

STATEMENT OF THE OFFICE OF ATTORNEY GENERAL
COMMONWEALTH OF PENNSYLVANIA
IN OPPOSITION TO
HOUSE BILL 2672 AND HOUSE BILL 2741
BEFORE THE JUDICIARY COMMITTEE
HOUSE OF REPRESENTATIVES

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History of the Office of Attorney General: Under Constitutional authority since 1874 and until the enactment of the Commonwealth Attorneys Act which became effective on January 20, 1981, the Attorney General was appointed by the Governor and served as a traditional member of the Governor's Cabinet. He served, basically, at the pleasure of the Governor and could be counted upon, by and large, to do the Governor's bidding.

On May 16, 1978, the electorate of the Commonwealth overwhelmingly approved a constitutional amendment creating the Office of Elected Attorney General to replace the officer appointed by the Governor since 1874. The 1978 constitutional amendment was implemented by the Commonwealth Attorneys Act, 71 P.S. § 732-101 et seq, which became effective January 20, 1981. Sections 201-208 of the Commonwealth Attorneys Act created the Office of Attorney General and defined the powers and duties of the Attorney General, now elected, and the Office of Attorney General.

The Commonwealth Attorneys Act, Sections 301-303, also created the Office of General Counsel, which is headed by a General Counsel appointed by the Governor to serve at his pleasure.

Prior to 1981, then, Pennsylvania's Attorney General was very much like the federal Attorney General of today and was even seen as a puppet or tool of the Governor with no independence whatsoever. The law vis-a-vis the powers of the Attorney General and the powers of the several elected district attorneys throughout the Commonwealth was, at best, in a state of confusion. See e.g. Matson v. Jackson, 368 Pa. 283, 83 A.2d 134 (1951) (attorney general does not have the power to investigate an assistant district attorney for communist leanings); Matson v. Marqiotti, 371 Pa. 188, 88 A.2d 892 (1952) (attorney general can supersede a district attorney); In re Shelley, 332 Pa. 358, 2 A.2d 809 (1938) (legislature, by statute, may provide for supersession of a district attorney by the attorney general in specific cases); McGinley v. Scott, 401 Pa. 310, 164 A.2d 424 (1960) (legislature may not enact any law to suspend or remove from office or otherwise punish a district attorney); Smith v. Gallagher, 408 Pa. 551, 185 A.2d 135 (1962) (district attorney may not agree to divest himself of any duty attendant on his office as an elected district attorney and appoint a special prosecutor to perform such duty).

Faced with this situation, and the electorate's call for an elected attorney general, the General Assembly carefully set out the powers and duties of the Attorney General and also stated the relationship between the elected Attorney General and the several elected district attorneys.

Thus, under Section 206, the General Assembly declared the Attorney General to be the chief law enforcement officer of the Commonwealth and the district attorney to be the chief law enforcement officer for the county in which he is elected. Section 206 also gives the Attorney General the power to prosecute--given under Section 205--and requires the Pennsylvania State Police to cooperate with the Attorney General and furnish such services which the Attorney General shall request.

Section 205(a)(1) of the Commonwealth Attorneys Act gives the Attorney General the power to prosecute in any county criminal court criminal charges against any state official or employee affecting the performance of their public duties or the maintenance of the public trust and criminal charges against persons attempting to influence such state officials or employees or benefit from such influence or attempt to influence.

Section 205(b) of the Commonwealth Attorneys Act provides that the Attorney General shall have concurrent jurisdiction with the district attorney for, inter alia, cases arising under Section 205(a)(1) and may refer to the district attorney, with his consent, any violation or alleged violation of the criminal laws of the Commonwealth which come to the Attorney General's notice.

Section 205(a)(4) allows courts to order supersession of a district attorney upon the petition of the Attorney General in any

criminal proceeding where the Attorney General establishes by a preponderance of the evidence that the district attorney has failed or refused to prosecute and such failure or refusal to prosecute constitutes an abuse of discretion. Section 205(5) allows the president judge of a district to ask the Attorney General to intervene in any criminal proceeding in the district to represent the Commonwealth. Section 205(c) allows the Attorney General, in his discretion, to prosecute criminal appeals upon request of a district attorney.

Thus, since the advent of the Commonwealth Attorneys Act in 1981, the relationship of the Attorney General and the district attorney has been clearly delineated.

The Commonwealth Attorneys Act does not give the Attorney General any supervisory powers over a district attorney or over the Pennsylvania State Police and they and the State Police remain free to perform whatever investigations and prosecutions they wish.

Thus, Pennsylvania has a system of elected district attorneys and an elected Attorney General, each independent of the other and also independent of the Governor.

It was this very lack of independence that led to the enactment of the federal special prosecutor law which expired in December, 1992, and the reauthorization legislation which is under

debate at this time in the Congress. The federal system needs, in the opinion of many in Congress, a special prosecutor because of the non-independence of the Attorney General of the United States who is appointed by and serves at the pleasure of the President and, therefore, does not have the independence that these Members of Congress, and much of the public, believe he or she ought to possess.

However, in Pennsylvania because of the independence possessed by the elected Attorney General and the district attorneys, a special prosecutor (called an Independent Counsel in this legislation) is neither warranted nor wise.

The fourteen years of experience in Washington with the federal special prosecutor law should cause Pennsylvanians to flee from such a law, but Mr. Piccola has swallowed the federal law proffered by his Washington advisers without stopping to consider the Pennsylvania Constitution. He authorizes the spending of two million dollars in taxpayers money to a non elected official to single out the action of an Attorney General--a person who is elected with the confidence of the voters statewide.

There are significant differences between the bills being heard today and the congressional proposal and even existing law--HB 2741 tries to emulate the Congressional House version of the bill with noted exceptions: The Congress would extend the

jurisdiction to the President, his Cabinet and potentially to the Members of Congress. Inclusion of Members of Congress avoids any apparent conflict that may result and this issue has been hotly debated because of all the recent congressional scandals. HB 2741 excludes the members of the Legislature, and only focuses on the Attorney General and not the Governor or the other statewide officers. The Federal bill specifically reserved the power of wiretap to the Attorney General--HB 2741 has no such provision, and in fact gives that power to his independent prosecutor. The Federal bill has a mandatory three year check-in with the federal courts to determine whether the Independent Counsel should continue--HB 2741 grants unbridled ability to go forward. The Federal bill mandates that they look to the administrator of the courts for office space and administrative support--HB 2741 makes no such requirements.

In attempting to capture the lack of safeguards of the independent counsel, Justice Scalia has written:

"The independent counsel operates in an area where so little is law and so much is discretion and he is intentionally cut off from the unifying influence of the Justice Department and the perspective that multiple responsibilities provide. What would normally be regarded as a technical violation, there are not rules defining such things, may in his* * *small world assume the proportions of an indictable offense. What would normally be regarded as an investigation

that has reached the level of pursuing such picayune matter that it should be concluded, may to him* * *be an investigation that ought to go on for another year. How frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile."

Thus, the Office of Attorney General opposes the enactment of House Bill 2672 and House Bill 2741. We oppose this idea consistent with the Department of Justice under Presidents Reagan and Bush. Attorney General Thornburgh, former Governor of this Commonwealth, strongly opposed reauthorization the of Independent Counsel Act. Federal career prosecutors have consistently opposed these statutes which are seen as an infringement upon their sworn duties, and, indeed, upon their very ability to prosecute the laws they have sworn an oath to uphold.

House Bill 2741 would authorize the appointment of an independent counsel in Pennsylvania by a panel made up of three (3) judges. House Bill 2672 would authorize a special prosecutor to be selected by the General Assembly. Each would be authorized to investigate and prosecute any matter involving possible criminal conduct on the part of the Attorney General, his deputies or assistants.

Their enactments are unnecessary as the several district attorneys of the Commonwealth already possess these powers and duties. Both are potentially unconstitutional in several respects and deserve closer scrutiny. Both bills represent bad public policy. There are no controls or restrictions placed on special prosecutors in House Bill 2672 and those contained in House Bill 2741 are insufficient. There are no effective cost controls. There is no real way to end an independent counsel's office once appointed.

1. Provisions of the Legislation.

House Bill 2672 would do the following:

Allow the General Assembly to authorize and appoint a special prosecutor;

Require that any prosecution by the special prosecutor take place in the Dauphin County Court of Common Pleas.

House Bill 2741 contains similar language to that contained in the Federal Independent Counsel Reauthorization Act and would do the following:

Create a Special Independent Prosecutor's Panel consisting of three (3) judges, chosen by lot, one from Commonwealth Court, one from Superior Court, and one from the several courts of Common

Pleas of the Commonwealth. (Federal judges are appointed to serve life time terms);

Allow the Attorney General or the General Assembly to ask the Office of General Counsel or allow the Office of General Counsel itself to begin an investigation and appoint a Special Investigative Counsel to conduct a preliminary investigation of the Attorney General or his Office if the Office of General Counsel determines that grounds to do this exist. (General Counsel has no criminal jurisdiction).

The Special Investigative Counsel would have ninety (90) days after the investigation is commenced to complete it. A one-time sixty (60) day extension could be allowed by the Office of General Counsel.

A Special Investigative Counsel would have no power to convene a grand jury, plea bargain, grant immunity and issue subpoenas. If the Special Investigative Counsel determines that there are no reasonable grounds to further investigate, then the matter ends.

If the Special Investigative Counsel determines that further investigation is warranted, or if that counsel is unable to determine within the allotted 90 days whether further investigation is warranted, then the Special Investigative Counsel must apply to the Panel for the appointment of an independent counsel.

If the Special Investigative Counsel has determined that there are no reasonable grounds to investigate further, and after he has filed the required report with the Panel "ending the matter," additional information is received by that counsel that is sufficient to constitute grounds to investigate further, counsel shall then receive another ninety (90) day period to investigate further. There is no way to end this cycle so long as "additional information" comes to the attention of the Special Investigative Counsel nor is there any time limit for receiving such "additional information."

The Panel, upon receipt of a Special Investigative Counsel's report that further investigation is warranted, then appoints an Independent Counsel and defines his or her "prosecutorial jurisdiction," all within thirty (30) days.

The Independent Counsel is to be a person of "appropriate experience" who may not hold any office of profit or trust with the Commonwealth, and is to be given "adequate authority to fully investigate and prosecute the subject matter and all matters related to the subject matter." This provision expressly prohibits any public sector lawyer from serving as Independent Counsel.

In lieu of appointing another Investigative Counsel, the Panel may expand the prosecutorial jurisdiction of an Investigative

Counsel. An Investigative Counsel is permitted to request an expansion of his or her prosecutorial jurisdiction.

An Investigative Counsel shall be compensated at a per diem rate equal to that of the Attorney General. There is no limit on the number of associates or aides or support personnel that an Investigative Counsel may hire. The only constraint is that after 2 years or the expenditure of \$2,000,000 dollars, a decision is to be made by the panel whether to terminate an Office of Independent Counsel.

An Independent Counsel may seek support and administrative services from the Pennsylvania State Police, but is not required to do so.

An Independent Counsel is given the same investigative and prosecutorial powers and functions as the Attorney General and his or her Office, including wiretaps, and is made separate and independent of the Office of Attorney General.

An Independent Counsel may be removed only by the General Counsel and only for good cause, physical disability, mental capacity, or any other condition that substantially impairs his or her duties. Other than certain restrictions relating to his or her private law practice, there is no code of conduct stated for an Independent Counsel.

The Judiciary Committees of the General Assembly are given "oversight jurisdiction with respect to the official conduct" of an Independent Counsel who, in turn, is given "the duty to cooperate with the exercise of such oversight jurisdiction." An Independent Counsel must file quarterly reports with the General Assembly describing the progress of the investigation.

Whenever a matter has been referred to an Investigative Counsel, the Attorney General and his Office and all district attorneys are required to suspend all investigations and proceedings regarding the matter.

2. The Lack of Fiscal Controls.

Under this law, each Independent Counsel will have only one subject matter to investigate, unless also assigned to "related matter," but unlimited resources to do what he or she wishes. Each Independent Counsel will start from scratch, ordering supplies and hiring aides for an office that did not exist before appointment. Independent Counsel will not have to consider the merits of other, similar cases or worry about normal budgetary constraints in deciding how far to press the case at hand. Independent Counsel will not be surrounded by peers handling similar cases or supervisors counselling him or her, nor be required to follow Office of Attorney General, or Office of General Counsel, policies or take

into account the administrative and other considerations that often shape a state criminal investigation.

While the assistance of the State Police is offered, including the use of State Police resources and personnel, there is no requirements that an Independent Counsel take advantage of them. Rather, an Independent Counsel may appoint whatever employees necessary and these personnel are excepted from the competitive hiring or civil service requirements.

There is no cap on expenditures by an Independent Counsel, only a requirement that the Panel which appointed the Independent Counsel consider terminating the appointment at the end of two years or upon the expenditure of \$2,000,000 by an Independent Counsel. The Panel does not ever have to terminate the appointment of an Independent Counsel.

Further, because House Bill 2741 would require the Office of General Counsel to fund the efforts of an Independent Counsel for an indefinite period of time,¹ it poses an impermissible threat to the executive's ability to responsibly manage its affairs.

¹The legislation leaves the length of an Independent Counsel's term to the discretion of the Panel or Independent Counsel. If the experience of Special Prosecutor Walsh is instructive, the term could be lengthy. After seven (7) years in office, and having spent a reported \$40,000,000, during which many of the cases filed by Special Prosecutor Walsh had been dismissed, he continued to insist that his work was not complete.

Neither the Governor nor the Attorney General would have the authority to control an Independent Counsel's expenditures. Unhampered by other responsibilities and unconcerned with the success of other law enforcement efforts, Independent Counsel's demands for staff and resources will be limited only by the bounds of the officer's energy and zeal and his or her own due regard for expense. Counsel could compel diversion of staff and resources at an unpredictable and unreasonable rate. Spending too much money is not made good cause for an Independent Counsel's removal.

3. The Unconstitutionality of These Bills.

Both bills are probably an unconstitutional placement of investigatory and prosecutorial powers into the hands of an unelected prosecutor.

This legislation could violate provisions of the Pennsylvania Constitution that divide and separate essential governmental powers between legislative, executive and judicial branches of state government. Pennsylvania Constitution, art. II, section 1, art. IV, section 2 and art. V, section 1. Judge Woodside states that "separation of powers was not instituted to promote governmental efficiency, but as a bulwark against tyranny--tyranny by the Governor, tyranny by the legislators, and tyranny by the judges." Woodside, Pennsylvania Constitutional Law, p. 25. There was a real concern that the Legislature might use its "plenary lawmaking power to swallow-up the other departments of the Government." General

Assembly of the State of New Jersey v. Byrne, 90 N.J. 376, 383 (1982). In approving these bills, the General Assembly would arrogate and interfere with the exercise of authority that the Constitution reserves for the executive branch.

The General Assembly has broad authority to make the law, but no authority to enforce it. Faithful execution of laws is the responsibility of the executive branch. Pa. Const., arts. III and IV. Legislative action that excessively interferes with the executive's ability to carry out the constitutional mandate violates the separation of powers doctrine.

House Bill 2672 would deprive the executive of all law enforcement authority in connection with the Attorney General and that Office and place it in the hands of the General Assembly through the agency of its special prosecutor. House Bill 2741 has the same effect through its provision that an Independent Counsel must cooperate with the General Assembly's "legislative oversight" and must submit quarterly reports of his or her progress to the General Assembly.

Both bills take powers and duties from the proper constitutional officer, the district attorney who is elected by the people, pursuant to article IX, section 4 of Pennsylvania's Constitution, and place those powers and duties into a non-constitutional and non-elected prosecutor.

Our Supreme Court has ruled that such would disenfranchise the people by removing their freedom to elect a district attorney of their choice. Smith v. Gallagher, 408 Pa. 551, 185 A.2d 135 (1962). While the General Assembly may increase or decrease the powers of a district attorney, it may not transfer them to another, non-elected, person. See Kemp v. Stanley, 204 LA. 110, 15 So.2d 1 (1943) (decided under Louisiana law); Ex Parte Corliss, 16 N.D. 470, 114 N.W. 962 (1907) (decided under North Dakota law). District attorneys, as constitutional officers, cannot be displaced by the legislature even as to a small portion of their functions. Ex Parte Corliss.

4. These Bills Represent Bad Public Policy

Public confidence in the fairness and impartiality of the criminal justice system must be promoted and maintained, but this legislation would have the opposite effect. It would establish a special system of criminal justice for a single case. Legislative approval of this plan would convey one of two messages: 1) the General Assembly does not believe the system works; or 2) the General Assembly is afraid to allow the system to operate in the case of an Attorney General. Neither message is likely to instill public confidence in our system of laws.

While we share the concern for public confidence in the criminal justice system, we are convinced that the system's

fairness and impartiality can only be demonstrated by allowing the system to work uniformly in all cases, regardless of the identity of the accused.

The system can and does operate properly. As constitutional officers, the several elected district attorneys have the independence necessary to enforce the law without fear of reprisal. Pa. Const. art. IX, section 4. Further, being subject to impeachment or criminal prosecution themselves, the several district attorneys are prohibited from using the law for the benefit of themselves or others.

Moreover, at each stage of a criminal investigation and prosecution, the courts of this Commonwealth are available to address any claim of a violation of individual rights or of a failure to prosecute diligently.

The legislation being considered today ignores these significant checks on the exercise of prosecutorial authority. In a claimed effort to close non-existent "loopholes," the bills would dismantle the Constitutional system already in place--a system that has served the people well. See e.g., Commonwealth v. Creamer, 236 Pa. Super. 168, 345 A.2d 212 (1975), where the District Attorney of Crawford County did not hesitate to attempt to prosecute a former attorney general for alleged offenses committed while Mr. Creamer was the Attorney General of Pennsylvania.

Furthermore, one of the most easily abused powers of the Office of Attorney General is to conduct wiretaps and we have very strict internal procedures and policies in place to guard against misuse and abuse. Yet this legislation gives an Independent Counsel that power without providing for any safeguards concerning its use.

This law could be used inappropriately, criminalizing what in fact are policy disputes. The watchwords in any process must be fairness, due process of law, accountability, and cost controls. These proposals provide for none of them.

House Bill 2741 has been literally lifted wholesale from the Federal Independent Prosecutor Reauthorization Act which is now being debated in the Congress. However, rather than include the state counterparts to the President, Vice-President, Members of Congress and others subject to the jurisdiction of the federal prosecutor, this bill focuses only upon one person and one office. The Governor, Lieutenant Governor, Members of the General Assembly, and their staffs are conspicuously absent from coverage in this proposed legislation.

The federal experience with a special prosecutor law has not been a without tremendous criticism. It is significant that the special prosecutor law was permitted to expire in December of 1992. The debate over whether to reauthorize special prosecutors has been

intense and we would be well advised to study that debate and learn what we can from the federal experience rather than joining in lock step with what is being proposed now in Congress.

In stark contrast to the federal experience of many many millions of dollars poured down the drain for so little results, the Office of Attorney General has been able to efficiently and economically prosecute Justice Rolf Larsen and is now prosecuting William Stinson. Also, only recently, the Dauphin County District Attorney commenced an investigation of the Election Bureau's referral regarding Attorney General Preate. Quite simply, Pennsylvania does not need a special prosecutor law.