chose not to be and we went to  
2 the Superior Court and I found out that it was his sole  
3 discretion and my client lost. But I think that ultimately  
4 there's prosecutorial discretion.

5           Concept cannot be weakened just because it's an  
6 employee or whatever of the Attorney General, where the  
7 charge of criminality is against the employee. I think then  
8 the Attorney General must do the right thing, or be held  
9 accountable in the political arena.

10           Q.     That's what this is all about, to make sure that  
11 the Attorney General does the right thing.

12           A.     Yeah.

13           Q.     One other area of inquiry, my recollection is,  
14 and my memory is probably worse than yours, was there not  
15 some discussion at the time that we had the task force going  
16 of restricting the ability of the Attorney General to run  
17 for another office while he held the Office of Attorney  
18 General?

19           A.     Yes, there was.

20           Q.     And could you summarize that?

21           A.     Oh, I wish I had known you were going to ask  
22 that. Let me see. This is institutional memory, which may  
23 be selective or vague, or whole. I think it got so far as  
24 it was proposed as an amendment to the bill in the Senate  
25 but was never adopted. I may be wrong about that. Yes,



1 there was discussion about, and of course this is the first  
2 time that an Attorney General has run for Governor, and that  
3 was one of the things that was very much on the surface of  
4 the discussions about the bill, and how do you keep an  
5 elected Attorney General from using that as a platform to  
6 run for Governor in every case? Because there's experience  
7 in States where they are elected where that is true. I  
8 think New York. I forget. Maybe not New York, but there's  
9 been some States where the elected Attorney General almost  
10 always runs for Governor. And there was concern about that  
11 and finally it was just decided to leave it to the election  
12 process.

13 Q. But wasn't the fact of that discussion, did that  
14 not occur because of concern about the huge inherent power  
15 of the Attorney General when it came to that prosecutorial  
16 discretion that you're talking about and that there was some  
17 discussion that he should not be permitted to use that kind  
18 of discretion to possibly or appear to be advancing himself  
19 for higher office?

20 A. Yes, there was, but my recollection is that that  
21 discussion was primarily directed at should an incumbent  
22 Attorney General who's running against an incumbent Governor  
23 be able to use his power to bring criminal charges against  
24 the Governor or the Governor's people, and I think that was  
25 the thrust of that concern.

1           I don't, with all due respect, Representative, I  
2 don't think that we ever thought about, and maybe we should  
3 have, because the Federal prosecutor's act was on the books,  
4 but, you know, that was a different world, I mean, than what  
5 we were -- we had enough problems on our plate at the time,  
6 very sensitive issue that people felt very strongly about.  
7 I don't think we ever thought about what happens if there's  
8 an allegation of criminality by the Attorney General.

9           ACTING CHAIRMAN PICCOLA: Staff have any  
10 questions?

11           (No response.)

12           ACTING CHAIRMAN PICCOLA: Thank you very much,  
13 Mr. Nast. It is always a pleasure.

14           MR. NAST: Thank you.

15           ACTING CHAIRMAN PICCOLA: We have our last  
16 witness is John Morganelli, District Attorney of Northampton  
17 County is coming to us on behalf of the District Attorneys  
18 Association.

19           MR. MORGANELLI: Good afternoon, members of the  
20 committee. Yesterday I received a phone call from Bill  
21 Ryan, who is the president of our association, and he asked  
22 if I was available to come out to Harrisburg today to  
23 address this issue, and I don't know if it was because  
24 nobody else wanted to do it, but I said I would be available  
25 to come. So here I am.

1 MS. WOOLLEY: Excuse me, Mr. Chairman. District  
2 Attorney Sacavage from Northumberland County is here.

3 ACTING CHAIRMAN PICCOLA: For the record, we're  
4 having this transcribed, could you both identify yourselves  
5 and then you could proceed to make your statement.

6 MR. MORGANELLI: Sure. I will identify myself.  
7 My name is John Morganelli, and I'm the district attorney  
8 from Northampton County.

9 MR. SACAVAGE: I am Robert Sacavage. I am the  
10 district attorney from Northumberland County, and I am a  
11 member of the executive committee of the District Attorneys  
12 Association. And I apologize for any confusion. We got the  
13 calls just within a few days and I wasn't sure that anybody  
14 was going to be here; otherwise we would have just had one  
15 person.

16 MR. MORGANELLI: I think what I'll do is I'm  
17 going to let Mr. Sacavage address the position of the  
18 District Attorneys Association, because he was and is a part  
19 of the executive committee that actually voted on a  
20 resolution, but after his remarks I would like to make a few  
21 comments of my own relative to this issue.

22 MR. SACAVAGE: At a meeting last weekend in  
23 Hershey, the executive committee of the District Attorneys  
24 Association considered the matter pending before this  
25 committee, and there was a vote taken supporting the concept

1 of an appointment process and funding of a special  
2 prosecutor in the event of a need to investigate matters  
3 pertaining to the Office of the Attorney General. The  
4 special prosecutor should be selected by an independent  
5 special process, and the appointing authority should be  
6 members of the judiciary. The committee feels that the  
7 subject needs further study, and the vote carried I think 6  
8 to 1.

9 I don't have any written statement, but the  
10 indication from the committee is that there is a need,  
11 obviously, when the Commonwealth Attorneys Act was passed  
12 there was an omission for those instances where the Attorney  
13 General or a member of his staff may be called into question  
14 on some impropriety or wrongdoing. And for that reason, the  
15 District Attorneys Association is willing to participate, to  
16 review, offer whatever advice, information that we can. I'm  
17 here to speak on behalf of the committee, and if this  
18 committee has any questions, I will try to respond, and in  
19 those instances where I'm speaking personally, I'll speak  
20 personally. Otherwise, I'll speak for the committee.

21 (Whereupon, Chairman Caltagirone assumed the  
22 Chair.)

23 REPRESENTATIVE PICCOLA: I don't have any  
24 questions, but I do have one comment or two comments,  
25 really.

1           The first comment, and I'm not certain, maybe  
2 you could repeat what you said about the appointment  
3 process, but we've done a great deal of research on this and  
4 I'm informed that a strictly judicial appointment is  
5 violative of the separation of powers in the Constitution  
6 and that there must be executive branch involvement in that  
7 appointment process. Now, in our bill, or bills, we have a  
8 provision whereby the person is actually appointed by a  
9 three-judge panel, but the appointing process is initiated  
10 by the executive branch, the Office of General Counsel, so  
11 that we meet those constitutional requirements.

12           MR. SACAVAGE: I don't think the resolution from  
13 the District Attorneys Association addressed that point. I  
14 recognize what you're saying. I think that we are not at  
15 odds on the matter of the three-judge panel actually being  
16 the appointing body for the prosecutor. I take it from  
17 reading and listening to the prior testimony that that's  
18 where you're moving, in that direction, and I think your  
19 bill, and the discussion that I heard also involves a  
20 screening process, and that's not inconsistent with anything  
21 I've said as well. So we recognize the separation of  
22 powers. Certainly a screening process is always  
23 appropriate.

24           Mr. Morganelli and I are elected officials, just  
25 like the members of this panel, and we all share the same

1 matter of having to review petitions, letters sent by  
2 constituents, and as I heard, people wanting impeachments  
3 for any number of reasons. As DAs we get requests for  
4 private criminal complaints and the like. It is necessary,  
5 in my view, that a screening process should be involved.  
6 And I don't think the judiciary would be -- is the  
7 appropriate body because then you would run into a  
8 constitutional problem.

9           However, the question remains, where should the  
10 screening process lie? The District Attorneys Association  
11 in the resolution felt that we should separate the gentleman  
12 from the process to take it out of the political arena.  
13 From recent experiences not in Pennsylvania but on the  
14 Federal level we see that sometimes the involvement of the  
15 legislative branch could be turned into political wrangling  
16 that would be best avoided. We don't have an elected U.S.  
17 Attorney, but in Pennsylvania we have an elected prosecutor,  
18 an elected Attorney General.

19           From what I gather, you're considering the  
20 Office of General Counsel to the Governor as being that  
21 detachment from the General Assembly. Our committee has not  
22 pondered that question. I myself have not formulated an  
23 opinion, although I think it's a step in the right  
24 direction, certainly, when you're taking away from the  
25 General Assembly in that regard.

1           Whether the Office of General Counsel is  
2 equipped for criminal obligations to deal with this  
3 screening process is another question. However, from the  
4 bill, I see you are looking at an investigative counsel that  
5 would be appointed by the General Counsel. So I think some  
6 attention should be given to who would be the investigative  
7 counsel. Would that be an ad hoc group or would that be a  
8 permanently established investigative counsel? There is  
9 some sentiment among the DAs, at least on the executive  
10 board, that against establishing that layer of bureaucracy  
11 where you're going to have a standing body handle them.  
12 That is going to require some careful thought because the  
13 investigative body who have to be given some powers, is that  
14 body going to be given arrest powers like the State Police  
15 or the municipal police? I don't know if that was  
16 particularly addressed in the bill, but it should be  
17 considered.

18           I know that the special counsel that you have --  
19 that would be appointed would have the powers to convene  
20 grand juries and frame indictments, but that is separate and  
21 apart from the investigative end of it.

22           MR. MORGANELLI: If I could just make one  
23 comment, since I had the pleasure of listening to some of  
24 your other witnesses. I don't envy you in this position  
25 trying to figure out how to go about this because as we all

1 know, although I think all your objectives is to try to make  
2 this as least political as possible. And we have it in the  
3 court system, as you all know that. But it seems to me this  
4 process of General Counsel doing the screening and then  
5 special investigative counsel and then it goes on really is  
6 a layer of bureaucracy that in my view is going to be  
7 cumbersome. It's just my own opinion.

8           Not only that, but I think it also raises issues  
9 as to what the relationship is between the Attorney General  
10 and the Governor at the time that this process may take  
11 place, whether or not they are political allies or not may  
12 have some bearing on this as well, and I think that's an  
13 issue that has to be discussed by you, and I'll leave you to  
14 your wisdom in terms of eventually solving that problem.  
15 But those are the things I would be concerned about in terms  
16 of this schedule, or this process.

17           And let me just give you an example, because I'm  
18 just looking at a summary of the bill. If the General  
19 Counsel determines that the information is not reliable,  
20 that he does not see any basis to proceed, that's the end of  
21 it, as I understand it. And that raises other questions,  
22 because there are going to be allegations, particularly if  
23 the Governor and the Attorney General are of the same party  
24 and they are political allies, and although that's not the  
25 case today, we don't know what is going to be the case down



1 the road. If the General Counsel decides and where do we go  
2 from there? Assume there is evidence and in the General  
3 Counsel's independent judgment, if you want to call it  
4 independent, there is no request for review, that's the end  
5 of it. And I think you're going to see allegations along  
6 this line, that the General Counsel is the Governor's  
7 appointee, the Governor and Attorney General are friends or  
8 political allies and that this process is not as  
9 independent.

10 I would like to see, I think, at some point you  
11 try to skip some of this point and get to the appointment of  
12 someone who is really going to be independent and who makes  
13 that decision of whether this thing goes forward or not.  
14 And this is a tough issue, and again, you've done the  
15 research and I'm not here to tell you what to do, but I see  
16 a little bit of a less problem of when the whole process can  
17 come to a halt because when some of, you know, I was  
18 involved in this litigation against the Governor on the  
19 death penalty, and what we saw was a situation in which the  
20 legislature put together a system which I thought made sense  
21 and said, here this person does this X, Y and Z, and when it  
22 came to the Governor's desk, the whole process came to a  
23 halt because of the individual Governor's decision to say, I  
24 don't feel like doing this right now and maybe it will be  
25 eight years before I do this, and there is no recourse

1 except going to court. And I just want to alert all of you  
2 to this potential that if there is a case that should go  
3 forward, you may find that just the General Counsel's  
4 opinion says that we should not, don't we need someone else  
5 to take a look at this? That is just my viewpoint on it.

6 REPRESENTATIVE PICCOLA: Well, you're absolutely  
7 correct. To some extent we have to rely on the news media,  
8 and is the fact that the referrals or the requests, they're  
9 not really referrals, the requests to the Office of General  
10 Counsel come from a variety of sources, and there's  
11 guarantees that those sources would not be political allies  
12 of anybody, or certainly not everybody in the process, and  
13 then if the Governor is going to make a decision to  
14 stonewall, as Governor Casey has decided to stonewall in  
15 your case of the death warrants, he's going to have to  
16 answer to that in the court of public opinion.

17 MR. MORGANELLI: True.

18 REPRESENTATIVE PICCOLA: I think we have to  
19 leave it to that.

20 MR. MORGANELLI: I understand your dilemma.

21 REPRESENTATIVE PICCOLA: But I think that the  
22 opportunity for a majority of the minority on the Senate and  
23 House Judiciary Committees to make a request certainly is  
24 the opportunity for a majority of the minority to make that  
25 request, and certainly they're not going to keep quiet about

1 it, because we tend to be political wranglers, I think you  
2 said, here in the General Assembly.

3           So I think we have to rely at some point on the  
4 news media and the court of public opinion, but I think this  
5 effort that we have in the bill is the best possible we can  
6 get at this time, although we're looking for improvements,  
7 if they're there.

8           MR. MORGANELLI: Just one last point before I'm  
9 done.

10           REPRESENTATIVE PICCOLA: And before you make  
11 that point, I would like to personally congratulate and  
12 thank you for taking that legal action, and it has nothing  
13 to do with this bill, but I commend you for taking that  
14 action and for being successful in the Commonwealth Court,  
15 and I hope you're successful on the petition for reargument,  
16 and when the appeal goes to the Supreme Court I hope that  
17 you're successful there, because this General Assembly has  
18 taken action as well to -- the House has, at any rate -- to  
19 force the Governor to sign death warrants and to enforce the  
20 death penalty which we've had on the books in this State for  
21 many, many years, and I thank the district attorneys for  
22 taking that appropriate action.

23           MR. MORGANELLI: Thank you.

24           Just one last point. There was some discussion  
25 by the previous speaker as to whether or not the district

1 attorneys or a sitting district attorney, a present elected  
2 district attorney should be involved at some point in terms  
3 of this whole process. I think the point that was raised by  
4 one of you was well-taken that we do have pretty much  
5 ongoing relationships with the Attorney General's Office  
6 through the drug task force, for example, through the  
7 conflicts of interest. I've used them on numerous  
8 occasions, and I would suspect that if you took a poll among  
9 the district attorneys, that most of them who are presently  
10 elected would not want to be, first of all, from a resource  
11 standpoint would be a burden to take on any type of major  
12 matter and also run their office. Probably what happens  
13 down the road is you are going to have the appointments of  
14 maybe former prosecutors, people who have been the district  
15 attorney of a certain county and now are no longer.

16           As you see in the Federal government, they  
17 appointed a former prosecutor, and I think that makes sense  
18 then to burdens. I certainly wouldn't volunteer for the  
19 job, but I think it would be a real burden, but that again  
20 is a real job for you individuals.

21           REPRESENTATIVE PICCOLA: Or perhaps a University  
22 of Pittsburgh law professor.

23           CHAIRMAN CALTAGIRONE: Senator Heckler.

24           SENATOR HECKLER: Thank you very much, Mr.  
25 Chairman.

1           I just want to thank you gentlemen for coming.  
2 I at least accord tremendous weight to the opinion of the  
3 association. That may be because you saw fit in your  
4 earlier days to retain my services, but I think that it is  
5 important that your organization or the district attorneys  
6 of the State have a continuing involvement in this  
7 legislation as it evolves.

8           It occurs to me, and I just, if you have a  
9 reaction, I would be interested in it, but just as food for  
10 thought, as this bill unfolds, there obviously has been  
11 considerable discussion focused on this multi-layer initial  
12 process and some concern that maybe that's unwieldy and  
13 bureaucratic, and I wonder what appropriate role the  
14 district attorneys of the State might have in, for instance,  
15 by some consensus process designating a list of names of  
16 suitable investigative counsel of people from whom an  
17 appropriate executive branch individual like the General  
18 Counsel or somebody else including the Governor, him or  
19 herself, could select, so that we are talking about veteran  
20 prosecutors who know how the process works, perhaps  
21 designating that the State Police are, you know, going to be  
22 available as the investigative resource of this individual,  
23 so that we know how that initial process is going to work.

24           And I guess the same thing could be done or  
25 could even work from the same list in terms of the

1 independent counsel, him or herself, that I don't believe  
2 the bill as it stands makes specific reference. The  
3 three-judge panel will pick somebody. You're entrusting to  
4 them to select somebody with appropriate skill and  
5 representation. It may be that there's an appropriate role,  
6 although the association is certainly a private organization  
7 and not part of government itself, I think over the years  
8 it's really distinguished itself in the minds in the  
9 legislature for being not necessarily nonpartisan but  
10 certainly bipartisan in rising above any political  
11 considerations and focusing on the best interests of the  
12 Commonwealth and justice.

13 MR. SCAVAGE: If I could comment on that, I  
14 think your point is directed at eliminating one of the  
15 layers of bureaucracy. You know, our query is of an Office  
16 of General Counsel, might it be better to have the executive  
17 branch establish a panel of, an investigative panel at the  
18 outset of each administration with recommendations from  
19 various groups - the General Assembly, the District  
20 Attorneys Association, people who have a natural interest in  
21 it - and instead of having the petitions running through  
22 General Counsel and then to an investigative panel, why  
23 wouldn't the investigative panel be an appropriate body to  
24 screen out those matters that are not significant? You  
25 might save on that. You would still have a body that would

1 receive the petition, that would have some kind of public  
2 appointment from the executive branch, and streamline it a  
3 bit.

4           SENATOR HECKLER: That would be somewhat similar  
5 to the merit selection process which the Governor avails  
6 himself of but ultimately exercises his discretion in  
7 nominating judges of the Courts of Common Pleas. And in  
8 fact, that's one of the things that confused me just a  
9 little bit, the comments that there might be former  
10 prosecutors out there who could fill these positions. I  
11 fought with someone that DAs automatically became judges  
12 after so many years. I didn't think that there are any  
13 available.

14           Thank you, Mr. Chairman.

15           CHAIRMAN CALTAGIRONE: Karen would like to make  
16 a comment.

17           MS. DALTON: I would just like to address the  
18 issue of cutting out the General Counsel, perhaps the judges  
19 appointing. This issue, I think Professor Jordan would  
20 agree with me on this, the Supreme Court case that upheld  
21 the Federal law, if my memory serves me correctly, that law  
22 was challenged on a number of bases, among them were  
23 separation of powers issues, and the court held that  
24 judicial involvement had to be minimal. It was okay for the  
25 appointment, but that the judiciary should not be involved

1 in making prosecutorial decisions, as you're suggesting.  
2 And that the reason why we have the General Counsel doing  
3 the original screening process is because in the Federal law  
4 the Attorney General, the Federal Attorney General takes on  
5 that role. So we're trying to track the Federal model for  
6 constitutional reasons, to meet the requirements of Morrison  
7 v. Olsen. That's why we're doing it that way.

8 MR. SACA VAGE: Perhaps I didn't express myself  
9 with clarity. The panel that I, the investigative counsel,  
10 the role that you have prescribed in the bill, you have the  
11 General Counsel and then you have the investigative  
12 counsel. I was suggesting the investigative counsel  
13 perhaps, and maybe I misspoke and said might not be a panel,  
14 but the person who was the investigative counsel, why not  
15 have that person appointed by the Governor? That person  
16 could be appointed with some advice and input from, it could  
17 be a former prosecutor or somebody of that nature. I didn't  
18 mean it to seem that the judges would appoint the  
19 investigating arm. I recognize the separation issue there.  
20 But just looking to eliminate the bureaucracy, and in light  
21 of what some comments earlier that had been made concerning  
22 the Office of General Counsel, how attune are they going to  
23 be to criminal matters when that's really not what they do  
24 on a day-to-day basis, but if you have somebody at the  
25 outset where some thought was given that this would be a



1 standing appointment at least, would then screen all the  
2 matters that are raised.

3 I guess what I'm troubled with is I don't see  
4 how you're going to avoid having some kind of standing  
5 bureaucracy once you pass a bill that's going to involve  
6 matters of reviewing the Attorney General and members of his  
7 staff, you're going to have all sorts of complaints from  
8 every end of the Commonwealth, and you better have a  
9 mechanism to deal with them.

10 CHAIRMAN CALTAGIRONE: I wanted to thank the  
11 District Attorneys Association for being here today and  
12 presenting their testimony. We really do appreciate that.

13 This hearing now will be recessed until 2 p.m.  
14 on May 6, 1994, at which time we will reconvene in this room  
15 and receive further evidence.

16 Thank you very much, gentlemen. The meeting is  
17 recessed.

18 (Whereupon, the proceedings were recessed at  
19 1:30 p.m.)

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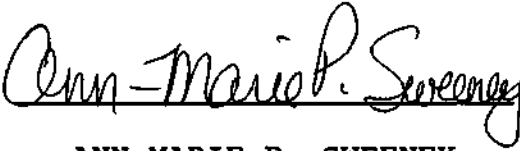
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I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken during the hearing of the within cause, and that this is a true and correct transcript of the same.



ANN-MARIE P. SWEENEY

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