Testimony of Honorable Curtis Emery von Kann
Before the Senate Committee on Governmental Affairs
February 24, 1999

Introduction

Senator Thompson, Senator Lieberman, and Members of the Committee:

My name is Curtis von Kann. My background, briefly, is that I was a trial lawyer in private practice in Washington, D.C. for sixteen years beginning in 1969. In 1985 President Reagan appointed me a Judge of the District of Columbia Superior Court, where I served for ten years. In 1995 I retired from the bench in order to help people resolve their legal disputes outside of court. Currently, I serve as Director of Professional Services in the Washington, D.C. office of J·A·M·S/ Endispute, the nation's largest and, we think, best mediation and arbitration company. What brings me here today, obviously, is the fact that in 1996 I was appointed the seventeenth Independent Counsel of the United States under the statute you are reviewing.

The letter from Senators Thompson and Lieberman inviting me to testify today asked that I address three topics, namely, my experience with the Act, my views on whether the Act has achieved its objectives, and any legislative proposals I believe the Committee should consider. I will confine my testimony to those three topics.

I appreciate that your invitation did not ask me to address the experience of other Independent Counsel, and I do not plan to do so. Since I am not privy to the multitude of facts and considerations which have influenced the actions and decisions of other Independent Counsel, I do not feel competent to comment on their work.

I request that my full written statement be placed in the record, so that I may confine my oral presentation to the highlights only.

I. My Experience With The Act.

In mid-November 1996, I received a telephone call from Judge David Sentelle, Presiding Judge of the U.S. Court of Appeals Division for the Purpose of Appointing Independent Counsels. He told me that the Division was considering candidates for an appointment it would have to make shortly and invited me to an interview before the three judges of the Division, which I attended soon after. On November 27, 1996, about a week after my interview, the Court appointed me Independent Counsel in the Matter of Eli J. Segal. Because the allegations concerning Mr. Segal had received little or no publicity at that time, the Attorney General requested that this appointment be made under seal, and the Court did so.

Immediately following my appointment, I began to assemble a staff and set up my office. In doing so, I was influenced by an experience earlier in my legal career. In 1983-1985, I had worked in the law firm of Jacob A. Stein, while he served as Independent Counsel in the first investigation of Attorney General Edwin Meese. While I did not work directly on that

investigation, I had an opportunity to observe Jake's modus operandi, and I was quite impressed by the economy and speed with which he conducted his investigation. When, twelve years later, it fell to me to perform the duties of an Independent Counsel, I was determined to do so as economically and expeditiously as possible, consistent with a thorough and professional investigation. Additionally, because the matter was under seal, I was determined that our investigation would be conducted in utmost confidence, so as not to violate the legitimate privacy interests of Mr. Segal and others involved in the matter.

With these thoughts in mind, I set about to hire a lean team. I selected two attorneys to work with me, namely, Richard A. Simpson and Melanie G. Dorsey. Mr. Simpson was a former Assistant United States Attorney who had later served on the staff of Independent Counsel James McKay in the second investigation of Attorney General Meese. Ms. Dorsey was also a former Assistant United States Attorney and a former senior attorney at the United States Office of Government Ethics.

Through the good offices of FBI Director Louis Freeh, Special Agent Ruth A. Bransford was detailed to assist in our investigation.

Through the assistance of James Sizemore and his staff at the Administrative Office of the United States Courts, I secured the service of Lula R. Tyler as my Administrator and "Certifying Officer."

Throughout the investigation, my staff never exceeded those 4 persons -- two lawyers, one FBI agent, and one administrator. Six months into the matter, after we completed the bulk of our substantive work, Mr. Simpson resigned to return to his full-time law practice, and Ms. Dorsey assumed the position of Deputy Independent Counsel, thereby reducing the staff roster from four to three.

The Administrative Office of U.S. Courts provided us with offices which it already had under lease as possible start-up space for Independent Counsels. No modifications to this space were required and it met the security requirements of an office under seal. Except for leasing one computer, we furnished the office entirely with perfectly satisfactory, used government furniture and supplies remaining from previous Independent Counsel offices. We devoted one terminal to Westlaw access for research purposes and obtained other research materials from the Department of Justice's law library.

With staff and offices in place, I began the substantive investigation in early 1997.

The allegations in our case concerned actions taken by Mr. Segal when he was Chief Executive Officer and Chairman of the Board of the Corporation for National and Community Service ("the Corporation"), a wholly-owned government corporation which oversaw the President's Americorps program. As you may recall, the National and Community Service Trust Act of 1993 provided that, in order to reduce demands on the federal treasury, the Corporation could accept private donations to support the Americorps program. Within a few months of the Corporation's creation, Mr. Segal and others at the Corporation decided that they should establish a non-governmental "501(c)(3)" entity, which could promote private support for Americorps and accept donations from foundations and corporations that preferred to make contributions to a private,

tax-exempt entity rather than the federal government. Accordingly, a D.C. non-profit organization called the Partnership for National Service ("the Partnership") was established. The Partnership's Bylaws called for three of its seven directors to be officers of the Corporation or their designees. Thus, Mr. Segal became a director and chairperson of the Partnership; Shirley Sagawa, the Corporation's Executive Vice President, served as president and a director of the Partnership; and Larry Wilson, Jr., the Corporation's Chief Operating Officer, served as secretary, treasurer, and a director of the Partnership.

The central question in our investigation was whether Mr. Segal (and also Ms. Sagawa and Mr. Wilson), by simultaneously serving as officers of the governmental Corporation and also as officers and directors of the private Partnership, violated the conflict of interest provisions of 18 U.S. C. § 208, which make it a federal crime for any officer or employee of the federal government, or of any independent agency of the United States, to participate personally and substantially in any decision or other matter in which an organization of which he or she is an officer or director has a financial interest.

Parenthetically, neither the Executive Director, nor any other officer or employee of the Corporation for National and Community Service, is a "covered person" under the Independent Counsel Act. However, the Attorney General determined that Mr. Segal was a covered person because he served as Chief of Staff of the 1992 Clinton/Gore Election Committee and participated in the day-to-day management of the campaign at the national level. Interestingly, it was not Mr. Segal's actions in his covered position (as campaign chief of staff) which were the subject of our investigation but rather his subsequent actions in the not-covered position of Chief Executive and Chairman of the Americorps Corporation.

In the course of investigating this matter, my staff and I undertook to gather as quickly as possible sufficient facts to make an informed judgment about whether Mr. Segal should be prosecuted. Thus, we met with representatives of the Corporation's Inspector General's Office, which had referred the matter to the Department of Justice, and met with staff of the Department's Section of Public Integrity. We obtained and reviewed approximately 10,000 pages of documents. We interviewed ten persons with knowledge of the pertinent matters and made detailed records of those interviews. We met twice with Mr. Segal's counsel to apprise them of the scope of our inquiry and to invite a submission detailing their views. In May of 1997, we conducted a two-day, recorded interview of Mr. Segal in which he answered, under oath, all the questions we put to him concerning this matter.

Throughout this investigation, we emphasized to all persons we talked with that the matter was under court seal and should not be disclosed to anyone without the court's permission.

By mid-June of 1997, my staff and I concluded that we had assembled a sufficient body of facts to make an informed prosecutorial decision. We had reviewed the most important documents and talked to the most important witnesses and had received generally consistent information. While we could have kept the investigation going many more months by looking for more documents and interviewing increasingly peripheral players, we decided that was neither necessary nor desirable.

During June of 1997, my staff prepared a complete analysis of all the matters we had considered, and we held several conferences to review and discuss this analysis. After thorough discussion, Mr. Simpson, Ms. Dorsey, and I unanimously agreed that we should not prosecute Mr. Segal, Ms Sagawa, or Mr. Wilson. We concluded that the simultaneous service of these individuals as officers of the governmental Corporation and the private Partnership, both of which were interested in raising donations for the Americorps program, may have constituted a violation of 18.U.S.C. § 208. However, we also decided that a sound exercise of prosecutorial discretion led to the conclusion that a criminal prosecution was neither viable nor desirable in view of several factors:

First, Mr. Segal testified credibly and without contradiction that he believed the creation and operation of the Partnership was lawful and proper, since the incorporation of the Partnership had been handled, on a pro bono basis, by one of Washington's largest law firms and the Office of Management and Budget was advised of plans to establish the Partnership and gave apparent approval.

Second, Mr. Segal and other Corporation employees saw the creation of the Partnership as a legitimate means to effectuate the goals of the National and Community Service Trust Act of 1993, including "reinventing government" by establishing public/private partnerships which would seek to employ the principle of leverage and grow national service, not with government dollars but with charitable dollars.

Third, Mr. Segal, and other Corporation employees, including staff in the Corporation's General Counsel and Public Liaison Offices, saw the Partnership, not as an entity separate from the Corporation, but rather as an arm of the Corporation that existed for administrative convenience and had congruent financial interests.

Fourth, there was no evidence that Mr. Segal, Ms. Sagawa, or Mr. Wilson benefited personally from their unremunerated positions as directors and officers of the Partnership.

Finally, there was no evidence of the willfulness needed to support a felony prosecution under § 208; any prosecution would be, at most, for a misdemeanor.

Because my order of appointment also contained the standard language vesting me with "authority to investigate related allegations or evidence of violation of any federal criminal law . . .by any person or entity . . . as necessary to resolve [the § 208 issue referred to me]," my staff and I also considered whether Mr. Segal or others should be prosecuted for other possible criminal violations related to creation of the Partnership.

Specifically, we considered whether Mr. Segal knowingly made false material statements, in violation of 18 U.S.C. § 1001, when he signed an application, submitted to the IRS in late November of 1994, which stated that the Partnership had not yet engaged in any fund-raising, when such fundraising had actually begun a month earlier, or when he signed annual financial disclosure reports which failed to include, in the section for positions held outside of the United States government, any reference to his positions in the Partnership. We concluded that prosecution was not warranted on either account. Drafts of the IRS application had been prepared by counsel and submitted to Mr. Segal at earlier times (perhaps even before the

Partnership fund-raising began); Mr. Segal looked quickly at the final application, detected no errors, and signed it, thus precluding a finding of knowing falsehood. Neither was Mr. Segal's omission of the Partnership from his financial disclosure forms a willful misstatement, since he considered himself to be acting in his official capacity as CEO of the Corporation when he performed his Partnership responsibilities; moreover, the Corporation's Alternate Designated Ethics Official had issued an opinion that Corporation officers were acting in their official capacities in their positions at the Partnership and were not required to list those positions in their disclosure forms.

We also considered whether, in submitting to the IRS an application to grant the Partnership 501(c)(3) status, Mr. Segal violated 18 U.S.C. § 205, which prohibits an officer or employee of any agency of the United States, other than in the proper discharge of his official duties, from acting as an agent for anyone before any department or agency in a matter in which the United States has a direct and substantial interest. We concluded that, because the application was submitted in connection with Mr. Segal's duties as CEO of the Corporation, the facts did not satisfy the statutory requirement that the officer must be acting "other than in the proper discharge of his official duties."

Finally, we considered whether Mr. Segal violated 18 U.S.C. § 641, which prohibits the conversion of federal money or property; 18 U.S.C. § 371, which prohibits any conspiracy to defraud the United States; or 18 U.S.C. § 207, which prohibits a former senior government employee from contacting his old agency, for a period of one year, with an intent to influence any agency action. We found insufficient evidence to show a violation of any of these sections.

Having concluded that no prosecution of Mr. Segal or other Corporation officers was warranted, my staff and I had to decide what to do by way of a Final Report. The Independent Counsel Reauthorization Act of 1994 abolished the requirement that an Independent Counsel explain his reasons for not seeking indictments. Nevertheless, the legislative history of the Act calls for the Independent Counsel "to provide a summary of the key steps taken" in the investigation and "to explain the basis for [his] decision." That history also indicates that Congress considered it crucial for the final report to contain "a discussion of the conduct of the person for whom the independent counsel was appointed to office."

Most law review commentaries discussing the final report requirement have criticized it, and Congress itself has cautioned that the requirement is not intended to authorize the publication of findings or conclusions that violate normal standards of due process, privacy, or simple fairness.

Moreover, our case was still under seal when we were wrestling with these considerations, although we recognized that the seal might be removed at some future time.

Ultimately, I decided to submit a Final Report with sufficient detail to assure the Court, Congress, and any other reader that our investigation was thorough, professional, and competent; that the decision to decline prosecution was based on the merits and the evidence adduced; and that resources were used wisely and economically. I also concluded, however, that the report should be concise; that it should not taint any individual; and that all persons, other than the subjects of the investigation, should be identified by generalized descriptions of their position but

not by name. On August 21, 1997, slightly less than nine months after I was appointed, I filed with the Court, under seal, a 25 page Final Report conforming to those guidelines.

In October of 1997, under circumstances still unknown to me, someone leaked to the press the fact that Eli Segal, who was then under consideration for presidential appointment to a significant position, had been the subject of a recent Independent Counsel investigation. Stories quickly appeared in the Washington Post, The New York Times, and, via wire service, in newspapers around the country. I have no idea who leaked this information or why, but I feel confident that it was not my staff.

Because the reason for keeping the matter under seal had, unfortunately, evaporated, and because some of the stories erroneously reported that Mr. Segal had been under investigation for campaign finance abuses, which was then a very hot issue and almost certainly more damaging to reputation than the true subjects of our investigation, I concluded that it was my duty to move the Court for public release of the Final Report. Mr. Segal's counsel also concluded, regretfully, that this was the best course. Thus, I filed a motion to lift the seal on our report, and the Court did so.

The last part of my experience, which I should briefly mention, is that, while it took me a bit less than nine months to recruit staff, set up an office, conduct the investigation, analyze the issues, and submit a final report declining prosecution, it took me an additional fifteen months to comply with the Act's requirements for terminating my office. First, Mr. Segal and Ms. Sagawa filed petitions for attorneys fees, as they were entitled to do; the processing of those petitions -- i.e., the submission of the initial petitions with supporting papers, responses by our office, replies by Segal's and Sagawa's counsel, the issuance of orders by the Court, and payment of the fees -- proceeded at a fairly leisurely pace over the space of nearly a year. The General Accounting Office, which audits Independent Counsel Offices and publishes reports every March and September on expenditures during the period which is six-to-twelve months prior to those dates, was unable to perform its last substantive audit on our office until November 1998, about fourteen months after we submitted our final report. Finally, while not a significant source of delay in our case, we were required to place all the substantive papers accumulated during our investigation into indexed, subdivided transfile boxes and to deliver 25 such boxes to the Archivist of the United States.

On October 15, 1998, I advised the Court and the Attorney General that I would terminate my office effective November 30, 1998, and on that date, I did so. The cost to the taxpayers for this 24 month effort -- nine months of substantive investigation and 15 months of wind-up -- was approximately $465,000.

II. Has The Act Achieved Its Objectives?

The prime objective of the Independent Counsel Act, passed in the wake of Watergate and the "Saturday Night Massacre," was to assure the public that prosecutorial decisions concerning high-ranking Administration officials are made on the merits by persons independent of the Administration and of the political winds that inevitably swirl around this town. To a large

extent, I believe the Act has achieved that objective. Of the approximately twenty Independent Counsel appointed under this Act, only three or four have received significant criticism, the public apparently being satisfied with the jobs done by the remaining sixteen or seventeen. In matters this controversial, an approval rating of 80% or higher is a pretty impressive record.

Moreover, with the single exception of one on-going investigation of the President, most of the criticism that has arisen is not on the grounds of the alleged partisanship of the Independent Counsel. Rather, the criticisms have been, principally, that recent investigations have been too expensive, too protracted, too wide-ranging, and too unchecked.

I believe there are better ways of dealing with those criticisms than simply abandoning the Act altogether. Allowing the Act to expire and letting the Attorney General appoint Special Prosecutors, on an ad hoc basis as future needs arise, is no real answer to such criticisms. An ad hoc Special Prosecutor's investigation could be just as expensive, protracted, and wide-ranging as any conducted under this Act. Moreover, if the case involves the President or other high officials, the Special Prosecutor will be essentially as free from supervision and control as Independent Counsels are now. Politically, no Attorney General would dare rein in or dismiss such a prosecutor in a highly charged case, given the firestorm that followed Archibald Cox's firing.

While the decision of what to do about the Act is certainly an important one, I believe zealous advocates on both sides of the issue have somewhat exaggerated the consequences of the course of action they oppose. In my view, the Republic will not crumble if the Act is allowed to expire; we managed reasonably well for 200 years without it and could doubtless do so again. Nor would the nation perish if the Act were reauthorized in exactly its present form; as noted, more than 80% of the Counsel operating under this Act have performed their duties in quite acceptable fashion and future counsel, unless they are extraordinarily obtuse, will certainly be chastened by some of the stinging criticism leveled at their recent predecessors.

The question, I suggest, is not what choice must be made to avoid disaster. Rather, the question is, with due regard for its costs, do the net benefits of having some sort of Independent Counsel Act outweigh the benefits of having none at all? In my judgment, the answer to that question is "Yes." I believe there is great value in having already in place an established mechanism and procedures for dealing with those exceptional situations where the public would not likely accept the integrity of a Department of Justice decision to prosecute, or not to prosecute, officials at the highest level. Moreover, I believe that there is a much greater opportunity to curb the perceived abuses (i.e., investigations which go on too long, cost too much, and veer off into too many tangential areas) through enactment of a carefully retooled Independent Counsel Act than by dispensing with statutory standards, requirements, and limitations altogether.

III. Legislative Proposals To Consider.

As the expiration date of the current Independent Counsel Act approaches, a great many people have come forward with proposals for changes in the Act. I have not read and considered all these proposals, and have not reached any hard and fast judgment concerning the complete

package of proposals I would favor. However, I do think the need for change in certain areas is clear.

First, the Act should be amended in three ways so that appointment of an Independent Counsel would be quite exceptional and not routine:

1. The list of "covered persons," which I'm told now totals 240, should be greatly reduced. I favor including only the President, Vice President, and Members of the Cabinet.

2. The Act should apply only to crimes allegedly committed while in office. Investigation of pre-office offenses should be left to regular state and federal prosecutors.

3. The "triggering mechanism" which activates the appointment process should be revised so as to raise the standard and make appointment less automatic. Various reformulations of the mechanism have been suggested, and I have no view at present as to which is best.

Second, the process for selecting Independent Counsels should be de-politicized. I rather like Lloyd Cutler's suggestion that each President, at the beginning of his term, would submit to the Senate the names of ten or fifteen persons who, upon confirmation, would constitute the panel from which future Independent Counsel would be chosen. Having such persons blessed in advance by both the Administration and Congress would greatly reduce the chances of their later being attacked as partisan or lacking in judgment.

Third, the process by which an Independent Counsel could seek to expand his or her investigation into new areas should be reviewed and tightened up considerably.

Fourth, the role of the Special Division should be re-examined. I am intrigued by Professor Gormley's thesis that the best way to place reasonable restraints and accountability on the work of Independent Counsels is to give the Special Division clear duties and powers with respect to overseeing that work, including the power to replace an Independent Counsel in extreme cases. Federal courts already have a well-developed body of caselaw for dealing with prosecutorial abuse and misconduct; it should not be too difficult to adapt that caselaw to dealing with excesses of an Independent Counsel. I believe that Congress should also look at proposals for assuring regular rotation of the membership of the Special Division; one possibility would be to appoint new three-judge panels every few years and allow prior panels to continue supervision of any Independent Counsel they appointed.

Fifth, Congress should take a fresh look at the Final Report requirement. It may be desirable to require that all Independent Counsel file a very brief report recording the skeletal facts of their investigation -- e.g., "I was appointed on date A, to investigate subject B, re matter C; I hired personnel D; we reviewed this many documents, interviewed this many witnesses, and decided on date E not to prosecute; or we obtained Indictment F, proceeded to trial, and secured this result." Beyond that, I would leave any substantive discussion of the case to the discretion of the Independent Counsel, with a presumption that there should not be such a discussion unless it is truly needed -- for example, to explain some unusual feature which, if unexplained, might generate confusion or perhaps to point out to Congress a need to correct some gap or ambiguity

in the criminal statute in question. In all cases, reports should be concise, prompt, and written with due regard for legitimate privacy and reputational interests of persons not indicted.

Sixth, in keeping with my former law professor, Archibald Cox, I favor writing into the statute strict, arbitrary time limits for the completion of all Independent Counsel investigations. Parkinson's Law correctly holds that "work expands to fill the time available for its completion." Never is this more true than when one is conducting an investigation of a high level official, with the whole world watching, and a virtually unlimited supply of stones to turn over, just to make absolutely certain that you didn't miss something. Yet, in nearly every other aspect of life, there are time limits by which very important things have to be completed -- thirty minutes to argue an incredibly complex case in the Supreme Court, three hours to complete a college or law school final examination, twenty hours to present to the Senate the case for or against impeachment of a President. Time is not an unlimited resource, and both the public and the subject have a right to a reasonably prompt completion of an Independent Counsel investigation.

Across the Potomac River, on the so-called "Rocket Docket" of the U.S. District Court in Alexandria, all cases -- no matter how complex or protracted -- go to trial within one year of filing. Competent counsel find that the short deadline forces them to focus on the most important aspects of the case and to use their resources wisely. Attempts by recalcitrant parties to drag out the proceedings are quickly squelched; District Judges dispose almost instantly of all motions filed.

Based on my own experience, I would suggest that the statute include a requirement that all Independent Counsel be required to either indict or announce a decision to decline prosecution within one year of their appointment; for good cause shown, I would allow the Special Division to grant up to two extensions of six months each, but no more than that. All investigations would have to be completed, at the absolute outside, in twenty-four months. (Of course, where indictments were brought, trial and appellate proceedings could go on for some time after that.)

Finally, I would urge Congress to insert a strict six month limit for the winding up of an Independent Counsel Office, once prosecution has been completed or declined. That is ample time to archive files, brief and decide attorneys fees petitions, and allow the GAO to conduct a final audit of the office.

Indeed, rather than having the Independent Counsel keep his or her office intact for many months while waiting for the next GAO audit cycle to come around, it may be most economical and sensible to require that the Independent Counsel shut down the office as soon as the substantive work is done and provide that an official at the Justice Department or the Administrative Office of the U.S. Courts would handle the clerical wind-down and final audit of all Independent Counsel, with the proviso that such counsel must remain available to answer any questions which might arise.

Incidentally, one thing I would not worry about much is setting budgets for Independent Counsel. While expenditures of some recent Independent Counsel may seem large, they are, in truth, insignificant in relationship to many less worthy federal expenditures and are hardly too great a price to pay to determine whether the highest government officials have committed serious criminal acts. I believe that the best way to bring down the total costs of Independent Counsel

matters is to implement changes, like those suggested above, which will insure that such investigations will be less frequent and less protracted than in recent years.

Conclusion

I am honored for this opportunity to testify before you on this important subject and will be happy to respond to questions on the matters addressed in my testimony.