

TESTIMONY OF CIRCUIT JUDGE RICHARD D. CUDAHY

Before Senate Committee on Government Affairs

April 14, 1999

Mr. Chairman, Members of the Committee . . .

I appreciate your inviting me, as a member of the Special Division, to testify on the future of the Independent Counsel Law.

I have been a member of the Special Division only since last October, and my knowledge of Independent Counsel matters reflects my relative inexperience. So I will be correspondingly brief in suggesting the few impressions that I have formed up to this point.

One area which has struck me as very important and deserving of close attention is control of costs. The Special Division participates to a degree in this important function by, for example, authorizing for six-month periods the incurral of commuting expenses by O.I.C. employees, receiving various expense reports, and awarding attorney's fees. The Supreme Court's decision in Morrison v. Olson may be a major obstacle to surveillance of Independent Counsel expenses by the Special Division. Whatever else is done, I would hope that an appropriate agency could undertake a study of just why these investigations have been so expensive. This certainly hasn't contributed to public confidence in the process.

Turning to the function most closely associated with the Special Division, the appointment of Independent Counsel, I, of course, speak with the dubious authority of one who has never yet been called upon to participate in such an appointment. I think, however, that my colleagues and our predecessors have discharged their obligations in the matter of appointments conscientiously and industriously. A crucial consideration here is to select people who can command credibility with the public. If public acceptance would be enhanced, I would see no objection to including third parties in the process - like the bar associations or the Attorney General (although this might re-introduce the potential conflicts that the Special Division was designed to avoid). I think that the future success of the counsel selection process can be optimized if opened to public view and understood by the public.

The Special Division can also play an important role at the other end of the process in determining when investigations ought to come to an end. This significant function does not call primarily for an adversarial relationship between Counsel and the Division. Rather, there should be a cooperative effort to reach a decision about termination in the public interest.

Finally, if the Independent Counsel procedure is to be retained, I believe that the Statute should be narrowed to authorize only investigations of the few officers at the pinnacle of the Executive Branch, including the Attorney General. In its current form, the Statute authorizes investigations of a much broader array of officials. This narrowing would accomplish two things: (1) it would limit the application of the law to the small area where its benefits would have a good prospect of exceeding its obvious costs; and (2) it would assure the availability of only the most highly qualified attorneys as Independent Counsels.

This concludes my statement, and I would invite whatever questions you may have.