

STATEMENT OF CONGRESSMAN GEKAS BEFORE THE HOUSE JUDICIARY COMMITTEE
OF THE COMMONWEALTH OF PENNSYLVANIA
MAY 5, 1994

MR. CHAIRMAN, THANK YOU FOR YOUR INVITATION TO TESTIFY TODAY ON LEGISLATION PENDING BEFORE THE HOUSE PROVIDING FOR THE APPOINTMENT OF INDEPENDENT COUNSEL IN CASES INVOLVING ALLEGATIONS OF WRONGDOING BY THE ATTORNEY GENERAL.

AS RANKING REPUBLICAN OF THE HOUSE JUDICIARY COMMITTEE'S SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS IN WASHINGTON, I HAVE HAD CONSIDERABLE EXPERIENCE OVER THE PAST FOUR YEARS WITH STILL-PENDING LEGISLATION TO REAUTHORIZE THE FEDERAL INDEPENDENT COUNSEL ACT. I AM FAMILIAR WITH THE ARGUMENTS ON BOTH SIDES OF THE ISSUE AS TO WHETHER OR NOT THERE SHOULD BE AN INDEPENDENT COUNSEL STATUTE IN THE FIRST PLACE. RECOGNIZING THE DISRUPTION THAT AN INDEPENDENT COUNSEL CAN CAUSE TO THE SYSTEM, I HAVE INTRODUCED LEGISLATION AND SUPPORTED AMENDMENTS IN THE CONGRESS TO IMPROVE THE FEDERAL STATUTE AND TO REQUIRE MORE ACCOUNTABILITY FROM THOSE WHO SERVE IN THE POSITION.

WHAT UNFORTUNATELY DRIVES THIS ISSUE IS A SUSPICION THAT CRIMINAL LAWS ARE NOT BEING IMPARTIALLY AND VIGOROUSLY ENFORCED AGAINST THOSE HIGHLY PLACED OR WELL-CONNECTED IN GOVERNMENT. THE BEST SOLUTION WOULD ENTAIL NO INDEPENDENT COUNSEL LEGISLATION AT ALL, BUT RATHER THE ELECTION AND RETENTION OF GOVERNMENT OFFICIALS THAT THE PEOPLE TRUST. IF THE PEOPLE CANNOT TRUST AN ATTORNEY GENERAL,

FOR INSTANCE, TO CARRY OUT THE LAW HE HAS SWORN TO UPHOLD, HE DOES NOT BELONG THERE IN THE FIRST PLACE.

THIS REQUIRES THE PEOPLE'S ATTENTION TO THOSE WHO GOVERN THEM, NOT MERELY THEIR WEARY FORBEARANCE MARKED BY THE OFTEN HEARD REFRAIN THAT "NO ONE IN POLITICS CAN BE TRUSTED." THERE IS CONSIDERABLE TRUTH IN THE OBSERVATION THAT WE GET THE GOVERNMENT WE DESERVE. IF CITIZENS DO NOT CARE ENOUGH TO DEMAND TRUSTWORTHY BEHAVIOR BY THEIR ELECTED OFFICIALS THEN, IT GOES WITHOUT SAYING, THEY WILL GET OFFICIALS THEY CAN'T TRUST.

BUT MAINTAINING TRUST IN GOVERNMENT IS NOT THE RESPONSIBILITY OF THE ELECTORATE ALONE. ELECTED OFFICIALS HAVE TO BE CONSCIOUS OF THEIR RESPONSIBILITY NOT ONLY TO THOSE WHO SENT THEM BUT ALSO TO THE INSTITUTION TO WHICH THEY WERE SENT. IT IS DIFFICULT TO WALK ONTO THE FLOOR OF THE UNITED STATES HOUSE OF REPRESENTATIVES WITHOUT FEELING A DUTY TO THE MEMORY OF DANIEL WEBSTER, HENRY CLAY, ABRAHAM LINCOLN, SAM RAYBURN AND THE MANY, MANY NOTABLE FIGURES OF AMERICAN HISTORY WHO TROD THAT FLOOR BEFORE. SERVICE IN HARRISBURG CARRIES WITH IT THE SAME RESPONSIBILITY.

THIS ALL BEING SAID, WE MAY NEED MORE. FOR ALTHOUGH WE HAVE THE TEN COMMANDMENTS, WE NONETHELESS HAVE A CRIMINAL CODE FOR THOSE WHO DISREGARD THEM. WE SHOULD LOOK AT INDEPENDENT COUNSEL LEGISLATION ---NOT AS THE COMPLETE SOLUTION TO THE QUESTION OF TRUST---BUT AS ONE METHOD TO ADDRESS UNUSUAL SITUATIONS WHERE MANKIND'S WORST IMPULSES HAVE PREVAILED AND A MALFEASANT OFFICIAL MIGHT OTHERWISE

ESCAPE THE ATTENTION OF THE PEOPLE TO THE DETRIMENT OF THE INSTITUTION HE SERVES.

LET ME STATE AT THE OUTSET THAT THERE IS NO ONE WAY TO WRITE AN INDEPENDENT COUNSEL LAW. THE FEDERAL STATUTE DESCRIBES THE KIND OF INFORMATION THAT CAN TRIGGER PRELIMINARY INVESTIGATION, DELIMITS THE TIME THAT SUCH CHARGES ARE TO BE INVESTIGATED, TELLS THE ATTORNEY GENERAL WHEN TO APPLY TO A COURT PANEL FOR THE APPOINTMENT OF AN INDEPENDENT COUNSEL AND SETS OUT THAT INDIVIDUAL'S AUTHORITY AND RESPONSIBILITY. LET ME INCLUDE THE STATUTE FOR THE RECORD AS A PART OF MY STATEMENT.

THE FEDERAL STATUTE IS INSTRUCTIVE AS ONE THAT, UNTIL IT WAS ALLOWED TO EXPIRE IN 1992, HAD BEEN IN EFFECT FOR MORE THAN A DOZEN YEARS AND WAS INVOKED OVER THAT PERIOD SEVERAL TIMES WITH VARYING DEGREES OF SUCCESS. IT SHOULD BE LOOKED AT, BUT THERE IS NO DOUBT THAT IT CAN, LIKE EVERYTHING ELSE, BE IMPROVED.

AN INDEPENDENT COUNSEL LAW SHOULD PROVIDE FOR APPOINTMENT OF THAT COUNSEL BY THE JUDICIAL BRANCH. THE POTENTIAL FOR POLITICAL INFIGHTING AND ABUSE IS ENHANCED, I THINK, IF THE LEGISLATIVE BRANCH APPOINTS THE INDEPENDENT COUNSEL AND THE APPEARANCE OF IMPARTIALITY MAY BE COMPROMISED IF THE EXECUTIVE BRANCH NAMES THE INDIVIDUAL. THE JUDICIAL BRANCH, THOUGH ELECTED IN PENNSYLVANIA, IS THE LEAST PARTISAN OF THE BRANCHES AND ONE PRESUMABLY LESS INVOLVED IN QUOTIDIAN POLITICAL STRUGGLES.

MY READING OF HOUSE BILL 2672 PLACES THE APPOINTMENT OF THE COUNSEL WITH THE GENERAL ASSEMBLY WHICH, I THINK, MAY BLUR SOMEWHAT WITH THE ASSEMBLY'S POWER OF IMPEACHMENT. I FEEL IT IS BETTER TO PRESERVE THAT LATTER POWER WITH UNDILUTED FOCUS AND GIVING THE ASSEMBLY THE POWER TO APPOINT COUNSEL WITH THE AUTHORITY TO PROSECUTE CARRIES WITH IT TOO MUCH PARTISAN POTENTIAL.

I DO, HOWEVER, AGREE THAT THE ASSEMBLY OUGHT TO HAVE A ROLE (AS SET OUT IN HOUSE BILL 2741) IN REQUESTING THE APPOINTMENT OF COUNSEL--- A POWER SHARED BY BOTH THE MAJORITY AND MINORITY. THE FEDERAL STATUTE CONTAINS SIMILAR LANGUAGE AND I THINK IT IS VALUABLE, IF USED RESPONSIBLY, IN SIGNALING TO THE GENERAL COUNSEL OF THE COMMONWEALTH THE EXISTENCE OR PERCEIVED EXISTENCE OF A CONFLICT OF INTEREST OF WHICH HE MIGHT NOT BE AWARE.

HOUSE BILL 2741 PROVIDES THAT INDEPENDENT COUNSEL BE APPOINTED (AFTER A PRELIMINARY INVESTIGATION BY A SPECIAL INVESTIGATIVE COUNSEL) BY A THREE-JUDGE PANEL, THE MEMBERS OF WHICH ARE CHOSEN BY LOT, ONE EACH FROM DIFFERENT COURTS. THIS IS A PREFERABLE APPROACH, ALTHOUGH ONE MUST REALIZE THAT CHOICE BY LOT LEAVES MORE THAN IDENTITY TO CHANCE. SOME CONSIDERATION MIGHT BE GIVEN TO ENSURING THE PROPER PERFORMANCE OF JUDGES ON THE PANEL, SINCE THEY ARE GIVEN THREE YEAR TERMS. MOREOVER, THE LEGISLATION PROVIDES THAT MEMBERS OF THE PANEL MAY BE REAPPOINTED BUT NEEDS SOME CLARIFICATION AS TO WHO REAPPOINTS THEM.

THERE IS A DIFFERENCE BETWEEN THE FEDERAL GOVERNMENT AND

PENNSYLVANIA. UNDER THE FEDERAL SYSTEM, THE ATTORNEY GENERAL IS AN APPOINTED MEMBER OF THE PRESIDENT'S CABINET. IN PENNSYLVANIA, HE IS ELECTED INDEPENDENTLY, PROVIDING FOR A DIVIDED EXECUTIVE. UNDER THE FEDERAL SYSTEM, HE IS A PART OF THE ADMINISTRATION, AND SO INDIVIDUALS COVERED UNDER THE INDEPENDENT COUNSEL LAW INCLUDE HIGHLY PLACED OFFICIALS THROUGHOUT THE EXECUTIVE. BUT IT MUST BE BORN IN MIND THAT EVEN IN A DIVIDED EXECUTIVE THE ATTORNEY GENERAL AND THE GOVERNOR MAY STILL BE OF IDENTICAL POLITICAL PARTIES, THUS PRESENTING THE SAME POSSIBILITY FOR ABUSE THAT WOULD EXIST IF THE ATTORNEY GENERAL WERE AN APPOINTED MEMBER OF THE EXECUTIVE CABINET. CONSEQUENTLY, SOME CONSIDERATION MIGHT BE GIVEN TO ADDRESSING SITUATIONS IN WHICH ONE PARTY CONTROLS BOTH THE GOVERNOR'S OFFICE AND THAT OF THE ATTORNEY GENERAL...AND EXTENDING COVERAGE TO THE GOVERNOR AND OTHER HIGH LEVEL MEMBERS OF HIS OR HER ADMINISTRATION.

THIS BRINGS US TO ANOTHER POINT...AND ONE WHICH I THINK IS TERRIBLY IMPORTANT AND NOT ADDRESSED IN EITHER BILL. HOW SHOULD ALLEGATIONS OF WRONGDOING BE INVESTIGATED WHEN DIRECTED AT MEMBERS OF THE LEGISLATIVE BRANCH?

I WAS THE SPONSOR OF AN AMENDMENT DURING RECENT CONGRESSIONAL CONSIDERATION OF THE INDEPENDENT COUNSEL REAUTHORIZATION THAT WOULD EXTEND COVERAGE TO MEMBERS OF CONGRESS. I DID SO BECAUSE I FELT IT IMPORTANT TO INSURE PUBLIC CONFIDENCE THAT ALL CRIMINAL LAWS ARE BEING APPLIED IMPARTIALLY THROUGHOUT THE GOVERNMENT AGAINST THE HIGH AND MIGHTY JUST AS AGAINST THE AVERAGE CITIZEN. IF AN INDEPENDENT COUNSEL LAW IS MOTIVATED, AS IT SURELY IS, BY THE

PERCEPTION OF PARTIALITY IN THE CRIMINAL JUSTICE SYSTEM, THEN IT IS JUST AS IMPORTANT TO COVER THE LEGISLATIVE BRANCH AS IT IS TO COVER MEMBERS OF THE EXECUTIVE.

THE PUBLIC CANNOT BE EXPECTED TO LOOK AT HARRISBURG OR WASHINGTON WITH FINE LINES OF A CONSTITUTIONAL SCHOLAR DRAWN BETWEEN THE EXECUTIVE AND LEGISLATIVE BRANCHES AND CONCLUDE THAT BECAUSE THE TWO ARE SEPARATE A CONFLICT OF INTEREST CANNOT DEVELOP WHEN THE EXECUTIVE INVESTIGATES MEMBERS OF THE LEGISLATIVE BRANCH. IN FACT, I THINK THE PUBLIC'S VIEW IS MORE REALISTIC BECAUSE IT SEES THE TWO BRANCHES OPERATING IN A POLITICALLY CHARGED ATMOSPHERE OF GIVE AND TAKE THAT UNIQUELY BINDS THEM. AS I HAVE SAID, WASHINGTON AND HARRISBURG ARE DIFFERENT, BUT THE PRINCIPLE OF PUBLIC CONFIDENCE IN GOVERNMENT IS THE SAME AND SHOULD BE BOLSTERED IN BOTH PLACES. THEREFORE, I THINK YOU SHOULD CONSIDER COVERING MEMBERS OF THE LEGISLATURE IN AN APPROPRIATE MANNER.

FINALLY, I THINK IT IS IMPORTANT THAT THE INDEPENDENT COUNSEL BE HELD ACCOUNTABLE TO SOMEONE FOR HIS PERFORMANCE LIKE ANY OTHER OFFICIAL IN THE GOVERNMENT. HE SHOULD BE HELD ACCOUNTABLE NOT ONLY FOR ACTIVITIES THAT MIGHT RESULT IN HIS REMOVAL, SUCH AS PHYSICAL DISABILITY AND MENTAL INCAPACITY, BUT ALSO FOR HOW EXPEDITIOUSLY HE ACCOMPLISHES HIS ASSIGNED TASK. PERHAPS THE EXAMPLE OF LAWRENCE WALSH AND THE NEVER ENDING IRAN-CONTRA INVESTIGATION IS TOO FRESH IN MY MIND, BUT IT NONETHELESS SHOULD NOT BE REPEATED FOR THE SAKE OF THE LONG SUFFERING TAXPAYER. THEREFORE, SOME CONSIDERATION SHOULD BE GIVEN TO BOLSTERING THE JUDICIAL PANEL'S POWER OF

TERMINATION. UNDER MY READING OF HOUSE BILL 2741, THE PANEL'S SUPERVISORY POWER OVER THE COUNSEL IS ONLY WHETHER OR NOT TO TERMINATE THE OFFICE AND, EVEN THEN, I'M NOT SURE THAT THE STANDARD IT IS SUPPOSED TO APPLY TO MAKE THAT DETERMINATION IS SET OUT IN SUFFICIENT DETAIL. THE TWO YEARS OR TWO MILLION DOLLAR TIME FRAME FOR PANEL ACTION IS APPROPRIATE, BUT I THINK THAT THE PANEL SHOULD HAVE THE POWER TO DETERMINE WHETHER OR NOT THE PARTICULAR INDEPENDENT COUNSEL REMAINS THE APPROPRIATE INDIVIDUAL FOR THE TASK.

THANK YOU AGAIN FOR YOUR INVITATION. I HOPE THAT MY COMMENTS HAVE BEEN HELPFUL AND I REMAIN AVAILABLE AND READY TO ASSIST YOU IN ANY OTHER WAY POSSIBLE.