Testimony of
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United States Senate Committee on Governmental Affairs

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Mr. Chairman and Senators:

As the son of one former U. S. Senator from Maryland and brother of another it is a personal privilege for me to appear today.

My contribution to your deliberations will be more anecdotal than analytical since I am here as a former federal prosecutor and not one who has served as an independent counsel.

The threshold premise for the independent counsel statute in 1977 was that the Department of Justice could not impartially investigate and, if necessary, prosecute highly placed officials in the Executive Branch who commit federal crimes.[1/]

The investigation of former Vice President Spiro T. Agnew in 1973 is a noteworthy case study of how the Department of Justice--and not a special or independent prosecutor--can discharge its law enforcement responsibility in the context of a politically sensitive criminal matter. As United States Attorney for Maryland I was the prosecutor responsible for initiating and then conducting this investigation. I was a Republican appointee of a Republican President and Vice President, the latter who was from my home state. In short, I worked for the same Executive Branch as they and our Attorney General.

Consequently, when Vice President Agnew entered a plea of no contest to tax felony charges and received a monetary fine, probation and no term of imprisonment in return for resignation from his office and we placed on the court record a 40-page summary of the proof of his criminal misconduct, the country was shown that our Executive Branch could prosecute its own officials without the necessity for enlistment of an independent counsel. With a staff of Assistant United States Attorneys in Baltimore, Agents of the Internal Revenue Service and a federal grand jury, all working under the personal direction of Attorney General Elliot T. Richardson, the Agnew investigation was significant confirmation of our principle of neutrality; that is, that no citizen is above or below the law including the second highest elected public official in our Republic.

Significantly, Attorney General Richardson decided, on my office's recommendation, that the Department of Justice should retain jurisdiction over the Agnew investigation and not refer the inquiry to the special prosecutor, Archibald Cox. Mr. Cox had been nominated as the Special Watergate Prosecutor to pursue a wide-ranging investigation of the President and others on May 18, 1973. Mr. Richardson replaced Richard Kleindienst as Attorney General of the United States on May 25, 1973. He inherited a Department of Justice which was demoralized--perhaps even humiliated--because the Watergate investigation had been taken away and assigned to a special prosecutor. So it was that, as Mr. Richardson moved from Secretary of Defense to become Attorney General, his mission was said by him to restore integrity and credibility to the Justice Department:

"To a large extent . . . [the American people's] respect for government is affected by the fairness and integrity of the law-enforcement process. I think there is an opportunity to restore confidence [by] finding ways in which the law-enforcement process can be made to be, and perceived to be, scrupulous in the ways in which it carries out its job."

What Mr. Richardson did not know as he delivered that statement on his arrival at Justice was that the Office of the United States Attorney for Maryland was assembling an array of witnesses, documents and hard evidence confirming that Mr. Agnew had received from a number of intermediaries kickbacks of 5% on public engineering and architectural contracts during his tenure as Governor of Maryland from 1966 to 1968 and that, thereafter, he had accepted a cash payment of $10,000 that was delivered to him in his temporary office in the basement of the White House by one of those engineers in January, 1969.

When I had informed his predecessor, Mr. Kleindeinst, of the Baltimore probe as he was resigning in May, 1973, he had encouraged me to "do what I had to do" and emphasized that I should brief the new Attorney General at the earliest opportunity.

My first meeting with Attorney General Richardson on June 12th was, needless-to-say, very dramatic.

Naturally, I seized the opportunity to brief my new boss on our expanding Baltimore investigation of the Vice President. The Attorney General, confronted with the increasing vulnerability of President Nixon to the Watergate entanglement, responded with remarkable equanimity. Mr. Richardson began by relating an experience he had as Republican U. S. Attorney in Massachusetts. In 1961 he and his office had initiated a kickback inquiry involving highway contractors and the Governor, a Democrat. After the 1960 national election, when he asked the new Attorney General, Robert F. Kennedy, for permission to stay in the job to complete the investigation, his request was denied. Naturally, this

political corruption matter was a casualty of the political transition and was not pursued, something Mr. Richardson found unsatisfactory.

To me his reaction and this meeting were most heartening. From the outset the new head of the Department of Justice demonstrated that he understood the predicate for our Maryland investigation. Further, he confirmed that principle mattered more than politics in federal criminal law enforcement, a sentiment I shared.

Finally, he chose to meet me alone, without aides or Justice Department staff, and said he would personally oversee my investigation, inviting me to "keep in touch" with him as we parted. He, the Attorney General, took charge immediately.

At our next meeting on July 3 the Attorney General had an opportunity to meet the three Assistants from my Baltimore office2/ who were conducting the Maryland political corruption investigation. After considerable delay I, by prearrangement, proceeded with lengthy introductions of our obviously young team of prosecutors--I was the oldest at 36--emphasizing their Harvard backgrounds for Mr. Richardson's absorption. Before I could get to the point of elaborating the considerable evidence that had been accumulated against Mr. Agnew since my earlier briefing, his secretary handed him a note and he excused himself.

No sooner had he returned then he was handed another note and left again. After another significant delay he returned to the conference room and said he owed us an explanation as to why he kept leaving the room. He said something to the effect that "the President's a little upset with Mr. Cox today," referring to a morning newspaper story that the special Watergate prosecutor was investigating the President's real estate transactions including, particularly, his home in San Clemente, California. He assured us that only calls from President Nixon had priority over our discussion. Then he began articulating the big issues:

- What would be the effect of the Agnew case on the capacity of the administration to govern?
- Should Mr. Agnew be confronted immediately with the evidence against him?
- Would the Vice President resign or would he contest the charges?
- Would the principal witnesses against the Vice President be offered immunity? (They were not--each agreed to plead guilty to at least one felony in return for their cooperation.)
- When should President Nixon be told?

By the time the three-hour meeting ended, Mr. Richardson had decided that, while it was imperative that the President learn of the investigation at the earliest possible time, the problems attendant to Watergate and the remote possibility that the witnesses against Mr. Agnew might not stand up to intense inquisition, persuaded him to delay telling the President. Again, the meeting was between my staff and Mr. Richardson, with no "career" Justice personnel present.

Encouraged as we Baltimore prosecutors were with the Attorney General's thoroughly responsible, determined and supportive reaction, the possibility that this investigation could, arguably, come under the jurisdiction of Special Prosecutor Cox had to be confronted.

At a follow-up meeting with the Attorney General on July 11th this issue was addressed at length.

Mr. Richardson reminded us that in his confirmation hearings, appointment of a special Watergate prosecutor had been a subject of discussion and certain Senators had pointed out that there would be an appearance of impropriety if an Attorney General appointed by the President also conducted the Watergate investigation. Mr. Richardson had acknowledged to the Senate that it was valid to be concerned about how the public perceived the Watergate investigation and that, therefore, it was justifiable and necessary that a special prosecutor be appointed for that matter.3/

He then told us that in the case of Mr. Agnew the same sensitivity to appearances of a conflict of interest could be raised in support of an argument for referring it to Mr. Cox. I said to the Attorney General that, because one of his stated objectives had been restoration of public confidence in the Department of Justice in the wake of Watergate, Mr. Kleindeinst's resignation and other events, the Agnew case offered a timely opportunity for us to demonstrate that the Department had the will, ability and capacity to vigorously enforce the criminal law, even as it involved the Vice President of the United States. I argued that my office could be fair to Mr. Agnew and could accelerate the investigation's pace, while remaining thorough. He agreed and the subject never arose again.4/

By the time news of the Agnew investigation broke in the Wall Street Journal on Tuesday, August 7, the investigation we began three months earlier was essentially complete. When Mr. Richardson met with President Nixon that same day, he was asked by the President to meet personally with Mr. Agnew to provide a summary of the status of the investigation in Baltimore. Mr. Richardson did so and Mr. Agnew, among other things, reacted by saying that we the prosecutors "lacked objectivity," and that someone at the Department of Justice in Washington should be placed in charge of the investigation. Mr. Richardson, it is said, defended me and my staff against these allegations and declined the request.

Then one of Mr. Agnew's attorneys is said to have observed that, if there was ever need for a special prosecutor, a prosecutor removed from any political role in the state where the case was being brought, it was surely in this situation. Mr. Richardson again disagreed, but then said that he would ask Assistant Attorney General Henry Peterson to make an independent assessment of the evidence that had been assembled.

Later in August, after that assessment had been completed, Mr. Peterson reported to the President and Vice President that the government had an airtight case against Mr. Agnew in support of criminal indictment on multiple charges of bribery, extortion, conspiracy and tax evasion.

Not unlike similar investigations of government officials in the years since, the Agnew defense strategy involved public attacks on the prosecutors, claims of "leaks" to the press, litigation initiated to forestall grand jury proceedings and undermining witnesses' reputations through media statements. Unique to Vice President Agnew, however, was his effort to forestall criminal prosecution by requesting an impeachment proceeding in the House of Representatives.

On September 25, 1973 the Vice President personally delivered a letter to Speaker Carl Albert in which he argued "that the Constitution bars a criminal proceeding of any kind--federal or state, county or town--against a President or Vice President while he holds office" and that, therefore, Mr. Agnew could not be criminally prosecuted and should be impeached. He referred to a similar request made by Vice President John C. Calhoun in 1826 who was charged with profiteering from an Army contract as Secretary of War. In that instance, the House appointed a select committee, subpoenaed witnesses and documents, held hearings and issued a report exonerating the Vice President. The obvious distinction between the two was that charges against Vice President Calhoun implicated his official conduct in that office while Mr. Agnew for the most part was answering allegations of criminal misconduct prior to his federal office.

In any event, the House declined the invitation, saying that it would not be proper for Congress to act on a matter then before the courts.5/ Interestingly, it was in this context that then Solicitor General Robert Bork issued an opinion for the Department of Justice to the effect that, contrary to Vice President Agnew's contention, the Constitution did not bar criminal proceedings against him. That conclusion (the subject of considerable recent discussion) became the predicate for a legal action on behalf of Vice President Agnew to prohibit the Justice Department from presenting any evidence to the grand jury. Given that the matter was ultimately resolved through the time-honored vehicle of plea bargaining, the federal courts were not called on to test this constitutional argument.

RECOMMENDATION

For almost 200 years the country survived without an independent counsel statute. From time to time Presidents and Attorneys General have gone outside the Department of Justice to designate Special Counsel to pursue a particular matter that public integrity or public policy required. There is a long "track record" of prosecuting crimes by government officials pursuant to existing laws and regulations. For examples, the Grant administration saw an outside prosecutor for

the Whiskey Ring; there was Teapot Dome during President Harding's tenure; tax corruption in the Truman administration; the peanut warehouse of President Carter and, more recently, Attorney General William Barr on three occasions in the early 1990's used his inherent authority to make special inquiries through outsiders who were not a direct subordinate of his or the President.

In my view as a former prosecutor, but not an Independent Counsel, the statute was unnecessary when enacted and remains undesirable today.

The answer to the question as to what to do about executive malfeasance is in the Constitution. It speaks of impeachment for the President. Prosecution is for all other executives. There is a mechanism in place already for dealing with presidential, vice presidential and high level misconduct. We have a free press, congressional oversight of executive branch officials and public opinion to provide true accountability.

In summary:

- conceptually our system of justice empowers and obligates the Department of Justice to handle federal criminal matters;
- responsibility for this rests with the Attorney General;
- the independent counsel statute removes this responsibility from an institution accustomed to the exercise of prosecutive discretion and puts it in another who has less institutional knowledge, a much narrower focus and little accountability;
- the Department of Justice has investigative personnel, tools and know-how to evaluate allegations of official malfeasance, but the statute has circumscribed this unsatisfactorily. There is no discernible reason why the Department of Justice should not be allowed to use these tools and a grand jury--the same prosecutorial resources used in the ordinary case--in political inquiries, as the statute now does not allow.
- The rule of neutrality and equality built into our legal heritage is frustrated by the independent counsel statute because it says our criminal justice system will be used differently for high officials than ordinary citizens. That is wrong.
- High officials including the President, Vice President and Attorney General are subject to special scrutiny through the political process.
- Our system is one of "checks and balances", but independent counsels are subject to neither.

My experience--together with historical precedent--teaches me that political conflicts of interest in the Department of Justice can be overcome by officials whose sense of duty overrides partisanship.

The compelling question for this Congressional body then must be whether the Department of Justice of the 1990's has the same capacity as existed in the 1970's to fulfill its law enforcement duty as to politically sensitive allegations against high-level executive branch officeholders. Again, congressional oversight could afford the answer. Many changes have taken place in the intervening decades in the Department's composition and operation. For example, I am told that this administration has decreed that all Assistant United States Attorneys now come under Civil Service. This was not true in the Agnew era so we were arguably more independent and less apprehensive about our careers. To the extent that this Administration has created a more career-oriented staff at the Department of Justice with lifetime (rather than career) jobs, I think there is more likelihood that getting along careerwise means going along and not taking politically difficult stands. In my view, the Department (particularly U.S. Attorneys' offices) should be composed of both permanent lawyers and temporary, non-career prosecutors.

Others have also questioned the will of this Administration to pursue vigorously allegations of high-level criminal misconduct.6/ And, of course, the Department of Justice is now considering the appointment of an independent counsel to investigate Independent Counsel Starr, the ultimate "coming full circle".

But conflicts are part of a prosecutor's--and public officials'--jobs. They can be overcome through full disclosure and recognition of the need for personal accountability. The public will judge eventually in any event.

Let us return to life before the 1978 independent counsel statute. Let us rely on existing laws and regulations that permit Attorneys General to appoint special counsel, on congressional oversight, on the free press and on political forces to meet public expectations that federal law enforcement will apply equally to high ranking government officials. Let us permit this independent counsel statute to expire.

FOOTNOTES

1/ Attorney General Reno reiterated this rationale when the statute was reauthorized in 1994. She testified before the Senate:

"In 1975, after his firing triggered the constitutional crisis that led to the first version of this act, Watergate Special Prosecutor Archibald Cox testified that an independent counsel was needed in certain limited cases, and he said --"-- and I am quoting --" '-- the pressure, the divided loyalty are too much for any man, and as honorable and conscientious as any individual might be, the public could never feel entirely easy about the vigor and thoroughness with which the investigation was pursued. Some outside person is absolutely essential.'"

"The reason that I support the concept of an independent counsel, with statutory independence, is that there is an inherent conflict whenever senior executive branch officials are to be investigated by the department and its appointed head, the Attorney General. The Attorney General serves at the pleasure of the President. Recognition of this conflict does not belittle or demean the impressive professionalism of the department's career prosecutors. It is absolutely essential for the public to have confidence in the system, and you cannot do that when there is conflict, or the appearance of conflict, in the person who is, in effect, the chief prosecutor. There is an inherent conflict here, and I think that is why this act is so important."

"The Independent Counsel Act was designed to avoid even the appearance of impropriety in the consideration of allegations of misconduct by high-level executive branch officials and to prevent the actual or perceived conflicts of interest. The act thus served as a vehicle to further the public's perception of fairness and thoroughness in such matters and to avert even the most subtle influences that may appear in an investigation of highly-placed executive officials."

2/ Assistant United States Attorneys Barnet D. Skolnick, Russell T. Baker, Jr. and Ronald S. Liebman

3/ In his book, Reflections of a Radical Moderate (Pantheon Books, 1996), Mr. Richardson writes as follows at p. 196:

"Now, I am not saying that appearances are never important. When on April 29, 1973, President Nixon asked me to leave the Department of Defense and go to the Department of Justice he left it up to me whether or not there should be a special prosecutor for Watergate. The more I thought about it, the clearer it seemed to me that public confidence in the investigation would depend on its being independent not only in fact but in appearance. And though I believed I could fulfill the first of these requirements, it was clear that I could not meet the second. I had from the beginning of his administration been the appointee of a president whose staff was being investigated and who might himself be implicated. I would, moreover, once again be serving at his pleasure.

Seven days after my meeting with Nixon I announced at a press conference that I would, if confirmed as attorney general, appoint a special prosecutor and give him all the independence, authority, and staff support needed to carry out the tasks entrusted to him. I assumed that future occasions to appoint a special prosecutor would be rare--no more frequent, perhaps, than two or three in the balance of the century. Only twice before in our history, after all, had such an appointment been thought necessary: the Teapot Dome scandal in 1925 and the investigation of Justice department officials in the early 1950s. It would have amazed me to be told that two-thirds of the way through the century's next-to-last presidential term *six*

special prosecutors would be serving simultaneously, with one looking into the Reagan era's Department of Housing and Urban Development, three investigating current cabinet members, one the actions of individuals in the Bush administration, and one transactions involving Bill Clinton that occurred long before he became President."

4/ According to the authors of a book about the Agnew investigation "This was exactly what [Mr.] Richardson wanted to hear. He expressed his agreement; Cox would be kept out. (Shortly thereafter, Richardson advised the Baltimoreans that he had discussed the Agnew matter with Cox and there were no problems. . . . Richardson instructed Cox to send anyone approaching him in anyway about the Agnew case straight to Beall.) . . . ." Cohen and Witcover, A Heartbeat Away (Viking Press, 1974), pp. 124-125.

5/ Jimmy Breslin, in How the Good Guys Finally Won (Viking Press, 1975), says that Speaker O'Neil persuaded Mr. Albert and Judiciary Committee Chairman Rodino that, whether Mr. Agnew was correct that the Constitution protected both the President and Vice President from criminal prosecution while in office was for the Courts to decide and quotes Mr. O'Neil at p. 63 as saying:

"Because the man is lying. He says he's innocent and he's being framed. I don't know about that. I think he's worried about going to jail, but he won't tell you that. He can't tell the truth. If we put this into the Judiciary Committee, we're doing exactly what Agnew wants. He'll have this stalled and delayed for so long that the court would wind up having no rights in the matter. And another thing, and I can guarantee this, if you let the man get away with this, then the Democratic caucus will skin you alive."

6/ See "Justice Without Fear or Favor," Eugene H. Methvin, Wall Street Journal, September 30, 1996. "If the U. S. Justice Department had fumbled as badly in Maryland in 1973 as it did in Arkansas in 1993, former Vice President Agnew would have become president of the United States."