Independent Counsel Law Reauthorization

Senator Joseph Lieberman

February 24, 1999

Thank you Mr. Chairman, for initiating this important series of hearings, which I believe will enable us to discuss in an open, forthright way whether the Independent Counsel law should be sustained and improved upon, or whether we should let it die. Many commentators, and many of our colleagues as well, have already written epitaphs for the Independent Counsel law. In fact, epitaph may be too nice a word. I, for one, believe strongly that burial and eulogy would not serve our nation's interests. The law has become inextricably linked with recent political controversies, whose partisan, pugilistic natures have tarred so much of what they have touched. As a result the very purpose that the law was designed to realize, increased public confidence in our criminal justice system and our government generally, seems to have been undermined.

But in considering whether to reauthorize the Independent Counsel law I hope that we can let go of the anger and the passions that have consumed the Congress in recent times. The Independent Counsel law is not about sex scandals and spin doctors and mud throwing; it is about making our government honest and accountable to the public. It is a well intentioned attempt to ensure that our government is as clean and trustworthy as any can be. It recognizes a dilemma that is at the heart of any political system: how to police those who hold the reins of power, who have themselves been entrusted with the execution and enforcement of the nation's laws. In 1978, in the aftermath of Watergate, Congress sought to address this problem without running afoul of the Constitution's doctrine of Separation of Powers. The result was a delicately crafted, often tinkered with, much debated law that has resulted in some good criminal investigations, and a few bad ones. I agree that the law needs to be changed, to reflect our experiences with it in the past twenty years. And I am willing to consider ideas for replacing it altogether with some other statutory scheme that could achieve the same purposes in a better way. But we should not simply walk away from the noble goal that motivated our predecessors in Congress to pass the Independent Counsel statute twenty years ago, namely, maintaining the public's trust in our government by providing that the rule of law reaches even to our most powerful leaders.

The issue then, as now, arises at a time of public cynicism, a time of partisan distrust between the executive and legislative branches. Can the executive branch be trusted to investigate itself for potential criminal wrongdoing? The answer may often be "yes," but what do we do when the answer is "no?" And how can we discern those cases? All too often, the mere surfacing of allegations against an administration causes damage: the charges can be seized upon by political opponents in Congress or outside of government. When the criminal justice system has been called into question in this way the public may feel it has no basis for determining the truth. And in some cases, an administration may even be actively involved in covering up crimes or failing to prosecute them aggressively.

The obvious example from recent history is Watergate, where President Nixon attempted to use his powers first to cover up the crimes of his aides and then to fire the special prosecutor for investigating them and him too aggressively. Some will argue that Watergate proved the system can work without an Independent Counsel, because Richard Nixon's malfeasance was ultimately exposed and he was forced from office. But Watergate represented a profound constitutional crisis, where the system very nearly did not work. It is also possible that other acts of high level wrongdoing in other Presidential administrations have gone un-investigated and unpunished.

Now it seems to many that the pendulum has swung in the opposite direction, and some independent counsels have gone afield. Whereas before the fear was that the President could arrogantly hold himself above the law, now the fear is that members of an administration risk being exposed to dogged investigators in pursuit of minor allegations. As a result, one complaint we hear is that officials covered by the Independent Counsel are held to a much higher standard than are members of the public. Other complaints about the Act are familiar: 1) It is said the Act leads to lengthy and expensive investigations that are unwarranted. 2) Controls on the cost and duration of the investigations are toothless. 3) The process for selecting an Independent Counsel is inscrutable - some still say unconstitutional - and as a practical matter no Attorney General could ever try to exercise her limited power to remove an Independent Counsel. 4) Having only one subject to investigate, Independent Counsels may lose their sense of perspective and pursue too energetically cases that would be declined by prosecutors with more pressing priorities. And 5) The low threshold for appointing an Independent Counsel, and the broad coverage of the Act, leads to far too many investigations that would be better handled by the Department of Justice.

In the hearings we begin today, we will be considering how serious these problems are, what causes them, and what can be done about them. Many commentators and organizations advocate letting the Act expire, without a replacement. They point out that Attorneys General would still have the power to appoint special prosecutors when necessary. Others suggest creating a special office within the Department of Justice to investigate top public officials, perhaps headed by a Public Prosecutor confirmed by the Senate and entrusted with some degree of autonomy for a longer term.

There are many ways we could improve on the current law, while retaining some kind of office of the Independent Counsel. I come to these hearings with an open mind, but committed to finding an agreement on some statutory mechanism for honestly policing and investigating misconduct by top executive branch officials. I understand the Independent Counsel statute can exact a terrible toll when prosecutors wield their powers in irresponsible ways. In these hearings some critics of the statute will argue that those abuses are the inevitable result of the Independent Counsel statute, that the statute cannot be fixed or even replaced with a sensible alternative, and that no statute is needed.

But a different sort of danger may surface when no statutory system exists to provide for the independent investigation of our top officials. A distinguished law professor has noted, "the affirmative power to prosecute is enormous, but the negative power to withhold prosecution may be even greater, because it is less protected against abuse." The conflicts of interest that arise

when the nation's top law enforcement officials are expected to investigate their colleagues, their systems, and themselves, will always raise the appearance of a conflict of interest, even when they are trying their best to remain objective. Our goal should be a system that allows top officials to be investigated thoroughly but fairly while maintaining the public's confidence in the process. Through our Committee's hearings we can all begin to consider how this goal might best be accomplished. In other words, we might actually learn something at these hearings.

This morning we are fortunate to have two distinguished panels of witnesses, and I am looking forward to hearing their testimony.