COBURN & COFFMAN PLLC

BARRY COBURN
ADMITTED IN MD, DC & VA
202-470-6706

1244 19th Street, NW
Washington, DC 20036

JEFFREY COFFMAN
ADMITTED IN DC & VA
202-470-0941

TEL: 202-657-4490
FAX: 866-561-9712
SKYPE ADDRESS: COBURN.COFFMAN

STATEMENT OF BARRY COBURN TO THE SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW OF THE JUDICIARY COMMITTEE OF THE HOUSE OF REPRESENTATIVES

"Books may be burned and cities sacked, but truth, like the yearning for freedom, lives in the hearts of humble men and women. The ultimate victory, the ultimate victory of tomorrow is with democracy.

– Franklin Delano Roosevelt

"When truth is in short supply, democracy is in danger."

– Paul K. McMasters
First Amendment Center, Arlington, VA

"If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice."

– Judge Learned Hand

Each of the quotations above reflects the close and enduring link between a thriving democracy and the search for truth in the public arena. Particularly in the context of our legal system, and especially as to investigations of possible criminal conduct, the public must have confidence that a prosecutor's search for the facts will be evenhanded, vigorous and unfettered by conflicting interests or loyalty.

Structuring a prosecutorial system to investigate politically sensitive alleged wrongdoing so that it achieves these objectives in a reasonable and effective way has never been, and will never be, an easy task. The separation of powers at the heart of our constitutional system ensures its difficulty. The executive branch, in nearly all cases, is the prosecutor of federal criminal

offenses, so prosecuting alleged offenses in which high-level personnel in the executive branch might be complicit presents an inherent, and not perfectly resolvable, problem. Our response has been, to some degree, to swing like a pendulum between imperfect solutions. Following the"Saturday Night Massacre" during the Watergate scandal, concern about executive branch conflicts of interest in criminal prosecutions was so acute that Congress passed the Ethics in Government Act, resulting in the appointment of a series of Independent Counsel to investigate executive branch officials. Calling in 1973 for a bill permitting judicial appointment of Independent Counsel, Senator Birch Bayh urged Congress to "set out as its first order of business, the difficult but . . . essential goal of reestablishing the public faith and confidence from which all else proceeds in a democracy." The authorization to appoint Independent Counsel was reaffirmed in the Independent Counsel Reauthorization Act of 1994. Following perceived excesses by several Independent Counsel, the statutory authorization for their appointment was allowed to lapse in 1999. In its place, the Attorney General promulgated regulations, codified at 28 CFR 600 *et seq.*, permitting the discretionary appointment by the Attorney General of "Special Counsel." This was deemed a compromise between the perceived difficulties engendered by statutory authorization of judicially appointed Independent Counsel versus the inherent conflict of interest in allowing the executive branch to investigate itself in politically sensitive matters. Now, however, in a highly politically sensitive matter where the Executive Branch may have had deep substantive involvement – the apparent destruction of videotapes of controversial "enhanced interrogations" of terrorism suspects by CIA personnel – the Attorney General has appointed a prosecutor with far less authority and independence than a Special Counsel, let alone an Independent Counsel. This, I submit, allows the pendulum to swing too far

away from where it was during Watergate, and ignores the substantial considerations that motivated congressional and regulatory authorization of both Independent Counsel and Special Counsel.

What we must do is to hold the pendulum steady, in a way that balances the various competing considerations in the appointment of an investigator in a context like this. An appropriate way must be found to balance the alleged inefficiencies, runaway costs and other perceived excesses of the independent counsel procedure against the critical need to ensure an objective, thorough, unblinking investigation of alleged criminal conduct in the executive branch. At this moment in our history, the best solution is the formal appointment by the Attorney General of a Special Counsel to conduct this investigation.

Watergate may seem a long time ago, but attention must be paid today to the fundamental concerns engendered by President Nixon's demand that Archibald Cox be fired, and the subsequent resignation of the Attorney General. This was as close to a true constitutional crisis as we have come in our recent history. Public trust in the government, particularly the executive branch, suffered in a way few of us alive at the time can forget. This concern was, at bottom, a concern about conflict of interest: a perception that the executive branch would not allow itself to be investigated in a fair and impartial manner, and that serious wrongdoing might never be ferreted out. Given its public policy implications, we should be at least as sensitive to this variety of conflict of interest as we are to garden-variety conflicts of interest in the legal representation of clients in private legal practice. By way of example, in the case of *United States v. Grass*, 93 Fed. Appx. 408 (3d Cir. 2004), *reversed on other grounds*, 543 U.S. 1112 (2005), the Court of Appeals affirmed a district judge's refusal to accept a waiver of a conflict of

interest in a criminal case, noting that

> the District Court noted that granting the waiver would raise serious concerns not only about defense counsel's ability to vigorously defend their client, but also about the public's confidence in the administration of justice.

And in *Lambert v. Blodgett*, 248 F. Supp. 2d 988 (E.D. Wash. 2003), *affirmed in part and reversed in part on other grounds*, 393 F.3d 943 (9th Cir. 2004), the District Court observed that an arrangement between defense counsel "with its potential conflicts of interest does not engender confidence in the indigent defense system and reflects poorly on the criminal justice system as a whole." *Essex County Jail Annex Inmates v. Treffinger*, 18 F. Supp. 2d 418 (D.N.J. 1998) states, along similar lines, that "courts have vital interests in . . . maintaining public confidence in the integrity of the bar [and] eliminating conflicts of interest." These are but a few examples of the level of concern expressed by courts and bar associations for generations about the critical need to avoid conflicts of interest. Seldom could the consideration be more acute than it is here. In 1975, testifying about the critical need for an independent investigator in certain highly politically sensitive cases, Professor Cox used language that is as compelling today as it was then:

> 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.

As recently as 1993, well before anyone had heard of Monica Lewinsky and years before Judge Kenneth Starr temporarily became a prosecutor, then-Attorney General Janet Reno eloquently endorsed the need for Independent Counsel when she testified before the Senate Governmental Affairs Committee in support of the reauthorization of the Independent Counsel

Statute:

> I'm pleased to announce that the department and the administration fully support re-enactment of the act and we will work closely with this committee and Congress to pass this very important piece of legislation. . . .
>
> While there are legitimate concerns about the costs and burdens associated with the act, I have concluded that these are far, far outweighed by the need for the act and the public confidence it fosters. . . . It is my firm conviction that the law has been a good one, helping to restore public confidence in our system's ability to investigate wrongdoing by high-level executive branch officials. . . .
>
> The Iran-Contra investigation, far from providing support for doing away with the act, proves its necessity. I believe that this investigation could not have been conducted under the supervision of the attorney general and concluded with any public confidence in its thoroughness or impartiality.
>
> 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. . . .
>
> It is absolutely essential for the public, in the process of the criminal justice system, to have confidence in the system, and you cannot do that when there is a conflict or an appearance of conflict in the person who is, in effect, the chief prosecutor. . . .
>
> 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, as I have said, 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.

It would be hard to say it better today.

In 1999, following alleged excesses by several independent counsel, the Independent Counsel Reauthorization Act of 1994 was allowed to expire, and was replaced by regulations promulgated by the Attorney General authorizing his or her appointment of Special Counsel.

These regulations softened – some might say eviscerated – a number of the safeguards against conflicts of interest present in the Independent Counsel legislation. In particular, the appointment and retention of Special Counsel was entirely at the discretion of the Attorney General, a presidential appointee, rather than the courts. In contemporaneous commentary in the Federal Register, 64 Fed. Reg. 37038-37044, the Attorney General explained the considerations warranting the regulations:

> These regulations seek to strike a balance between independence and accountability in certain sensitive investigations, recognizing that there is no perfect solution to the problem. The balance struck is one of day-to-day independence, with a Special Counsel appointed to investigate and, if appropriate, prosecute matters when the Attorney General concludes that extraordinary circumstances exist such that the public interest would be served by removing a large degree of responsibility for the matter from the Department of Justice. The Special Counsel would be free to structure the investigation as he or she wishes and to exercise independent prosecutorial discretion to decide whether charges should be brought, within the context of the established procedures of the Department. . . .
>
> There are occasions when the facts create a conflict so substantial, or the exigencies of the situation are such that any initial investigation might taint the subsequent investigation, so that it is appropriate for the Attorney General to immediately appoint a Special Counsel.

It is important to understand, then, that the regulatory scheme authorizing the appointment of a Special Counsel was intended to be a compromise solution, one designed to take account of some of the perceived excesses of the Independent Counsel legislation while addressing, at least to a degree, the inherent conflict of interest in allowing the executive to investigate itself in politically sensitive cases in which there is alleged wrongdoing by high-level administration officials. It is this compromise solution that our Attorney General has declined to invoke here.

The consequences of failing to appoint a Special Counsel in the CIA videotape matter are already being felt. An erosion of confidence in the independence and thoroughness of the CIA tapes investigation is evident from even a cursory perusal of mainstream press, political blogs and other internet journalism. One website, "buzzflash.com," published an article on January 3, 2008 entitled "Mukasey Seeks to Protect White House and DOJ With Durham 'CIA Torture Tape' Appointment." According to this article:

> Attorney General Mukasey has guaranteed both that the investigation will be narrow in focus (as you can bet it will stay within the CIA and at lower levels to boot), and far from independent of the compromised Department of Justice senior staff, including AG Mukasey. The scapegoating of lower level CIA officers seems a likelihood.

The article quotes a former Assistant United States Attorney, Elizabeth de la Vega, as stating:

> The major problem – a huge apparent and possibly actual conflict – is that information reported thus far about the destruction of the tapes implicates officials at the highest levels of the administration, possibly all the way up to Bush and Cheney. The administration cannot investigate itself and that is precisely what will necessarily be happening here.
>
> Unlike Patrick Fitzgerald, whose appointment placed him in the shoes of the Attorney General for purposes of the CIA leak investigation, Durham will have no independent powers whatsoever. . . . Durham will be reporting directly to the Deputy Attorney General. Because this is a case involving national security, that means, according to the U.S. Attorney's Manual, that Durham will have to receive prior express approval from the Deputy Attorney General . . . for doing just about anything in the case. . . .

Another website called Capitol Hill Blue, in an entry from January of this year, speculates that if Mr. Durham aggressively investigates the CIA-related misconduct within the scope of his charter, the White House could demand his firing, leading to another Saturday Night Massacre in which the Deputy AG and the Attorney General resign rather than fire him.

In a similar vein, in an article published on the internet in mid-February, the website

Salon.com notes that the Bush administration is seeking the death penalty against six Guantanamo detainees, even though some of the evidence against them was gathered through coercive interrogation tactics such as waterboarding. Waterboarding has been defended by CIA Director Michael Hayden, and Attorney General Mukasey's statements about it have been, at best, ambiguous. Given that Mr. Durham's investigation focuses upon the destruction of videotapes of precisely these kinds of so-called "enhanced interrogations," the Salon article argues that, for these reasons, "A special counsel is urgently needed, now more than ever." As Salon notes, Mr. Durham "reports to Mukasey, who to this day refuses to acknowledge that waterboarding is torture and has told Congress that the use of waterboarding by CIA interrogators "cannot possibly be the subject of a criminal" investigation. Salon says: "What is needed is a special counsel who is granted the same authority as the attorney general in matters pertaining to the investigation – like Patrick J. Fitzgerald on the disclosure of a CIA officer's identity. Considering what we already know of the Bush Administration's record on torture and prisoner abuse, investigative independence is essential."

Slate.com comes to similar conclusions. In a January 3, 2008 posting, Slate says: "Both the CIA and the White House will throw as much sand in the eyes as they possibly can, and if Harriet Miers can be prevented from testifying about fired U.S. attorneys, you can bet the White House won't make it easy for Durham to investigate allegations of lies and obstruction. The fact that Durham ultimately answers to Mukasey is hardly comforting, either."

Similarly, the group Human Rights First, based in New York City, issued a press release in January 2008 noting: "If the Attorney General were really interested in avoiding a conflict of interest, he would make Mr. Durham a Special Counsel and ensure his independence from an

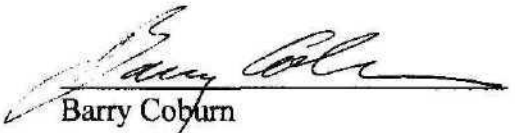
internal reporting chain that is infected by multiple conflicts of interest." In support of this assertion, Human Rights First notes the legal opinions of the Office of Legal Counsel in support of harsh interrogation techniques, and Assistant Attorney General Alice Fisher's and former AAG Michael Chertoff's alleged participation in meetings relating to the appropriateness of these interrogation methods.

Certainly legitimate problems existed with Independent Counsel in the past. The prosecutive function is a delicate one. Prosecutors must be sensitive to motivations external to the facts under investigation, such as ego, ambition, vindictiveness, personal preconceptions and their own political leanings. There are times when any prosecutor – either within or outside the Department of Justice – can fail to exercise careful, seasoned judgment. USA Today notes some of these concerns in an editorial from January 4 of this year, entitled "Give Bull Durham a Chance." The editorial references the Independent Counsel investigation of Ken Starr, which, it says, "careened down endless detours into unrelated accusations against President Clinton. The inquiry cost $52 million, lasted more than six years and led to Clinton's impeachment on charges stemming from the Monica Lewinsky sex scandal." The same editorial refers to the investigation by David Barrett focused on Henry Cisneros, which cost $22 million and resulted in a guilty plea to a misdemeanor by Mr. Cisneros. Finally, the editorial lumps Patrick Fitzgerald into the same wide swath of criticism, saying that he "spent almost four years trying to find out who leaked the name of CIA employee Valerie Plame Wilson to reporters. Vice President Cheney's Chief of Staff was convicted of perjury, but no one ever was charged with the leak. The major result was to make it easier for public officials to intimidate potential whistle-blowers. Not exactly in the public interest."

With respect to the Durham inquiry, the USA Today editorial says: "Spy agencies need to learn that they can't flout laws. The public needs to regain confidence in intelligence agencies. The best way to do both is to find the facts quickly and punish any wrongdoing. That's what career prosecutors do best, as long as they remain free from political interference." But this last statement begs the crucial question. Allowing a prosecutor who must report "up the line" in the Department of Justice to investigate the kind of alleged misconduct at issue here raises fundamental, structural issues of conflict of interest, lack of impartiality and possible political interference in the investigation, the very concerns that led to the creation of the Independent Counsel Act and then the compromise Special Counsel regulations. These concerns fundamentally undermine public confidence in the results of the investigation, regardless of the best of intentions on the part of the particular prosecutor. It is for these reasons that members of this Committee have sought the formal appointment of a Special Counsel under Department of Justice regulations. In December 2007, Congressman Rush Holt (D-NJ), a member of the Select Intelligence Oversight Panel, wrote a letter to Attorney General Mukasey requesting the appointment of a Special Counsel. Congressman Holt noted that the CIA already had made what appeared to be false representations about the matter in connection with the Moussaoui prosecution in the United States District Court for the Eastern District of Virginia. Chairman

Conyers also has called forcefully for the appointment of a Special Counsel. For the reasons I have stated, I strongly agree that the appointment of a Special Counsel is needed.

Respectfully submitted,



Barry Coburn
Coburn & Coffman PLLC
1244 19th Street, NW
Washington, DC 20036
Tel: 202-657-4490

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