Testimony of Philip B. Heymann on the

Independent Counsel Statute

Mr. Chairman and Members of the Committee:

Professor Archibald Cox, Don Simon, Executive Vice President of Common Cause, and I spent many hours considering to the best of our abilities the problems presented by the Independent Counsel Act and by letting it lapse. What I am about to describe is the result of that work, which draws heavily on my experience as Assistant Attorney General in charge of the Criminal Division under Attorneys General Bell and Civiletti. It is designed to produce the greatest possible assurance of a lack of partisanship in any prosecutorial decision, particularly those involving high level members of the administration, short of creating an Independent Counsel. We believe that the Independent Counsel structure has inherent flaws that make it undesirable if a strong alternative can be developed. What I am about to describe is that alternative, which has since been reviewed by the Common Cause governing board and adopted also as the position of that organization. We have sent a letter in the organization's name to the Committee.

The problem with the Independent Counsel Act is simple: it empowers an enthusiastic prosecutor, subject to the demands of a President's enemies and not subject to normal constitutional and budgetary constraints, to assemble an office full of aides dedicated to relentlessly pursuing every avenue, however unpromising, that might lead to the conviction of the President or another high official. The substitute promises to avoid this problem and still provide a substantial measure of public confidence that decisions not to prosecute are unaffected by high level pressure. And it provides the same confidence when there is a decision to prosecute an opponent of the administration as it does when there is a decision not to prosecute a high level friend of the administration. The alternative was first used by Attorneys General Griffin Bell and Benjamin Civiletti during the Carter Administration, but was then, after passage of the Independent Counsel Law, abandoned by their successors. It works like this.

Modeling the arrangement on the general pattern in Britain and other western democracies, Attorney General Bell determined that Cabinet level officials should take part in prosecutorial decisions only in very exceptional circumstances. Even if it is more a matter of appearances than realities, decisions regarding prosecution of either those who are passionate opponents of the President or those who are his most loyal supporters should be made by officials having little contact with the President and unmistakably on the basis of professional judgement alone. The same is true of decisions to bring a prosecution in a situation where a failure to bring the case might cost a President votes.

The Independent Counsel Statute is thus wise in its judgement that someone other than a cabinet level official should also decide whether other cabinet level officials or their superiors should be prosecuted. Indeed the problem of credibility whenever there is a failure to prosecute goes beyond even the seventy-five officials listed in the Independent Counsel Act; it includes doubts about a decision not to prosecute whenever it looks like a crime may have been committed by any member of Congress or powerful supporter of the administration. What is wrong with the

Independent Counsel Act is that it addresses only part of the problem and does this through the creation of a new office with unlimited funding and a single target.

Therefore, under regulations first promulgated by Attorney General Bell, the Assistant Attorney General in charge of the Criminal Division, who supervises the prosecutors in the Department of Justice, was vested with the responsibility and authority to be the highest level of review or appeal in individual cases of possible prosecution. As a safeguard and in recognition of the supervisory power of the Attorney General and Deputy Attorney General, the rules allowed either of these officials to overrule a decision made by the Assistant Attorney General in charge of the Criminal Division but only if they were prepared to announce publicly that they were doing this and, so far as it was consistent with legal ethics, made public their reasons. This overruling never happened during the years of Attorneys General Bell and Civiletti.

It is, of course, true that this structure continues to leave room for concern that the President's interests are being favored, for he appoints the Assistant Attorney General. But unusually careful confirmation hearings, as in the case of the Director of the Federal Bureau of Investigation, would provide added assurance to the present tradition that the occupant of this job be a professional prosecutor, not closely tied to the President and his closest associates. The Assistant Attorney General in charge of the Criminal Division has rare, if any, contact with the President or other cabinet members, and generally has no concern about who are opponents and who are supporters of the President. That distance from the President and cabinet is, of course, not true of most Attorneys General.

Still, to provide additional credibility to what seems to us to be the proper structure of prosecution in any event, in cases involving a decision not to prosecute any of a handful of the highest officials we would arrange that the Assistant Attorney General consult with a fairly selected panel of three of his/her predecessors, at least one of whom would have to be of the opposite party, and then state his reasons publicly (as the Attorney General has taken to doing in declining appointment of an Independent Counsel). If any of his three predecessors believes that the Assistant Attorney General's decision not to prosecute one of the handful of the top officials was not defensible or was unreasonable, the advisor would be free to make this view public. That would certainly lead to congressional hearings.

We would insist on still another portion of the Bell system. He directed that no one in the White House and no one in the Congress could have direct contact on an individual case with the Assistant Attorney General or any prosecutor reporting to him. White House staff or members of Congress could communicate with the Attorney General or the Deputy Attorney General about a case. They might have critical information in some circumstances. But those two top officials in the Department of Justice would decide whether it was appropriate to relay the information to the Assistant Attorney General or other prosecutors. This would prevent a situation like that at the beginning of Watergate when President Nixon asked the Assistant Attorney General to provide information about the investigations surrounding the President and his staff. It would also guarantee that no official of the President's party could convey his enthusiasm for prosecuting an opponent of the Administration.

These simple arrangements, already tried for a period of several years of the Carter Administration, go as far as it is possible to go towards assuring the non-partisan application of

prosecutorial standards and, more realistically in most cases, the appearance of such unbiased decision making, short of reenacting a failed statute that requires judges to appoint an outsider as prosecutor. The arrangements provide some guarantee against a repetition of the Watergate-type situation that was behind the passage of the Independent Counsel Act. At the same time, they do not create the immense risks we have seen accompanying the Independent Counsel Act.

The arrangements I propose simply put the United States in the same posture as most western democracies; only in extraordinary cases will a Cabinet official decide whether a prosecution should or should not be brought. These arrangements which have proven workable by experience, will increase citizen confidence that law and not politics reigns even in our most sensitive cases.

I would suggest one additional step. No prosecutor should be left, when he believes the President has committed a crime, with the choice between prosecuting him during his term of office and suggesting impeachment. The first may be unconstitutional and would certainly be reckless. The second may invite consequences for the nation that are warranted only for the most serious offenses. A statutory provision saying that, notwithstanding any statute of limitations or other right to a prompt disposition of the matter, a President may be indicted within two years of leaving office would create an appropriate remedy consistent with the nation's needs for both the full attention of its President and respect for the rule of the law.