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S. Hrg. 106–131

THE FUTURE OF THE INDEPENDENT COUNSEL ACT

HEARINGS

BEFORE THE

COMMITTEE ON
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

FEBRUARY 24, MARCH 3, 17, 24, AND APRIL 14, 1999

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THE FUTURE OF THE INDEPENDENT COUNSEL ACT

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THE FUTURE OF THE INDEPENDENT COUNSEL ACT

WEDNESDAY, FEBRUARY 24, 1999

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 10:25 a.m., in room SD–342, Dirksen Senate Office Building, Hon. Fred Thompson, Chairman of the Committee, presiding.

Present: Senators Thompson, Stevens, Collins, Domenici, Cochran, Specter, Gregg, Lieberman, Levin, Akaka, Durbin, Torricelli, Cleland, and Edwards.

OPENING STATEMENT OF CHAIRMAN THOMPSON

Chairman THOMPSON. The Committee will come to order, please. The Committee on Governmental Affairs today begins a series of hearings on the Independent Counsel Act. The statute is set to sunset on June 30. The Committee's hearings will undertake a comprehensive examination of the statute, which has now existed for more than 20 years.

Today, our witnesses will describe the purposes that the Independent Counsel Act was designed to achieve and how well it has accomplished those purposes.

The idea for the Independent Counsel Act can be traced back to the final report of the Senate Watergate Committee, although that report recommended the creation of a permanent office, rather than an incident-by-incident appointed individual.

Former Senator Howard Baker, who, of course, was the vice chairman of that committee, is here, as is former Attorney General Griffin Bell, the first Attorney General who implemented the statute. Also with us today is a panel of former independent counsel who will offer their views of the statute and also to make recommendations.

In future sessions, the Committee will hear—for the first time in reauthorization hearings of the act—from former targets of independent counsel and their lawyers. The Committee will not only hear proposals to amend the statute, but will consider testimony on alternatives to the statute from individuals who have been prosecuted in politically sensitive cases outside the framework of the Independent Counsel Act.

We are also working to schedule testimony by former Independent Counsel Lawrence Walsh and current Independent Counsel Kenneth Starr. The appearance of these two witnesses will give

Committee Members the opportunity to propose first hand their questions concerning these two investigations.

As we all know, the Independent Counsel Act was born out of legitimate concern that when the Justice Department is investigating its own or a superior, or the President, there is an inherent conflict of interest. Therefore, the response was that perhaps we ought to appoint somebody who is independent.

The only problem with that is that in our system of government, nobody is independent. If somebody truly is independent, they probably are a danger. So we have struggled with the act over the last 20 years, and I think many now are questioning the fundamental concept that the act has been based upon, and whether or not it sufficiently took into account such things as human nature, and the idea that when you create a statute, that which is allowable under the statute, whether harmful or not, eventually will happen.

We have seen that played out. A lot of people think that the act worked just fine until recently and that Mr. Starr has caused all these problems, and they are shocked that there are tough, aggressive prosecutorial tactics that are going on this country, tactics that many people who understand our system know go on on a regular basis and have for some time at the Justice Department and their offices throughout the country.

I trust this will not be a referent on any particular individual. We certainly are aware of the criticism of the current independent counsel. Hopefully, we will have him here, although I must say that some who have been most critical of Mr. Starr were not critical of the previous 6½-year, $47 million investigation of another President of a different party who indicted people on the eve of the 1992 election and filed a report accusing people of criminal conduct and things of that nature. Civil libertarians were hard to find back in those days.

But, of course, the Republicans were very critical in that time. So now that Capitol Hill is littered with the carcasses of gored oxen on both sides, perhaps we can sit down in a measured way and determine what we have and where we should go from here.

I think it is clear that from the very beginning, we have seen that there were problems that needed to be worked out and we have attempted to tinker with the statute and fine-tune the statute and correct problems.

One independent counsel would do something and we would react to it. Another one would do something else and we would react to that. It was passed in 1978, amended in 1983, again in 1987, and again in 1994. We have made it easier for the Attorney General to request the appointment of an independent counsel. We have made it more difficult for the Attorney General to appoint the independent counsel.

At various times, we have narrowed the covered persons, we have changed the time periods, we have changed reporting requirements, we have changed the relationships that the Independent Counsels have to the Attorney General. We have put in cost controls, we have tinkered with the duties of the special division, the court that appoints the independent counsel.

We have done all of these things now for some 20-odd years and now we will examine the results. I think clearly, in some cases, the results of that have been good. We have three former independent counsel here with us today on our second panel who will point out that in some cases it has worked well and justice has been done. Those were lower profile cases than many of the others that we see.

The problem, it seems to me, is that the higher the profile of the case, when you start dealing with the President, for example, whichever party is having their President attacked automatically attacks the independent counsel.

The very purpose that the law was established for, and that is to increase and enhance people's confidence in their government, is being defeated. We are going in the opposite direction.

So we have this political free-for-all where the independent counsel is attacked, and the independent counsel cannot respond. I suppose there has never been an investigation where mistakes have not been made somewhere along the way and public confidence probably suffers in the process.

We set up these independent counsel, we give them all of the power that the Attorney General has without the controls, all the time, all the money. They only have one case to investigate many times and we put on top of that, on the high-profile cases, the terribly increased media scrutiny, which creates pressures on normal human beings knowing that they are going to be judged in the media, usually according to how many scalps that they are able to put on the wall.

Therefore, it causes them to turn over every single leaf, big leaves, small leaves, and everything in between, which would not be the case in a normal situation handled by normal prosecutors with a variety of cases, a variety of considerations who are able to work pretty much in anonymity, and they simply do not have the pressures either to bring prosecution in a case or to refrain from bringing prosecution in a case for fear that they might lose the case even though it is justified in its bringing.

It can work. Depending on the individual, it can work in either way, but both ways are really adverse to our sense of justice. But I think the one thing that is always there is the feeling for the need to turn over every possible leaf, which results in more expensive investigations than you would have normally, although people should know that Justice Department investigations, in general, are often very expensive, white collar cases especially, and can go on for years.

Mothers are called before grand juries. All these things that we are seeing now for the first time are not that unusual in most cases, so it is not strictly a black versus white situation.

It seems to me what we have here is a case where you are more likely to have abuses of the system than you otherwise would have, causing a lot of additional expense in a very expensive process any way you cut it, additional expense from what you would have in a normal situation.

You have a lot of criticism that there are too many independent counsel being appointed, that the Attorney General has a hair trig-

ger, that it is almost automatic that she has got to refer matters to a three-judge panel and ask for an independent counsel.

We have all this criticism on the one hand, and I think there is a good deal of validity to it, but on the other hand, you have a situation that is present today where the Attorney General refuses to request an independent counsel in what appears to be the classic case for which the Independent Counsel Law was set up and that is the campaign finance situation concerning the President.

The President certified that he would take public money and would not take private money in his campaign. He signed a certification, took the public money, and then proceeded to run in millions of dollars of soft money, flew the National Democratic Committee, and the Attorney General decided that as long as they ran TV ads with that soft money, clearly for the benefit of the President's campaign and used the magic words or refrained from using the magic words, the mere fact that it went to benefit the President's campaign and the mere fact that it clearly went against the intent of the public financing law did not count and she would not refer it to an independent counsel even though the people who she relied upon and brought in to handle the investigation strongly recommended that she do so.

In other words, soft money was taken off the table, which caused a Federal judge recently to rule that if soft money is now legal, that it is legal across the board, which means soft foreign money is now legal.

So now, at least according to one Federal district judge, although I doubt if many Americans realize it, apparently foreign money from any foreign source can legally be brought into American campaigns, run through the DNC or the RNC in soft money contributions, and as long as they refrain from using the magic words, they can buy TV ads for their favorite political candidate.

That is another strange result that has come from all this. So what do we do about it? That is why we are here today. Some people say, well, let us abolish it without even looking at it. Let us get on with it. But a knee-jerk reaction based upon recent circumstances might have been what caused us to start down this road to start with.

We probably would be best served not to do that. We could tinker with it again. Hope springs eternal with regard to our ability to tinker and solve the problems. We have done that a lot. We still have a lot of problems. I think that most people are coming to the position that maybe it has more to do with the underlying concept than with the details of the statute itself.

Another option is, after we have given it fair consideration, to see whether or not going back to the pre-Watergate system that operated for about 200 years in this country might still, all in all, be better than what we have.

The Attorney General has the statutory authority to appoint special counsel and we have with us today, General Bell, an individual who, of course, used that authority and that is one of the things that we can explore with him today.

We will hear many options, many suggestions, good suggestions, things that we ought to take our time and go through and consider the ramifications of. We have tried to set these hearings, not stack

these hearings all on one side or the other, but to have a balance in the hearings to really give a thorough examination of this.

I want to express my appreciation for the cooperation of the Ranking Member, Senator Lieberman, who has worked very closely with me in setting up these hearings and is equally committed to addressing this reauthorization in a serious manner, and I hope he appreciates the fact that we were able to start these hearings on his birthday. It took a lot of effort, but we were able to do that. So congratulations, and any statement that you might have.

[The prepared statement of Senator Thompson follows:]

PREPARED STATEMENT OF SENATOR THOMPSON

WASHINGTON, D.C.—The following is the prepared opening statement of Senator Fred Thompson (R–TN) Chairman of the Governmental Affairs Committee, at a February 24 hearing on the reauthorization of the Independent Counsel Act:

"The Committee on Governmental Affairs Today begins a series of hearings into reauthorization of the Independent Counsel Act. That statute is set to sunset on June 30. The Committee's hearings will undertake a comprehensive examination of the statute, which has now existed for more than 20 years. Today, our witnesses will describe the purposes that the Independent Counsel Act was designed to achieve and how well it has accomplished those purposes.

"The idea for the Independent Counsel Act can be traced back to the final report of the Senate Watergate Committee, although that report recommended the creation of a permanent office, rather than an incident by incident appointed individual. Former Senator Howard Baker, who of course was the Vice Chairman of that committee, is here, as is former Attorney General Griffin Bell, the first attorney general who implemented the statute. Also with us today is a panel of former independent counsel to offer their views on the statute and to make recommendations.

"In future sessions, the Committee will hear—for the first time in reauthorization hearings of the act—from former targets of independent counsel and their lawyers. The Committee will not only hear proposals to amend the statute, but it will consider testimony on alternatives to the statute from individuals who have prosecuted politically sensitive cases outside the framework of the Independent Counsel Act. We are working to schedule testimony by former Independent Counsel Lawrence Walsh and current Independent Counsel Kenneth Starr. The appearance of these two witnesses will give Committee members the opportunity to propose first hand their questions concerning these two investigations.

"I have long had concerns about the operation of this law. I am not of the view expressed by some that the Independent Counsel Act was a smashing success until 1994, at which time unprecedented and unforeseeable problems arose. Many of the criticisms now raised about the statute are not new. Some of the criticisms, such as cost, were the subject of prior amendments to the statute that were made in earlier reauthorizations. Yet, despite those amendments, the same criticisms remain. The tinkering approach of earlier reauthorizations will not pass muster this time. Of course, the difference between tinkering and radical change is in the eye of the beholder. I have not made any final decisions whether to favor radical change to the existing statute, go back to the prior system that worked in Watergate, or consider a new alternative. All of these positions will be represented in these hearings. I do think that the burden of persuasion rests with those who desire to retain the statute, even with significant changes.

"Many people have complained that the statute has a hair trigger for requiring the appointment of an independent counsel. There may be validity to that view. But at the same time, the total discretion placed in the Attorney General means that no remedy can overturn a determined refusal to seek an independent counsel even when such an appointment is clearly required. The President's involvement in illegal campaign fundraising was in part what convinced Congress of the need to enact this law. Yet, when that situation recently arose, the Attorney General refused to seek that appointment, adopting an interpretation both of the election laws and the Independent Counsel Act that none of her predecessors had ever taken. As a result, the statute was turned from a sword to make sure high-level wrongdoing is addressed to a shield from the prosecution of wrongdoing.

"While this is a subject that can raise contentious issues, I appreciate the cooperation of the ranking member, Sen. Lieberman. We have worked in a bipartisan way

to set up these hearings, and he and I are equally committed to addressing reauthorization in a serious and civil way."

OPENING STATEMENT OF SENATOR LIEBERMAN

Senator LIEBERMAN. Thank you, Mr. Chairman. Thank you for your openness to cooperation. Thank you for everything—reminding me it was my birthday. It has been a pleasure to work with you in preparing this important set of hearings, which I believe will enable us to discuss in a fair, open, and meaningful 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 here in Congress as well have already written epitaphs for the Independent Counsel Law. In fact, epitaph may be too nice a word for what has been done.

I, for one, feel strongly that the burial of the Independent Counsel Law would not serve the interests of the American people. I know that the law has become inextricably linked with recent political controversies whose partisan, pugilistic nature has tarred so much of what they have touched.

This is not unusual. Perhaps it is inherent in the history of this law. In fact, the law was allowed to expire. Some thought it was a death. It turned out to be a temporary incapacitation in 1992 because of previous concern with a previous independent counsel, in that case Lawrence Walsh.

But in considering whether to reauthorize the Independent Counsel Law, I hope that we can let go of the anger and the passions and some of the divisions that have consumed us in recent times, because the Independent Counsel Law is not about sex scandals and spin doctors and mud throwing.

It is about a very well-intentioned effort to make the American Government more honest and worthy of the trust of our people. It is an attempt to ensure that our government is as clean and trustworthy as can be. It recognizes a dilemma that is at the heart of any political system which is, how do we police those who hold the reins of the police power, who have themselves been entrusted with the execution and enforcement of the Nation's laws?

In 1978, in the aftermath of Watergate, although as the date indicates, after 5 years of congressional deliberation, Congress sought to address this problem without running afoul of the Constitution's doctrine of separation of powers.

The result, I think, was a delicately crafted, often tinkered with, much debated law that has resulted in some very good criminal investigations, by my standards, and a few bad ones. I agree that the law needs to be changed to reflect our experiences with it in the past 20 years.

I am even willing to consider ideas for replacing it altogether with some other statutory scheme that could achieve the same purposes, perhaps in a better way, but I do not think we should walk away from the noble goal that motivated our predecessors in Congress to pass the Independent Counsel Statute 20 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 distrust between not only the people and their government, but between those of us in the Legislative Branch and those in the Executive Branch. We ask the question, which this statute asks, can the Executive Branch be trusted to investigate itself for potential criminal wrongdoing?

The answer, hopefully, is often yes, but what do we do when the answer is no? And how can we discern those cases and how can we convince the public that the Executive Branch can be trusted to investigate itself? All too often the mere surfacing of allegations against an administration causes damage. Charges can be seized on 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 sound 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.

Now, we have a troubling example that motivated the adoption of this law in the first place, which is Watergate, where the President, history now tells us, 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 the President'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. Of course, it is also possible that other acts of high-level wrongdoing in other presidential administrations have gone uninvestigated and unpunished.

Now it seems to many that the pendulum has swung in the opposite direction and that some independent counsels have gone too far afield. Whereas, the previous fear was that the President could arrogantly hold himself above the law, the present fear held by many is that the President and members of his administration are exposed to such dogged investigation in pursuit of allegedly minor allegations that they may, in fact, be held to a higher standard than are all other citizens of the country under the law.

There are other complaints about the act that are familiar that I will mention very briefly, some of which have been touched on by the Chairman.

First, it is said that the act leads to lengthy and expensive investigations that are unwarranted.

Second, controls on the cost and duration of the investigations are said to be inadequate.

Third, the process for selecting an independent counsel is said to be inscrutable. Some still say notwithstanding the Supreme Court decision in *Morrison v. Olson,* that it is unconstitutional. As a practical matter, they say no Attorney General could ever try to exercise his or her limited power to remove an independent counsel.

Fourth, having only one subject to investigate, many allege, independent counsels lose their sense of perspective and pursue with too much zeal cases that would normally be declined by prosecutors who have a range of priorities before them.

And fifth, the low threshold for appointing an independent counsel and the broad coverage of the act, that is the number of people in the Executive Branch covered, leads to far too many investigations, some critics allege, that would better be handled by the normal prosecutorial processes of the Department of Justice.

Well, in the hearings we begin today, we have an opportunity to consider how serious these problems are; what has caused them; and what, if anything, can and should be done about them. As I said before, 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 not just letting it expire, but creating a whole new process in its place, for instance, an 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.

I see a wry smile on the face of Senator Baker as I mention this because this was an idea that was trotted out in an earlier time here in the Senate. So these are all interesting ideas and 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 on these suggestions, but I am committed to a goal, which is to sustain a statutory mechanism for honestly policing and investigating people at the highest levels of our government when they are suspected of committing a crime.

I understand that the Independent Counsel Statute, as it is conceived today, can exact a toll when prosecutors wield their powers in irresponsible ways. As the Chairman said, the independent counsel is not the only prosecutor in America who is subject to such zeal.

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.

Well, in the first place, the ultimate check on an over-zealous independent counsel is the courts where the results of the counsel's work must ultimately reach judgment. But I would say more generally, a different sort of danger will face us if 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 even be greater because it is less protected against abuse." That power to prosecute will be severely limited without an Office of Independent Counsel.

The conflicts of interest that arise when the Nation's top law enforcement officials are expected to investigate their colleagues, their superiors, and themselves will always raise the appearance of a conflict of interest even when they are trying their best to remain objective.

So I believe our goal should be to find our way to a system that allows top officials to be investigated thoroughly but fairly while

maintaining the public's confidence in the process. Through the Committee hearings that we begin today, I am confident that we can all begin to consider how better this goal might be accomplished.

In other words, Mr. Chairman, we might actually learn something in these hearings that we would like to express in the law. This morning, we are fortunate indeed to have Senator Baker, General Bell, and a distinguished panel of former independent counsels to help us begin this process of education. I look forward to their testimony and I thank you again, Mr. Chairman, for your leadership and openness in this matter.

[The prepared statement of Senator Lieberman follows:]

PREPARED STATEMENT OF SENATOR LIEBERMAN

Thank you Mr. Chairman, for initiating this series of hearings, which I believe will enable us to discuss in a meaningful 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. The law has become inextricably linked with recent political controversies, whose partisan, pugilistic nature have tarred all that they touch. 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, has instead 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 good government. 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 while preserving its purpose. And I am willing to consider ideas for replacing it altogether with some other statutory scheme that could achieve the same goals 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 uninvestigated 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 many 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. I am intrigued by this suggestion.

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 hopeful that we can agree 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 bosses, 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.

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

Chairman THOMPSON. Thank you very much. Senator Stevens.

OPENING STATEMENT OF SENATOR STEVENS

Senator STEVENS. Mr. Chairman, I am constrained to say that I came here to listen to my two great friends that are sitting at the witness table. I respectfully say that the Chairman and Ranking Member have consumed now 20 minutes and I have a meeting at 11:30. So if each Member takes even half the time as the Chairman and Ranking Member, I shall be long departed. So I want to say good-bye to my friends.

Chairman THOMPSON. Thank you. Senator Levin.

OPENING STATEMENT OF SENATOR LEVIN

Senator LEVIN. I am afraid I am going to be the first offender, so good-bye, Senator Stevens.

Senator STEVENS. I think we should change the rules. I do not think the Senators has the right to take the time of the witnesses, but that is the way it goes.

Senator LEVIN. I would be happy to follow whatever rule the Chair wants to set on this.

Chairman THOMPSON. You are following them.

Senator LEVIN. First I want to thank the Chairman and the Ranking Member for scheduling this comprehensive set of hearings. I want to thank our witnesses not only for coming, but for patiently or otherwise listening to our statements.

This is the fourth time in 20 years that the Independent Counsel Law is being reauthorized or being considered for reauthorization. At each of these turning points, when we could have terminated the law rather than continue it, Congress concluded that the Independent Counsel Law performed an important function.

But at reauthorization time, coterminous with support for a mechanism for independent investigations of high-level officials, was our concern with ensuring that the individuals who conduct such investigations also be subject to restraints and limits on their authority like everyone else in our system of government that has a check and balance built in for all of us.

In 1978 when Congress first enacted what was then called the Special Prosecutor Law, we did it to promote public confidence in the impartial investigation of alleged wrongdoings by high-level government officials. At the same time in the original law, we established what we thought were important checks on this new power.

Congress required, for instance, the special prosecutor to comply with Justice Department guidelines. Congress gave the Attorney General the authority to terminate the special prosecutor for cause. And Congress limited the jurisdiction of the special prosecutor to the subjects proscribed by the special court based on information provided by the Attorney General.

In 1982, we faced the first reauthorization of the law and this Committee found that the special prosecutor provision should be retained. But we found that significant amendments were required. During that reauthorization, we made a number of changes to the statute.

For instance, we reduced the number of persons mandatorily covered by the statute. We increased the threshold for seeking the appointment of an independent counsel. We allowed for the reimbursement of attorney fees for subjects of investigations who were never indicted.

During the second reauthorization in 1987, the Committee concluded in our report that, "The independent counsel provides an effective and essential procedure to investigate persons close to the President." At the same time, we reorganized the statute, made adjustments in the procedures for preliminary investigations, and to address cost concerns, required the GAO to audit the expenditures of each independent counsel office.

By the time the third reauthorization came around in 1993, the Supreme Court had upheld the constitutionality of the law, and during this review, the Committee concluded that the law had achieved, "remarkable public acceptance in terms of restoring public confidence in criminal investigations of top Executive Branch officials," but we found that additional fiscal and administrative controls on independent counsel proceedings were needed.

Concerns about the statute at that time centered on establishing stronger cost controls and greater accountability and we imposed limits on staff salaries, office space and travel. We gave special court authority to terminate an independent counsel's office if it found the independent counsel had substantially completed his or her responsibilities.

So at each step of the way, we have reviewed the advantages and disadvantages of the independent counsel system and each time we concluded that it was a worthwhile law. But each time, we also tried to put in limits on the powers of the independent counsel.

We face that same decision today, 20 years after this law was enacted, but this time the issue and concerns are different. This time we have had an independent counsel, Kenneth Starr, who has spent 4½ years and over $40 million investigating the President, but only 25 percent of the American people have confidence in his investigation.

And many of the people, including this particular citizen, believe that he has pushed the envelope of his prosecutorial powers to the extreme and beyond, time and time again. But he is not the only independent counsel who has raised public concerns.

We have had, for instance, an independent counsel who was appointed in 1990 to investigate President Reagan's secretary of HUD and who is still in office almost 9 years later, having spent almost $30 million and who announced 4 years ago there would be no indictment of the secretary who was his target.

And this time, on this reauthorization, we have had an independent counsel who was appointed to investigate gifts to a secretary of agriculture who spent $17 million doing so, went through a 7-week trial, called 70 witnesses, and his charges were resoundingly rejected.

Now, these recent developments have shaken the foundations of the Independent Counsel Law. What they tell us is that the effectiveness of the Independent Counsel Law depends not only on its provisions, but at its core, on the good judgment of the individuals who are appointed to serve.

The question that these recent investigations and indictments raise is whether or not it is possible to amend the statute to place effective limits on the excessive power which has been wielded by some independent counsels, and if not, what would take its place.

If we were to let the law expire, we would be left with a Justice Department's inherent authority to appoint a special prosecutor at the discretion of the Attorney General, but the independence and the credibility of that process has been challenged and, indeed, was rejected by a special court which terminated Robert Fiske's service and appointed Mr. Starr in his place.

Other alternatives to the Independent Counsel Law have been considered over the years. One alternative which I find attractive, if the current law cannot be repaired, would be to place these investigations with the public integrity section of the Department of Justice, but to make some changes: To make the head of that section subject to Senate confirmation, to make the head of that section appointed for a fixed term, and to give responsibilities to the head of that section to report to Congress as well as to the Attorney General.

This alternative, as has been pointed out by Senator Lieberman, is similar to the one that Senator Baker has previously proposed to us with some real foresight. Over the next few months, we will first, though, be determining whether or not the current law can be repaired.

I believe that we should consider keeping it only if major changes are made such as the following: One, requiring the selection of independent counsels with significant prosecutorial experience who have had little or no partisan political involvement and no real or apparent conflicts of interest.

Two, applying the statute only to crimes that are allegedly committed while the person is in office. Three, limiting an independent counsel's office to 3 years, after which time any ongoing investigation would revert to the Justice Department unless the Attorney General determined that extending the independent counsel office was essential to the public interest.

Four, providing practical mechanisms to enforce effectively the statutory requirement that independent counsels comply with established Justice Department policies.

So my support for the Independent Counsel Law has been based on a premise that high-ranking Federal officials should be investigated and prosecuted in a manner no different than a private citizen under the same circumstances. No better, no worse, and unless we can achieve that in the amendments to the current Independent Counsel Law, we should provide another mechanism.

But the alternative, no mechanism, is not acceptable to me. We either should amend this law significantly or put in place another mechanism which has and will instill public confidence that investigations of allegations of criminal behavior by high-level officials will be investigated and prosecuted in the same way that those prosecutions and investigations would be performed against a private citizen.

Thank you very much, Mr. Chairman.

[The prepared statement of Senator Levin follows:]

PREPARED STATEMENT OF SENATOR LEVIN

This is the fourth time in the 20 year history of the independent counsel law that we have considered its reauthorization. Although I was not in the Senate at the time the law was initially enacted, I have been involved in each of the reauthorizations. And at each of these turning points—when we could have terminated the law rather than continue it—Congress concluded that the independent counsel law performed an important function. But at reauthorization time, coterminus with support for a mechanism for independent investigations of high level officials, was our concern with ensuring that the individuals who conduct such investigations also be subject to restraints and limits on their authority like everyone else in our system of government with its checks and balances.

In 1978 when Congress first enacted what was then called the "special prosecutor" law, we did it to promote public confidence in the impartial investigation of alleged wrongdoings by high-level government officials. At the same time, we established important checks on this new power. Congress required the special prosecutor to comply with Justice Department guidelines; Congress gave the Attorney General the authority to terminate the special prosecutor for cause; and Congress limited the jurisdiction of the special prosecutor to the subjects prescribed by the Special Court based upon information provided by the Attorney General.

In 1982, we faced the first reauthorization of the law. This Committee, in its report recommending reauthorization, stated:

> Prompted by the events of Watergate, Congress recognized that actual or perceived conflicts of interest may exist when the Attorney General is called

> on to investigated alleged criminal activities by high-level government officials. When conflicts exist, or when the public believes there are conflicts, public confidence in the prosecutorial decisions is eroded, if not totally lost. Thus, a statutory mechanism providing for a temporary special prosecutor is necessary to insulate the Attorney General from making decisions in these instances.

The Committee went on to conclude, that "the special prosecutor provisions must be retained." The Committee also concluded, however, that "the special prosecutor provisions require significant amendment."

During that reauthorization we made a number of changes to the statute. For example, we reduced the number of persons mandatorily covered by the statute; we increased the threshold for seeking the appointment of an independent counsel, restricting the number of times the Attorney General would need to invoke the statute; we changed the name of the officer from "special prosecutor" to "independent counsel;" and we allowed for the reimbursement of attorney fees for subjects of investigations who were never indicted.

During the second reauthorization in 1987, this Committee concluded in its report, that "[T]he independent counsel provides an effective and essential procedure to investigate persons close to the President." At the same time, we made changes to the statute based upon our observation of its implementation over the preceding 5 year period. We reorganized the statute, made adjustments in the procedures for preliminary investigations, and to address cost concerns, required GAO to audit the expenditures of each independent counsel office.

By the time of the third reauthorization in 1993, the U.S. Supreme Court had upheld the constitutionality of the law. During this review of the statute, the Committee concluded that the law had achieved "remarkable public acceptance in terms of restoring public confidence in criminal investigations of top executive branch officials, but that additional fiscal and administrative controls on independent counsel proceedings were needed." In its 1993 report, the Committee determined:

> [T]he statute should be reauthorized, because it meets a critical need public trust in government. In 15 years of operation, the independent counsel law has gained the public's trust as establishing a system that provides fair and impartial criminal investigations and prosecutions. It has proven to be both constitutional and a trusted means of handling the rare case in which an Administration is asked to investigate and prosecute its own top officials. While not perfect, it is a law that has met the test of time and the bitter lessons of Watergate.

Concerns about the statute at that time centered on establishing stronger cost controls and greater accountability. We imposed limits on staff salaries, office space, and travel. We gave the special court authority to terminate an independent counsel office if it found the independent counsel had substantially completed their responsibilities; and we made it clear that the independent counsel process could be used to investigate Members of Congress.

At each step of the way, we reviewed the advantages and disadvantages of the independent counsel system, and each time we concluded that it was a worthwhile law. But each time we also tried to improve it and fix it.

We face the same decision today, 20 years after the law was first enacted, but this time the issues and concerns are different. This time we have an independent counsel, Kenneth Starr, who has spent 4½ years and over $40 million investigating the President and only 25 percent of the American people have any confidence in him. And no wonder. Mr. Starr pushed the envelope of his prosecutorial powers to the extreme time and time again—challenging the attorney-client relationship after the death of a client (his argument was handily rejected by the Supreme Court), jeopardizing the relationship between the Secret Service and the President of the United States, subpoenaing lists of book purchases, wiring an informant for a matter in which his office had no jurisdiction, and discussing immunity with a target without her attorney present, indeed, threatening to withhold immunity if she called her attorney.

But he's not the only independent counsel who has raised public concerns. This time we also have an independent counsel who was appointed in 1990 to investigate President Reagan's Secretary of HUD and who is still in office almost 9 years later, having spent almost $30 million and having announced over 4 years ago there would be no indictment of the Secretary. And this time we have an independent counsel who was appointed to investigate gifts to the Secretary of Agriculture and who has spent over $17 million to do so. He put the Secretary through a 7-week

trial, calling more than 70 witnesses, and his charges were resoundingly rejected with a verdict of "not guilty" by the jury.

These recent developments have shaken the foundations of the independent counsel law. What they tell us is that the integrity and effectiveness of the independent counsel law depends at its core on the good judgment and common sense of the individuals appointed to serve. Several independent counsels in the last number of years have exhibited neither good judgment nor common sense, and their investigations have caused many to lose faith in the independent counsel system. The question is whether we should end the independent counsel law over the troubling behavior of a handful of recent independent counsels. The answer to that question is another question—is it possible to amend the statute to place effective limits on the excessive power wielded by some independent counsels? If not, what would take its place?

If we were to let the law expire, we would be left with the Justice Department's inherent authority to appoint a special prosecutor at the discretion of the Attorney General. The Attorney General used this inherent authority when she appointed Robert Fiske to investigate Whitewater because the independent counsel law had lapsed. In that case, once the independent counsel law was reenacted, the Special Court terminated Mr. Fiske's service and appointed Mr. Starr in his place, contending that the appointment of Mr. risks by Ms. Reno had tainted his independence. We have no reason to believe that similar arguments would not be made in future cases were the Justice Department to rely, again, on its own authority to appoint independent counsels.

Other alternatives to the independent counsel law have also been considered over the years. One alternative, which I find attractive, would be to place these investigations with the Public Integrity Section of the Department of Justice and make the head of that section subject to Senate confirmation, appointed for a fixed term, and given responsibilities to report to Congress as well as to the Attorney General. This alternative is similar to one that I understand Senator Baker has proposed.

Over the next few months we will be determining whether the current law can be repaired. I believe we should consider keeping it only if major changes are made, including:

— requiring selection of independent counsels with significant prosecutorial experience, little or no political involvement and no real or apparent conflicts of interest, from a list of candidates consisting of 2 or 3 persons proposed by each federal judicial circuit; applying the statute only to crimes allegedly committed while in office;
— limiting an independent counsel's office to 3 years, after which time any ongoing investigation would revert to the Justice Department unless the Attorney General determined that extending the independent counsel office were essential to the public interest;
— providing practical mechanisms to enforce effectively the statutory requirement that independent counsels comply with established Justice Department policies;
— requiring a stronger showing for the Attorney General to seek appointment of an independent counsel by permitting such appointment only if the Attorney General finds reasonable evidence to believe that a covered official committed a covered crime; and
— reducing the coverage of the statute to the President and Vice President and members of the Cabinet.

My support for the independent counsel law has been based on the premise that high ranking federal officials should be investigated and prosecuted in a manner certainly no better than a private citizen, but equally important, in a manner no worse than a private citizen. We should not forget that in 20 years of operation, we have had 20 independent counsels, half of whom never brought an indictment and the majority of whom spent less than $1 million and operated for less than 3 years. In return, the American people had the reassurance that criminal allegations against our very top officials were being investigated by persons independent from the political appointees in the Executive Branch.

But, our system of government is based on the premise that no official has unlimited power; we are all supposed to be subject to effective checks in how we exercise our authority. That premise has been repeatedly challenged by some independent counsels who seem to interpret reasonable oversight as a violation of their independence. We will have to decide whether the current law can be amended to include appropriate checks and balances.

Another problem is the politicization of the independent counsel process. Instead of insulating the investigation of top officials from politics as the law was meant

to do, the law has too often become a political weapon offering repeated political flashpoints. For example, in addition to political criticism of independent counsels, the Attorney General has been subjected to severe attacks for either appointing independent counsels too readily or for failing to appoint them in particular cases. Since the Supreme Court has held that the Attorney General's authority to request appointment of independent counsels is a constitutional necessity, I don't see any way to cure that aspect of this statute by amendment, even if cures can be found in other areas. If this statute is renewed, that's a problem we would just have to live with.

In the next few months, this Committee and the Congress will decide whether to amend the current law or whether a different approach is required. I'm open to both solutions. However, I am not supportive of simply letting the independent counsel law expire and leaving to chance or fate how we handle the future criminal investigations against our very top federal officials.

Chairman THOMPSON. Thank you. Senator Collins.

OPENING STATEMENT OF SENATOR COLLINS

Senator COLLINS. Thank you, Mr. Chairman, and good morning and welcome to our distinguished witnesses. I want to applaud your leadership, Mr. Chairman, and that of Senator Lieberman for convening what is sure to be a highly informative and important series of hearings on the future of the Independent Counsel Act.

While we can agree that the Independent Counsel Law has led a controversial existence since its passage in 1978, I think we can also agree that the act was born from the noblest of intentions. The national cynicism which engulfed the Nation in the aftermath of Watergate led Congress to craft a process designed to provide an independent counsel to investigate allegations against high-ranking government officials in a manner that would promote public confidence in the results of the investigation.

Despite such noble intentions, the implementation of the act has raised serious concerns about the unfettered powers of independent counsels and the impact of this law on the due process rights of those investigated.

But, Mr. Chairman, it is also important that we recognize that some independent counsels have conducted their investigations exactly as Congress contemplated under the law. For example, Ralph Lancaster, a highly regarded private practitioner from Portland, Maine, took a leave from his law firm to conduct the ongoing investigation into allegations involving the secretary of labor.

He has done so capably, fairly, and quietly. I am not ready to abandon the Independent Counsel Law altogether for the Attorney General will always have conflicts of interest, whether perceived or actual, in investigating his or her boss, the President, the Vice President, as well as colleagues in the cabinet.

At the same time, it is evident that this law needs fundamental reforms in its scope and its reach. I look forward to hearing from the wide range of witnesses who are scheduled to present their views before the Committee, and I hope that they can shed lights on the ways that Congress can strike the right balance, can develop a system that preserves the important safeguards in our criminal justice system while ensuring public trust in the outcome of investigations of high-ranking public officials.

Again, thank you, Mr. Chairman.

[The prepared statement of Senator Collins follows:]

PREPARED STATEMENT OF SENATOR COLLINS

SENATOR SUSAN COLLINS WEIGHS MERITS OF INDEPENDENT COUNSEL STATUTE AT GOVERNMENTAL AFFAIRS COMMITTEE HEARING

Senators consider future of Independent Counsel statute, set to expire June 30, 1999

WASHINGTON, D.C.—Senator Susan Collins (R–ME), of the United States Senate Committee on Governmental Affairs, heard testimony today from various experts on the Independent Counsel statute, including former Senate Majority Leader Howard Baker and former U.S. Attorney General Griffin Bell.

The current Independent Counsel statute expires June 30, 1999, and Congress must decide whether to reauthorize it, reauthorize it with amendments, devise a new system of handling cases currently under the jurisdiction of the Independent Counsel statute, or return to a reliance on pre-independent counsel law.

"I am not ready to abandon the Independent Counsel law altogether, for the Attorney General will always have conflicts of interest, whether perceived or actual, in investigating his or her boss the President and the Vice President, as well as colleagues in the Cabinet. At the same time, it is evident that this law needs fundamental reforms in its scope and reach," said Senator Collins.

"We need to look at the law and any alternatives carefully. We shouldn't allow the frustrations that many have felt over the length and expense of various Independent Counsel investigations force us into a hasty decision. It is important that we recognize that some Independent Counsels have conducted their investigations exactly as Congress contemplated under the law. Ralph Lancaster, for example, a highly regarded, private practitioner from Maine, took a leave from his law firm, to conduct the investigation into allegations against the Secretary of Labor. He has done so capably, fairly—and quietly," the Senator added. "I will be considering all possibilities in addressing this issue, but I am especially interested in proposals to limit the scope and reach of investigations, as well as to reduce the number of individuals subject to the statute."

Other witnesses at today's hearing include Arthur Christy, Special Prosecutor in the Hamilton Jordan investigation and Joseph diGenova, Independent Counsel in the Clinton passport file investigation.

The Governmental Affairs Committee is chaired by Sen. Fred Thompson (R–TN).

Chairman THOMPSON. Thank you. Senator Durbin.

OPENING STATEMENT OF SENATOR DURBIN

Senator DURBIN. Thank you very much, Mr. Chairman, and let me say at the outset that I made a mistake. Four years ago, I voted to reauthorize this law. A number of my Republican colleagues came to me and said that there had been excessive efforts made under this law that cannot be justified.

I thought they overstated the case. They did not. I sit here today readily acknowledging to the Chairman and other Members of the panel that I made a mistake in that vote. I hope that we can rectify that mistake in the actions that we are about to take in this Committee.

Our form of government is grounded on the premise that unchecked power is tyranny. The independent counsel is unchecked, unbridled, unrestrained, and unaccountable. Our system of justice is grounded on the presumption of innocence and the belief that it is better for a wrongdoer to go unpunished than an innocent man be wrongly convicted.

Statements by the Independent Counsel Smaltz in the Espy case, the actions of other independent counsels make it clear that this basic rule of law in America has too often been ignored. Let me read to you the words of Archibald Cox when he wrote, "Independent counsels must see their function not as pursuit of a target to be wounded or destroyed, but as an impartial inquiry with as much concern for public exoneration of the innocent as for indictment."

Unfortunately, this message has been lost. Our experience with this statute has been tainted by some prosecutors who have let their ambition cloud their judgment. Recall last December right after a jury acquitted former Agriculture Secretary Mike Espy of 30 corruption counts lodged against him after a 4-year, $17 million investigation.

Independent Counsel Don Smaltz remarked, "The actual indictment of a public official may be as great a deterrent as a conviction of that official." That outrageous statement led the Attorney General of the United States, a week later, to say, "I will say that in terms of what I do at the Justice Department, a person is innocent until proven guilty and that it is a conviction that speaks." I am glad the Attorney General made that statement.

Let me talk about the accountability under the law, because as you see, as it is written, the independent counsel is accountable to the Attorney General. Those who open the morning paper had a chance to note that even that very premise of the law is being questioned in court today.

This morning we learned that Attorney General Reno's authority to hold Independent Counsel Starr accountable is being challenged by a three-judge panel at the behest of a politically conservative advocacy group, the Landmark Legal Foundation.

I hope you will note for the record that Mr. Starr is suggesting that the only way he can be properly investigated is by the appointment of an independent counsel. Where does this end?

I think, frankly, that we have a responsibility here to look beyond the abuses and excesses of Kenneth Starr to the clear abuses by Lawrence Walsh, by Donald Smaltz, and by others. I hope that if the issue is prosecutorial abuse, that we are not naive enough to believe that this abuse is isolated solely to the actions of an independent counsel.

As I discuss the strategy and tactics of Kenneth Starr in this latest case with other prosecutors, they think I am naive to believe that is not happening in a lot of different places across America every day. All of us want crime under control, but at what cost.

I would hope that we would be as sensitive to the rights of ordinary Americans as we are to high-profile Americans who become the targets of independent counsels in Washington, DC. Given this record, what are we to do? I will vote to end this law and seek a mechanism to guarantee future prosecutors in this area are both independent and accountable. I do not believe it is possible to fix this flawed statute.

Last year I introduced legislation to impose term limits on the three judges who select independent counsels so that judges do not become entrenched or invested in a particular investigation or a special prosecutor.

Of the ten judges who have served on the special panel, all but one have served much longer than a 2-year term. In fact, the members of the first panel served 6, 7, and 10 years, respectively. This daisy chain of judges does not create independent counsels.

Following the role played by the independent counsel in the impeachment trial of President Clinton, I think Congress should do what many people are asking, simply let the law expire.

And as for the impact on pending investigations, I would like to say to Judge Starr and all other counsels, your days are numbered. You have got to come before Congress, justify your actions, justify your expenses, and justify your existence. Thank you, Mr. Chairman.

Chairman THOMPSON. Thank you. Senator Domenici.

OPENING STATEMENT OF SENATOR DOMENICI

Senator DOMENICI. I join with Senator Stevens in wanting very much to hear the witnesses, but obviously having heard such eloquence, I must at least contribute a couple of very mundane observations.

I do not think there is any question that in our great system of government, we have a big problem regarding whether we should trust the Executive Branch of government to investigate itself.

Essentially, that is a residual effect of the way we have structured our government. When crimes are committed by somebody in the Executive Branch or by the President, they often are uniquely Federal. Thus, they must be investigated by an Attorney General or no one if we do not have some other process.

So from my standpoint, while I think the special prosecutor can truly exceed the bounds of reason and perhaps be too dedicated and diligent about trying to obtain convictions, from my standpoint, we still have to answer the question of what are we going to do.

Are we truly going to just trust the Executive Branch of government to investigate itself? If we are going to do that, then I think we will be saying that in the history of the special prosecutor, there have been no real incidents when the Executive Branch was at fault and special prosecutors found them guilty.

I believe every one of us will find that some special prosecutors' activities were worthwhile, were good, and accomplished something very significant for the country. So I merely ask the question, if that is the case, do we want now to say we will have nothing in its place and leave it up to the Attorney General of the United States to decide whether or not there will be an investigation of the President?

Often, the issue is whether there is a conflict of interest. Every investigation by an Attorney General of a President faces that conflict. I think it is almost implied that there is a conflict of interest. That person is appointed, can be removed by the President, and obviously there is a conflict of interest.

So, Mr. Chairman and Ranking Member, I laud you for the hearings. I hope we will do something constructive. I do not like the way the special prosecutor statute has worked, but I do believe we ought to have something in its place if we are going to totally abandon and abolish it in its current form.

I regret to say I do not have any ideas yet, but that does not mean that we are not going to do something very, very good. I will have some ideas before we are finished. I have another little chore around here that keeps me from the work of this Committee with such diligence and dedication as each of you. But, I will commit to the Chairman, who worries about some of us giving enough time to this Committee, that I will give as much as is necessary to ex-

press my views and be part of trying to make something come out of this Committee that will work. Thank you very much.

Chairman THOMPSON. Thank you very much. Senator Cleland.

OPENING STATEMENT OF SENATOR CLELAND

Senator CLELAND. Thank you very much, Mr. Chairman, and I applaud you and Senator Lieberman for holding these hearings and for leading off the hearings with such a distinguished group of American citizens, Senator Howard Baker and my dear friend, Judge Griffin Bell.

I do not think we could have two better Americans to address this sticky wicket in American Government. I have watched it, the Independent Counsel Law, function over the last 20 years and I feel much like the drunk on the Titanic. I ordered ice, but this is ridiculous. [Laughter.]

I think it is time to let the Independent Counsel Statute die the ignominious death it so richly deserves. I think questions have been raised, though, by the distinguished panel, which Senator Baker and Judge Bell chaired, about how do you deal with potential abuses of the President, the Vice President, and the Attorney General.

I found it interesting that your panel recommended that the Attorney General, in effect, recuse him or herself, step aside and maybe appoint a special counsel or someone else in the Justice Department to investigate.

I think that is a much better way to go than the way we have proceeded the last 20-some-odd years in terms of the Independent Counsel Statute Law. I am pleased that we have Judge Griffin Bell with us today, a distinguished American and a great Georgian. I appreciate Judge Bell's willingness to be here.

As many of you know, Judge Bell is a graduate of the law school at Mercer University and practiced in Savannah, Georgia and Rome, Georgia before joining the prestigious law firm in Atlanta, King and Spaulding. In 1961, Judge Griffin Bell was appointed by President John F. Kennedy to serve as judge on the 5th Circuit Court of Appeals.

He returned to private practice in Georgia shortly before he was appointed by President Carter to be Attorney General of the United States in 1977. We served together under President Carter there for 4 years. Griffin Bell is uniquely qualified to advise us on the question of an independent counsel and the question of a special counsel.

He served as Attorney General when the first independent counsel provisions were passed by the Congress and signed into law by President Carter in 1978 as part of the Ethics in Government Act.

Furthermore, in November of 1979, Judge Bell was the first Attorney General to actually appoint an independent counsel, Arthur Christy, who will be testifying on the second panel. He also actually appointed a special counsel before the independent counsel.

I would appreciate, in my question time, Mr. Attorney General, getting into your understanding of the distinction between the two and some options available to us as we proceed.

Your experience as Attorney General at this pivotal time provides us, I think, with some valuable insight and I am pleased to

welcome you today. Again, Senator Baker, welcome. Mr. Chairman, Senator Lieberman, we are delighted to be with you on this hearing and look forward to our panelists' comments. Thank you.

Chairman THOMPSON. Thank you very much. Senator Cochran.

OPENING STATEMENT OF SENATOR COCHRAN

Senator COCHRAN. Mr. Chairman, thank you. It is a temptation to say I told you so and I am not going to say it, but when we had this bill up for reauthorization last time, some of us made a very strong effort to amend and to reform and change the proposed bill, but we failed. Twenty-nine votes were cast on the floor of the Senate in favor of an amendment I authored.

I am not saying we ought to go back and resurrect that amendment and pass it because I am not sure it goes far enough. We were trying to seek a way to improve the accountability of the independent counsel, however that counsel would be appointed under the statute, and also to have some limitations on budget and other restraints we thought might be an improvement.

But we failed. Here we are again and I am leaning toward the position that some have already taken publicly and that is to just let the thing die and let us go back to where we were before we adopted an Independent Counsel Statute. That is where I lean today.

But I am going to do like my good friend from New Mexico, Senator Domenici, and reserve judgment on that right now and listen to the witnesses and try to keep an open mind, to explore all the options, and try to carefully come to a decision that serves the public interest in this area.

I do not think, Mr. Chairman, you could have started the hearings any better than selecting these two witnesses to appear before us today. No one is better qualified or better suited to talk on this subject than Senator Baker and former Attorney General Griffin Bell. Thank you very much.

Chairman THOMPSON. Thank you very much. Senator Akaka.

OPENING STATEMENT OF SENATOR AKAKA

Senator AKAKA. Thank you very much, Mr. Chairman. I wish to express my appreciation to you and Senator Lieberman for your efforts in bringing about these hearings on the Independent Counsel Act. I also want to thank Senator Levin for his remarks. As the coauthor of the legislation, his perspective and counsel greatly enhanced our deliberations.

I want to welcome our expert panelists and thank you for bringing your unique perspectives to the table. Without question, you have made a huge impact on the history of our country and particularly on the Independent Counsel Act.

As my colleagues have outlined and as we have heard from others outside of this Committee, the act should be reformed to the point of even terminating it.

Since the enactment of the Ethics in Government Act of 1978, which included provisions for the appointment of an independent counsel to investigate wrongdoings by high-level Executive Branch officials, there have been three reauthorizations, each of which re-

sulted in changes influenced by actions of preceding independent counsels.

I do not need to recount the modifications the law has undergone, but rather suggest the reading of a recent Mercer Law Review article, "The History of the Independent Counsel Provisions," by Katy Harriger, one of the leading historians on the act.

Our series of hearings offer a good opportunity to review thoroughly the successes and failures of the act through the experiences of those who have served as independent counsels, from individuals who have been the targets of the investigations, and legal experts who have examined the law.

We will see if the act has lived up to its promise of providing a mechanism to ensure impartial justice in dealing with high-level officers. By bringing together these witnesses, we will be better able to analyze the weaknesses and strengths of the current statute.

Obviously, there are flaws in the act which are propelling it towards extinction. Given the acrimonious history of the statute, there are many with a strong distaste for the law who look forward to its expiration this June.

We wish to find a workable solution to fixing the act. These hearings provide an opportunity to do so. There is strong public opinion against the statute at the present time. Even organizations such as the American Bar Association, which was instrumental in the creation of the statute, are now coming out against it.

Because there are sharply divided views on the reauthorization of the act, I am confident that this Committee will provide a fair and bipartisan platform for the ensuing debate. I am open to seeing if reauthorization is a viable option. Mr. Chairman, I ask that the rest of my remarks be printed in the record.

I would like to close with saying that I would like to quote Professor Ken Gormley, the author of two recent law review articles who said, "The days of turmoil and governmental crisis are the worst times to make sweeping decisions to abandon entire legislative schemes." I agree with Professor Gormley and I ask that we all keep open minds on this statute so we may fairly judge its viability. Thank you very much.

Chairman THOMPSON. Thank you very much. Your statement will be made a part of the record.

[The prepared statement of Senator Akaka follows:]

PREPARED STATEMENT OF SENATOR AKAKA

Thank you Mr. Chairman. I wish to express my appreciation to you and Senator Lieberman for your efforts in bringing about these hearings on the Independent Counsel Act. I also want to thank Senator Levin for his remarks. As the coauthor of the legislation, his perspective and counsel greatly enhance our deliberations. And to our expert panelists, thank you for bringing your unique perspectives to the table.

As my colleagues have outlined in their statements, we are now 20 years into the Independent Counsel Act. Since the enactment of the Ethics in Government Act of 1978, which included provisions for the appointment of an independent counsel to investigate wrongdoings by high level executive branch officials, there have been three reauthorizations each of which resulted in changes influenced by actions of preceding independent counsels. I do not need to recount the modifications the law has undergone, but rather, suggest the reading of a recent Mercer Law Review article, "The History of the Independent Counsel Provisions," by Katy Harriger, one of the leading historians on the Act.

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pendent counsels, from individuals who have been the targets of their investigations, and legal experts who have examined the law. We will see if the Act has lived up to its promise of providing a mechanism to ensure impartial justice in dealing with high level federal officers. By bringing together these witnesses, we will be better able to analyze the weaknesses and strengths of the current statute.

Obviously, there are flaws in the Act that are propelling it towards extinction. Given the acrimonious history of the statute, there are many with a strong distaste for the law who look forward to its expiration this June. If we wish to find a workable solution to fixing the Act, these hearings provide an opportunity to do so.

There is strong public opinion against the statute at the present time. Even organizations such as the American Bar Association, which was instrumental in the creation of the statute, are now coming out against it. Because there are sharply divided views on the reauthorization of the Act, I am confident that this Committee will provide a fair and bipartisan platform for the ensuing debate.

I am open to seeing if reauthorization is a viable option. However, without significant changes, I understand why there is such an outcry against the statute as it currently operates. In reviewing the many papers written on the law, I have been particularly struck by the scholarship that has been accorded to reauthorization and the breadth to which the legal community has debated the issue. I expect that our hearings will produce the same vigorous discussions that have occurred outside the halls of Congress.

I am also looking forward to hearing from Attorney General Reno, who is scheduled to testify next month. I know that the Attorney General, in her 1993 testimony before this Committee on the Act's reauthorization, said, "that the statute has served the country well." I will also be interested to learn if the Administration supports reauthorization as it did in 1993. Last week, Deputy Attorney General Eric Holder, Jr., who heads a Justice Department task force reviewing the Independent Counsel Act, said he expects the Administration to have a formal recommendation prior to either his testimony before the House this week or before Ms. Reno appears before this panel.

I understand that Kenneth Starr has been invited to testify before the Committee to add his views on the Act, and I am hopeful that he will accept the invitation.

In closing, I would like to quote Professor Ken Gormley, the author of two recent law review articles, who said, the ". . . days of turmoil and governmental crisis are the worst times to make sweeping decisions to abandon entire legislative schemes." I agree with Professor Gormley, and I ask that we all keep open minds on this statute so we may fairly judge its viability.

Chairman THOMPSON. Senator Torricelli.

OPENING STATEMENT OF SENATOR TORRICELLI

Senator TORRICELLI. Thank you, Mr. Chairman, very much. While I had some intention to be brief, I notice with Senator Stevens' absence, now I can lose all restraint whatsoever.

I feel some responsibility to speak just for a moment on this issue. Having been a member of the House of Representatives and remained relatively silent during previous debates, and indeed, on each occasion having lent my own vote for the Independent Counsel Statute, I feel some responsibility and want to revisit some of the comments made during those years that either I did not hear or I did not find sufficiently persuasive, but led me to the wrong conclusion.

Senator Baker, having said during a previous debate on this issue, "The Independent Counsel Statute would establish a virtual fourth branch of government and would substantially diminish the accountability of law enforcement."

Republican Lawrence Hogan of Maryland said, "My question is, do you think that maybe we are creating a Frankenstein monster, creating someone who does not have to answer to anyone, has unfettered power?" Robert Bork, an individual that I do not quote often, said, "What you are doing is building an office whose sole function is to attack the Executive Branch throughout its tenure.

It is an institutionalized wolf hanging on the flank of the elk which does not seem to me to be the way to run a government."

Henry Hyde, who warned of McCarthyism, unaccountable and awesome power to ruin people's lives. Or the prescient and now famous dissent by Justice Scalia in *Morrison v. Olson.*

It is time for all of us who participated in those debates and cast votes through the years to admit we were wrong. Indeed, as I think Senator Collins noted, our intentions were sound. We were guided by the example of Watergate, but history cannot be guided by a single example. You cannot be bound by a single mistake.

So Senator Cochran may not be here to remind us that he was right or to say I told you so, but he is entitled. Most Americans will reach this conclusion because of the abuses of Kenneth Starr, the violations of fundamental due process, the leaking of grand jury information, the failure to follow Justice Department guidelines.

But that is not the entire case. There is, as Senator Durbin has noted, the Smaltz investigation of $7 million of Mike Espy. There is the Barrett investigation of $7 million of Secretary Cisneros, the indictment of his ex-mistress. But it is also bipartisan.

The investigation led by Mr. Walsh for $40 million of 7 years, reaching its conclusions conveniently during the 1992 elections, may have been helpful to the Democratic Party, but it was wrong, it was inexcusable, and it is another reason why I believe this Congress, on a bipartisan basis, cannot believe that this law can be repaired.

It is fundamentally, institutionally flawed. It is remarkable that at this late date in the life of this republic that we are reminded of so basic a lesson that liberty in our Nation is dependent upon a balance of powers. It is, as Madison wrote in *Federalist 51*, "That ambition must be made to counteract ambition."

It is a fundamental principle of our Nation. We have violated it in this generation at our peril. We do not seem to remember that which the founding fathers considered to be so basic. What we may have argued in previous debates provided for a balance of ambitions do not work. The Attorney General's power to remove the independent counsel is theoretical. It does not safeguard.

The Congress' ability to provide oversight responsibilities has no real power at all. The Independent Counsel Statute was created by many of us because we lived with the example of the Saturday Night Massacre. It does not provide sufficient balance against these abuses as an historic experience.

I take from these experiences this single lesson. If the Congress of the United States does not basically have confidence in the integrity of an Attorney General of the United States not to interfere with professional prosecutors or to provide protection against people who are violating the laws of our country, then the Congress of the United States, and particularly this Senate, is not using its power of advice and consent with sufficient authority, it is our fault. Then get a better Attorney General. Do not approve the people who are being nominated.

I believe that there are answers to assure accountability without reauthorizing this statute. I believe basically Presidents, Democrats and Republicans, have appointed Attorney Generals with sufficient integrity.

But if we believe we must convince the public of the basic independence of prosecutors of the Justice Department by doing something else, then extend the term of the assistant Attorney General responsible for public integrity to 6, 7, or 8 years. Make that individual subject to the appointment by the powers of the U.S. Senate.

We can do something else to assure this integrity within the Justice Department without creating this office of no accountability. Let me simply then finally say to my colleagues in the Senate who believe that this law should be reauthorized.

I think you have a very heavy burden. The practical politics of this matter, I believe, and I will participate in a bipartisan effort requiring cloture. You do not count your votes to 50 in what will be required to reauthorize the Independent Counsel Statute.

Nor do I believe that we are simply dealing with future independent counsels. There is a continuing and ongoing problem that must be addressed within the appropriations process. If Mr. Starr or other independent counsels want to continue in their responsibilities beyond the termination of the Independent Counsel Statute, they must seek appropriations.

I believe it is fair and just for this Congress to give current independent counsels 90 days or as long as 6 months to conclude their investigations or transfer them to professional prosecutors within the Justice Department and then restore the basic balance of powers, systems of accountabilities that governed this country for 200 years before this brief absence of responsibility.

I regret the votes that I have cast in the past, but I am willing to learn by them and be held accountable for them. Mr. Chairman, I suspect that ends any suspense about how I will vote on the Independent Counsel Statute. I welcome our witnesses and I thank you, Mr. Chairman, for calling these hearings.

Chairman THOMPSON. Thank you very much. Although we all regret having to keep our distinguished guests waiting, I think the statements have been excellent and have clarified the issues and hopefully, even for the benefit of the witnesses today, expressed the concerns and ideas that perhaps we can get some feedback on.

We have a very distinguished first panel. Senator Howard Baker, former majority leader and White House chief of staff; and the Hon. Griffin Bell, former Attorney General of the United States. Thank you for coming.

Senator Baker, is a distinguished Tennessean, and was vice chairman of the Watergate Committee. I had the opportunity to sit at his right hand over in the caucus building back many, many years ago and learned a great many things, perhaps not enough, but perhaps I am still learning from the senator and I am sure I will again today. Thank you very much for being here and, Senator Baker, we will start with you.

I might also point out that our two guests, witnesses, are cochairmen of the Miller Center Commission on Separation of Powers that address this very issue that we are dealing with today. So we are indeed fortunate and honored to have you here today. Senator Baker, do you have any opening comments?

TESTIMONY OF HON. HOWARD H. BAKER, JR., FORMER SENATE MAJORITY LEADER

Senator BAKER. Mr. Chairman, thank you very much. Senator Lieberman and Members of the Committee, it is a pleasure to be here. This is only the second time, I believe, that I have ever appeared on this side of the podium and I am pleased to have the opportunity to sit here. I now feel fully informed on the subject.

I appreciate you, Mr. Chairman, mentioning our service together on the Senate Watergate Committee. Indeed, you were minority counsel on that committee when I was vice chairman. We were both young men then, a condition from which I have now fully recovered.

As you have already mentioned, former Attorney General Griffin Bell and I served as co-chairmen of the Miller Center Commission on Separation of Powers. The Miller Center of Public Affairs at the University of Virginia was established in 1975 as a non-partisan research institute that supports scholarship on the national and international policies of the United States.

The report on the separation of powers, which included a section on the Independent Counsel Statute, was released by the commission on December 7 of last year. Judge Bell, of course, a distinguished lawyer, a distinguished Federal judge, and former U.S. Attorney General, was a major contributor to the deliberations of the commission, but particularly on the Independent Counsel Statute and indeed, the commission based its findings and recommendations largely on the paper prepared by Griffin Bell on that subject.

Both Judge Bell and I have lived through in the wake of the chaos surrounding Watergate, and I remember vividly the Senate debates on the enactment of the first Independent Counsel Statute in 1978. Forgive me for saying it, but I also recall, in the recollection of these distant years, that we also passed the Campaign Finance Reform Act, the Ethics in Government Act, and sometimes I am tempted to think that none of them worked very well.

But that is not a condemnation, Mr. Chairman and Senator Lieberman and Members of the Committee, of the effort. Indeed, it is a commentary on the very essence of our system that we try, we learn, and we try again.

I watched that while I was in the Senate. I watched it not only in the first effort to create this act, but in subsequent debate. As Senator Torricelli remarked, I have had something to say on this subject on more than one occasion.

But it is my firm view now, Mr. Chairman, that the time has come to make mid-course corrections. My own view, to summarize the statement that I prepared in the interest of time, my own view is that the act ought to expire. We ought to write on a clean slate. We ought to cool off, let some time go by so we can consider the relative merit of the proposals that no doubt will be presented or may already have been presented for addressing this issue.

It is an issue of major importance, ladies and gentlemen of the Committee, because what we are dealing with is no less than a fundamental structural conflict in our system. On the one hand, we have vested of the Constitution the entire executive authority, including the authority to execute the law and to see that it is faith-

fully performed in the President and the President's administration.

On the other hand, we are dealing with how we at least diminish that. We use words like isolate the Attorney General from the possibility of conflict or separate the President's responsibilities by doing, and then you can fill in the blanks with dozens of things.

The fact of the matter is, whatever we do with an Independent Counsel Statute or with a special prosecutor statute is at least a dilution of, perhaps even a diminution of the inherent constitutional authority. Indeed, the sole constitutional authority of the President proceeds with the execution of the laws and the faithful performance of public officials.

But notwithstanding that, I could not honestly sit here and tell you that my 20 years of experience in government, which spanned a time when I participated in the investigation of one President and perhaps the defense of another one, that I have not come to the conclusion that there needs to be some address to these issues.

Indeed, I think there must. I have thought long and hard about how to do that. I have looked at a lot of proposals, many of them with great merit. I have tried to weigh and balance the value and merit of the several proposals I have seen with the danger of the inherent conflict and the diminution or dilution of presidential authority. So far, I have been unable to come to a conclusion.

So, Mr. Chairman, Senator Lieberman, and Members of the Committee, I have reluctantly concluded at this time that I am not capable of making a recommendation on what ought to happen. So instead, I recommend to the Senate, to this Committee, that we cool it and think about it for a while. We let the temper of these times subside.

There is no absolute urgency in passing anything and indeed, come June 1999 when the act expires, there is no national cataclysm. There is no problem that cannot be addressed in the ordinary constitutional form. That does not mean that we cannot continue to address this issue and come up with our best judgment, your best judgment on what ought to happen.

I agree with those who say that it is a serious issue, it is one that should be addressed. I agree with those who say that we are treading on dangerous ground when we truncate the authority of the Attorney General or the President. The truth of the matter is, Mr. Chairman, I agree with every argument that has been put forth by this Committee today.

But in good conscience, I cannot say that I know what the answer is, but I do commend you, as Members of this Committee, as you as Chairman and the Ranking Member, for going forward with these hearings. I have high confidence that you will find these mid-course corrections.

The U.S. Government does not do everything well, but it does that well. It does learn from its mistakes and we do adjust policy to change circumstance and circumstances have changed. So I counsel for caution and care. I think the act should simply be permitted to expire in June.

I think perhaps before this session is over, that you will have a better idea of what you ought to do after you have had time to

think about it coolly, carefully, and calmly. That is my position, Mr. Chairman.

[The prepared statement of Senator Baker follows:]

PREPARED STATEMENT OF HOWARD H. BAKER, JR.

Former Attorney General Griffin Bell and I served as co-chairmen of the Miller Center Commission on the Separation of Powers. The Miller Center of Public Affairs at the University of Virginia was established in 1975 as a non-partisan research institute that supports scholarship on the national and international policies of the United States. The report on the Separation of Powers, which included a section on the Independent Counsel Statute, was released on December 7, 1998. Judge Bell, a distinguished lawyer, judge and U.S. Attorney General in the Carter Administration, was a major contributor to the deliberation of the Commission, but particularly on the Independent Counsel Statute. The Commission based its findings and recommendations largely on his paper on this subject.

Both Judge Bell and I lived through, and in the wake of, the chaos surrounding Watergate. I remember vividly the Senate debates on the enactment of the first Independent Counsel Act in 1978. At that time, there was a general consensus that something had to be done to separate from the Justice Department the responsibility to investigate and prosecute alleged crimes by named individuals, including the President, the Vice President and the Attorney General. At the same time, I and many others had serious doubt about the constitutionality of a proposal that would diminish or displace the authority of the President and, through him, the Department of Justice for faithful execution of the laws of the land. However, subsequently, the Supreme Court in *Morrison v. Olson* (1988) held the act to be constitutional.

But the Independent Counsel Act was one of a series of measures enacted after Watergate which, if not unconstitutional, have been proved by experience to be unwise. These measures, bearing virtuous-sounding titles such as "campaign finance reform" and "ethics in government," have in practice had pernicious effects on campaigns and on the operation of the government. This disappointing and frustrating result only confirms that the mind of man is incapable of anticipating for very long the practical effects of sweeping public policy legislation.

It seems clear to me that, with respect to the Independent Counsel Statute, the time has long since come for mid-course corrections. Our system is good at that. We recognize that our legislative and policy ideas and proposals are never perfect and that the public policy arena is one of continuing readjustment.

It was the conclusion of the Miller Center report that the Independent Counsel Statute should be permitted to expire by its terms in June of this year. We believe that some sort of policy is necessary to insulate the President, the Attorney General and others in high office from the possibility of conflict, but that the complexities and deficiencies of the Independent Counsel Statute are such that it seems to us better to start by writing on a clean slate.

As pointed out by Professor Sam Dash, who was Counsel for the Majority in the Senate Watergate Committee, in a recent column appearing in *The New York Times,* the problems and difficulties involving the Independent Counsel Statute really are a commentary on how Federal prosecution routinely operates. If that is so, as it may well be, then I would commend to the Committee a broader inquiry than just the renewal of the Independent Counsel Statute.

I have no doubt that the Congress, through this Committee and others, can draft a statute appropriate to the challenge and minimize the difficulties with the present law. I am also convinced that the better part of legislative discretion would be to let this act expire, to let tempers cool and to address the issue of Federal prosecution in a broader, more detached and objective way.

Chairman THOMPSON. Thank you very much, Senator. As usual, wise words. General Bell.

TESTIMONY OF HON. GRIFFIN B. BELL, FORMER U.S. ATTORNEY GENERAL

Judge BELL. Mr. Chairman, Senator Lieberman, and Members of the Committee, I am opposed to renewing the statute. I have had experience under the statute as Attorney General and later as counsel for President Bush in the Iran-Contra investigation. I long

ago concluded that this statute is unworkable for a number of reasons and represents very poor governmental policy.

I am aware that the Supreme Court upheld the constitutionality of the statute in *Morrison v. Olson,* but the mere fact that it is constitutional does not mean that it represents good policy.

The statute is badly flawed from the standpoint of fairness and efficiency. There are a lot of other things I could say that are wrong about the statute. It reminds me of my late partner, Charles Kirbo, who was describing a person he did not care for in south Georgia. He said he was an SOB and had some other faults as well. [Laughter.]

This is about the best description I can give this statute. We prepared this paper for the University of Virginia study group.[1] There were 14 people on that commission, most of whom had had government experience, and we had a unanimous vote that we ought to let the statute expire.

Indeed, I was hoping the day would really begin with a funeral, but it would take too long. But the question arises, Senator Lieberman put his view on just what the issue is, what would be substituted for the statute if it were to expire?

Our response is that we would go back to the system that we have always had and under which the Watergate prosecution was conducted, the Teapot Dome oil scandal was handled, the Carter peanut warehouse was investigated, and even Whitewater was being investigated by Bob Fiske, all appointed by Attorney General. That was the system we had.

It lasted for about 200 years and nothing terrible ever happened in the country. Every problem we had was dealt with. So I think the Department of Justice is perfectly adequate to handle any investigation, particularly if we hold the Attorney General and the Department of Justice to a standard of being a neutral zone in the government.

That was President Carter's favorite description of the Department of Justice. He told me that he wanted me to go over there and make this Department of Justice into a neutral zone in the government, that all law to be adequate had to be neutral and to operate on neutral principles.

That is what we have to point to. That is what we have to demand. There should be no politics in the Department of Justice and the Attorney General should take care not to get involved in political decisions.

It is the recommendation of the Miller Center study group that the law of recusal, which applies to Federal judges, be also applied to the Attorney General except that the Attorney General will appoint someone to act for the Attorney General in the case of a pending investigation of a high governmental official such as the President or Vice President or the Attorney General.

It seems odd that the Attorney General would be recused but would appoint someone to act either outside the department or inside the department, but that is the kind of country we have. Somebody has to be accountable, but we would still hold the Attor-

[1] The paper from Miller Center of Public Affairs, University of Virginia entitled "The Separation of Powers: The Roles of Independent Counsels, Inspectors General, Executive Privilege and Executive Orders submitted by Howard H. Baker, Jr. appears on page 120.

ney General accountable, but someone else would be selected about whom there was no question of impropriety to do that.

Now, when I was Attorney General, the statute had been passed, but it did not apply retroactively and there was a lot of views about President Carter having obtained funds from a bank in Atlanta and laundered the funds through his peanut warehouse.

So I appointed Paul Curran, who had been a United States attorney in the Southern District of New York who was a Republican, to do the investigation. I made a public announcement that I had selected him, given him all the power of the Attorney General, and he took that assignment on.

He did not do anything else except that for 6 months. He never had a press conference, he never had a leak, and he finished it in 6 months, and he said he had accounted for every peanut and every nickel and there was nothing wrong. That is the way it ought to be done and that is the way it can be done in a good system.

We can go back to that system and I think we would be well-served. Now, that can be a substitute for the present statute, but we require some changing in the law. Somebody in 1987 took out one word in the statute, political, in the Section (e), 591(e), I think it is.

Somebody took out the word. If I knew who that was, I would make a public announcement as to who took out that word. That enabled the Attorney General not to be disqualified now. There is another part of the statute, 591(c), when she reaches out and gets the Governor of Arkansas and other various and sundry people because she has a conflict, the word political is in there. She had a political conflict. That is, she was appointed by the person being investigated. But they took it out of another place.

But there is another statute that somebody called to my attention this morning, staff counsel. It was passed as part of the Reform Act of 1978, which does apply the Federal judge recusal standard to everyone in the Department of Justice.

Now, that would operate except for the fact that somebody has changed this other statute, took the word political out. If you do that, that is a substitute, but everybody then would know what the system is and people, I think, would be well-satisfied to go back to the old system.

Most people trust our government, most people I know, and they think it has worked well and they think there is very little we can do to improve on what the founding fathers came up with and I am of that view. I am pretty well-satisfied with the system we have and we do not gain anything by tinkering with the system.

We have tinkered and tinkered about long enough, I think, in this particular statute. I have got some other statutes that I would like to remove, also, while we are about it. [Laughter.]

Chairman THOMPSON. We will have another hearing.

Judge BELL. We will take questions, I am sure, Senator Baker and I.

[The prepared statement of Judge Bell follows:]

PREPARED STATEMENT OF GRIFFIN B. BELL

I served as Attorney General of the United States during the period when the original Independent Counsel Act was enacted in 1978 as a part of the Watergate

reform. The statute had been reenacted several times, but always with a sunset provision. The statute was allowed to expire in 1992, but was reenacted in 1994 and will be expiring this year unless renewed.

I am opposed to renewing the statute. I have had experience under the statute as Attorney General and later as counsel for President Bush in the Iran-Contra investigation. I long ago concluded that this statute is unworkable for a number of reasons and represents very poor governmental policy. I am aware that the Supreme Court upheld the constitutionality of the statute in *Morrison v. Olson,* 487 U.S. 654 (1988). The mere fact that it is constitutional does not mean that it represents good policy.

The statute is badly flawed from the standpoint of fairness and efficiency. It received the consideration of a 14-person commission of experienced public officials in a study recently sponsored by the Miller Center at the University of Virginia. I was co-chair of that Commission on Separation of Powers with Senator Howard Baker. It was the unanimous view of our Commission that the statute should be allowed to expire.

I attach a paper which was prepared in connection with that study, which sets out some of the problems associated with the Independent Counsel Statute and includes sound reasons for a decision not to renew it.

The question arises as to what would be substituted for the statute if it were to expire. Our response is that we would go back to the system that we have always had and under which the Watergate prosecution was conducted, the Teapot Dome oil scandal was handled, and the Carter Peanut Warehouse was investigated. Even Whitewater started under a special counsel appointed by the Attorney General when there was no Independent Counsel Statute; I refer to Mr. Robert Fiske.

The Department of Justice is perfectly adequate to handle any investigation; particularly if we hold the Attorney General and the Department of Justice to a standard of being a neutral zone in the government. There should be no politics in the Department of Justice and the Attorney General should take care not to become involved in political decisions.

Hence, the recommendation of the Miller Center study group that the law of recusal which applies to Federal judges be also applied to the Attorney General except that the Attorney General would appoint someone to act for the Attorney General in the case of the pending investigation of those high in government position. This would hold the Attorney General accountable to see that the investigations take place but by someone who is not subject to questions as to propriety.

I will be glad to answer any questions.

INDEPENDENT COUNSEL STATUTE

The independent counsel era began by statute in 1978 as the special prosecutor statute. This was an idea promoted by the American Bar Association, and born of the distrust of government created by Watergate.

The statute, with a 5-year sunset provision, has been reenacted a number of times and has been amended from time to time. It was last reenacted in 1994 after having lapsed in 1992. It expires in 1999. One amendment substituted "independent counsel" for "special prosecutor." Other amendments had to do with persons covered under the act and the duties of the Attorney General under the act. An outline of the statute is attached.

Regardless of the amendments, the import of the statute continues to be that the Attorney General and the Department of Justice are not to investigate allegations of crime against the President and Vice President and most of the top people in the Executive Branch as well as certain political party officials.

With respect to the allegations of crimes involving covered persons, the Attorney General has limited investigative authority and must decide whether to seek independent counsel without convening a grand jury, engaging in plea bargaining, granting immunity or even issuing subpoenas.

Some of the separation of powers issues which are implicated in this statute were held constitutional in *Morrison v. Olson,* 487 U.S. 654 (1988). The linchpin of the holding was that special counsel is an inferior officer under the Constitution such as could be appointed by the Congress or the courts, and that the Attorney General could remove the special counsel. We consider those issues and others as policy questions, entirely aside from legality issues.

The power and duty to faithfully execute the laws is vested by the Constitution in the President. He does this through the Department of Justice with respect to criminal law. The breadth of the transfer of this duty from the Attorney General to independent counsel under this statute is substantial. The Attorney General is

restricted unduly in deciding the need for independent counsel. The Attorney General can remove the special counsel, but only for cause and that cause can be contested in the courts. In the practical world, no special counsel will ever be removed by an Attorney General. The special court appoints the special counsel entirely within the discretion of the court. There are no realistic fiscal or time constraints on the special counsel. In effect, the law creates miniature departments of justice to prosecute a particular person. The special counsel has been given the President's power and duty to faithfully execute the laws.

The statute places persons other than high government officials under the special counsel jurisdiction. Section 591(c) adds to those persons specifically covered in Section 591(b), others when the Attorney General receives information sufficient to constitute grounds to investigate whether the person may have violated a Federal criminal law and the Attorney General determines that an investigation or prosecution of the person with respect to the information received by the Attorney General or other officer of the Department of Justice may result in a personal, financial or political conflict of interest. It can be fairly inferred that this jurisdiction requires a nexus to the investigation of covered persons under Section 591(b), although the statute does not so state.

It was this section which gave the independent counsel in the Whitewater matter jurisdiction over non-Federal persons who were not covered in Section 591(b) and who were later prosecuted in the Whitewater matter. There was a court decision regarding the Governor of the State and private parties who were prosecuted, holding that the Independent Counsel Law did in fact cover those persons even though they were not in the Executive Department of the government because they fell under Section 591(c) and the Attorney General had certified that she had a political conflict of interest. *See U.S. v. McDougal,* 906 F. Supp. 499 (1995). The unspoken premise was that the President was being investigated, thus the nexus to a covered person.

This peculiar type of conflict (political) is to be contrasted with the other provisions of the act which disqualify the Attorney General because of personal or financial relationships with covered persons. Section 591(e). The political disqualification is used only in Section 591(c). We are left with the remarkable situation where the Attorney General has an admitted political conflict to warrant the appointment of special counsel for persons not covered in Section 591(b) but who have a close relationship with persons who are covered (the President and others). But the Attorney General in a different matter is not disqualified on financial or personal grounds where the President is the subject despite the fact that the President appoints the Attorney General and the Attorney General serves at the discretion of the President.

Any conflict of interest problem, while at the same time honoring the President's constitutional duty to faithfully execute the laws through the Department of Justice and the preservation of trust in the Department of Justice as an institution, would be eliminated if the Attorney General and other political appointees in the Department of Justice were disqualified on grounds of an appearance of impropriety, as is the case with Federal judges. *See* Title 28, Section 455, U.S. Code. The Attorney General would be directed by the statute in such event to appoint a person not having a conflict of interest, whether in or outside the Department of Justice, to conduct such investigation as might be appropriate.

The special counsel problem, if we agree that it is a problem, seems to present a number of options.

The first is to do nothing.

The second is to repair the statute in one or more ways. There are a number of areas in need of repair. The coverage is much too broad, particularly Section 591(c). It is under that section that the Whitewater special counsel has received jurisdiction over non-Federal persons rather than under 591(b), which includes the President and other executive officers. Certainly, Federal special counsel jurisdiction over non-Federal persons should not rest on the Attorney General being disqualified. Even Section (b) should be modified to include only the President, Vice President and Attorney General and not the retinue of Federal officers now included.

Section 592(a)(2), which restricts the Attorney General from convening grand juries, issuing subpoenas, and so forth, needs to be eliminated to give the Attorney General more discretion to investigate allegations. This section puts blinders on the Attorney General with respect to making the determination whether to seek special counsel.

Another area for reform would be in restricting the special court in the selection of special counsel. The Court has total discretion now and should be restricted to appointing counsel as to whom there is no appearance of impropriety. A standing panel nominated by these same judges and confirmed by the Senate would let the

public know in advance of the universe from which special counsel might be selected.

One problem with the special counsel statute that probably cannot be repaired is the inherent absence of due process from the procedure itself. This is the isolation of the independent counsel from the Executive Branch and the isolation of the putative defendant from the safeguards afforded all other Federal investigatees. The inherent checks and balances the system supplies heightens the occupational hazards of a prosecutor taking in too narrow a focus, a possible loss of perspective and a single minded pursuit of alleged suspects seeking evidence of some misconduct. This search for a crime to fit the publicly identified suspect is generally unknown or should be unknown to our criminal justice system.

The person being pursued publicly in the investigation is treated differently from other suspects being investigated by Federal prosecutors who are afforded the protection of no comment by the prosecution on a pending investigation, including not acknowledging the fact of the investigation. Such disparate treatment can hardly be justified on the ground that the special counsel treats with only those holding political office or their associates.

The final report by the special counsel can be another example of lack of due process by suggesting guilt although there was no indictment. An example is the report of Judge Walsh in the Iran-Contra investigation. This treatment would never be given by the Department of Justice to an ordinary person who was investigated but not indicted. The final report should be eliminated. It is quite enough to indict or close the investigation.

The third option would be to let the statute expire. In that event, however, the standard for recusing the Attorney General should be raised to that of the judiciary, *see* 28 U.S.C., Section 455, which would require recusal when the President or Vice President or Attorney General are involved and the impartiality of the Attorney General might reasonably be questioned. My experience at the Department was to use the judicial model for recusal of all political appointee officers and in all matters. The statute might provide that the Attorney General, although recused, could appoint special or outside counsel or a Justice Department officer who is not disqualified. This would hold the Attorney General accountable as a responsible official and avoid any possible separation of powers problem. *Compare* Section 591(e) of present statute.

SPECIAL COUNSEL STATUTE

Outline of Pertinent Parts

A. Section 591

1. 591(a)—Preliminary investigation by Attorney General under Section 592 when Attorney General receives information sufficient to constitute grounds to investigate whether any person described in Subsection (b) may have violated any Federal criminal law.
2. 591(b)—Persons covered include President and Vice President plus a host of other Federal officials and some political party officials.
3. 591(c)(1)—Provides open-ended coverage over and above those persons included in 591(b) of any person being investigated or prosecuted by the Department of Justice which may result in a personal, financial or political conflict of interest. This was the authority used for appointing special counsel to prosecute the Governor of Arkansas and private persons. The Attorney General asserted a political conflict of interest as to those persons. *U.S. v. McDougal,* 906 F. Supp. 499 (1995).
4. 591(c)(2)—Coverage of members of Congress added in 1994 "when the Attorney General determines that it would be in the public interest to do so."
5. 591(d)—How to determine need for preliminary investigation and time periods allowed for determining whether grounds to investigate exist (30 days).
6. 591(e)—When Attorney General is recused, to designate Department of Justice official not disqualified to take over.

B. Section 592—Preliminary Investigation and Application for Appointment of Independent Counsel

1. 592(a)(1)—How investigation is to be conducted and to be done in 90 days. Special Court must be notified of preliminary investigation.

2. 592(a)(2)—Attorney General prohibited from convening a grand jury, plea bargaining, granting unanimity or using subpoenas during investigation.
3. 592(a)(3)—Court may extend 90-day period for 60 days upon good cause shown.
4. 592(b)—Court must be notified if further investigation is not warranted and court shall have no power to appoint an independent counsel in the matter.
5. 592(e)—If further investigation found warranted, appointment of independent counsel by court to follow.
6. 592(g)—Committee of the Judiciary in either House of the Congress may request the Attorney General to seek appointment of independent counsel—Attorney General must report to Committee giving facts to date and reasons why no counsel sought if that is the case.

C. Section 593—Duties of the division of the court in the appointing process, qualifications of independent counsel, jurisdiction of counsel, and fees for subject of investigation.

D. Section 594—Authority and duties of independent counsel, compensation, expense reimbursement and staff, reports to the court by independent counsel and final report required.

E. Section 595—Congressional oversight

1. 595(a)—Independent counsel has duty to cooperate in oversight, must file annual reports.
2. 595(b)—Attorney General must also report within 15 days to Congress as to particular cases or investigations.
3. 595(c)—Independent counsel must advise House of Representatives of information received which may constitute grounds for impeachment.

F. Section 596—Procedure for removing

1. 596(a)—Grounds for removal
   a. Reports by Attorney General to court and Congress relative to removal
   b. Judicial review of removal order
2. 596(b)—Termination of office by independent counsel, termination of office by court

G. Section 599—Expiration date—June 30, 1999.

Chairman THOMPSON. Thank you very much, Judge Bell. Senator Baker, there are just so many areas, of course, we would like to talk about, but focusing on the role of Congress in all of this for a moment, you have seen these things occur from the standpoint of many years in Congress as well as in the Executive Branch.

For any system to work, Congress has got to be involved. Separation of powers, of course, involves the congressional branch. None of us want Congress to be forcing prosecutions, but yet, Congress has an oversight responsibility.

It has occurred to me that part of the problem we have seen here, the result we have had is Congress has been able to step back or has chosen to kind of step back and not fulfill some of its traditional roles.

In a substantial change, maybe the role of the Congress has changed or maybe it should not have, but we have seen some investigations successful, some not successful. There are more pressures to bear now and attention spans are shorter than they used to be.

What do you see as Congress' role? What has happened to Congress' role in all of this and what should it be?

Senator BAKER. Mr. Chairman, I think you touch a fundamentally important point; that is, the Congress has the inherent constitutional responsibility to oversee the functions of government.

I think in a strange way, the Independent Counsel Statute, in whatever configuration and modification, has sort of invited Congress to leave it up to George, to back away from it and say not only the independent counsel will handle it, but perhaps there is something not quite right about Congress looking into the matters that are being investigated by an independent counsel.

I think that the oversight responsibility is alive and well and I think the Congress ought to fully consider its responsibility, its duty to exercise that in connection with matters that might otherwise be presented to an independent counsel.

I think that becomes doubly important if, in fact, this act expires, because while the Attorney General then and the President will have the primary and fundamental responsibility for looking into these matters, the Congress has the undoubted right to inquire and oversee how that function is performed.

I do not think anybody thinks that there is a constitutional conflict there. So I think you make an important point. The oversight function is a terribly important safeguard. It is one that can supplement, perhaps even replace the function of independent counsel and one that will have a great concentrating effect on the minds of those who have the responsibility to see that the laws are faithfully executed.

Chairman THOMPSON. And it seems to many of us that we have recently seen even the congressional role as far as the impeachment process has been minimized and that of the independent counsel has been greater than what many people probably thought when the Independent Counsel Statute was created.

Senator BAKER. Well Judge Bell said he would like to take out that one word. For my part, I would like to take out that provision, that the independent counsel has to file a report, has to report to Congress.

Judge BELL. That is one of the worst things in the statute.

Senator BAKER. Well, it is and what it has done is eviscerate the impeachment provisions of the Constitution.

Judge BELL. That is one of the most unfair things ever done in this country.

Chairman THOMPSON. And nobody knows what the report should contain or should not contain or to what extent Rule 6(e) should apply.

Judge BELL. Well, you can tell that you almost indicted someone, but finally decided not to. That is the only thing. You would never do that in an ordinary case.

Senator BAKER. That is the only situation that I know of in the American governmental system where you can spend millions of dollars investigating somebody, a high-profile investigation, then say, well, we decided there was not anything wrong and he spent millions—or she—has spent millions of dollars, has no opportunity really to defend themselves, and it is grossly unfair.

Chairman THOMPSON. Well, maybe——

Senator BAKER. But on the question of impeachment, Mr. Chairman, I think that is worthy of a separate inquiry for this Committee because I think you fundamentally changed the impeachment functions of the Constitution of the United States.

Chairman THOMPSON. And, General Bell, even further than what Senator Baker referred to, we have seen that in that final report, you can actually accuse somebody of criminal conduct——

Judge BELL. You would need to read the Iran-Contra report.

Chairman THOMPSON [continuing]. Without due process.

Judge BELL. It would be like me being before a grand jury being investigated and the U.S. attorney announces that I am guilty, but deciding not to prosecute me. This is supposed to be a free country.

Senator BAKER. A counterpart to that, though, Mr. Chairman, is the story about the old fellow being tried in a justice of the peace court in Tennessee and he went home and his wife said, how are we doing? He said, I will tell you how we are doing. They are telling lies on us and they are proving part of them. [Laughter.]

Chairman THOMPSON. That reminds me of another story that you used to tell.

Senator BAKER. We are in trouble.

Chairman THOMPSON. That I have thought of a lot over the last several months. Senator Baker represented this mountain client who, after Senator Baker had explained to him his duties and responsibilities as a witness in his own case, he was being charged with criminal conduct, apparently on the steps of the courthouse, the old gentleman stopped Senator Baker, leaned over to him and said, Howard, now you have to understand. If it is just a lie between me and the penitentiary, I aim to tell it. [Laughter.]

I always took that story as a true one. General Bell, let me ask you, you referred to a situation in Arkansas. I think you were referring to the case of Jim Guy Tucker where the Attorney General, I think, recused herself?

Judge BELL. She had recused herself on the grounds that she had a political conflict since she was appointed by the person being investigated.

Chairman THOMPSON. Apparently then, the political conflict was because of Tucker's relationship to the President?

Judge BELL. Right.

Chairman THOMPSON. And she had a political conflict there. But when it comes to the President himself under this statute, she has no such political conflict.

Judge BELL. Because they took out the word political.

Chairman THOMPSON. They took out the word political. So that is just another——

Judge BELL. Like I said, I would like to find the person that did that.

Chairman THOMPSON. It is just another result of the tinkering, so she has to recuse because of a political conflict with Jim Guy Tucker, but she does not have to recuse with regard to the President.

Judge BELL. Right.

Chairman THOMPSON. Let me ask——

Senator BAKER. It sounds like Judge Bell is going to post a reward for that person.

Chairman THOMPSON. In the Paul Curran case that you referred to, General Bell, you used your statutory authority that you had to appoint a special counsel to come in for that period of time. What

degree of independence did you give him? What can we learn from the situation?

Essentially if we let the statute expire and do nothing else, we would be under the same set of circumstances, basically, that you were in at that time and you had that discretion and you chose it.

I am interested in what degree of independence you gave him, what you learned from that, what were his reporting requirements?

Judge BELL. I will find the press statement that we issued because that was the charter that we had. Then I had a press conference and reiterated what was in the press release, that he had all the powers that I had to the extent it was possible for me to delegate under the Constitution. I was the designee of the President to see that the laws were faithfully executed.

I was acting as an agent for the President and I gave, through my powers as the agent, I gave all the power I had to him. He could go get all the FBI agents he wanted, get all the lawyers he wanted in the department. He did not hire any outside people. He just used people we already had.

Chairman THOMPSON. Some people have expressed concern over a system like that, that you could never afford politically to fire a person like that. How did you feel about that? Did it occur to you that if he really messed up or he got out of hand that you could afford to—I don't know whether you recused yourself or not, whether you would be the one doing the firing or not, but whether you could afford to fire the person even though he deserved it?

Judge BELL. Well, I could do that. If you are dealing with honorable people, you do not have to have a contract. I selected him because I knew he was an honorable person, a fine lawyer, a fine prosecutor, and I never expected to have any trouble with him. But if I had, I could have removed him. All I had to do was call him on the telephone and tell him he was going too slow or whatever the problem was.

Chairman THOMPSON. So you feel that——

Judge BELL. And there are a lot of Paul Curran's in this country that you can find, that the Attorney General can find. Ralph Lancaster, Senator Collins mentioned him, a fine lawyer, fine person up there in Portland, Maine. He is doing one of these special counsels.

Chairman THOMPSON. But we do have to account for the possibility, don't we, that every once in a while, you are going to have a situation where things might get out of hand. You have got to account for that somehow and I guess the question is whether or not politically you could ever afford to fire one.

I know Harry Truman did one time. I think President Grant did one time, also, but lately, that has not been a very popular idea.

Judge BELL. Well, President Grant, unfortunately, made the grave error of firing the Attorney General from Georgia. I have always held that against President Grant, but other than that, he was a pretty good President. [Laughter.]

Chairman THOMPSON. Under your proposal, the Attorney General would recuse himself and appoint someone either from within or without the Justice Department; is that right?

Judge BELL. Right.

Chairman THOMPSON. Do you not think that we need to go outside the Justice Department even if you are investigating a President? Do you think someone a little further down the line in the Justice Department?

Judge BELL. That would be a case where I would go outside.

Chairman THOMPSON. In other words, it would depend on who the subject was maybe?

Judge BELL. We had a case, the Bert Lance case, when I was Attorney General and that was handled internally. The prosecutors were lower-level people. It did not even pass over my desk because I had put in this recusal system we use in the Federal court. I had been experienced in the Federal court system.

That is in this statute now, according to what I saw this morning, but it does not apply to the Attorney General. It has been changed, as I said, with the one word taken out.

Chairman THOMPSON. And although the Attorney General has that option today to bring someone in, your proposal would make it mandatory?

Judge BELL. Ms. Reno appointed Bob Fiske. That is how Bob Fiske got in place in the Whitewater.

Chairman THOMPSON. It was during the lapse of the Independent Counsel Law.

Judge BELL. During the lapse. That shows how the government we have works.

Chairman THOMPSON. And a lot of people feel like Mr. Fiske was unfairly criticized, which seems to be the history of any investigation now of an independent counsel of a President.

Judge BELL. Yes. Oh, sure. You are not going to win any popularity contest if you are a prosecutor. That comes with the appointment.

Chairman THOMPSON. Thank you very much, gentlemen. Senator Lieberman.

Senator LIEBERMAN. Thanks, Mr. Chairman. Thank you both, Senator Baker and Judge Bell. I am reminded that when I came to the Senate from being Attorney General of Connecticut, what I most missed was the title general and it is nice to see you, General.

Judge BELL. I have trouble getting people to call me General.

Senator LIEBERMAN. I appreciate your wisdom and I have enjoyed your humor. I feel a little bit left out of the Tennessee/Georgia circuit. I do not feel an immediate story from Connecticut coming to mind, but as we begin this proceeding and series of hearings on the independent counsel, I am reminded of something that Senator Cleland quoted, which he gave credit to W.C. Fields for and it may well describe where we are.

He said, it is time to take the bull by the tail and face the situation, and that is about where we are with the Independent Counsel Act.

Senator Thompson asked a bit about this, but I was struck, though I know, General Bell, you clearly favor the expiration of the law. Senator Baker, you have been quite clear that you favor the expiration and a cooling off period and coming back to thinking what we can do.

The commission that you were part of did recommend the expiration, but then did say that you recognize that the possibility of con-

flicts of interest in investigation of high officials is far from imaginary. I am reading from your report.

"The difficulty lies in striking a balance between holding such public officials accountable and protecting their inherent right to fair treatment. The commission suggests"—and this is three lines of raising some possibilities—"that when the President, Vice President, or the Attorney General is involved in a criminal investigation, the Attorney General should be required, under a new statute, to recuse himself or herself from the case. The Attorney General, though recused, could appoint either outside counsel or a Justice Department official who was not disqualified. The Attorney General would remain accountable as the responsible official entitled to dismiss the counsel or Justice Department official for cause."

I wanted to just take a few moments, since that does present an interesting alternative to the status quo, and ask you just a few questions about that. Under that statute, the recused Attorney General would still be the responsible official entitled to dismiss the special prosecutor.

I wonder whether you envision statutory provisions to define the procedures for removal under that circumstance?

Judge BELL. I would not. I think it complicates it beyond measure to have a statute. I think the Attorney General is the agent of the President. He cannot give away the power to remove the person that has been appointed and you have the power to do that if you have good reason to do it.

The oversight committee of the Congress is so strong that the Attorney General—I do not know how it was in Connecticut, but down here in Washington, every day you are under the gun of the oversight committees. You would not dare get rid of the counsel that you had appointed because you were disqualified yourself unless you had a good reason to do it.

That is just the way it is. The government works well if it is left alone.

Senator LIEBERMAN. As you know, what engendered the original Independent Counsel Statute was President Nixon's firing of Archibald Cox, I should say the firing by the aforementioned Judge Bork.

Judge BELL. That was a firestorm.

Senator LIEBERMAN. That was a firestorm. We did some research and it looked to me and my staff as if there had been six special prosecutors appointed, that we could find, over our history dating back to President Grant up through Archibald Cox, and interestingly, three of them were fired and the Presidents who fired them may have a pattern—President Grant, President Truman, and President Nixon. It is quite an interesting group.

Of course, that is part of why the Congress ventured into trying to create a statutory framework to set some standards. Although as you indicated very well in your case with Paul Curran, a good appointment, thorough investigation, that was it.

I guess the question I want to ask is whether it should be a goal of ours to reassure the public that there is going to be a clearly independent investigation without concern about either influence or termination by a superior officer who is just not happy with how aggressively or how the special prosecutor is going at it.

In other words, whether simple recusal of the Attorney General, particularly if the Attorney General continues to be the responsible official, is enough to reassure the public, I suppose, in that sense, whether reassuring the public should be an important consideration of ours.

Judge BELL. I see nothing wrong with having a statute saying that the person could be removed for cause, good cause.

Senator LIEBERMAN. You see that as a reason why——

Judge BELL. But that raises the problem, though, by having a statute because the Attorney General has been appointed by the President, the President is being investigated by this person, and if she starts trying or he starts trying to remove the special counsel, you will have another firestorm.

Senator LIEBERMAN. That is right.

Judge BELL. So I think it would be better left unsaid.

Senator BAKER. I agree with Judge Bell. I think that the most successful independent counsel or special prosecutor we ever had was not done under the statute and that was Leon Jaworski. I think the combination of the oversight responsibility of the House and Senate together with the public reaction, the political reaction to an unwarranted discharge of a special counsel is more powerful than any statute we could contrive.

It has been my experience in this and other matters that every time we change the delicate balance proscribed for in the Constitution, we get in not only to unchartered waters, but we get into grave difficulty.

In the final analysis, it proves not to work very well, which is not to say I do not think we can do anything at all. I think you can, but I think the more you try to restrict the authority of the Attorney General in this respect, the more difficulty you are going to encounter.

Senator LIEBERMAN. Let me ask you both if you want to say a little bit more about the suggestion in the commission report that we limit even the recusal, the mandatory recusal and appointment of special prosecutor to allegations or suspected crimes by the President, Vice President, and Attorney General.

Just explain a little bit. Perhaps it is self-evident, but just if you would say a few words about why you think we should limit the potential targets to those three.

Judge BELL. I do not think we should limit it. That is in that report, but that was a part of the report I did not write. That was not in the supporting document. I think the author was doing what you are doing. He was trying to reassure the public by naming those three officers, but the statute, it was called to my attention this morning, was part of the Watergate reform. It applies to everybody in the Justice Department.

Senator LIEBERMAN. And you would prefer——

Judge BELL. They are all subject to being recused for impropriety, appearance of impropriety just like a Federal judge.

Senator LIEBERMAN. Right. Senator Baker.

Senator BAKER. I really do think that it ought to be limited if you are going to have a statute at all simply for the reason that these things have a tendency to grow like topsy and if you have three, pretty soon there will be a temptation to have 6 or 10 or 12. That

is the reason I suggest for the inclusion of that sentence in the report.

But I agree with Judge Bell that the general policy in the executive department and the Department of Justice calls for the recusal of people who have a conflict in any event, and I think you are better off not being too precise about it.

If you are going to be precise at all, you ought to limit it very severely and that is to the number three that we came up with.

Judge BELL. Following on that, if this new statute did what the report said, limited it to those three officers, that would mean that they would not be appointing people outside the department except on a rare occasion. Just on those three, you would appoint somebody outside the department.

Senator LIEBERMAN. Would you add to those three, as some have discussed in considering an alternative, the executives of the campaign committee of the incumbent President? This is obviously in our minds because of the 1996 election, but that is in the statute now.

Judge BELL. I think that was added later. Senator Levin probably knows when that was added. I do not believe that was in the original statute.

Senator LIEBERMAN. I think that is correct.

Senator BAKER. I think that the regular process of monitoring the performance of public officials, and I suppose they fall in the category of public officials if not government officials, that monitoring their performance is a function that the Justice Department can do without any additional and supplemental statutory language. I would not favor including——

Judge BELL. The first thing you would know, we would have so many special counsel running around that we will not need a Department of Justice. We will have 15 to 20 departments going at the same time. This is a very bad policy.

I will tell you another thing that I would like to mention while we are on this subject. This statute has done untold harm to the Justice Department morale. These people over at the Justice Department are professional prosecutors, most of whom came there under the honors program. They have been there 25 or 30 years.

They think that this reflects on them, that they cannot be trusted to prosecute anyone. Therefore, it has been taken by the public, by the law, out of their hands and this was true from day one. The professionals in the department did not like this law. It is not really fair to these people, to have this thing outside the department.

Senator LIEBERMAN. Senator Baker.

Senator BAKER. Let me add to that. It has done damage in a lot of places other than just to the Justice Department, too. The Iran-Contra matter was being investigated by one of four independent counsels when I went to the White House as President Reagan's chief of staff.

It was also the time when the act was reauthorized and sent down for the President's consideration, as the Constitution requires. Without going into vast detail, I want to tell you that there was a great debate going on within the senior staff at the White House with the President on whether or not this was a good idea.

I will betray one confidence and say that President Reagan thought it was a terrible idea, this whole concept of independent counsel, but it was decided that it would not be wise for him to veto that bill considering that there were four independent counsels investigating one or the other aspects of his administration, and he signed it.

Now, I do not know whether he regretted it or not, but I have regretted it because I think that public relations politics distorted a fundamental intellectual judgment on whether that bill should have been signed or not. But hindsight is 20/20 and it is only told to you to emphasize the point Judge Bell makes, that the act has had unintended consequences a lot of places.

Senator LIEBERMAN. Thank you both. I do want to say that it struck me, in response to what you said about the impact on the Justice Department, that one of the sub-dramas we were witnessing over the last couple of years is the department began to investigate abuses in the 1996 campaign.

It was not just the judgment by the Attorney General as to whether to invoke the Independent Counsel Act and appoint an independent counsel to look at that campaign, but there was an expression of what might be called internal professional pride by the public integrity section that wanted to prove that they could do it.

Judge BELL. I think to have an Attorney General who lets people vote on things, let's the FBI give their opinion about what ought to be done, I think that is the worst policy in the world. If you are going to be the Attorney General, you have to be the boss, you have to be accountable, and you have to make the decisions. If you are not going to do that, then you do not need that job. We need to get somebody else in the job.

Senator LIEBERMAN. Hearing you say that, General Bell, reminds me how much things have changed around Washington. Thank you both very much.

Chairman THOMPSON. We have two Members that want to have brief opening statements. Senator Specter and Senator Edwards, briefly, if you would, please, and then we will go to Senator Collins for questions.

OPENING STATEMENT OF SENATOR SPECTER

Senator SPECTER. Thank you very much, Mr. Chairman. Just a couple of comments. I appreciate very much what Senator Baker and Judge Bell have had to say. When you talk about oversight, I am interested in what Judge Bell had said, strong congressional oversight from the perspective of somebody who is being overseen.

The attitude that I think most of us have who are doing the oversight is it has not done much good and that there has to be something of a greater structure. When you talk about the professionals, you have Charles LaBella who called for an independent counsel and you have the FBI director who calls for an independent counsel, and there is a real problem as to what is going on in the Justice Department, that they are taking votes.

Now you have the fury about an investigation of Starr and another independent counsel coming in to investigate Starr. The removal statute is explicit in calling for personal action of the Attorney General, only by the personal action of the Attorney General

and only for good cause, and you would think that the Attorney General might be involved personally and make a determination on these factual matters which we have heard and come to a conclusion.

I look at the matter to see what the experts have to say, but have an interest in some structure. We have had a lot of experience with the Independent Counsel Statute and most of it has been bad, but there are some specifics that I think we ought to undertake.

I think we ought to limit the subjects. We do not have to have the various secretaries called in for independent counsel. Probably the three you articulate, President, Vice President, and Attorney General is sufficient. It seems to me that if you have the President, who is suspected of that, nobody can serve two masters and you just have that tremendous potential for conflict.

Then the tenure has been expanded. Why not limit the independent counsel to the life of the grand jury and expanded it for cause shown? But 18 months has been established for an investigative period, which is a pretty good hallmark, and I think it ought to be full-time. If someone is not prepared to devote full-time to being independent counsel, they ought not to take the job.

You cannot get the job done in full-time, let alone in having another job. Then the expansion of jurisdiction has been ill-advised. You talk about oversight. We had the Attorney General in for Judiciary Committee oversight and we have done this on a couple of occasions and it is a nullity.

I asked the Attorney General why she expanded Starr's authority and she said the petition speaks for itself. Well, the petition, two half-pages, does not speak, it barely whispers, as to why Starr's jurisdiction was increased.

I said contemporaneously that it was a bad move, not in derogation of Starr, but because the public would have no confidence with the public perception of a vendetta, of Judge Starr being out to get the President. I am not saying it is true, but that certainly was the public view.

Then you have the concern as to whether the Attorney General will act, and she has special counsel for just about everybody except the President. If you take a look at the Alexis Herman, Secretary of Labor's application, it is shameful with the concession on the face of the application that there is no basis for doing so.

We have worked very hard on the question of some judicial review and I have prepared a mandamus action. You cannot really file a mandamus action for independent counsel in the context where you are having an impeachment proceeding. You just cannot do everything at the same time.

But the Attorney General has turned a deaf ear on overwhelming evidence which this Committee developed on campaign finance reform and the issues of Chinese contributions, etc.

When I was district attorney of Philadelphia, there was a statute which said, somebody could petition the court to replace the public prosecutor if there was a dereliction of duty, fails or refuses to prosecute, on abuse of discretion. Perhaps we might head there in a more simplistic way. But at least preliminarily, my thought is, we ought to have some structure here and that the conflict is a very deep and a very serious one.

I appreciate what Senator Baker says about public reaction and I think there is a lot to that, but I just have a question as to whether it is enough. I am going to listen to the independent counsel today and try to make an informed judgment. Thank you.

Chairman THOMPSON. Thank you very much. Senator Edwards, do you have any comment.

OPENING STATEMENT OF SENATOR EDWARDS

Senator EDWARDS. Just very briefly. Judge Bell, Senator Baker, it is a pleasure to be here. It is always wonderful to be in the presence of great lawyers who have spent a lot of their lives in public service.

General BELL. And who have no accent.

Senator EDWARDS. You are not claiming I have got an accent, are you?

Let me just say very briefly that the only thing that is clear to me is that this Independent Counsel Law has been a disaster and it is a mess and oftentimes, it seems to me, that when you try to fix a mess, you end up with a worse mess.

I am completely open-minded about precisely what ought to be done. I have listened with great interest to what the two of you have had to say and I will listen with great interest to the other panels. I come to that subject with a completely open mind.

I thank you all for being here and appreciate participating.

Chairman THOMPSON. Thank you very much. Senator Collins.

Senator COLLINS. Senator Baker, Judge Bell, you are obviously held in great esteem by all the Members of this Committee, and your assessment of the need for this law differs dramatically from mine, so it would be probably prudent on my part to not ask you any questions at all.

Nevertheless, I do want to express to you my concerns about why I think we need to totally overhaul this law, but why we still need a mechanism for an independent counsel. I want to suggest that the Independent Counsel Law, if it operates as we would like it to operate, can actually confer benefits on the high-ranking official who is being investigated. Let me give you two examples of that.

One is when the independent counsel clears the high-ranking official, the President, the Vice President, a cabinet member, of wrongdoing.

It seems to me that the public is much more likely to have confidence in that decision and to be ensured that it was not tainted by any political considerations if it is made by an independent counsel than if it were made by a Justice Department official or even a special counsel appointed by the Attorney General.

It seems to me that having that decision made by an independent counsel removes any cloud of suspicion over how the decision was made.

The second example of the benefit of the Independent Counsel Law, to me, is that it guards against the Department of Justice bending over backwards and prosecuting the high-ranking official in a case where normally a prosecution would not be brought in order to remove any public doubt about why the decision was made.

So that I would argue that in a close call, the independent counsel is much more likely to have the ability to clear an official or decide that the case is not worthy of prosecuting than if it is done within the Department of Justice where the pressure, because of public perception, might be to prosecute a case that otherwise would not be.

So I would like you to respond, each of you to respond to, how can we get those kinds of benefits without an Independent Counsel Law?

General BELL. I would say that if I was the President or a high official and somebody told me that this is going to be a big favor to you, we are going to appoint a special counsel, special prosecutor to investigate you, I would pay any price not to have that favor done for me.

I would rather be prosecuted by somebody at the Department of Justice that is a professional prosecutor.

Senator BAKER. I guess I think, Senator, that my initial remark addresses the issue somewhat; that is, I have been on every side of this issue since 1978, even before 1978, in the wake of Watergate, and I have had a variety of positions on what we ought to do, and as I examine them, I lay them aside one at a time.

The truth of the matter is, I do not know what you ought to do, but I think you ought to let this act expire, have a cooling off period, and then decide in a calm and deliberate way what would be appropriate to do. I think the times are so tense right now politically that almost anything we do for months to come is likely to be a mistake. So I think we ought to just cool it off for a while.

I do not say that nothing is required, although I must say the older I get, the more I become a constitutional purist. I think the Constitution apportioned and assigned responsibility pretty well, very well indeed, and that that coupled with oversight in the Congress, coupled with the elective process has served us mighty well over the years.

But I do not rule out the possibility. If I were sitting in your seat, I would not rule out the possibility of passing some law some time, but I would resist doing it right now.

Senator COLLINS. Thank you. Mr. Chairman, I guess the final comment that I would make is, I think as we struggle through this issue, that we do have to remember that the reason this bill was passed in the first place was to promote public confidence in the decisions that were being made.

We need to be fair to the targets of investigations. We need to make sure that we have a carefully crafted and balanced law, but we also need to remember that the ultimate goal is promoting public confidence. Thank you.

Chairman THOMPSON. Thank you very much. Senator Levin.

Senator LEVIN. Thank you, Mr. Chairman, and again, let me thank our witnesses.

First, Judge Bell, on the question of whether or not a public official—someone in his right mind—would request the appointment of an independent counsel, we have had a number of examples where actually that was requested by a public official in order to make sure that there would be public confidence in the outcome.

I remember, for instance, when Attorney General—or former Attorney General then, I guess, Ed Meese specifically requested that there be an independent counsel just so he was confident that he would be cleared, and that when he would be cleared or not prosecuted that then it would have much more public credibility than if there was an inside person selected.

So I think that Senator Collins' question does raise a very important point. I think your response is also true. You would have to probably wonder maybe, given recent activities at least, whether that person had "lost it" in making that kind of a request, but history has shown that there have been such requests for that particular purpose. I just want to add that to the record because I think it is an important point.

Judge BELL. I was not aware of it that General Meese made that request.

Senator BAKER. He did.

Senator LEVIN. Second, Senator Baker, your advice is always to be listened to very, very carefully, and your cooling-off-period suggestion basically is what we may end up doing either intentionally or unintentionally, but——

Senator BAKER. If I might say, Senator, I found that always to be welcome advice to tell the Senate to put something off.

Senator LEVIN. I remember when you were majority leader, you were trying to get us to move, but my question really is this. You are such a thoughtful person that we at some point would welcome your assessment of some specifics, and when that point comes, when you feel free to give us that assessment or when you think, assuming we have not acted by then, the cooling-off period has lasted long enough, it would be welcome, I know, by all of us that you give us specific reactions to specific suggestions, and that is true very much with you, General Bell, as well.

You, though, have not suggested a cooling-off period. So you may be willing to give us your reactions to specific proposals now rather than later, but let me start, then, with you.

One of the suggestions that I believe Senator Baker had made in earlier days was kind of bolstering the Public Integrity Section, and I want to make sure my memory is correct on this. If it is not, Senator Baker, please correct me.

One way to do that, if we decide not to reauthorize this outside person, but to somehow or other strengthen the inside part of the Justice Department that might have jurisdiction over these kind of cases, one suggestion which had been made—and I think I am expanding a bit on it—would be that the Public Integrity Section be subject to Senate confirmation, have a fixed term perhaps, and be subject to removal for cause only. And perhaps a fourth part of that would be that that person still be under the control of the Attorney General and in the Attorney General's office, but head of that section, would file a report not just to his or her boss, the Attorney General, but would also file a report should he or she choose with the Congress to give some kind of an outside oversight aspect to that.

I am wondering whether or not you would feel free to comment on that, and then I will ask you, Senator Baker, if you would want to comment on that, despite your own advice that we cool off.

So, first, General Bell?

Judge BELL. I am not certain I favor that, and I will tell you why. Attorney General Levi set up something called the Office of Professional Responsibility that governed the lawyers' conduct. It worked very well. It was very independent. As a matter of fact, I was investigated twice myself by that office because somebody accused me of something. I just said, "Well, investigate me. I would be glad to be investigated."

That now is in the deputy's office, assigned to the deputy's office. So you have got the deputy in charge of the Office of Professional Responsibility. That very same thing could happen with the Public Integrity Section. I am very familiar with the Public Integrity Section department, and it works well now. They are in the criminal division. They do a good job, but I am not saying just setting up another bureau like that is a good idea. That is what special counsel are. They have got bureaus. They have got an idea how they want people. They do not use department people, except if they want to.

So I am not stating I am in favor of that.

Senator LEVIN. All right. Senator Baker.

Senator BAKER. I thought it was a good idea at the time, but I am not so sure now. I spoke earlier about diluting the authority of the Attorney General or even displacing the authority of the Attorney General or the President. I worry more about that now than I did at that time, but I do think it is one template that might be applied to the problem.

I would add to that, I have often thought that perhaps the head of that section, confirmable by the Senate, should have a term of years that was not coterminous of that with the President, but all of those things raise a fundamental concern in my mind about whether or not it's an unwarranted intrusion into the constitutional chain of command. I will think some more about that.

Answering your first question, it is more than mere lip service to say that I want to hear this debate. I want to see what comes from Congress and from commentators and reporters and columnists about this issue because I find over the years that, as time goes by, I benefit from those things. I may disagree with most of them, but I take them in and I sometimes, to my own surprise, end up with a firmly fixed view of something.

I am hoping that will happen here, but I must say in candor, as I have once or twice before, if I were sitting in your place, Senator, I could not honestly say that I could wholeheartedly recommend a statute to take the place of this one against the proposal for a cooling-off period.

Judge BELL. I would like to give you a bit of history on that idea of the Public Integrity Section.

President Carter once asked me for a legal opinion as to making the Department of Justice an independent agency, and I got the Office of Legal Counsel to study the question and to give the answer, a formal opinion—I suppose it is over at the Department now—the answer was that you could not do that because the only power to execute the laws is given to the President.

If we made the Department of Justice independent, we would have to get another Department of Justice. We would have to have

some way for the President to faithfully execute the laws. It is very difficult to tinker with the system. Somehow or another, we just have to make it work as it is.

Senator LEVIN. One of the problems with going back to the appointment of special counsel is what happened to Judge Fiske. He was appointed by the Attorney General to look into the President Clinton matter.

Then, when we reauthorized the Independent Counsel Law, we specifically provided that the court could continue him or any existing special counsel as an independent counsel in the event there was a request to the court to appoint an independent counsel. Yet, that court, even though Judge Fiske had done a lot of work already and I think had completed his investigation of the Vince Foster matter, for instance—that court said, if my recollection is correct, that the fact that he was appointed by the Attorney General tainted that appointment and therefore would not continue him as independent counsel, but instead would appoint Kenneth Starr.

I think we have to remember that we now have a court saying that the appointment of a special counsel by the Attorney General was tainted because it was the Attorney General which made the appointment and would we not get back into that same situation if we go back to the prior situation.

Now, that is not so much a question, although I would welcome a comment from either of you.

Senator BAKER. Well, it would if you still have the three-judge supervisory panel, but if the act expires, presumably that would expire, too.

Senator LEVIN. No. I mean their thought, though, the thought that somehow or other it was tainted by the appointment, would continue in other places even if there were no three-judge panel.

My point is that even a panel that you would think would be much more cautious and more thoughtful before reaching that kind of a conclusion reached a conclusion that the mere appointment of a special counsel by the Attorney General somehow or other tainted the independence of that person, and therefore, they were going to go with somebody else.

I just want to throw that back into the mix.

Judge BELL. Maybe the judges thought that. They must have had that idea. I do not know.

Senator LEVIN. I am sure they did.

Judge BELL. One of the worst things about this law—there are a lot of things wrong with it—is the fact that three judges can sit over there in the District of Columbia and pick the special counsel, anybody they want, they do not have to be confirmed by the Senate. At one time, Lloyd Cutler had the idea, that we would have a law that would create a standing panel of prosecutors and the judges had to select from this standing panel, each of whom had been confirmed by the Senate. This is another thing where you have power that is unaccounted for. It is not good.

Senator LEVIN. Senator Baker, you made a reference that I would like you to expand upon having to do with Section 595 of the Independent Counsel Law, which is the provision that relates to the impeachment question. It says that the independent counsel shall advise the House of any substantial, credible information

which such independent counsel receives in carrying out the independent counsel's responsibilities, if such information may constitute grounds for an impeachment.

You indicated that this fundamentally changed—I believe this is your reference—the impeachment power of the United States, and that is something I was very much troubled by in this last impeachment. There was such a huge role for the independent counsel which was taken by the House as the investigatory material for its impeachment.

Would you just expand as to what you meant by that?

Senator BAKER. Once again, I am not sure how I would handle that because, certainly, simple logic suggests that if a special counsel or anybody else turns up with a serious allegation against a President that might be an impeachable offense, they owe a responsibility to pass it on to the House of Representatives, presumably to the Senate as well in due course.

But it seems to me that the very fact that the House did not have hearings, but rather depended on the record that the special counsel submitted to them, changed the way the Constitution originally had described the impeachment process.

I guess I visualized in my mind's eye that if the special counsel found serious charges or had serious charges against the President, he would convey that to the House, but it would be the responsibility of the House to investigate those things and to decide whether or not to go forward with the impeachment provisions under Article I of the Constitution.

Judge BELL. Was there any other statute ever born like this? I have never heard of any statute that requires prosecutors to give the House evidence of impeachable offense.

Senator LEVIN. I know of none.

Judge BELL. I think this is only one.

Senator LEVIN. Thank you, Mr. Chairman.

Chairman THOMPSON. Thank you very much. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

There are a number of States which have provisions that if the prosecutor fails to perform his duty, he uses discretion on application to the court. The court may appoint special counsel to handle the prosecutions.

One of the problems which we have had with respect to campaign finance reform and the investigation of the Chinese contributions, made by this Committee, involved the refusal of the Attorney General to appoint independent counsel to those very serious charges to the President at a time when independent counsel was being appointed—Secretary of Interior Babbitt, Secretary of Labor, etc.

I had produced an amendment in July, 1997 which sought to provide for some appellate review and to limit the standing to a majority of the Judiciary Committee of either house or a majority of the minority so that the party out of power would be represented, and this is similar to a provision in the existing law which gives those individuals in the Judiciary Committee the right to request in writing that the Attorney General apply for the appointment of independent counsel, but the Attorney General may then refuse if the Attorney General chooses.

My question to each of you is: What would you think of imposing that limited kind of statutory approach to have judicial review if you have people of that standing and the Judiciary committees come forward and make an application? Senator Baker.

Senator BAKER. Well, Senator Specter, I must tell you, once again, I have not given serious thought to your proposal. I guess I can visualize a situation where that might be abused, but let me think about it. I would rather not give you an answer at this time.

I will tell one more story, and I promise I will not tell any more.

Senator SPECTER. Your stories certainly impede our questions, Senator Baker.

Senator BAKER. When I argued my first case before a jury, I was a very young man. My dad was there. He was a lawyer, too, and when I sat down, I said, "How did I do?" He said, "You did OK, but you ought to guard against speaking more clearly than you think." [Laughter.]

If I tell you one bit about what I think about your amendment, it will be more than I know. So I think I will wait.

Senator SPECTER. Senator Baker, to repeat a Senator Baker story before you came to the Senate as a rich young lawyer and left 18 years later, none of the three?

Senator BAKER. That is right. You remember my closing remark when I came here. I was a wealthy young lawyer, and I have recovered from all three conditions.

Senator SPECTER. Well, I am glad to hear that.

Judge Bell, what about some judicial supervision?

Judge BELL. That would be like making the Attorney General subject to the All Writs Act, Mandamus.

Senator SPECTER. Correct.

Judge BELL. And I am not certain that—I mean I think the Attorney General can ignore the statute and effectively about the statute, and there is nothing you can do about it now.

Senator SPECTER. I think the Attorney General has done that, and that is why there was such extensive consideration for a Mandamus action.

Judge BELL. I have a serious doubt that the courts would uphold this statute as being constitutional on account of Separation of Powers. I have never heard of being able to Mandamus a prosecutor, for example, in the Federal system, but I do not know. I have not looked into it. I see where you are coming from.

Senator SPECTER. There is some authority to that effect. There had been three cases that were brought in the District Court to Mandamus, the Attorney General-appointed independent counsel, and were granted. All three were overturned on appeal on lack of standing. That is why my provision very carefully crafts standing in a very limited way to Senators on the Committee and a majority of either party to do that, but I think the *Morrison* case does raise the issue which you have addressed. I think that is true, but my instinct is that we could craft the statute around that if we decided that as a matter of public policy, we thought it was a wise thing to do.

Judge BELL. Yes.

Senator SPECTER. Senator Baker is certainly correct on the frustration which has set in around here when we have worked on

campaign finance reform and have produced such powerful cases. You have the FBI director, a very distinguished lawyer and former Federal judge, and Labella, and you have the Attorney General just refusing to act on that. Essentially, we are looking for a referee.

Judge BELL. When I was serving on the Fifth Circuit Court of Appeals, we had a district judge in Mississippi who ordered the U.S. Attorney to indict someone, and the U.S. Attorney refused, took it over to the Justice Department. The Attorney General just refused, said do not do it.

I cannot remember how we got the case, whether it was on a contempt citation or what, but we held in that case that the judge did not have the power to tell the prosecutor to indict someone. There is a line there somewhere. I would really have to do a lot of research to answer your question.

Senator SPECTER. Well, on the case you cite—and I have seen judges try the same thing—where it is sua sponte, or they do it as opposed to someone coming to the court in an organized sustained way with evidence, if the judge tries to do it on his own, which may have been your case—of course, I do not know the specifics—I think there is a limitation on judicial power.

Judge BELL. It was a Federal judge ordering the Federal prosecutor to indict someone, and his contention was he committed perjury sitting in the witness box.

Senator SPECTER. Well, I have seen that happen. I have seen that as district attorney, and I do not think the judge can do that, being in effect an indicting grand jury.

I think it is different when the judge is asked in his judicial capacity by a third party on presentation of evidence to appoint the independent counsel.

Judge Bell, let me pick up on a comment that you made on calling on the telephone, and I think the telephone is a great way to do it. Little independent investigations are a great way to do it. I am very concerned about what is happening now in the morass that has come about on the investigation of Judge Starr and now the three-judge special panel is in it.

When I was district attorney of Philadelphia, which is obviously a much different situation, a much lesser situation, but I had my top deputies accused of impropriety, and I felt it incumbent upon me to make that my first order of business and to call in the people who had knowledge of the impropriety and then to call the deputy in and confront the issue and make a very prompt determination. It was my job as district attorney. I was the elected official.

Judge BELL. All right.

Senator SPECTER. And when I look at the statute for removal and see the trouble the Congress went to, to make it the "personal action" of the Attorney General, I really wonder why there are so many committees and so many votes over there, and the stories come out. The staff is equally divided as to whether Harold Ickes, the deputy chief of staff, ought to be indicted or not, and then you have the stage all set.

Would you be willing to make a comment as to how you would handle it? Would you do it on the phone, if you had——

Judge BELL. Well, I would make the decision myself. I would not take a vote of my people. That is the first step.

Senator SPECTER. You might do a little bit of independent investigating?

Judge BELL. Yes, and I would not require the FBI to tell me what I ought to do. I mean, I would do it—the Attorney General needs to do it, make her own mind up about it, and if she does, I think she has the discretion to say yes or no because there is no way to appeal the ruling, even though you might think she is wrong. I do not think it can be appealed now.

Senator SPECTER. Well, that would depend on whether or not we can structure a Constitution——

Judge BELL. Right.

Senator SPECTER [continuing]. Provision which would give the—limit the right of appeal on a special group which had special standing.

Judge BELL. This is something that has been going on for years at the Department of Justice.

One of the things that the Senate used to do when I was Attorney General is try to get underlying memoranda to show that somebody working under me disagrees with what I did, with the conclusion I reached, and I never one time gave an underlying memoranda, took the position that the Senate was not entitled to them. It just creates chaos in trying to govern the run of the Department.

Senator SPECTER. Did you allow your subordinates to publicly disagree with you?

Judge BELL. I did not have anybody—if somebody wanted to disagree with me, I would put it in a press release, give names. I mean, I had no problems with people disagreeing with me, but somebody has to be in charge, and you cannot investigate me by getting all the people under me to say, "Well, I would not have made that decision." I mean, that is a poor way to run a government, in my judgment, and I never would produce such a document, and I would not now if I was Attorney General. Again, I would not produce that because I do not think that is the right way to do it now.

But since Ms. Reno has put in the system, the way she takes a vote apparently from different people and what they think about how to do things, I guess you are entitled to get all of that information.

Senator SPECTER. Well, it is——

Judge BELL. I am not being critical. She appointed Labella. She asked the head of the FBI to give his opinion. So you have got all of these opinions out there in public, but, ordinarily, we charge the Attorney General with running the Department of Justice, and if it is a decision that has to be made by the Attorney General, that is it. He makes it, or she makes it.

Senator SPECTER. Well, that would be something beyond, I think, congressional reach, except where you have the Department in such disarray. The FBI Director speaks out really out of a very profound sense of disagreement, and you have Labella speaking out in a very profound sense of disagreement. Then the fat is in the fire, and we do have oversight responsibilities, but if you examine the transcripts for Senator Thompson or I or others who questioned the Attorney General at Judiciary oversight hearings, what is the basis

for expanding the jurisdiction of Ken Starr on the Lewinsky matter, the petition——

Judge BELL. Well, you have oversight jurisdiction.

Senator SPECTER. Let me finish. The speaker speaks for itself, Senator, but the petition does not speak at all.

Judge BELL. Yes. I think you have oversight to look into that. You have a reason to look into it.

I had a head of the anti-trust division once say that the Department—he and his underlings decided I had made a bad ruling when I told him to do something on an anti-trust investigation, and they said they would like it to be publicly known.

So I said we will issue a press release saying—and you give me the rest of the names—that you all disagree with the Attorney General, but he had already made the ruling. So I have said let me have the names. Well, in a little while, he never brought the names. So I called him and asked him to please send the names up, but he never gave them to me. That ended that.

Senator SPECTER. Thank you very much, Judge Bell, Senator Baker. Thank you, Mr. Chairman.

Chairman THOMPSON. Thank you very much. Senator Durbin.

Senator DURBIN. Senator Baker and Judge Bell, thank you for being here, and I apologize for stepping out a few moments. You made a valuable contribution. It is certainly refreshing to hear your point of view with some experience under your belt.

I would like to ask you just one question in deference to the Chairman's concern in the next panel, and it relates to a problem that I think is before us. To put it in a nutshell, when I worked in the Illinois General Assembly, we had what we called the perpetual motion bill where we increased the size and weight of cement mixers, concrete trucks, to a point where they would tear up the highways. So we figured that they would be tearing up the highways as they dumped the cement and concrete behind them and to patch them, perpetual motion, just keep it going.

This seems to be a perpetual-motion law that we have here. I noticed—and I think she may be with us today—Ms. Melanie Dorsey was quoted a few months ago in *The Washington Post* about her efforts to close down an office of the independent counsel and how it became almost impossible because they had to have an audit every 6 months by the General Accounting Office. It was required by law, and so they had to have an employee. So they kept the employee on the premises for the General Accounting Office audit, and then, of course, I guess they had to audit the presence of that employee. So it never ends. Some of these have gone on for 9 years and more.

My question to you is very simple. If we accept your premise, this has to come to an end, how do we turn the lights out on all of the existing independent counsels and do it in a fair way? What do you think might be a reasonable approach to do that?

Judge BELL. The statute has got a provision in it that I am very familiar with, because I almost used it in the Iran-Contra investigation representing President Bush, that you can petition the Department of Justice or the court to transfer the investigation back to the Department of Justice.

I think it probably contemplated loose ends, but to finish it. Maybe there is no reason to have a special counsel for some of the cases. So that would be the way I would go, to just use that statute.

Senator DURBIN. Send it back to the Department.

Judge BELL. Yes.

Senator BAKER. I agree with that. I think that it is a real problem, but I think that there is already a remedy, and I think either to have the Attorney General take care of it or to have a petition that it be closed down.

Senator DURBIN. Does that have to go back through that three-judge panel to happen, though?

Judge BELL. It can go to the Attorney General first, and if she does not want to do it, then you can send it to the three-judge panel. Either one has the power.

Senator DURBIN. Thank you very much for your response, and thanks for being here. Thanks, Mr. Chairman.

Chairman THOMPSON. Thank you very much. Senator Edwards.

Senator EDWARDS. Thank you, Chairman. I will make this very brief. I promised I would be brief.

It seems to me that we talked about lots of options for dealing with this issue, the independent counsel being one, the existing law, the power of the Attorney General to appoint special counsel, bolstering the Public Integrity Section.

The thing I have not heard discussed, at least not much—I mean I came in late—is can you all imagine a way that the U.S. Attorney within the existing structure of the Justice Department—that the U.S. Attorney, for example, for the District of Columbia, that we could set up sufficient safeguards that the public would feel comfortable with the notion that the U.S. Attorney prosecuted these kinds of cases within the existing system?

Judge BELL. I would not feel comfortable with it. U.S. Attorneys are usually the most political people you can find, anyway. They are all appointed by the Senators. [Laughter.]

The Constitution fooled the people into thinking they are appointed by the President.

Senator EDWARDS. Right.

Judge BELL. I went to see a U.S. Attorney one time in the West, and he did not have a picture of President Carter in his office, but he had a picture of his Senator. I said, "Well, why don't you have a picture of the President in here?" He said: He didn't appoint me; Senator So-and-So appointed me.

Chairman THOMPSON. Senator Edwards has not been here long enough to make any appointments yet. I think that is the point. [Laughter.]

Judge BELL. He has not made any appointments yet.

Chairman THOMPSON. That is correct.

Senator BAKER. That is not constitutionally correct, but it is much admired in this building.

Senator EDWARDS. Senator Baker, do you have an opinion about that? Do you agree with that?

Senator BAKER. Yes, I do agree with that. I think U.S. Attorneys by and large are very professional, very qualified, but I think it is above their pay grade. I really do think it requires special atten-

tion. I think the Attorney General should have the responsibility, and if he chooses a U.S. Attorney someplace to do it, that is fine with me, but I do not think U.S. Attorneys on their own initiatives should have that power.

Senator EDWARDS. And neither of you can imagine some sort of system, procedure, or mechanism by which, for example, the U.S. Attorney for the District of Columbia could be appointed in a less political way that would solve this kind of problem?

Judge BELL. I do not want to say that. I do not think we ought to tinker around with things. We have an Attorney General. Just hold the Attorney General responsible, and if she has got a conflict of interest or he has, step aside, appoint somebody in your place.

Senator BAKER. I agree with that. I want to think some more about Senator Specter's dilemma, that is, what do you do when the Attorney General will not act and when there are significant reasons to think that there is major controversies in the Department. I want to think about that part, but otherwise, I think you have just got to depend on the Attorney General. You have got to just depend on the Attorney General doing what the Attorney General is supposed to do. That is the delegate of the Presidential authority.

Judge BELL. I think I do not know the answer to that question either. It is certainly worth thinking about.

Ordinarily, if the Attorney General would not act, the President would get another Attorney General because he would feel responsible. He is elected by the people.

Chairman THOMPSON. But what if the proposed action, though, had to do with the President?

Judge BELL. I know. That is a problem, and so what Senator Specter is saying is there ought to be some appellate authority you could go to, and it would be——

Chairman THOMPSON. A Mandamus-type thing.

Judge BELL. It would be a Mandamus-type thing. It would have to be a clear case. It could not be just an appeal. It would have to be a Mandamus.

Senator EDWARDS. If I could just follow up, my concern is it seems to me the more complex these solutions become, the more problems they create.

Judge BELL. Yes.

Senator EDWARDS. Senator Baker referred to the simplicity of the Constitution. It seems to me that we ought to be looking for a very simple—if it is findable—a very simple solution to this problem as opposed to some complicated structure.

Judge BELL. That is what we came up with in this recommendation at the Miller Center, and we thought was a simple thing. The Attorney General is subject to being recused, just like a Federal judge, but has a duty to appoint somebody who is not—by whose qualifications there is no doubt.

Senator EDWARDS. Yes, sir. Thank you both very much.

Chairman THOMPSON. Thank you very much.

I am reminded on the question of the U.S. Attorneys and whether or not they are political, my recollection is one of the first things the Attorney General did this administration was get rid of all the old U.S. Attorneys and appointing their own people.

Judge BELL. Right.

Chairman THOMPSON. So I think that kind of speaks for itself.

Thank you very much, gentlemen. I really appreciate your coming. I know it has been a long day for you. Your contribution has been invaluable. We may call on you again before it is over with.

We want to thank our second panel. Would you come forth, please? We will now proceed with Arthur Christy, the first special prosecutor appointed under the 1978 Ethics and Government Act, former Independent Counsel Joe diGenova who investigated the Clinton passport file matter, and Curtis von Kann who investigated Eli Segal, the former head of Americorps.

Gentlemen, thank you very much for your patience. We got started a little late this morning. We had a vote to start with, and since we are going to have rather extensive hearings over an extended period of time and this is an important issue, I thought it would be good if we could have statements by Senators. It probably delayed you substantially, but we really appreciate your contribution.

Mr. diGenova, do you have a statement that you would like to make?

TESTIMONY OF JOSEPH E. diGENOVA, INDEPENDENT COUNSEL, CLINTON PASSPORT FILE INVESTIGATION

Mr. DIGENOVA. Very briefly, Mr. Chairman. First of all, thank you for the invitation to be here.

The great Danish constitutional scholar, Victor Borge, said that his uncle had accomplished a great thing in his life when he discovered the cure for which there was no disease. He said, unfortunately, his uncle caught the cure and died, and I think that is where we are, Mr. Chairman, with this statute.

The body politic has caught the cure and has died. This is a statute which, in my opinion, cannot be reformed in any meaningful way. My position is a very simple one, that you should end it, not mend it.

The reason I take that position, Mr. Chairman, is stated in great length in the statement which I put before the Committee, but I think it is important to revisit the notion that what Congress did for a very good reason at the time of Watergate was to try to fashion some perfect model for insulating law enforcement from political conflicts of interest. It was a noble effort, and it was an effort that was well worth trying, but notwithstanding the effort and revisions, successively three times, Congress has never been able to make something good out of something that is fundamentally bad.

The reason people were having difficulty, for example, responding to Senator Specter's question about whether or not it would be a good idea to cast a statute, giving the U.S. Senate or the House the right to go to court, the question of the decision of an Attorney General not to appoint an independent counsel, the reason that is a notion that gives people pause is exactly the reason this statute is a bad idea.

We have an Executive, a Legislative, and a Judicial Branch under our form of government. They are given enumerated powers, except for those that are reserved to the States, and those powers are delineated purposely so that we can have a balance of power.

It is a great system, but it is impact. We all know that. To think that we can find a way to perfectly deal with political crimes or accusations of political crimes is a fool's errant. It cannot be done.

The system that we have in existence for investigating crime and prosecuting it is a good one. It has held us in good stead over many years, when we have had problems at the Executive Branch. Long before the existence of this statute, Attorneys General and Presidents were forced to appoint outside counsel to investigate crimes when there were obvious political conflicts of interest because the public wheel required it. Congress and journalists demanded it, and there was a reaction to the elected officials in the Presidency and in the Executive Branch that they had to respond. That is a good system. It is not a bad system.

I can understand Senator Specter's frustration, and I wish he were here because I think his point is understandable, but the minute the U.S. Congress starts filling petitions in a Federal court to overturn the decision of the chief law enforcement of this country acting on behalf of the President, not to begin an investigation, we will do exactly what this statute had done by its very existence.

What this statue has done, for example, it has a provision in there already that allows a majority of the minority of either House or Senate Judiciary committees to send a letter to the Attorney General which requires the Attorney General to then begin a decision-making process about whether or not to begin an investigation. That, in my opinion, is an abomination. It was the beginning of the politicization of the criminal justice investigating and charging process.

You cannot permit the Congress outside of its traditional oversight function to play a role in law enforcement. It does not have that role. It should not have that role. If it does not like what an Attorney General is doing, it ought to cut off her money. If it does not like what an Attorney General is doing, it ought to legislate out of existence her authority to do certain things, but the Congress should not become involved in trying to be the Executive Branch.

I remember listening to John Dingell talk about how the oversight committees of Congress were the great grand jury of the American people. Now, whether or not you agreed or disagreed with Congressman Dingell's abuse or use of power, depending upon your viewpoint, the fact is that Congress' oversight function is a powerful weapon.

It is true, as Senator Specter noted and as you have noted, Mr. Chairman, it may very well be that the congressional branch does not respond; that sometimes you will have an arrogant executive which in terms of the execution, the faithful execution of its duties maybe wanting. There are many people who believe that that is what has existed in the recent past. That is for others to decide, but I think your obviously fundamental caution about deciding how to fix something that is bad is not to make it worse.

Let me give you another example, Mr. Chairman. The notion somehow that you can fix this statute by putting a time limitation on an investigation or a limitation on the amount of resources that would be permitted to be used in an investigation, you would create a Potemkin prosecutor. No respectable prosecutor or lawyer would ever take an assignment to conduct a real investigation if he or she

were told, "You have to do this in a limited period of time, with this amount of money," because that invites automatically dilatory tactics, delay tactics.

This Committee has had experience with that. It was given a time table within which to conduct its investigation of campaign abuses, and that limitation proved to be a boon to the opponents of the investigation. The same thing would happen in a criminal investigation. That is why under Federal law, there is no limit on an investigation other than the statute of limitations which requires the bringing of a charge against someone within a specified time from the period the alleged defense was committed.

I underscore that if the Committee were to seriously consider putting time and resource constraints on a prosecutor, then I suggest that people simply appoint a cartoon because that is what you would end up with. No responsible lawyer would ever undertake such an investigation if their authority was limited and the time frame was limited.

The Committee already by law requires the GAO to audit every dime that an independent counsel spends. My expenses for my investigation were just finally audited last year, and I left in 1995. Congress knows how every dime is spent. It may not know about it within the 30 days within which the money is spent, but it certainly has authority to find out.

The suggestions made that the independent counsel should be appointed by somebody else other than the three judges, there is no perfect way to appoint somebody to one of these jobs. It is probably true that a group of judges sitting around trying to decide who should be a prosecutor is a pretty bad idea. I would agree with that, but the U.S. Supreme Court has said it is constitutional.

I might say that even though the statute is unconstitutional, I think its existence is extremely unwise, and I think clearly my position is it should be allowed to lapse. I think Senator Baker's notion that the Committee and the Congress should take a cooling-off period to think about some options is a pretty good idea.

I would underscore also, Mr. Chairman, what I think others have said. The statute has led to something that is very, very dangerous. First of all, I think the trivialization of the investigation of crime by putting things into it which would ordinarily not be investigated, the triggering mechanism for the use of the statute is fundamentally unfair to high-level government officials. In addition, it has led to an over-criminalization of our everyday life.

Congress, just as a side note, has enacted many, many criminal laws over the last few years and has given U.S. Attorneys and Justice Department officials vast authority which they never had before. That really is what is at the core of the problem surrounding the Independent Counsel Statute. Once you take all of that vast power and give it to a prosecutor to investigate one person under the targeting theory developed in the 1960's, you have a prescription for dangerous exercise of power, even if that power is within the limits of the law. It is a very dangerous thing.

I must say, Mr. Chairman, that I noted recently that the American Bar Association, after 25 years of supporting the statute, had decided that it had an epiphany, and that for some reason, the statute in their eyes had developed structural informities.

I think about the only thing the ABA needs now is a pact, and then they will have brought themselves into the true meaning of what they are doing. This was not a policy decision. This was a political decision by the ABA.

In fact, when I heard that they had decided that they were against the statute, I began to reexamine my position to determine whether or not I was right thinking at that point.

I think what is safe to say, Mr. Chairman, is that some very fine people have been appointed under this statute. This is not about who is appointed. It is about the law itself. This is a dangerous digression from the separation of powers, from the way we hold prosecutors accountable, and from the way we historically have investigated crimes, whether they are political or otherwise.

We have made it very, very difficult, it seems to me, for anybody to perform these functions without being held up to an intense microscope of the conduct of their duties. When we require that a report be filed at the end of an independent counsel's investigation if they decide not to charge anybody, look at what we have done.

The purpose of the statute is to appoint someone to investigate the crime who has nothing to do with the Department of Justice. The statute says no one in the Department of Justice can investigate this crime. Therefore, we will pick an independent person, and that person, we say is fine because they are not part of the Department.

So what do we do? We say we do not trust that person. We want a written report when they are done to see exactly why it is that they did not charge somebody. That is a very, very serious mistake.

Assuming, for the sake of argument, that the statute would continue to exist, that report requirement should be eliminated. A statement by an independently appointed prosecutor that a charge either should not be brought because there is no evidence of a crime or that even though there may be evidence it is not worthy of prosecution should be sufficient for the body politic to feel comfortable that an independent job has been done.

I think, Mr. Chairman, also, just as a note, there is nothing wrong with saying that political accountability through the President and the Attorney General is a bad thing. It is a good thing. Holding people accountable for the power that they wield is important. I think that once the process is allowed to run its course and you use the regulatory authority that the Attorney General has under the statute, that will be sufficient as it was in Watergate, as it was in Teapot Dome, as it was at the beginning of Whitewater, to see that thorough investigations are conducted by people who have honesty and integrity.

I will stop at that point, Mr. Chairman.

[The prepared statement of Mr. diGenova follows:]

THE FOLLOWING ARTICLE FROM THE GEORGETOWN LAW REVIEW WILL SERVE AS MR. DIGENOVA'S PREPARED STATEMENT

THE INDEPENDENT COUNSEL ACT: A GOOD TIME TO END A BAD IDEA

*By Joseph E. diGenova**

**Mr. diGenova served as Independent Counsel from 1992 to 1995 investigating the Bush Administration State Department's search of President Clinton's passport file*

while he was still a presidential candidate. Mr. diGenova served from 1983 to 1988 as United States Attorney for the District of Columbia. He currently practices at the law firm of diGenova and Toensing in Washington, D.C.

When Dr. Samuel Johnson said "Patriotism is the last refuge of a scoundrel,"[1] he apparently had not heard of reform. Reform, *in vacuuo,* is a wonderful idea, but reform in application can sometimes be awful for the people who are affected by it. The changes effected by the adoption of the independent counsel statute provide an example of the awful, if unintended, consequences of failing to understand the ramifications of reform.

The independent counsel statute was born out of a legitimate concern following the Watergate affair. that the Justice Department might not be able to investigate serious crimes involving the President of United States, the Vice President, or the Attorney General, as well as other high-level officials, due to inherent conflicts of interest. In a paroxysm of reaction, President Carter proposed the Ethics in Government Act (the "independent counsel statute"), one of the purposes of which was to remove the "appearance of impropriety" when the Department of Justice investigates high officials in the executive branch.[2] To accomplish this purpose, the independent counsel statute included a provision establishing an Office of the Special Prosecutor, with various mechanisms through which a prosecutor is appointed and his jurisdiction is established.

At the time, I was one of those who believed that this provision was pure folly. There were many and varied reasons: it was bad public policy; it contorted the constitutional structure and was therefore unconstitutional; and it would ultimately lead to grievous abuses of the prosecution function because of the over-politicized nature in which these investigations often begin. The subsequent experience under the independent counsel provisions has proved these criticisms to be essentially correct.

In 1988, the Supreme Court upheld the constitutionality of the independent counsel provisions of the Ethics in Government Act in *Morrison v. Olson.*[3] Justice Antonin Scalia dissented[4] from the majority in what became the siren song of Republicans who did not like the application of the statute back then, and has now become the siren song of Democrats who do not like the application of the statute now. Everything that he predicted in that dissent has come true.

Justice Scalia laid out several grave scenarios that the statute has created: "[B]y the application of this statute in the present case, Congress has effectively compelled a criminal investigation of a high-level appointee of the President in connection with his actions arising out of a bitter power dispute between the President and the Legislative Branch."[5] Justice Scalia was concerned that as a result of the independent counsel statute's limitations on the discretion of the Attorney General to appoint a prosecutor, Congress would be in a position to effectively "compel" a criminal investigation any time "the Attorney General cannot affirm, as Congress demands, that there are *no reasonable grounds to believe* that further investigation is warranted."[6]

Justice Scalia was not only concerned with the limited discretion that the statute left the Attorney General, he was also troubled by the fact that certain committees in the House and the Senate had the right to initiate an investigation by merely sending a letter to the Attorney General. Justice Scalia seriously doubted whether any Attorney General would have the political fortitude to withstand the scrutiny after failing to recommend an independent counsel appointment: "Merely the political consequences (to [the Attorney General] and the President) of seeming to break the law by refusing to (appoint an independent counsel] would have been substantial."[7] As a result, in Justice Scalia's mind, the Attorney General is caught in a Catch–22. If she fails to recommend an independent counsel appointment, she provides political fodder to her adversaries who will contend that her failure to do so is a cover-up; she will be vilified by opponents in Congress and will become politically damaged goods. If, on the other hand, she succumbs to the political pressure

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[1] John Bartlett, Familiar Quotations 316 (Justin Kaplan ed., 1992) (quoting from JAMES BOSWELL, LIFE OF JOHNSON, at Apr. 7. 1775 (G.B. Hill ed. & L.F. Powell, rev. ed. 1934) (1791)).

[2] *See, e.g.,* S. Rep. No. 95–170, at 6 (1978), reprinted in 1978 U.S.C.C.A.N. 4216, 4222.

[3] 487 U.S. 654 (1988).

[4] *Id.* at 697 (Scalia, J., dissenting).

[5] *Id.* at 703 (Scalia, J., dissenting).

[6] *Id.*

[7] *Id.* at 702 (Scalia, J., dissenting).

to recommend the independent counsel appointment, she gives credence to the accusations of the administration's enemies, no matter how unjustified.

The loss of an effective check on the powers of the independent counsel also worried Justice Scalia. Justice Scalia discussed this shortcoming in the context of separation of powers,[8] but it is equally applicable when discussing the independent counsel statute as a matter of effective policy. Justice Scalia was troubled by the fact that because the independent counsel was not under the authority of the Attorney General or subject to other control by the President, the independent counsel had prosecutorial discretion that is unchecked by any part of our system of checks and balances: "[T]he balancing of various legal, practical, and political considerations, none of which is absolute, is the very essence of prosecutorial discretion. To take this away is to remove the core of the prosecutorial function, and not merely 'some' Presidential control."[9] Prosecutorial discretion, in Justice Scalia's analysis, involves a "balancing" of executive interests: whether or not, in the interests of justice, particular acts are worthy of devoting resources and time to prosecute; whether or not a prosecution is worth the disclosure of national security secrets;[10] and whether or not prosecution is worth damaging sensitive international interests.[11] Under the independent counsel statute the balancing is removed from the control of the executive, and prosecutions that might not be in the best interests of the republic are without any political check.

This unfettered discretion also ignores (in fact denies) the powerful checks on executive powers already present under our Constitution: the checks and balances of a Congress that will impeach executives who fail to enforce the law and the political check of the people who "will replace those in the political branches . . . who are guilty of abuse."[12] What a dangerous creature we have now loosed upon our system of checks and balances: an independent counsel, removable only for cause, who in a real sense does not answer to Congress, the executive, or the judiciary, and, worst of all, is in no way accountable to the people.

Such, scenarios that Justice Scalia identified are cause for alarm. The danger is that Congress, a body that is inherently partisan in nature, has granted itself a tool that it can use for partisan purposes against its political enemies. One need not think hard to come up with numerous instances when various factions in Congress have raised the cry for an independent counsel to probe an officer. And, to borrow a phrase from Chief Justice Marshall in *McCulloch v. Maryland,*[13] the power to prosecute is the power to destroy, and the power to investigate is the power to maim, if not destroy.[14]

Once an independent counsel is appointed, political enemies enjoy the added effect of avoided consequences—it is far easier for partisan Members of Congress to have an independent counsel carry out its investigations than it would be for the Congress itself. According to Justice Scalia, "instead of accepting the political damage attendant to the commencement of impeachment proceedings against the President on trivial grounds . . . [Congress may simply] trigger a debilitating criminal investigation of the Chief Executive under [the independent counsel] law."[15] "The independent counsel, therefore, provides partisan members of Congress with good "cover": they can blame the independent counsel for excessive or unmerited investigations, investigations for which the members of Congress may themselves have called.

The statute ultimately reflects a whole notion of "reform" that has led to the trivialization of ethics in the nation's capital and the trivialization of criminal law in general. Because of repeated calls for independent counsel investigations of one supposed controversy after another, an atmosphere has developed in which "everything is a crime, so that therefore nothing is a crime." As a result, the independent counsel statute has debased the currency of the criminal law and led to an awful run of instances that have led the American people to lose their image of this stat-

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[8] Here I am referring to Justice Scalia's criticism of the removal of executive control over a prosecutor, which he stated was essentially an executive function. *See id.* at 705–10 (Scalia, J., dissenting).

[9] *Id.* at 708 (Scalia, J., dissenting).

[10] *See id.*

[11] An independent counsel had subpoenaed the former ambassador of Canada, creating an embarrassing international incident. *See id.* I cannot believe this subpoena would ever have been issued by a Justice Department prosecutor.

[12] *Id.* at 711 (Scalia, J., dissenting).

[13] 17 U.S. 316 (1819).

[14] *Id.* at 431 ("the power to tax involves the power to destroy").

[15] *Morrison,* 487 U.S. at 713 (Scalia, J., dissenting).

ute as being something that is "special."[16] Its routine use has debased its original currency: it was to be reserved for those rare instances when a constitutional crisis confronted the nation.

Although it may be true that the Espy, Cisneros, and HUD cases are all worthy of federal criminal investigation, it is abundantly obvious that they were not worthy of an appointment of an independent counsel. These are all investigations that the U.S. Department of Justice (DOJ) could easily have conducted. An implicit assumption of the independent counsel statute is that the DOJ cannot be trusted to investigate such matters. This assumption is ingrained into the minds of the American people, reinforcing a negative assumption that eventually affects the public's perception of impartiality of the DOJ as a whole in everyday matters.

The net effect of these problems is the numbing of the public conscience when it comes to morality, ethics, and conduct in the nation's capital. As a result, the level of cynicism in America has increased and people feel disconnected from their government. Americans have less incentive to participate and more incentive to distrust. It is no minor irony that such effects work counter to the actual goals of the "reform," namely to ensure to the people the integrity of their government and their belief in it.

Is there any solution?

From the outset, I have believed that Congress would never change this law significantly and that it would never repeal it. Therefore, I have often suggested three changes which would in some measure address these concerns: 1) narrow the covered persons under the law, making any future version applicable only to the President, Vice President, and Attorney General; 2) eliminate the requirement that the Attorney General proceed with a preliminary investigation if she cannot determine whether the information is specific and from a credible source;[17] and 3) remove the restrictions placed on the Attorney General's ability to conduct a preliminary investigation.[18] But I have now concluded that even these amendments would be unwise. Instead, I have come to the conclusion that what I believed earlier, when the statute was first proposed by President Carter, is truer now than it ever was before—*we do not need the independent counsel statute.* Indeed, we cannot *afford* to have the independent counsel statute because the damage to our institutions (the presidency, the Congress, the courts, and the body politic) is too grave to be permitted.

My own experience as independent counsel has convinced me that the statute is a bad idea that—unlike a good wine—has not gotten better with age. This is a wine that has turned to vinegar and can never be returned to a vintage state. Far too many independent counsels have been appointed since the statute was first passed in 1978. By the time I was appointed in 1992, thirteen independent counsels had been appointed to investigate allegations ranging from cocaine use by a Carter aide to lying about a mistress by a cabinet nominee. In the end, my investigation identified no criminal violations, just political stupidity in the administration. But the accusations that led to my appointment surfaced during an election year, and partisans used the low "appearance of impropriety" standard to bring about my appointment, undoubtedly to embarrass the President.

The statute is compromised at its very core. It cannot be nit-picked and amended into a satisfactory form. The statute's mere presence in any form politicizes the entire process by which we accuse people, investigate them, and eventually "charge them with crimes or exonerate them. The initiation process under this statute invites all the elements that should not be involved when deciding to initiate a criminal investigation of any person, namely personal and political motivations.[19]

The targets of such investigations are also severely disadvantaged. The statute has led to a situation in which rather than being equal under the law, high level public officials in the executive branch are given fewer fights than the average citizen. It is one of those rare instances in which the "big-shots" actually are treated

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[16] indeed, the term "special prosecutor" was replaced by the term "independent counsel" throughout the act. Although the reason was to remove any negative connotations of the Watergate era, perhaps the change also reflects the fact that such appointments are no longer "special."

[17] 28 U.S.C. § 591(d)(2).

[18] These restrictions include the inability to grant immunity, convene a grand jury, or even issue subpoenas. *See id.* § 592(a)(2)(A). In addition, the statute prohibits the Attorney General from basing her decision that the information is not specific or credible or that there are no reasonable grounds for further investigation by an independent counsel on the fact that the target lacked the state of mind for a violation of criminal law 28 U.S.C. § 592(a)(2)(B)(i)–(ii).

[19] "Nothing is so politically effective as the ability to charge that one's opponent and his associates are not merely wrongheaded, naive, ineffective, but, in all probability, 'crooks.' And nothing so effectively gives an appearance of validity to such charges as a Justice Department investigation and. even better, prosecution." *Morrison,* 487 U.S. at 713 (Scalia, J., dissenting).

unfairly and are at a disadvantage as compared to the average citizen because of the hair-trigger mechanism for the invocation of the statute. Part of the reason for this disadvantage is the nature of white collar criminal investigations today. It is widely known among defense lawyers that white collar criminal investigations are lengthy and intrusive by their very nature. Various techniques, including undercover stings and surveillance, are now commonplace in such investigations. When you combine the already lengthy and intrusive federal criminal investigative process with the low triggering mechanism and politically oriented accusatory process of the independent counsel statute, you end up with a horrific amalgam which truly threatens the civil liberties of high level government officials.

Furthermore, the costs for the target or subject of such probes are substantial. Careers are put on hold or ended, legal expenses pile up, and a mere misstatement could result in criminal prosecution:

> How frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile . . . [a]nd to have that counsel and staff decide, with no basis for comparison, whether what you have done is bad enough, willful enough, and provable enough, to warrant an indictment.[20]

Of course, it goes without saying that the psychological effects of the investigation on the target are difficult to bear. Public scrutiny of the defendant is one thing when an indictment against a target is obtained by a U.S. Attorney. But when independent counsel is appointed merely to initiate an investigation of an executive official, the public scrutiny that the official receives is intolerable. Families are torn apart or severely strained. I cannot conceive of a good public policy reason to continue the statute's existence.

For all these shortcomings, the independent counsel statute provides absolutely no assurances whatsoever that the American people, the Congress, or the press will be satisfied with the result. In a real sense, the independent counsel is accountable to no one. Any failure of the independent counsel to obtain an indictment when merited or to conclude when the investigation is going nowhere cannot be reviewed. Voters, Congress, the President, and the courts do not have control over the quality of the outcome. The irony here is that the appointment of an "independent" counsel was supposed to obviate any such concerns. But the highly politicized nature of the accusatory process under the statute has ripened into cynicism about who is appointed independent counsel and by whom and how. The statute has been consumed by itself.

There are all sorts of proposals floating around now about how to amend the statute to try to make it work: allow the Attorney General to recommend three independent counsel candidates to the Special Division of judges which appoint the independent counsel, and require the panel to select from that list; allow a committee of the American Bar Association to keep a "corral" of available independent counsels which they can recommend to the court; or establish a permanent Office of Independent Counsel, which would be in place and ready to go on a moment's notice. All of these suggestions really do not deal with the fundamental problem of the statute: its mere existence.

It is readily apparent to anyone who has studied the statute, watched its application, and followed the evolution of its application from constitutional crises to trivial criminal allegations, that the statute cannot be fixed or mended in a way that changes its fundamental flaw: it is an extra-constitutional,[21] fourth branch[22] of government that does not perform a useful role in our constitutional scheme. Rather, it may be doing irreparable damage to the political and governmental institutions of this country, including all three of our branches which are intimately involved in the application of the independent counsel statute.

It is very important to remember that in Watergate, a President of the United States was forced from office and named an unindicted co-conspirator in a criminal case, all without the benefit of this statute. A *true* constitutional crisis was handled without this flawed statute being in existence, and the crisis ended exactly the way it should have: a disgraced president leaving office.

I think that the lesson of Watergate is that when a true constitutional crisis does exist, the American people, the Congress of the United States, the media of this country, and the body politic as a whole will rise up and demand an independent inquiry of anything involving the President, Vice President, or the Attorney General. And that is the way it ought to happen. Resort to such mechanisms ought to

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[20] *Id.* at 708 (Scalia, J., dissenting).
[21] Even if it is constitutional under *Morrison.*
[22] Or a fifth branch depending on how you view independent regulatory agencies.

be reserved for those moments in history when the enforcement of the Constitution is at issue. We do not need a statute for that.

In addition, we do not need a statute to investigate members of the cabinet if they are alleged to have done something wrong. We need to restore confidence in the DOJ and its ability to handle cases of this nature when they do not involve the President, a Vice President, or the Attorney General. The integrity of the government requires it: if the American people are to have faith in the way the DOJ does its job with average Americans every day, their faith in its ability to investigate the government must be restored.

If we get to a point where a President, a Vice President, or an Attorney General appears to have done something wrong and it needs to be investigated, we will once again rise to the occasion and force the legal and political process to require an independent investigation. But this statute is not necessary for that to happen.

Chairman THOMPSON. Thank you very much. Mr. Christy.

TESTIMONY OF ARTHUR H. CHRISTY, SPECIAL PROSECUTOR, HAMILTON JORDAN INVESTIGATION

Mr. CHRISTY. I ask that my remarks be included in the record.

Chairman THOMPSON. They will all be made part of the record.

Mr. CHRISTY. Mr. Chairman, I guess I am here because I was the first special prosecutor so many years back that there are probably very few Members of this Committee that even remember what it was I was to investigate. Let me remind you of the enormity of the crime that I was to investigate, which was that Hamilton Jordan, Chief of Staff to President Carter, had taken two or three toots of cocaine in a trendy New York nightclub. That was my mandate. I was a bit of a piker, I think, because I completed my investigation in 6 months, and it only cost $180,000.

At any rate, I agree with my distinguished colleague, Joe diGenova that there is no way you can put time constraints or money constraints on a special prosecutor, but on many of the other points he made, I am afraid that I would disagree.

One of the things that troubles me the most about doing away with the act is what I call public perception. The public wants to know at the end of an investigation, has anything been covered up, has it been fully investigated, has everything been done that should be done, and I believe that, really, only a special prosecutor appointed, whether by a three-judge panel or some other kind of a panel, is the type of person that can do that.

I think that there are certain things that I would suggest in amending the law, and by the way, when I talk about the public perception, if the Attorney General is going to conduct the investigation, let us say of a member of the Cabinet and ultimately exonerates, exculpates that particular person, what does the public think? Do they not possibly think, look, there is the Attorney General who is of this party clearing the Secretary of whatever it is who was also of the same party when they break bread together every other day or so? Isn't the perception that maybe something has been covered up? That perception, I think, disappears when you have a special prosecutor.

I believe very strongly that the act should be reenacted, but I would have some suggestions, Mr. Chairman. First of all, I would reduce the number of officials that are covered under the act, which somebody told me the other day came to 79, and I would limit it to the President, Vice President, Attorney General, members of the Cabinet, and perhaps the heads of the FBI and CIA.

Two, I think the act should not apply to alleged criminal acts or activity that occurred prior to the time the official took office.

Three, the act should be limited to acts of wrongdoing that are committed only while the official is in government, actually working in the government.

Next, the act should not cover, in my opinion, personal mistakes or indiscretions. It should relate to something connected with the actual governmental work that that particular official is doing.

Next, the investigation should be limited to the original mandate that was given to the independent counsel, and he should be prohibited from expanding his jurisdiction. If he wants to expand it, he has got to go to the Attorney General with very good reasons and must demonstrate that what he wants to expand his investigation to is directly related to his original mandate.

I cannot remember whether this actually was amended before, but they ought to eliminate the power in the final report of the independent counsel to make reference to criminal conduct of somebody who is not indicted. There should be no reference of that type.

Finally, and I do not know how you would put this in the statute, but I think that any person appointed as an independent counsel should be someone who has had prosecutorial experience. You do not want somebody learning on the job.

Dealing with grand juries is a delicate matter. There are a lot of rules governing what goes on before the grand jury, and unless somebody has had some experience dealing with grand juries and the rules and regulations which govern their actions, I think it is open to mistake, so I think that the independent counsel should have some prosecutorial background and experience.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Christy follows:]

PREPARED STATEMENT OF MR. CHRISTY, FIRST SPECIAL PROSECUTOR UNDER THE ETHICS IN GOVERNMENT ACT OF 1978

Senator Thompson and distinguished Senators. My name is Arthur Christy. I guess I am here because I was the first Special Prosecutor, as it was then called, under the Ethics in Government Act of 1978.

My mandate was to investigate whether or not Hamilton Jordan, then Chief of Staff to President Jimmy Carter, had taken, as alleged, a couple of toots or more of cocaine at a trendy night club in New York called Studio 54.

On November 19, 1979 Benjamin R. Civiletti, then Attorney General of the United States, pursuant to § 592(c)(1) Title 28 applied to the United States Court of Appeals for the District of Columbia Circuit, Special Prosecutor Division, for the appointment of a Special Prosecutor to investigate allegations of possession of cocaine by Hamilton Jordan in violation of 21 U.S.C. § 844(a), which is a misdemeanor. On November 29, 1979, Honorable Roger Robb, presiding Judge of the Court of Appeals for the District of Columbia Circuit; Honorable J. Edward Lumbard, Senior Circuit Judge for the Court of Appeals for the Second Circuit; and Honorable Lewis Render Morgan, Senior Circuit Judge for the Court of Appeals for the Fifth Circuit, the Judges comprising the Special Prosecutor Division who were appointed by the Chief Justice of the United States, appointed me as the first Special Prosecutor. The order appointing me reads:

> Upon consideration of the application of the Attorney General pursuant at 28 U.S.C. § 592(c)(1) for the appointment of a special prosecutor to investigate the allegation that Hamilton Jordan possessed cocaine in the Southern District of New York on June 27, 1978, it is:
>
> ORDERED that ARTHUR H. CHRISTY is appointed special prosecutor to investigate this matter, and any other related or relevant allegations of a violation or violations of 21 U.S.C. § 844(a) by Hamilton Jordan.

Based on all of the information developed during the course of my Investigation it was my conclusion that there was insufficient evidence to warrant the bringing of criminal charges against Jordan for possession of cocaine in violation of 21 U.S.C. § 844(a).

The information developed during the course of my Investigation was presented to a Grand Jury seated in the Southern District of New York. On May 21, 1980, after deliberation, the Grand Jury reported that there was insufficient evidence for an indictment of Hamilton Jordan, and voted unanimously a no-true bill. I believe I may be the only Special Prosecutor where the Grand Jury voted a no-true bill.

For your information, I and my staff conducted approximately 100 interviews of about 65 persons. The Grand Jury met in 19 sessions and 33 witnesses appeared, some on as many as three occasions. Over 2000 pages of Grand Jury testimony were taken.

One might say that my investigation was a single shot against a single target. Reading about subsequent investigations conducted by Special Prosecutors or Independent Counsels (hereinafter Independent Counsel) I can only say that my investigation was a piece of cake. Perhaps I was a piker as I spent only six months and approximately $180,000 as best I can recall. I think probably the most significant contribution that I made during my investigation was the selection and appointment of Theresa Duggan as my Administrative Assistant. She was superb at organizing everything, including how to get paid, how to rent space, how to get typewriters and all of those details necessary for the operation of the law office. Testimony to how good she is that in, at least five or six subsequent Independent Counsels hired Terri Duggan as Administrative Assistant. She only retired last year after a very distinguished career. If anybody writes the book on how to set up a Special investigation under the Act Terri Duggan would be the one to do it.

While I believe the Act should be re-enacted, there are certain changes I would like to see, among them:

1. Reduce the number of officials covered to the President, Vice-President, Attorney General, members of the Cabinet and, perhaps, the heads of the FBI and the CIA.
2. The Act should not apply to alleged criminal activity that occurred prior to the time the official took office.
3. The Act should be limited to acts of wrongdoing that are committed while the official is in the government.
4. The Act should not cover personal mistakes or indiscretions.
5. The investigation of matters not within the original mandate should be prohibited unless the matter is directly related to the Independent Counsel's mandate and is necessary for its fulfillment.
6. Eliminate the power to accuse an individual of criminal conduct in the final report if no charges are brought.
7. There should be some rule or regulation that the Independent Counsel have some prosecutorial background and experience.

ARTICLE BY ARTHUR H. CHRISTY IN THE GEORGETOWN LAW JOURNAL

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TRIALS AND TRIBULATIONS OF THE FIRST SPECIAL PROSECUTOR UNDER THE ETHICS IN GOVERNMENT ACT OF 1978

*By Arthur H. Christy**

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I. THE APPOINTMENT

I recall it was a Tuesday morning, November 27, 1979, and I was sitting quietly at my desk working on a motion for a case I was handling. The telephone rang, and my secretary told me that Judge J. Edward Lumbard, then Senior Circuit Judge for the United States. Court of Appeals for the Second Circuit, was on the line.

Having served as an Assistant under Judge Lumbard in 1953 and 1954, when he was United States Attorney for the Southern District of New York, it was always a pleasure to have a call from the Judge. He asked me if I could come and see him sometime to talk about the possible appointment of a special prosecutor under the

Ethics in Government Act of 1978 (the "Act").[1] I told him that I would he free later in the week, but he suggested, rather forcefully, that I jump on the subway and hasten down to his chambers. Little did I know or guess as I left the office what lay ahead.

In Judge Lumbard's chambers, I was introduced to Judge Roger Robb, presiding Judge of the Court of Appeals for the District of Columbia Circuit, and Judge Lewis Render Morgan, Senior Circuit Judge for the Court of Appeals for the Fifth Circuit. These three judges had been appointed by the Chief Justice of the United States Supreme Court to comprise the Division of the Court in accordance with the Act.[2] They explained to me that the then Attorney General, Benjamin Civiletti, was preparing to apply to them for the appointment of a special prosecutor to investigate the allegation that Hamilton Jordan, then Chief of Staff to President Jimmy Carter, had used cocaine in the Southern District of New York on June 27, 1978. The allegation was that Jordan had sniffed cocaine at Studio 54, a trendy discotheque in Manhattan operated by a couple of miscreants, Steve Rubell and Ian Schrager. After considerable discussion about the intent and operation of the recently enacted Act. I said that, honored as I was by their offer, I did not think I could accept the appointment without talking to my partners. They understood this, and suggested that I go back and talk to my partners and then call Judge Lumbard within the next two days with my decision.

One fortuitous fact I learned from the three judges was that I would not have to resign from my firm or actually give up practicing law. That was important. I did, however, refrain from taking on any high profile cases while acting as special prosecutor.

While I was somewhat reluctant at first to accept this appointment, my great esteem for my former mentor, Judge Lumbard, led me to conclude that I could not turn him down. Therefore, after consultation with my partners—who thought the whole investigation silly but found no objections—I called Judge Lumbard on Thursday, November 29, and told him I was prepared to accept the appointment. He asked me to come down to his office that afternoon and at that time, the three judges appointed me as special prosecutor.

The order appointing me read in pertinent part:

> Upon consideration of the application of the Attorney General pursuant to 28 U.S.C. § 592(c)(1) for the appointment of a special prosecutor to investigate the allegation that Hamilton Jordan possessed cocaine in the Southern District of New York on June 27, 1978, it is
>
> ORDERED that ARTHUR H. CHRISTY is appointed special prosecutor to investigate this matter, and any other related or relevant allegation of a violation or violations of 21 U.S.C. § 844(a) by Hamilton Jordan.[3]

II. CONCLUSION OF THE INVESTIGATION

Though not necessarily logical, I have decided to present my conclusion on the investigation at the beginning of this essay. I submitted my Report to the Division of the Court, as required by the Act,[4] on May 28, 1980, just six months after my appointment. Simultaneously, I submitted to the Division of the Court an Addendum to my Report, with a request that a copy of part or all of the Addendum be delivered to the Attorney General, in the discretion of the Division. Because Rule 6(e) of the Federal Rules of Criminal Procedure[5] prevents the public release of testimony given and documents submitted to a grand jury, I based my Report solely on interviews I conducted in my office or elsewhere with all the persons to my knowledge having any information relating directly or indirectly to the allegation against Hamilton Jordan. The Addendum contained references to testimony submitted to the grand jury in support of my conclusion as well as certain other information which I felt should be brought to the attention of the Division of the Court and the Attorney General.

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[1] The Ethics in Government Act of 1978, 28 U.S.C. §§ 591–599 (1978) (codified as amended at 28 U.S.C. §§ 591–599 (1994)). As the original Act referred to a "special prosecutor," I shall use that term throughout. In 1983, the Act was amended to substitute the term independent counsel for special prosecutor. See 28 U.S.C. § 592 (1983).

[2] 28 U.S.C. § 49 (1978), amended by 28 U.S.C. § 49 (1983).

[3] ARTHUR H. CHRISTY, REPORT OF SPECIAL PROSECUTOR ON ALLEGED POSSESSION OF COCAINE BY HAMILTON JORDAN IN VIOLATION OF 21 U.S.C. § 844(A), at 2 (May 28, 1980) (on file with the author) [hereinafter CHRISTY REPORT].

[4] 28 U.S.C. § 594(h) (1978).

[5] FED. R. CRIM. P. 6(e).

Based on all of the information developed during the course of my investigation, my staff and I concluded that there was insufficient evidence to warrant bringing criminal charges against Hamilton Jordan for possession of cocaine in violation of 21 U.S.C. § 844(a).[6]

The information developed during the course of the investigation was presented to a grand jury sitting in the Southern District of New York, empaneled for the purpose of the investigation. On May 21, 1980, after due deliberation, the grand jury reported that there was insufficient evidence for an indictment of Mr. Jordan, and unanimously voted a No True Bill.[7]

III. CONDUCTING THE INVESTIGATION

So there I was, the first Special Prosecutor. What to do? Where to go? There were no guidelines, no paths to follow, no lights to show the way, not even, it seemed to me, any light at the end of the tunnel.

The first thing I did was to meet at the Justice Department with Attorney General Benjamin Civiletti, Philip Heymann, Assistant Attorney General in the Criminal Division, and Charles Ruff, Acting Deputy Attorney General. They reported to me what they had learned during their ninety-day investigation and provided me with all of the reports prepared by the Federal Bureau of Investigation, which had been conducting its own investigation into this matter at the request of the Attorney General. The reports were voluminous.

At either my first or second meeting with Messrs. Heymann and Ruff about the investigation of Mr. Jordan, I pointed out to them that it seemed to me that the Attorney General could decide right then and there not to appoint a special prosecutor and declare the matter closed. The reason I gave was that I did not believe a prosecutor in New York, under either the state or federal system, would pursue a case involving such a smidgen of cocaine. And if there would be no prosecution under the state or federal law in New York, then why go to the expense of appointing a special prosecutor? They answered that on its face the Act required the appointment of a special prosecutor under these circumstances.[8]

It is true, of course, that as special prosecutor, I could have decided in the first week or so that the matter, involving just two toots of cocaine, was so minimal in the general scheme of the criminal law of both the state and federal systems that there was no point in continuing the investigation. However, I then considered the ramifications if I were suddenly to announce, having just been appointed special prosecutor, that I had decided that there was no point in going further because even if I concluded that Mr. Jordan had taken a couple of toots of cocaine, it was unlikely any jury would convict—de minimis non curat lex. I did not think that result would be politic after all the hoopla of being appointed the first special prosecutor particularly as the Attorney General did not decline prosecution.

One circumstance Messrs. Civiletti and Heymann made clear to me was that I was on my own, and I was not to communicate with anybody in the Department of Justice about the investigation except under unusual conditions. I had learned earlier from the three judges who appointed me that they also preferred that I not communicate with them on the progress of the investigation unless something unusual arose, such as a request to expand my jurisdiction.

Where to begin? The first matter to which I turned was to gather a staff.

For a chief assistant, I selected Jim Lavin, who had been in the United States Attorney's office and had been involved in the prosecution of narcotics cases. I also appointed a former associate of Christy and Viener, Arthur Nealon, who had served as an Assistant District Attorney in Manhattan. Finally, I appointed Steven Greiner, a partner in a large prestigious law firm, with whom I had recently worked closely in a very complicated case. He had not been a prosecutor, and I felt it might be wise to have someone on the staff who had no prosecutorial background and could present views that might not have occurred to those of us who had been prosecutors.

Although it was complicated, I was able to arrange for the appointment of an outstanding member of the FBI, John Barrett, as well as a senior official in the Drug Enforcement Administration, Jack Toal. I was concerned, however, that an FBI agent assigned to the investigation might feel obliged to reveal my investigation to

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[6] See CHRISTY REPORT, supra note 3, at 3.

[7] Id.

[8] The Act as enacted in 1978 substantially limited the Attorney General's discretion in appointing a special prosecutor. See 28 U.S.C. § 592(b)(1) (1978) (Attorney General must request appointment of a special prosecutor unless the Attorney General "determines that the matter is so unsubstantiated that no further investigation or prosecution is warranted.").

his superiors. I discussed this concern with Special Agent Barrett and he agreed that he would not report the work that we were doing to his superiors without first obtaining my approval. Finally, I decided that I wanted my own investigator, who would report directly, and only, to me. I selected James McShane, a retired FBI agent with whom I had worked when I was an Assistant United States Attorney. It was a wise choice.

The first order of business in the investigation was to review the approximately 500–600 pages of interviews and reports prepared by the FBI in the period from September to November 1979. These interviews were the basis for summoning and interviewing witnesses. The FBI conducted the preliminary investigation in an expeditious, thorough, and professional manner. we interviewed almost all of the witnesses previously interviewed by the FBI, and quite a few others not interviewed by the FBI, about whom we learned during the investigation.

I then began to worry about some other major matters, such as how we would get paid and where we would get funds to open and supply an office. Very fortunately, I remembered working with Ms. Terri Duggan years earlier, when she had been an administrative assistant for an operation that I was running when I was in private practice. Terri Duggan came aboard in early December, and it was the best appointment I possibly could have made. As a matter of fact, as successive special prosecutors, or independent counsels, were named, the first thing they did was to call me up and ask, "Where do I start?" My invariable answer was, "Call Terri Duggan, you won't be able to get along without her." In fact, Ms. Duggan has served as Administrative Assistant to eight Special Prosecutors and assisted others.[9] If anyone could write the book on how to set up and begin operating as a special prosecutor, Terri Duggan would be the one. She was hardworking, dedicated, loyal and able to charm any government official to cut through the maze of government bureaucracy and get what we needed.

Terri Duggan and I began to wrestle with the basics of how to get an investigation off the ground. At times we felt like an unwanted child. No one at the Department of Justice seemed to want to help us in any way with regard to the nuts and bolts, such as how we were to get paid, pay for office space, and handle many other important details. One thing I had learned from my friend Paul Curran[10] was that I would be better off if I was not under the jurisdiction of the Department of Justice. He told me they were very slow to pay, and at that particular point they still owed him money. I then discovered that we could come under the jurisdiction of the Administrative Office of the United States Courts in Washington, D.C. This jurisdictional move proved to be wise.

It was my original idea to rent space either in my office or somewhere else in Rockefeller Center, where my office was located. We were advised, however, that the rents were too expensive. I conducted a large part of the investigation from my own office, particularly in the beginning. Ms. Duggan and I then searched and found some space at 26 Federal Plaza, which was right across from the United States Courthouse. This location was helpful, as we could interview witnesses at Federal Plaza and then walk them across the street to the courthouse where the grand jury was sitting.

Within a short time, Ms. Duggan had the offices, which were quite small, painted, carpeted, fitted with new locks installed and furnished with desks, chairs, filing cabinets and typewriters. I cannot tell you how much I relied on Ms. Duggan for all of the minor things such as letterhead, envelopes, a postage meter and all the necessary tools that are used in a law office. There were, as I have said, no guidelines for us to follow; we made our own. Ms. Duggan kept us on a tight leash as far as expenses were concerned, making sure we operated within government guidelines. In short, she made sure we were fiscally responsible. All of the attorneys on the staff were part-time. The only full-time employee was Terri Duggan. At the end of each week, we gave Ms. Duggan the amount of time that we had worked and she prepared the necessary payroll reports. There were, of course, no benefits. Terri Duggan so impressed the Administrative Office of the United States Courts that one of my problems was fending off requests that she leave me and join them at higher pay. Luckily for me, she resisted all such blandishments.

After reviewing the information gathered by the Attorney General, I determined that the investigation should have the assistance of a grand jury. On December 18,

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[9] Ms. Duggan has worked with Independent Counsels Arthur Christy, Leon Silverman, Jacob A. Stein, Alexia Morrison, Whitney North Seymour Jr., James McKay, Arlin M. Adams, and Larry D. Thompson.

[10] Paul Curran had been appointed a prosecutor to investigate Burt Lance, a friend of President Carter. Paul was not a special prosecutor under the Act since his appointment was before 1978.

1979, by order of the Chief Judge of the United States District Court for the Southern District of New York, a grand jury was empaneled specifically for the investigation. A grand jury can compel the appearance of witnesses and the production of documents, and I considered both vital to my pursuit of the truth. There were some witnesses who had refused to be interviewed by the FBI without immunity or simply had refused to be interviewed at all. Under the Act, the Attorney General could not have convened a grand jury, issued subpoenae, or granted immunity to a witness—important tools in any investigation. I found witnesses who could sit across the table and lie like hell, but put those same witnesses in the grand jury with twenty-three citizens staring at them, and the truth is apt to emerge.

During the course of the investigation, my staff and I conducted approximately 100 interviews of about sixty-five people. At each interview there were at least two members of my staff present. one member would prepare a report and the other members of my staff who were present during the interview would review it when it was completed.

The grand jury conducted its first session with witnesses on March 7, 1980, and its last session on May 21, 1980. In all, the grand jury met for nineteen sessions. Thirty-three witnesses appeared, some on as many as three occasions. More than 2,000 pages of grand jury testimony were taken.[11]

IV. THE INVESTIGATION

A. BACKGROUND TO THE ATTORNEY GENERAL'S DECISION

In April 1977, Stephen Rubell, Ian Schrager and Jack Dushey opened a discotheque in Manhattan called Studio 54. Studio 54 became an instant financial and trendy success. From the day they opened its doors, Messrs. Rubell, Schrager and Dushey started "skimming" money off the top of Studio 54's operations: they removed cash from the registers each evening and inserted a new tape, divided the cash among themselves, and then provided their accountants with the new tape for preparation of Studio 54's tax returns.

On December 14, 1978, Studio 54 was raided by Internal Revenue Service agents acting on information that there was a large "skimming" operation. The agents found bundles of cash hidden in a ceiling. On June 28, 1979, Messrs. Rubell and Schrager were indicted; Dushey was named as an unindicted co-conspirator. The indictment charged a conspiracy to evade the payment of income taxes by failing to report in excess of $2,500,000 of cash receipts of Studio 54. The indictment also charged Messrs. Rubell and Schrager with obstruction of justice for withholding, destroying, concealing, and tampering with documents which had been subpoenaed.[12]

After the indictment, counsel for Messrs. Rubell and Schrager engaged in discussions with the United States Attorney's office in what was characterized by them as a plea bargaining negotiation. Rubell and Schrager hoped that at least one of them would be permitted to plead to a misdemeanor so as not to jeopardize the liquor license held by Studio 54. Rubell and Schrager were pressed by their counsel to determine if they knew of any violations of the criminal laws which might induce the United States Attorney to reduce the felony charges against them. The Assistant United States Attorney in charge of the tax case had asked Rubell and Schrager during prior plea bargaining sessions about persons dealing cocaine at Studio 54.

On August 17, 1979, Schrager and his attorney lunched prior to the meeting that afternoon, in the United States Attorney's office for another plea bargaining session. At that luncheon, Schrager told his attorney for the first time that he recalled Rubell telling him about a year earlier that Hamilton Jordan had been in Studio 54 one night and had taken cocaine. That afternoon Schrager's attorney, without consulting Rubell or his attorney, told the Assistant United States Attorney they might be able to provide information about the use of drugs by a high government official (no pun intended). If the government agreed to drop the case against Rubell and Schrager, Schrager's attorney said they would reveal more information about the incident.

At a meeting that night, Rubell told his and Schrager's attorneys that Hamilton Jordan and other White House people had come to Studio 54 some time in 1978 and had asked for cocaine; that John Conaghan, a.k.a. Johnny C., the resident dispenser of drugs at Studio 54, was there; that Johnny C. and Rubell took Jordan and another White House aide to the basement, where Jordan allegedly took two toots of cocaine.

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[11] CHRISTY REPORT, supra note 3, at 52.
[12] Id. at 5.

The attorneys stated they wanted to talk to Johnny C. about whether he had given Jordan cocaine, as they felt they needed corroboration. It was agreed that Rubell would interview Johnny C. in his office that evening and that the interview would be taped. The interview took place, but when the attorneys went to pick up the tape of the meeting, they discovered, to their great horror and chagrin, that the tape had been inserted backwards and had failed to record. They decided, therefore, to make another tape. It was during this second conversation that Johnny C. stated, in substance but with some leading, that he recalled giving two toots of cocaine to Hamilton Jordan.

The tape of that conversation was turned over to the FBI during the investigation conducted by the Attorney General. Counsel for Rubell and Schrager thereafter went to the United States Attorney's office and offered to reveal the name of the "high government official" who allegedly took the cocaine. United States Attorney Robert B. Fiske, Jr. attended that meeting on August 22. Fiske stated that there would be no disposition of the tax case against Rubell and Schrager as his office was not prepared to forego its tax case for information about an unknown government official who had supposedly taken drugs on a one-time basis.

Schrager's attorney nevertheless revealed to Fiske at that meeting the name of Hamilton Jordan. The attorney also stated that another White House aide was present with Mr. Jordan at Studio 54 on the night in question, but that only Mr. Jordan used cocaine. At the conclusion of that meeting, Fiske advised Schrager's attorney and the other attorneys present that the government would not dismiss the felony charges against Rubell and Schrager or even reduce them to a misdemeanor.

On August 23, 1979, at the request of counsel for Messrs. Rubell and Schrager, there was a meeting at the Department of Justice in Washington at which defense counsel hoped to persuade the Department to overrule Mr. Fiske's decision not to dismiss the indictment or reduce the charges. Present at that meeting were Messrs. Heymann and Ruff, the Southern District Assistant in charge of the tax case, and counsel for Rubell and Schrager. At the conclusion of the meeting, the defense attorneys were again advised that the charges against Rubell and Schrager would not be dismissed or reduced.

Sometime after the meeting at the Department of Justice on August 23, 1979, the Attorney General, pursuant to the Act,[13] commenced a preliminary investigation with the aid of the FBI.

On November 2, 1979, Messrs. Rubell and Schrager each pled guilty to one count of evasion of taxes due from Studio 54 and one count of evasion of taxes due personally. On January 18, 1980, Rubell and Schrager were each sentenced by Judge Richard Owen to three and one-half years in prison and a fine of $20,000.

In the meantime, the Attorney General concluded his preliminary investigation within the ninety-day limit prescribed by the Act,[14] found that the allegations against Mr. Jordan warranted "further investigation," and applied to the Division of the Court for the appointment of a special prosecutor.

B. THE ACCUSERS

There were only three people who claimed to have direct information concerning Mr. Jordan's alleged use of cocaine in Studio 54: Rubell, Johnny C., and one Barry Landau. As witnesses, the most charitable thing that could be said about them was that they were utterly unbelievable. In one of his early interviews with the FBI before my appointment, Rubell had told the FBI that he saw Mr. Jordan take cocaine in the presence of Johnny C. Rubell was later interviewed on an ABC 20/20 program telecast, as were Johnny C. and Barry Landau.[15] On the 20/20 program, Rubell said that someone, whom he could not recall, had told him that Mr. Jordan had wanted cocaine. He then went on to say that Jordan "took a hit in each nostril, and that was it."[16] We interviewed Rubell on several occasions; on two occasions, however, he said that he could not recall that he had seen Mr. Jordan take cocaine.[17] Finally, Rubell admitted that when he said on 20/20 that Jordan had taken "a hit in each nostril" he could not say that of his own independent recollection, but only because that was what he recalled Johnny C. had told him.[18] I concluded that Rubell's statements were of no evidentiary value.

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[13] 28 U.S.C. §§ 591–599 (1978).
[14] Id. § 592(a) (1978).
[15] 20/20 (ABC television broadcast, Oct. 4, 1979), cited in CHRISTY REPORT, supra note 3, at 18–19.
[16] Id. at 19.
[17] Id.
[18] Id. at 20.

Johnny C. told many different versions of Mr. Jordan's alleged cocaine use in Studio 54, including that he gave him "two toots." [19] The bottom line, however, was that Johnny C. said he was not certain whether or not he had given cocaine to Mr. Jordan in the basement of Studio 54. Johnny C. said that he offered cocaine to a man, whom he could not precisely recall. He described the man to whom he had given cocaine as being over six feet tall, with very neat hair, which was parted on the left side. Johnny C. is six feet two inches tall. Mr. Jordan is considerably shorter. In view of all of Johnny C.'s different statements, it was apparent that the substance of Johnny C.'s present recollection would not provide any positive evidence that Mr. Jordan took cocaine in Studio 54.

Landau claimed that on the evening of June 27, 1978, while at Studio 54, Mr. Jordan asked him for cocaine. Despite what he had said on the 20/20 program, however, when we pressed him, he did not claim to have any knowledge that Mr. Jordan in fact took cocaine that night. Landau said he did not hear Mr. Jordan ask Rubell or anyone else for cocaine, did not hear any other discussions about cocaine, and did not see Mr. Jordan or any other member of the Jordan group take cocaine. He also said that prior to August 24, 1979, he was never told by Rubell or anyone else that Mr. Jordan had taken cocaine in his visit. Landau declined to be interviewed by the FBI about June 27, 1978.[20]

Although Landau said that other persons were with Mr. Jordan that evening when Mr. Jordan asked Landau for cocaine, each of those persons explicitly denied that Mr. Jordan asked anyone for cocaine in his presence. I had very serious doubts about Landau's credibility under any circumstances.[21]

C. REFLECTIONS ON THE INVESTIGATION

Hamilton Jordan, in his book published after he left the Carter administration, wrote that everybody at the White House was afraid that I was going to turn the investigation into a Roman circus, and they were very much worried.[22] As a matter of fact, that was the last thing I had in mind. To demonstrate the extent to which we kept secret what we were doing, I arranged with the FBI to have Hamilton Jordan flown from National Airport to LaGuardia, picked up by Jack Barrett and Jack Toal, and brought to my office. In the middle of the afternoon in a small caravan, we went from my office to Studio 54, because I wanted Mr. Jordan to see the basement in which it was alleged he was given the cocaine. We had arranged to decoy the Studio 54 employees for a time, which permitted us to go in the back door, down the steps into the basement, spend twenty minutes in the basement, retrace our steps and get back to my office for some more interviews without detection. Later in the day, Barrett took Mr. Jordan back to the airport so he could fly back to Washington. Not one newspaper reported this surreptitious visit and I was quite proud of having made the arrangements and having carried it off without any problems. In fact, in his book, Mr. Jordan was quite complimentary about the low key approach that we took in the investigation.[23] I also managed to bring him up from Washington, from LaGuardia airport to the courthouse, and to the grand jury room where he testified, and then back to the airport and to Washington without the press ever learning about it. Of course, it would have been very easy to have alerted the press and told them to be at Studio 54 at 3:30pm on a particular afternoon and to find something interesting.

V. THE INDEPENDENT COUNSEL ACT SHOULD NOT BE ABOLISHED

I believe the Independent Counsel Act should be retained.

One problem with the Attorney General conducting an investigation is that the Attorney General is prohibited from using a grand Jury, is not permitted to subpoena witnesses, cannot give immunity to a witness and cannot plea bargain. All of these are necessary tools to fully evaluate any allegation, and are available to an independent counsel.

More important, however, is the issue of perception. There are hard decisions—very close calls—that an independent counsel has to make during an investigation, and an independent counsel may make them a bit differently than might the Attorney General who is loyal to the administration. It is the perception of the public

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[19] Id. at 21.

[20] Id. at 30.

[21] Rubell and Landau testified before the grand jury on three occasions, and Johnny C. on two occasions.

[22] HAMILTON JORDAN, CRISIS: THE LAST YEAR OF THE CARTER PRESIDENCY 239 (1982).

[23] Id.

which is important; we want the public to feel that the investigation is not tainted with bias, and that whoever conducts the investigation will conduct it without regard to any influence. The American people must have faith in the conduct of the investigation, and the matter of appearances as much as anything else is important. This is the issue of perception. I think the American public may feel uneasy if the Attorney General is conducting the investigation of, say, a fellow Cabinet member with whom he or she sits at lunch or breakfast day in and day out.

VI. POSTSCRIPT

In his book, Crisis: The Last Year of the Carter Presidency, Mr. Jordan wrote:

> With my lawyers, I took the shuttle to New York to see the special prosecutor. I tried to relax on the way up but found it difficult. We talked about Arthur Christy, the special prosecutor appointed by the federal court to investigate the Studio 54 charges. I wondered what kind of man would take an assignment like that: to drop a lucrative private practice to prosecute a misdemeanor against a public official. It seemed plain to me: a publicity seeker, an ambitious lawyer trying to get his name in the newspaper.
>
> However, Christy surprised me. Not that he did me any favors, but I was impressed with his businesslike manner. He questioned me intensely, leaving the room occasionally to confer with one of the several lawyers and investigators on his staff. He was polite but kept a proper distance.
>
> I appreciated his sensitivity to the publicity surrounding my case. He had made it possible for me to come and go to his office quietly and without any news leaks; he seemed as interested in keeping my visit out of the papers as I was. When we headed back to Washington, I felt better. At least I knew that an honorable man was investigating me and that he seemed determined only to find the truth. I hoped that he would.[24]

Sometime thereafter, Steve Rubell in a television interview went out of his way to comment on how fair I had been and that I had treated him very decently.

When I told my eighty-four year old mother about the compliments from both Mr. Jordan and Mr. Rubell, she commented somewhat acidly that if I got compliments from both of them, I must have done something wrong.

Chairman THOMPSON. Thank you very much. Mr. von Kann.

TESTIMONY OF HON. CURTIS EMERY von KANN, INDEPENDENT COUNSEL, ELI SEGAL INVESTIGATION, AMERICORPS CHIEF

Judge VON KANN. Senator Thompson, I am pleased to be here.

Just by way of brief background, since there has been some talk that independent counsel should have prosecutorial experience, I had none. I was 16 years in private practice in Washington, 10 years as a judge of the District of Columbia Superior Court, and then in 1995, I retired to enter the field of arbitration and mediation and currently serve with J-A-M-S/ENDISPUTE here in Washington, DC.

The Committee's invitation asked that the three of us address three subjects, namely our experience with the act, our views on whether the act has achieved its objectives, and any legislative proposals that we might wish the Committee to consider. I will confine my testimony to those three topics.

I would be grateful if my full statement could be put in the Committee record, and I will try to give a very telescoped oral version.

Chairman THOMPSON. All statements will be made a part of the record.

Judge VON KANN. Thank you. My experience with the act, I guess, is briefly this.

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[24] Id.

I was appointed in November 1996 as the 17th independent counsel under this act to investigate certain allegations concerning Eli J. Segal. Mr. Segal had served as chief of staff of the 1992 Clinton-Gore Election Committee and was, thus, a covered person under the act. However, the allegations did not relate to that. They related to his subsequent appointment by the President as chairman of the board and CEO of the Corporation for National and Community Service, the wholly owned government corporation that oversaw the Americorps program.

It was alleged that Mr. Segal and others at the corporation, having set up a private partnership to help raise funds for Americorps and then serving as officers and directors of that private corporation at the same time that they held the government posts, had violated certain Federal conflict-of-interest laws, principally 18 U.S.C. Section 208 and five or six others.

At the time of my appointment, the allegations about Mr. Segal had not been made public. Accordingly, Attorney General Reno requested that my appointment be made under seal, and it was.

As soon as I was appointed, I determined that we should conduct the investigation as quickly and economically as we could with due regard for the confidentiality required by the seal appointment.

I hired a small staff, two lawyers, both of whom were former prosecutors, Richard Simpson and Melanie Dorsey, who is here today. An FBI agent, Ruth Bransford, was delegated to us, and Lula Tyler, who had served as an administrator in certain other independent counsel office, also took on our office.

We secured some modest office space from the Administrative Office of the U.S. Courts. We outfitted it with some used furniture left over from prior independent counsel, and we got going.

In the space of about 5 months, we met with the Inspector General staff at the Americorps Corporation. We met with the Department of Justice Section of Public Integrity. We reviewed 10,000 pages of documents. We interviewed 10 witnesses. We met twice with Mr. Segal's counsel, and we conducted a 2-day recorded interview of Mr. Segal under oath.

By June 1997, we concluded that we had examined enough facts, not all the facts in the world, but enough to make an informed decision. For reasons that are set forth in my written statement, we unanimously concluded, the three attorneys on the staff, that Mr. Segal should not be prosecuted. In most cases, there was no violation, and with respect to one matter, there was perhaps a violation, but prosecutorial discretion dictated that there not be a prosecution in that case.

We then had to write a final report, as the act requires. At that point, we were still under seal. I was very concerned about the possibility of unduly tainting the reputations of persons involved in the matter, and ultimately, we concluded that we should write a report that was concise, that would not taint any individuals, and we identified all the subjects of our investigation other than the named subjects, not by their name, but by a generalized description of their position.

On August 21, 1997, just under 9 months after I was appointed, I filed with the court under seal a 25-page final report that met those standards.

Unfortunately, in October 1997, under circumstances still unknown to me, the fact of our investigation leaked out. Stories began appearing in *The Washington Post* and *The New York Times* and then were picked up by the wire service and appeared all across the country indicating that Mr. Segal was under investigation by an independent counsel for campaign finance abuses. That had nothing to do with our investigation whatever.

I concluded that the reason for having been under seal had now evaporated, and the publicity concerning Mr. Segal was much more damaging because of the incorrect description of our investigation. I moved the court to lift the seal. Mr. Segal joined in that, and we became public soon thereafter.

I should say, just by wrapping up our experience, that although it took us about 9 months to conduct the investigation, analyze the issues, and decline prosecution, it took us 15 months to comply with the act's requirements for winding down the office. That included processing two attorney fee petitions, which took quite some time, and then waiting for the GAO to get around to us in its regular cycle of auditing independent counsel offices and also archiving about 25 boxes of documents to deliver to the archivist, although that we did fairly quickly.

The total cost of this 24-month effort was $465,000. Inflation has gone up, Arthur, since your day.

Has the act achieved its objectives? Well, we all know the primary objective of the act in the wake of Watergate and the Saturday Night Massacre was to assure the public that prosecutorial decisions concerning high-ranking officials were made on the merits by persons independent of the political winds that swirl around this town.

I think to a large extent, the act has achieved those objectives. Of the approximately 20 independent counsel appointed under this act, there has really only been significant criticism of three or four of those individuals. Apparently, the public has been generally satisfied with the job done by the other 80 to 85 percent, and in matters this controversial, an approval rating of 80 percent or higher is not a bad record.

Moreover, with the single exception of Ken Starr's investigation, which has been challenged on grounds of alleged partisanship, the criticisms have generally not been about partisanship. They have been that the investigations are too expensive, too protracted, too wide-ranging, and too unchecked.

I believe there are better ways of dealing with those criticisms than simply abandoning the act altogether. Allowing the act to expire and letting Attorneys General appoint special prosecutors on an ad hoc basis is not a real answer to those criticisms. An ad hoc special prosecutor may conduct an investigation just as expensive, protracted, and wide-ranging as any conducted under this act.

Moreover, if the case involves the President or other high officials, the special prosecutor will be essentially as free from supervision and control as independent counsel are now.

Politically, no Attorney General would dare rein in or dismiss such a prosecutor, given the firestorm that followed Archibald Cox's firing.

I think that to some extent, the debate on this subject has exaggerated the consequences. The republic will not crumble if the act is allowed to expire. We managed reasonably well for 200 years without it. We could do so again. Nor would the Nation perish if the act were reauthorized exactly in its present form. As noted, more than 80 percent of the counsel appointed under this act have performed their duties in an acceptable fashion, and I think any future counsel would have to be extraordinarily obtuse, not to be chastened by some of the recent stinging criticism that has been voiced.

The question I think is not what choice do we make to avoid disaster? Rather, with due regard for its cost, do the benefits of having some sort of Independent Counsel Act outweigh the benefits of having none at all?

In my judgment, the answer to that question is "yes." I believe there is great value in having already in place an established mechanism and procedures for dealing with those exceptional situations where the public would not likely accept the integrity of a Department of Justice decision to prosecute, or not to prosecute, officials at the highest level. Moreover, I think there is a greater opportunity to curb the perceived abuses of investigations which go on too long, cost too much, and veer off into tangential areas through enactment of a carefully retooled Independent Counsel Act rather than dispensing with statutory standards and requirements and limitations altogether.

The third subject you asked me to address is legislative proposals to consider. There are a great many of them floating around now. I have not read and considered all of those proposals, and I have not reached any hard and fast judgment on the precise package that I would recommend. However, I do think the need for change in certain areas is very clear.

First, the act should be amended in three ways so that appointment of an independent counsel would become quite exceptional:

(1) The list of covered persons should be greatly shrunk. I have been quoted a figure of 240 people under the current act. I am not sure how that was calculated. I have also seen the numbers 79 and 49. I am not sure what the correct figure is. I would favor limiting it to the President, the Vice President, and members of the Cabinet.

(2) As with Arthur, I suggest it be limited only to offenses committed in the covered offices, not to prior offenses, which should be left to the regular State and Federal prosecutors.

(3) The triggering mechanism should be significantly revised so as to make appointments much less automatic. Various reformulations for that have been suggested. I have no present view on which is the best.

Second, the process for selecting independent counsels should be depoliticized. I rather like Lloyd Cutler's suggestion that each President, at the beginning of a term, would submit to the Senate the names of 10 or 15 persons who, upon confirmation, would constitute the panel from which future independent counsel would be chosen. Having such persons blessed in advance by both the administration and Congress would greatly reduce the chances of their later being attacked as partisan or lacking in judgment.

Third, the process by which an independent counsel could seek to expand his or her investigation into new areas should be reviewed and tightened up considerably.

Fourth, the role of the Special Division should be re-examined. I am intrigued by Professor Gormley's thesis that the best way to place reasonable restraints and accountability on the work of independent counsel is to give the Special Division clear duties and powers with respect to overseeing that work, including the power to replace an independent counsel in extreme cases. Federal courts have already developed a well-recognized body of case law for dealing with prosecutorial abuse and misconduct; it should not be too difficult to adapt that case law to dealing with excesses of an independent counsel. I also believe Congress should look at proposals for assuring regular rotation of the membership of the Special Division; one possibility would be to appoint new three-judge panels every few years and allow prior panels to continue supervision of any independent counsel they appointed.

Fifth, Congress should take a look at the final report requirement. It may be desirable that all independent counsel file a very brief report basically outlining the skeletal summary of their assignment: "I was appointed on X date to investigate Y, I did Z, I finished on such-and-such a date." Beyond that, I would leave it to the discretion of independent counsel whether they should discuss any substantive matters, with the presumption that they shouldn't unless there was some strong need to do so, for example, to point out to Congress some ambiguity or gap in a law that perhaps should be re-examined. In all cases, reports should be concise, prompt, and written with due regard for legitimate privacy and reputational interests of persons not indicted.

Sixth—and this is the next to the last—in keeping with my former law professor, Archibald Cox, I favor—I know Joe diGenova doesn't—but I favor writing into the statute strict, arbitrary time limits for all independent counsel investigations. Parkinson's Law holds that work will expand to fill the time available for its completion, and this is never more true than when one is an independent counsel conducting an investigation of a high-level official and there are virtually an unlimited supply of stones to turn over, just to make sure you didn't miss something. But in every other aspect of our life, I suggest, there are time limits by which very important things have to be done: 30 minutes to argue the most incredibly complex case in the Supreme Court of the United States, 3 hours to complete a college or law school exam, 20 hours to present to the Senate the case for or against impeachment of a President. Time is not——

Chairman THOMPSON. Which was too long.

Judge VON KANN. Which is too long. Time is not an unlimited resource, and both the public and the subject have a right to a quick decision by an independent counsel.

Just across the river in Alexandria sits the famous Eastern District of Virginia, which operates the so-called rocket docket. Every case filed in that court goes to trial in 1 year, no matter how complex, no matter how protracted. Competent counsel find that with that sort of a deadline, they focus their attention on the most important things, and they use their resources wisely. And attempts

by recalcitrant parties to drag out the proceedings are quickly squelched. The judges there act almost immediately on any motions to compel someone who is holding back.

Based on my own experience, I suggest that the statute should include a requirement that all independent counsel be required to either indict or decline prosecution within 1 year of their appointment. For good cause shown, I would allow the Special Division to grant up to two extensions of 6 months each, but no more. All investigations would have to be completed in 24 months at the outside. Of course, if an indictment was brought, trial and appellate proceedings thereafter might go on for some time.

Finally, I would urge Congress to insert a strict 6-month limit for the winding down of an independent counsel office once the prosecution has been completed or declined. That is ample time to archive files, to brief and decide attorney fee petitions, and to have GAO depart from its regular schedule and come in and complete a final audit of the independent counsel office. Indeed, it may even be most economical and sensible to require that the independent counsel shut down the office as soon as the substantive work is done and provide that some official of the Justice Department or the Administrative Office of U.S. Courts would handle the clerical wind-down and the final audit of all independent counsel, with the proviso that the counsel must remain available to answer questions.

Incidentally, one thing I would not worry too much about is setting budgets for independent counsel. While expenditures of some of the independent counsel may seem large, they are, in truth, fairly insignificant in relation to many other perhaps less worthy expenditures in the Federal budget, and are certainly not too much to pay for finding out whether the highest officials of the land have committed serious crimes. I believe the best way to bring down the total costs of independent counsel matters is to implement changes, like those I have suggested, which will ensure that these investigations will be less frequent and less protracted than they have been in recent years.

Thank you for the opportunity to testify, and with my colleagues, I would be happy to respond to any questions.

[The prepared statement of Judge von Kann follows:]

PREPARED STATEMENT OF HON. CURTIS EMERY VON KANN

INTRODUCTION

Senator Thompson, Senator Lieberman, and Members of the Committee: My name is Curtis von Kann. My background, briefly, is that I was a trial lawyer in private practice in Washington, D.C. for 16 years beginning in 1969. In 1985 President Reagan appointed me a Judge of the District of Columbia Superior Court, where I served for 10 years. In 1995 I retired from the bench in order to help people resolve their legal disputes outside of court. Currently, I serve as Director of Professional Services in the Washington, D.C. office of JAMS/ENDISPUTE, the Nation's largest and, we think, best mediation and arbitration company. What brings me here today, obviously, is the fact that in 1996 I was appointed the 17th Independent Counsel of the United States under the statute you are reviewing.

The letter from Senators Thompson and Lieberman inviting me to testify today asked that I address three topics, namely, my experience with the act, my views on whether the act has achieved its objectives, and any legislative proposals I believe the Committee should consider. I will confine my testimony to those three topics.

I appreciate that your invitation did not ask me to address the experience of other Independent Counsel, and I do not plan to do so. Since I am not privy to the multitude of facts and considerations which have influenced the actions and decisions of other Independent Counsel, I do not feel competent to comment on their work.

I request that my full written statement be placed in the record, so that I may confine my oral presentation to the highlights only.

I. *My Experience With The Act.*

In mid-November 1996, I received a telephone call from Judge David Sentelle, Presiding Judge of the U.S. Court of Appeals Division for the Purpose of Appointing Independent Counsels. He told me that the Division was considering candidates for an appointment it would have to make shortly and invited me to an interview before the three judges of the Division, which I attended soon after. On November 27, 1996, about a week after my interview, the Court appointed me Independent Counsel in the Matter of Eli J. Segal. Because the allegations concerning Mr. Segal had received little or no publicity at that time, the Attorney General requested that this appointment be made under seal, and the Court did so.

Immediately following my appointment, I began to assemble a staff and set up my office. In doing so, I was influenced by an experience earlier in my legal career. In 1983–1985, I had worked in the law firm of Jacob A. Stein, while he served as Independent Counsel in the first investigation of Attorney General Edwin Meese. While I did not work directly on that investigation, I had an opportunity to observe Jake's modus operandi, and I was quite impressed by the economy and speed with which he conducted his investigation. When, 12 years later, it fell to me to perform the duties of an Independent Counsel, I was determined to do so as economically and expeditiously as possible, consistent with a thorough and professional investigation. Additionally, because the matter was under seal, I was determined that our investigation would be conducted in utmost confidence, so as not to violate the legitimate privacy interests of Mr. Segal and others involved in the matter.

With these thoughts in mind, I set about to hire a lean team. I selected two attorneys to work with me, namely, Richard A. Simpson and Melanie G. Dorsey. Mr. Simpson was a former Assistant U.S. Attorney who had later served on the staff of Independent Counsel James McKay in the second investigation of Attorney General Meese. Ms. Dorsey was also a former Assistant U.S. Attorney and a former senior attorney at the U.S. Office of Government Ethics.

Through the good offices of FBI Director Louis Freeh, Special Agent Ruth A. Bransford was detailed to assist in our investigation.

Through the assistance of James Sizemore and his staff at the Administrative Office of the U.S. Courts, I secured the service of Lula R. Tyler as my Administrator and "Certifying Officer."

Throughout the investigation, my staff never exceeded those four persons—two lawyers, one FBI agent, and one administrator. Six months into the matter, after we completed the bulk of our substantive work, Mr. Simpson resigned to return to his full-time law practice, and Ms. Dorsey assumed the position of Deputy Independent Counsel, thereby reducing the staff roster from four to three.

The Administrative Office of U.S. Courts provided us with offices which it already had under lease as possible start-up space for Independent Counsels. No modifications to this space were required and it met the security requirements of an office under seal. Except for leasing one computer, we furnished the office entirely with perfectly satisfactory, used government furniture and supplies remaining from previous Independent Counsel offices. We devoted one terminal to Westlaw access for research purposes and obtained other research materials from the Department of Justice's law library.

With staff and offices in place, I began the substantive investigation in early 1997.

The allegations in our case concerned actions taken by Mr. Segal when he was Chief Executive Officer and Chairman of the Board of the Corporation for National and Community Service ("the Corporation"), a wholly-owned government corporation which oversaw the President's Americorps program. As you may recall, the National and Community Service Trust Act of 1993 provided that, in order to reduce demands on the Federal treasury, the Corporation could accept private donations to support the Americorps program. Within a few months of the Corporation's creation, Mr. Segal and others at the Corporation decided that they should establish a non-governmental "501(c)(3)" entity, which could promote private support for Americorps and accept donations from foundations and corporations that preferred to make contributions to a private, tax-exempt entity rather than the Federal Government. Accordingly, a D.C. non-profit organization called the Partnership for National Service ("the Partnership") was established. The Partnership's Bylaws called for three of its

seven directors to be officers of the Corporation or their designees. Thus, Mr. Segal became a director and chairperson of the Partnership; Shirley Sagawa, the Corporation's Executive Vice President, served as president and a director of the Partnership; and Larry Wilson, Jr., the Corporation's Chief Operating Officer, served as secretary, treasurer, and a director of the Partnership.

The central question in our investigation was whether Mr. Segal (and also Ms. Sagawa and Mr. Wilson), by simultaneously serving as officers of the governmental Corporation and also as officers and directors of the private Partnership, violated the conflict of interest provisions of 18 U.S.C. § 208, which make it a Federal crime for any officer or employee of the Federal Government, or of any independent agency of the United States, to participate personally and substantially in any decision or other matter in which an organization of which he or she is an officer or director has a financial interest.

Parenthetically, neither the Executive Director, nor any other officer or employee of the Corporation for National and Community Service, is a "covered person" under the Independent Counsel Act. However, the Attorney General determined that Mr. Segal was a covered person because he served as Chief of Staff of the 1992 Clinton/Gore Election Committee and participated in the day-to-day management of the campaign at the national level. Interestingly, it was not Mr. Segal's actions in his covered position (as campaign chief of staff) which were the subject of our investigation but rather his subsequent actions in the not-covered position of Chief Executive and Chairman of the Americorps Corporation.

In the course of investigating this matter, my staff and I undertook to gather as quickly as possible sufficient facts to make an informed judgment about whether Mr. Segal should be prosecuted. Thus, we met with representatives of the Corporation's Inspector General's Office, which had referred the matter to the Department of Justice, and met with staff of the Department's Section of Public Integrity. We obtained and reviewed approximately 10,000 pages of documents. We interviewed ten persons with knowledge of the pertinent matters and made detailed records of those interviews. We met twice with Mr. Segal's counsel to apprise them of the scope of our inquiry and to invite a submission detailing their views. In May 1997, we conducted a 2-day, recorded interview of Mr. Segal in which he answered, under oath, all the questions we put to him concerning this matter.

Throughout this investigation, we emphasized to all persons we talked with that the matter was under court seal and should not be disclosed to anyone without the court's permission.

By mid-June 1997, my staff and I concluded that we had assembled a sufficient body of facts to make an informed prosecutorial decision. We had reviewed the most important documents and talked to the most important witnesses and had received generally consistent information. While we could have kept the investigation going many more months by looking for more documents and interviewing increasingly peripheral players, we decided that was neither necessary nor desirable.

During June 1997, my staff prepared a complete analysis of all the matters we had considered, and we held several conferences to review and discuss this analysis. After thorough discussion, Mr. Simpson, Ms. Dorsey, and I unanimously agreed that we should not prosecute Mr. Segal, Ms Sagawa, or Mr. Wilson. We concluded that the simultaneous service of these individuals as officers of the governmental Corporation and the private Partnership, both of which were interested in raising donations for the Americorps program, may have constituted a violation of 18 U.S.C. § 208. However, we also decided that a sound exercise of prosecutorial discretion led to the conclusion that a criminal prosecution was neither viable nor desirable in view of several factors:

First, Mr. Segal testified credibly and without contradiction that he believed the creation and operation of the Partnership was lawful and proper, since the incorporation of the Partnership had been handled, on a pro bono basis, by one of Washington's largest law firms and the Office of Management and Budget was advised of plans to establish the Partnership and gave apparent approval.

Second, Mr. Segal and other Corporation employees saw the creation of the Partnership as a legitimate means to effectuate the goals of the National and Community Service Trust Act of 1993, including "reinventing government" by establishing public/private partnerships which would seek to employ the principle of leverage and grow national service, not with government dollars but with charitable dollars.

Third, Mr. Segal, and other Corporation employees, including staff in the Corporation's General Counsel and Public Liaison Offices, saw the Partnership, not as an entity separate from the Corporation, but rather as an arm of the Corporation that existed for administrative convenience and had congruent financial interests.

Fourth, there was no evidence that Mr. Segal, Ms. Sagawa, or Mr. Wilson benefited personally from their unremunerated positions as directors and officers of the Partnership.

Finally, there was no evidence of the willfulness needed to support a felony prosecution under § 208; any prosecution would be, at most, for a misdemeanor.

Because my order of appointment also contained the standard language vesting me with "authority to investigate related allegations or evidence of violation of any Federal criminal law . . . by any person or entity . . . as necessary to resolve [the § 208 issue referred to me]," my staff and I also considered whether Mr. Segal or others should be prosecuted for other possible criminal violations related to creation of the Partnership.

Specifically, we considered whether Mr. Segal knowingly made false material statements, in violation of 18 U.S.C. § 1001, when he signed an application, submitted to the IRS in late November 1994, which stated that the Partnership had not yet engaged in any fundraising, when such fundraising had actually begun a month earlier, or when he signed annual financial disclosure reports which failed to include, in the section for positions held outside of the U.S. Government, any reference to his positions in the Partnership. We concluded that prosecution was not warranted on either account. Drafts of the IRS application had been prepared by counsel and submitted to Mr. Segal at earlier times (perhaps even before the Partnership fund-raising began); Mr. Segal looked quickly at the final application, detected no errors, and signed it, thus precluding a finding of knowing falsehood. Neither was Mr. Segal's omission of the Partnership from his financial disclosure forms a willful misstatement, since he considered himself to be acting in his official capacity as CEO of the Corporation when he performed his Partnership responsibilities; moreover, the Corporation's Alternate Designated Ethics Official had issued an opinion that Corporation officers were acting in their official capacities in their positions at the Partnership and were not required to list those positions in their disclosure forms.

We also considered whether, in submitting to the IRS an application to grant the Partnership 501(c)(3) status, Mr. Segal violated 18 U.S.C. § 205, which prohibits an officer or employee of any agency of the United States, other than in the proper discharge of his official duties, from acting as an agent for anyone before any department or agency in a matter in which the United States has a direct and substantial interest. We concluded that, because the application was submitted in connection with Mr. Segal's duties as CEO of the Corporation, the facts did not satisfy the statutory requirement that the officer must be acting "other than in the proper discharge of his official duties."

Finally, we considered whether Mr. Segal violated 18 U.S.C. § 641, which prohibits the conversion of Federal money or property; 18 U.S.C. § 371, which prohibits any conspiracy to defraud the United States; or 18 U.S.C. § 207, which prohibits a former senior government employee from contacting his old agency, for a period of 1 year, with an intent to influence any agency action. We found insufficient evidence to show a violation of any of these sections.

Having concluded that no prosecution of Mr. Segal or other Corporation officers was warranted, my staff and I had to decide what to do by way of a final report. The Independent Counsel Reauthorization Act of 1994 abolished the requirement that an Independent Counsel explain his reasons for not seeking indictments. Nevertheless, the legislative history of the act calls for the Independent Counsel "to provide a summary of the key steps taken" in the investigation and "to explain the basis for [his] decision." That history also indicates that Congress considered it crucial for the final report to contain "a discussion of the conduct of the person for whom the independent counsel was appointed to office."

Most law review commentaries discussing the final report requirement have criticized it, and Congress itself has cautioned that the requirement is not intended to authorize the publication of findings or conclusions that violate normal standards of due process, privacy, or simple fairness.

Moreover, our case was still under seal when we were wrestling with these considerations, although we recognized that the seal might be removed at some future time.

Ultimately, I decided to submit a final report with sufficient detail to assure the Court, Congress, and any other reader that our investigation was thorough, professional, and competent; that the decision to decline prosecution was based on the merits and the evidence adduced; and that resources were used wisely and economically. I also concluded, however, that the report should be concise; that it should not taint any individual; and that all persons, other than the subjects of the investigation, should be identified by generalized descriptions of their position but not by

name. On August 21, 1997, slightly less than 9 months after I was appointed, I filed with the Court, under seal, a 25-page final report conforming to those guidelines.

In October 1997, under circumstances still unknown to me, someone leaked to the press the fact that Eli Segal, who was then under consideration for presidential appointment to a significant position, had been the subject of a recent Independent Counsel investigation. Stories quickly appeared in the *Washington Post, The New York Times,* and, via wire service, in newspapers around the country. I have no idea who leaked this information or why, but I feel confident that it was not my staff.

Because the reason for keeping the matter under seal had, unfortunately, evaporated, and because some of the stories erroneously reported that Mr. Segal had been under investigation for campaign finance abuses, which was then a very hot issue and almost certainly more damaging to reputation than the true subjects of our investigation, I concluded that it was my duty to move the Court for public release of the final report. Mr. Segal's counsel also concluded, regretfully, that this was the best course. Thus, I filed a motion to lift the seal on our report, and the Court did so.

The last part of my experience, which I should briefly mention, is that, while it took me a bit less than 9 months to recruit staff, set up an office, conduct the investigation, analyze the issues, and submit a final report declining prosecution, it took me an additional 15 months to comply with the act's requirements for terminating my office. First, Mr. Segal and Ms. Sagawa filed petitions for attorneys fees, as they were entitled to do; the processing of those petitions—i.e., the submission of the initial petitions with supporting papers, responses by our office, replies by Segal's and Sagawa's counsel, the issuance of orders by the Court, and payment of the fees—proceeded at a fairly leisurely pace over the space of nearly a year. The General Accounting Office, which audits Independent Counsel Offices and publishes reports every March and September on expenditures during the period which is 6 to 12 months prior to those dates, was unable to perform its last substantive audit on our office until November 1998, about 14 months after we submitted our final report. Finally, while not a significant source of delay in our case, we were required to place all the substantive papers accumulated during our investigation into indexed, subdivided transfile boxes and to deliver 25 such boxes to the Archivist of the United States.

On October 15, 1998, I advised the Court and the Attorney General that I would terminate my office effective November 30, 1998, and on that date, I did so. The cost to the taxpayers for this 24 month effort—9 months of substantive investigation and 15 months of wind-up—was approximately $465,000.

II. *Has The Act Achieved Its Objectives?*

The prime objective of the Independent Counsel Act, passed in the wake of Watergate and the "Saturday Night Massacre," was to assure the public that prosecutorial decisions concerning high-ranking administration officials are made on the merits by persons independent of the administration and of the political winds that inevitably swirl around this town. To a large extent, I believe the act has achieved that objective. Of the approximately 20 Independent Counsel appointed under this act, only three or four have received significant criticism, the public apparently being satisfied with the jobs done by the remaining 16 or 17. In matters this controversial, an approval rating of 80 percent or higher is a pretty impressive record.

Moreover, with the single exception of one on-going investigation of the President, most of the criticism that has arisen is not on the grounds of the alleged partisanship of the Independent Counsel. Rather, the criticisms have been, principally, that recent investigations have been too expensive, too protracted, too wide-ranging, and too unchecked.

I believe there are better ways of dealing with those criticisms than simply abandoning the act altogether. Allowing the act to expire and letting the Attorney General appoint Special Prosecutors, on an ad hoc basis as future needs arise, is no real answer to such criticisms. An ad hoc Special Prosecutor's investigation could be just as expensive, protracted, and wide-ranging as any conducted under this act. Moreover, if the case involves the President or other high officials, the Special Prosecutor will be essentially as free from supervision and control as Independent Counsels are now. Politically, no Attorney General would dare rein in or dismiss such a prosecutor in a highly charged case, given the firestorm that followed Archibald Cox's firing.

While the decision of what to do about the act is certainly an important one, I believe zealous advocates on both sides of the issue have somewhat exaggerated the consequences of the course of action they oppose. In my view, the Republic will not crumble if the act is allowed to expire; we managed reasonably well for 200 years

without it and could doubtless do so again. Nor would the Nation perish if the act were reauthorized in exactly its present form; as noted, more than 80 percent of the counsel operating under this act have performed their duties in quite acceptable fashion and future counsel, unless they are extraordinarily obtuse, will certainly be chastened by some of the stinging criticism leveled at their recent predecessors.

The question, I suggest, is not what choice must be made to avoid disaster. Rather, the question is, with due regard for its costs, do the net benefits of having some sort of Independent Counsel Act outweigh the benefits of having none at all? In my judgment, the answer to that question is "Yes." I believe there is great value in having already in place an established mechanism and procedures for dealing with those exceptional situations where the public would not likely accept the integrity of a Department of Justice decision to prosecute, or not to prosecute, officials at the highest level. Moreover, I believe that there is a much greater opportunity to curb the perceived abuses (i.e., investigations which go on too long, cost too much, and veer off into too many tangential areas) through enactment of a carefully retooled Independent Counsel Act than by dispensing with statutory standards, requirements, and limitations altogether.

III. *Legislative Proposals To Consider.*

As the expiration date of the current Independent Counsel Act approaches, a great many people have come forward with proposals for changes in the act. I have not read and considered all these proposals, and have not reached any hard and fast judgment concerning the complete package of proposals I would favor. However, I do think the need for change in certain areas is clear.

First, the act should be amended in three ways so that appointment of an Independent Counsel would be quite exceptional and not routine:

1. The list of "covered persons," which I'm told now totals 240, should be greatly reduced. I favor including only the President, Vice President, and Members of the Cabinet.
2. The act should apply only to crimes allegedly committed while in office. Investigation of pre-office offenses should be left to regular State and Federal prosecutors.
3. The "triggering mechanism" which activates the appointment process should be revised so as to raise the standard and make appointment less automatic. Various reformulations of the mechanism have been suggested, and I have no view at present as to which is best.

Second, the process for selecting Independent Counsels should be de-politicized. I rather like Lloyd Cutler's suggestion that each President, at the beginning of his term, would submit to the Senate the names of 10 or 15 persons who, upon confirmation, would constitute the panel from which future Independent Counsel would be chosen. Having such persons blessed in advance by both the Administration and Congress would greatly reduce the chances of their later being attacked as partisan or lacking in judgment.

Third, the process by which an Independent Counsel could seek to expand his or her investigation into new areas should be reviewed and tightened up considerably.

Fourth, the role of the Special Division should be re-examined. I am intrigued by Professor Gormley's thesis that the best way to place reasonable restraints and accountability on the work of Independent Counsels is to give the Special Division clear duties and powers with respect to overseeing that work, including the power to replace an Independent Counsel in extreme cases. Federal courts already have a well-developed body of caselaw for dealing with prosecutorial abuse and misconduct; it should not be too difficult to adapt that caselaw to dealing with excesses of an Independent Counsel. I believe that Congress should also look at proposals for assuring regular rotation of the membership of the Special Division; one possibility would be to appoint new three-judge panels every few years and allow prior panels to continue supervision of any Independent Counsel they appointed.

Fifth, Congress should take a fresh look at the final report requirement. It may be desirable to require that all Independent Counsel file a very brief report recording the skeletal facts of their investigation—e.g., "I was appointed on date A, to investigate subject B, re matter C; I hired personnel D; we reviewed this many documents, interviewed this many witnesses, and decided on date E not to prosecute; or we obtained Indictment F, proceeded to trial, and secured this result." Beyond that, I would leave any substantive discussion of the case to the discretion of the Independent Counsel, with a presumption that there should not be such a discussion unless it is truly needed—for example, to explain some unusual feature which, if unexplained, might generate confusion or perhaps to point out to Congress a need to correct some gap or ambiguity in the criminal statute in question. In all cases,

reports should be concise, prompt, and written with due regard for legitimate privacy and reputational interests of persons not indicted.

Sixth, in keeping with my former law professor, Archibald Cox, I favor writing into the statute strict, arbitrary time limits for the completion of all Independent Counsel investigations. Parkinson's Law correctly holds that "work expands to fill the time available for its completion." Never is this more true than when one is conducting an investigation of a high level official, with the whole world watching, and a virtually unlimited supply of stones to turn over, just to make absolutely certain that you didn't miss something. Yet, in nearly every other aspect of life, there are time limits by which very important things have to be completed—30 minutes to argue an incredibly complex case in the Supreme Court, 3 hours to complete a college or law school final examination, 20 hours to present to the Senate the case for or against impeachment of a President. Time is not an unlimited resource, and both the public and the subject have a right to a reasonably prompt completion of an Independent Counsel investigation.

Across the Potomac River, on the so-called "Rocket Docket" of the U.S. District Court in Alexandria, all cases—no matter how complex or protracted—go to trial within 1 year of filing. Competent counsel find that the short deadline forces them to focus on the most important aspects of the case and to use their resources wisely. Attempts by recalcitrant parties to drag out the proceedings are quickly squelched; District Judges dispose almost instantly of all motions filed.

Based on my own experience, I would suggest that the statute include a requirement that all Independent Counsel be required to either indict or announce a decision to decline prosecution within 1 year of their appointment; for good cause shown, I would allow the Special Division to grant up to two extensions of 6 months each, but no more than that. All investigations would have to be completed, at the absolute outside, in 24 months. (Of course, where indictments were brought, trial and appellate proceedings could go on for some time after that.)

Finally, I would urge Congress to insert a strict 6-month limit for the winding up of an Independent Counsel Office, once prosecution has been completed or declined. That is ample time to archive files, brief and decide attorneys fees petitions, and allow the GAO to conduct a final audit of the office.

Indeed, rather than having the Independent Counsel keep his or her office intact for many months while waiting for the next GAO audit cycle to come around, it may be most economical and sensible to require that the Independent Counsel shut down the office as soon as the substantive work is done and provide that an official at the Justice Department or the Administrative Office of the U.S. Courts would handle the clerical wind-down and final audit of all Independent Counsel, with the proviso that such counsel must remain available to answer any questions which might arise.

Incidentally, one thing I would not worry about much is setting budgets for Independent Counsel. While expenditures of some recent Independent Counsel may seem large, they are, in truth, insignificant in relationship to many less worthy Federal expenditures and are hardly too great a price to pay to determine whether the highest government officials have committed serious criminal acts. I believe that the best way to bring down the total costs of Independent Counsel matters is to implement changes, like those suggested above, which will insure that such investigations will be less frequent and less protracted than in recent years.

CONCLUSION

I am honored for this opportunity to testify before you on this important subject and will be happy to respond to questions on the matters addressed in my testimony.

Chairman THOMPSON. Well, thank you very much, and, again, thank you all for your patience and your forbearance. I assure you, although others have gone on to other responsibilities, that your views and thoughts will be known to everyone concerned with this. I think clearly the jobs that you did show that there have been instances when it worked the way the drafters of the law intended for it to.

But, Mr. diGenova, I was wondering whether or not Mr. von Kann's plea for time limitations made any impression on you.

Mr. DIGENOVA. Well, let me begin by saying that I understand that Judge von Kann's mentor, Archibald Cox, has had an epiph-

any in the last 12 months and has decided, again, that there are structural infirmities in the statute which he had missed for 25 years.

Chairman THOMPSON. There has been a lot of that going on.

Mr. DIGENOVA. Yes, there have been many epiphanies in the last—I saw some of them this morning. There were lights, haloes glowing over on this side.

I think what is most—putting aside the acuteness of, again, the epiphany of many of the act's lovers who have now become its critics, I think what we have to do is what would the Justice Department do if asked, as part of its reauthorization package, you would require it to accept limitations on criminal investigations, and the answer is the President of the United States would rightfully veto that piece of legislation, and he should.

No responsible investigation can have time limits put on it because it is an open invitation to dilatory tactics by very aggressive and very able counsel, and it doesn't take much. Even if you are not being dilatory, there are a huge number of issues that come up in a criminal investigation. Let me give you an example.

When I was appointed the independent counsel, I was called by the court. The statute was expiring within 48 hours of my appointment. I was interviewed by the court. I was appointed, secretly. The next morning, after I had had the conversation with the court when I was appointed, I woke up and there was a headline, the largest headline I had ever seen, saying, "DiGenova Appointed Independent Counsel to Probe Bush."

It had leaked out. I felt awful. I had not even had a chance to discuss this with some people that I had a duty to discuss it with. It encouraged me in my resolve to conduct an investigation that was below the radar screen. In fact, I moved our grand jury. No one ever knew it. It was not sitting in the U.S. District Court here. Our witnesses never went in that courthouse. We kept below the radar.

I never held a single press conference or issued a single press release until the day I filed my report after I had exonerated everyone. I held one press conference the day I issued my final report to issue an apology to the people who had been investigated—an apology not from me, but on behalf of the people of the United States and the Government of the United States for having to put them through what the statute required.

During that time, I was handed an investigation which had involved an illegal interception of telephone communications at the State Department. That created terrible problems involving whether or not even the fundamental evidence that had come into our possession could be used under the tainted evidence rules, as you know, of the wiretap statute. We had to conduct two separate investigations: One with FBI agents and prosecutors who knew what was in those telephone conversations, and one group of prosecutors and FBI agents who knew nothing about that information. The issue was litigated on two tracks before the chief judge and in the U.S. Court of Appeals.

The problem with having a limitation on the investigation is that there is no responsible way to put a limitation on an investigation, because if you do you are automatically killing the investigation

and you will get no one of repute to accept the assignment to undertake it.

Chairman THOMPSON. I wish you would quit saying that because I am sitting here thinking no Chairman in his right mind would accept such limitations, either. But we did and regretted it, over our objections.

Mr. CHRISTY. Mr. Chairman, may I make just one comment? Senator Levin in the course of his remarks noted that he—or he doubted that anybody would ask that a special counsel be appointed to investigate him, and there was a reference to Edwin Meese.

Chairman THOMPSON. Yes.

Mr. CHRISTY. However, some time in the very early 1980's, Mr. Donovan, who I think had been appointed Secretary of Labor, asked that a special counsel be appointed, and Leon Silverman was appointed and ultimately exonerated Mr. Donovan, whose comment then was: "But how do I get my reputation back?"

Chairman THOMPSON. Well, thank you for that. That is a valuable comment.

I would like to ask all three of you a very specific point, whether or not you think that the subjects of your investigation were out more in terms of attorneys' fees and expenses because an independent counsel was appointed to investigate them as opposed to a situation where the Justice Department had handled the same case.

Judge VON KANN. Actually, Senator, the irony is our subjects were better off in that all three of us declined prosecution, and under the act they were entitled to have their attorneys' fees paid by the taxpayers, which in my case happened.

Mr. CHRISTY. But that later on——

Judge VON KANN. I think you are right.

Mr. CHRISTY. My guy and Donovan didn't get it.

Judge VON KANN. That was a later provision in the statute.

Chairman THOMPSON. Let's carry it a step further and assume indictment in both scenarios. I know that is stretching it a little bit, but you see the point I am getting to. Does an independent counsel investigation—is it more onerous and burdensome strictly from a financial standpoint than a similar investigation by the Justice Department? Part of that just may be opinion, a matter of opinion.

Mr. DIGENOVA. Well, Mr. Chairman, I think one of the things—one of the horrible secrets of this whole issue is that the truth is that Federal criminal investigations are very onerous per se, whether they are conducted by an independent counsel, the Main Justice, or a U.S. attorney. The cost of defending yourself, even if you are only a witness, let alone a subject or target, is tremendous. It is a part of the system that I think Congress ought to take a look at when it reviews the general area of Federal criminal law enforcement. But being a target or a subject or even a witness in any of these investigations requires the hiring of a good lawyer who knows his or her way around. It is very expensive.

If you become a target in any Federal criminal investigation, whether or not it is an IC or the Justice Department, the costs associated with that are staggering in terms that any normal individual would understand. Hundreds of thousands of dollars can easily

be spent in responding to subpoenas and doing all sorts of things that are necessary to properly defend yourself.

I think what happens in the independent counsel situation is that people get dragged into an investigation who are on the periphery as well as those who are at its core because of the desire to be thorough, that independent counsels have, which is a natural consequence of a whole bunch of things in the statute. And a lot of people have to spend money for lawyers who wouldn't otherwise do it.

Chairman THOMPSON. The higher the profile of the case is, probably the more pressures come to bear.

Mr. DIGENOVA. That is exactly correct.

Chairman THOMPSON. The idea of being thorough and so forth, and even more so than you would in an ordinary case, which gets me to my next question. I was struck when reading Mr. Christy's testimony that although he had a case there—and, of course, it was handled in a very expeditious manner. But even though he had a case there, probably regular prosecutors would not have prosecuted. He had bad witnesses who had every motivation to lie. They were trying to cut a deal for themselves, and yet—and you already had 500 or 600 pages of FBI interview material to start your investigation. But you felt it necessary to interview 100 witnesses and have 19 grand jury sessions over 6 months. And I believe in your testimony you thought in view of all the commotion—you were the first independent counsel, of course, but in the profile of the case, it would not be very wise for anybody to be able to say you were giving short shrift to this investigation.

So is it fair to say that you felt it necessary to kind of go beyond the duty, go beyond what a regular Federal prosecutor would in a similar case, even involving the same man?

Mr. CHRISTY. I discussed this with the then-Attorney General and his assistants and said to them, why are we involved with two toots of cocaine? I mean, that wouldn't even get to the complaint bureau in New York, either in the Federal system or in the State system. Well, he said, it is a crime, it is a misdemeanor. The law says you have got to appoint a special counsel.

After I was appointed, I considered seriously whether I should at that point just decline prosecution on the grounds that even if I went through and got an indictment, I didn't think there was any jury in the city of New York that would even remotely think of convicting him.

My thought is that that thing should have been cut off right at the pass.

Chairman THOMPSON. I think that is a point well made, also.

Mr. diGenova, I am going to ask you another question. You talked about in terms of damage you think the statute has done to the public perception. Instead of curing the problem, it has exacerbated the problem, public cynicism and so forth, I think especially in the higher profile cases.

In the lower profile cases, it seems like some of the pressures are not there, and it works a lot better. The higher the profile, the bigger the problems.

Ironically, most of us are focusing in now on just limiting it yet to a few instances where the President, the Vice President, and the

Attorney General are involved. But those are the very cases where we have had all the problems and the political pressures and criticisms come to bear. So we kind of meet ourselves coming back. It is difficult to solve.

But I want to ask a question that may be unfair, but do the best you can. That has to do with the Justice Department in all of this. Some of us are thinking that it might be better to let it lapse, and at least for a while, maybe forever; give it back to Justice. That implies getting back or maintaining, however you view it, a certain level of confidence in the Department of Justice. I don't want to be unduly critical or unduly general. Senator Specter's and my criticisms of the Department have been well documented. They have gone over there for about 2 years without even having a head of the Criminal Division and various other things.

Is the Justice Department going to need to regain some—have they lost throughout all of this, maybe due to the independent counsel, due to some decisions that have been made? You are familiar over there. Some of them I am sure are your friends. Some of them are my friends. Do they need to regain a measure of credibility? Have they lost a measure of credibility over the last few years without necessarily getting into a lot of detail, if you don't consider that to be an unfair question?

Mr. DIGENOVA. Well, I don't think it is an unfair question, Mr. Chairman, and I tell you, I think all of us have to be aware of how the Department feels about itself. I don't want to get too touchy-feely here, but the truth is you are dealing with a core bureaucracy of career prosecutors who, for the most part, are fundamentally sound, good people, who spend their lives dedicated to Federal law enforcement. And they do a good job.

What the statute did over a period of time—and, remember, there are two constituencies inside the Department. There are people who love this statute in the Department because it gets them out of politically sensitive cases and out of the sight in the gun of people who want to oversee cases like this and criticize the Department for not going with it. There are people inside the Department who hate the statute because they view it as an insult to their integrity and their ability to investigate certain types of crimes.

I know both of those camps. I knew them when I served as U.S. attorney, and I knew them when I was an independent counsel, and I know them as a defense attorney.

The Department over the years, I think, has suffered an erosion of confidence in itself as a result of the existence of the statute, and I think there has developed some ingrained feelings inside the Department and pro and con. There are camps inside the Department about this statute.

I think some of those things have come out in the press. You have seen some of the stories in *The Washington Post* and *The New York Times* about the differences of opinion that have come at the highest level within the Department in terms of interpreting the Independent Counsel Statute.

I think that the Congress could do nothing better than to reinvigorate the Department in a meaningful way by demonstrating its continued confidence in their ability to do their job.

Now, I can't account for the fact that members, individual members may not have that confidence because of what they perceive to be the performance of the Department. I think the Department has to prove itself every day in the way it does its job, just like anybody else does who is doing a job. But I do think that the statute has led to an erosion of confidence, I think unjustifiably, in the ability of the Department and its career prosecutors to investigate very sensitive cases.

I have several matters with the Department right now at my firm. I have the utmost confidence in those people to be fair. If some of those matters get into the area of an independent counsel, everything changes. The entire ball game changes when it is a high-profile person. All of the calibrations are different. All of the decisionmaking is different.

It shouldn't be that way. It wasn't when I was an independent counsel, and it wasn't when these two gentlemen were independent counsels. But human nature being what it is, I think the Department has felt harmed by the existence of the statute, and I think that—well, let me say something also about what Senator Levin said because it fits right into what you are saying.

Senator Levin—and I am sorry he isn't here—proposed or threw out an idea that one of the things if we re-enacted the statute would be to have a requirement that—or if it was just the Attorney General appointing someone, that this person would have to file a report with the Attorney General and then a report with the committees.

The minute you start doing stuff like that, you start to destroy the independence of prosecutors. I don't think it is important for Congress to be able to get prosecution memos, for example. I agree with the Attorney General. She should never turn over a prosecution memo, and I agree with Judge Bell when he said he would never do it. And I would go to contempt if I were an Attorney General on that, and I would win.

That is not to say that Congress should not conduct excellent, intrusive oversight, in fact, and apropos of Senator Specter's concerns, whether or not oversight is effective or not is really a question for the members of any committee to decide how far they want to go and how far they want to push something.

But the Department has a morale problem as a result partially of the existence of the statute. Whether or not it has a morale problem for other reasons, I don't know and I am not competent to tell this Committee. But the death of this statute would not be a cause for dismay within the ranks of career prosecutors at the Department, and I understand that and I stand with them in that regard because I, again, believe that this statute is a very bad idea because it basically says we can't trust certain people. That is not to say that there are not instances in which a special counsel should be appointed, as was done in Teapot Dome, as was done in the tax fraud scandal, as was done in Watergate, and as was done at the beginning of Whitewater. All of that is handled.

Chairman THOMPSON. Thank you very much. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman. Picking up on the question as to who ought to be covered by the statute, Mr. von Kann, you were independent counsel for Eli Segal. It seems to me

that prominent as Mr. Segal was, he was not closely connected to the Attorney General. Is there really a need to have independent counsel in a matter of that sort?

Judge VON KANN. I think not. But it must be remembered he was covered by the act not because he ran the Americorps program but because he had run the Clinton-Gore campaign. It was in that capacity that he was covered. And under the statute, once the President was elected and he was appointed to something, his coveredness went with it. I think that is well worth re-examining. Whether campaign officials should be included is debatable, but it had nothing to do with his running of the campaign.

Senator SPECTER. Well, we are looking for some rational basis to make a determination as to who would be so close to the Attorney General or the Department of Justice that there is a conflict of interest.

Mr. Christy, with Hamilton Jordan, he was very close to President Carter, but is there any reason to believe that the investigation of Mr. Jordan couldn't have been conducted by the Department of Justice?

Mr. CHRISTY. My own opinion is that the Department of Justice should have thrown it out right in the beginning. But they didn't. They made the decision that he was chief of staff; it was alleged that he had committed a crime, and, therefore, automatically we appoint a special prosecutor.

Senator SPECTER. Well, if they weren't wise enough——

Mr. CHRISTY. I think, if I could just continue, when I got the case and began to look at it, I wondered could I or did I have the guts to decline prosecution, and I concluded that having recently been appointed special prosecutor, the Attorney General having not thrown the case out, I better go ahead and investigate. But I don't think it was worthy of investigation, no.

Senator SPECTER. Well, you are talking about the merits of the case, and I admire your decision and your forthrightness and to call it as you saw it. I am looking at a little different aspect, and that is, Hamilton Jordan is a key man in the President's administration. But he doesn't consort with the Attorney General. He doesn't really have a relationship with the Attorney General like the President does or the Vice President does. I am looking for some rational basis for making a categorization if we are going to keep the statute as to limiting the number of covered people.

Mr. CHRISTY. Well, actually, Mr. Jordan did have a fair amount of contact with the Attorney General, as I recall it. But whether or not if you re-enact the act to include the President's chief of staff, I am not sure that I——

Senator SPECTER. OK.

Mr. diGenova, how about your investigation? Was that one which should have called for independent counsel, or could the Department of Justice have handled that?

Mr. DIGENOVA. Well, I think the Department of Justice could have handled it. I don't think there is any question about that. I do not believe that it was—even though some of the people who were being investigated were working in the White House, I do not believe that the Justice Department was incapable of doing that. I think career prosecutors working with FBI agents would have

been able to investigate the matter as well as I did and would have concluded the matter exactly the way I did.

But I also understand that—my position, of course, is that the statute should be abolished and allowed to die, and that if there are instances like this, I would have been fine if the Attorney General had said, look, this involves too many people at the White House that I meet with regularly at Cabinet meetings, I think we ought to just have a special counsel under the regulatory rules that I have and let them investigate this. That would have been fine as well, even if the statute hadn't existed.

I think an Attorney General could have honestly looked at my set of facts and said that he or she had a conflict of interest with the people who were under scrutiny.

Senator SPECTER. I would think it would require something more than meeting with them or knowing them, some much closer relationship. If you are the appointee of the relationship, that is something very different than if you meet people.

When I was district attorney, I indicted people who were in the political system of my party. We are searching for a standard. I think it might be useful, and we can pursue this independently, to really survey all of the independent counsel and get the specifics as to whether they felt those individuals required independent counsel because you have got to know those people a lot better than we can simply to know the title, and similar where Mr. Christy knows Mr. Jordan much better, having investigated him, to get an idea as to whether he really had a conflict of interest, so we can screen through and try to find some standard in the event we intend to reauthorize.

Chairman THOMPSON. Or, even if there was a conflict with the Attorney General, whether or not with the lower-level person the Attorney General could recuse herself and let someone else take that on, but still keep it within the Department.

Judge VON KANN. If I might, Senator Specter, I think all of us favor—at least Mr. Christy, and I, and probably Joe—if the law were to be reenacted, greatly reducing the number of people who are covered. I favor drawing the line at the President, the Vice President, and members of the Cabinet, but I would say it is difficult to do it, I think, sometimes just on the basis of one's position.

You asked me do I think there was a need to have an independent counsel for Mr. Segal, and I think the answer is no, but it should be noted, Mr. Segal was a longtime friend and close friend of the President. He was known to be such within the administration. He continued to serve as assistant to the President, working out of the White House on occasion while he was also running the Americorps program. It is sometimes difficult to classify these things by position.

There are instances in which individuals are well recognized within the administration, despite the particular post they are holding, as being extremely close to the President, and that makes it a bit more difficult, I think, to say, "Well, that person clearly does not need an independent counsel. Look at the job he has got." Well, sometimes the job is not as important as the relationship.

Senator SPECTER. Or, being close to the President, of course, is fundamentally different than being appointed by the President.

Let me ask you the question, gentlemen, each of you, as to a limited tenure. What do you think of the idea to limit the tenure of independent counsel to the life of a grand jury to be extended only on a showing of cause? Mr. diGenova.

Mr. DIGENOVA. Senator, I would be opposed to that because, as I have said earlier, I think it invites dilatory tactics.

As opposed to the tenure, if you mean someone else would then be appointed to continue the investigation, that would be wasteful, but I think to impose a limitation which we do not in other Federal criminal investigations of 18 months to reach a decision would invite the kind of tactics which have been complained about in recent years.

Senator SPECTER. But how about if you had a full-time requirement?

Mr. DIGENOVA. Well, I think if you have a full-time requirement, you may not be able to get the kind and caliber of people you want to take the jobs. I think being paid $50 an hour for some of us who have been out of law school for $30 is not quite what I would consider appropriate, but, nonetheless, I continue to practice law.

Senator SPECTER. We might modify the rate of pay.

Mr. DIGENOVA. You could, but Congress decided that it thought it was paying independent counsel too much 10 years ago. They did not like what people were making.

It seems to me if you are going to do that, if you are going to make somebody resign from a law firm and give up a very lucrative practice to do something in the public good—and there are those who say, "Well, fine, if you are going to take this job, then you have to take standard government pay"—I think modifying pay in those circumstances might be a good idea, but, again, remember, I do not think the statute should be saved, but if you are going to save it, then you are going to have to figure out a way to pay quality people. People are not going to give up their law practices to do these jobs. They are just not going to do it.

Senator SPECTER. I think you may be wrong about that. Some might not, but I think many might.

Mr. DIGENOVA. Well, it——

Senator SPECTER. Let me finish.

You might get senior lawyers who are near retirement. I think we have a big pool of lawyers who could do a competent job, and when you talk about the——

Chairman THOMPSON. They never retire, though.

Senator SPECTER. When you talk about the time of an investigation, I think 18 months comprehends probably more than 95 percent of investigations.

Mr. DIGENOVA. Senator, I will only say this. I have been a U.S. Attorney. I have been an advisor to the Attorney General. I have been an Assistant U.S. Attorney. I have been an independent counsel. Now I am a defense attorney. And I have got to tell you something. There is nobody who can tell you how long an investigation is going to last anymore.

What has happened in Federal criminal law with the evolution of the vast powers Congress has given to prosecutors, it is that they can dig and dig and dig, and this process can be 3, 4, and 5 years, without the blink of an eye.

Senator SPECTER. Well, Mr. diGenova, I am not totally without experience in the field, and I think 18 months is good enough for 95 percent of the cases, but if you have not found it in 18 months, it might be a good time just to wrap it up.

I had grand juries on municipal corruption which had a life of 18 months. I had grand juries on drugs. I had grand juries on police corruption. I ran three major grand juries, a year and a half each, and what you cannot find in a year and a half, perhaps you ought to forget about.

Mr. DIGENOVA. Senator, there are very few prosecutors in this country who were as good as you were. There is no question about it.

Senator SPECTER. Well, I was not part time.

What do you think, Mr. Christy? Is 18 months a generalization long enough?

Mr. CHRISTY. No. I do not. I think that if you want to say 18 months and then come back and tell us why you need another 18 months and another 18 months, that might work, but I do not think you can put an arbitrary time limit on it. It just does not work that way.

Senator SPECTER. I was Assistant Counsel to the Warren Commission who investigated the assassination of President Kennedy, and they brought in an outside team of 12 lawyers, 6 seniors and 6 juniors, and they told us the investigation was going to be done in 3 months. We got an extension.

We started in early January, and we finished in September. That was not a small case, but we were under pressure to finish it, and we finished it.

What do you think, Mr. von Kann? I do not have to defend the Warren Commission results here, which I am prepared to do, but not at this particular hearing.

Chairman THOMPSON. Still doing that?

Senator SPECTER. Not at this particular hearing.

Judge VON KANN. Well, Senator, I think I am your only ally on the time limit. Earlier I did indicate I favor——

Senator SPECTER. Well, that is one more than I usually have, Mr. von Kann.

Judge VON KANN. Well, I favor a time limit. I had suggested 12 months with two possible 6-month extensions, a total of 24 months. Obviously, these numbers are somewhat arbitrary.

I think Joe's point is well taken that there are difficulties, and sometimes someone can be very obstructive and drag the process out, but just a couple of quick responses. I do not want to continue the debate unduly.

We do have time limits on prosecutors in various settings. Under the Speedy Trial Act, we have time limits for bringing a case, when someone is preventively detained, there are time limits for bringing a case.

And the reason I think some of these independent counsel investigations have gone on so long is that there is not an effective time limit, and if there were one and a counsel were having difficulty with someone, I find that courts when they know there is a deadline can handle things pretty expeditiously. They schedule an expe-

dited hearing, they get that case in quickly and they rule, and the matter proceeds.

I think if courts, particularly those who were conscious of the Independent Counsel Statute, realized that the counsel had 7 more months to complete his or her investigation, someone is dragging it out, I think if Joe went to court, he would get some pretty speedy results.

So I think it is doable within limits, and in my view, having some limits is better than letting it sort of drag on forever.

Senator SPECTER. Mr. von Kann, the examples you cited were good, and we legislated time limits on habeas corpus cases. You can get an extension, but we have very tight time limits there in accordance with the general philosophy of making it a priority.

Let me ask one more question because the time is going.

Chairman THOMPSON. The light is off. We can be informal here, if it is all right with you.

If I might just come in on that particular point, I am sitting here thinking about what you are saying. It seems to me that another one of the reasons why it takes so much time in some of these cases is because they are so high profile.

What we are doing is narrowing the number of people down to the highest-profile cases, highly politically charged. The prosecutor and independent counsel reputation is on the line. The press is going to judge him or her, usually, on those kinds of cases whether or not they get somebody, all those kinds of things.

I can just see now, if you impose a time limit on top of that, you are going to have every report in with: "Well, we could have perhaps done better and gotten more if they just had not run the clock out on us."

Judge VON KANN. Well, that is possible, although I think you said earlier that the problem has been mainly with independent counsel handling the highest-profile cases. Recently, that has been true, but I think we have to remember, there were two independent counsel investigations of Attorney General Meese, who was a very close friend of the President and a very powerful figure in that administration. In both cases, the independent counsel conducted it quickly, declined prosecution. There were no serious challenge to those decisions by Jacob Stein and James McKay.

There was then an investigation by Whitney Norris Seymour of Michael Deaver who was chief of staff to President Reagan and a very close friend of the President's. In that case, there was an indictment. All of those counsel conducted it without any serious challenge to the——

Chairman THOMPSON. The problem with that is kind of like some of the economic analysis that we get that behavior has not changed regardless of what we do. The question is whether or not these subjects would have changed their behavior had they known that there was a time limitation——

Judge VON KANN. Possibly.

Chairman THOMPSON [continuing]. On their activity.

I just think in terms of the President, for example, all he has to do is exert a couple of legitimate executive privilege claims and run those all the way up to Supreme Court and back.

Judge VON KANN. There is no perfect solution to many of these issues, and does a time limit have some problems? Yes.

Is it worth thinking about when we have investigations that have been running 7 and 9 years? Yes.

Chairman THOMPSON. Sure. Senator Specter, do you have anything further?

Senator SPECTER. I want to touch on one more subject, really the core issue about judicial review where you have an abuse of discretion.

We have been looking at campaign finance reform and the contributions in the Chinese matters and the super abundance of investigation. We talked about FBI Director Freeh's dissent and Mr. Labella's dissent. We prepared a complaint in Mandamus which documents the matter.

There is a real issue as to whether there is standing, even if you had the Judiciary Committee in full behind it, but we could give standing. There is standing for a majority of the majority or a majority of the minority of either Judiciary committee in either house to get a response from the Attorney General.

What would you think about having judicial review an umpire? Mr. von Kann, let's start with you on that one.

Judge VON KANN. I would have some real concern about that because I think that it is a pretty fundamental principle that a prosecutor must have discretion to decline prosecutions, and I think as Judge Bell talked about earlier, the general consensus is that courts do not have authority to order a prosecutor to institute a prosecution.

It seems to me, there are two responses to the issue you raise. One is public outcry. If there is a serious dispute about the Attorney General's decision to decline prosecution in a particular case, I think that will eventually find its way into the political process. That may be a better way of handling it.

Another possibility which I think could be at least considered, rather than having the issue of Mandamus mandamusing the Attorney General, there might be a possibility, I suppose, of allowing the decision about whether or not to institute a prosecution in some cases to be made by the court, by the Special Division, based upon certain statutory standards.

Courts do in some instances decide whether or not to appoint a receiver to run a branch of government, which is something we see from time to time. People petition and say that the Department of Housing is a disaster and a receiver needs to be appointed to take over and run it for a time. There are instances in which courts will receive petitions to do extraordinary things.

It might be possible to build into the statute a provision of that sort. The notion of second-guessing the exercise of prosecutorial discretion by the Attorney General, I have quite a bit of trouble with.

Senator SPECTER. Well, there are a number of States which have statutory provisions where on application of the court, the public prosecutor may be replaced for the purpose of that prosecution on the ground of abuse of discretion, which is a little different from a Mandamus action, but pretty close.

When you talk about the political process, it is complicated now because you cannot really focus on campaign finance reform in the context of an impeachment proceeding, but we were working on it all during 1997, this Committee, and found an avalanche of evidence, and then not only on campaign finance reform, but the Chinese contributions. And there was a tremendous amount of political pressure brought to bear. How much more can you get than the special counsel whom the Attorney General brings in from San Diego, or how much more political pressure can you get than the director of the FBI? It just did not work.

At some point, there has got to be a safety valve, and traditionally, we go to the courts as a safety valve. What do you think, Mr. Christy?

Mr. CHRISTY. I do not know that you have any other alternative but to go to the courts, if you find yourself in that situation.

Senator SPECTER. Well, we have found ourselves there. We have found ourselves with oversight hearings and have propounded the questions and have been on the issue of issue ads versus advocacy ads, and we have been on the issue of delegating the authority under a memorandum of understanding to the Federal Election Commission. We asked the Attorney General. This is a penal provision, the Department of Justice—the Attorney General is the only one who has law enforcement responsibilities, not the Federal Election Commission, and she said we are deferring to them.

Mr. diGenova, what do you think?

Mr. DIGENOVA. Senator, if I were the Attorney General, I would resist your writ of prohibition with every ounce of power and strength I had in my body. I believe it would be an unconstitutional usurpation of executive functions.

The power to decide whether or not to prosecute is one of the single most core functions of the Executive Branch. To suggest that a court could order, an Article III court could order an executive official to bring a case because the court disagreed with the discretionary judgment not to bring the case would, I think, be a profoundly unconstitutional act.

Senator SPECTER. But, Mr. diGenova, how can it be a core executive function to decide whether or not to prosecute the executive?

Mr. DIGENOVA. How can it not be?

Senator SPECTER. Well, the executive cannot be given the authority to decide whether he/she should be prosecuted.

Mr. DIGENOVA. But the executive is given that authority under the Constitution. That is not a judicial function, and it is not a legislative function. The legislature does not have a right to conduct grand juries. The judiciary supervises grand juries, but does not conduct them.

My suggestion, Mr. Chairman, is I think you may be in a catch-22. It may very well be that notwithstanding the conduct of Executive Branch officials at this point in our history, with which you and other Members of the Committee and Congress are perhaps justifiably frustrated, there may be absolutely nothing you can do.

Chairman THOMPSON. I have another suggestion, that we exercise the power that the Constitution gives us——

Mr. DIGENOVA. You could impeach.

Chairman THOMPSON [continuing]. And the power of the purse and the power of appointment which would create a political firestorm that we would need to be prepared and have the courage enough to stand up and fight, but I am sympathetic with Senator Specter's dilemma because it is my dilemma, too, and we have talked about it a whole lot.

As I give it thought, getting back to the basics of perhaps what we need to do, there is no easy way out for us. We, as Congress, need to step up to the plate and exercise the clear constitutional authority and power that we have and be willing to take that fight to the public.

Senator SPECTER. Well, Mr. Chairman, do we shut down the Justice Department by limiting their appropriations?

Chairman THOMPSON. Well, how we do it and to what extent and where? Those are all questions that we would need to debate.

Senator SPECTER. We do not have to deny confirmation to the nominee for the Criminal Division.

Chairman THOMPSON. Because there has not been one, but there are other appointments.

Senator SPECTER. Nobody has been submitted. We do not have to turn down that nomination.

Chairman THOMPSON. There are other appointments. I mean, we could do it, not to mention judgeships.

Senator SPECTER. We are not doing too bad a job on that as it is. [Laughter.]

Mr. DIGENOVA. Mr. Chairman, you actually made the point which is that Congress has obviously several levers at its disposal which is, of course, the advice and consent process, the appropriations process, the reauthorization process, all of which provide opportunities for Congress to exercise legitimate——

Chairman THOMPSON. Yes. I said power of appointment. That is, of course, what I was referring to.

Mr. DIGENOVA. Absolutely, yes, and I agree with you. I think that would be, in the political and constitutional arena, the proper place for Congress to play its role.

Senator SPECTER. I believe we have some authority beyond. I categorically disagree with your assertion, Mr. diGenova, and I do not do this often with you, that it is not a core executive function to decide not to prosecute the executive, but that is a fairly narrow area of disagreement.

Thank you, Mr. Chairman.

Chairman THOMPSON. On that happy note, gentlemen, thank you very much. I sincerely appreciate the contribution that you have made to this area of the law, as well as your contribution today. Thank you very much.

Mr. DIGENOVA. Thank you, Mr. Chairman.

Chairman THOMPSON. We are adjourned.

[Whereupon, at 2:15 p.m., the Committee was adjourned.]

APPENDIX

CRS REPORT FOR CONGRESS BY JACK H. MASKELL, LEGISLATIVE ATTORNEY, AMERICAN LAW DIVISION

June 30, 1988 (Revised February 5, 1992)

The Congressional Research Service works exclusively for the Congress, conducting research, analyzing legislation, and providing information at the request of committees, Members, and their staffs.

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MORRISON V. OLSON: CONSTITUTIONALITY OF THE INDEPENDENT COUNSEL LAW

SUMMARY

The Supreme Court decided in a 7–1 opinion authored by Chief Justice William Rehnquist, that the independent counsel (formerly "special prosecutor") provisions of the Ethics in Government Act are constitutional. In *Morrison, Independent Counsel v. Olson,* 487 U.S. 654 (1988), the Supreme Court ruled that the provisions of law establishing the mechanisms for a court appointment of an independent counsel to investigate and prosecute alleged wrongdoing by high-level Administration officials were consistent with the "Appointments Clause" of the Constitution, did not impermissibly vest an Article III court with non-judicial duties, and did not violate the "separation of powers" doctrine by unduly interfering with the President's constitutional duties and authority in the field of federal law enforcement.

The Supreme Court, in a 7–1 decision, upheld the independent counsel (formerly "special prosecutor") provisions of the Ethics in Government Act of 1978[1] against constitutional challenges. The opinion of the Court, authored by Chief Justice Rehnquist, reversed a split 2–1 United States Court of Appeals panel decision which had earlier found the law unconstitutional.[2]

In *Morrison, Independent Counsel v. Olson,* 487 U.S. 654 (1988), the Supreme Court found that the provisions of the Ethics in Government Act which establish the mechanism for appointing an independent counsel by a special court to investigate allegations of criminal wrongdoing by certain high-level Administration officials did not violate "separation of powers" principles and did not unduly interfere with the President's constitutional duties in the field of law enforcement. The independent counsel provisions of the Ethics in Government Act were adopted to ensure the impartial pursuit of justice and to avoid real and apparent conflicts of interest

[1] P.L. 96–521, Title VI, as amended by P.L. 97–409 and P.L. 100–191; see 28 U.S.C. § 591 *et seq.*

[2] *In re Sealed Case,* 838 F.2d 476 (D.C. Cir. 1988). The United States District Court for the District of Columbia had uphold the law against constitutional challenges. *In re Sealed Case,* 665 F.Supp. 56 (D.D.C. 1987); see also *Deaver v. Seymour,* 656 F.Supp. 900 (D.D.C. 1987); *North v. Walsh,* 656 F.Supp. 414 (D.D.C. 1987); *In re Olson,* 818 F.2d 34 (D.C. Cir. Division for the Purpose of Appointing Independent Counsels 1987).

which may arise in an investigation and a criminal prosecution by an Administration of itself and its own high ranking officers in the executive branch of government.[3]

The independent counsel law is, "triggered" when the Attorney General receives specific information from a credible source sufficient to constitute grounds to investigate alleged violations of federal criminal law by certain officials. 28 U.S.C. §§ 591, 592.[4] After a "preliminary investigation" by the Attorney General of the allegations, the Attorney General may request and petition for the appointment of an independent counsel by a "Special Division" of the United States Court of Appeals. 28 U.S.C. § 592. The Special Division selects the independent counsel and establishes his or her "prosecutorial jurisdiction". 28 U.S.C. § 593. The independent counsel then pursues the relevant legal matters independent from day-to-day control of the Attorney General or the President (28 U.S.C. § 594), and is removable from office by the Attorney General only for "good cause". 28 U.S.C. § 596.

The Supreme Court found that this statutory scheme of the Ethics in Government Act was consistent with the "Appointments Clause" of the Constitution, did not impermissibly vest an Article III court with non-judicial duties, and did not violate the "separation of powers" doctrine by impermissibly interfering with the President's constitutional duties.

This case arose in the context of an investigation being conducted by Independent Counsel Alexia Morrison into allegations of false testimony by a former Department of Justice official with respect to a congressional probe of the Environmental Protection Agency's "Superfund" program. The legal issues "ripened" when the former Justice Department official, former Assistant Attorney General Theodore Olson, and two former colleagues from the Department, refused to honor a subpoena obtained by the independent counsel and were held in contempt of court.

APPOINTMENT OF INDEPENDENT COUNSEL

The Supreme Court held that the appointment of the independent counsel by the Special Division of the United States Court of Appeals was consistent with the "Appointments Clause" of the Constitution. The Appointments Clause provides, at Article II, Section II, clause 2, that the President, by and with the advice and consent of the Senate, shall appoint all officers of the United States, except that Congress may by law vest the appointment of "such inferior Officers, as they think proper," in the President alone, "in the Courts of Law," or in the heads of departments.

The independent counsel, found the Court, is clearly an "inferior officer" whose appointment may be vested by statute in "the Courts of Law". Although declining to set out a specific line of demarcation for an "inferior" officer versus a principal officer of the United States, the Court noted that the characteristics of the office of independent counsel establish that the independent counsel, even though she exercises significant discretion and independent authority, "clearly falls on the 'inferior officer' side of that line." 487 U.S. at 671. The factors the Court noted in making that characterization were: (1) the independent counsel "is subject to removal by a higher Executive Branch official"; (2) the independent counsel is empowered by law to perform "only certain limited duties"; (3) the office is "limited in jurisdiction"; and (4) the office "is limited in tenure." *Id.* at 671–672.

The Supreme Court, unlike the Court of Appeals earlier, found no inherent constitutional difficulty with an "interbranch" appointment of an inferior officer, that is, an appointment by the judicial branch of an executive officer. The "excepting clause" within the Constitution's Appointments Clause gives to Congress "significant discretion to determine" whether it is "proper" to make such interbranch appointments, and the language of the excepting clause itself "admits of no limitation on interbranch appointments." 487 U.S. at 673.

The power of Congress to provide by law for interbranch appointments of inferior officers would not be unlimited, however, and past case law has found that such authority would be improper when the appointment created an "incongruity" within the functions of the appointing body. *Ex parte Siebold,* 100 U.S. 1371, 398 (1880).

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[3] For general background note CRS Report No. 87–192A "Legislative History and Purposes of Enactment of the Independent Counsel (Special Prosecutor) Provisions of the Ethics in Government Act of 1978", May 4, 1987.

[4] Certain federal officials come "automatically" within the coverage of the independent counsel provisions. These are officials for whom an inherent conflict of interest was deemed to be present or most potentially present if an investigation of them by the Attorney General, controlled by the President, were to be initiated, such as the President himself, the Vice President, the Attorney General, the President's cabinet, etc. See 28 U.S.C. § 591(b). The Attorney General may, however, request an independent counsel for any person if the Attorney General believes that an investigation by him or the Justice Department would constitute a "personal, financial, or political conflict of interest". 28 U.S.C. § 591(c).

The Supreme Court found no such "incongruity" in the case of the court appointing the independent counsel, as courts of law have experience, "special knowledge and expertise" in the area of criminal prosecution (487 U.S. 676, n.13), and in the past have had the recognized authority to appoint "special prosecutors" for criminal contempts of court (*Young v. United States ex re. Vuitton et Fils S.A,* 481 U.S. 787 (1987)), and to make interim appointments of United States Attorneys for prosecuting crimes (*United States V. Solomon,* 216 F.Supp. 835 (S.D.N.Y. 1963)). Since the judges involved in the Special Division's appointing of an independent counsel may not participate in any matter involving an independent counsel they have appointed (28 U.S.C. § 49f), no imposition on the court of "Incongruous" duties was found. The Supreme Court stated, in fact, that since the executive branch is to be disqualified by law because of conflict of interest principles from exercising authority to appoint a person to investigate and prosecute certain of its own high ranking officers, "the most logical place to put it was in the Judicial Branch." 487 U.S. at 677.

NON-JUDICIAL DUTIES IN AN ARTICLE III COURT

It has long been established that the judicial power of the courts of law is limited to "cases" and "controversies" (*Muskrat v. United States,* 219 U.S. 346, 356 (1911)), and that executive duties of a "nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution" (*Buckley v. Valeo,* 424 U.S. 1, 123 (1976), citing *United States v. Ferreira,* 13 How, 40 (1862); *Hayburn's Case,* 2 Dall. 409 (1792)), so as to prevent the judicial branch "from encroaching into areas reserved for the other branches." 487 U.S. at 678. In the case of the independent counsel provisions, the Supreme Court found that there can be "no Article III objection" to the power of the Special Division of the court to appoint an independent counsel, since that authority is expressly derived from the Appointments Clause in Article II of the Constitution, "a source of authority that is independent from Article III." *Id.* at 678–679. A logical "incident" of that appointment authority in Article II is the power of the court to define for that appointee the "nature and scope of the official's authority," that is, the independent counsel's prosecutorial jurisdiction. *Id.* at 679. The Supreme Court noted, however, that the Special Division's discretion in defining the independent counsel's prosecutorial jurisdiction is not to be considered unlimited, but that it must be truly "incidental" to its power to appoint:

> [T]he jurisdiction that the court decides upon must be demonstrably related to the factual circumstances that gave rise to the Attorney General's investigation and request for the appointment of the independent counsel in the particular case. 487 U.S. at 679.

Most of the other functions and duties imposed on the court by the Ethics in Government Act were described by the Supreme Court as "essentially ministerial" and of no constitutional consequence, since they did not allow in practice for the Special Division to "supervise" or control the independent counsel's investigation or prosecution, and so do "not encroach upon executive or legislative authority." 487 U.S. at 680–681. The Court, however, did urge the Special Division not to attempt to go beyond its specific, narrow statutory authority so as to avoid the potential for "serious constitutional ramifications" and "transgressions of constitutional limitations of Article III." *Id.* at 684–685.

The one remaining authority of the Special Division that troubled the Supreme Court was the power of the court to terminate the office of the independent counsel. 28 U.S.C. § 596(b)(2). Seeking to interpret the statute "in order to save it from constitutional infirmities," the Supreme Court read a circumscribed power of termination into the Special Division's statutory authority to "occur only when the duties of the counsel are truly 'completed' or 'so substantially completed' that there remains no need for any continuing action by the independent counsel." 487 at 682–683. The Court explained the nature of such power:

> It is basically a device for removing from the public payroll an independent counsel who has served her purpose, but is unwilling to acknowledge the fact. So construed, the Special Division's power to terminate does not pose a sufficient threat of judicial intrusion into matters that are more properly within the Executive's authority to require that the Act be invalidated as inconsistent with Article III. 487 U.S. at 683.

The Court concluded that the exercise of powers by the Special Division also does not pose any threat to the "impartial and independent federal adjudication of claims." 487 U.S. at 683, quoting *Commodity Futures Trading Commission v. Schor,* 478 U.S. 833, at 850 (1986). The Special Division, and its judges, in the opinion of the Supreme Court, are "sufficiently isolated" by the statutory provisions from re-

view of the actions of the independent counsels "so as to avoid any taint of the independence of the judiciary." 487 U.S. at 684.

SEPARATION OF POWERS

1. "Good Cause" Removal

It had been argued that since the independent counsel is removable by the Executive, through the Attorney General, only for "good cause", that such statutory limitation imposed by Congress on the President's "at will" removal authority of an officer who is exercising purely executive functions unduly interferes with the President's constitutional duties and prerogatives, and so violates separation of powers principles. The Supreme Court, however, rejected that argument, and distinguished earlier "separation of powers" cases in *Bowsher v. Synar,* 478 U.S. 714 (1986), and *Myers v. United States,* 272 U.S. 52 (1926), as dealing with attempts "by Congress itself to gain a role in the removal of executive officials". 487 U.S. at 686. No attempted aggrandizement of congressional power over removal of executive branch officials was seen to be at issue in the independent counsel law.

In upholding the standard of "good cause" removal of the independent counsel in this case the Supreme Court re-affirmed and expanded on the line of cases in *Humphrey's Executor v. United States,* 295 U.S. 602 (1935), and *Wiener v. United States,* 357 U.S. 349 (1958), where the Supreme Court had found that the Constitution does not give the President "illimitable power of removal" over independent agency officials (*Humphrey's Executor, supra* at 630), and that "no such power" of unlimited at-will removal authority "is given to the President directly by the Constitution." *Wiener, supra* at 356. The Supreme Court in *Morrison* found that officers allowed to be provided certain statutory protections and independence from at-will removal by the President need *not* necessarily be performing quasi-legislative and quasi-judicial functions such as officials of independent regulatory agencies (as in *Humphrey's Executor*), and that such "good cause" removal standard may apply to officers who are in fact performing "core" or purely executive functions. 487 U.S. at 689–690.

The test that the Supreme Court used is not simply whether the functions of the officer involved are "purely" executive, but rather whether or not the limiting of the removal authority of the President "impede[s] the President's ability to perform his constitutional duties". 487 U.S. at 691. The restriction on the President's unfettered removal prerogatives in the independent counsel law do not unduly interfere with the President's constitutional authority to "take Care that the Laws be faithfully executed" (Article II Section 3), found the Court, since the "good cause" standard for removing the independent counsel is in itself sufficient to allow the President to ensure that the laws are being faithfully executed:

> This is not a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the "faithful execution" of the laws. Rather, because the independent counsel may be terminated for "good cause," the Executive, through the Attorney General, retains ample authority to assure that the counsel is competently performing her statutory responsibilities in a manner that comports with the provisions of the Act. 487 U.S. at 692.

2. Interference With Executive Functions

The Supreme Court ruled that the independent counsel provisions of the Act, taken as a whole, did not violate the separation of powers principles as unduly interfering with the role of the executive branch. The Court reemphasized the "importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches" in establishing what the Framers regarded as the "self-executing safeguards" of "separated powers and checks and balances" that would protect against the "encroachment or aggrandizement of one branch at the expense of the other". 487 U.S. at 693, citing *Bowsher v. Synar, supra* at 725; *Buckley v. Valeo, supra* at 122. The Court noted, however, that "we have never held that the Constitution requires that the three branches of Government 'operate with absolute independence'." 487 U.S. at 693–694; *United States v. Nixon,* 418 U.S. 683, 707 (1974); *Nixon v. Administrator of General Services,* 433 U.S. 425, 442 (1977).

The Court found that in the case of the independent counsel law, there was "not an attempt by Congress to increase its own powers at the expense of the Executive Branch." 487 U.S. at 694. Similarly, there was no usurpation of executive power and functions by the judicial branch. It was emphasized by the Supreme Court that under the statutory scheme:

> [T]he Special Division has no power to appoint an independent counsel *sua sponte;* it may only do so upon the specific request of the Attorney General, and the courts are specifically prevented from reviewing the Attorney Gen-

eral's decision not to seek appointment, § 592(f). In addition, once the court has appointed a counsel and defined her jurisdiction, it has no power to supervise or control the activities of the counsel. 487 U.S. at 695.

The Court ruled in conclusion that the Act does not impermissibly undermine the powers of the Executive Branch (*Schor, supra* at 856), nor "disrupt[ ] the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions. *Nixon v. Administrator of General Services, supra* at 443." 487 U.S. at 695. The Court recognized that some diminishing of executive control over the independent counsel and her investigation and prosecution was inherent in the law because of the required independent nature of the office to comport with the purposes of the law to avoid conflicts of interest in law enforcement. However, the Court found that such independence did not unduly interfere with the President's ability to "perform his constitutionally assigned duties", as the President and the Attorney General retained sufficient "control" and "supervision" over the independent counsel process by: (1) allowing the Attorney General to remove the independent counsel for "good cause"; (2) providing that no independent counsel may be appointed except upon the specific request of the Attorney General; (3) providing no judicial review of the decisions of the Attorney General with respect to requesting or not requesting an independent counsel or conducting or not conducting a "preliminary investigation" before requesting an independent counsel; (4) providing that the jurisdiction of the independent counsel is defined "with reference to the facts submitted by the Attorney General"; and (5) requiring the independent counsel, unless not possible to do so, to abide by Justice Department policy. 487 U.S. at 695–696.

Justice Scalia dissented from the opinion of the Court, and would have found that the statute impermissibly changes the separation and "equilibrium of power" that the Constitution established among the three branches of government by depriving the President of "exclusive control" over the exercise of a purely executive function. In dissent, Justice Scalia would have ruled, in addition to the general separation of powers issues, that the independent counsel is a "principal" officer who could not be appointed by a court, and that the restriction of a "good cause" removal does not provide the President with enough control over the exercise of the executive's prosecutorial powers. Particularly troubling to Justice Scalia was the implication of the law to individual targets of an independent counsel investigation, Such persons, it was argued, would not have the advantage that other citizens have of the over-all perspective that a Justice Department prosecutor brings to his duties, because of the competing public interests, policy factors and priorities which such a prosecutor must consider in an investigation, or a prosecution. Rather, an individual target under the Ethics in Government Act is subject to the arguable "distortion" of having a prosecutor and an entire staff whose only function in the government is to investigate and prosecute that one target.

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ABSTRACT

This report provides a brief overview and "walk through" of the statutory mechanisms of the independent counsel law, including the role in the independent counsel process of the Attorney General of the United States, and the special three-judge panel of the United States Court of Appeals. The current independent counsel law has a five year "sunset," and will expire in June of 1999.

INDEPENDENT COUNSEL PROVISIONS: AN OVERVIEW OF THE OPERATION OF THE LAW

Summary

The statutory mechanisms of the independent counsel law are triggered by the receipt of information by the Attorney General of the United States which alleges a violation of any federal criminal law (other than certain misdemeanors or "infrac-

tions") by a person covered by the Act. Certain high-level federal officials, for whom an inherent conflict of interest may exist in normal Justice Department criminal law enforcement, are "automatically" covered by the law. Additionally, the Attorney General has discretion to seek an independent counsel for any person for whom there may exist a personal, political or financial conflict of interest for Justice Department personnel to investigate; and the Attorney General may seek an independent counsel for any Member of Congress (rather than have the Department of Justice conduct the proceedings) when the Attorney General deems it to be in the "public interest."

After conducting a limited review of the allegations (a 30-day threshold examination of the credibility and specificity of the charges, and a subsequent 90-day preliminary investigation, with a possible 60-day extension), the Attorney General, if he or she believes that "further investigation is warranted," applies to a special "division of the court," a federal three-judge panel appointed by the Chief Justice of the Supreme Court, requesting that the division of the court appoint an independent counsel. The Attorney General of the United States is the only officer in the government who may apply for the appointment of an independent counsel. The special division of the court actually selects and appoints the independent counsel, and designates his or her prosecutorial jurisdiction, based on the information provided the court by the Attorney General. The independent counsel has the full range of investigatory and prosecutorial powers and functions of the Attorney General or other Department of Justice employees. Although Congress may call on the Attorney General to apply for an independent counsel by a written request from the House or Senate Judiciary Committee, or a majority of members of either party of those committees, the Attorney General is not required to begin a preliminary investigation or to apply for an independent counsel in response to such a request, but must provide certain information to the requesting committee.

There is no specific term of appointment for independent counsels, and they serve for as long as it takes to complete their duties concerning that specific matter within their defined and limited jurisdiction. Once a matter is completed, the independent counsel is to file a final report. The special division of the court may find that the independent counsel's work is completed, and may terminate the office. A periodic review of an independent counsel for such determination is to be made by the special division of the court. An independent counsel, prior to the completion of his or her duties, may be removed from office (other than by impeachment and conviction) only by the Attorney General of the United States for cause, mental or physical impairment, or other impairing condition, and such removal may be appealed to the court.

The statutory provisions for the appointment of an independent counsel (formerly called "special prosecutor") were originally enacted as Title VI of the Ethics in Government Act of 1978,[1] and are codified at 28 U.S.C. §§ 591–599. The statute "lapsed" due to its five-year sunset provision and the absence of congressional reauthorization by the end of 1992, but was again reauthorized in 1994. The current provisions of the law will expire, if not reauthorized, on June 30, 1999. The mechanisms of the Ethics in Government Act concerning the appointment and the activities of an independent counsel were upheld against constitutional challenges by the Supreme Court in *Morrison v. Olson.*[2]

Background, Operation and Coverage of the Act

The Attorney General of the United States is the only officer designated by statute who may apply for the appointment of an independent counsel.[3] The statutory mechanisms are triggered by the receipt of information by the Attorney General alleging violations of any federal criminal law (other than Class B or C misdemeanors or " infractions") by one of the persons covered by the Act.[4] If, after conducting a limited review of the matter, the Attorney General determines that there are "reasonable grounds to believe that further investigation is warranted," the Attorney

[1] P.L. 95–521, as amended and reauthorized by P.L. 97–409, P.L. 100–191, and P.L. 103–270.

[2] 487 U.S. 654 (1988). For a general discussion of that decision, see CRS Report 92–134, "*Morrison v. Olson:* Constitutionality of the Independent Counsel Law," June 30, 1988, revised February 5, 1992.

[3] 28 U.S.C. §§ 591, 592. The Supreme Court noted that separation of powers concerns raised by the appointment by a court of a prosecutor to perform executive law enforcement functions are mitigated by the fact that an independent counsel may be appointed "only . . . upon the specific request of the Attorney General." *Morrison v. Olson,* 487 U.S. supra at 695.

[4] 28 U.S.C. § 591 (a).

General applies to a special federal three-judge panel requesting that the panel appoint an independent counsel.

The original intent of the Act was to provide a mechanism to avoid the inherent or structural conflicts of interest, or the appearances of conflicts or of "conflicting loyalties," which could arise where the Attorney General or the President must supervise or conduct criminal prosecutions of themselves, or of high level officials or colleagues in the President's Administration.[5] Since under our Constitution, and under our scheme of government with its separation of powers, the executive branch enforces the federal law, the persons automatically covered by the Act were those classes of persons which experience, such as the Teapot Dome and Watergate scandals, indicated could create the greatest potential for inherent conflicts of interest, or of conflicting loyalties, when the executive branch, through its normal enforcement mechanisms, had to conduct a criminal law enforcement activity directed at itself or its high ranking officials.

Persons automatically covered by the Act include (1) the President and Vice President; (2) persons serving in positions listed in 5 U.S.C. § 5312 (cabinet level positions); (3) an individual working in the Executive Office of the President compensated at a rate equivalent to level 11 of the Executive Schedule under 5 U.S.C. § 5313; (4) any Assistant Attorney General, or Justice Department employee compensated at or above a level III of the Executive Schedule under 5 U.S.C. § 5314; (5) the Director and Deputy Director of the C.I.A., and the Commissioner of the I.R.S.; (6) persons holding those positions specified in (1)–(5) for one year after leaving their positions; and (7) the chairman and the treasurer of the national campaign committee seeking the election or reelection of the President, and any officer of that committee exercising authority at the national level, during the incumbency of the President.[6]

In addition to investigating information concerning possible violations of federal criminal law by persons specifically designated or "automatically" covered in the Act, for whom there may exist an inherent conflict of interest in federal law enforcement, the Attorney General also has discretionary authority to request the appointment of an independent counsel for other persons, including specifically Members of Congress. The Attorney General may conduct a preliminary investigation and apply for an independent counsel concerning alleged violations of law by any person not specified in the automatic coverage, if the Attorney General determines that an investigation by him or her, or by other Department of Justice officials, may result in a "personal, financial, or political conflict of interest."[7] This discretionary "catchall" provision was added to the law in 1983 to allow the Attorney General the discretion to apply for an independent counsel even in those circumstances where the official was not "automatically" covered, but where the Attorney General felt that the best interests of justice would call for the appointment of someone independent from the control and authority of the President or from the Attorney General.[8]

The Attorney General is now also expressly authorized to request an independent counsel for a Member of Congress, even if no explicit "conflict of interest" is found or determined under the "catchall" provision of § 591(c)(1).[9] Under a provision enacted in the 1994 reauthorization law, the Attorney General's discretion is broadened,[10] and the independent counsel process may be invoked for a Member of Congress, and a preliminary investigation conducted, upon the finding by the Attorney General that it "would be in the public interest" to do so.[11]

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[5] For a general discussion, see CRS Report 87–192, "Legislative History and Purposes of Enactment of the Independent Counsel (Special Prosecutor) Provisions of the Ethics in Government Act of 1978," March 4, 1987.

[6] 28 U.S.C. § 591(b).

[7] 28 U.S.C. § 591(c)(1),

[8] Note S. Rept. 97–469, 97th Cong., 1st Sess., at 9 (1981).

[9] Members of Congress have not been "automatically" covered by the provisions of the Act since the legislative branch, under the separation of powers principles in the Constitution, does not and may not appoint prosecutors, fire prosecutors (other than by impeachment and conviction), or supervise or control criminal investigations by the Department of Justice or by the United States Attorneys, as do the President and the Attorney General. No "inherent" or structural conflict, therefore, was seen or has been experienced in having the Department of Justice and the United States Attorneys generally continue to investigate and prosecute Members of Congress.

[10] H. Rept. 103–511, 103rd Cong., 2d Sess., at 10 (1994). "It broadens the standards for invoking the process with respect to Members from requiring a conflict of interest to requiring the Attorney General to find it would be in the public interest."

[11] 28 U.S.C. § 591(c)(2). H. Rept. 103–511, *supra* at 10: "This broader standard would allow the Attorney General to use the independent counsel process for Members of Congress in cases of perceived as well as actual cases of conflicts of interest."

Threshold Inquiry/Examination

Once information alleging a violation by a covered federal official is received by the Attorney General, the Attorney General has 30 days from the time the information is first received to determine if a "preliminary investigation" should be conducted.[12] During this "threshold inquiry" period, the Attorney General will examine the sufficiency of the allegations presented to determine if there exist grounds to investigate. The law specifies that in determining the "sufficiency" of the information as to whether grounds to investigate exist, the Attorney General may consider only the factors of "the degree of specificity of the information" and the "credibility of the source of the information."[13] The Attorney General is specifically prohibited during this time, when examining the specificity of charges and the credibility of the source, from dismissing a complaint because he or she determines that the official involved, "lacked the state of mind required for the violation of criminal law."[14]

Preliminary Investigation

If the Attorney General determines during the 30-day period that the allegations received are specific and credible enough, or if no determination is made within the 30-day time limit, then the Attorney General is to conduct a "preliminary investigation." The preliminary investigation must be completed within 90 days, unless a one-time extension of 60 more days is granted by the division of the court upon the request of the Attorney General.[15]

The law provides that "the Attorney General shall conduct . . . [a] preliminary investigation . . . [u]pon receiving information that the Attorney General determines is sufficient to constitute grounds to investigate" that a person covered by the Act has engaged in conduct violative of federal criminal laws;[16] and that "the Attorney General shall, upon making that determination [that the information received is credible and specific enough], commence a preliminary investigation with respect to that information."[17] Although the language of the statute speaks in mandatory terms ("shall conduct" and "shall commence"), two United States Courts of Appeals cases have found that the statutory scheme provides no private right of action for members of the public, and no standing to sue for members of the public, to require the Attorney General to conduct a preliminary investigation.[18]

The purpose of the preliminary investigation is to determine if there are "reasonable grounds to believe that further investigation is warranted."[19] The authority and power of the Attorney General during these preliminary and threshold stages are intentionally limited to prevent extensive participation in substantive decision making by the Attorney General, and so to avoid the potential conflicts of interest at which the law was directed in the first instance. The Attorney General, during the preliminary investigation, is not allowed to convene a grand jury, plea bargain, issue subpoenas, or grant immunity,[20] and may not base a determination that "no reasonable grounds exist to warrant further investigation" on a finding that an official lacked the state of mind required for a crime, unless there is "clear and convincing evidence,"[21] an occurrence which Congress believed would be a "rare case" given the limited investigatory powers of the Attorney General.[22]

One of the factors for the Attorney General to consider in determining whether a matter warrants further investigation is the "written or other established policies of the Department of Justice" concerning the conduct of criminal investigations.[23] This consideration was originally added to the law in 1983, and the language clarified in 1987, to deal with the triggering of the independent counsel provisions in matters which may not have warranted action by the Justice Department under its

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[12] 28 U.S.C. § 591(d)(2).

[13] 28 U.S.C. § 591(d)(1). See S. Rept. 97–496, 97th Cong., 2d Sess., at 11, 12 (1982); S. Rept. 100–123, 100th Cong., 1st Sess., at 15 (1987); see also *Nathan v. Smith,* 737 F.2d 1069 (D.C. Cir. 1984) as to the specifically of the allegations required.

[14] 28 U.S.C. § 592(a)(2)(B)(i). See S. Rept. 100–123, *supra* at 10–11, 18.

[15] 28 U.S.C. § 592(a)(1),(3).

[16] 28 U.S.C. § 591 (a) and (c).

[17] 28 U.S.C. § 59 1 (d)(2).

[18] *Banzhaf v. Smith,* 737 F.2d 1167 (D.C. Cir. 1984); *Dellums v. Smith,* 797 F.2d 817 (9th Cir. 1986); see also *Nathan v. Smith,* 737 F.2d 1069 (D.C. Cir. 1984), at 1077 (J. Bork, concurring).

[19] Note 28 U.S.C. §§ 592(c)(1)(A), 592(a)(1).

[20] 28 U.S.C. § 592(a)(2).

[21] 28 U.S.C. § 592(a)(2)(B)(ii).

[22] See H. Rept. 100–452, 100th Cong., 1st Sess., at 24–25 (1987). See also H. Rept. 103–511, *supra* at 11: "Congress believes that the Attorney General should rarely close a matter under the independent counsel law based upon finding a lack of criminal intent, due to the subjective judgments required and the limited role accorded the Attorney General in the independent counsel process."

[23] 28 U.S.C. § 592(c)(1).

own policies. Congress was expressly concerned with the triggering of the statute during the Carter administration for allegations about certain presidential aides and social cocaine use which, even if true, the Department of Justice, within its prosecutorial discretion, would not have normally prosecuted.[24]

Congressional Requests for an Independent Counsel

A request to the Attorney General to apply for an independent counsel in a particular matter may be made by the Judiciary Committee of either House of Congress, or by a majority of the members of either the majority or non-majority party of those committees.[25] The Attorney General is not required to apply for an independent counsel pursuant to such request, nor is the Attorney General required to conduct a "preliminary investigation" because of such request. The Attorney General must, however, within 30 days after the receipt of the request, report to the requesting committee as to whether an investigation has begun, the date upon which any such investigation began, and reasons regarding the Attorney General's decisions on each of the matters referred. If the Attorney General makes any applications or notifications to the division of the court because of a preliminary investigation of the matter referred to him by Congress, the material shall be supplied to the committee which made the referral. If the Attorney General does not apply for an independent counsel after a preliminary investigation, then the Attorney General must submit a report detailing the reasons for such decision.[26]

Recusal of Attorney General

If the information received under this statutory scheme "involves" the Attorney General or "a person with whom the Attorney General has a personal or financial relationship," then the Attorney General "shall" disqualify or "recuse" himself or herself from the matter, designating the next most senior officer in the Department of Justice to take over the Attorney General's functions under the law.[27] The disqualification should be in writing, stating reasons, and filed with any application or notification submitted to the division of the Court.[28]

Application to the Division of the Court for an Independent Counsel

After the preliminary investigation, if the Attorney General finds "reasonable grounds to believe that further investigation is warranted," or after 90 days if no determination is made, the Attorney General "shall apply" for the appointment of an independent counsel by a special panel of the United States Court of Appeals.[29] The law specifically provides that the Attorney General's determination whether to apply to the special division of the court for an independent counsel "shall not be reviewable in any court."[30]

When the Attorney General applies to the division of the court for an independent counsel, the application must contain "sufficient information to assist the division of the court in selecting an independent counsel and in defining that independent counsel's prosecutorial jurisdiction so that the independent counsel has adequate au-

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[24] See S. Rept. 97–496, *supra* at 3, 15: "In determining whether 'reasonsonable grounds' exist, the bill directs the Attorney General to comply with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws. The Attorney General must justify his decision that a special prosecutor should not be appointed upon a showing to the court that the Department of Justice does not, as a matter of established practice, prosecute the alleged violation of federal criminal law. Alternatively, he may state to the court that it is the practice of U.S. Attorneys for the district in which the violation was alleged to have occurred not to prosecute this violation." In 1987 this provision was clarified to make sure that the Attorney General did not "misuse" the provision to dismiss a matter at this stage when the Attorney General found that the "evidence collected" did not offer a "reasonable prospect of conviction," rather than basing a dismissal on the standard of whether the matter warranted further investigation. See S. Rept. 100–123, *supra* at 11. "Hearings held within the Committee indicate that the Attorney General has misused this provision to justify replacing the statutory standard for requesting an independent counsel . . . with a Departmental policy related to indictments—which asks whether there is a 'reasonable prospect of conviction'." *Id.* at 19.

[25] 28 U.S.C. § 592(g)(1).

[26] 28 U.S.C. § 592(g)(3).

[27] 28 U.S.C. § 591(c)(1).

[28] 28 U.S.C. § 591(c)(2).

[29] 28 U.S.C. § 592(c). As noted, the Senate report in 1987 emphasized that the standard to be used by the Attorney General for determining whether to apply for an independent counsel is whether there exists "reasonable grounds to believe that further investigation is warranted," and not whether the case offered a "reasonable prospect for conviction." See S. Rept. 100–123, *supra* at 11. The Committee noted that the standard concerning the "prospects of conviction" is generally applied by the prosecuting authority at the stage when the prosecutor is considering an indictment, rather than at the early stages of determining whether an independent counsel should be appointed to investigate the allegations made. *Id.* at 11, 18–19.

[30] 28 U.S.C. § 592(f).

thority to fully investigate and prosecute the subject matter."[31] The application and supporting materials may not be released to the public without the approval of the division of the court.[32]

Appointment by Division of Court

The division of the court, which is a panel of three judges from the United States. Courts of Appeals (one being from the District of Columbia Circuit) serving two-year terms on the panel, actually names and appoints the independent counsel, and defines the counsel's prosecutorial jurisdiction upon application and request of the Attorney General.[33] The Senate Report on the 1978 Ethics in Government Act explained that the court appointment of the independent counsel (then called a "special prosecutor") was necessary "in order to have the maximum degree of independence and public confidence in the investigation conducted by that special prosecutor."[34]

Prosecutorial Jurisdiction

As noted, the three-judge panel sets out the prosecutorial jurisdiction of the independent counsel based on the information provided in the request by the Attorney General. The Senate Report on the Ethics in Government Act noted that defining the prosecutorial jurisdiction by the court is an "important part of the responsibility of the . . . court . . . for the control . . . and the accountability of such a special prosecutor."[35] The Supreme Court, in upholding the law against constitutional challenges in *Morrison v. Olson, supra,* noted, however, that because of separation of powers concerns, the court's duties must be merely "ministerial," and that the division of the court's discretion in defining the independent counsel's jurisdiction was thus not unlimited, but "must be demonstrably related to the factual circumstances that gave rise to the Attorney General's investigation and request for the appointment. . . ."[36]

The independent counsel statute provides that the prosecutorial jurisdiction shall be such as to "assure that the independent counsel has adequate authority to fully investigate and prosecute the subject matter with respect to which the Attorney General has requested the appointment of the independent counsel, and all matters related to that subject matter."[37] Furthermore, the independent counsel is to be authorized to pursue so-called collateral matters which "arise out of" the investigation of the original matter, such as "perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.'[38] Matters pursued within the original grant of jurisdiction from the three-judge panel must thus be "demonstrably related" to the subject matter of the Attorney General's request, either in the nature of collateral offenses such as perjury or obstruction of justice which "arise out of" the investigation or prosecution of the original matter, or things which are otherwise "related" to the "subject matter of the Attorney General's original request" for an independent counsel.[39]

Other or new matters may be pursued by the independent counsel either upon a "referral" of "related" matters, or by an "expansion" of the independent counsel's existing prosecutorial jurisdiction. Although the independent counsel may ask the Attorney General or the court to refer matters to him or her which "are related to the independent counsel's prosecutorial jurisdiction,[40] the statute requires that any "expansion" of the prosecutorial jurisdiction of an existing independent counsel be made by the division of the court only "upon the request of the Attorney General . . . and such expansion may be in lieu of an additional independent counsel."[41]

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[31] 28 U.S.C. § 592(d). The Senate Report on the then "special prosecutor" legislation, S. 555, 95th Congress, noted that "in many cases the Attorney General might have suggestions as to the names of individuals who would make good special prosecutors, which information would be of assistance to the division of the court." S. Rept. 95–170, 95th Cong., 2d Sess. 56 (1977).

[32] 28 U.S.C. § 592(c).

[33] 28 U.S.C. § 593(b),

[34] S. Rept. 95–170, *supra* at 56.

[35] *Id.*

[36] 487 U.S. at 679.

[37] 28 U.S.C. § 593(b)(3).

[38] *Id.*

[39] *United States v. Wade,* 83 F.3d 196, 197–198 (8th Cir. 1996); *Morrison v. Olson, supra* at 679; *United States v. Crop Growers Corp.,* 954 F. Supp. 335, 341 (D.D.C. 1997).

[40] 28 U.S.C. § 594(c).

[41] 28 U.S.C. § 593(c); note *Morrison v. Olson, supra* at 680, n. 18; *In re Olson,* 818 F.2d 34, 47 (D.C. Cir. 1987). There may, of course, be some disagreement as to whether a new matter requested by the independent counsel is within the independent counsel's original prosecutorial jurisdiction, and is thus a "related matter" for the court itself (or the Attorney General) to refer under 594(c), or whether jurisdiction over the matter requested is an "expansion" of existing

When requested by the independent counsel, upon the independent counsel's discovery of matters not covered by his or her original jurisdiction, the Attorney General will conduct a preliminary investigation, giving due consideration to the independent counsel's request, to determine if the jurisdiction should be expanded.[42] If the Attorney General decides not to expand the jurisdiction, the division of the court has no authority to do so on its own.[43]

Authority, Powers of Independent Counsel

The law provides that the independent counsel will have "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice" including, but not limited to, conducting grand jury investigations, granting immunity to witnesses, inspecting tax returns, receiving appropriate national security clearances, and challenging in court any privilege claims or attempts to withhold evidence on national security grounds.[44] The Department of Justice must provide assistance and access to materials which the independent counsel requests, and personnel may be detailed from the Department of Justice upon request of the independent counsel.[45]

Appropriations, Cost Controls and Audits

The appropriation for the funding of the offices of the independent counsels is an open ended appropriation within the Department of Justice. Public Law 100–202 established a "permanent indefinite appropriation" within the Justice Department "to pay all necessary expenses of the investigations and prosecutions by independent counsel."[46] The Comptroller General is directed "to perform semiannual financial reviews of expenditures" of the independent counsels from this appropriation.[47]

Numerous fiscal and administrative provisions and cost control measures were added to the independent counsel law in the Independent Counsel Reauthorization Act of 1994. Procedures for expenditure certifications, requirements to follow Department of Justice policies with regard to the expenditure of funds, requirements to use federal office space unless other space may be obtained for less cost, provisions limiting compensation of independent counsels and staff, and provisions regulating travel and per diem expenses of the independent counsel and staff, were enacted as part of P.L. 103–270.[48]

The independent counsel is required to make a mid-year and end-of-year financial statement of expenditures.[49] The mid-year statements are to be reviewed, and the end of year statements are to be audited by the Comptroller General of the United States, and the results reported to specified congressional committees.[50] The independent counsel is also required to make reports every six months to the division of the court which identify and explain major expenses of the office, and summarize all other expenses incurred.[51]

Removal of an Independent Counsel

An independent counsel may be removed (other than through impeachment and conviction) only by the Attorney General for "good cause, physical or mental disability" or other impairing condition.[52] This removal may be challenged by the independent counsel in the United States District Court for the District of Columbia.[53] Any removal action must be fully explained by the Attorney General to the special division of the court and to the House and Senate Judiciary Committees.[54]

The special division of the court may also "terminate" the office of independent counsel if the counsel's work is completed.[55] The 1994 reauthorization law also pro-

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jurisdiction, that is, the matter is "not covered by the prosecutorial jurisdiction of the independent counsel," such that the Attorney General must expand jurisdiction under § 593(c). See *In re Espy,* 80 F.3d 501 (D.C. Cir. 1996); *United States v. Tucker,* 78 F.3d 1313 (8th Cir. 1996).

[42] *In re Meese,* 907 F.2d 1192 (D.C. Cir. 1990).

[43] 28 U.S.C. § 593(c)(2)(B).

[44] 28 U.S.C. § 594(a).

[45] 28 U.S.C. § 594(d).

[46] P.L. 100–202, § 101(a), December 22, 1987, 101 Stat. 1329, see now 28 U.S.C. § 591, note. See also Appendix, *Budget of the United States Government, Fiscal Year 1999,* at 599–600.

[47] *Id.*

[48] See 28 U.S.C. § 594(b),(c),(1).

[49] 28 U.S.C. § 596(c)(1).

[50] 28 U.S.C. § 596(c)(2).

[51] 28 U.S.C. § 594(h)(1)(A).

[52] 28 U.S.C. § 596(a)(1).

[53] 29 U.S.C. § 596(a)(3).

[54] 28 U.S.C. § 596(a)(2).

[55] 28 U.S.C. § 596(b)(2).

vided that the division of the court will review after two years, and then yearly after the succeeding two year period, whether the work of the independent counsel is completed or so substantially completed that the Department of Justice may appropriately finish the work.[56] The Supreme Court, in *Morrison v. Olson, supra,* concerned about the potential interference that the original termination authority could have over an executive branch investigation, interpreted the original termination authority of the special division narrowly as one which does "not give the Special Division anything approaching the power to *remove* the counsel while an investigation or court proceeding is still underway—[as] this power is vested solely in the Attorney General."[57]

Disclosure of Information, Reporting

Much of the initial and preliminary matters concerning the independent counsel, his or her appointment, and jurisdiction may be kept confidential.[58] The legislative history of the Ethics in Government Act indicates that this confidentiality "is crucial to the general scheme of this chapter" to protect high-level public officials from the publicity of unsubstantiated allegations which may trigger the investigatory process.[59] However, the legislative history expressly recognized that there "will be other situations where the public will be aware of the allegations of criminal wrongdoing and there will be a great deal of public attention centered on whether a special prosecutor will be appointed, who that special prosecutor will be, and what the jurisdiction of that special prosecutor will be."[60] In such instances, the Committee noted that certain confidentialities may not serve "any purpose," except that the actual application from the Attorney General might still be kept confidential in the interest of not further publicizing unsubstantiated allegations contained therein, and that the decision to release information would be left to the division of the court on a case-by-case basis.[61] The division of the court may release the identity of the independent counsel and his or her prosecutorial jurisdiction if requested by the Attorney General or in the court's own initiative if deemed in the public interest.[62]

A final, detailed report from the independent counsel is required prior to the termination of the independent counsel's office setting forth the work of the counsel and any reasons prosecutions were not brought in any matter.[63] This report is made to the division of the court, and may be released by the division of the court, in part or in whole, to the Congress or to the public.[64]

Upon completion of an investigation, the files of the office of an independent counsel, after grand jury and national security information are identified, are turned over to the Archivist of the United States, and are to be maintained in accordance with the federal records laws.[65] Access to these records will generally be governed by the provisions of the Freedom of Information Act.[66]

Congressional Oversight

The independent counsel is now directed by statutory language to submit to the Congress an annual report on the activities of such independent counsel, including the progress of investigations and any prosecutions. Although it is recognized that certain information will need to be kept confidential, the statute states that "information adequate to justify the expenditures that the office of the independent counsel has made" should be provided.[67]

The conduct of an independent counsel is subject to congressional oversight and an independent counsel is required to cooperate with that oversight.[68] The Conference Report on the Ethics in Government Act of 1978 noted that "a special prosecutor is required to file periodic reports with Congress and cooperate with the oversight jurisdiction of the House and Senate Judiciary Committees, thereby insuring

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[56] 28 U.S.C. § 596(b)(2), as added by P.L. 103–270, Section 3(h).
[57] 487 U.S. at 692.
[58] 28 U.S.C. §§ 592(c) (notifications, applications filed with court); 593(b)(4) (identity and jurisdiction of independent counsel).
[59] S. Rept. 95–170. 95th Cong., 1st Sess., to accompany S. 555, "Public Officials Integrity Act of 1977." at 57–58 (1977).
[60] *Id.* at 58.
[61] *Id.*
[62] 28 U.S.C. § 593(b). The identity and jurisdiction of the independent counsel must be disclosed upon the return of an indictment or filing of any criminal information.
[63] 28 U.S.C. § 594(h)(1)(B),
[64] 28 U.S.C. § 594(h)(2).
[65] 28 U.S.C. § 594(k)(1),(2).
[66] 28 U.S.C. § 594(k)(3)(A).
[67] 28 U.S.C. § 595(a)(2), as added by P.L. 103–270, Section 3(g).
[68] 28 U.S.C. § 595(a)(1).

accountability."[69] The independent counsel provisions also provide that the independent counsel "shall advise" the House of Representatives of any "substantial and credible information" which may constitute grounds for an impeachment of a federal official.[70] In addition to oversight of the independent counsel, the statute as amended in 1988, provides that the Attorney General must respond to the appropriate congressional committee within 15 days of a request from that committee for specific information on a case which has been made a matter of public knowledge.[71]

Sunset Provision

The provisions of law relating to the independent counsel have had, since the time of their original enactment, a five year "sunset." That is, the provisions of law expire five years after enactment, and thus need reauthorization every five years. The current provisions, reauthorized and amended by the Independent Counsel Reauthorization Act of 1994, P.L. 103–270, June 30, 1994, will expire on June 30, 1999, unless reauthorized.[72]

Division of the Court

The "division of the court" referred to in the Ethics in Government Act of 1978, is a special three-judge panel of the United States Court of Appeals for the District of Columbia made up of federal jurists appointed for two-year terms on the panel by the Chief Justice of the United States Supreme Court.[73] One of the federal judges chosen must be from the District of Columbia Circuit. The panel is formally called the Division for the Purpose of Appointing Independent Counsels. The current panel, as of this writing, consists of Judge David B. Sentelle (D.C. Cir.), Judge John D. Butzner (4th Cir.); and Judge Peter T. Fay (11th Cir.).

Independent Counsels/Special Prosecutors

The following list provides the names of the independent counsels appointed by the Division of the Court for Appointing Independent Counsels under the statutory provisions of the Ethics in Government Act of 1978, as amended, and sets out in summary fashion the areas or subjects of investigation.[74] This list includes those independent counsels whose appointments were made a matter of public record. Noted also as "sealed" are those independent counsels whose identity and/or prosecutorial jurisdiction have been kept confidential. Under the provisions of the Ethics in Government Act relating to the appointment of independent counsels, the information on the appointment of independent counsels and the targets of an investigation was generally to be kept confidential unless the division of the court had deemed it to be in the public interest to release, or unless and until an indictment or criminal information had been returned.[75] The independent counsels appointed under the Ethics in Government Act provisions have included:

1. Arthur H. Christy (appointed November 29, 1979). Investigated allegations concerning President Carter's Chief of Staff Hamilton Jordan, regarding alleged cocaine use.
2. Gerald J. Gallinghouse (appointed September 9, 1980). Investigated allegations concerning President Carter's national campaign manager Tim Kraft, regarding alleged cocaine use.
3. Leon Silverman (appointed December 29, 1981). Investigated allegations concerning President Reagan's Secretary of Labor Raymond J. Donovan, regarding bribery of labor union officials and certain connections to organized crime. Further investigation commenced on June 11, 1985, upon referral to investigate alleged false testimony before grand jury.

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[69] H. Rept. 95–1756, 95th Cong., 2d Sess. 78 (1978). See also "Ethics in Government Act Amendments of 1982." S. Rept. 97–496, 97th Cong., 2d Sess., 3 (1982).

[70] 28 U.S.C. § 595(c). The Constitution provides for removal by impeachment and conviction of the "President, Vice President and all civil Officers of the United States." *United States Constitution,* Art. II, Section 4. The Senate version of the independent counsel (special prosecutor) bill required only information for impeachment of the President, Vice President or a judge or justice (S. Rept. No. 95–170, *supra* at 71), but this was expanded to "an impeachment," presumptively including "all civil officers," in conference. H. Rept. No. 95–1756, *supra* at 50.

[71] 28 U.S.C. § 595(b).

[72] 28 U.S.C. § 599.

[73] 28 U.S.C. § 49.

[74] For a summary of the results, costs, and the time frame of the investigations and prosecutions, note CRS Report 98–19, "Independent Counsels Appointed Under the Ethics in Government Act of 1978, Costs and Results of Investigations."

[75] 28 U.S.C. § 593(b)(4).

4. Jacob A. Stein (sworn in April 2, 1984). Investigated allegations concerning President Reagan's nominee for Attorney General Edwin Meese, regarding his finances, financial disclosure and other allegations including trading in public offices.

5. Alexia Morrison (appointed May 29, 1986). Alexia Morrison was appointed after the resignation of independent counsel James C. McKay, to investigate allegations concerning former assistant Attorney General Theodore B. Olson for allegedly giving false testimony to Congress regarding the EPA "superfund" inquiry.

6. Whitney North Seymour Jr. (appointed May 29, 1986). Investigated charges concerning former President Reagan aide Michael K. Deaver, regarding alleged violations of postemployment conflict of interest laws in representing certain foreign clients before the White House after leaving government employment.

7. Lawrence E. Walsh (appointed December 19, 1986). Investigated Lt. Colonel North, and others, in relation to the "Iran Contra" matter concerning sale of arms to Iran and the alleged diversion of profits from the sale to support the Contras in Nicaragua in violation of federal law.

8. James C. McKay (appointed February 2, 1987). Appointed to investigate allegations concerning former White House staffer Franklyn C. Nofziger and potential violations of post-employment "revolving door" conflicts of interest in relation to alleged "influence peddling" and lobbying activities performed for Wedtech Corporation. On May 11, 1987, Mr. McKay was referred the additional matter of Attorney General Edwin Meese's conduct concerning the Wedtech Corporation, Mr. Meese's financial holdings and potential conflicts of interest, Mr. Meese's involvement in the Aqaba Pipeline project and other matters.

9. James R. Harper, appointed August 17, 1987 to replace Carl S. Rauh (appointed December 19, 1986). The subject of the investigation was sealed.

10. Sealed. Independent counsel appointed May 31, 1989.

11. Larry D. Thompson, appointed July 3, 1995, to replace Arlin M. Adams, appointed March 1, 1990. Investigating allegations of criminal conspiracy to defraud the United States by Samuel R. Pierce, former Secretary, of the Department of Housing and Urban Development in the Reagan Administration, and others, concerning the programs of the Department of Housing and Urban Development.

12. Sealed. Appointed April 19, 1991.

13. Michael F. Zeldin, appointed on January 11, 1996, to succeed Joseph E. diGenova, who was appointed December 14, 1992, to investigate whether Janet Mullins, Assistant to President Bush for Political Affairs, violated any federal laws concerning the search of then presidential candidate Bill Clinton's passport files during 1992 presidential campaign.

14. Kenneth W. Starr (appointed August 5, 1994). Appointed to continue the investigation of allegations commonly referred to as "Whitewater begun by the Attorney General-appointed Special Counsel Robert B. Fiske, Jr., regarding any possible violations of law relating in any way to President Clinton and the First Lady Hillary Rodham Clinton's relationship with Madison Guarantee Savings and Loan Association, the Whitewater Development Corporation, or Capital Management Services, as well as any collateral matters arising out of the investigation of such matters including obstruction of justice or false statements.

15. Donald C. Smaltz. Appointed September 9, 1994, to investigate any potential criminal conduct concerning allegations that Secretary of Agriculture Mike Espy received various gifts and entertainment from companies or organizations which are regulated by or have official business with the Department of Agriculture.

16. David M. Barrett. Appointed May 24, 1995, to investigate allegations pertaining to the Department of Housing and Urban Development Secretary Henry G. Cisneros and false statements allegedly made to the FBI during background check.

17. Daniel S. Pearson. Appointed July 6, 1995, as independent counsel to investigate allegations concerning financial dealings of Secretary of Commerce Ronald H. Brown.

18. Sealed. Appointed November 27, 1996.

19. Carol Elder Bruce. Appointed March 19, 1998, to investigate allegations of false statements to Congress by Interior Secretary Bruce Babbitt concerning the rejection of a proposed Indian gambling casino in Wisconsin.

LETTER FROM GRIFFIN B. BELL TO SENATORS THOMPSON AND LIEBERMAN

February 26, 1999

Senator Fred Thompson, *Chairman*
Senator Joseph Lieberman, *Ranking Minority Member*
United States Senate
Committee on Governmental Affairs
Washington, D.C.

Re: Independent Counsel Statute

DEAR SENATORS: At our hearing on Wednesday, February 24, I referred to the appointment of Paul Curran as Special Counsel to investigate the Carter peanut warehouse and the National Bank of Georgia. I stated that I would find the transcript of the press conference at which Mr. Curran was appointed and from which we could understand the terms of his appointment.

I have now found that transcript and enclose a copy for each of you. This investigation was completed within six months and Mr. Curran worked full time in doing the investigation.

It was a pleasure to appear before your Committee.

Yours sincerely,

GRIFFIN B. BELL

Enclosure

APPOINTING PAUL CURRAN AS SPECIAL COUNSEL TO INVESTIGATE THE CARTER WAREHOUSE

PRESS BRIEFING, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

March 20, 1979

Good morning. I want to announce that I am appointing Paul J. Curran of New York as Special Counsel to conduct the remainder of the inquiry into the various loan transactions between the National Bank of Georgia and the Carter Warehouse. This appointment is being made under the authority of the Attorney General, as found in Title 28 of the United States Code, Section 515(a).

The Department of Justice has recently completed an intensive preliminary investigation of these loan transactions. That preliminary investigation did not resolve all factual and legal issues relating to the transactions, and therefore the Department has carefully considered available courses of action to pursue the inquiry.

At the recommendation of Assistant Attorney General Heymann, with the approval of Deputy Attorney General Civiletti, I have determined that because of the unique combination of circumstances in this matter, it is in the best interest of the administration of justice, and the public's perception of the fairness and impartiality of justice that an independent Special Counsel be appointed.

Over the last two years, the Department has received over 40 requests from members of Congress and, from time to time, requests from others, to appoint Special Counsel or Special Prosecutors in all manner of investigations. We have always declined to do so. Frequent appointment of special attorneys would undermine the ability of the Department of Justice to conduct its business on a sound basis. It is essential to the administration of justice that the public have confidence in the ability of the Department of Justice to carry out its functions impartially and fairly. Common appointment of special prosecutors would erode the confidence of the public, would chip away at the morale of career prosecutors who have dedicated themselves to striving to administer justice uniformly for all.

The Department of Justice often has to make and defend hard prosecutive decisions, and should be called upon to make those decisions if it is to fulfill its role as a neutral and vigorous guardian of law. It has plainly demonstrated that it has the capacity and integrity to investigate allegations of wrongdoing without regard to the position held by any subject of an investigation.

For these reasons, it is the general policy of the Department not to appoint special prosecutors for investigation except where required by the terms of Title 6 of the Ethics in Government Act of 1978. That statute requires that allegation of federal criminal violations received against a limited number of high-ranking officials be referred to a special court for the appointment of prosecutors, if, after a preliminary investigation, the Department determines that the allegations warrant further in-

vestigation or prosecution. The Department has already implemented Title 6 on two and intends to enforce it faithfully.

The Criminal Division's current inquiry into the various loans by the National Bank of Georgia to the Carter Warehouse has been consistent with a high standard of vigorous and impartial investigation. Late last summer, in the course of an ongoing inquiry into the activities of several Georgia banks, the Criminal Division examined records which described loan transactions between the National Bank of Georgia and the Carter warehouse. The attorneys on the banking case were directed by Assistant Attorney General Heymann, at that time, to investigate the character and handling of these loans. This investigation has continued and intensified over the last several months, as we considered the appropriate structure for handling the completion of the inquiry.

It has been and remains the conclusion of the Department, as detailed in a March 5, 1979 letter from the Attorney General to the Chairman of the Senate Judiciary Committee, that the Ethics in Government Act does not apply to the pending inquiry, inasmuch as the basic information involving the loan transactions was developed by the Department of Justice prior to October 26, 1978, the effective date of the Act.

Nonetheless, this Administration endorses the Ethics in Government Act; and the Department recognizes, in the spirit of the Act, that the Carter Warehouse inquiry involves a combination of extraordinary and special circumstances. These lead us to the conclusion that we should depart from our general policy against special counsel or special prosecutors in this unusual case.

We have determined that an independent Special Counsel selected from outside the Department should be appointed to head the remainder of the Carter Warehouse inquiry. A Special Counsel is appropriate here for the following reasons: the investigation touches on the conduct of a business in which the President of the United States, the President's brother and the President's mother each hold a partnership interest. It is important to the American public's confidence in the administration of justice that they be assured that the ultimate resolution of the investigation, whether it be a finding that no charges are warranted, or a decision to initiate civil or criminal proceedings, was reached fairly, impartially, and without even the possibility of deference to high office.

At the same time, the subjects of the investigation should not have to fear that they might be treated more harshly than is warranted, by a Department eager to prove its impartiality. The combination of these circumstances, we believe, outweighs the compelling reasons behind our policy not to appoint special prosecutors generally. The substance and the perception of justice and fairness to the subjects involved, require a Special Counsel.

The Special Counsel will have full authority over the warehouse inquiry, and will supervise that investigation on a day-to-day basis. The Special Counsel will have authority to draw on existing Department of Justice personnel and resources, including access to any files, records, and other relevant materials; to bring in any additional staff necessary to perform his duties; to conduct proceedings before grand juries; and to conduct any other investigation that he deems necessary; to determine whether or not to contest any assertion of testimonial privilege; and to determine whether or not application should be made to a federal court for warrants, subpoenas or other court orders; to decide whether application should be made for a grant of immunity for any witness, consistent with applicable statutory requirements; and finally, to determine whether or not the prosecution of any individual, entity, or group of individuals, is warranted or not warranted.

Special Counsel will not be operating with special statutory authority. Therefore, prosecutive decisions, including applications for immunity, must finally be approved by the Assistant Attorney General for the Criminal Division.

When the Special Counsel reaches a decision with regard to any aspect of the investigation, or the entire investigation, he will report the decision to Assistant Attorney General Heymann. Mr. Heymann could overrule the Special Counsel only if the Special Counsel's decision was so grossly inconsistent with well-established prosecutorial standards as to render the decision unconscionable.

In the event that a, decision of the Special Counsel were overruled, the matter would be fully reported to the public and the Congress at the earliest possible stage, consistent with the rights of any remaining potential defendants and the restrictions of Federal Rules of Criminal Procedure 6(e).

In short, the Special Counsel will conduct a thorough and expeditious investigation of the Carter Warehouse loan transactions, and will bring the matter to a fair and just conclusion, whether by closing the case or by initiating appropriate civil or criminal proceedings. Special Counsel can build effectively on the fruits of the investigation to date. While the Department is confident that even without this spe-

cial appointment, any investigation would be full, vigorous, and impartial. The Special Counsel will serve as a special guarantee to the public of these qualities.

Now, you all know Assistant Attorney General Heymann, who is in charge of the Criminal Division. I want to introduce to you now Paul J. Curran of New York, who is former United States Attorney for the Southern District of New York; for,a long time before his service as U.S. Attorney, and since, a partner in the law firm of Kaye, Scholer, Fierman, Hays and Handler of New York. Paul is an experienced prosecutor, a fine trial lawyer, a member of the American College of Trial Lawyers, highly regarded amongst lawyers who try cases and amongst prosecutors. I have met him myself for the first time this morning, although he was carefully investigated in the sense of asking other people about him.

I am confident that he is the kind of person that will come in, will do a good, thorough job on the matter pending, and that the public will have confidence in what he does and in the way this matter is being handled by the Department of Justice. I deeply appreciate his being willing to render this public service. It is the sort of thing that makes you proud of lawyers, when you can call a lawyer, bring him out and away from a busy practice, and get him to take on a task of this kind.

Phil—and Paul Curran.

ASSISTANT ATTORNEY GENERAL HEYMANN: We will be prepared to address questions on the mandate, why we are proceeding this way, but not questions on the underlying facts of the investigation, for obvious reasons.

SPEAKER: Can you tell us first, is this a full time job? Are you going to be here in Washington, or is this something you are going to supervise part time? That wasn't fully explained.

MR. CURRAN: I intend to work at it full time, beginning some time next week. Where I'll be doing it, I don't know; I'll probably be doing it several places.

SPEAKER: Are you going to be the only "outsider," so to speak? Will everybody else be Justice Department?

MR. CURRAN: I think not, although I've just gotten into this matter. My present plan is to have one or two counsel from the outside, whom I will pick and who will work with me on the matter.

SPEAKER: How long do you think it's going to take?

MR. CURRAN: I have no idea.

SPEAKER: How long are you prepared to do it?

MR. CURRAN: Well, my charge is to do a thorough and expeditious inquiry, and that's what I'm going to do, but I couldn't stand here today and give you any time frame, because——

SPEAKER: You didn't give an outside date on how long you can remain, or something like that?

MR. CURRAN: I have no time frame on that.

SPEAKER: Are you a Democrat or a Republican?

MR. CURRAN: I'm an enrolled Republican.

SPEAKER: Mr. Heymann, is your decision subject to review by the Deputy Attorney General and the Attorney General?

ASSISTANT ATTORNEY GENERAL HEYMANN: I believe that my decision will be not reviewed by the Deputy Attorney General or the Attorney General in this case.

SPEAKER: The question is whether it is subject to review; not what will happen, but whether it is subject to review.

ASSISTANT ATTORNEY GENERAL HEYMANN: I believe it will not be subject to review.

SPEAKER: Mr. Curran, will you take a moment to tell us why you took the job?

MR. CURRAN: Well, I guess several reasons. First, it sounded like an interesting and challenging assignment. I think it's in the public interest to do something like this. A lawyer should do something like this when he's called upon to do it, if he can, consistent with his other obligations. I also believe that, having spent six years with the Department in New York, three years as an Assistant U.S. Attorney years ago, and three years—two and a half years more recently as United States Attorney, it's important to the Department to have something like this done, if the Department feels it should be done by a Special Counsel. And I believe that it's ultimately in the public interest.

SPEAKER: When were you first contacted by Judge Bell, and what was your first reaction?

MR. CURRAN: I was not contacted by Judge Bell. I first received a telephone call, which I returned, because I wasn't in my office, from Mr. Heymann last Wednesday. I talked to him once on Wednesday, once on Thursday, twice on Saturday, and three times yesterday.

SPEAKER: Did it take time to talk you into it? Is that the reason for the frequency?

MR. CURRAN: Well, I suppose there are a number of factors. I believe initially when he called me, he was talking to me about whether I might have an interest, and that was really the first conversation. The second conversation went a little bit further, and I said that I might have an interest. That was Thursday. After I did some checking, I told him on Saturday that I thought I would have an interest, subject to clearing up a couple of matters that required my personal attention; and then on Monday we nailed it down.

SPEAKER: What kind of checking did you do on Thursday?

MR. CURRAN: I didn't do any on Thursday.

SPEAKER: Well, whatever day it was that you did——

MR. CURRAN: I had to check into a couple of matters that I was handling at my office.

SPEAKER: Oh, not about the case?

MR. CURRAN: No, nothing to do with the case.

SPEAKER: Mr. Heymann, what were the factors that led you to first contact Mr. Curran?

ASSISTANT ATTORNEY GENERAL HEYMANN: We sat down and made up a list—and when I say "well I mean people in the Criminal Division, almost entirely—made up a long list of names. We reduced the names to five who were our first priority. I talked to a number of people about each of the five names. I then called three, specifically; all three were willing to take the job, and I picked Mr. Curran.

SPEAKER: Was the—was your choice, in part, dictated by the fact that Mr. Curran was a known Republican? Did you—in point of fairness, did you want a Republican if you could find one?

ASSISTANT ATTORNEY GENERAL HEYMANN: I wanted a prosecutor. I thought it was an advantage if it was a Republican, but I did not think that was determinative.

SPEAKER: Were all five on your priority list Republicans?

ASSISTANT ATTORNEY GENERAL HEYMANN: No.

SPEAKER: What about the three?

ASSISTANT ATTORNEY GENERAL HEYMANN: I can't even tell you as to all three, what their party was. I know that Paul was a Republican; I know that—I have not, by the way, met him before this morning myself, in person.

SPEAKER: What advantages do you see——

ASSISTANT ATTORNEY GENERAL HEYMANN: I know one was a Democrat, and the third I don't know.

SPEAKER: One of the five?

ASSISTANT ATTORNEY GENERAL HEYMANN: One of the three was a Democrat, one was a Republican

SPEAKER: How did Mr. Curran's name first come before you, Mr. Heymann?

ASSISTANT ATTORNEY GENERAL HEYMANN: I don't know who suggested it, but he comes from a distinguished and highly admired career as U.S. Attorney in the Southern District of New York.

SPEAKER: What are the advantages, say, in having a Republican Special Prosecutor?

ASSISTANT ATTORNEY GENERAL HEYMANN: Oh, it's—I don't regard it as overwhelming, but what we want to do is have an investigation that the American people will—and certainly will believe is vigorous, complete, and absolutely fair, calling the shots either way they come out, wherever they come out.

SPEAKER: Your statement also says that you are worried—that there was some concern in the Department, in the event that those who were being investigated should not have to fear that the Department would treat them harshly to prove its impartiality. Have you heard from the President's mother, the President, or the President's brother, to that effect? Did they ask you——

ASSISTANT ATTORNEY GENERAL HEYMANN: I have been involved in this investigation since August of 1978; August 13th is the first time I have heard of it. In that period, I have never said anything except. "Go! Go! Go!" and I have never heard a word from Judge Bell or anyone in the White House about it. Nor have I invited it, but I have never heard a word from anybody.

It does worry me in general, in any political case; it worries me that there will be a tendency to prove our integrity by bringing cases that should not be brought, whether it is a Congressman or a Mayor or whoever; and I think that's always one good reason to be very careful in political cases.

SPEAKER: What is the substantive difference, if any, between a Special Counsel and a Special Prosecutor?

ASSISTANT ATTORNEY GENERAL HEYMANN: Practically none. We tried to copy—we used the term "Special Counsel" in large part because "Special Prosecutor" has taken on a statutory meaning, now, under the Ethics in Government Act. We tried to copy the powers of the Special Prosecutor Statute, and of the earlier Special Prosecutors. I think that they are substantially identical, except for the retention in the head of the Criminal Division of a very narrow power that is carefully spelled out in the paper you have before you, not to go along with actions that depart so widely and so drastically from what anybody might expect—well-established standards—that they would be unconscionable.

SPEAKER: Why did you retain that power?

ASSISTANT ATTORNEY GENERAL HEYMANN: I think it's a practical matter; it doesn't make a lot of difference. As a theoretical matter. The Justice Department continues to have a responsibility. Some of you may remember that at the time that Elliot Richardson was dealing with this there was always a phrase that Elliot Richardson used, which was that the Attorney General retained the powers that the Attorney General must retain.

The Justice Department has a responsibility, always ought to have a responsibility, to see that nothing unconscionable is done.

SPEAKER: Mr. Curran, as you know, there was a preliminary investigation by the FBI. As a former prosecutor, you know that the next thing the FBI can do is to undertake a full field investigation. Do you anticipate ordering a full field investigation?

MR. CURRAN: I anticipate conducting a thorough and expeditious inquiry, and at this time that's all I'm going to say. I am not familiar with the facts, and I am in no position this morning to discuss what I intend to do, to the extent I could discuss it anyway.

SPEAKER: Mr. Heymann, why didn't you go ahead with a full Special Prosecutor under the Ethics in Government Act?

ASSISTANT ATTORNEY GENERAL HEYMANN: It has been my advice to the Attorney General that there is no legal power of the Attorney General to go to court for a Special Prosecutor in this matter, and that there is no legal power in the court to appoint a Special Prosecutor.

The statement of that, which the Attorney General has given to both Judiciary Committees, can be summarized. It has about three independent prongs, but if I can just take one of them. The Attorney General, in order to go to a court for a Special Prosecutor in this case, would have to personally find that this investigation involving certain loans of the National Bank of Georgia was not related to other investigations that we have going involving the National Bank of Georgia. In the language of the legislative history, he would have to find that it did not pertains to the same incidents or transactions or course of conduct being investigated.

It seems to me that this plainly relates to investigations of other loans of the National Bank of Georgia, and that the court has no power, as I read the statute—or the Attorney General has no power, to get a court appointment, in that situation.

SPEAKER: Mr. Heymann, do you contemplate other matters going on involving the National Bank of Georgia, or are those going to be held in abeyance?

ASSISTANT ATTORNEY GENERAL HEYMANN: Other matters will go on; I contemplate this.

SPEAKER: Mr. Heymann, under what conditions may the Special Counsel be dismissed?

ASSISTANT ATTORNEY GENERAL HEYMANN: It never occurred to us that that would—perhaps foolishly, it never occurred to us that that would come up as an issue until we started talking, just before coming up here, and I can't tell you the answer to that. I can't imagine it. We will have a written order creating Mr. Curran's post, and, I suppose, we may or may not deal with it then. I can't imagine that situation.

SPEAKER: What is Curran's salary?

ASSISTANT ATTORNEY GENERAL HEYMANN: The salary has not been worked out yet, either, and I wouldn't—I shouldn't reveal the generosity of attitude Mr. Curran has towards his salary, because it will prejudice him in dealing with the Justice Department.

SPEAKER: Mr. Heymann, could you finish the answer that you were giving about why you didn't appoint a full-fledged Special Prosecutor under the Ethics in Government Act?

ASSISTANT ATTORNEY GENERAL HEYMANN: The simple answer is, I don't think that that is a legal possibility. I think it would be inconsistent with Section 604(2) of the statute. I think it is forbidden, not legally possible.

SPEAKER: Are you saying the Attorney General doesn't have an independent power to appoint a Special Prosecutor outside of that Act?

ASSISTANT ATTORNEY GENERAL HEYMANN: The Attorney General has the independent power to appoint a Special Prosecutor that he has exercised in appointing Mr. Curran as Special Counsel; and I don't read any great distinction between Special Counsel and Special Prosecutor. He has no power to go to the court and ask the three-judge court that has been set up under the Ethics in Government Act, to do that for him. He doesn't have the power because it's clear, under Section 604(2), that he doesn't; it's simply a legal matter.

SPEAKER: Isn't "prosecutor" a more—a pejorative term? A "prosecutor" implies you're after a criminal case, as opposed to advising on whether or not there is one?

MR. CURRAN: When I was trying cases as a prosecutor I never wanted to be called a "prosecutor." I preferred to be called "the attorney for the Government" and the defense counsel called me the "Prosecutor." I don't know whether it is a particularly good term or not. I'm satisfied that as Special Counsel, I have all the powers I need to conduct this inquiry thoroughly and expeditiously, and I'm satisfied, should Mr. Heymann and I have an ultimate disagreement, that under the charter which Judge Bell read, there are adequate safeguards there as well.

SPEAKER: If there is a disagreement, will it be made public? Can you state now that it will be made public?

MR. CURRAN: Page 6, at the top, says precisely that.

SPEAKER: Mr. Curran, were there any powers or authority that you insisted upon in your conversations with Mr. Heymann over the last week? Is there any——

MR. CURRAN: You mean, that I didn't receive?

SPEAKER: Well, that you, yourself, specifically asked for assurances on or bring in?

MR. CURRAN: Yes. I asked initially, I guess, the very first time we talked, whether I would have total independence, and his answer was, "Yes." And I asked, also, about the ability to bring in a lawyer or two, if I thought it was appropriate, from the outside, of my own choosing; and the answer to that was, "Yes." And then we discussed the powers of the job, and things that are mentioned in the charter, for example, and I'm satisfied thoroughly with those powers.

SPEAKER: Do you have to get the Department's approval for the two people that you (inaudible)?

MR. CURRAN: That's not my understanding. No, my understanding is I can select anybody I want.

SPEAKER: Your release of Judge Bell's remarks described this as an investigation into NBG loans to the Carter Warehouse. Is your mandate limited to that subject matter, or will you also be investigating other possible violations of law involving the President, the President's brother, and his mother?

MR. CURRAN: Well, you say "other possible violations of law." I don't know that there are any violations of law uncovered as of now, as far as I know, against anyone. As I understand it, my mandate is to look at those loan transaction and to see where the money went, or the proceeds of the loan transactions, and follow that situation wherever it deserves to be followed. If you're asking me if something else comes up during the course of that inquiry which indicates a totally separate possible violation of criminal law, I think that would have to be dealt with at the time we uncover it, if it ever happens.

SPEAKER: Let me just move back to what you said a moment ago. You said you don't know if any violations of criminal law have yet come up. Could you elaborate on that? There has been a preliminary investigation here, which has gone on for some time, and it's safe to assume that there was some sort of a report compiling the results of that; and from what you say, I gather that there have been no violations of law that warrant indictment, that have been——

MR. CURRAN: Oh, no, I'm sorry. I was stressing my knowledge, or lack of knowledge. I have read no reports in this matter, so I have no knowledge right now of the facts. I have no knowledge of what's been found or not at this time, in whatever preliminary investigation was conducted. I'm going to attain that knowledge quickly.

SPEAKER: Mr. Heymann, can you answer that question? Without going into the facts of the case, it would seem that your investigation so far has produced enough information so that it warrants a further investigation. That's obvious.

ASSISTANT ATTORNEY GENERAL HEYMANN: I won't go into the underlying facts at all, or the next steps, because it wouldn't be proper. It would also prejudice, to some extent, Mr. Curran's investigations and his plans, whatever he plans to do. And I can't tell you as to the future; that's going to be up to him.

SPEAKER: Mr. Curran, everybody knows about the Southern District of New York. It was one of the proudest, most "go-go" offices within the Justice Department. There's a feeling about that office, that once you've been in it, and once you've led it, even if you leave it, you're not really "outside the company," to borrow from an-

other agency. And here the Justice Department is saying that it has gone outside the Justice Department to bring someone other in. How "other" are you?

MR. CURRAN: Well, people from Justice Department in Washington used to call us, when I was back there, the "Department of Justice for the Southern District of New York." They didn't mean that in a particularly endearing sense, I don't think, or at least some of them didn't. I don't know about "us" and "them." I'm going to do this investigation the best I know how. I'm going to call the shots as I see them, as best I can, and finish it as quickly as I can. That's all I can tell you.

SPEAKER: Mr. Curran, the Attorney General's statement says that, in the event a decision of the Special Counsel were overruled, the matter will be fully reported to the public and the Congress at the earliest stage possible, consistent with the rights of remaining defendants and the Rules of Criminal Procedure. Does that mean to you a matter of hours, days, or many months after the dust has settled, or how do you interpret that?

MR. CURRAN: Well, to me it means just as soon as one could possibly do it, and if it could be done in a matter of hours, I suppose it should be done in a matter of hours, consistent with the rights of defendants under Rule 6(e), which, as you know, is the grand jury secrecy rule.

SPEAKER: When you were in New York, Mr. Curran, you had some prosecutions involving Nixon officials. Were you under any pressure? Are you familiar with the kind of pressure this bring down on you?

MR. CURRAN: When I was in New York, I had a number of prosecutions involving people in government, at state, city, and national levels, and in my two and a half years as United States Attorney and my three years as an assistant, way before I ever had any political pressures, or indeed any pressures of any kind with respect to cases I was handling.

SPEAKER: Mr. Curran, could you address yourself to a hypothetical issue of constitutional law?

MR. CURRAN: I'll try.

SPEAKER: Can a sitting President of the United States be indicted?

MR. CURRAN: I think I'll defer to the constitutional lawyer.

ASSISTANT ATTORNEY GENERAL HEYMANN: I'm under strict instructions from the Attorney General to refer all such questions to the Office of Legal Counsel. No, I wouldn't answer that now.

ATTORNEY GENERAL BELL: And they will not run an opinion on a hypothetical question. Not even for a member of the press.

SPEAKER: You had the option in this matter, of going the review panel route. Was there a determination made that, politically, you would take a whipping if you went that way?

ASSISTANT ATTORNEY GENERAL HEYMANN: No, the—I think a decision was made on the merits, Carl. Obviously the merits always are public merits, too, and it means that they have public impact. The question—the difference between a reviewing panel and a Special Counsel, such as Mr. Curran will be, is how complete and detailed the control of the ongoing investigation will be, and how obvious it would be, how obvious that he's in control it would be. We wanted the greater control, and the greater apparent control. Both of them will be in Curran's hands.

SPEAKER: Has the President of the United States been advised that a special Counsel has been appointed? And if so, by whom, when, and what was his reaction?

ATTORNEY GENERAL BELL: Last night, about six-thirty or a quarter to seven, I went over to the White House and advised Jody Powell that I had decided to appoint Mr. Curran as Special Counsel this morning. That is the only person I have talked to about it at the White House. I have not discussed the matter with the President at all, nor have I advised Mr. Kirbo of what I was going to do. I advised Mr. Powell, and I imagine he may have told the President, but I don't know that. You'll have to ask him that.

SPEAKER: Why did you——

ATTORNEY GENERAL BELL: This morning, at 15 minutes to 10, 1 had delivered a copy of this biography and the press release to Senator Kennedy and Senator Thurmond, because of the offices they hold; Chairman Rodino and Congressman McClory, because of the offices they hold on the House Judiciary Committee; and to Mr. Powell. I did it because—as an accommodation to the media, assuming they would probably have some interest in asking the White House questions about this matter—I thought maybe it would be better for them to be forewarned by 15 minutes.

SPEAKER: Judge, if a Special Prosecutor were justified in the Watergate case, why is one not justified in this case?

ATTORNEY GENERAL BELL: Well, I've never completely compared it to the Watergate—I was not in Washington at that time. I handle cases on a case-by-case

basis, and we have appointed a Special Counsel. I know it's very disappointing to the media that we will not use the term "prosecutor." Mr. Marro put his finger on the answer to that question. You assume, if we use the term "prosecutor," that we are going to prosecute someone. We believe in due process of law, and we don't announce in advance, before we finish an investigation, that we're going to prosecute someone. They do that in some countries, but we have never yet done it in this country. Thank you.

SPEAKER: Mr. Heymann, will there be a permanent team of Justice Department lawyers assigned to Mr. Curran, or will he just call upon the resources as he needs them?

ASSISTANT ATTORNEY GENERAL HEYMANN: He will just call upon the resources that he needs at any given time. It will be completely up to him.

SPEAKER: Mr. Curran, can you imagine this dragging on into 1980, election year?

MR. CURRAN: That's awfully hard to answer. I would prefer not to imagine anything close to that, but I don't know. I am simply not familiar enough with the facts.

SPEAKER: Mr. Heymann, do you contemplate a public report, even if there is no indictment and no civil action warranted?

ASSISTANT ATTORNEY GENERAL HEYMANN: I don't know. I think it's something we have to think about hard. Judge Bell, on another related occasion, on allegations regarding the activities of Robert Vesco, said that he would like to see a public report made. It's very hard for us to figure out how to do it with a proper respect both for the privacy rights of the people whose reputations are affected, and for a technical, legal rule, Rule 6(e). There is no exception that makes it easy to do when you've had a grand jury.

SPEAKER: But you did it with the U.S. Recording case and the Federal Bureau of Investigation. Why shouldn't the same standards apply to the White House?

ASSISTANT ATTORNEY GENERAL HEYMANN: I don It know the reference. We did it with regard to what?

SPEAKER: The U.S. Recording case and the F.B.I. earlier in this Administration.

ASSISTANT ATTORNEY GENERAL HEYMANN: All I can tell you is, we would like in appropriate cases to issue a report if there is no official action, such as a prosecution, and I welcome suggestions on how we could do it. I don't know what we did in the U.S. Recording.

SPEAKER: Thank you very much.

THE SEPARATION OF POWERS: THE ROLES OF INDEPENDENT COUNSELS, INSPECTORS GENERAL, EXECUTIVE PRIVILEGE AND EXECUTIVE ORDERS

FINAL REPORT OF THE NATIONAL COMMISSION ON THE SEPARATION OF POWERS FROM THE MILLER CENTER OF PUBLIC AFFAIRS, UNIVERSITY OF VIRGINIA

December 7, 1998

Founded in 1975, the Miller Center of Public Affairs at the University of Virginia is a nonpartisan research institute that supports scholarship on the national and international policies of the United States. Miller Center programs emphasize both the substance and the process of national policymaking, with a special emphasis on the American presidency and the executive branch of government. Philip Zelikow, White Burkett Miller Professor of History, is Director of the Miller Center.

INTRODUCTION

The separation of governmental powers is one of the hallmarks of the American Constitutional system. In Britain and in the many other countries that follow the Westminster model, the executive, legislative and judicial functions are all handled, wholly or in important measure, by the single entity known as parliament. In the United States, however, each of these functions is carried out by a separate branch of government, namely the Presidency, the Congress and the Judiciary.

The three are interrelated, not only in the way they derive their power but also in the way they exercise it. The President, senators and representatives are directly elected; judges and justices are appointed by the President with the consent of the Senate. Congress can remove a President from office by impeachment for "high crimes and misdemeanors." All three branches can be involved in the formulation of laws; Congress must pass them, the President must sign or veto them and the courts are frequently called upon to adjudge their constitutionality and meaning.

This arrangement of separated and overlapping functions creates a system of checks and balances that is another hallmark of the American system.

Some of this is set out in the Constitution. Some is codified in the decisions of the Supreme Court, such as Marbury v. Madison, which established the right of the Court to rule on the constitutionality of acts of Congress. Many gray areas remain, however, where the delineation of powers is not so clear and where, in fact, the branches of government, usually the legislative and executive, grapple from time to time for dominance. Often these struggles take place deep within the bureaucracy, but sometimes, as in the extensive investigation of a sitting President by an independent counsel and the resulting consideration by Congress of his report, they become the stuff of national preoccupation.

One important struggle was recently decided by the Supreme Court when it declared unconstitutional the Line-item veto statute passed by Congress after years of agitation for a Federal law giving Presidents the right, already enjoyed by many governors, to approve some parts and disapprove other parts of legislation. President Clinton signed the bill and used its powers on several occasions, but the Court subsequently found that it ceded to the President Congressional powers that Congress was not empowered to cede in the absence of a Constitutional amendment.

The Miller Center Commission on the Separation of Powers is the eighth such commission established by the Center to study aspects of the Federal government, in a series dating back to 1980. Like the others, it is independent of party and faction. Over the last two and one-half years, it has conducted a methodical and scholarly survey, examining a number of areas where the separation of powers is unclear and selecting five of them for detailed consideration. These are: The office of independent counsel, the uses of inspectors general throughout the government, the doctrine of executive privilege, the issuance of executive orders and the War Powers Resolution passed in 1973. All are related in some way to the contentious debates that arose out of the Vietnam War and the Watergate scandal. The Commission makes specific recommendations on each.

INDEPENDENT COUNSEL

Doubtless the most tropic of these recommendations relates to the functioning of independent counsels, who operate under a law first passed in 1978 for a five-year period and renewed and amended several times since. This is a role born of the distrust in government created by Watergate. When the holders of specified high offices, 49 in all, are alleged to have committed crimes, the authority of the Attorney General himself to investigate the matter is severely limited, and the Attorney General must consider requesting the judicial appointment of an independent counsel.

If such a counsel is deemed to be necessary, the duty to faithfully execute the laws, which is vested in the President by the Constitution, and normally exercised through the Department of Justice with respect to criminal law, is in effect transferred in cases where the President might have a conflict of interest. From November, 1979, to May, 1998, no fewer than 21 independent counsels have been named.

The Commission concludes that the law is seriously flawed. It finds that the Attorney General is unduly restricted in deciding the need for independent counsel. The Attorney General can remove the counsel, but only for cause, and that can be contested in the courts. In the practical world, no counsel is likely to be removed by an Attorney General. There are no realistic fiscal or time constraints on the counsel. In effect the law creates miniature departments of justice, independent of the Attorney General, to prosecute particular persons.

Driven by the fact that the independent counsel statute will expire next Year unless Congress acts to revise or extend it, the Commission considered a number of ways in which the statute establishing the independent counsel could be reformed. It concludes that there is no way of correcting the inherent absence of fairness from the procedure itself—chiefly the isolation of the putative defendant from the safeguards afforded to all other subjects of Federal criminal investigations.

A paper discussing the law was prepared for the Commission by former Attorney General Griffin R. Bell, its co-chairman. The paper states, quoting from a 1988 brief that he wrote with two other former attorneys general: "The inherent checks and balances the system supplies heighten the occupational hazards of a prosecutor: taking too narrow a focus, a possible toss of perspective and a single-minded pursuit of alleged suspects seeking evidence of some misconduct. This search for a crime to fit the publicly identified suspect is generally unknown or should be unknown to our criminal justice system." Judge Bell also criticized the provision of the statute requiring independent counsels to issue final reports. In some though not all cases, such as the Iran-Contra investigation, he said, these can suggest guilt even though there is no indictment in the case.

Gerhard Casper, the president of Stanford University, who is a nationally recognized authority on the separation of powers, said recently that he doubted that the office of independent counsel could be eliminated because, he argued, once established, such institutions are hard to uproot.

The Commission urges that the independent counsel statute be permitted to expire next year under the five-year "sunset" provision. But the Commission recognizes that the possibility of conflicts of interest in investigations of high officials is far from imaginary. The difficulty lies in striking a balance between holding such officials accountable and protecting their inherent right to fair treatment. The Commission suggests that when the President, the Vice President or the Attorney General is involved in a criminal investigation, the Attorney General should be required under a new statute to recuse himself or herself from the case. The Attorney General, though recused, could appoint either outside counsel or a Justice Department official who was not disqualified. The Attorney General would remain accountable as the responsible official, entitled to dismiss the counsel or Justice Department official for cause.

INSPECTORS GENERAL

After the Watergate scandal, Congress took a second step to check abuse in the executive branch, passing the Inspector General Act of 1978. The act, as amended, currently empowers the President to appoint inspectors general in each of 28 Federal agencies, and prohibits senior officials within those agencies from obstructing any audit or investigation by an IG or blocking the issuance of any subpoena by an IG during the course of an audit or investigation. A President may remove an IG, but only after reporting his reasons to Congress, which raises separation of powers concerns. (We note, however, that in practice the reasons can be perfunctory, as when President Reagan told Congress that he was removing all the IGs because he needed to have the "fullest confidence in the ability, integrity and commitment" of each.)

IGs must also report to Congress twice a year, which means they are subject to two masters, in that they serve as members of the Executive Branch yet report to Congress about the internal workings of their agencies. They serve, in other words, within executive agencies as Congressional ferrets of dubious constitutionality, though the issue has not, been raised in court. While the system creates conflict, it is also useful in the detection and prevention of fraud and abuse within the Executive Branch. Once again, as with the independent counsel, it is a question of balance.

As one vivid demonstration of how the system operates, the Commission cites the role of the IG in the Justice Department, which attenuates the Attorney General's authority. The IG can always threaten the Attorney General with a "seven-day letter." That is to say, whenever the IG has serious concerns about the way things are being handled within the Justice Department, he can report his concerns at once to the Attorney General, who then has seven days to send the report to Congress.

It has even been suggested that inspectors general be permitted to prosecute certain kinds of cases. Currently, when an IG uncovers evidence of criminal conduct, the prosecutions are conducted by United States Attorneys and the Department of Justice. Judge Bell, who also reported to the Commission on this subject, said that any grant of prosecutorial authority would represent an unacceptable widening of the IG's authority. The Commission opposes any further moves in that direction. The fundamental problem is that no one watches the watchdogs. There is no central agency that collects information about what each inspector general is doing, which varies widely from agency to agency. The IGs, born independent by design, are now so independent that some have begun to run amok. They constantly seek more authority, and when it is not expressly granted, some take it anyway. No one is there to check their power. The Commission endorses the suggestion recently made by Senator Susan Collins that the General Accounting Office or some other neutral agency periodically review the inspector generals' operations to insure consistency and to rein in IGs who exceed their statutory mandate.

EXECUTIVE PRIVILEGE

Whenever Congress exercises its power to "check and balance" the actions of the executive through investigation and corrective legislation, one of the President's main defenses has been invoking executive privilege. That is the President's right to withhold documents and testimony concerning the content of communications with his top-level staff and other executive branch officials relating to official business. It is strongest where national security is concerned, weakest where Congress is investigating allegedly illegal or unethical actions by executive branch officials.

Many Presidents—from Jackson in 1833, who refused to comply with a Senate request for a document relating to the Bank of the United States, to Reagan in 1982—who ordered an aide not to reply to a House committee's subpoena, have cited the doctrine of executive privilege. Perhaps surprisingly, such assertions have been subjected to court proceedings only twice to test their constitutionality.

In the case of President Nixon's Watergate tapes, an appellate court rejected a claim of absolute privilege but declined to enforce a subpoena issued by the Senate Watergate Committee, absent a showing of a specific need for the tapes. In the case of President Reagan's Environmental Protection Agency administrator, whom Congress cited for contempt, the President sued for a declaratory judgment char his claim was well taken. The judge ruled that suit premature, pending any criminal action to enforce the citation, but pregnantly observed that the difficulties of the case "should encourage the two branches to settle their differences without further judicial involvement. Compromise and cooperation, rather than confrontation, should be the aim of the parties."

Executive privilege is much more difficult to sustain against the demands of criminal juries for information relevant to a criminal indictment or trial. Even though the lower courts had previously refused to enforce the Senate Watergate subpoena for the Nixon tapes, the Supreme Court upheld a subpoena for the same tapes issued by the judge presiding over the criminal trial of the principal Watergate defendants. In response to the President's claim that some of the tapes referred to national security matters, the Supreme Court authorized the trial judge to examine the tapes *in camera* and to provide the prosecutor with those, including the so-called "smoking gun" tapes, which did not raise national security concerns. As to executive claims outside the national security area, the Court instructed the trial judge to balance the jury's need for each document against the President's assertion of the right to withhold it.

The Watergate case profoundly affected executive privilege, as it affected so many things. Lloyd N. Cutler twice a Presidential counsel, argued in a study for the Commission: "While die President still holds a strong legal hand when he asserts executive privilege vis-a-vis the Congress, his political power and will to do so have been greatly weakened by Watergate and its aftermath. Watergate seriously impaired the moral status of the Presidency, and substantially enhanced the moral status of Congressional investigations. Since Watergate, incumbent Presidents have been reluctant to assert executive privilege whenever they or their closest advisors or family members have been accused of illegal or unethical misconduct. This reluctance is induced by a well-founded concern that their political opponents and a portion of the media will react by charging 'cover-up,' and that odious comparisons will be drawn to Watergate."

In the Commission's view, the waivers of executive privilege by modern Presidents, including Bill Clinton, are doing serious long-term damage to the ability of Presidents to perform their duties. When Presidents dare nor seek confidential advice for fear it will not remain confidential, when Presidential aides and cabinet members are reluctant to offer advice for the same reason, when all top executive branch officials are loath to write memoranda or make records of their consultations with one another, Presidents are ill-equipped to exercise their full executive power. Moreover, historians and biographers will lose their most important source materials. The Commission therefore recommends that Congress reduce its demands on the Presidency concerning its internal deliberations, and that Presidents invoke executive privilege to resist unreasonably invasive demands from Congress. The Presidency cannot function with a Congressional TV surveillance camera at the White House.

EXECUTIVE ORDERS: THE WAR POWERS ACT

The use of executive orders is almost as old as the republic. The first, issued by Thomas Jefferson, led to the Marbury v. Madison decision, which established the Supreme Court's power to decide the constitutionality of acts of Congress but left untouched another highly significant issue—the power of the President alone, by executive order, to take binding actions not expressly authorized by the legislature. It is a critical issue for the separation of powers, and although more than 13,000 executive orders have now been published, the issue has not been resolved to this day.

When Congress passes and the President signs legislation expressly delegating some legislative power to the President, such as the power to make environmental or safety regulations, the courts have generally sustained the delegations. (But, as noted above, the Supreme Court overturned a more sweeping delegation, the Line Item Veto Act.) The separation of powers question arises in its most difficult form

when Congress has delegated nothing, and the President relies on his own explicit or implicit powers. Two examples are President Truman's seizure of the steel mills during the Korean War and President Carter's suspension of court actions by U.S. nationals against the government of Iran; a third, the standoff over the War Powers Resolution, is treated separately below.

In the steel case, the Supreme Court ruled against President Truman, noting that Congress had voted down a bill that would have delegated seizure power to him. In the Iranian case, the court upheld President Carter's order as a legitimate exercise of his foreign-policy powers. The issues created in these and other cases have been managed without significant damage to the principle of checks and balances. But the commission believes the War Powers Resolution creates a serious risk of such damage and that further steps should be taken to limit that risk.

Born of American involvement in Vietnam, the War Powers Resolution reflects the legislature's desire to reassert its prerogatives in foreign affairs, which had been eroded by the Executive Branch over a long period. It is intended to deal with the modern reality that armed conflicts involving American troops abroad have become more commonplace and declarations of war have become rarer. The resolution requires the President "in every possible instance" to consult with Congress before committing armed forces to hostilities and keep consulting until they are no longer involved in hostilities or have been removed from the war zone.

Although widely derided as unwise, unconstitutional or both, the resolution has never been subject to definitive Constitutional review. Presidents have ignored it when using force for short-term operations and sought approval for major operations such as the Gulf War without conceding that they need it. Congress has skirted confrontation as well. In any event, modern technology makes it impractical to apply the Wax Powers Resolution to the most important war decision of all, responding to a nuclear attack. Here the need for speed, not Presidential usurpation, has removed Congress from the equation. Similarly, the need for secrecy has made it impossible to consult large numbers of members of Congress in cases of hostage-rescue missions.

Nevertheless, it remains true that Presidents cannot effectively exercise their shared powers to make foreign policy and to wage war without the cooperation of Congress, and in achieving such cooperation, as George Shultz said, "trust is the coin of the realm." To build that trust, the next President and Congress would be well advised, before deploying armed forces, to consult the majority and minority leaders and the relevant committee leaders of both houses. Another possibility, the Commission believes, would be an agreement to amend the resolution to remove the generalized requirement to consult Congress, limiting the duty to consult to designated leaders, while at the same time repealing the probably unconstitutional requirement to withdraw American forces if Congress has not concurred within 60 days. In the complex world we inhabit today, no greater degree of Congressional consultation and involvement seems feasible.

COMMISSION MEMBERSHIP

Howard H. Baker, Jr., co-chair, was United States senator from Tennessee from 1967 to 1985, and chief of staff in the Reagan administration. He practices law in the Knoxville, Tennessee firm of Baker, Donelson, Bearman & Caldwell, with offices in Washington, D.C.

Griffin B. Bell, co-chair, was attorney general of the United States from 1977 to 1979. He is a senior partner in the law firm of King & Spalding in Atlanta.

R.W. Apple, Jr. is chief correspondent of the *New York Times.* He has reported for the *New York Times* since 1963, writing from more than 100 countries.

Lloyd N. Cutler is Senior Counsel to the Washington law firm of Wilmer, Cutler & Pickering. He served as White House counsel for Presidents Carter and Clinton and was special counsel to President Carter on the ratification of the SALT II Treaty.

William P. Barr served as Attorney General in the Bush Administration. He is senior vice-president of GTE, Inc.

Andrew H. Card, Jr. is the president and chief executive officer of the American Automobile Manufacturers Association. He served in President Bush's cabinet as Secretary of Transportation.

Lawrence S. Eagleburger was Secretary of State from 1992 until 1993. He served in the Foreign Service for 27 years. In 1993, he joined the law firm of Baker, Worthington, Crossley, Stansberry and Woolf as Senior Foreign Policy Advisor.

William Frenzel is a Guest Scholar at the Brookings Institution in Washington, D.C. During his 20 year tenure in the House of Representatives (R-Minn.), he served

as ranking minority member of the House Budget Committee and was a member of the Ways and Means Committee and its trade subcommittee.

Paul D. Gewitz is the Potter Stewart Professor of Constitutional Law at Yale University.

Juanita Kreps is James B. Duke Professor of Economics and Vice President Emeritus, Duke University. She served as Secretary of Commerce in the Carter Administration.

Daniel J. Meador is the James Monroe Professor of Law Emeritus at the University of Virginia. He served as Assistant Attorney General, Office for Improvements in the Administration of Justice, U.S. Department of Justice, from 1977 to 1979.

Joshua I. Smith is the chairman and chief executive officer of MAXIMA Corp, a computer systems and management information products and services firm. He served as Chairman of the U.S. Commission on Minority business Development under the Bush Administration and was a member of the Executive Committee of the 1990 Economic Summit of Industrialized Nations.

Sander Vanocur was a television journalist and commentator. He is presently host of "Movies in Time" on the History Channel.

William Webster is a senior partner with Milbank, Tweed, Hadley & McCloy, in Washington, D.C. He served as the director of the FBI from 1978 until 1987 and of the CIA from 1987 until 1991. From 1973 until 1978, he served as judge, U.S. Court of Appeals.

Kenneth Thompson, the Commonwealth Professor of Government and Foreign Affairs at the University of Virginia, served as Commission coordinator. During his tenure as Director of the Miller Center from 1979 to 1998, he established the National Commissions program as a way to fulfill a key Miller Center mission: to examine and improve the American presidency. He is currently Resident Scholar at the Miller Center.

LETTER FROM CURTIS E. VON KANN

J.A.M.S ENDISPUTE (JUST PEOPLE JUST RESULTS)

March 1, 1999

HONORABLE ARLEN SPECTER
United States Senate
Committee on Governmental Affairs
Washington, D.C.

DEAR SENATOR SPECTER: At last week's hearing, you and I were voices crying in the wilderness in support of a fixed time limit for Independent Counsel investigations. The principal stated objection was that, through obstructionist tactics, subjects might stymie the investigation while the clock was running out. After the hearing, it occurred to me that there is an easy answer to this objection, namely, to provide that the time limit will be tolled during the period when any court is considering a motion to enforce a subpoena or otherwise deal with obstructions. Thus, I hope you will continue to press for inclusion of some time limit in any revised Independent Counsel Act.

I should add that, while I favor enactment of a modified Independent Counsel statute in the reasonably near future, there is great merit in Senator Baker's suggestion of a "cooling off" period. Present passions (inflamed more by recent controversial decisions of a few key players, which can happen under any scheme, than by incurable flaws in the Act) make some want to "chuck the whole thing" rather than engage in the thoughtful, objective cost-benefit analysis of weighing the advantages of a statute, which sets procedures and standards and strikes a careful balance between competing considerations, against the advantages of no statute at all. Such an analysis may well be better undertaken a year from now than in the rush to June 30, 1999.

Very truly yours.

CURTIS E. VON KANN
Former Independent Counsel

PREPARED STATEMENT BY U.S. REPRESENTATIVE JAY DICKEY, FROM THE STATE OF ARKANSAS

Mr. Chairman: Thank you for allowing my statement and bill, H.R. 117, The Independent Counsel Reform and Accountability Act of 1999, to appear in the February 24, 1999, Senate Governmental Affairs hearing record.

I re-introduced the Independent Counsel Reform and Accountability Act (H.R. 117), in the U.s. House of Representatives, on January 6, 1999. After careful consideration, I re-introduced this bill because I believe that the basic concept of the independent counsel is necessary.

However, under the guidelines of the current independent counsel statute, there is no accountability and the guidelines are far too broad.

My bill, H.R. 117, attempts to correct the problems by making substantial, needed changes to the current statute. This bill will provide Congress with a more reasonable statute to consider when a vote on re-authorization of the Independent Counsel Statute comes to a head.

Mr. Chairman, this Congress must find an alternative to the current statute or let the independent counsel statute expire altogether.

Mr. Chairman, once again, thank you for allowing my statement and a copy of H.R. 117 to be included in the record.

[The copy of H.R. 117 follows:]

I

106TH CONGRESS
1ST SESSION

H. R. 117

To reform the independent counsel statute, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 6, 1999

Mr. DICKEY (for himself, Mr. TAYLOR of North Carolina, Mr. DUNCAN, Ms. MCKINNEY, Mr. STUMP, Mr. NORWOOD, and Mr. HEFLEY) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To reform the independent counsel statute, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Independent Counsel Accountability and Reform Act of 1999".

SEC. 2. BASIS FOR INVESTIGATION.

(a) PRELIMINARY INVESTIGATION.—Section 591 of title 28, United States Code, is amended—

(1) in subsection (a)—

(A) by striking "information" and inserting "specific information from a credible source that is"; and

(B) by striking "may have" and inserting "has"; and

(2) in subsection (c)(1)—

(A) by striking "information" and inserting "specific information from a credible source that is"; and

(B) by striking "may have" and inserting "has".

(b) FURTHER INVESTIGATION.—Section 592(c)(2) of title 28, United States Code, is amended by striking "information" and inserting "specific information from a credible source that is".

SEC. 3. SUBPOENA POWER.

Section 592(a)(2) of title 28, United States Code, is amended by striking "grant immunity, or issue subpoenas" and inserting "or grant immunity, but may issue subpoenas duces tecum".

SEC. 4. AUTHORITY OF ATTORNEY GENERAL.

Section 592(a)(2) of title 28, United States Code, is amended by striking subparagraph (B), by striking "(A)", and by running the text of subparagraph (A) into the paragraph heading.

1 **SEC. 5. PROSECUTORIAL JURISDICTION OF INDEPENDENT**
2 **COUNSEL.**

3 (a) PROSECUTORIAL JURISDICTION.—Section 593(b)
4 of title 28, United States Code, is amended—

5 (1) in paragraph (1)—

6 (A) by striking "define" and inserting
7 ", with specificity, define"; and

8 (B) by adding at the end the following:
9 "Such jurisdiction shall be limited to the al-
10 leged violations of criminal law with respect to
11 which the Attorney General has requested the
12 appointment of the independent counsel and
13 matters directly related to such criminal viola-
14 tions."; and

15 (2) by amending paragraph (3) to read as
16 follows:

17 "(3) SCOPE OF PROSECUTORIAL JURISDIC-
18 TION.—In defining the independent counsel's pros-
19 ecutorial jurisdiction, the division of the court shall
20 assure that the independent counsel has adequate
21 authority to fully investigate and prosecute the al-
22 leged violations of criminal law with respect to which
23 the Attorney General has requested the appointment
24 of the independent counsel and matters directly re-
25 lated to such criminal violations, including perjury,

1 obstruction of justice, destruction of evidence, and
2 intimidation of witnesses.".
3 (b) CONFORMING AMENDMENT.—Section 592(d) of
4 title 28, United States Code, is amended by striking "sub-
5 ject matter and all matters related to that subject matter"
6 and inserting "the alleged violations of criminal law with
7 respect to which the application is made and matters di-
8 rectly related to such criminal violations".
9 **SEC. 6. ATTORNEYS' FEES.**
10 Section 593(f) of title 28, United States Code, is
11 amended—
12 (1) in the first sentence of paragraph (1)—
13 (A) by striking "the court may" and in-
14 serting "the court shall";
15 (B) by inserting after "pursuant to that
16 investigation," the following: "if such individual
17 is acquitted of all charges, or no conviction is
18 obtained against such individual, at a trial
19 brought pursuant to that investigation, or if the
20 conviction of such individual at such a trial is
21 overturned on appeal,"; and
22 (C) by inserting ", trial, and appeal (if
23 any)" after "during that investigation"; and

1 (2) by striking paragraph (2) and striking "(1)
2 AWARD OF FEES.—" and running the matter in
3 paragraph (1) into the subsection heading.

4 **SEC. 7. ADMINISTRATIVE SUPPORT.**

5 (a) ADMINISTRATOR OF GENERAL SERVICES.—Sec-
6 tion 594(l)(2) of title 28, United States Code, is
7 amended—

8 (1) by striking "Director of the Administrative
9 Office of the United States Courts" and inserting
10 "Administrator of General Services"; and

11 (2) by striking "Administrative Office of the
12 United States Courts" and inserting "General Serv-
13 ices Administration".

14 (b) OFFICE SPACE.—Section 594(l)(3) of title 28,
15 United States Code, is amended to read as follows:

16 "(3) OFFICE SPACE.—The Administrator of
17 General Services shall promptly provide appropriate
18 office space for each independent counsel. Such of-
19 fice space shall be within a Federal building unless
20 the Administrator of General Services determines
21 that other arrangements would cost less.".

22 **SEC. 8. AUTHORITIES AND DUTIES OF INDEPENDENT**
23 **COUNSEL.**

24 (a) COMPLIANCE WITH POLICIES OF THE DEPART-
25 MENT OF JUSTICE.—Section 594(f) of title 28, United

1 States Code, is amended by striking "enforcement of the
2 criminal laws" and inserting "the enforcement of criminal
3 laws and the release of information relating to criminal
4 proceedings".

5 (b) LIMITATION ON EXPENDITURES.—Section 594 of
6 title 28, United States Code is amended by adding at the
7 end the following:

8 "(m) LIMITATION ON EXPENDITURES.—No funds
9 may be expended for the operation of any office of inde-
10 pendent counsel after the end of the 2-year period after
11 its establishment, except to the extent that an appropria-
12 tions Act enacted after such establishment specifically
13 makes available funds for such office for use after the end
14 of that 2-year period.".

15 **SEC. 9. TREATMENT OF CLASSIFIED INFORMATION.**

16 Section 594(a) of title 28, United States Code, is
17 amended by adding at the end the following: "An inde-
18 pendent counsel appointed under this chapter who gains
19 access to classified information shall follow all procedures
20 established by the United States Government regarding
21 the maintenance, use, and disclosure of such information.
22 The failure to follow such procedures shall be grounds for
23 removal for good cause under section 596(a)(1), in addi-
24 tion to any penalty provided in section 798 of title 18 or
25 any other law that may apply.".

1 **SEC. 10. OUTSIDE LEGAL WORK.**

2 Section 594(j)(1) of title 28, United States Code, is
3 amended by inserting before the period the following: "and
4 any such independent counsel may not during such period
5 engage in any legal work which is additional to the legal
6 work the counsel is engaged in as such a counsel".

7 **SEC. 11. ELIMINATION OF REPORTS.**

8 (a) SECTION 594.—Section 594(h) of title 28, United
9 States Code, is amended—

10 (1) by striking subparagraph (B) of paragraph
11 (1), by striking the dash, and by striking "(A)" and
12 running the text of subparagraph (A) after "shall";

13 (2) by striking everything after the first sen-
14 tence in paragraph (2); and

15 (3) by striking paragraph (3).

16 (b) SECTION 595.—Section 595(a) of title 28, United
17 States Code, is amended—

18 (1) by striking paragraph (2); and

19 (2) by striking the heading for paragraph (1)
20 and running the text of such paragraph into the
21 heading for subsection (a).

22 (c) SECTION 596.—Section 596(b) of title 28, United
23 States Code, is amended—

24 (1) in paragraph (1), by striking subparagraph
25 (B) of paragraph (1), by striking the dash, and by

1 striking "(A)" and running the text of subparagraph
2 (A) after "when"; and
3 (2) in paragraph (2), by striking the second
4 sentence.

5 **SEC. 12. REMOVAL, TERMINATION, AND PERIODIC RE-**
6 **APPOINTMENT OF INDEPENDENT COUNSEL.**

7 (a) GROUNDS FOR REMOVAL.—Section 596(a)(1) of
8 title 28, United States Code, is amended by adding at the
9 end the following: "Failure of the independent counsel to
10 comply with—
11 "(A) the established policies of the Depart-
12 ment of Justice as required by section 594(f),
13 and
14 "(B) section 594(j),
15 may be grounds for removing that independent
16 counsel from office for good cause under this sub-
17 section.".

18 (b) TERMINATION.—Section 596(b)(2) of title 28,
19 United States Code, is amended to read as follows:
20 "(2) TERMINATION BY DIVISION OF THE
21 COURT.—The division of the court may terminate an
22 office of independent counsel at any time—
23 "(A) on its own motion, or
24 "(B) upon the request of the Attorney
25 General,

1 on the ground that the investigation conducted by
2 the independent counsel has been completed or sub-
3 stantially completed and that it would be appro-
4 priate for the Department of Justice to complete
5 such investigation or to conduct any prosecution
6 brought pursuant to such investigation, or on the
7 ground that continuation of the investigation or
8 prosecution conducted by the independent counsel is
9 not in the public interest.".
10 (c) QUARTERLY EXPENDITURES.—
11 (1) AMENDMENT.—Section 596(c) of title 28,
12 United States Code, is amended by adding at the
13 end the following:
14 "(3) On or before the end of March 31, June 30,
15 September 30, and December 31 of each year, an inde-
16 pendent counsel shall report to the committees listed in
17 paragraph (2)(B) the aggregate amount expended in the
18 previous quarter. The requirement to report such amount
19 shall not be construed to require a disclosure of the inves-
20 tigation for which such amount was expended.".
21 (2) EFFECTIVE DATE.—The amendment made
22 by paragraph (1), shall take effect at the end of the
23 1st quarter beginning after the date of the enact-
24 ment of this Act.

1 (d) PERIODIC REAPPOINTMENT.—Section 596 of title
2 28, United States Code, is amended by adding at the end
3 the following:
4 "(d) PERIODIC REAPPOINTMENT OF INDEPENDENT
5 COUNSEL.—If an office of independent counsel has not
6 terminated before—
7 "(1) the date that is 2 years after the original
8 appointment to that office, or
9 "(2) the end of each succeeding 2-year period,
10 such counsel shall apply to the division of the court for
11 reappointment. The court shall first determine whether
12 the office of that independent counsel should be termi-
13 nated under subsection (b)(2). If the court determines
14 that such office will not be terminated under such sub-
15 section, the court shall reappoint the applicant if the court
16 determines that such applicant remains the appropriate
17 person to carry out the duties of the office. If not, the
18 court shall appoint some other person whom it considers
19 qualified under the standards set forth in section 593 of
20 this title. If the court has not taken the actions required
21 by this subsection within 90 days after the end of the ap-
22 plicable 2-year period, then that office of independent
23 counsel shall terminate at the end of that 90-day period.".

1 **SEC. 13. EFFECTIVE DATE.**

2 The amendments made by this Act shall not apply
3 with respect to any investigation which is pending, before
4 an independent counsel appointed under chapter 40 of
5 title 28, United States Code, on the date of enactment
6 of this Act.

○

QUESTIONS AND ANSWERS FOR CURTIS EMERY VON KANN FROM SENATOR LIEBERMAN

1. Question: The announcement of an investigation, like an indictment, is tantamount to a conviction in the minds of many people, despite the fact that in thirteen of the twenty independent counsel investigations, no indictments were returned. How was it possible for you to conduct your inquiry without leaks or press attention? What guidance or recommendations can you make to this Committee to assure the integrity of independent counsel investigations and the privacy of the individuals involved?

Answer: Because the allegations concerning Mr. Segal had received no publicity, the Attorney General requested that my appointment be made under seal; the Special Division complied with that request and issued its November 27, 1996 order of appointment under seal. For the next eleven months, our investigation proceeded under seal, with no publicity and no inquiries from the media. In October 1997, under circumstances still unknown to me, someone did leak to the press that Eli Segal was the subject of an Independent Counsel investigation; thereafter, a number of news accounts appeared, some containing significant inaccuracies. I determined that the reasons for keeping the matter under seal had evaporated; I moved the Court to lift the seal, Mr. Segal did not oppose the motion, and it was granted.

Accordingly, my efforts to protect the privacy of Mr. Segal and others involved in our investigation were only partly successful.

As to recommendations, I would offer three:

(1) Unless there has been significant publicity concerning the matters to be investigated, Independent Counsel appointments should be made under seal. This will increase the ability of the Independent Counsel and his/her staff to insist on confidentiality in dealing with witnesses; will greatly diminish the chances of the media becoming aware of the investigation; and will provide greater likelihood—although no guarantee—that the investigation may be concluded without any publicity.

(2) I would consider making it a Federal criminal offense, punishable by substantial fine or imprisonment, for anyone to leak information to the media concerning an Independent Counsel investigation known to be under seal.

(3) I suggest that, if the requirement of a final report is retained in the Independent Counsel Act, the report should refer to individuals (and corporations) other than the subject only by generic description (for example, "a manager in the contracting office of a corporate donor") and not by name. This was the mode of identification utilized in my final report.

2. Question: What criteria would you establish for the selection of independent counsels?

Answer: I don't believe that one can devise formal selection criteria for Independent Counsels which will significantly increase the chances of good appointments, any more than one could devise such criteria for selection of good judges, attorneys general, or senators. Individual qualities of judgment, discretion, wisdom, and efficiency are much more important than any litmus test of particular qualifying criteria.

For example, I do not believe it is appropriate to require that all Independent Counsel have served as prosecutors in the past. Some of the most successful independent counsel have not had such prior employment experience. One can always hire, as deputy independent counsel and staff attorneys, persons with prosecutorial experience. Indeed, some observers of the Independent Counsel Act believe that, since an Independent Counsel staff of zealous prosecutors may sometimes need to be reined in, one who has served as a criminal defense counsel (as Jacob Stein has) or a trial judge (as I have) may have the better perspective for serving as an Independent Counsel than a former prosecutor.

In short, I would not favor mechanistic criteria (e.g., "must have been a prosecutor," "must have practiced law for at least 20 years," etc.). Rather, I would formulate the criteria more broadly (e.g., "the individual appointed shall have obtained—as prosecutor, defense counsel, or trial judge—substantial criminal law experience and shall have the judgment, wisdom, temperament, and discretion to carry out the investigation expeditiously, fairly,

and with due regard for the rights of all affected persons") and would leave it to the selection process to identify candidates of the highest caliber.[1]

3. Question: With respect to both setting up an office and conducting the investigation, is the lack of formal support from the Justice Department a weakness, or could it impair the independence of the investigation? While not involved in Jacob Stein's investigation of Edwin Meese, you worked in the same office and saw how he organized his effort, and you hired an attorney with previous experience in an independent counsel investigation as a member of your staff. How vital is such "institutional memory" to an investigation?

Answer: As to Justice Department support, I believe the present balance—in which the Independent Counsel can avail himself or herself of whatever assistance may be desired from DOJ but may also choose to operate completely independent of DOJ—is about right. I received complete cooperation from DOJ and the FBI when I asked for it but experienced no interference or intrusion into my independence.

"Institutional memory" does seem to me a valuable asset which can probably be fostered in two ways. On an informal level, those who receive Independent Counsel appointments are well advised to include prior Independent Counsel experience on their staff and/or to consult with prior Independent Counsels for their insights. On a more formal level, the Administrative Office of the U.S. Courts has an Independent Counsel Support Section whose staff provides each new Independent Counsel with an orientation briefing and a handbook of useful materials and are available to answer any administrative questions which may arise.

One kind of support which would be welcome is an office, within the Administrative Office of the U.S. Courts or the Justice Department, to handle the administrative winding up of an Independent Counsel Office—principally the archiving of files and awaiting a final GAO audit (which are currently performed only for the six months ending March 31 and the six months ending September 30). Indeed, it might be wise to require that, whenever an IC Office advises GAO that it has completed all operations and is ready for final audit, GAO would audit that office with 30 days of such notice rather than waiting for up to six months for the next periodic audit cycle to roll around.

QUESTIONS AND ANSWERS FOR JUDGE BELL AND SENATOR BAKER FROM SENATOR CLELAND

1. Judge Bell, having served as Attorney General, do you believe that the statutory authority granted to Attorney Generals to appoint special counsels outside the Department of Justice to investigate matters in the public interest is sufficient to conduct investigations of high government officials should we choose not to reauthorize the Independent Counsel statute? If not, why?

Answer: Yes. Such was sufficient in the case of the Teapot Oil scandal, Watergate and the Carter Warehouse investigation.

2. To Judge Bell and/or Senator Baker: I understand the national Commission on Separation of Powers, which you co-chaired, recommends a new statute that would provide that when the President, Vice President, or Attorney General are involved in a criminal investigation, the Attorney General is to be recused and appoint outside counsel or a qualified Department of Justice official to investigate. But what procedure would you use to investigate the other high office holders currently covered under the Independent Counsel statute who have committed alleged wrongdoing?

Answer: The procedure should be the same. The Attorney General, in this situation, should appoint a special counsel from inside or outside of the Department of Justice to investigate allegations of wrongdoing.

3. To Judge Bell and/or Senator Baker: Although the National Commission on Separation of Powers, which you co-chaired, concludes that there is no way of correcting the inherent absence of fairness from the procedure itself, assuming reauthorization of the Independent Counsel Act is inevitable, what do you believe are the most important amendments Congress should make to the statute?

[1] As indicated in my testimony before the committee, I like Lloyd Cutler's suggestion that each President submit to the Senate the names of ten or fifteen people who, upon confirmation, would constitute the panel from which future Independent Counsels would be chosen.

Answer: If the Independent Counsel Act were to be amended, I would suggest that it be amended in several ways. First, the coverage of the statute is much too broad, particularly Section 591(c). It is under that section that the Whitewater special counsel has received jurisdiction over non-Federal persons, rather than under Section 591(b), which includes the President and other executive officers. Section 591(c) should be eliminated, and Section 591(b) should be modified to include only the president, Vice President, and Attorney General and not the retinue of Federal officers now included.

Section 592(a)(2), which restricts the Attorney General from convening grand juries, issuing subpoenas, and so forth, needs to be eliminated to give the Attorney General more discretion to investigate allegations. This section puts blinders on the Attorney General with respect to making the determination whether to seek special counsel.

The statute should also be amended to restrict the special court in the selection of special counsel. The Court has total discretion now and should be restricted to appointing counsel as to whom there is no appearance of impropriety. A standing panel nominated by these same judges and confirmed by the Senate would let the public know in advance of the universe from which special counsel might be selected.

Finally, the requirement of a final report should be eliminated.

4. Judge Bell, you have also criticized the provision of the.statute requiring Independent Counsels to issue final reports. Some in Congress have suggested that eliminating that provision should be a possible amendment to the Act. What is your criticism of the final reporting requirement and why do you believe it is unnecessary?

Answer: The final report by the special counsel is an example of the lack of due process afforded the target by suggesting guilt although there has been no indictment. A final report would never be issued by the Department of Justice to an ordinary person who was investigated but not indicted. A final report is not necessary. It is quite enough to indict the target, or close the investigation.

5. To Judge Bell and/or Senator Baker: It is estimated the total cost of all 20 Independent Counsel investigations from 1979 through March 30, 1998, has been just under $150 million. Some have suggested moving the investigatory function of the Independent Counsel under a permanent division of the Department of Justice where career prosecutors or a full-time "independent counsel" could conduct these investigations to avoid some of the problems we have had with the statute and presumably would also keep costs of investigations down. Do you believe this would be a prudent alternative to our current independent counsel process?

Answer: I do not. No such standing authority is needed, given the small number of such investigations. The regular Justice Department investigatory and prosecutorial procedures are entirely adequate in most cases. I know this from actual experience.

LETTER FROM HOWARD H. BAKER, JR. ABOUT QUESTIONS AND ANSWERS

May 26, 1999

THE HONORABLE JOSEPH MAXWELL CLELAND
United States Senate
Senate Dirksen Office Building
Washington, D.C. 20510

DEAR SENATOR CLELAND: Thank you very much for your additional questions subsequent to my testimony before the Committee on the Independent Counsel Act. I have a copy of General Griffin Bell's reply dated May 10, 1999. I associate myself fully with those answers.

Sincerely,

HOWARD H. BAKER, JR.

THE FUTURE OF THE INDEPENDENT COUNSEL ACT

WEDNESDAY, MARCH 3, 1999

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 10:05 a.m., in room SH–216, Hart Senate Office Building, Hon. Fred Thompson, Chairman of the Committee, presiding.

Present: Senators Thompson, Collins, Cochran, Specter, Gregg, Lieberman, Levin, Akaka, Durbin, and Edwards.

OPENING STATEMENT OF CHAIRMAN THOMPSON

Chairman THOMPSON. Let's come to order, please.

The Governmental Affairs Committee continues its hearings today on whether or how to reauthorize the Independent Counsel Act. We want to thank everyone for moving back and forth between hearing rooms with us. The media has asked us to use this room whenever we can. They have a greater ability to cover what we are doing, and we appreciate your operating on sometimes short notice as to where we are going to be having these hearings.

The first panel will present a view on this subject never before considered by a committee reviewing this law, and that is the perspective of subjects of the Independent Counsel investigation and their attorneys; in fact, almost solely, I think, today from their attorneys.

Ted Olson, who was going to be with us, is ill this morning and could not be with us. But as we go along, we might be able to refer to some of his comments in his testimony and submission to the Committee because I think he also has a valuable insight.[1]

But, frankly, we have the advantage today of having with us five of the very best attorneys in the country, and we have the advantage through them of seeing how some of these things operate in the real world. We operate sometimes in a vacuum with regard to these things, but these gentlemen will be able to give us, I think, an insight that perhaps is all too rare.

I know that when matters get very, very serious with an individual, they go to people who not only are the most clever or perhaps astute, but also people of great integrity whose judgment they rely upon. And such is the case with the five gentlemen we have here today. These gentlemen not only are fierce advocates for the cases that they have, but they are people who have proven that they are

[1] The prepared statement of Mr. Olson appears in the Appendix on page 229.

interested in having the best system, the best overall system, because it is the environment in which they live and the environment in which we all live. It has to do with our system of justice.

My experience has been that the higher you go in terms of capability and integrity in the hierarchy in this legal system, the more these people are able to put aside their own political views, whatever they may be, and really look at things objectively. That is their life. That is what they are paid to do, is to analyze things objectively before they become advocates. So I think we are really fortunate in having these gentlemen here with us today.

Obviously, no one is pleased to be the subject of any criminal investigation. It is important to recognize that Congress has given regular Federal prosecutors expansive powers in recent years, and that Independent Counsel also use these same powers. The witnesses on the first panel have experience both with standard Federal prosecutions and with Independent Counsel prosecutions. They will thus be able to provide the Committee with insight into any abuses that may appear only, or far more frequently, in Independent Counsel investigations than in standard Federal criminal prosecutions.

The second panel consists of three individuals who prosecuted high-level government officials through other approaches other than the Independent Counsel Act. One witness did so as a standard Federal prosecutor within the Justice Department. A second witness was a special prosecutor appointed by the Attorney General, and removable at will. A third was a regulatory Independent Counsel, a term that we haven't heard used much. But there is a regulation on the books separate and apart from the Independent Counsel Act that allows the Attorney General to appoint a so-called regulatory Independent Counsel, rather than by a three-judge panel, terminable only for cause. So we will get to explore that a little bit today for the first time.

So their testimony will benefit the Committee in considering what might be the advantages and disadvantages of adopting alternatives to the Independent Counsel Act and I look forward to their testimony.

Senator Lieberman.

OPENING STATEMENT OF SENATOR LIEBERMAN

Senator LIEBERMAN. Thank you very much, Mr. Chairman. I join you in welcoming the witnesses today, who are really an extraordinary group of attorneys and remind us why, in spite of ongoing public abuse, the legal profession is really a noble profession. At least I think it is, and I appreciate the work that these people have done pro bono at various times in their careers, as well as the extraordinary work they have done for which they have been compensated which has been of a high quality as well.

I suppose that there are some people following news about Congress' consideration of the Independent Counsel Act who would wonder why we are proceeding with this hearings, I mean as if the patient has already died. So why are we still in the operating room? But it is too early to begin preparing eulogies, and rightfully so, in my opinion.

Mr. Chairman, I do thank you again for both the seriousness with which you have put together this series of hearings, notwithstanding your own inclination as to what the outcome should be, and the fairness and openness with which you have involved both me and others on the Democratic side in this process.

My reference to the news was, of course, I was disappointed yesterday to read the administration position, as stated by Deputy Attorney General Holder, to a House committee because it is a change of position from the position the administration took at its outset in 1993 and 1994 which was critical to the reauthorization of this counsel in 1994.

I suppose beauty is in the eye of the beholder. The attractiveness or ugliness of the Independent Counsel office may depend on whether you are in power or not. We recall that the Republicans tended to be much less enthusiastic about renewing the Independent Counsel after the experience with Lawrence Walsh. And Democrats are much less inclined to renew the counsel after the experience with Kenneth Starr now.

And I think what we are trying to do here is to learn from the experiences that we have had with these two Independent Counsel and a host of others who were less controversial and less visible, most of whom, incidentally, did not proceed to indict their targets. But most of all, not just to learn from this experience, but to try to transcend it, to go beyond it and look at the purpose for which this law was created in 1978.

It is easy enough to find scars, or warts rather—scars on others and warts in the office. But we have to ask ourselves, what we do if we let it die and don't create something in its place, what is going to happen the next time there is a suspicion of criminal behavior by people at the top of our government? Are we and the public going to be satisfied with and have confidence in either the Justice Department itself or a special prosecutor appointed by the Attorney General, accountable to the Attorney General, removable by the Attorney General, being in charge of the investigation?

So I suppose yesterday I was disappointed by Mr. Holder's testimony not just because of the change of the position, but because as I followed it, it seemed to me that one or two of his points went to the heart of the statute, but the rest of them were the kinds of criticisms that can be remedied with surgery as opposed to termination.

So it is in that spirit of open-mindedness that I look forward to the testimony of this very fine panel of witnesses, whom I thank for giving us their time and thoughts. And, again, I thank you, Mr. Chairman, for the way you have led this effort.

Chairman THOMPSON. Well, thank you, Senator Lieberman. I do think the natural tendency is for all of us to be kind of pushed to the extremes of our positions and for people who are searching for a bottom line to everything at all times, and we really shouldn't reach a bottom line yet. And you might be interested in knowing that with the growing popularity of the notion that we should abolish the law, I am beginning to reassess my own position on it.

Senator LIEBERMAN. That is good. You have a kind of reflexive orneriness about you, a kind of innate maverick that I was hoping would rise. Thank you.

Chairman THOMPSON. Our first panel consists of two attorneys who have represented targets of Independent Counsel investigations. We were going to have an additional one, Mr. Olson, who himself was a target. I will not go through the long resumes that I could relate concerning these gentlemen. They are all extremely well-known, nationally known, tops in their profession. They have all served their government—both served their government. They have both been at distinguished private practices.

Robert Bennett is, among his other endeavors, counsel for the President, counsel for Harold Ickes, was counsel for Caspar Weinberger. Nathan Lewin was former counsel to Attorney General Edwin Meese. Mr. Olson, whom I mentioned, was counsel for targets in the Clinton passport file investigation, as well as a subject himself, subject of an Independent Counsel investigation, whose case incidentally resulted in the Supreme Court decision in *Morrison v. Olson.*

So, gentlemen, thank you for being here, and any preliminary statements that you might have.

Mr. Bennett.

TESTIMONY OF ROBERT S. BENNETT, SKADDEN, ARPS, SLATE, MEAGHER AND FLOM

Mr. BENNETT. Good morning, Senator Thompson and Members of the Committee. My name is Robert Bennett and I am a partner in the Washington office of Skadden, Arps, Slate, Meagher and Flom, and I want to thank Senator Thompson and the Committee for inviting me here to express my views about a statute which I feel very strongly about and with which I have had, frankly, a great deal of experience.

I and my firm have represented both targets and witnesses in many, many Independent Counsel investigations. As the Chairman noted, I personally represented Caspar Weinberger in connection with the investigation of Lawrence Walsh, and currently, as you know, represent President Clinton. In addition, I have served as special counsel to the Senate Ethics Committee in three investigations—the Harrison Williams investigation, the David Durenberger investigation, and the so-called Keating Five investigation. Also, in my earlier life, I learned what a magnificent lawyer Chairman Thompson is when we both served as consultants to the Senate Foreign Relations Committee regarding the appointment of Alexander Haig as Secretary of State.

Before going into private practice, I was a Federal prosecutor, serving here in the District of Columbia. And I believe that with this range of experience, I have some insight into the functioning and the flaws of the Independent Counsel Act.

Can this statute be saved? I have come to the view that it cannot and that it should not be reenacted, although I should, in the spirit of full disclosure, tell you I have not always held this view. Several years ago, I felt that it was necessary for public acceptability to have such a statute, although even then I thought it was necessary to make some substantial changes.

I am no longer of that view. I believe there is no perfect answer. There is no possibility of having total independence, but that on balance we should allow this statute to lapse. I believe that the last

few years have made it very clear that the act has simply failed to fulfill its purpose and I don't think it should be reenacted in any form.

First of all, rather than freeing prosecutorial discretion from political bias, the act has yet become another weapon, indeed a nuclear weapon, in the arsenal of partisan politics. Partisan politics affects every phase of the Independent Counsel Statute, every step of the process. The very first call for an Independent Counsel, the decision to make a referral, the court's choice of Independent Counsel, the conduct of the investigation by the Independent Counsel once appointed—every step has become an opportunity for one side or the other to cry political foul.

When I was representing Mr. Weinberger, the cries of political foul came from one side, and now the cries of political foul come from the other. We could argue for days about who is to blame for this, but I sense that there is plenty of blame for all to share. But, to me, the bottom line is this: The public now views the Independent Counsel Statute as largely a political process, and this has not only undermined respect for the Department of Justice, but it has also led to disrespect for Congress, who many believe are willing to interfere with impartial law enforcement for the sake of partisan gain.

Rather than ensuring that public officials are not treated with kid gloves, the Independent Counsel Act has become a vehicle for subjecting them and those around them to a seemingly perpetual scrutiny more intense than any private citizen would have to endure. The mere appointment of an Independent Counsel puts the scandal machine, which has caused so much damage to both sides of the political aisle, in overdrive.

And rather than being invoked in limited and extraordinary instances, the act is structured in such a way and has been interpreted by the courts in such a way as to give Independent Counsel ever-expanding jurisdiction. This has resulted in the prosecution of peripheral individuals, some of whom have never held public office or who have never had any dealings whatsoever with the public figure who is supposed to be the target of the Independent Counsel, and for matters which would normally not subject anyone to prosecution.

Moreover, any benefits to be derived from the act are outweighed, I believe, by the costs imposed on our society. These costs include the corrosion of public confidence in our justice system, the erosion of the separation of the powers, incursions into the rights of individuals in and out of public office. And perhaps most troubling, I strongly believe that it is the act and its accompanying scandal mentality that are discouraging some of the very best and brightest people from entering government.

The Independent Counsel concept is of no benefit anymore and the act should be scrapped. It should be allowed to die. It cannot be fixed. All the proposed fixes will make it more complicated and unwieldy, and will raise as many questions as they solve. And I would go even further, and perhaps I should say at this point I want to make it clear that I don't speak on behalf of the President, on behalf of Mr. Weinberger, or on behalf of any other client.

But I would propose that once this act is allowed to lapse, all currently active Independent Counsel investigations should be referred back to the Public Integrity Section of the Department of Justice, which can assess all pending prosecutions and investigatory leads and determine which to abandon and which to pursue. They should be brought back within the Department of Justice budgetary system and under the auspices of the Department of Justice guidelines. These cases, if need be, can be referred to a Leon Jaworski-type special prosecutor within the Department of Justice framework, and if the Attorney General decides the current Independent Counsel can be retained to continue their work.

Former Attorney General Edward Levi was able to spot the problems with the Independent Counsel Act two decades ago. While I didn't agree with all of his testimony, I agree with this. He said very prophetically that the act would create opportunities for actual or apparent partisan influence in law enforcement; publicize and dignify unfounded, scurrilous allegations against public officials; result in the continuing existence of a changing band of multiple special prosecutors; and promote the possibility of unequal justice. Senators, we should have listened to Attorney General Levi.

Some of the act's fundamental flaws are well-known to this Committee—the lack of deadlines for completing an Independent Counsel investigation, the limitless resources available to an Independent Counsel, the fact that an Independent Counsel has only one case to pursue. Senators, in over 30 years of practice, I have, for present purposes, learned one lesson that is more important than any others. Beware of the lawyer with one case, who has an endlessly deep pocket to finance it, and no time limit in which to get the job done.

While I am vigorously opposed to the reenactment of the statute in any form, I would urge this Committee to at least conduct some radical surgery. Senator Lieberman mentioned surgery should you decide to renew it. Well, hopefully, if you do that, make it radical surgery if it is to continue in any form. And I thought perhaps I could be most helpful to the Committee to give you a list of things which I think have to be changed and which go to the core of the practical problems which I face day in and day out in dealing with these Independent Counsels.

The overarching point to me, is that if you are to reenact the statute, you somehow have to bring the Independent Counsel within the Department of Justice budgetary system and under the auspices of DOJ guidelines.

Second, any act should be limited in application only to the President, Vice President and Attorney General. And no discretionary authority is needed, in my opinion, because existing government ethics regulations already require the Attorney General to recuse herself when she has an actual personal or financial conflict of interest.

Third, any renewed act should be invoked only in connection with charges of felony-level offenses that occurred while the target held public office. You should not permit an Independent Counsel to have a hunting license to pursue a covered official in all aspects of his or her past life.

Four, preliminary inquiries should not have artificial 90-day deadlines.

Fifth, the Attorney General should be authorized to issue subpoenas and use a grand jury during the preliminary inquiry phase. I would agree, if reenacted, the Attorney General should not be able to give immunity to witnesses.

Sixth, the standard for referring a matter to an Independent Counsel should be probable cause or, at a minimum, a rational basis to believe that a felony has occurred. The requirement that a referral must be made if further investigation is warranted should be eliminated. The burden should always be on the government to affirmatively establish some quantum of evidence to go forward with an Independent Counsel investigation.

Seventh, the act should make explicit that Independent Counsel's jurisdiction is to be strictly construed and should not be expanded beyond that which is necessary to prosecute obstruction and perjury in connection with its original jurisdiction.

Eighth, each Independent Counsel investigation should have a deadline and a budget stated in the jurisdictional referral. It should be part of the Attorney General's mandate to set a deadline and a budget which in his or her judgment is reasonable to complete the investigation, given the nature of the referral. If an Independent Counsel determines that he or she will need more time or money, they can apply to the special division of the court.

Nineth, Independent Counsels should be selected from a preexisting roster of highly qualified professional prosecutors or former prosecutors, those who are used to using the enormous power of law enforcement and the power of prosecution. And these lists should be compiled ahead of time by the Department of Justice based on names solicited from sources such as the American Bar Association, the U.S. District Courts and the U.S. Attorneys offices throughout the country.

The appointment should not be made because someone seeks the job or because a well-placed friend recommends him or her to a judge on the special division. I think an interesting area of inquiry of this Committee would be to determine just how some of the Independent Counsels have been selected. I would suggest to you that you would find that it was not always done in an objective and impartial way but very often it is someone who seeks the job.

Tenth, a significant percentage of an Independent Counsel's staff should be required to be highly experienced career prosecutors. Perhaps career prosecutors in the Public Integrity Division should be regularly assigned to staff Independent Counsel investigations.

Eleventh, an Independent Counsel should be required to, for all practical reasons, give up his or her private practice until the investigation is completed.

Twelveth, there should be no requirement that an Independent Counsel issue a final report, and all who are appointed should agree not to write books about their investigation. Reports and books serve no prosecutorial purpose and only further politicize the process and tarnish the reputations of individuals whom the Independent Counsel may have chosen not to prosecute. Moreover, the report-writing requirement increases the cost of investigation because they cause Independent Counsels to pursue aspects or details

of investigations which have little investigatory value, but only serve the purpose of protecting the Independent Counsel from future criticism and placing him or her in a favorable historical light.

Thirteenth, there should be no requirement that the Attorney General report to Congress on why he or she chose not to refer a matter to an Independent Counsel. In the current law, the Attorney General must do so if she declines to make a referral that was initiated by a request from the majority of members of either party on the Judiciary Committee. This simply creates opportunities to use the Independent Counsel Act as a weapon in partisan politics, and subverts well-established and warranted rules concerning the secrecy of criminal investigations.

Fourteenth, Independent Counsels should be clearly required to follow DOJ policy and guidelines, except for those that require approval of the Attorney General or other high-ranking DOJ officials. Witnesses, subjects and targets of Independent Counsel investigations should be recognized in the statute as having standing to enforce this requirement.

Fifteenth—and this is my final one—the Attorney General should be authorized to remove or discipline an Independent Counsel for good cause, including a failure to follow DOJ guidelines or a violation of ethical rules applicable to prosecutors. The procedures for removing an Independent Counsel and who should conduct investigations of Independent Counsels should be spelled out in the statute or regulation. There is no need to fear that an Attorney General will use this authority improperly. Congressional oversight and the news media will see to that.

Mr. Chairman, Members of the Committee, we do not need an act such as the Independent Counsel Act. In the passion that followed the Watergate scandal, it seems that the country and Congress may have ignored the most obvious lesson of Watergate. The system worked. Despite the Saturday Night Massacre, a special counsel, appointed within the existing Justice Department structure and regulations, was able to pursue the most serious charges against the highest officer in the land.

President Nixon did not shut down the prosecution by firing Archibald Cox. A free press and firm Congress would not permit him to do that. In the end, he turned over the tapes and resigned. There is every reason now to revert back to that structure. Outside the Independent Counsel Act, there still exists mechanisms which an Attorney General can use in the extraordinary case to appoint a special counsel who cannot be fired except for cause, but who otherwise would operate within the Justice Department.

The practical reality is that there could never be a cover-up of a serious crime by a President or other high-ranking official. Congressional oversight, an aggressive press, and professional prosecutors and agents would blow the whistle on any such attempt. The Independent Counsel Act is simply not needed.

I very much appreciate the opportunity to come here today and to express my views. Thank you very much.

[The prepared statement of Mr. Bennett follows:]

PREPARED STATEMENT OF ROBERT S. BENNETT

Good morning Senator Thompson and Members of the Committee. My name is Robert S. Bennett, and I am a partner in the Washington office of Skadden, Arps, Slate, Meagher and Flom. I want to thank Senator Thompson and the Committee for inviting me to present my views on the Independent Counsel Act, about which I feel very strongly, and with which I have had much experience. My comments today are my own views and I do not speak for the President nor any other client.

I and my firm have represented both targets and witnesses in Independent Counsel investigations. We have represented Republicans and Democrats, public officials and corporations involved in Independent Counsel investigations. These included Caspar Weinberger, the former Secretary of Defense in the Reagan administration; Harold Ickes, former White House Chief of Staff; and of course, President Clinton. Additionally, I served as special counsel to the Senate Ethics Committee in three investigations: the Harrison Williams investigation; the David Durenberger investigation; and the so-called "Keating Five" investigation. Before going into private practice, I was a Federal prosecutor, serving in the District of Columbia as an Assistant U.S. Attorney. I believe this range of experience gives me some insight into the functioning, and the flaws, of the Independent Counsel Act.

Can this statute be saved? I have come to the view that it cannot, and should not be re-enacted. I did not always hold this view. Several years ago I felt that it was necessary for public acceptability to have such a statute although even then I thought it necessary to make substantial changes.

However, as events over the last few years have made clear, the act has failed to fulfill that purpose and I believe it should not be re-enacted in any form: * Rather than freeing prosecutorial discretion from political bias, the act has become yet another weapon—indeed, a nuclear weapon—in the arsenal of partisan politics. * Rather than ensuring that public officials are not treated with kid gloves, the Independent Counsel Act has become a vehicle for subjecting them, and those around them, to seemingly perpetual scrutiny more intense than any private citizen would have to endure. The mere appointment of an Independent Counsel puts the scandal machine in overdrive. * And rather than being invoked in limited and extraordinary instances, the act is structured in such a way, and has been interpreted by the courts in such a way, as to give Independent Counsels ever-expanding jurisdiction. This has resulted in the prosecution of peripheral individuals—some of whom have never held public office or have never had any dealings whatsoever with the public figure who is supposed to be the target of the Independent Counsel—for matters which would normally not subject anyone to prosecution.

Former Attorney General Edward Levi was able to spot the problems with the Independent Counsel Act two decades ago—before any Independent Counsel had even been appointed under the act. In testimony he gave before the House Judiciary Committee in 1976, when the act was first proposed, he warned that it would create opportunities for actual or apparent partisan influence in law enforcement; publicize and dignify unfounded, scurrilous allegations against public officials; result in the continuing existence of a changing band of multiple Special Prosecutors; and promote the possibility of unequal justice.Senators, we should have listened to Attorney General Levi.

Some of the act's fundamental flaws are well-known to this Committee—the lack of deadlines for completing an Independent Counsel investigation, the limitless resources available to an Independent Counsel, the fact that an Independent Counsel has just one case to pursue. Senators, beware of a lawyer with one case who has an endlessly deep pocket to finance it and no time limit in which to get the job done. As Justice Scalia stated in his now-prescient dissent in *Morrison v. Olson,* "How frightening it must be to have your own Independent Counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile—with whether it is worthwhile not depending upon what such judgments usually hinge on, competing responsibilities."

I believe these problems will be well canvassed by the other witnesses before the Committee. The Committee also, no doubt, is hearing from legal scholars who will discuss the separation of powers and other constitutional concerns posed by the Independent Counsel regime. I hope today to provide the Committee with some practical insight into how the act actually functions, based on my experience representing individuals who have come within its purview. From this practical perspective, I have concluded that the act is fatally flawed.

The first flaw is the hair-trigger provision for activating an Independent Counsel investigation. The act requires the Attorney General to appoint an Independent Counsel at the end of a preliminary investigation if he or she concludes there are "reasonable grounds to believe that further investigation is warranted." Further, the

Attorney General cannot avoid the appointment of an Independent Counsel unless there is "clear and convincing evidence" that the target lacked criminal intent. At the same time, the act precludes the Attorney General from using basic investigative tools—such as subpoenas, a grand jury, grants of immunity—to develop evidence that might exonerate the covered person. Thus, proving a negative, which is hard enough in itself, becomes nearly impossible.

This system is repugnant to the rights of the individual who is the subject of a preliminary inquiry. First, it is counter to one of the most basic tenets of our jurisprudence—that you are presumed innocent until proven guilty. Indeed, this reverse burden of proof has a very real impact on the rights of the targeted public official. He effectively has no choice but to forego his constitutional right to remain silent in the face of a preliminary inquiry, because if the target does not submit to a voluntary interview with DOJ prosecutors, the Attorney General will be forced to conclude that further investigation is warranted. On the other hand, if the target does cooperate, and an Independent Counsel is appointed nonetheless, his statements to prosecutors in the preliminary inquiry can be used against him by the Independent Counsel.

We ask our public officials to make numerous sacrifices in order to enjoy the privilege of public office. But sacrificing basic constitutional protections is, I respectfully submit, too high a price to ask of anyone. Certainly none of you would welcome being put to that choice.

Notwithstanding this Hobson's choice, it is very telling that most defense counsel advise their clients to submit to a voluntary interview in the hope of avoiding an Independent Counsel. This is because no responsible defense counsel that I know of would choose to have his or her client investigated by an Independent Counsel rather than the Department of Justice. That fact speaks volumes about the Independent Counsel Act. It says that the act has failed in one of its most important missions—to provide equal justice under the law, regardless of status.

Pursuant to the act, an Independent Counsel in theory is to provide the same "justice" as would the Department of Justice; the only aspect that is supposed to be different is that an Independent Counsel, not the Attorney General, is the final arbiter of prosecutorial discretion. To this end, the act provides that an Independent Counsel is to follow established Justice Department policy and guidelines. Indeed, the Supreme Court in part relied on this provision when it upheld the constitutionality of the act in Morrison v. Olson. In 1994, after the Morrison decision, Congress attempted to fortify this requirement further, by providing that deviations from DOJ policy would be tolerable only if applying DOJ policy would be inconsistent with the purposes of the act. The legislative history makes clear that the only deviations Congress had in mind were in cases where DOJ policy required a prosecutor to get approval from the Attorney General or another DOJ official before acting.

The reality is, however, that Independent Counsels often do not follow Department guidelines. The reality is that any individual who becomes entangled in an IC investigation—even private peripheral actors as well the target public official—are treated much more harshly at the hands of an Independent Counsel than they would be by the Department of Justice. And unlike a normal DOJ prosecution—where a prosecutor has numerous senior and more broadly experienced superiors with whom to consult, and where a target of any investigation can take steps to ensure that a prosecutor's decision-making is reviewed by such experienced people—there are no such resources available in an Independent Counsel investigation. There is no one to appeal to. We have placed the enormous law enforcement power of the Executive branch in the hands of a single individual who for both political and practical reasons is unaccountable, unchecked and who cannot meaningfully be challenged.

Most troubling, recent court decisions have rendered this requirement—the requirement that Independent Counsels follow Department guidelines—unenforceable. In this regard, I draw the Committee's attention to the case of Ronald Blackley, issued a month ago by the U.S. Court of Appeals for the District of Columbia. Mr. Blackley was Chief of Staff to Agriculture Secretary Michael Espy. He was prosecuted by the Espy Independent Counsel not for anything he did in connection with the allegations that Mr. Espy improperly accepted gifts. Indeed, Mr. Blackley was not even called as a witness at Mr. Espy's trial.

Mr. Blackley was prosecuted for failing to disclose $22,000 on his financial disclosure form. Yet, the Department of Justice had a policy not to subject persons to criminal sanctions for such non-disclosure unless it could be proved that the undisclosed income came from an illegal source, and the Department of Justice had previously investigated Mr. Blackley and had declined to prosecute. There thus was clear evidence that prosecuting Mr. Blackley on this basis would be contrary to DOJ

policy. Nonetheless, the Independent Counsel prosecuted Mr. Blackley, and he was convicted. On appeal, the D.C. Circuit held that an individual convicted by an Independent Counsel had no standing to enforce the act's requirement that the Independent Counsel follow DOJ guidelines. The only remedy for a failure to follow such guidelines, the Court said, was for an Independent Counsel to explain his failure to do so in his final report.

This decision guts Congress's already limited efforts to reign in Independent Counsels and to ensure that they do not provide uneven justice. Ironically, Mr. Blackley was sentenced to 27 months in prison, while Mr. Espy was acquitted. The Espy Independent Counsel, displayed further disregard for the role of the prosecutor in our system when he indicated after Mr. Espy's acquittal that "the actual indictment of a public official may, in fact, be as great a deterrent as a conviction."

Two other statutory provisions aimed at restraining an Independent Counsel have likewise proven to be toothless tigers. One is the requirement that each Independent Counsel periodically submit reports to the Special Division—the panel of judges who oversee IC appointments. Judge David Sentelle of the Special Division said in a recent speech that when he receives these reports, he just sticks them in a file. As quoted in an article in the February 22 Legal Times, Judge Sentelle said he has no idea why the statute requires Independent Counsels to file such reports, inasmuch as "it gives us no duties, no authority and no responsibility with regard to that report." Even if he thought the report disclosed "the worst behavior in the world," Judge Sentelle honestly observed, "I couldn't do a thing about it."

The final, and perhaps most significant, statutory effort to control out-of-control Independent Counsels has proved especially problematical. That is the provision that permits the Attorney General to remove an Independent Counsel for good cause. The act does not lay out procedures for how an Attorney General is to determine whether good cause exists for removing an Independent Counsel; nor does it explain who is to investigate an IC, and whether discipline short of removal may be invoked. Right now, we have the DOJ, Independent Counsel Ken Starr, and the Special Division engaged in a dispute over how to investigate allegations against the Independent Counsel. This provision, moreover, has only turned into another opportunity to inject partisan attacks into the process. The upshot may be the appointment of an Independent Counsel to investigate an Independent Counsel! Where will it end?

I have come to the conclusion that we do not need an Independent Counsel Act. In the passion that followed the Watergate scandal, it seems the country and Congress may have ignored the most obvious lesson of Watergate: the system worked. Despite the Saturday night massacre, a special counsel, appointed within the existing Justice Department structures and regulations, was able to pursue the most serious charges against the highest officer in the land. President Nixon did not shut down the prosecution by firing Archibald Cox. A free press and firm Congress would not permit him to do that. In the end, he turned over the tapes and resigned.

There is every reason now to revert to that structure. Outside the Independent Counsel Act, there still exist mechanisms which an Attorney General can use in the extraordinary case to appoint a special counsel who cannot be fired except for cause, but who otherwise would operate within the Justice Department. The practical reality is that there could never be a cover-up of a serious crime by a President or other high-ranking official. Congressional oversight, an aggressive press, and professional prosecutors and agents would blow the whistle on any such attempt. The Independent Counsel Act simply is not needed.

Moreover, any benefits to be derived from an Independent Counsel regime are outweighed by the costs it imposes on our society. These costs include the corrosion of public confidence in our justice system; the erosion of the separation of powers; and incursions into the rights of individuals in and out of public office. Perhaps most troubling, I strongly believe, is that the act and its accompanying scandal mentality are discouraging the best and brightest from serving in government.

On the other side of the ledger, I no longer see any benefit to having an Independent Counsel Act. The justification for the act was never, in my mind, that the Department of Justice could not be trusted to vigorously pursue investigations into politically important people. To the contrary, it has always been my experience, both in and out of government, that the professional prosecutors of the Federal Government are thorough, fair and impartial no matter who is the target of their investigation. For example, during a Democratic administration, the Department did not shrink from prosecuting Congressman Rostenkowski, arguably the most powerful Democrat in Congress and an ardent supporter of President Clinton.

Now, however, partisan politics infects every phase of the Independent Counsel process. Every step of the process—the very first call for an Independent Counsel, the decision to make a referral, the court's choice of an Independent Counsel, the

conduct of the investigation by an Independent Counsel once appointed—every step has become an opportunity for one side or the other to cry political foul. We can argue for days about who is to blame for this; there is, I sense, plenty of blame for all to share. But the bottom line is this: the public now views the Independent Counsel process as largely a political process. This has not only undermined respect for the Department of Justice but has also led to disrespect for Congress who many believe are willing to interfere with impartial law enforcement for the sake of partisan gain.

The Independent Counsel concept is therefore of no benefit anymore, and the act should be scrapped. The act should be allowed to die. It cannot be fixed. All the proposed fixes will make it more complicated and unwieldy, and will raise as many questions as they solve.

I would even go further. I would propose that once the act is allowed to lapse, all currently active Independent Counsel investigations should be referred to the Public Integrity Division of the Department of Justice, which can assess all pending prosecutions and investigatory leads and determine which to abandon and which to pursue. They should be brought back within the Department of Justice budgetary system and under the auspices of DOJ guidelines. These cases, if need be, can be referred to a Leon Jaworski-type special prosecutor within the DOJ framework and even, if the Attorney General decides, the current Independent Counsel can be retained to continue their work.

While I am vigorously opposed to the re-enactment of the statute, I would urge this Committee to conduct radical surgery on it, if it is to continue in any form. My recommendations for change follow:

- The single most important change must be to bring the Independent Counsel within the Department of Justice budgetary system and under the auspices of DOJ guidlines.
- Any renewed act should be limited in application only to the President, Vice President and the Attorney General. No discretionary authority is needed because existing Government Ethics regulations already requires the Attorney General to recuse herself when she has an actual, personal or financial conflict.
- Any renewed act should be invoked only in connection with charges of felony-level offenses that occurred while the target held public office. You should not permit an Independent Counsel to have a hunting license to pursue a covered official in all aspects of his or her past life.
- Preliminary inquiries should not have artificial 90-day deadlines.
- The Attorney General should be authorized to issue subpoenas and use a grand jury during the preliminary inquiry phase.
- The standard for referring a matter to an Independent Counsel should be probable cause, or at a minimum, a rational basis to believe that a felony offense has occurred. The requirement that a referral must be made if "further investigation is warranted" should be eliminated. The burden should always be on the government to affirmatively establish some quantum of evidence to go forward with an IC investigation.
- The act should make explicit that an Independent Counsel's jurisdiction is to be strictly construed, and should not be expanded beyond that necessary to prosecute obstruction and perjury in connection with its original jurisdiction.
- Each IC investigation should have a deadline and a budget stated in the jurisdictional referral. It should be part of the Attorney General's mandate to set a deadline and a budget which in his or her judgment is reasonable to complete the investigation, given the nature of the referral. If an IC determines that he or she will need more time or money, they can apply to the Special Division of the Court.
- Independent Counsels should be selected from a pre-existing roster of highly qualified professional prosecutors or former prosecutors, compiled by the Department of Justice based on names solicited from sources such as the American Bar Association, Federal District Courts and U.S. Attorneys throughout the country. The appointment should not be made because someone seeks the job or because a well-placed friend recommends him or her to a Judge on the Special Division.
- A significant percentage of an Independent Counsel's staff should be required to be highly experienced career prosecutors. Perhaps career prosecutors in the Public Integrity Division should be regularly assigned to staff Independent Counsel investigations.
- An Independent Counsel should be required to give up his or her private practice until the investigation is completed.

- There should be no requirement that an Independent Counsel issue a final report and all who are appointed should agree not to write books about their investigation. Reports and books serve no prosecutorial purpose and only further politicize the process and tarnish the reputations of individuals whom the IC may have chosen not to prosecute. Moreover, the report writing requirement increases the cost of investigation because they cause Independent Counsel's to pursue aspects or details of investigation which have little investigatory value but only serve the purpose of protecting the Independent Counsel from future criticism and placing him or her in a favorable historical light.
- There should be no requirement that the Attorney General report to Congress on why he or she chose not to refer a matter to an Independent Counsel. In the current law, the Attorney General must do so if she declines to make a referral that was initiated by a request from the majority of members of either party on the Judiciary Committee. This simply creates opportunities to use the Independent Counsel Act as a weapon in partisan politics, and subverts well-established and warranted rules concerning the secrecy of criminal investigations.
- Any Independent Counsels should be clearly required to follow DOJ policy and guidelines except for those that require approval of the Attorney General or other high-ranking DOJ officials. Witnesses, subjects and targets of IC investigations should be recognized in the statute as having standing to enforce this requirement.
- The Attorney General should be authorized to remove or discipline an Independent Counsel for good cause, including a failure to follow DOJ guidelines or a violation of ethical rules applicable to prosecutors. The procedures for removing an IC, and who should conduct investigations of Independent Counsels, should be spelled out in statute or regulation. There is no need to fear that an Attorney General will use this authority improperly; Congressional oversight and the news media will see to that.

Chairman THOMPSON. Thank you very much, Mr. Bennett. Mr. Lewin.

TESTIMONY OF NATHAN LEWIN, MILLER, CASSIDY, LARROCA AND LEWIN

Mr. LEWIN. Thank you, Mr. Chairman and Members of the Committee. My name is Nathan Lewin. I have practiced law in Washington, D.C., for the past 30 years, after serving in the Department of Justice and the Department of State during the Kennedy and Johnson administrations. I was a Federal prosecutor in the 1960's and have been a white collar criminal defense lawyer since joining my present firm, Miller, Cassidy, Larroca and Lewin, in 1969.

I have taught at Harvard, the University of Chicago and Georgetown law schools, and I gave the first course that was ever given in a national law school, titled "Representation of the White Collar Criminal Defendant," when I was a visiting professor at the Harvard Law School in 1975. Coincidentally, a student in that class was Jamie Gorelick, who came to work thereafter for our firm, became a partner, and then provided distinguished service in the Clinton administration for several years as Deputy Attorney General. I am presently teaching both at Columbia Law School and the George Washington University Law School.

I have also had the privilege of arguing 27 cases in the Supreme Court of the United States, in one of which, as a matter of fact, Senator Lieberman was co-counsel when he was Attorney General of the State of Connecticut. And many of the cases have involved issues of criminal law. In May 1987——

Senator LIEBERMAN. They are asking the result, because during the trial I said that—excuse me for interrupting, but just to explain this, I indicated when I spoke in closed session—I hope I am not

incarcerated for revealing this, but I have said it in public session, too, that my admiration for Chief Justice Rehnquist had gone up during the trial. But it had always been high for his judgment because in the one case I had the honor to argue with you, the result was a vote of 8–1, and the only Justice wise enough, clear-headed enough, courageous enough to vote on our side was Justice Rehnquist.

Mr. LEWIN. That is correct, but I guess as was true in that trial, he was silent, largely silent. He gave no reason for his dissent. He just said Chief Justice Rehnquist dissents. I have been mystified ever since then exactly why it is he agreed with our clearly correct position, but nonetheless he was on the right side.

Mr. BENNETT. Well, you both did better than I did. I was 9–0. [Laughter.]

Senator LEVIN. Next time, bring Senator Lieberman with you. You will pick up one Justice. [Laughter.]

Senator LIEBERMAN. It was an Establishment Clause case, so we assume that Justice Rehnquist's vote, though unexplained, was a matter of faith.

Mr. LEWIN. I will take that on faith as well.

In May 1987, I was asked by then Attorney General Edwin Meese to represent him in the Independent Counsel investigation that was initiated against him. This was the second Independent Counsel investigation concerning Mr. Meese. The first, by the way, had concluded after several months, very efficiently, quickly done by a leading practitioner here in Washington, D.C., Jake Stein, who conducted an Independent Counsel investigation that cost, I think, $300,000 and cleared Mr. Meese in the first Independent Counsel investigation.

For the following 14 months, assisted ably by my partner, Jim Rocap, and other personnel in our firm, I represented the Attorney General in what was to that date the most highly publicized Independent Counsel investigation. It was the first time that a Cabinet officer was investigated under this procedure while he or she continued in office.

The Independent Counsel in charge of that investigation was James McKay, who had been, and then I think returned, as a partner at Covington and Burling. And he had originally been appointed to investigate Lyn Nofziger, who was an assistant to President Reagan. The Meese investigation was concluded 14 months later, in July 1988, with a determination by Mr. McKay not to return any criminal indictments against the Attorney General. It was a very welcome outcome, but the road that was traveled to get to that destination was a very rocky and disturbing one.

In representing Mr. Meese more than a decade ago, I encountered many of the same defects in the Independent Counsel process that have come to public attention in recent years. I have followed in the popular and legal media the reports of the investigations and prosecutions conducted by subsequent Independent Counsels, including the robustly criticized activities of Kenneth Starr. In my own mind, I have been continually evaluating the benefits and drawbacks of the law, and I have to tell you that contrary to my distinguished friend, Bob Bennett, and maybe a little bit like the Chairman, I was at the inception against the notion of an Inde-

pendent Counsel. But over the years, I have come to the conclusion that, if constitutional—and the Supreme Court has upheld its constitutionality—it really has a very beneficial concept which I think can be effectively carried out with proper safeguards.

Now, having been invited by the Committee to testify on this subject, I would like to summarize my personal conclusions. And again I have to emphasize these are my personal views. They don't reflect the opinions of my distinguished former client, Mr. Meese, nor do they reflect the views of my partners in what I think is the leading firm in Washington, several of whom——

Mr. BENNETT. I object. Objection. [Laughter.]

Mr. LEWIN [continuing]. Several of whom have been involved in the representation of targets, subjects, or witnesses in other Independent Counsel investigations, and I think who take a different view, quite honestly.

My opinion is that in today's media-dominated age, the concept of an Independent Counsel, not answerable to the Attorney General or to the President, is essential for public confidence in government, and that fair and efficient investigations can be conducted by an Independent Counsel. There are major flaws in the present law and they should be remedied. And Bob Bennett here has, I think, listed 15 suggestions, and as I think is customary among lawyers, I have to say agree with about half of them and strongly disagree with the other half.

Now, I think some law, even if imperfect, is better than none. And in case a serious allegation of misconduct that would call for independent investigation erupts after June of this year and the Nation finds itself without a statute, I would oppose the suggestion made last week to this Committee by Senator Baker that there be a cooling off period without the law.

If meaningful amendments cannot be drafted and voted on by June—and I believe they can—the Congress can renew the law for a limited period, 6 months, or a year. But the reality is, as lawyers know better, I think, than anybody else, that a deadline concentrates the mind. If the law disappears, there is going to be no pressing incentive to consider how it should be amended until there is some new scandal and we are trying to figure out how to deal with that.

Now, Shakespeare's Marc Antony observed in his famous address that "the evil men do lives after them; the good is oft interred with their bones." So it is with the Independent Counsel. In today's climate, few look at what was accomplished over the past 20 years by the nine or ten counsel who conducted efficient investigations and effectively cleared high-ranking government officials.

My own conclusion from the investigation of Mr. Meese and from studying other investigations is that the process whereby individuals are cleared of charges is truly meaningful only if the clearing is done by an independent attorney. And the critics of the law don't consider the successful criminal prosecutions that receive little publicity. The emphasis today is all on the abuses, all of which I think are correctable.

Now, I say that the independence of an Independent Counsel makes his or her decision exonerating the accused conclusive in the public mind. There was a memorable moment during the Meese in-

vestigation that brought this proposition home to me. It was March 29, 1988, 10 months after the Meese investigation began. The media were after Attorney General Meese and there was much speculation that Independent Counsel McKay was going to indict him.

I knew by then that this speculation was false. The Independent Counsel had resolved, and told me that he had resolved, in Mr. Meese's favor the primary issue which was referred to him, and had pretty much completed his investigation on a second major issue which I will describe in a few minutes that was so remote and insubstantial that I really didn't think it deserved inquiry.

But nonetheless, reacting to the media's frenzy, Deputy Attorney General Arnold Burns and Assistant Attorney General William Weld abruptly announced that they were resigning. The announcement was a total surprise to Mr. Meese, and it generated enormous demands from the media that he also resign immediately. I called Mr. McKay, and my partner, Jim Rocap, and I went over to this office and met with him and his deputy, Carol Bruce, who is now the Independent Counsel handling the Bruce Babbitt investigation.

I told Mr. McKay my opinion that the pendency of the investigation and its long overdue conclusion had precipitated these resignations, and I asked him to declare publicly that he was not intending to indict Mr. Meese. After considering my request, the Independent Counsel took the forthright step of announcing on April 1, 1998, that, "based on the evidence developed to date," he would not be indicting Mr. Meese. That was featured in the press the following day.

That conclusion was accepted by the media and the public as vindication of the Attorney General, and the demands for his resignation abated. It was clear to me that an announcement by a Department of Justice lawyer, or even by an outside counsel responsible to the Department of Justice that the Attorney General was cleared and would not be indicted would not have rescued Mr. Meese from the lynch mob.

Now, I think, as I said, there are major flaws in this statute. And in the statement that I have given and prepared for the Committee, I have listed not only a number of major flaws, but also my specific proposed statutory text for amendments. Just let me list those.

No. 1, is what I call the Inspector Javert Syndrome. Victor Hugo created an unforgettable character in "Les Miserables," the inspector who hounds Jean Valjean all his life because he is convinced that the theft of a loaf of bread should not go unpunished. Some Independent Counsel have taken on the role of an Inspector Javert and they treat the government official who is the target of their initial authorization as a quarry who should be hunted down.

The ABA Sections on Criminal Justice and Litigation said in their fine report recently, although again I don't agree with their conclusion, that the assignment of an Independent Counsel, "too often appears to be investigating an individual rather than a crime." That, to my mind, was the largest flaw in the Meese investigation.

It was shocking to be told after the Wedtech phase of the investigation was totally put to rest that Mr. Meese would have to refute

allegations concerning, (1) a proposed Aqaba pipeline project that had absolutely nothing to do with Wedtech; (2) other investments involving a Mr. Chinn who was named in the referral; (3) the Attorney General's participation in telecommunications matters at the Department of Justice; (4) the funding of Mrs. Meese's job at the Multiple Sclerosis Society; and, (5) the accuracy of the Meeses' 1985 tax return.

We responded to all those, but that is not the job and should not be the job of an Independent Counsel. Authorizing a government prosecutor to investigate an individual rather than a crime is contrary to fundamental principles of American justice. There is probably no person alive, and surely no person who has accomplished enough in his or her lifetime to be considered for a Cabinet post or top-level government appointment, who could not be faulted for some misstep in public or private life.

Our Constitution does not knowingly empower Inspectors Javert to find skeletons in the closets of public officials. How can that be cured? The Independent Counsel law can be amended in a clear and forceful manner to prevent an expansion of authority. Right now, as Mr. Bennett said, the law favors broad definitions of the jurisdiction of an Independent Counsel and liberal extensions of authority. I would propose that an Independent Counsel should be authorized to investigate a specific allegation that has survived the preliminary steps, if they are kept, described in Sections 591 and 592. He should be prohibited from extending that investigation to any other conduct unless it is a part of a single continuing offense.

If an Independent Counsel comes across a new charge, such as Mr. Starr did when Linda Tripp came to him in January 1998 with allegations and evidence of perjury and obstruction of justice in the Lewinsky matter, the entire investigation should be referred immediately to the Attorney General and, if appropriate, assigned only to another Independent Counsel. The statute should prohibit the assignment of the same matter to that Independent Counsel. That ban removes the personal incentive that an Independent Counsel may have, or may appear to have, in going off on a tangent from his initial investigation.

If he knows with absolute certainty that any other alleged crime will be investigated by someone else, neither he nor his staff can be tainted by personal ambition in pursuing that lead. If there is any emergency matter that has to be done, as I think was claimed with regard to the information that Ms. Tripp provided to Mr. Starr, that would have to be done by the Department of Justice while the new Independent Counsel is being appointed.

Now, in the case of the Lewinsky allegations, the evidence presented suddenly to Mr. Starr by Linda Tripp was very serious. It justified strong measures, but if they had been taken by the Department of Justice, I don't think there would have been the criticism that has now accompanied it.

Now, I should note at this point that I do not join the chorus of disapproval that is being heard frequently with regard to Independent Counsel Starr. I know and have great respect for Kenneth Starr, whom I retained to represent me personally in an appeal that he undertook before being invited to serve as an Independent

Counsel. The investigative and prosecutive measures that his office has taken are all too familiar to me.

During three decades of representing targets of Federal criminal investigations, I have seen much, much more serious violations of fairness and decency than are alleged with regard to Mr. Starr. I wish all my clients were treated with the respect and forthrightness that Mr. Starr and his staff showed to the targets of their investigation.

Now, my other proposals for revision of the Independent Counsel law are various. My second point relates to what I call the Walter Winchell Illusion.

Chairman THOMPSON. Mr. Lewin, could you summarize some for us? I don't know what your intentions are.

Mr. LEWIN. I am going to summarize the remainder of the points that I make in here.

Chairman THOMPSON. You have some very, very good recommendations here and I don't want to short-circuit you.

Mr. LEWIN. No. I am going to summarize.

Chairman THOMPSON. We were pent up for a month in impeachment investigations and not allowed to talk, and I think it is bubbling up maybe a little bit. [Laughter.]

Mr. LEWIN. Mr. Chairman, I will give you really just simply captions.

The Walter Winchell Illusion relates to the fact that an Independent Counsel, as Mr. Bennett has said, writes a report. And too many Independent Counsels, including Mr. McKay, whose report I have right here, thought that it was their job to write about the target of the investigation extensively expressing opinions about things that were not in the original referral, judgments of guilt on some matters. That is not the job of an Independent Counsel and is, I think, contrary to American notions of justice.

The third point I have I call the Quest for Queen Esther because this is the day after Purim, you see. And as Bob Bennett has mentioned, nobody can figure out how an Independent Counsel is selected. Well, when I was reading the Book of Esther yesterday, on the Jewish holiday of Purim, when the Persian king was looking to select his queen, his advisers brought candidates from all over the country in for his examination.

And my proposal, and I have reduced it to legislative language, is that this be a task that really be assigned in part to the Senate; that if each Senator were required to designate two names of leading attorneys, not in their State necessarily, just two names of leading attorneys for a roster from which Independent Counsel would be chosen, and that roster were made public so that the special court could receive communications from the public regarding the attorneys on that list, as well as having all the background information, and they would be required to select from that list of 200 attorneys, I think that is, as I say, a Queen Esther form of selection that I think is perfectly appropriate with regard to an Independent Counsel.

My fourth point is what I call the Frankenstein Phenomenon. The concern is that an Independent Counsel will turn into Dr. Frankenstein's monster and will do all kinds of incredible unethical, illegal things, go beyond the standard of the Department of

Justice. My proposal is that at the same time that an Independent Counsel is selected for the purpose of reviewing what he does, there be a selection of a special panel. It has got to be different from the one that names the Independent Counsel under *Morrison v. Olson,* but a special panel of three circuit judges who can be selected from among the senior circuit judges around the country, and that panel would have the jurisdiction to oversee and entertain motions, complaints with regard to the conduct of the Independent Counsel, and make prompt resolution.

You would have a judicial review procedure for what the Independent Counsel does. At present, the statute says he has to follow Department of Justice standards, but there is no way of enforcing that. This panel could enforce that by real, active litigation with the Independent Counsel.

The fifth point is what I call the Methuselah Factor, the fact that Independent Counsels just seem to go on and on forever. They almost meet the biblical maximum number of years. There is no way of terminating them. I see Senator Specter is not here, but he had mentioned an 18-month period in the past. I think an Independent Counsel in his reports to the court should state how much longer he expects the investigation to take in his 6-month reports. Once he gets to 18 months, it seems to me, if he doesn't justify it, I think the court can terminate or order the Independent Counsel to terminate his jurisdiction and investigation.

And my final point is what I call the King Midas Fallacy. There is a notion here that there is a pot of gold, that everybody can, like Rumpelstiltskin, turn straw into gold. Independent Counsels spend enormous amounts of money. Exactly how their budget can be limited constitutionally I don't know. I am not in favor of Mr. Bennett's suggestion that they go back to the Department of Justice, but maybe there can be something built in with regard to what the original court does when it authorizes the appointment of the Independent Counsel and maybe sets a budgetary limit.

But in addition to that, the cost of these investigations—and the public doesn't realize this because they read the newspapers and they are told about enormous lawyers' bills, that Betty Currie has got a lawyer's bill for who knows how much, hundreds of thousands of dollars. Other witnesses who are working for the government who are simply drawing salaries, again, have got enormous lawyers' bills.

As a practicing lawyer, I know, and I know from my colleagues, these are bills. That doesn't mean that there are payments. These are not people who can afford to pay lawyers' bills, and the fact of the matter is that one of the gross unfairnesses about this system—which is geared to government because it is a whole statute which says we are going to investigate government employees, many of whom are people of limited resources—is that it doesn't provide for the payment of lawyers' fees, except of a subject who is not indicted.

I would propose that anybody who receives a subpoena from an Independent Counsel who is a government employee be entitled to retain counsel, to be paid out of the budget of the Independent Counsel. In other words, the application would be made to the court, and this would not be shown to the Independent Counsel be-

cause there are things on lawyers' bills that are attorney-client confidences, but nonetheless, payments every quarter to witnesses, subjects. I submit even targets who are government employees would have to be paid by the government so that they could have effective legal representation.

Now, as I say, I certainly have views with regard to many of the proposals that Bob Bennett has made. I think it would be a mistake to limit the targets to only the President, the Vice President and the Attorney General. As a matter of fact, if anything, I think the investigation of the President shows that an Independent Counsel cannot really effectively deal, in terms of the public stage and the public media, with an accused like the President of the United States. Even an Independent Counsel can't deal with it, and I think that the suspicions that would grow up if there was no Independent Counsel are even greater.

So I think I will conclude now, at the Chairman's suggestion, and certainly be prepared to respond to any questions.

[The prepared statement of Mr. Lewin follows:]

PREPARED STATEMENT OF NATHAN LEWIN

My name is Nathan Lewin. I have practiced law in Washington, D.C., for the past 30 years after serving in the Departments of Justice and State during the Kennedy and Johnson administrations. I was a Federal prosecutor in the 1960's and have been a white-collar criminal defense lawyer since joining my present firm, Miller Cassidy Larroca & Lewin, in 1969. I have also taught at Harvard, University of Chicago, and Georgetown Law Schools, and gave the first course ever given in a national law school on "Representation of the White-Collar Criminal Defendant' when I was a Visiting Professor at the Harvard Law School in 1975—shortly after Watergate. I might add that among the students in that course was Jamie Gorelick, who came to work for our firm, became a partner, and then provided distinguished service for several years during the Clinton Administration as Deputy Attorney General. I am presently teaching at Columbia Law School and George Washington University Law School.

I have also had the privilege of arguing 27 cases in the Supreme Court of the United States, many of which have involved issues of criminal law. And in May 1987 I was asked by then Attorney General Edwin Meese to represent him in the Independent Counsel investigation that was initiated against him. For the next 14 months, assisted ably by my partner Jim Rocap and other personnel in our firm, I represented the Attorney General in what was—to that date—the most highly publicized Independent Counsel investigation. It was the first time that a Cabinet officer was investigated under this procedure while he or she continued in office. The Independent Counsel in charge of that investigation was James McKay, who had originally been appointed to investigate Lyn Nofziger, an Assistant to President Reagan.

The Meese investigation was concluded in July 1988 with a determination by Mr. McKay not to return any criminal indictment against the Attorney General. That was, of course, a welcome outcome, but the road traveled to get to that destination was a very rocky and disturbing one. In representing Mr. Meese more than a decade ago, I encountered many of the same defects in the Independent Counsel process that have come to public attention in recent years. I have followed the popular and legal media reports of the investigations and prosecutions conducted by subsequent Independent Counsels, including the robustly criticized activities of Kenneth Starr. In my own mind, I have been continually evaluating the benefits and drawbacks of the law. Having been invited by the Committee to testify on this subject, I am honored to summarize my personal conclusions—and I emphasize that these are my own personal views. They do not reflect the opinions of my distinguished former client, Attorney General Meese. Nor do they reflect the views of my law partners, several of whom have been involved in the representation of targets, subjects or witnesses in other Independent Counsel investigations.

My opinion is that in today's media-dominated age, the concept of an Independent Counsel—not answerable to the Attorney General or to the President—is essential for public confidence in government, and that fair and efficient investigations can be conducted by an Independent Counsel. There are, I believe, major flaws in the

present law, and they should certainly be remedied as soon as possible. I will discuss some of these flaws and my proposals for change in this testimony. But some law—even if imperfect—is better than none. And just in case a serious allegation of misconduct that would call for independent investigation erupts after June of this year and the nation then finds itself without this statutory remedy, I would oppose the suggestion made last week by former Senator Baker that we have a "cooling-off period" *without* the law. If meaningful amendments cannot be drafted and voted on by June—and I believe they can—the Congress can renew the law for an additional six months or one year while the drafting is going on. The reality is, as all lawyers know, that a deadline concentrates the mind. If the law simply disappears, there will be no pressing incentive to consider how it should be amended until some new scandal breaks out

Shakespeare's Marc Antony observed, in his famous address, that "the evil men do lives after them; the good is oft interred with their bones." So is it with Independent Counsel. In today's climate, few look at what was accomplished over the past twenty years by the nine or ten counsel who conducted efficient investigations and effectively cleared high-ranking government officials. My own conclusions from the investigation of Mr. Meese and from studying other investigations is that the process whereby individuals are cleared of charges is truly meaningful only if the clearing is done by an independent attorney. Nor do the critics consider successful criminal prosecutions that received little publicity. The emphasis now is on abuses—all of which are, I believe, correctable.

The independence of an Independent Counsel makes his or her decision exonerating an accused conclusive in the public mind. There was a memorable moment during the Meese investigation that brought this proposition home to me. It was March 29, 1988, ten months after the Meese investigation had begun. The media were after Attorney General Meese, and there was much speculation that Independent Counsel McKay was going to indict him. I knew by then that this speculation was false. The Independent Counsel had already resolved, in Mr. Meese's favor, the primary issue which was referred to him, and had pretty much completed his investigation on a second major issue—to be described later—that was so remote and insubstantial that it truly did not deserve inquiry.

Nonetheless, reacting to the media's frenzy, Deputy Attorney General Arnold Burns and Assistant Attorney General William Weld abruptly announced that they were resigning. The announcement was a total surprise to Mr. Meese, and it generated demands from the media that the Attorney General also resign.

I immediately called Mr. McKay. Jim Rocap and I went to his office to meet with him and his deputy, Carol Bruce (who is now the Independent Counsel investigating Interior Secretary Bruce Babbitt). I told Mr. McKay my opinion that the pendency of the investigation and its long-overdue conclusion had precipitated the resignations, and I asked him to declare publicly that he was not intending to indict Mr. Meese.

After considering my request, the Independent Counsel took the forthright step of announcing on April 1, 1988, that "based on the evidence developed to date" he would not be indicting Mr. Meese. The conclusion was accepted by the media and the public as vindication of the Attorney General, and the demands for his resignation abated. It was clear to me that an announcement by a Department of Justice lawyer or even by an outside counsel responsible to the Department of Justice would not have rescued Mr. Meese from the lynch mob.

In this testimony, I plan to discuss the principal flaws in the present statutory scheme and then to return to why, notwithstanding these defects, I believe that some Independent Counsel law is needed.

(1) The Inspector Javert Syndrome

The investigation of Attorney General Meese began with an allegation that Mr. Meese had, through a personal friend named E. Robert Wallach, provided illegal assistance while he was Counselor to the President to a business called the Wedtech Corporation. The written referral to Mr. McKay stated that he should investigate whether "the Federal conflict of interest law, 18 U.S.C. §§ 201–211, or any other provision of Federal criminal law" had been violated by Mr. Meese's "relationship or dealings at any time from 1981 to the present" with the Wedtech Corporation, Mr. Nofziger, E. Robert Wallach, W. Franklyn Chinn, and/or Financial Management International, Inc.

Under this broad charter, Mr. McKay proceeded to a thorough investigation of the Wedtech allegations. His Final Report acknowledged that he not only tried to identify any official acts performed by Mr. Meese for Wedtech, but also "to conduct a full investigation of Mr. Meese's financial affairs from 1981 through 1986." The Attorney General cooperated fully, and even came to the U.S. District Court to testify

before the grand jury. Mr. McKay's final report declared that "the investigation into Wedtech-related and Meese Partner matters was substantially complete by the end of November 1987."

This was six months after the investigation began, and it should have ended there. But Mr. McKay apparently believed it was his job to investigate not merely the particular allegation, but every possible allegation that might be made against Mr. Meese involving any of the other names in the referral. And, before concluding his task, he went beyond even that limitation to conduct a total investigation of Mr. and Mrs. Meese's finances and other possible conflict-of-interest allegations.

Victor Hugo created an unforgettable character in *Les Miserables*—the inspector who hounds Jean Valjean all his life because he is convinced that the theft of a loaf of bread should not go unpunished. Some Independent Counsels have taken on the role of Inspector Javert and treat the government official who is the target of their initial authorization as a quarry who, they feel, should be hunted down. The ABA Sections on Criminal Justice and Litigation said in their recent report that the assignment of an Independent Counsel "too often appears to be investigating an individual rather than a crime."

That, to my mind, was the largest flaw in the investigation of Attorney General Meese. It was shocking to be told, after the Wedtech phase of the investigation was totally put to rest, that Mr. Meese would have to refute allegations concerning (1) a proposed "Aqaba pipeline project" that had absolutely nothing to do with Wedtech, (2) other investments involving Mr. Chinn, (3) the Attorney General's participation in telecommunications matters at the Department of Justice, (4) the funding of Mrs. Meese's job at the Multiple Sclerosis Society, and (5) the accuracy of the Meeses" 1985 tax return.

The Aqaba pipeline investigation consumed an additional six months and, I am sure, substantial government resources after the Wedtech investigation ended. And when that was nearing completion, we were told that Mr. McKay and Ms. Bruce were going to inquire into whether the Attorney General should have disqualified himself when the Department of Justice was considering antitrust action regarding the "Baby Bells." And then, in February 1988, we were told that the funding of Mrs. Meese's job was to be yet another new area of inquiry. And shortly before the investigation ended, the matter of the 1985 tax return was suddenly raised.

Authorizing a government prosecutor to investigate an individual, rather than a crime, is plainly contrary to fundamental principles of American justice. There is probably no person alive—and surely no person who has accomplished enough in his or her lifetime to be considered for a Cabinet post or an equivalent top-level government appointment—who could not be faulted for some misstep in public or private life. We do not knowingly empower Inspectors Javert to find skeletons in the closets of public officials.

The Independent Counsel law must be amended in a clear and forceful manner to prevent this kind of expansion of authority. At present, the law favors broad definitions of the jurisdiction of an Independent Counsel and liberal extensions of authority. The presumption should be reversed. An Independent Counsel should be authorized to investigate a specific allegation that has survived the preliminary steps described in Sections 591 and 592. He should not be able to extend that investigation to any other conduct unless it is part of one single continuing offense. There must be an absolute prohibition against granting an existing Independent Counsel any authority to expand his investigation beyond the specific allegations that he was initially authorized to investigate. If an Independent Counsel comes across a new charge—such as Mr. Starr did when Linda Tripp came to him in January 1998 with allegations and evidence of perjury and obstruction of justice in the Lewinsky matter—the entire investigation should be referred immediately to the Attorney General and, if appropriate, assigned thereafter to *another* Independent Counsel.

This flat unequivocal ban on expansion of an ongoing investigation removes the personal incentive that an Independent Counsel may have—or may appear to have—in going off on a tangent from his initial investigation. If he knows, with absolute certainty, that any other alleged crime will be investigated by someone else, neither he nor his staff can be tainted by personal ambition in pursuing that lead. The Department of Justice will have to be trusted to take any immediate investigative steps that are needed if a new matter arises. And whether or not an Independent Counsel should be appointed to pursue the new charge will be evaluated on its own merits.

Had such a proposition of law governed the Meese investigation, the work of the Independent Counsel would have ended after six months, with absolutely no harm to the administration of justice. None of the excursions that Mr. McKay took after the Wedtech allegations were resolved would have come close to justifying the appointment of additional Independent Counsels.

In the case of the Lewinsky allegations, the evidence presented suddenly to Mr. Starr by Linda Tripp on January 12, 1998, was, I think, very serious, and it justified prompt law-enforcement measures. The Lewinsky investigation would not have garnered the criticism it has received if that investigation had been conducted, on an emergency basis, by Department of Justice personnel and thereafter under the aegis of a different Independent Counsel. It is clear that the Department of Justice was not eager to handle this "hot potato" and gladly referred it, as it was entitled to do under existing law, to Mr. Starr.

I should note, at this point, that I do not join the chorus of disapproval that is being heard frequently with regard to Independent Counsel Starr. I know and have great respect for Kenneth Starr, whom I retained to represent me personally in an appeal that he undertook before being invited to serve as Independent Counsel. The investigative and prosecutive measures that his Office has taken are all too familiar to me. During three decades of representing targets of Federal criminal investigations, I have seen much more serious violations of fairness and decency by Federal prosecutors at various levels. I wish all my clients were treated with the respect and forthrightness that Mr. Starr and his staff showed to the targets of their investigation.

I believe that the Inspector Javert Syndrome can be cured and prevented by amended statutory provisions, and I propose language accomplishing that result in an Appendix to this Statement.

(2) The Walter Winchell Illusion

A second major grievance I have with the conduct of the Independent Counsel who handled the Meese inquiry in 1987–88 relates to his Final Report. Mr. McKay was not content to embark on various expeditions that had absolutely nothing to do with Wedtech, but he also felt obliged to include in his Final Report a recitation of all the allegations, together with his personal evaluation of their validity. As a consequence, he opined publicly, with respect to two allegations, that Mr. Meese had violated Federal criminal law but that criminal prosecution was, nonetheless, not "warranted."

This was a public smear on Attorney General Meese's reputation that was, unfortunately, legally privileged. The only remedy I had, as Mr. Meese's counsel, was to include, in the Response we filed on behalf of Mr. Meese, the sworn conclusions of two highly respected former Federal prosecutors that the facts recited in Mr. McKay's Report did not state a prosecutable Federal offense and to present his defense in extenso in the Response. But our Response—which was, I believe, far better written and more persuasive that Mr. McKay's Report—was read by very few. Although Mr. McKay exonerated Attorney General Meese totally on the Wedtech allegations, the public misimpression remains to this day that Mr. McKay believed that Mr. Meese was guilty of the Wedtech charges but chose to withhold criminal prosecution for some overriding policy reason. In fact, *The New York Times* made precisely that error in a Sunday magazine story it printed several months ago and, when called on to correct it, only aggravated its initial mistake by citing the gratuitous opinions of guilt regarding conflict-of-interest and taxes that Mr. McKay had put into his Final Report.

There is, I believe, a consensus now that a Final Report is not a Walter Winchell gossip column, in which an Independent Counsel may, without legal liability, state his opinions about a subject's guilt. The job of an Independent Counsel is to investigate and to decide whether to initiate a criminal prosecution. The Final Report should be used to tell Congress what the Independent Counsel has done, not what he personally believes.

In the Appendix to this Statement I propose an amendment to Section 594(h)(1)(B) designed to destroy any Independent Counsel's illusion that the Congress and the public are entitled to hear his opinion of the facts revealed by his investigation.

(3) The Quest for Queen Esther

The existing statute leaves the selection of Independent Counsel entirely to the Special Division of the Court of Appeals. That court relies on its own initiative to collect names, check qualifications, and make the appointment. I recall that years ago—before my representation of Attorney General Meese—I was called by a Federal appellate judge who was on the Special Division panel and asked my opinion of a Washington, D.C., lawyer who was being considered for appointment as an Independent Counsel. I gave him high ratings. The appointment was made, and he performed his duty admirably. But I was surprised at the time over the haphazard quality of the information-gathering process that the court was using.

Since my representation of Mr. Meese it has occasionally occurred to me that an appointment as Independent Counsel might be interesting. But there is no roster and no place to apply. I asked two Federal appellate judges who are not on the Special Division panel how one goes about being considered. Both replied that they would not, as a matter of principle, recommend names to the panel. That makes the selection process totally random. Three Federal judges select attorneys for these very important duties entirely on the basis of who they know personally or by reputation.

The lawyers selected have, by and large, been distinguished and experienced. But no one can say that there is any system for selecting them. And it is simply dangerous to have a statutory procedure with so gaping a void in a major, possibly outcome-determinative, phase of the process.

How should the court gather candidates for the list from which an Independent Counsel is selected? The Biblical Book of Esther—which was read in synagogues all over the world yesterday on the Jewish Holiday of Purim—describes how the King of Persia proceeded to select a new queen more than 2500 years ago. By royal decree candidates from across the breadth of his kingdom were brought to the palace for the King's personal examination. And the result was the selection of the fairest of them all—Queen Esther.

The search for an Independent Counsel should be no less exhaustive. I recommend that the Congress become involved in the selection process by nominating the pool of lawyers from which Independent Counsel are chosen. The special division might be required to select an Independent Counsel from a roster of nominees of the Senate. Each Senator would nominate two lawyers for the pool. This would give the court up to 200 names of leading members of the Bar. Along with the nomination, the Senatorial office would be expected to provide the court with relevant background information on its nominees, including cases that attorneys have handled and the names of judges and counsel who could be called as references.

The roster of names would be a public document. Lawyers or others who might want to support or oppose particular nominees could submit letters to the court. The court would thus have a broad array of names and a wide choice of sources from whom to inquire.

In the Appendix to this Statement I propose an amendment to Section 593(b)(2) to create the roster of candidates from which the special division court would select an Independent Counsel.

(4) The Frankenstein Phenomenon

This brings me to the important question of possible abuse of power. What should be done if an Independent Counsel turns, a la Dr. Frankenstein's monster, into an out-of-control creature that exceeds bounds of legality and fairness? The present law has no effective mechanism to prevent abuses of power beyond the toothless exhortation of Section 594(f) that the Independent Counsel should comply with "the written or other established policies of the Department of Justice" and should "consult with the Department of Justice."

I should emphasize, at the outset, that there is no truly effective means of curing or preventing gross errors of judgment by any Federal prosecutor, including an Independent Counsel. Should the charges against Mike Espy have been brought to trial or were they a combination of trivial technical violations that should not be subject to the criminal law? If it was a misjudgment to pursue that case—and I personally believe it was—I can only say that in my experience as a criminal-defense lawyer I have seen instances of misjudgments by rank-and-file Federal prosecutors that were as great or greater. I have tried, usually unsuccessfully, to have misjudgments of this kind reviewed and reversed by higher levels within the Federal justice system. Occasionally, I have even gone to the Department of Justice to complain of misguided zeal by Assistant U.S. Attorneys in the field. Nearly all the time, I have been rebuffed. Any experienced white-collar criminal-defense lawyer will tell you that line prosecutors have broad discretion, and that when their decisions are approved by a U.S. Attorney himself or herself, there is a snowball's chance in hell of getting that decision reversed by the Department of Justice.

I have told my clients that, in the real world, they must live with a system that tolerates lapses in judgment, and that there is seldom any recourse short of vindication at trial. That is what the Espy case demonstrated. I do not believe that this experience proves the infirmity of the Independent Counsel Law. The same poor judgment could have been shown—and often has been shown—in prosecutions controlled by the Department of Justice.

But what of more flagrant excesses that violate the law or that infringe on constitutional rights? Although Section 594(f) requires an Independent Counsel to "comply with the written or other established policies of the Department of Justice,"

there is no enforcement mechanism. And what if an Independent Counsel leaks grand jury evidence to the press—a charge that has been made, but far from proved, with regard to Independent Counsel Starr?

I think that judicial supervision and oversight of an Independent Counsel should be the business of a panel of three appellate judges selected randomly for each Independent Counsel investigation. The issues are usually susceptible to determination as a matter of law, and they can be resolved on the submission of briefs and, if necessary, oral argument. Oversight by an appellate panel avoids the delay incident to a decision by a single district judge that is then taken on appeal. And if evidence must be obtained through oral testimony, the court of appeals can appoint a special master to hear the evidence and to make proposed findings.

Each investigation, I believe, should have its own appellate panel to which the targets, subjects or witnesses may apply to challenge the conduct of an Independent Counsel. That panel may be determined, by lot, as soon as the investigation begins. The parties and witnesses will, therefore, know to whom to turn if the Independent Counsel exceeds his authority, engages in unconstitutional or unlawful conduct, or violates the statutory directive of Section 594(f)(1).

In the Appendix to this Statement I propose an amendment to Section 594(f) to deal with the Frankenstein Phenomenon.

(5) The Methuselah Factor

Another criticism of the Independent Counsel law is that Independent Counsel investigations take too long. I can tell you, as I tell every client who consults me at the inception of an investigation into a "white-collar" offense, that I have never in 30 years of practice seen a properly conducted investigation finished within the time predicted by the prosecutor or within the longest period the potential accused expects in his worst nightmare. By their nature, such investigations always drag on, frequently until just before the statute of limitations will expire.

Any arbitrary fixed deadline for Independent Counsel investigations will have unfair repercussions. An Independent Counsel whose time is almost up will feel pressured to indict even if his case has holes. On the other hand, a crafty defense counsel who sees the deadline approaching may find reasons to delay until the Independent Counsel is out of office.

Nonetheless, it is reasonable to ask an Independent Counsel who has been at it for more than a year-and-a-half why he is taking so long and assign to him the burden of explaining the Methuselah Factor. I propose an amendment to Section 594(h)(1)(A) which will require an Independent Counsel to advise the court that has appointed him, in his 6-month reports of finances, how much longer he expects the investigation to last and the specific reasons for the duration of the investigation once it exceeds 18 months. The court should be empowered to evaluate his explanation and to direct that the investigation terminate by a specified date if it is not satisfied with the Independent Counsel's explanation. Such a termination order, based on the content of a report of the Independent Counsel to the court, is, I believe, an appropriate "judicial" power as defined in *Morrison v. Olson,* 487 U.S. 654, 681–683 (1988).

(6) The King Midas Fallacy

Another serious criticism of the Independent Counsel law concerns the huge amount of money that some investigations have cost the taxpayer. Many believe that Independent Counsel are oblivious to these expenses and that they treat the public treasury as if it were King Midas' storehouse, constantly replenished with gold.

It is clear that the court that appoints the Independent Counsel could not, under *Morrison v. Olson,* 487 U.S. 654 (1988), supervise the expenditure of funds by an Independent Counsel. I do not see a constitutional means of assigning to a court the duty of limiting an Independent Counsel's expenses. Only Congress may police that aspect of an investigation, possibly by imposing arbitrary dollar limits.

There is, however, another aspect of the King Midas Fallacy that justifies a drastic change in the premise on which an Independent Counsel investigation is conducted. In authorizing costly investigations scrutinizing the conduct of high-level government officials, Congress operates under the misguided notion that lawyers may be pressed into involuntary servitude to represent Federal Government employees ensnared in these investigations.

The media enjoys describing the massive attorneys' bills that ordinary government employees run up when they are involved in an Independent Counsel investigation. Huge figures have been cited for Betty Currie and Bruce Lindsey in the Lewinsky investigation. I don't know how accurate these figures are. Nor do I know

whether the clients whose skyrocketing legal fees are reported in the press are actually paying their lawyers.

My own belief is that, contrary to what journalists report, very few lawyers are putting their children through college on fees from these cases. Lawyers' bills may mount, but payment is nowhere in sight.

To be sure, Section 593(f)(1) of the law provides that a "subject of an investigation" may recover attorneys' fees "if no indictment is brought against such individual." I invoked this provision to recover attorneys' fees for our representation of Attorney General Meese after Mr. McKay's investigation was concluded. Other lawyers who have represented "subjects" who were not indicted in other investigations have had their fees paid by the United States after the investigation was over.

This is, by the way, a peculiar provision. It gives statutory sanction to what would, under other circumstances, be an ethical violation. If I had told Attorney General Meese when he first consulted me that I would represent him on the understanding that he would pay my fees only if he was not indicted, I would be making a contingent-fee arrangement in a criminal case. That is grounds for disbarment.

Given Mr. Meese's limited personal financial resources, that was nonetheless the effect of the statutory provision for payment of attorneys' fees. If Mr. Meese had been indicted, I doubt that he could have afforded to stand trial, much less pay our outstanding bill.

Most government officials who find themselves targets or subjects of an Independent Counsel investigation are not independently wealthy. The economic burden of defending them—regardless of what the media may say—falls on their lawyers. When a government employee is subpoenaed to testify in an Independent Counsel investigation, he or she must find a lawyer who will be willing to undertake the representation even if the prospect of payment is bleak. Much of the financial burden of investigations of Cabinet officers therefore routinely falls on Washington lawyers. They undertake the work because it is interesting and they feel a responsibility to society. But it really constitutes involuntary pro bono representation. And it confers a legally questionable gratuity upon the government employee.

The time has come, I think, for the United States to pay lawyers who represent government employees in these situations, and the cost should be charged against the budget of the Independent Counsel. If a government employee is subpoenaed by an Independent Counsel, he or she should be able to retain a lawyer at the lawyer's prevailing hourly rate, with the lawyer's bill to be submitted, on a quarterly basis, to the special division court for payment by the government. The court may, of course, review the bill for reasonableness (although it should not, at that juncture, reveal the bill or any of its details to the Independent Counsel).

Lawyers who cannot now afford to accept a client in an Independent Counsel investigation on the evanescent promise that payment may be made in the future can realistically be retained under such a system. Independent Counsel and his staff will also become aware of how expensive repeated subpoenas are because the lawyers' fees for unnecessary visits will be charged to the Independent Counsel's budget.

By the same token, I favor paying, on a quarterly basis, the lawyers' fees of all subjects or targets of an Independent Counsel's investigation who are government employees. Those lawyers' bills should, of course, be itemized and reviewed by the court of appeals for reasonableness. But if a government official is investigated by an Independent Counsel, he should be able to call on the lawyer of his choice, and the lawyer should know that he will be fairly compensated, on a timely basis, for his services. That arrangement should be effective even after indictment and during trial.

What happens if the target of an Independent Counsel investigation is ultimately indicted and convicted? In that case, the sentence may require him to reimburse the government for its payment of his own lawyer's fees—just as sentencing law today requires the payment of restitution in addition to jail or some other restriction on liberty. But it is unethical and unfair to the lawyer to make him work for nothing or to make his compensation depend entirely on whether the client is indicted.

Should this apply to anyone subpoenaed by an Independent Counsel, whether or not in government service? The private sector is different. Subjects or targets of an Independent Counsel who are in the private sector when they become subjects or targets are similar to subjects or targets of an ordinary Federal prosecutor. Private individuals must find funds to pay lawyers if they are suspected of complicity in a Federal crime. If the same people are being scrutinized by an Independent Counsel, they should also secure private funding for their defense.

* * * * *

If there is so much wrong with the present Independent Counsel law, why keep it? Why not just let the law lapse and return to the status quo ante two decades ago? Let the Attorney General choose a Special Counsel—as Judge Griffin Bell told this Committee he did in the case of the Carter Peanut Warehouse—whenever a credible accusation is made against the President or a Cabinet officer.

The answer is that the concept of an Independent Counsel is right, and the public—through the media—has become accustomed to it. There is no turning back. The public will no longer accept a determination in a sensitive investigation concerning a high government official if made by a counsel who is not independent. The determinations recently made by Attorney General Reno on several threshold issues relating to the appointment of Independent Counsels have been greeted with great skepticism and continue to provide grist to the columnists.

Looking back at the experience of the Meese investigation, I was enormously frustrated and unhappy during various junctures of that investigation. I thought that Mr. McKay was acting unreasonably in a way that an ordinary Federal prosecutor—limited by budgeting restraints and reasonable choices regarding priorities—would not have done.

But the outcome was accepted by the American people. Mr. McKay did his job and found that there was no basis to indict Attorney General Meese on the allegations that had initiated the investigation (and on most other peripheral matters). No one has, since that time, questioned the result. Would the same be true if the decision had been reached not by an independent lawyer selected by the court but by a lawyer appointed by the Deputy Attorney General (since the Attorney General was disqualified)? I think not.

Surely not in today's climate. The prevailing winds are those of skepticism and cynicism. Experts on TV roundtables and talk shows routinely question the integrity and the motives of government officials from top to bottom.

The purpose of the Independent Counsel law is to restore confidence in government processes by ensuring the public that government officials who commit crimes will be prosecuted no less zealously than the private citizen. In the history of Independent Counsel law, many defendants have pleaded guilty or been convicted after trial by Independent Counsel. These successful prosecutions should not be ignored.

But what of Kenneth Starr's performance? The conventional wisdom is that this latest investigation demonstrated the undesirability of the Independent Counsel process. I think, contrary to that conventional wisdom, that it proved that an Independent Counsel is necessary for the most sensitive cases, and surely when it is the President who is accused.

Fifty Senators voted to find the President removable from office because he committed obstruction of justice. Many of those who voted against removal said publicly that he should be criminally prosecuted for that offense after he leaves office. Forty-five Senators thought he should be removed for grand jury perjury, and many others agreed that he should ultimately be criminally prosecuted for perjury during the Paula Jones deposition or in the grand jury.

Is there any real likelihood that the case against the President—recognized now by most Americans to be a legitimate criminal prosecution—would have gone as far as it did if the prosecutor were not totally independent? The pressures on a prosecutor who was subject to Justice Department oversight would surely have overcome any inclination to investigate further. If Independent Counsel Starr was zealous, his zeal and his independence were surely needed to discover the facts in the case.

APPENDIX OF PROPOSED AMENDMENTS TO THE INDEPENDENT COUNSEL LAW

(1) *The Inspector Javert Syndrome*

1. Section 594(e) is repealed.

2. Replace Section 593(b)(3) with the following:

> (3) *Scope of prosecutorial jurisdiction.*—The division of the court shall define the prosecutorial jurisdiction of the Independent Counsel by reference to the alleged unlawful conduct of the individual who is the subject of the investigation and any Federal criminal statute that the subject may have violated. The jurisdiction of the Independent Counsel should also include the authority to investigate and prosecute Federal crimes, other than those classified as Class B or C misdemeanors or infractions, that may have arisen or may arise out of the investigation or prosecution of the matter so de-

fined, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses. The Independent Counsel may not investigate any matter not included within the definition of such Independent Counsel's prosecutorial jurisdiction without receiving prior authorization from the division of the court pursuant to subsection (c).

3. Replace 593(c) and 593(d) with the following:

(c) *Amendment of jurisdiction.*—

(1) *In general.*—The division of the court shall not amend the prosecutorial jurisdiction of an Independent Counsel unless the prosecutorial jurisdiction, as initially defined, has omitted alleged conduct or a Federal criminal statute that is part of a single continuing course of criminal conduct. If the Independent Counsel discovers or receives information about possible violations of criminal law by the subject of the Independent Counsel's investigation that are not covered by the prosecutorial jurisdiction of the Independent Counsel and do not qualify for amendment under this subsection, the Independent Counsel shall submit such information to the Attorney General for further proceedings under section 591 of this chapter. An Independent Counsel shall not qualify and may not be appointed pursuant to subsection (b) to conduct any investigation and prosecution of an individual within his prosecutorial jurisdiction other than the matter initially defined by the special division or amended pursuant to subsection (c)(2).

(2) *Procedure for request by Independent Counsel.*—If the Independent Counsel discovers or receives information about conduct that is not covered by the prosecutorial jurisdiction of the Independent Counsel but is part of a single continuing course of criminal conduct that includes the conduct defined by the order of the division of the court, the Independent Counsel may apply to the court for an amendment of the prosecutorial jurisdiction. The division of the court may, following such notification and hearing to interested parties, including the Attorney General, as the court deems appropriate, amend the prosecutorial jurisdiction of the Independent Counsel.

(2) *The Walter Winchell Illusion*

Add to Section 594(h)(1)(B) the following language:

, provided that no report of an Independent Counsel shall state or imply there is merit to any allegation that does not result in indictment and conviction.

(3) *The Quest for Queen Esther*

Replace Section 593(b)(2) with the following:

(2) *Selection of Independent Counsel.*—Not later than 45 days after the enactment of this law and on or before September 1 of every second year thereafter, each member of the U.S. Senate shall provide to the Director of the Administrative Office of the U.S. Courts the names of two attorneys, resident anywhere in the United States, who are not employed by the United States or by any local government, and who are qualified by education and experience to serve as Independent Counsel and are willing to serve. The roster of attorneys nominated by the members of the Senate shall be published by the Administrative Office of the U.S. Courts, which shall receive and file letters from the public regarding the nominees. The division of the court shall appoint as Independent Counsel one of the nominees on the roster maintained by the Administrative Office of the U.S. Courts, but no nominee shall, at the time of his appointment or service, hold any other office of profit or trust under the United States.

(4) *The Frankenstein Phenomenon*

Replace Section 594(f) with the following:

(f) *Fairness and compliance with legal standards*—

(1) *In general.*—An Independent Counsel shall comply with legal standards regarding investigations applied in the Federal courts and, except to the extent that to do so would be inconsistent with the purposes of this chapter, shall comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws. Any person aggrieved by an Independent Counsel's violation of these standards may move before the court designated pursuant to subsection (f)(2) for an

order enjoining the Independent Counsel from proceeding with any action that violates these standards.

(2) *Reviewing court.*—Within 30 days of the appointment of an Independent Counsel the Director of the Administrative Office of the U.S. Courts shall select by lot a court of three active circuit judges that will have jurisdiction to review the conduct of the Independent Counsel, determine claims presented to it pursuant to subsection (f)(1), and issue orders regarding the investigation by the Independent Counsel. The circuit judges eligible for such lottery and assignment shall be the four most senior active circuit judges (excluding chief judges) in each judicial circuit identified in § 41 of this Title who agree to accept such assignment and are not members of the division specified in § 49 of this Title or any other court created pursuant to this subsection. The Clerk of the U.S. Court of Appeals for the District of Columbia Circuit shall serve as the clerk of any court appointed pursuant to this subsection and shall provide such services as are needed by such court.

(3) *National security.*—An Independent Counsel shall comply with guidelines and procedures used by the Department of Justice in the handling and use of classified materials.

(5) *The Methuselah Factor*

1. Replace Section 594(h)(1)(A) with the following:

(A) file with the division of the court, at the conclusion of 6 months after the date of his or her appointment and for each 6-month period thereafter until the office of that Independent Counsel terminates, a report containing the following:

(i) an identification and explanation of major expenses and a summary of all other expenses incurred by that office during the 6-month period with respect to which the report is filed;

(ii) an estimate of future expenses of that office;

(iii) an estimate of how many more months the Independent Counsel believes that the investigation will last; and

(iv) in the case of any report filed 18 months or more after the appointment of the Independent Counsel, an explanation, with reference to specific events during the investigation, for the duration and expected duration of the investigation; and

2. Renumber subsections (2) as (3) and (3) as (4). Insert the following as subsection (h)(2):

(2) *Termination by the courts.*—If the division of the court determines from the report filed pursuant to subsection (1) that there is no lawful justification for the extension of the investigation, the court may, following the filing of any report filed 18 months or more after the appointment of the Independent Counsel, order that the investigation be concluded within a specified number of months.

(6) *The King Midas Fallacy*

Replace Section 593(f) with the following:

(f) Attorneys' fees.—

(1) *Government employees.*—On the application of any government employee who was served with a subpoena by the Independent Counsel, the division of the court shall order the Independent Counsel to pay reasonable attorneys' fees directly to an attorney chosen by the government employee to represent him or her with regard to the subpoena and the investigation of the Independent Counsel. The division of the court shall not submit information in the application to the Independent Counsel or the Attorney General. It shall review the application for attorneys' fees in light of the sufficiency of the documentation, the need or justification for the services, whether the expense would have been incurred but for the provisions of this chapter, and the reasonableness of the amount of money requested. Applications for payment of attorneys' fees under this subsection shall be submitted no more frequently than every three months, and payment shall be made within 15 days of the order of the court. Any payments made by the Independent Counsel to an attorney under this subsection shall be added

to the expenses of the Independent Counsel reported pursuant to section 594(h)(1) of this Title.

(2) *Targets and subjects.*—Any government employee who is a target or subject of the investigation of the Independent Counsel shall be entitled to apply for and obtain payment of attorneys' fees pursuant to subsection (1), whether or not served with a subpoena, from the time he or she is notified by the Independent Counsel or it otherwise becomes clear that he or she is a target or subject of the investigation.

(3) *Non-government employees.*—Any individual who is not a government employee and any other entity that is the subject of an investigation conducted by an Independent Counsel and has not been indicted shall be entitled, at the conclusion of the investigation, to recover reasonable attorneys' fees incurred as a result of the investigation which would not have been incurred but for the requirements of this chapter. Any application for attorneys' fees pursuant to this subsection shall be submitted by the division of the court to the Attorney General and to the Independent Counsel for comment in light of the criteria enumerated in subsection (1).

(4) *Conviction and reimbursement.*—If any person who is awarded attorneys' fees by an order of the division of the court pursuant to this subsection is thereafter convicted on an indictment submitted by the Independent Counsel, the sentencing court may, as part of the sentence and judgment of conviction, direct that he or she reimburse to the United States the amount of attorneys' fees paid under this subsection.

(5) *Definition.*—"Government employee" means any person who earns more than 50 percent of his or her total annual income from a salary provided by the United States or any state or local government.

Chairman THOMPSON. Thank you very much, Mr. Lewin. I think your last point that you made is one that is probably the best point in favor of retaining some sort of statute, and that is—and a point that you elaborate more in your written statement—that we can't go back again; that now that we have it, the public expects some kind of other mechanism even though it may be flawed; and that we are not really writing on a blank slate anymore in terms of public perception. And I must say that so far the polls indicate that apparently most people would favor retaining something, and that may go to your point there. We can get back to that in a minute.

But I think what you two gentlemen do is point out two different sides to different coins that maybe we don't often get. In the first place, there are investigations that go on in this country all the time, and just because an Independent Counsel is not investigating someone doesn't mean that someone would not be investigating someone. So you are comparing. It is not Independent Counsel versus nothing oftentimes. Most times, it is the Independent Counsel versus, say, a regular Justice Department-type investigation. So what is the difference there? I think that is one thing we need to explore.

The other coin has to do with the fact that we raise all these problems with the Independent Counsel, but the investigation has got to go somewhere. And most people say, well, let's let it go back to Justice in one form or another, bring in special counsel on occasion, Public Integrity in most cases, or what not. But that presents problems. I mean, we are suffering, right now from diminished confidence, perhaps, that the Justice Department can handle those things. I think you laid a wonderful background that I would like to get back to in a moment or two.

More detailed points first. For some reason, you gentlemen, all of you—the point that crops up throughout your statements that I

don't see in a lot of others has to do with attorneys' fees. I can't quite figure that out, but it is there and it is something that we don't spend a whole lot of time concentrating on. And you suggest that the system we have now is unfair to targets, and also unfair to witnesses, and we should broaden that compensation.

But the first thing that strikes me is that ordinary people in ordinary investigations are investigated all the time both by Justice Department and around the country whether they are indicted or not. And under our current IC system, of course, if you are not indicted, you get all or most of your attorneys' fees paid. And if you are indicted, you are not, even if you are acquitted. But most people don't get their attorneys' fees paid under any circumstances, if they are not indicted or if they are indicted and acquitted, or whatever.

I am wondering whether or not this maybe, the system that we have set up, is some kind of implicit recognition that perhaps this is kind of extraordinarily onerous. And my second point is in view of the fact that most people, whether the investigations are fair or unfair, or the prosecutions are successful or unsuccessful or renegade or justified, do not get their attorneys' fees paid at all, so what justification do we have for expanding the provision of an IC statute if, in fact, we have one. And if we do away with it, as Mr. Bennett suggests, I assume we would have no provision for any attorneys' fees at all.

Could you elaborate, each of you, on those points?

Mr. BENNETT. Well, I may get drummed out of the corps here. I just don't see that as a big issue because, again, as a practical matter the egos—and I don't mean that in a critical way—of first-rate trial lawyers who do this kind of work is they want to be in the action. And while there may be a particular lawyer who will not take a case or can't afford to take a case, most people who come under investigation in an Independent Counsel investigation are going to be able to get representation. And I would be troubled if the Committee wastes a whole lot of time on this and not on the more fundamental issues.

If I could just make one other point so my position is clear, I agree that there is a need of some kind of independence, but my point is it is best to be done within the structure of the Justice Department. If, in a high-profile investigation, any one of the people, such as Mr. Lewin, Mr. Fiske, Mr. Ruth, or Mr. Beall, who are here today, were appointed as a special counsel working within the structure of the Justice Department under appropriate internal guidelines I think you will accomplish about as much as you can. We will get the benefits of independence without all of the draconian things we have been talking about.

To me, it is a practical thing. Let me just share with you the experience I had when I represented Mr. Weinberger. We caught Mr. Walsh towards the end of his investigation. I believe he served—maybe I will be corrected on this—I think it was 7 years which was longer than all but three attorneys general in the history of our country.

Very often, I wasn't able to deal with Mr. Walsh. I was dealing with a deputy who had been primarily a drug prosecutor in another jurisdiction. When I have a major Justice Department case, I can

get several experienced prosecutors to look at the case—these are professionals who have experience in using the vast machinery of law enforcement. Usually, when I am dealing with an Independent Counsel, I am not dealing with someone with that kind of experience. In the beginning of an investigation, you find there are lot of very good people working for the Independent Counsel, but if you get into the tail-end of an investigation, you find that most of the very good people are gone. My concerns are basically practical concerns.

Chairman THOMPSON. Very good point. Mr. Lewin, comment on that because you make the point on the other side of that coin that your experience under ordinary circumstances, non-Independent Counsel circumstances, is that you run into the same or worse problem than Mr. Bennett refers to. So what do you think about what Mr. Bennett just said?

Mr. LEWIN. Absolutely. Maybe Bob Bennett gets seven or eight Department of Justice people wrestling over each of the questions that he brings to them. My experience really has been, by and large, that there are great injustices done in ordinary Federal criminal prosecutions. In some prosecutions assistant U.S. attorneys and U.S. attorneys themselves approve going ahead even when it is a gross misjudgment. Going to the Department of Justice is very much of an uphill battle.

I have done that a number of times. I am flattered that Mr. Bennett says that if I was an Independent Counsel, everybody would take my word. I just don't think that is true. I think the Department of Justice by and large lets its line attorneys and the people up the line—gives them great discretion. They make great misjudgments, and you don't get the Department of Justice ready to interfere with that in the ordinary course.

Chairman THOMPSON. How about the length of the investigation?

Mr. LEWIN. The length of the investigation? I have been in investigations, criminal investigations, that have gone to the eve of the statute of limitations and even have required—the government prosecutor says, look, we want to get the statute of limitations extended. These things go on and on and on quietly, without all of the glare of publicity that may accompany it.

Let me explain to you why I think an Independent Counsel is desirable. The theory of an Independent Counsel is if you have a discreet allegation, an experienced attorney—a Bob Bennett, a Bob Fiske, a Jake Stein, a Leon Silverman—should be able to look at that allegation, have a couple of people working on it maybe full-time, and make a judgment as to whether you ought to go ahead. That is an experienced lawyer working from the outside.

As a matter of fact, I am not in favor of having all these lawyers resign to become full-time Independent Counsels. The theory ought to be that a Bob Fiske or a Bob Bennett or maybe myself should be able to look at this, have a couple of people working on it, and within 6 months decide is there something we can go ahead with or not. But that is a discreet allegation. If they say to me, go after Mr. "X" and find everything you can about him, of course, that is going to take years. But that is not the kind of thing that the theory of the Independent Counsel is directed to.

Chairman THOMPSON. That rolls into another question—I have got just a little bit of time—and that has to do with the selection process and the reference made that if these gentlemen were appointed, you gentlemen were appointed Independent Counsel, things would go smoothly, and I think that they would.

Several suggestions have been made concerning how the three-judge panel might operate in the selection process. And I think one of the things we have learned is the fact that apparently it is very haphazard. It depends on the personal acquaintances of the three judges either directly or through other references that they get.

Let's just take these high-profile cases, setting all the criticisms after the fact aside. Has it not been the case that everybody who has been selected as an Independent Counsel has been someone of the highest reputation at the time that they were selected? I won't ask you for details and put you on the spot in terms of names, but as a general proposition it does occur to me that with regard to these high-profile cases, whether it be Mr. Starr or Mr. Walsh or any of the others, that there is not a great deal of criticism coming in terms of things that were on the table at that time. You never can tell what someone is going to do, but at that time.

Mr. BENNETT. Well, I think—could I just make one observation on his point?

Chairman THOMPSON. Yes.

Mr. BENNETT. I agree with Mr. Lewin that there is a lot of injustice out there and there are a lot of bad decisions. And if you get a line attorney in some other jurisdiction, it is hard to get review at Main Justice. I am not talking about that. I am talking about a high-profile Justice Department investigation. In 30 years, I have never had a situation where I could not get a meaningful review in an appropriate case. I have certainly been turned down a whole lot of times, like the Rostenkowski case. This is a good example. He was a very close friend to the President. The President was campaigning for him. I certainly couldn't get Eric Holder at the Justice Department to back off that case. When you have a significant case at the Justice Department, I find that you get a lot more review and scrutiny than with an Independent Counsel.

But let me address your point, and I don't want to get into names and I accept your permission not to do that. I don't agree with that. First of all, with all due respect to appellate court judges, I don't think they are very good at picking Independent Counsel.

Second, they live in a different world. They are not down there in the pit. As my friend Ted Olson says, he quotes a Spanish saying that, "It is one thing to talk about the bulls and quite another to be in the bull ring." And I think if you look at these resumes carefully, you will find that many times these are not people who have been in the bull ring. They have beautiful, wonderful resumes. I am not surprised that Jake Stein brought about a good result. He has been in the bull ring.

Chairman THOMPSON. But you are talking about qualifications more than integrity.

Mr. BENNETT. I am not talking about integrity. I don't question the integrity. But what we have done is we have taken the vast law enforcement power of the Executive Branch and have placed it

sometimes in the hands of people who have not used that power frequently, who are not experienced in the nuances of using that power, and that is a problem.

Chairman THOMPSON. I take your point. Mr. Lewin, briefly, and I will——

Mr. LEWIN. I agree entirely. These are all men of integrity, but I agree with Bob Bennett. They are not people who know what it is like to actually be questioning witnesses, making judgments with regard to them, preparing the case. I have, as I said before, the highest regard for Ken Starr, but it turned out that he was never involved in terms of questioning grand jurors, in terms of making personal evaluations of witnesses.

Now, I think that is the kind of qualification that is looked for in terms of the Independent Counsel. That is the kind of judgment. It is a Bob Bennett's judgment and a Bob Fiske's judgment that really is needed. But within the Department of Justice—and this just responds to your earlier question, Mr. Chairman. I think when it is within the Department of Justice, the public will not accept it the way they would if this were an independent person employed from the outside world out in the private sector acting under the auspices of the court.

It will still be the Attorney General's person who has decided not to prosecute. That is the case you have got to be looking at. You have got people who are coming on the next panel who successfully prosecuted Vice President Agnew, for example—Mr. Beall. That is good, and nobody says it can't be done by the Department of Justice. The problem is what is going to happen with the next Cabinet officer about whom the Department of Justice maybe hears an allegation and doesn't indict. Is the public going to believe it or are they going to say it is political?

Chairman THOMPSON. Thank you very much. Senator Lieberman.

Senator LIEBERMAN. Thanks, Mr. Chairman. Thanks to both of you for the time you took in preparing your statements, which I thought were very thoughtful and very helpful. And though you reluctantly assumed the role of surgeon here, Mr. Bennett, I thought some of your operating suggestions were really quite helpful.

In a way, I want to come back to what Mr. Lewin just finished with. But I want to clarify, Mr. Bennett, the last suggestion you made, which was to have removal of the Independent Counsel for good cause by the Attorney General. As you well know, that is in the current law, but then that decision by the Attorney General is appealable to the court.

Am I correct in assuming that you would remove that last step of appeal? Would you allow the Attorney General's judgment to be final there?

Mr. BENNETT. Yes, I would remove it. I think separation of powers is pretty important, and I think judges should be judging cases and they shouldn't be getting involved in issues such as the removal of a prosecutor. I believe if an Attorney General improperly or without cause removed a prosecutor, there would be such enormous hell to pay in this country—that is our best protection. Judges should judge, prosecutors should prosecute, and we should not get it all muddled up the way we have

Senator LIEBERMAN. How about the possibility of establishing some appeals process within the Executive Branch as a way of surmounting your separation of powers concerns?

Mr. BENNETT. I haven't really thought about that, but I think that that is a possibility. I think it is consistent with my overall view of this that within the structure of the Justice Department we can, in effect, have a Leon Jaworski-type prosecutor that will be credible to the American people, whichever way he or she goes, but have these protections within the structure of the Executive Branch and the Department of Justice. Nothing will solve all your problems.

Senator LIEBERMAN. Right. Let me now come back to what Mr. Lewin said because I thought you made a good point, at least in my review of this over the last couple of weeks. You approached the point from a different perspective. Here is what I mean.

I have been for retaining this office in some form for two reasons. One is to assure that, in fact, independent investigations are conducted of the highest-ranking people of our country when they are suspected of committing a crime, just to prevent the circumstance where such an investigation, if done internally, was corrupted, was stifled.

The second, though, is the point of public credibility, and particularly at this time of great cynicism. I know cynicism has been part of American history, but the cynicism quotient seems to be a bit higher and expresses itself in distrust of government. You would want to convince the public that an investigation was done fairly, and this is a point where we do really have Mr. Starr's investigation too much in our mind, I think, because you make the point through the Meese experience which is important for us to remember that one of the central reasons for having an Independent Counsel is not just to make sure that there be prosecution if it is justified by the facts, but that there be a declaration of innocence that is credible to the public if the facts don't justify prosecution. And as I mentioned briefly in my opening statement, more than half of the Independent Counsels have not gone forward with indictments, which is a measure in that sense of the success of the office.

So part of what I want to ask Mr. Bennett is that question, which is—as you said at the outset, the Independent Counsel office has become a weapon in the arsenal of partisan politics. You are right. Politics has become more partisan. The electronic media particularly, but all media now, have lowered their own thresholds for what kinds of scandal they will cover, how much they will cover.

But isn't it true that one way or another, there are going to be partisan politics and media focus on these investigations, and ultimately, particularly in cases of decisions not to prosecute, that there is going to be much more credibility if you can say this person wasn't under the heel of the Attorney General or the President?

Mr. BENNETT. Well, you have to be careful. I mean if you write the statute in a way, as I understand the law, which totally isolates the Attorney General, then you are going to have an unconstitutional statute. As I read the *Morrison* case, the only reason that the separation of powers argument survived was because it was

recognized that in the last analysis the Attorney General has some power here, the power of removal. So you are stuck with that, no matter what system you have. So let's not forget total independence is probably unconstitutional.

Also, I don't think the test, by the way, should be whether there is no prosecution. I mean, we shouldn't assume that all of the decisions that have been made not to prosecute were the right ones. But I believe, Senator, that, using Jake Stein as an example, and assuming that was the right decision—and I am not suggesting it was not—I believe if Mr. Stein had been designated as a special counsel or a special prosecutor within the Public Integrity Section, and that there were internal guidelines which said he didn't have to report to the Deputy Attorney General or didn't have to report to A, B, C or D and he had come out the way he did, I think the public would have accepted his decision.

But we can't let the tail wag the dog here. The problem we have is we have just created this monster. We should focus on making the Department of Justice an institution which people do respect. If no decision within the structure of the Justice Department will be accepted by the public than this Committee should not focus on the Independent Counsel Statute, but for the long-term survival of our system, should instead focus on making the Justice Department a different entity than it is. I don't believe that that is necessary, but that is what is most important.

Senator LIEBERMAN. I hear you.

Mr. LEWIN. Can I just speak to that for a moment, Senator Lieberman, because I do disagree with my good friend Bob Bennett on that?

I mean, this is a government of laws and not of men. Much as I respect Jake Stein—Bob Bennett, and I and Mr. Fiske all would say, well, if Jake Stein says there is not a basis for prosecuting, I would believe him. But 99 percent of the American public, or maybe more I daresay, have never heard of Jake Stein. And they would simply say, hey, this was at a time when Mr. Meese was appointed. The Jake Stein investigation grew out of the appointment of Mr. Meese as Attorney General.

Senator LIEBERMAN. Right.

Mr. LEWIN. Now, just imagine that Jake Stein had been appointed by the Department of Justice as an Independent Counsel, a special counsel, to look into whether the President's appointee for Attorney General committed any criminal offense. And with all the regard I have for Jake Stein, if he had said after 6 months, no, perfectly all right, I think most of the country would have said this is a political fix. So they got some lawyer who has got great respect?

So, that is not the point. As I say, it is a government of laws. You have got to look to set up a system that people will have confidence in, not rely on individual people. And that is why I have come around to the view that there should be a system under which a Jake Stein or a Bob Bennett or a Bob Fiske is appointed as an independent lawyer. When they conclude their investigation, that is a declaration of innocence which you don't get from the Department of Justice.

If I succeed on behalf of a client with a U.S. attorney or with the Department of Justice, the case goes away. My client says to me, hey, I want to get a letter that says they concluded this and said I am innocent. Prosecutors laugh at me. I tell the client they are going to laugh if I ask them for a letter, because prosecutors never write letters saying you are innocent. But when an Independent Counsel says, I have concluded the investigation and there is no basis for indicting Mr. Meese, that is as close as you will ever get to a declaration of innocence.

Mr. BENNETT. There is a flip side of this which I think is more significant and more important. You appoint somebody totally independent who operates totally outside of the Justice Department there are going to be a substantial number of people who say the politicians are at work interfering with law enforcement.

And there will be a lot of defense lawyers, some of whom are here today who will argue "Ladies and gentlemen of the jury, this is politics, this is politics."

Senator LIEBERMAN. Well, it is going to happen in either case, so the question is how can we make the judgment of the prosecutor most credible to the most people. It is hard to ask too many questions of you guys. Your answers are engaging.

Did I hear you say, Mr. Bennett, that you thought that when the law expires, we ought to bring all the Independent Counsels back into the Justice Department? I know we have the power of the purse, but wouldn't that be a real separation of powers concern that the Congress is essentially wrapping up independent prosecutors' investigations?

Mr. BENNETT. No. I am not naive to think that this is going to happen, but I think if you were to determine that this statute—I am somewhat of a realist, but I feel, to be honest with you, if you determine that this statute should die because of a variety of reasons, then you should let it die. You shouldn't let three, four, or five Independent Counsel just continue as is.

If you decide that there is a new structure you are going to have within Justice then what I am saying is all of those cases should go back for review within the new structure. And it may well be that the determination is that Mr. Starr continues or that any one of the other Independent Counsel continue. But if it is a bad system, let's end it. Let's not perpetuate it.

Chairman THOMPSON. I think your realism is well-placed.

Mr. BENNETT. I took a shot. Thank you. [Laughter.]

Chairman THOMPSON. Thank you. Senator Collins.

Senator COLLINS. Thank you, Mr. Chairman. I want to thank both of our witnesses for their testimony. Mr. Lewin, I particularly enjoyed your testimony because it mirrors so much my own thinking on this issue. You pointed out, as did Senator Lieberman, that the public is much more likely to accept a finding if it is made by an Independent Counsel not to bring charges against the target of the investigation. And I think that is such an important point that has been overlooked in much of the debate.

Now, an alternative that some have advocated is to beef up the Public Integrity Division of the Justice Department perhaps by having a head who has a set term that would go beyond the term of the President. And I wanted to get your reaction to that pro-

posal. Do you see the same problems of independence and public confidence in the results of investigations occurring as long as that official is part of the Justice Department, no matter how many safeguards we try to put in?

Mr. LEWIN. Yes. I think assuring that person's continuity in office as head of the Public Integrity Section doesn't take care of the problem that he or she is still within the Department of Justice. And ultimately the decision, I guess, is made within or under the Department of Justice aegis. If it is a totally separate office, although nominally within the Department of Justice, I have serious problems with that, too.

Some people have suggested setting up an office of Independent Counsel within the Department of Justice which is totally independent. But you then have somebody who is sitting around there waiting to find some allegation against a public official. He has a whole staff that doesn't handle the ordinary kinds of activity, but if he handles these kinds of things, is waiting around to be able to justify his own office's existence by a whole group of these cases. I think that makes the situation as bad, if not worse, than it is today. If you have an allegation that justifies triggering some mechanism that somebody is looked into, let's do that, but don't, for God's sake, have an office to simply say we are independently going to look to see whether any Cabinet officials have committed any offenses.

And by the way, let me add to that another disagreement I have with Bob Bennett concerns this notion that it has got to be limited to the time that the public official is in office. That means that in the very first years of a new administration nobody who makes an allegation against a Cabinet officer about something he or she may have done in private life before he or she became a Cabinet officer would come within this procedure. And yet I think it is equally important.

If somebody says, the Secretary of Commerce did something a year or 6 months before he or she became Secretary or Commerce, the problems with regard to that being investigated by the Department of Justice are as great as if it is something the Secretary or Commerce did on his or her third day in office.

Senator COLLINS. Let me ask you two other quick questions. One concerns the coverage of the law. Mr. Bennett has suggested that if the law survives, we should narrow the coverage to just the President, the Vice President and the Attorney General. It is difficult to figure out exactly how many people are covered under the current law because it is tied to salary levels, but it is probably more than 100 officials.

I have proposed shrinking the coverage, but not nearly to the extent that Mr. Bennett proposes. It seems to me that the Attorney General is always going to have an inherent conflict of interest, whether actual or perceived, investigating any of her colleagues in the Cabinet, for example.

Do you have any suggestions on narrowing the scope of the covered officials under the law?

Mr. LEWIN. I don't have any specific suggestions. I haven't addressed that in my statement, but I agree with you, Senator Collins, that it should be narrowed from where it presently is, but not

as far as Mr. Bennett suggests or others have suggested. I think simply limiting it to the President, Vice President and Attorney General would be far too narrow. The same problem arises with any member of the Cabinet, people who are right up there in terms of White House staff right next to the President. I think they all ought to be covered.

Senator COLLINS. Finally, I share your concerns about the fairness of the final report provision of the Independent Counsel Act. I think we have seen more than one case where the final report to Congress includes a lot of opinion by the Independent Counsel that damages the reputations of people even in cases where a decision not to indict the official occurred. I think we saw that with the Walsh report, for example. And, indeed, Ken Starr's report raises issues of whether impeachment proceedings should be tied to an Independent Counsel's report.

Why not just abolish the reporting requirement altogether, the requirement of a final report to Congress?

Mr. LEWIN. Well, I think abolishing it in terms of any recitation of evidence would be the proper thing to do. On the other hand, I think it has an accountability feature to the extent that the Independent Counsel says to Congress, here is what I did, I conducted an investigation. It can be a very short, and should be a very short document that just simply reports what the Independent Counsel actually did, not what he believes, not a summary of evidence, and certainly not a statement of opinion.

And let me just give you a practical insight into that. When Mr. McKay completed his report about Attorney General Meese, we were extremely relieved that he was not indicting. He had this terrible stuff in the report about, well, I think he committed this, I think he committed that, but we won't indict.

As a defense counsel, I was faced with a Hobson's choice. I could go to him and say, you can't put that in the report; either you indict my client or take it out. And I had a fear that the response would be, OK, if that is what you want, we will indict him. We were so delighted that he was not going to be indicted, we weren't quarreling with the fact that there was stuff in that report. But a defendant and his lawyer are in an impossible position when that happens because if he tries to call the Independent Counsel's bluff, there is the risk that it won't be a bluff at all.

Senator COLLINS. Thank you, Mr. Chairman

Chairman THOMPSON. Thank you very much. Senator Levin.

Senator LEVIN. Thank you, Mr. Chairman. Going back to a point which a number of us have raised, which is the credibility of a decision not to indict, Mr. Bennett, your answer to that was that if a decision not to indict was made by a special counsel rather than an Independent Counsel, you thought that would have as much public credibility. And I must say I don't agree with you on that point.

I happen to think there are many problems with the Independent Counsel law, and many abuses that we have seen, severe abuses. We have tried to rein in the power of Independent Counsel each time we pass the law or reauthorize the law. We have not succeeded, in my judgment. We ought to keep trying to find some other mechanism.

But in one area I really do not agree with you, and it is the Meese experience, too, because I can personally vouch for the fact that I was no fan of Mr. Meese, to put it gently. But when the Independent Counsel reached a conclusion that he would not indict Mr. Meese, I could accept that far more readily than I could have accepted the Department of Justice, which he was, I think, then nominated to head, reaching that conclusion. I can give you that as a personal experience in terms of confidence in a decision not to indict, which after all is the decision which I believe has been made by a majority of the Independent Counsel, or close to it.

Second, we have the experience of the court relative to Judge Fiske, where we specifically told the court that they could appoint Judge Fiske as the Independent Counsel, should they choose, because he had already been selected as special counsel in the Whitewater matter. And we very specifically in the reauthorization said they may appoint him, and that court decided not to reappoint Mr. Fiske and specifically said it has got nothing to do with his integrity, which they accepted very readily, thank God.

But the court said that, having reviewed the motion of the Attorney General, Robert Fiske's appointment as Independent Counsel would not be consistent with the purpose of the act. And then they went on to say that, as Fiske was appointed by the incumbent administration, "the court therefore deems it in the best interest of the appearance of independence contemplated by the act that a person not affiliated with the incumbent administration be appointed."

So even this three-judge panel, who I happen to disagree with, by the way, significantly on their decision here because I thought they should have reappointed Judge Fiske—he had already been into the matter and he had total integrity—nonetheless, they said the appearance of independence was such that they would not reappoint him, even though it was authorized by the act.

So in terms of the level of confidence that someone outside or inside the Department of Justice has in terms of the public accepting a result, particularly when it is a result not to indict—it seems to me we ought to accept that there would be a greater level of public confidence with a decision of an Independent Counsel not to indict than there would be typically with a special counsel's decision not to indict.

Now, that is not a question. It is just my own feeling about that. That should be put on the scale, however, against the criticisms of the Independent Counsel law. So where I think I disagree with you, Mr. Bennett, is in your statement that the public would have accepted it as much coming from a special counsel as an Independent Counsel. I think on that it is not accurate in my experience, based on many things.

However, that is not to deny your ultimate conclusion that there is so much on the other side of the scale that outweighs that benefit that we have to look at both sides of the scale. I myself, again, would like to try to see if we can fix this law, repair it; if we can't, to find a way to bolster the Public Integrity Section.

Now, having said all that, let me get to my questions because it is a point that I think is important, obviously, to all of us who have

spoken that there is some credibility gained on a decision not to indict. We have to look at the other side as well.

Now, termination by the court. The current law provides—and here I will have a question—the current law does provide, and I want to read it. "If the Attorney General has not made a request under this paragraph to terminate an Independent Counsel no later than 2 years after the appointment of the Independent Counsel, then at the end of the 2-year period, the court will do it on its own motion." That is current law.

Now, I haven't seen that placed in operation by the court. Now, maybe I have missed something here, but this is now a question of both of you.

Mr. LEWIN. What section are you reading from now?

Senator LEVIN. I am reading from Section 596(b)(2). "The division of the court, either on its own motion or upon the request of the Attorney General, may terminate an office of Independent Counsel at any time on the grounds the investigation of all matters within the prosecutorial jurisdiction of Independent Counsel or accepted by such Independent Counsel has been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions."

Now, we have had two instances that I would like to ask you about. One is the Pierce Independent Counsel that has been going on 9 years. I think 4 years ago, the Independent Counsel decided that it had resolved the issues relative to the former HUD Secretary and it is still not finally completed. That provision, which was aimed by the Congress to try to put some limits on these investigations, has seemingly not had any effect on that investigation which has been going on 9 years.

And in the Starr investigation, we had Judge Starr saying, I think, 6 months ago when he made his presentation to the House that his investigation was either completed or nearly completed relative to Whitewater, Filegate, Travelgate, and one other gate.

Now, my question of both of you is are you aware of any effort by the special court to terminate either of those two investigations based on Section 596(b)(2). That is my specific question.

Mr. BENNETT. I am not.

Senator LEVIN. Do you have any comment? I want to give you a chance to comment on my earlier——

Mr. BENNETT. Yes, I would like to. No, I don't know of any. I just want to be sure you understand my position. If you start with the fundamental question of will the public accept a decision with someone who has nothing to do with the Justice Department better than one who has something to do with the Justice Department——

Senator LEVIN. Not to prosecute, we are talking about.

Mr. BENNETT. Yes. With all due respect, I mean that is a Ph.D. in the obvious. Of course, if you have nothing to do with the Justice Department, it is better. But my point is, Senator, you can get 80 or 90 percent of the way there with some changes within the system, without all the other baggage, you point out correctly there is sort of a sliding scale here. That is not your word, but there is a lot of other baggage that comes with it. And what I am saying is for that extra 10 percent or 20 percent, or whatever, it is just not

worth all the other problems you are going to have. That is my point.

Thank you.

Senator LEVIN. Sure. Mr. Lewin, do you know of any consideration by the court under 596(b)(2) to terminate an Independent Counsel because the work is nearly completed, as was represented by Judge Starr 6 months ago and was apparently the case in the Pierce investigation, a few years ago?

Mr. LEWIN. No, I know of none. Of course, the problem is that the special division of the court operates under in camera or secrecy rules, except to the extent that it issues opinions. So there is no ongoing publication of any application, if any application was made, whether anybody ever asked to have the office terminated.

And the problem, quite frankly, Senator Levin, is that the statutory language doesn't give you much of a hook on which to rely. It talks about the ground that the investigation of all matters within the prosecutorial jurisdiction of such Independent Counsel has been completed. Now, if the Independent Counsel says, I haven't completed it yet, judges have a hard time saying, we disagree, we tell you you have completed your jurisdiction. It looks like the kind of thing that will only take care of the most extreme kind of case.

Senator LEVIN. Let me move to the suggestion that you have made, Mr. Bennett, and others have, that we go back to a system where special counsel are selected. I happen to agree with you totally. The law has not succeeded in removing the issue from politics at all. We have not succeeded in that. In only one area do I think the law has clearly succeeded, and that is the area which Mr. Lewin has focused on where there is a decision not to indict. I think it is more readily accepted in maybe 100 percent versus 80 percent. Maybe we can get to that. Nonetheless, there is a difference there which is important, I believe.

But, now I want to ask you about removing from politics. If we go back to a special counsel approach, we will still have a situation where politics can be interjected quite easily, and that is that people will argue, you ought to pick a special counsel here, you shouldn't be doing this inside the Justice Department with the Public Integrity Section doing it, you should pick a special counsel.

We have that now argued with the Independent Counsel all the time. We have people in the Congress putting a lot of pressure on Attorney General Reno to go for an Independent Counsel in the campaign finance area. You should go; the law requires you to go. Many people in the Congress put tremendous pressure on the Attorney General to do that. That was political pressure on the Attorney General.

You could still have that kind of political pressure on the Attorney General to seek a special counsel, if that is the route we go. So, that doesn't really remove it at least totally from politics, now, to get to the sliding scale, does it? That is my question. Don't you just have the same political problems with that mechanism, or similar political problems?

Mr. BENNETT. These are all degrees. You can't eliminate politics completely from these things, and frankly I am not sure you should. But it is a question of degree. I think there will be less of it under what I suggest rather than what we have now. And one

of the big problems which I hope you will not overlook—I am sure you won't—is the way the system works now, we have each of these levels of which just puts the scandal machine in overdrive. And on each occasion, members of Congress speak on each of these events, and politics takes over.

Maybe I don't think it is as complicated a problem as many people do. I think if you had a roster of superstar people, many of whom are testifying before you today, and they were on a roster ahead of time and people weren't lobbying for these positions, and if a sensitive investigation came up and a revised Public Integrity Section—if it were announced that Mr. Fiske or Mr. Lewin or Mr. Beall, or any one of a number of wonderful lawyers were going to handle this, and here are these internal guidelines, I think it would go a long way to reducing, if not eliminating politics.

Senator LEVIN. Thank you, Mr. Chairman.

Chairman THOMPSON. Thank you very much.

Mr. BENNETT. I find it interesting, by the way—you mentioned Mr. Fiske. The argument for not having Mr. Fiske do it, the appearance issues—I can't quite understand the subsequent appointment, which to me created many more appearance problems.

Chairman THOMPSON. Thank you very much. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman. Last week, Senator Baker made a comment that the Independent Counsel Statute had drastically altered the nature of the impeachment proceedings by the provision which called upon Independent Counsel to transmit information to the House of Representatives on specific and credible evidence of wrongdoing.

My own view is that we ought to try to salvage the Independent Counsel Statute, and a number of us are working on that. And if we do, I would be interested especially, Mr. Bennett, in your view of that particular provision. You were mentioned very prominently in the impeachment proceedings, where we heard more repetition of lawyers' arguments and no witnesses in one of the most remarkable non-trial trials, I think, ever. At least that is my view.

But we went over and over and over again the President's deposition in the case brought by Ms. Paula Jones, and the famous commentary on what "is" is and whether he was observing on the representations that his distinguished counsel, Robert S. Bennett, was making at the time. And, of course, we have seen the referral by the Independent Counsel to the House of Representatives, leading the House to conclude that they needed no witnesses and setting the stage for a very unusual impeachment proceeding, leading Senator Baker to conclude that that provision at least ought to be changed.

Having been involved to some substantial extent, Mr. Bennett, I would be interested in your view as to Senator Baker's recommendation.

Mr. BENNETT. I am not quite sure precisely what——

Senator SPECTER. He wants to strike the provision from the Independent Counsel Statute, if we retain it, which requires the Independent Counsel to give to the House of Representatives specific and credible evidence which could lead to impeachment.

Mr. BENNETT. As I understand it, I don't—I have not studied the issue, Senator, but my initial reaction is, again, it is not a total one

way or the other. It would seem to me—and, again, before you were here I said I am not here speaking on behalf of the President. I would be troubled with any kind of rule which said that an Independent Counsel or a Justice Department lawyer was barred from presenting to the U.S. Congress or a committee operating under the Constitution from getting information under appropriate circumstances. I would have a great deal of difficulty with that.

You have a constitutional role to play, an important one, and there may well be times when you have this unique situation, which hopefully we will not have for another 200 years. I would be hard put to say you should not get certain kinds of information.

Senator SPECTER. I don't think Senator Baker was saying that there would be a prohibition, but simply not a requirement, or perhaps a refinement so that the statute would not raise an inference or presumption that the House of Representatives should take that record without conducting an independent inquiry. If they decide that they want to pursue articles of impeachment.

Mr. BENNETT. Right. What I am enormously troubled with and I think was wrong and should not be permitted again is this wholesale dumping of material, of raw material on the Congress, to let people do with it what they will. And I think that if a lesson was learned, that should be one of the lessons. That should never have happened and it was wrong.

And let me tell you one other thing, Senator, a very practical thing, as someone who day in and day out represents people. Many times I am asked to have clients cooperate with the government, and many times in the last 30 years I have had clients talk to FBI agents. And, normally, I have been able to say, and when I was a prosecutor I was able to say, look, there is Rule 6(e), grand jury secrecy.

What happened recently—I have to tell a client, look, if this thing gets high-profile enough, this could all be dumped over on Congress and what you tell the FBI agent or what you tell this person is going to be on the front page of the paper.

Senator SPECTER. Thank you very much, Mr. Bennett. I want to move on to another issue. We have limited time here, but I would agree with you that there ought not to be wholesale dumping. And my view is that whatever is evidentiary and ought to come before a committee ought to be in the public domain. And if it doesn't come before the House Judiciary Committee—if the House wants to play the President's tape, then the tape ought to be in the public domain to that extent. And we did not duplicate that in the Senate when we had depositions, videotaped depositions. The portions which were played in the Senate proceeding are part of the public record and the rest of it is not. The transcript may be available, but the videotapes are not available.

Let me move to the question on time limit and ask you, Mr. Lewin, the question about trying to curtail the scope. My own sense is that if we are to retain the Independent Counsel Statute, we are going to have to provide that jurisdiction is not to be expanded, as it was, for example, covering Ms. Lewinsky on the decision made by the Attorney General without, I think, adequate information. Certainly, her petition to expand the jurisdiction says very little,

a subject which we tried to pursue in Judiciary Committee oversight and will later.

But you have come out in favor of an 18-month time limit, which I would like to see as a starting point, with a couple of addenda to make it feasible, such as full-time Independent Counsel—we had discussions last week as to whether we could get people who would do it on a full-time basis—what the problem would be in dilatory tactics, so that we might extend the 18 months to expand the time if somebody raises issues and takes executive privilege, for example, to the Supreme Court, and provide for expedited review by the court of any matter which comes within the purview of Independent Counsel to try to condense it.

But I would like an amplification of your thinking on the practicality of imposing that kind of a time limit.

Mr. LEWIN. Well, I think that the burden can be certainly imposed on whoever is appointed as Independent Counsel to justify anything beyond 18 months to the supervising court, to the special division of the court. I have to disagree, as I think I mentioned before, with the notion that this has to be a full-time job. I think if, in fact, it is appropriately limited the way it should be so that a particular allegation is made and is referred to an Independent Counsel, then I think the theory of Independent Counsel is that the allegations should be narrow enough.

And under my proposal, any extension should be prohibited in advance. The statute should say you will never get extended to anything that is related, anything except direct obstruction of justice in the course of your investigation. But other than that, the definition has to be in terms of a particular allegation, and I think then you want the judgment of an Independent Counsel who maybe has some other practice, as a matter of fact is involved in these things all the time and makes that ultimate judgment as to whether this is a prosecutable case.

In England, for example, prosecutors who actually try cases are chosen from the private bar. Barristers take cases for prosecution on behalf of the State, and the rest of the time they are involved in private litigation. I don't know why that should not be true in this instance. Now, if somebody is appointed——

Senator SPECTER. Let me move on to another subject because the yellow light has just come on, and that is the question as to supervisory authority over the Attorney General's decision not to appoint an Independent Counsel. Senator Levin has commented that politics has stayed in the process, except when there is a decision not to prosecute. And that isn't quite the same as a decision not to appoint Independent Counsel, but there has been a good deal of frustration coming from Members of this Committee and Judiciary for the long investigation which Governmental Affairs conducted on campaign finance reform, and especially the Chinese implications.

There were three mandamus actions brought in district courts which granted applications for compelling the Attorney General to appoint Independent Counsel. All three were reversed on appeal, on the ground of a lack of standing. And my thought is to copy a portion of the statute which grants a majority of the majority or a majority of the minority of the Judiciary Committee of either House the power to require the Attorney General to give a written

response, which is very limited, but to expand that to give standing in a very limited way to those groups to apply to the court as a referee, where we had none, when Attorney General Reno declined to appoint Independent Counsel to utilize that mandamus feature if we are to retain the statute.

I would be interested in both of your views on that question.

Mr. LEWIN. Well, it appears to me that that is—if it is limited in terms of scope and Congress specifically defines standing in terms of that narrow group, I think it is a way of getting judicial review over the Attorney General's decision, which I think the Supreme Court, given *Morrison v. Olson,* would uphold. I think it is a permissible mechanism for getting some outside review, and I think would encourage or would improve public confidence in the system, as such.

Senator SPECTER. Thank you. Mr. Bennett, what is your view?

Mr. BENNETT. I haven't studied that issue, Senator, and I just think this is too important for me to express a view when I haven't—I am troubled with lots of people coming in and I see a lot of independent groups trying to get into things and it causes lots of problems. But I am going to defer on that, if you don't mind.

Senator SPECTER. Well, Senators and members of the House can cause lots of problems, too. Thank you very much, Mr. Bennett and Mr. Lewin.

Thank you, Mr. Chairman.

Chairman THOMPSON. Thank you very much.

Gentlemen, we could go on for a long, long time. You have been very, very helpful to us in our deliberations and brought up several points that I think that most of us probably had not really fully considered.

Senator LEVIN. Could Mr. Bennett just for the record supply that answer, if he feels free to do so later? [1]

Mr. BENNETT. I will, Senator.

Chairman THOMPSON. Thank you very much. With that, if there is nothing else, then you may leave with our gratitude. Thank you. Thank you very much.

Mr. BENNETT. Thank you very much.

Mr. LEWIN. Thank you.

Chairman THOMPSON. We will now proceed to our second panel for a discussion of alternatives to the current Independent Counsel Statute. This panel is made up of prosecutors who have conducted investigations outside of the Independent Counsel Statute.

The witnesses are George Beall, former U.S. attorney who successfully prosecuted Vice President Spiro Agnew; Robert Fiske, former U.S. attorney and the first regulatory Independent Counsel in the Whitewater investigation; and Henry Ruth, special prosecutor during Watergate and former counsel to Hamilton Jordan.

Mr. Beall, would you care to proceed with your testimony? Your entire remarks will be entered and made a part of the record, and if you could summarize those for us, we would certainly appreciate it.

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[1]Letter from Robert S. Bennett appears in the Appendix on page 233.

TESTIMONY OF GEORGE BEALL, HOGAN AND HARTSON

Mr. BEALL. Thank you, Senator Thompson. Mr. Chairman, mindful of the hour, I do ask that my written submission be incorporated in the record.

At the outset, I introduce myself. I am George Beall. I am an attorney privately with the law firm of Hogan and Hartson and in a previous career served as the U.S. Attorney for the District of Maryland. I was appointed in 1970 by President Nixon, on the recommendation of U.S. Senator Charles Mathias, whom some of you may have served with, at a time when my brother, J. Glenn Beall, Jr., was also U.S. Senator from Maryland, and in the shadow of my father, who was U.S. Senator from Maryland from 1952 to 1964. So as a Republican appointee in a Republican administration with fairly long Republican lineage, I came to the office, I suppose, with the kind of conflicts of interest that defy description.

But in any event, confronted with that lineage, I embarked on a special project, so to speak, in Maryland. Unhappily, in the 1970's and earlier, it was an open secret that the public business in Maryland was too often for sale. I decided as the U.S. Attorney that that office was peculiarly well-equipped to try to get at this particular problem and undertook a fairly broad-ranging investigation in January 1973.

Within the first month—and those of you who are former prosecutors will appreciate this—I had an individual, an architect, with his lawyer, come into my office and, conscience-stricken, describe how he had been making payments to local public officials in Maryland of 5 percent on the face of every contract, in return for getting public work.

He also explained to us how he generated the funds to do that, and it wasn't very complicated. His firm would give bonuses to senior executives and the executives would cash the check and they would give back to the firm the cash that the firm maintained as a fund to use to pay the 5 percent. We, with that information, began the process of pursuing local public officials. We ended up indicting the chief executives of two political subdivisions in Maryland, and in the course of the investigation learned, in May 1973, from one of the engineers that he had made payments to Mr. Agnew when he was the Governor of the State of Maryland.

This particular individual was subject to some significant credibility problems and it presented me, the U.S. Attorney for Maryland, with a very, very awkward prospect because at that point in history we did not have an Attorney General. When I first heard from this particular witness, Mr. Kleindienst had left the Department. Mr. Richardson had not yet been appointed, and I was confronted with the awful, terribly scary prospect of having this secret about the Vice President and not being able to share it with anybody.

But, happily, there came a time when I was able to meet with Attorney General Richardson. As I relate in my submission, happily, he, by reason of, I think, fundamental integrity that he enjoyed and by reason of his prior experience as a U.S. Attorney for the District of Massachusetts, responded sorrowfully to the story that I presented to him. He also responded positively in saying that this was the kind of matter that simply had to be pursued.

And he displayed, again, happily, enough confidence in me to permit us to go forward very quickly, keeping in mind that I was 35 years of age at the time and I was the oldest member of my staff. We arranged to meet with the Attorney General and he expressed obvious concern not about the integrity of the investigation, but obviously the explosiveness of the investigation because the problems of Watergate were ongoing and the Presidency was in increasing jeopardy. And to have the Vice Presidency simultaneously in jeopardy was something that he grappled with from day one.

But I was very mindful of the fact that the Attorney General had committed to the Senate during his confirmation hearings to appoint an Independent Counsel. Indeed, Professor Cox had been identified and appointed as of that time to handle the Watergate matter. I was concerned that the Attorney General may be inclined to either refer the Agnew investigation to Mr. Cox or appoint some other Independent Counsel.

So I made it my business very early on in meetings with the Attorney General—and I have to say I met with him personally. I mean, to his great credit, he personally involved himself in this matter from day one and indicated that I was to report to him, I was to keep him advised. He was fully supportive of what we did from the very beginning, and I seized the opportunity early on to suggest to the Attorney General that the Agnew investigation was something that we could handle. We could handle it effectively. We had the staff, we had the experience, and we had the competency, and, simultaneously, it was an opportunity for the Department of Justice to display to all who watched that the matter was conducted fairly and thoroughly.

The Attorney General, in a meeting in 1973, after a lot more discussion than I have been able to recite to you, concluded that, yes, the Department of Justice should retain jurisdiction, should not refer it to an Independent Counsel; that, yes, under the Constitution the Department of Justice and the Attorney General does have responsibility for dealing with criminal misconduct on the part of public officials, even to the second highest office in the land. At the conclusion of that meeting in June, it was decided that the Department of Justice would play out the investigation. There would be no Independent Counsel; and the subject was never discussed again.

Chairman THOMPSON. Actually, "special counsel" was the term being used then, I believe, wasn't it?

Mr. BEALL. That is correct. Every time we talk about the Independent Counsel Statute, I am reminded of the *New Yorker* cartoon that appeared a couple of years ago when a waiter appears at a table of people and he has a tray in his hand. On the tray there is a human figure and the waiter says, "who ordered the special prosecutor?"

I think from my perspective, not as an Independent Counsel or former Independent Counsel, I have been persuaded from day one that this statute was unnecessary. To me, from the beginning, it has been a solution in search of a problem. The reaction in the wake of Watergate was not unusual. There was a feeling that something had to be done. But it is a little bit like something had

to be done in Maryland to prevent architects and engineers from buying public work, and the legislature passed a law that sets up a very elaborate screening process for doing this and it is far more expensive and very cumbersome process that probably, a little bit like the special prosecutor law, is an over-reach and unnecessary.

So, with that, I will conclude by saying that there has been some observation this morning that perhaps we can't go back again. That may be true. It is a different Department of Justice today. There is a different culture. As I comment in my remarks, I am told that in this administration Assistant U.S. Attorneys, for example, are under civil service. That was not true in my era and I think it is a bad thing.

I think it was healthy when you had a combination of young, eager-beaver prosecutors with career civil servants. When you have all civil servants, I think you are likely to get the kind of gridlock and perhaps lack of initiative that is necessary if you are going to attack corruption.

Chairman THOMPSON. Or independence, also? Lack of independence, you think?

Mr. BEALL. I think there is lack of independence as well.

Chairman THOMPSON. All right. Thank you very much.

[The prepared statement of Mr. Beall follows:]

PREPARED STATEMENT OF GEORGE BEALL

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 U.S. 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.

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[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."

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 U.S. 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 U.S. 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 percent 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 12 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 office[2] 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. Richard-

[2] Assistant U.S. Attorneys Barnet D. Skolnick, Russell T. Baker, Jr. and Ronald S. Liebman.

son'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 3-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 11 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

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[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 1950's. 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."

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.

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[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."

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 U.S. 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

[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

Continued

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.

Chairman THOMPSON. Mr. Ruth, a slightly different view.

TESTIMONY OF HENRY RUTH, FORMER SPECIAL PROSECUTOR, WATERGATE SPECIAL PROSECUTION FORCE, WASHINGTON, DC

Mr. RUTH. Yes, sir. I strongly feel the act should be maintained, and I have to voice a strong objection to hearing that Watergate proves that you can do it within the system. As one who was in charge during the Saturday Night Massacre, it is impossible to describe how thin a thread existed at that time, and for 3 weeks thereafter, for the continuation of the Special Prosecutor.

And to say that you want to set up a system that can survive a Saturday Night Massacre, to me, is inviting a Saturday Night Massacre because in this age of PR, I believe, as current events have proved, a very strong information machine at the White House can create the atmosphere for a massacre to succeed.

One thing I had hoped from Watergate was that future White Houses would say, well, the way to deal with an allegation is to get everything out in the open and not cover up the problem. Without cover-up, there is no problem. We see now that future Presidents may take a different tack, in light of the success of the present incumbent, and that is attack: Attack the lawyers, attack the witnesses, attack the prosecutor, attack the laws the prosecutor seeks to enforce, and don't get it out in the open because you can succeed by attacking.

I also want to say that I think it is a mistake to set time and budgetary limits for an Independent Counsel ahead of time. I used to do a lot of white-collar criminal defense work, as my colleagues here have done. And in the area of joint defense and joint defense privilege among defense attorneys—I think this is what might have happened to the Senate's investigation of campaign contributions—the second you set a time limit, 23 people get a one-way ticket to China and the joint defense lawyers sit around the table once or twice a week and say, how do we get this beyond the time limit. And that is going to happen in every white-collar criminal case, as well as Independent Counsel case.

Budgetary limits, I think, are deceiving. Everybody says, well, we have spent $150 million on Independent Counsels. Well, first, you have to ask how much would the Justice Department have spent on those 20 investigations of Independent Counsels and subtract that from the $150 million. And as I say in my written testimony, if you look at the 20 Independent Counsels, only 4 of the 20 have

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in Arkansas in 1993, former Vice President Agnew would have become President of the United States."

expended 87 percent of that total of $150 to $155 million, which means to me that as to expense, 16 of the 20 were not a problem.

And if you look at time limits of the 20, 16 of the Independent Counsel investigations have been completed. Ten were finished under 18 months, which is extraordinary for a complex investigation, and two of the present ongoing ones are still under 18 months. So as I look at the problems of time and expense, and even charges filed, in 11 of the completed investigations, there were no charges. Two, uncompleted, have had no charges. So 13 of the 20 have had no criminal charges. So it is not that an Independent Counsel automatically thinks that he or she has to bring a criminal charge.

And as I see it, out of the 20, at least 15 were successful, and successful in the sense that the public believed in the results. Now, the five that I think are a problem are HUD, Iran-Contra, Mr. Starr, the one against Mr. Espy, and the one against Mr. Cisneros. And I have proposed, as you know, in my testimony, about 13 recommendations to the statute which I tend to group under four problems.

The coverage issue is one: How many people are covered, what kind of offenses are covered. I made suggestions on that. Second is the preliminary investigation problem and the expansion of investigation problem, and I have made some suggestions on that. Third is the tenure and accountability of an Independent Counsel. I have made some suggestions on that. And, fourth, is fairness. I think that of the five main problem investigations I see out of the 20 Independent Counsel, those 13 recommendations, if enacted, would take care of most of the problems of those investigations.

To me, the HUD investigation could have gone back to Justice a long time ago. In the Iran-Contra investigation—the Senate immunity raised enormous problems for Mr. Walsh. And delay tactics which can't be blamed on Mr. Walsh, raise a problem for extending the investigation. But I think an Independent Counsel should have to report, as I have suggested, to the Attorney General and the head of the Criminal Division after 3 years and every year after that 3-year period, and persuade the Attorney General that there are reasons to continue the investigation.

If there were an enforcement of compliance by an Independent Counsel with Justice policy, that referral may not have happened because if the Attorney General believed at the time that even if the charges against Mr. Espy were true, the Justice Department would not bring a gratuities charge, then I believe the Attorney General should not refer that to an Independent Counsel, and the same with Mr. Cisneros.

I would like to see the Independent Counsel reserved for actions by an incumbent while in office, and perhaps only official actions or actions that affected the treasury, the monies, of the Federal Government. And if there is an allegation about private life or something that happened before the election or appointment, let the Attorney General appoint a Bob Fiske special counsel for those.

I think an Independent Counsel should be reserved for the most serious matters and that the Attorney General has a right, after a period of time, to demand accountability from such an official.

I will stop there. Thank you very much, Senator.

Chairman THOMPSON. Thank you very much.
[The prepared statement of Mr. Ruth follows:]

PREPARED STATEMENT OF HENRY RUTH

I appreciate the opportunity to express my view that the Congress should reauthorize the Independent Counsel Act of 1978, as amended, with substantial modifications. This year, too many people have expressed strong negative views of the act without sufficiently examining the history of implementation over the past 20 years. I bring to this issue the perspective of having toiled for 28 months in the Watergate prosecution office and having represented, along with Steve Pollak, the first person (who was also the first innocent person) subjected to investigation under the 1978 law, i.e., Hamilton Jordan who was then Chief of Staff for President Carter and who was cleared of wrongdoing by Special Prosecutor Arthur Christy and by a unanimous vote of a New York grand jury. I was also privileged to lead the men and women of the Watergate office for the 3-week period following the Nixon-Bork firing of Archie Cox and the ineffective administration attempt to abolish our office prior to the appointment of Leon Jaworski.

The prevailing view of critics appears to be that Independent Counsels feel compelled to indict, stretch their investigations needlessly over too long a time and spend too much money. A look at the facts is helpful in negating these erroneous impressions. Since 1978, 11 of the 20 Independent Counsels have brought no criminal charges and 10 have completed their investigations in 18 months or less. Fifteen of the 20 offices have completed their mission in less than 4 years. In contrast, although most of the Watergate prosecutions were brought within 3 years of the June 1972 break-in at Democrat headquarters, the Watergate prosecution function served by the U.S. Attorney's Office and later the Watergate Special Prosecution Force endured for about 5 years.

In addition, of the $150 to $155 million expended by the 20 counsel offices created under the 1978 act, four of the offices have spent over 85 percent of the total monies used for these purposes. In other words, 16 investigations have expended an average of $1 million each and the remaining four have expended over $135 million. In summary, I would view these facts as to outcome, expenditures and length of office tenure as an Independent Counsel success rate of at least 75 per cent. And no one knows how much money the Department of Justice would have expended for these investigations, so we do not know really the extent of extra dollars the Independent Counsels have cost the taxpayers.

In lieu of discarding the entire mechanism, legislative consideration should focus upon the four or five investigations that appear to have created severe negative reaction. These are the counsel offices created to investigate HUD, Iran-Contra, Whitewater, Secretary Espy, and Secretary Cisneros. Your Committee should also ask and answer two key threshold questions: Should persons at the highest levels of government be compelled to adhere to a standard of compliance with the criminal laws that is stricter than that afforded an ordinary citizen? And is the Department of Justice the most effective way to investigate highest-level Executive Branch officials who fall under the suspicion of a criminal allegation?

On the threshold questions, we are confronted with the apparently unanimous view of President Clinton's defenders that Presidents, though not above the law, are also not "below the law." Those defenders maintain that if an ordinary Joe or Janet making $6 an hour tossing french fries would not be investigated, then a President should not be so pursued either. On the other hand, I believe that people entrusted with running a democratic government deserve stricter scrutiny for lawful behavior than does an average citizen. At the time Hamilton Jordan was investigated on a phony allegation of a single, two-second incident of cocaine use, I was so outraged as his attorney that I wanted the special prosecutor provisions thrown in the Atlantic Ocean. Clearly, other citizens in America would not have been investigated by the Federal Government for such an allegation. But in hindsight, despite the pain inflicted on Mr. Jordan during the 7-month investigation, one can argue convincingly that a Chief of Staff to the President of the United States should not be using drugs and should be investigated if a credible allegation surfaces even though a roofer, a reporter or an assembly line worker would not be so investigated. The problem with the Jordan matter was not the allegation, in my opinion, it was the total lack of credibility of the allegation. Under present law, I believe that the Jordan special prosecutor would not have been appointed because present law permits a Department of Justice closure if an allegation is not from a credible source.

The second threshold issue confronts the question of why the Department of Justice cannot do the job as well as an Independent Counsel. I cannot face that ques-

tion without reliving October 20, 1973, the night of the Saturday Night Massacre. The Watergate prosecutor was fired and the White House announced that our Office was abolished. The President's Chief of Staff sent the FBI to surround our office and freeze our records. By far, the majority of our staff was under 30 years old and worried about their future lives. In anticipation of adverse action, we had secured copies of key documents in secret locations around Washington, D.C. and even removed some key items from the office that Saturday night hidden in underwear and other unlikely locations. We did not know whether the military would raid our homes looking for documents. Unanimously, the staff of the Watergate prosecutors' office just refused to leave or to change anything we were doing unless someone physically removed us. And if an unprecedented 450,000 telegrams of spontaneous protest had not descended upon Washington, D.C. in the few days after that Saturday night, no one really knows if President Nixon would have succeeded in aborting the investigation. In other words, we did not feel that the Department of Justice was an adequate instrument for investigating the President and other high officials of government.

Even today, the difficulties of normal investigation of high-level officials appear in the Department of Justice pursuit of campaign financing violations. After 1 year, it was embarrassingly clear that the media were far ahead of the Federal investigators and the Attorney General felt compelled to find a new investigative chief; and even he resigned later from that position in apparent frustration about the lack of an Independent Counsel. Then, his intensive efforts and disagreement with the Attorney General were rewarded by his loss of an impending appointment as U.S. Attorney in San Diego. What does all that tell future Justice investigators about their independence?

I propose the following changes in the Independent Counsel Act:

1. Limit coverage to the President, Vice President, Chief of Staff to the President, the President's National Security Advisor, heads of Cabinet-level agencies including the Attorney General, the Director of the CIA, the IRS Commissioner and the Assistant and Associate Attorneys General in the Department of Justice.

2. Limit offense coverage to only those crimes committed in whole or in part while an incumbent is in national office and only those acts or attempts which involve actual or potential Federal Government agency action, an illegal use of Federal moneys or an interference with a Federal investigation through perjury, obstruction, witness tampering and the like.

3. Expand the Attorney General's preliminary investigation by permitting a grand jury subpoena for documents and grand jury testimony by the one or more persons making the allegation. If a person making an allegation refuses to testify without immunity, the Attorney General should be permitted to grant immunity to such person if normal Department of Justice policy and practice would so allow.

4. The preliminary investigation should be only one stage and an Attorney General should be able to dismiss an allegation if it is not specific, if it is not credible, if the Department of Justice under its policies would not otherwise prosecute such a high government official even if the allegation were true or if the Attorney General finds that a further reasonable investigation would more likely than not fail to reveal sufficient admissible evidence adequate to institute a Federal criminal charge. The Attorney General would have up to 6 months for a preliminary investigation.

5. An expansion of an existing Independent Counsel investigation should not occur without a preliminary investigation and referral by the Attorney General.

6. An Independent Counsel and core staff should be required to work fulltime at that task.

7. The Attorney General should maintain a core list of not less than 10 and not more than 25 persons who, because of prior Federal enforcement experience plus additional qualifications, are clearly able to serve as Independent Counsels. Anyone, including members of the three-judge appointing court, should be free to recommend such persons to the Attorney General. But the three-judge appointing court must appoint an Independent Counsel from such list unless the court rejects the qualifications of all such members of the list.

8. At the end of 1 year, an Independent Counsel who is still active must report to the Attorney General why the provisions of section 594(g) of the Independent Counsel Act (dismissal of matter pursuant to Department of Justice policy) have not been applied. Such report shall also be filed at the conclusion of each subsequent year.

9. After 3 years of an Independent Counsel's investigation, and at the conclusion of each year thereafter, the Independent Counsel shall inform the Attorney General and the Assistant Attorney General (Criminal) as to the progress of the investigation and as to why the investigation should proceed further with the Independent

Counsel. The Attorney General and Assistant Attorney General shall not share any such information with any other person unless otherwise authorized in this act.

10. The government should reimburse reasonable attorney's fees under section 593(f) of government employee witnesses in Independent Counsel investigations in situations where the witness status would not have occurred but for the requirements of the Independent Counsel Act.

11. An impeachment referral under Section 595(c) should occur only if the House Committee on the Judiciary by a two-thirds vote so requests or if the Independent Counsel so determines. And in any event, no referral shall occur until the Independent Counsel has concluded that probable cause exists that the President has committed a Federal criminal violation. Such referral shall be limited to inclusion of the testimony, documents and other evidence which relates to the reason for the referral. The Independent Counsel shall not include a narrative within the referral, but shall include an index.

12. Under Section 596(a)(1), the Attorney General may conduct an investigation as to whether good cause exists for removal of an Independent Counsel and the Independent Counsel should be directed to cooperate with that investigation. In determining "good cause", the Attorney General may take into consideration whether or not Departmental policy and practice would conclude the Independent Counsel's investigation without further action if the investigation were within the Attorney General's purview. The Attorney General should also be able to take into account the fact that matters or persons then remaining under Independent Counsel investigation could now be adequately handled within the Department of Justice without violating the provisions of the act.

13. In the Independent Counsel's final report under Section 594(h)(1)(B), as to persons investigated but not indicted, the Independent Counsel shall state only the nature of the allegation, the extent of the investigation and the conclusion that the investigation failed to reveal evidence sufficient to file a criminal charge under the standards and policies of the Office.

I believe that the combination of these changes to the law would reduce, if not eliminate, the inequities which many persons perceive in the substance of the Cisneros prosecution and in the length and breadth of the Espy, Iran-Contra, Whitewater and HUD investigations. The Committee should recognize, however, that the perceived excessive length of an Independent Counsel's (or any other prosecutor's) investigation may actually be the inevitable result of obstruction, delay, failure to produce documents, improper use of joint defense agreements, intimidation, inappropriate use of privileges and/or other devices sometimes employed by subjects and/or their counsel. We cannot and should not blame Independent Counsels for those conditions.

I thank the Committee once again for considering these recommendations.

Chairman THOMPSON. Mr. Fiske.

TESTIMONY OF ROBERT B. FISKE, JR., DAVIS, POLK AND WARDWELL

Mr. FISKE. Thank you, Mr. Chairman. There has been a lot of discussion about what would happen if the statute is not renewed, what are the alternatives. And I have been asked to come down here to give the Committee the benefit of my experience in 1994, following my appointment to what the Chairman referred to as a regulatory Independent Counsel by the Attorney General pursuant to 28 Code of Federal Regulations, § 600.1. I will do that as briefly as I can. I also have some views as to how the statute should be modified, if it is to be renewed, which I will address at the end of my statement.

I have a biographical statement which you have all seen, but just very simply after graduating from the University of Michigan Law School 44 years ago, my career has been a combination of private practice and public service. In private practice, I represent companies in complex civil litigation. I also represent individuals and corporations in white-collar crime investigations. I spent 4 years as an Assistant U.S. Attorney and 4 years as U.S. Attorney by appointment of President Gerald Ford, both in the Southern District of

New York, and in both of those tours of service prosecuted a number of high-profile criminal cases myself.

As Members of the Committee undoubtedly recall, back in 1993 the Independent Counsel Statute had lapsed, and so in early 1994, when there was a hue and cry for the appointment of a regulatory Independent Counsel, there was no statute in effect. Republicans called for the Attorney General to appoint a regulatory counsel. She was reluctant to do it because she said, if I do that, anybody I pick is going to be subject to criticism because how could they have the appearance of independence if they have been picked by somebody who reports to the President, whom the Independent Counsel is investigating.

When several Democratic Senators joined in the call for an Independent Counsel, the President himself asked the Attorney General to appoint a regulatory counsel under the Code of Federal Regulations. And shortly following that, I received a call from two high-ranking people in the Justice Department. And I think it is worth just spending a minute on the process that we went through for my selection because I think it bears on many of the issues that you are concerned about.

The two individuals that contacted me were Philip Heymann, who was then the Deputy Attorney General, and JoAnn Harris, who was then the chief of the Criminal Division. I had known both of them and worked with both of them back when I was U.S. Attorney. They told me I was on a short list of people that were being considered for this appointment and asked if I would be interested. I said I was, and they asked me to come to Washington, which I did, and we engaged in a series of discussions in which there quickly emerged three important issues that were important to me and important to them.

One was what would my authority be if I were selected. And I looked at the Code of Federal Regulations which were then in effect—and they were pretty much the same as they are today—and I was satisfied, and I think you will be satisfied reading those regulations that, if selected, I would have absolutely the identical powers that someone would have had if the statute had been in effect. So, that was not a problem.

The second issue was will I be independent. They assured me that I would be. That was very important to them. It was important to the Attorney General. They said, if you are selected, we will not try to control your investigation, we won't even ask you how it is going, you will be completely on your own, we don't expect to hear from you until it is over.

And the third issue was the subject of my jurisdiction because, as you all know, whatever jurisdiction I was conferred under these regulations would, by definition, be taken away from the Justice Department. I would for all practical purposes be the Attorney General for whatever area was covered by my jurisdiction. They said it was important to them and to the Attorney General that I have the jurisdiction that I felt was necessary, and they even asked me to go draft up what I thought was appropriate and they would consider it. And, in fact, they would accept it unless it was sort of totally unreasonable.

I did that, and without reading it into the record—it is in my written statement—suffice it to say that the jurisdiction that I wrote out was accepted by them and it was conferred on me by the Attorney General, and it is the same jurisdiction, precisely word for word, that was later conferred on Ken Starr by the three-judge court when he was appointed in August 1994.

After my meetings with Mr. Heymann and Ms. Harris, I went to see the Attorney General and I had a short meeting with her in which, after thanking me for my willingness to accept the appointment, she said she had two questions. One, "was I satisfied that I had all the authority and jurisdiction I needed." I said "I was." And she said, "are you satisfied you will have all the independence you need?" I said "I was." And she said, I promise you you will not hear from me again until after this is all over.

And I think it is important to note at this point that during the period of my service from January 21, 1994, until August 5, 1994, the commitments that were made to me by the Attorney General, Mr. Heymann and Ms. Harris as to my independence were totally and completely fulfilled. At no time did anyone in the Justice Department make any effort to influence anything that I was doing. At no time did anyone ask how things were going or what I was doing.

On one or two occasions, at my request, I was put in touch with career people in the Justice Department to answer questions about Justice Department practices and procedures which I was making every effort to follow. Those contacts were initiated by me and consisted only of my obtaining information from them that I thought would be helpful to me in discharging my responsibilities. And on a few occasions, we initiated discussions with a representative of the Solicitor General's office on a legal question.

On March 24, after my appointment was announced, I took a leave of absence from my firm to work full-time on this investigation and went down to Little Rock to set up an office. I also made arrangements to set up an office in the District of Columbia. I immediately started to put together a staff of former prosecutors and other lawyers from around the country to conduct the investigation, and I would just like to take a minute to read their qualifications into the record because I am very proud of this group.

Roderick C. Lankler, a New York lawyer who had spent 13 years in the Manhattan district attorney's office under Frank Hogan and Robert Morgenthau, serving as deputy chief of the Homicide Bureau and subsequently chief of the Trial Division; Rusty Hardin, from Houston, Texas, who had spent 15 years in the Harris County district attorney's office, where he had obtained over 100 felony convictions, including 13 first-degree murder convictions, and had been designed Texas Prosecutor of the Year in 1989; James E. Reeves, from Caruthersville, Missouri, an experienced trial lawyer who had served as U.S. Attorney for the Eastern District of Missouri in 1969 and 1973; Denis McInerney, a deputy chief of the Criminal Division in the Southern District of New York; Mark Stein, also a deputy chief of the Criminal Division on the Southern District of New York; Julie O'Sullivan, an assistant U.S. Attorney in the Southern District of New York, a former law clerk to Justice Sandra Day O'Connor who is now a professor at Georgetown Law

School and I understand she has been invited to testify before this Committee at a later date.

Three lawyers I also obtained from private practice on the basis of recommendations from people whom I respected around the country. William S. Duffey, from Atlanta, Georgia, a partner in King and Spalding, was highly recommended to me by Griffin Bell.

Gabrielle Wolohojian, from the Boston firm of Hale and Dorr, was highly recommended to me by Bob Mueller, the former Assistant Attorney General in charge of the Criminal Division under President Bush; and Carl Stich, a partner in the Cincinnati firm of Dinsmore and Shohl, was highly recommended by lawyers that had worked with him in the investigations of savings and loan fraud in Ohio. I also had three younger lawyers from my firm, two of whom are now serving as Assistant U.S. Attorneys.

Very briefly, reviewing the work that we did in the 9 months that I served, at the time I was appointed there was a pending indictment in Little Rock which had been obtained by the U.S. Attorney's Office there against David Hale, a former municipal judge who been president of Capital Management Services. The indictment charged Hale and two lawyers, Charles Matthews and Eugene Fitzhugh, with fraud against the Small Business Administration.

Mr. Hale's public allegation that then Governor Clinton had pressured him into making an illegal SBA loan had been one of the events leading to the call for the appointment of an Independent Counsel. We prepared that case for trial. Mr. Hale agreed to plead guilty, and he did plead guilty. The other two individuals went to trial and in the middle of trial plead guilty and received jail sentences.

After Mr. Hale agreed to plead guilty, our office entered into extensive debriefings of him to work out the terms of an acceptable plea agreement. And we worked out a plea agreement under which he pleaded to two counts, and agreed to cooperate fully with the efforts of our office. In my statement, which I know is a matter of record, I quote what I said to the sentencing court back in March 1996, at the time I appeared before the court pursuant to the plea agreement to state to the court the extent of Mr. Hale's cooperation while he was working with our office.

It is quoted in my statement. Suffice it to say that I told the court that Mr. Hale's cooperation with us had given us information which subsequently led to the guilty pleas by four individuals, and also had provided substantial information with respect to the case that was then being tried before Judge Howard which resulted in the conviction of Governor Tucker and the two McDougals.

I also told the court—and this is relevant to an issue, I know, that you are concerned about—that Mr. Hale had brought to our attention in the course of the investigation several other matters of which we did not have prior knowledge, one of which was a bankruptcy fraud in which Mr. Hale told us Governor Tucker and others had participated. We investigated that matter and the investigation that followed led to the indictment and conviction of Governor Tucker on that charge as well.

The investigation of this bankruptcy and tax fraud involving Governor Tucker was conducted by our office pursuant to a para-

graph of the jurisdictional statement which gave us authority to investigate other allegations or evidence of violation of any Federal criminal or civil law developed during the Independent Counsel's investigation. The bankruptcy fraud investigation of Governor Tucker was one example where we used that provision.

There were two others that have become public that are important. One related to Webster Hubbell. In March 1994, the Rose law firm in Little Rock filed a public allegation before the Arkansas Grievance Committee alleging fraud by Mr. Hubbell in connection with billing practices relating to his clients and his partners. We had a discussion with the Justice Department. Obviously, this had to be investigated. Mr. Hubbell was then the Associate Attorney General in the Justice Department. It was pretty clear that the Justice Department did not want to investigate that, and should not have investigated that at that time.

The issue was did they appoint another regulatory counsel or should I do it? We were already looking at some issues relating to the Rose law firm, and so it made sense all around for us to undertake that investigation. We did, and by the time I left in August 1994 and turned it over to Ken Starr, we had developed substantial evidence establishing Mr. Hubbell's guilt which he admitted in his guilty plea in December 1994.

The third area where we expanded our jurisdiction related to allegations concerning the financing of Governor Clinton's 1990 campaign for governor—allegations had been made that money that he had obtained by loans from the Perry National Bank—money that he had borrowed ostensibly to pay off Whitewater loans may have been used improperly for his 1990 campaign. We were investigating that. In the course of that, we discovered a fairly flagrant currency transaction report violation which subsequently led to a guilty plea by the former president of the Perry County Bank.

And, finally, in Washington, we completed an investigation into the death of Vincent Foster, concluding that that was a suicide in Fort Marcy Park. We also investigated allegations of possible obstruction of justice in connection with conversations and meetings in 1993 and early winter of 1994 between the White House and Treasury officials concerning referrals from the RTC. We issued a report in June 1994 in which we concluded that there was not sufficient evidence of obstruction of justice to warrant a prosecution.

On June 30, 1994, as you all know, the Independent Counsel Statute was reenacted. The same day, the Attorney General applied to the court for the appointment of an Independent Counsel and recommended that I be appointed. I have in my statement the opinion of the three-judge court which Senator Levin has already referred to, so I won't read that into the record. But suffice it to say that they concluded that they appointed Kenneth Starr because they felt that appointing me would create the appearance of a lack of independence, since I had originally been selected by the Attorney General.

If one of the purposes of today's hearing is to examine how would the system work if the Independent Counsel Statute is not renewed, I can state that from my personal experience during the time I served as regulatory Independent Counsel, I am one hundred-percent satisfied that I functioned every bit as effectively as

if I had been appointed pursuant to the statute. My powers, my actual independence, and my jurisdiction were identical.

Based on that experience, I believe if the statute is not renewed, there is an effective mechanism for dealing with what, in my view, should be an extremely limited number of situations where someone outside of the Justice Department should be appointed to handle a sensitive investigation. And I would cite just one example in addition to what has been already referred to today, and that is the situation in 1978 when my predecessor as U.S. attorney in New York, Paul Curran, was appointed by Attorney General Bell to investigate allegations of wrongdoing in connection with Billy Carter's peanut warehouse.

The issue there was whether money from the warehouse had improperly gone into President Carter's campaign. And Paul conducted an investigation in which he wrote a report in which he said, "I accounted for every nickel and every peanut, and found no violation." And I would just pause on that for a second because it goes to this issue that Senator Levin and all the rest of you have highlighted today. Can the public have confidence in a situation where someone is exonerated by someone who has been appointed by the Attorney General rather than by the three-judge court?

And my recollection of that situation—and you can go back and read the newspaper articles at the time—is that that decision, that conclusion by Paul Curran, was one hundred-percent accepted, I think every bit as well as it would have been if he had been appointed by a three-judge court.

In terms of my views as to the statute, I believe that in the vast majority of situations it would be far preferable to allow the career prosecutors in the U.S. Attorney's Office and in the Justice Department to investigate and prosecute these cases. George Beall's description of what they did with respect to Vice President Agnew is testimony to that. I think testimony to that is also reflected in what Bob Bennett referred to earlier, which is in my statement, the fact that the U.S. attorney in the District of Columbia, a Democratic appointee, vigorously and effectively prosecuted Congressman Rostenkowski, who I would submit at the time was far more important to the President in his position as chairman of the House Ways and Means Committee, dealing with the budget and the health care plan, than were any of the number of Cabinet officers for whom since special prosecutors have been appointed.

If you get to the basic issue, should the statute be renewed, the only argument I see for renewing any part of this statute is the concern that has been expressed today. And notwithstanding what I said about the one hundred-percent public acceptability of Paul Curran's report, I would agree with everyone else that to some degree a decision by an Independent Counsel who has been picked by a three-judge court not to indict will have some degree of credibility beyond that of an Independent Counsel picked by the Attorney General. By how much, we can all debate, but it is hard to say that it wouldn't to some degree.

So the problem is not in the situations where you are worried about will this person do an effective investigation and is there any risk that there won't be an effective prosecution and effective indictments or trials afterwards. As I said before, I think once I was

appointed I was one hundred-percent satisfied that I could do this job every bit as well as if I had been appointed under the statute.

If there are indictments, then the credibility of the Independent Counsel is played out exactly where it ought to be, in the courtroom. And the public can judge by the results in the courtroom whether this is a prosecution that should have been brought or shouldn't have been brought. So the only concern is when there isn't an indictment and then it is just a question of the extent of the person's credibility.

If the statute is to be renewed, I would make these suggestions, and I will do it very quickly. It should be limited to the President, the Vice President and the Attorney General. It should be a full-time requirement, and I can't believe that if the coverage is limited to the President, the Vice President and the Attorney General there won't be many competent lawyers that would be willing to take that on on a full-time basis.

I think the idea of a time limit has great potential. I agree with Henry Ruth that there are obviously risks of stonewalling, and there is obviously the kind of situation where you have somebody under indictment who may be a potential witness if they are convicted. You have to wait until a trial is over. You have to wait for appeals. There may be things that prolong the investigation, so it can't be an arbitrary time limit. But some kind of accountability, I think, is good.

I would make the accountability not to the three-judge court, but to the Attorney General because I think, to the maximum extent possible, I think the control of these investigations, to the extent there is control, ought to be in the Executive Branch and not the court.

With respect to the appointment, that is the only place where I think, as I have said before, the statute really serves a meaningful purpose. And even there—and I think I heard this suggestion from someone else, so this isn't original, but there has been a suggestion that there be a list of people put together that is submitted to the court and the court picks off that list.

Another way to do it which would give more power to the Attorney General, where I think it ought to be, and still give a strong stamp of credibility to the appointment would be for the Attorney General to prepare a list of individuals, submit that to the court in advance and have the court basically bless that list. Or if there were somebody on the list that the court didn't think ought to be on the list, they could take it off. But you would have a list that had been pre-approved by the court, but the Attorney General would make the appointment from the list.

I would raise the threshold for appointment. An article in the *Michigan Law Review,* to which I always turn when I am in search of education, by Professor Gormley, would create the standard as "substantial grounds to believe that a felony has been committed." I would give the Attorney General power to investigate that she doesn't have now. I would give her powers to issue subpoenas during the investigative process.

Finally, I would eliminate the report requirement, for two reasons. One, it is unfair. And, second, I think the reporting requirement in itself tends to prolong the investigation because any Inde-

pendent Counsel who is doing the investigation wants to write something that is going to be bullet-proof from criticism if it has to be a public report. Prosecutors in other areas don't write reports. I don't think there is any need for a report here.

[The prepared statement of Mr. Fiske follows:]

PREPARED STATEMENT OF ROBERT B. FISKE, JR.

I understand that one of the purposes of today's hearing is to examine how the system might work in the event that the Independent Counsel Statute is not renewed. I have been requested to appear to give the Committee the benefit of my experience in 1994 following my appointment as an Independent Counsel by the Attorney General under 28 C.F.R. § 600.1. I also have some views as to how the Independent Counsel Statute should be modified if it is to be renewed which I will address at the end of my statement.

As the Members of the Committee undoubtedly recall, the Independent Counsel Statute, which was first enacted in 1978, had a "sunset" provision which meant that it expired after 5 years unless it was renewed. The statute was renewed with similar 5-year sunset provisions in 1982 and 1987. Pursuant to the 1987 renewal, the statute expired on December 14, 1992 and was not renewed at that time. Accordingly, there was no Independent Counsel Statute in effect in December 1993 when demands began to be made for the appointment of an Independent Counsel in connection with allegations against President Clinton relating to Whitewater and Madison Guaranty Savings and Loan.

Demands were made upon the Attorney General, initially by Republicans, for her to appoint an Independent Counsel under the power that she had under 28 C.F.R. § 600.1. She resisted such requests, stating that she was concerned that anyone that she appointed, no matter what his or her qualifications were, would be subject to criticism on the grounds that he or she could not have the appearance of independence if he or she were appointed by an Attorney General who was accountable to the President to be investigated by the Independent Counsel. In early January 1994, several Democratic senators, including Senators Moynihan, Bradley, Robb, and Feingold, joined in the call for the appointment of an Independent Counsel. On January 12, President Clinton himself asked the Attorney General to make such an appointment and that same day the Attorney General stated that she would. I was subsequently contacted by two high-ranking officials in the Justice Department: Philip Heymann, the Deputy Attorney General; and JoAnn Harris, the Assistant Attorney General in charge of the Criminal Division. I had worked with both of them when I was U.S. Attorney for the Southern District of New York.

They told me I was on a short list of people being considered, and asked me whether, if asked to do so, I would be willing to accept an appointment by the Attorney General as Independent Counsel to investigate the Whitewater matter. I said that I would. The following week, I went to Washington and had a series of meetings with Mr. Heymann, Ms. Harris and others at the Justice Department. In those discussions with the Justice Department, three important issues emerged: (1) independence; (2) authority; and (3) jurisdiction. With respect to the first issue, I was assured that whoever was appointed would be totally independent from the Justice Department; that no one would make any effort to influence what he or she was doing; and that the person appointed was not expected to report to anyone in the Justice Department until after the entire investigation had been completed.

With respect to authority, I examined the provisions of the Code of Federal Regulations which were in effect at the time and was satisfied that, if appointed, I would have all the powers that an Independent Counsel appointed under the statute would have had—indeed in practical effect I would be the Attorney General in the areas covered by my jurisdiction.

On the third subject—the scope of my jurisdiction—I was told that it was very important to the Attorney General that whoever was appointed should have all the jurisdiction necessary to do the job properly. I was told to draft up what I thought the jurisdiction should be. The Justice Department had a draft of a proposed jurisdictional provision which they gave me to consider. I then rewrote it to my satisfaction. That was the jurisdiction which I subsequently was given, which was codified in 28 C.F.R. § 603.1 as follows:

"§ 603.1 *Jurisdiction of the Independent Counsel*

"(a) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to investigate to the maximum extent authorized by part 600 of this chapter whether any individuals

or entities have committed a violation of any Federal criminal or civil law relating in any way to President William Jefferson Clinton's or Mrs. Hillary Rodham Clinton's relationships with:

(1) Madison Guaranty Savings & Loan Association;
(2) Whitewater Development Corporation; or
(3) Capital Management Services.

"(b) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to investigate other allegations or evidence of violation of any Federal criminal or civil law by any person or entity developed during the Independent Counsel's investigation referred to above, and connected with or arising out of that investigation.

"(c) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to investigate any violation of section 1826 of title 28 of the U.S. Code, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of Federal law, in connection with any investigation of the matters described in paragraph (a) or (b) of this section.

"(d) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to seek indictments and to prosecute, or to bring civil actions against, any persons or entities involved in any of the matters referred to in paragraph (a), (b) or (c) of this section who are reasonably believed to have committed a violation of any Federal criminal or civil law arising out of such matters, including persons or entities who have engaged in any unlawful conspiracy or who have aided or abetted any Federal offense."

(I should note, parenthetically, that this is precisely the same jurisdiction which was conferred upon Kenneth Starr when he was later appointed by the Special Division for Appointing Independent Counsels of the U.S. Court of Appeals for the D.C. Circuit.)

During the course of my discussions with Mr. Heymann and Ms. Harris, I was told that they were going to recommend to the Attorney General that I be appointed. On the afternoon of Wednesday, January 19, 1994 I met with the Attorney General. After thanking me for being willing to undertake this appointment, she said that she wanted to make sure that I was satisfied that I had all the authority that I needed, and that I was satisfied that I had all the independence that I needed. I said that I was, as to both. She said that she would make the announcement the following day, and that she did not expect to talk to me again after that until the entire matter was over.

It is important to note that during the period of my service from January 21, 1994 until October 6, 1994 the commitments that were made to me by the Attorney General, Mr. Heymann and Ms. Harris as to my independence were totally and completely fulfilled. At no time did anyone in the Justice Department make any effort to influence anything that I was doing. Indeed, at no time did anyone ask how things were going or what I was doing. On one or two occasions, at my request, I was put in touch with career people in the Justice Department to answer questions about Justice Department practices and procedures which I was making every effort to follow. Those contacts were initiated by me and consisted only of my obtaining information from them that I thought would be helpful to me in discharging my responsibilities. On a few occasions we initiated discussions with a representative of the Solicitor General's Office on a legal question.

On Monday, January 24, I took a leave of absence from my firm and went down to Little Rock to set up an office. I also made arrangements to set up an office in the District of Columbia because I had committed to investigate the circumstances surrounding the death of Vincent Foster.

I immediately started to put together a staff of former prosecutors and other lawyers from around the country to conduct the investigations. The people that I recruited were as follows:

Roderick C. Lankler, a New York lawyer who had spent thirteen years in the Manhattan District Attorney's Office under Frank Hogan and Robert M. Morgenthau, serving as Deputy Chief of the Homicide Bureau and subsequently Chief of the Trial Division.

Rusty Hardin, from Houston, Texas, who had spent 15 years in the Harris County District Attorney's Office where he had obtained over 100 felony convictions, including 13 first-degree murder convictions, and had been designated "Texas Prosecutor of the Year" in 1989.

James E. Reeves, from Caruthersville, Missouri, an experienced trial lawyer who had served as U.S. Attorney for the Eastern District of Missouri in 1969 and 1973.

Denis J. McInerney, a Deputy Chief of the Criminal Division in the U.S. Attorney's Office in the Southern District of New York.

Mark J. Stein, also a Deputy Chief of the Criminal Division in the Southern District of New York.

Julie O'Sullivan, an Assistant U.S. Attorney in the Southern District of New York and a former law clerk to Justice Sandra Day O'Connor.

William S. Duffey, Jr., from Atlanta, Georgia, a partner in King & Spalding who was highly recommended to me by former Attorney General Griffin Bell and Frank Jones of that firm.

Gabrielle R. Wolohojian, from the Boston firm of Hale & Dorr who was highly recommended to me by Robert S. Mueller III, the Assistant Attorney General in charge of the Criminal Division under President Bush.

Carl J. Stich, Jr., a partner in the Cincinnati firm of Dinsmore & Shohl, who was highly recommended to me by several lawyers who had worked with him in the investigation and prosecution of savings and loan fraud in the State of Ohio. He had also served as a Special Attorney General in Kentucky in investigating election crimes.

Patrick J. Smith, Timothy J. White and *Beth Golden,* all of whom were then young associates from my law firm, Davis Polk & Wardwell. (Mr. Smith is now an Assistant U.S. Attorney in New York and Ms. Golden, after serving as an Assistant U.S. Attorney in Minnesota, is now a Deputy Attorney General in New York.)

At the time I was appointed, there was a pending indictment in Little Rock which had been obtained by the U.S. Attorney's Office against David Hale, a former municipal judge, who had been president of Capital Management Services, Inc. The indictment charged Hale and two lawyers, Charles Matthews and Eugene Fitzhugh, with fraud against the Small Business Administration. Mr. Hale's public allegation that then-Governor Clinton had pressured him into making an illegal SBA loan had been one of the events leading to the call for the appointment of an Independent Counsel. The case was set for trial on March 24. An immediate priority, of course, was to get that case ready for trial. We did so and, in early March, David Hale agreed to plead guilty to a superseding two-count information (Matthews and Fitzhugh, whose trial was severed, pleaded guilty during trial in June and received jail sentences).

The first count of the information against Mr. Hale replicated the pending charge of fraud against the SBA. The second count was a broad mail fraud count covering Mr. Hale's activities over a 6-year period with a number of other individuals. The plea agreement, which called for Mr. Hale's complete and truthful cooperation, was entered into after intensive debriefings of Mr. Hale by our office. Following the plea, Mr. Hale continued to cooperate with our office and with Kenneth Starr after he took over.

Pursuant to the plea agreement, I appeared at Mr. Hale's sentencing in March 1996 to state to the Court the extent of his cooperation while I was Independent Counsel. I advised the Court that:

> ". . . . [B]etween March and August 1994, Mr. Hale provided substantial information to our office in connection with investigations that subsequently led to guilty pleas by the following individuals: Robert Palmer, who pleaded guilty to conspiracy to make false entries in the records of Madison Guaranty Savings & Loan Association; Chris Wade, who pleaded guilty to bankruptcy fraud and making a false statement to a financial institution; Stephen Smith, who pleaded guilty to conspiracy to misapply the funds of CMS; and Larry Kuca, who also pleaded guilty to conspiracy to misapply the funds of CMS. Finally, Mr. Hale had also provided a great deal of information to my office in connection with that part of the investigation that relates to the case that is currently being tried before Judge Howard [this was the case which resulted in convictions of Governor Tucker, James McDougal and Susan McDougal]. My office was intensively investigating that information at the time Mr. Starr took over." (Transcript of Hale Sentencing, 3/25/96, pp. 13–14).

In addition to those matters, I also told the Court that Mr. Hale had brought to our attention several entirely new matters of which we had no prior knowledge. One example of such a matter was a bankruptcy and tax fraud in which, Mr. Hale alleged, Governor Tucker and others had participated. The investigation that followed Mr. Hale's providing us with that information ultimately led to the indictment and conviction of Governor Tucker, as well as William Marks and John Haley, for tax and loan fraud.

The investigation of the bankruptcy and tax fraud involving Governor Tucker was conducted by our office pursuant to paragraph (b) of the jurisdictional statement which gave us authority to:

> "investigate other allegations or evidence of violation of any Federal criminal or civil law by any person or entity developed during the Independent Counsel's investigation."

This was one of three principal areas which have since become public where we exercised jurisdiction beyond the original Whitewater/Madison Guaranty mandate. The second such situation involved the investigation of Webster Hubbell for fraud against his clients and his partners in the Rose Law Firm arising from fraudulent billing practices. A complaint making those allegations was filed against Mr. Hubbell by the Rose Law Firm before the Arkansas Grievance Committee and made public in March 1994. In discussions with the Justice Department, it was agreed that it made sense for our office to investigate this matter. We began that investigation in March 1994 and, by the time I left, we had developed substantial evidence establishing Mr. Hubbell's guilt, which he admitted in his guilty plea in December 1994. The other area was an investigation which we undertook in the spring of 1994 into the financing of then-Governor Clinton's 1990 campaign for governor. In the course of this investigation we obtained evidence which led to a conviction, by guilty plea, of Neal Ainley, the former president of the Perry County Bank in Perryville, Arkansas, for currency transaction reporting violations in connection with large cash withdrawals by the Clinton campaign.

In Washington, we completed an investigation into the death of Vincent Foster. We concluded that Mr. Foster's death was a suicide in Fort Marcy Park. We also investigated allegations of possible obstruction of justice in connection with conversations and meetings in 1993 and early winter of 1994 between the White House and Treasury officials concerning referrals from the Resolution Trust Corporation. We issued a report in June 1994 in which we concluded that there was not sufficient evidence of obstruction of justice to warrant a prosecution.

On June 30, 1994, the Independent Counsel Statute was reenacted, and on that same day, the Attorney General applied to the Special Division of the D.C. Circuit asking for the appointment of an Independent Counsel with the same jurisdiction under which I was then operating pursuant to 28 C.F.R. § 603.1. In that application, she recommended that I be appointed. On August 5, 1994, the Court granted the application for the appointment of an Independent Counsel and selected Kenneth Starr for that position. In explaining the decision, the Court stated:

> ". . . . The Court, having reviewed the motion of the Attorney General that Robert B. Fiske, Jr., be appointed as Independent Counsel, has determined that this would not be consistent with the purposes of the act. This reflects no conclusion on the part of the Court that Fiske lacks either the actual independence or any other attribute necessary to the conclusion of the investigation. Rather, the Court reaches this conclusion because the act contemplates an apparent as well as an actual independence on the part of the Counsel. As the Senate Report accompanying the 1982 enactments reflected, "[t]he intent of the special prosecutor provisions is not to impugn the integrity of the Attorney General or the Department of Justice. Throughout our system of justice, safeguards exist against actual or perceived conflicts of interest without reflecting adversely on the parties who are subject to conflicts." S. Rep. No. 496, 97th Cong., 2d Sess. at 6 (1982) (emphasis added). Just so here. It is not our intent to impugn the integrity of the Attorney General's appointee, but rather to reflect the intent of the act that the actor be protected against perceptions of conflict. As Fiske was appointed by the incumbent administration, the Court therefore deems it in the best interest of the appearance of independence contemplated by the act that a person not affiliated with the incumbent administration be appointed. . . ."

As stated above, I understand that one of the purposes of today's hearing is to examine how the system would work if the Independent Counsel statute is not renewed. In my opinion, during the time I served as regulatory Independent Counsel, I functioned every bit as effectively as if I had been appointed pursuant to the statute. My powers, my actual independence and my jurisdiction, were identical. Based on that experience, I believe that if the statute is not renewed, there is an effective mechanism for dealing with what in my view should be an extremely limited number of situations where someone outside of the Justice Department should be appointed to handle a sensitive investigation. That was, of course, what happened in Watergate, which occurred before the statute was adopted, when independent pros-

ecutors functioned extremely effectively under appointments from the Attorney General. That is also what happened in 1978 when Paul Curran, my predecessor as U.S. Attorney for the Southern District of New York, functioned extremely effectively under an appointment by Attorney General Griffin Bell to investigate allegations of wrongdoing against Billy Carter in connection with his peanut warehouse.

In terms of jurisdiction and investigative and prosecutorial authority, there is no difference between what an Independent Counsel can do under the statute and under the regulations. This was the case when I was appointed in 1994 under the regulations. The only difference is in the circumstance leading to the appointment and even in that situation, to a significant extent, the difference may be more apparent than real.

Under the regulations, the Attorney General has total discretion as to whether and when to appoint an Independent Counsel, as to the identity of the Independent Counsel selected, and as to the scope of the Independent Counsel's jurisdiction. Under the statute, the Attorney General is required to apply for the appointment of an Independent Counsel when there are allegations against specified individuals which, after a 90-day period of investigation, are of sufficient weight that he or she cannot say there is no reasonable basis to believe that an investigation would produce evidence of a crime. But even there, whether or not an application for appointment of an Independent Counsel should be made is entirely the Attorney General's decision to make. A decision not to apply is not reviewable by any court, under 28 U.S.C. § 592(f). *See Banzhaf v. Smith,* 737 F.2d 1167 (D.C. Circuit 1984).

I believe that, in the vast majority of situations now covered by the statute, it would be far preferable to allow the career prosecutors in the Justice Department and the U.S. Attorneys around the country to be responsible for investigating and prosecuting allegations of misconduct by high-ranking government officials. The prosecution of Vice President Agnew by the U.S. Attorney in Baltimore, and the prosecution of Congressman Rostenkowski by the U.S. Attorney for the District of Columbia are but two examples of the ability and willingness of the Justice Department to effectively investigate and prosecute such cases.

If the statute were to be renewed, I would limit its coverage to the President, the Vice President and the Attorney General and would make the appointment a full-time position.

Chairman THOMPSON. Thank you very much. As you know, I have had some real criticisms about the current setup and have wondered whether or not it would not be best to go back to a Justice-related process. But let me play devil's advocate with you just for a moment because it has to do not only with just the question of whether or not to indict, but also whether or not to investigate. And it gets back to the credibility of a Justice Department under those circumstances. It points out how important it is.

It seems to me that in a strange way, when a decision not to investigate has been made in some cases recently, Independent Counsel law has become a shield instead of a sword, as most people fear. In other words, if it doesn't fit the technical requirements and there is no judicial supervision of the Attorney General, she has total discretion just to say that I don't think the law applies, end of story; I don't care what you say or what everybody thinks or what my chief investigator thinks.

She can come to that conclusion, so if it doesn't meet those technical requirements, actually it is more difficult to get an investigation going of a high-ranking official than it otherwise would be, because if you didn't have an Independent Counsel law, it might be easier to concentrate on the inherent conflict that everybody sees instead of the technical requirements of that law.

So it gets back again to Justice, which I think is the crucial question here. Everybody sees problems with what we have. The question is whether or not, if we go back to Justice in some way, relying on bringing in special counsels in the Public Integrity office, and so forth, would be suitable. Mr. Beall and Mr. Fiske both give ex-

amples from their own experience that lead them to believe that perhaps it would be suitable. But it seems to me like we may have different circumstances now than in each of those cases.

Mr. Beall, in your case, you were not a part of Main Justice. You were a U.S. Attorney out here and you were left alone. You had an Attorney General who basically consulted with you and let you do your thing, and when you met with him, you didn't even have all these other assistant deputy U.S. Attorney types or Department of Justice types around; there was just you and him. And you were out there and you were allowed to do your job.

In fact, as I read your statement, Mr. Agnew wanted you and tried to push the Attorney General to bring it into Main Justice. He apparently didn't like it out there with you, and for good reason as it turned out, I suppose.

Mr. BEALL. Senator, may I comment on that?

Chairman THOMPSON. Yes.

Mr. BEALL. I had learned a hard lesson in the first year of my appointment when we in Baltimore had investigated and wanted to take to the grand jury an indictment with respect to construction of the Longworth House of Representatives parking garage. That particular contract and that particular project was, in our view, criminally tainted.

When I went to Justice to seek permission, I was forbidden by the Attorney General, John Mitchell, from signing an indictment that would have implicated some high-level officials. And the grand jury did something very unusual. The grand jury decided they were going to return the indictment anyway, without the U.S. attorney's signature. Of course, that prompted a legal action and the district court in Maryland said that an unsigned indictment would be valid.

Chairman THOMPSON. So you had good and bad experience with attorneys general?

Mr. BEALL. I had a bad experience. So when it came to Mr. Agnew, quite honestly, I did what was humanly possible to make sure that Justice stayed out of our way. We were, for example, told repeatedly we should submit some sort of a written prosecution memorandum to Justice, and I didn't do it.

Chairman THOMPSON. So does it not get down, then, to the individual that you happen to draw at the time? If we look at current circumstances, my recollection is the first thing that the current administration did was fire all the U.S. attorneys. Now, that normally happens. There is a turnover there, but my recollection is it happened more rapidly and more thoroughly than before. They put Webster Hubbell in the number two position in the Department of Justice. And now I understand they have made all the assistant U.S. attorneys civil servants, which at least you think lessens their independence. So we have a different situation.

We are constantly trying to look down the road, and in a couple of years we will have a different President and we need to look at this—nobody knows which candidate will win, so it is an ideal in some way. But still it reminds us of the fact that not only do we have another remaining 2 years currently, but it depends in large part on the luck of the draw. And maybe it gets back to Congress;

we have to do a better job, perhaps, on the front end in terms of some of these appointments.

Mr. Fiske, you point out that you were left unfettered under the regulatory system. It should be pointed out that under the regulatory Independent Counsel, you basically operated the same way you would under a statute. However, on the front end it is different in that the Attorney General gets to decide, totally discretionary—she has a great deal now—as to whether or not to bring one in. She gets to decide who to bring in and she basically decides the jurisdiction. That is under the regulatory system that you were appointed.

I think she made the right decisions in all those cases in your case. But, again, this was a case where the President himself asked that an Independent Counsel be brought in. So it would be a whole lot easier for her to give you all this independence, I would think, than under perhaps another circumstance where the President was resisting.

Finally, Mr. Ruth, you point out a problem that has to do with perception. We saw a situation where, as you put it, the media seemed to be ahead of the Justice Department in this campaign investigation. They brought in someone from the outside to give some perception of doing the right thing. Then they made a recommendation on an Independent Counsel. That was not followed. And now, as you point out, apparently the fellow who made the recommendation went back and apparently lost his position in line to become a U.S. attorney in San Diego.

So I don't know all the realities of that, but from a perception standpoint everything possible went wrong in order to create public cynicism, and we didn't even get to the question of indicting or not indicting. It all has to do with the question of whether or not to even appoint or to ask for; totally discretionary. People talk about a hair trigger. You can make a case in some cases when it gets high enough that it is a locked trigger.

So you are suggesting that we continue on with some form of an Independent Counsel. Is that the main reason why you have come to that conclusion? First of all, have I relayed your analysis of that situation correctly? And, second, where does that figure into your thinking in terms of where we ought to come out?

Mr. RUTH. Well, I think it is more than a perception problem, Senator Thompson. I mean, I was a bureaucrat, GS–11 through 18, as well as a Watergate prosecutor. This makes me think, for example, when Waco happened, Treasury Secretary Lloyd Bentsen asked three of us from the outside to investigate ATF's performance, and we came up with a rather blistering report and the five top people in ATF resigned. The FBI and Justice did its own inside evaluation of their performance, and essentially that evaluation, all four volumes, can be boiled down to their saying we raided the Branch Davidians, 75 people died, and we did a great job. It was a whitewash.

I think in addition to perception, there is a substantive problem. When I came to Watergate, I was a good friend of Henry Peterson until the day he died, and there is no way I was going to investigate——

Chairman THOMPSON. Head of the Criminal Division in the Justice Department during Watergate.

Mr. RUTH. Yes. There was no way I was going to investigate Henry Peterson. The first day, I recused myself and I said I am not going to investigate him; I will become a character witness for him. So I recused myself. I said don't tell me anything you are doing about Henry.

Many times, as you know, attorneys general have a prior close association with the President, and it is tough to investigate a friend. I couldn't do it. It is tough to go to Cabinet meetings and look across the table and say I am investigating you. Your budget has to go to the White House every year. There are built-in problems if you don't have an Independent Counsel under that rare situation where it is needed.

I do not agree that attorneys general would be fine as long as there are special counsel. Archie Cox was a regulatory counsel, and when Bork fired us he actually forgot to abolish our regulation for about a week. He even forgot about 28 CFR, the Code of Federal Regulations, which was why Judge Gesell said the firing was illegal. So, that was just a detail flaw. If the President wants to get rid of you, he can get rid of you. So I think there are built-in problems with special counsel.

This campaign contribution investigation which you just mentioned that is ongoing in Justice—who is going to have faith in the results? Right or wrong, who is going to have faith in the results? Anybody who takes a close, substantive look might say, well, maybe that is as far as they could get. But if, after a year, the media is still ahead of you, something in that bureaucracy must have said, we will spend a year reading the newspaper clippings and interviewing underlings, whereas an Independent Counsel would say let's interview persons at an intermediate or higher level. Let's ask them to come over tomorrow at 10 a.m. And you tend to do that as an Independent Counsel, whereas if you are GS–15 in the Justice Department, you sit down and write a memo which goes to 10 other people.

Chairman THOMPSON. I rest my case. Senator Lieberman.

Senator LIEBERMAN. Thanks, Mr. Chairman.

Mr. Ruth, something you said in very human terms reminded me that we haven't talked here at all about the general inclination of Presidents to appoint close friends and allies as attorneys general. It hasn't always been the case, but if I remember correctly, President Reagan brought his personal attorney in as Attorney General. President Carter was very close to Griffin Bell. I believe John Mitchell might have been in President Nixon's law firm. Of course, President Kennedy appointed his brother. You can't get much closer than that. So let's just leave it there, and I think you made the point.

You have been excellent witnesses, and again I appreciate the time. There is always the danger that one finds in testimony evidence to support one's prior conclusions, so I state that up front. But it does seem to me that each of you in your way, in the stories and your excellent testimony, to me make me feel stronger about the need to protect the independence of prosecution of the highest officials.

Mr. Ruth, you said in a sentence that will resonate in my brain for as long as this goes on how thin the thread was for that 3 weeks, how thin the thread was after Mr. Cox was fired in terms of the investigation going forward. And you made another comment about what has happened more recently about the way in which prosecutors have become open to attack by politicians.

Now, it just makes you wonder whether everybody accused President Nixon of being pretty good at all this, but if they had done a job on Archibald Cox at that point, a spin attacking him for one reason or another, whether the outpouring of public outrage would have occurred that led to the reluctant appointment of Mr. Jaworski.

Mr. Beall, I was fascinated. I had either never known or forgotten this whole story that you tell about how Attorney General Richardson within the Justice Department had decided not to tell the President about the investigation of the Vice President. It leaked, and then I guess you were called in and the President ordered the Attorney General to sit with Vice President Agnew and tell him about the investigation. And then he called for the sort of special counsel within the Department because he was wanting to take hold of it. I mean, it is to the credit of you and the Attorney General that you didn't yield at that point.

Mr. BEALL. Well, the Attorney General deserves all the credit. I mean, keep in mind I was a 35-year-old prosecutor from outside the Capital Beltway. But the Attorney General did have a very, very serious problem with respect to involvement or not of the President. He obviously was appointed by the President. I met with the Attorney General on June 12. The Attorney General did not speak to the President until I had sent a letter; actually, I hand-delivered a letter to Mr. Agnew's personal counsel in my office on August 1, saying essentially "You are under investigation; this is to formally advise you. You are welcome to produce documents, welcome to come meet with us and talk with us and come to the grand jury, and so forth and so on."

I handed the letter to his attorney in order to avoid leaks, and so forth and so on. That Sunday morning, I was at home and I got a call from a reporter from the *Wall Street Journal* who said that he has in his hand the letter. I am mindful of the fact that the Attorney General hadn't met with the President yet. Of course, the first call I made was the Attorney General.

Senator LIEBERMAN. That may have been rare in those days.

Mr. BEALL. Yes.

Senator LIEBERMAN. Mr. Fiske, your situation is very different and it suggests to us how complicated this whole matter is. Your situation is unique, so perhaps it wouldn't be repeated. But there is some reason to believe—certainly, some historians, journalists, analysts have suggested that some of our colleagues up here felt that you were not being quite aggressive enough, and that that may have been the reason why some of them cooperated in the reenactment of the Independent Counsel Statute, which then led to your termination. It is not quite a Saturday Night Massacre and it takes a certain leap here, and it just, again, says to me that it is important.

Mr. Beall, even though I have a high regard for what you did, apparently there were some critics at the time who said that the Department, not so much you, but the Department had been easier on the Vice President in those cases, allowing him to make a deal where he would resign, and in that sense being easier on him than they would have been on an everyday citizen accused of similar charges. So it just says to me that even the credibility of that Attorney General who was so independent and you who were so independent was questioned at that time because it was an in-house investigation.

Mr. BEALL. Senator, I think the result, that is the plea bargain, was hotly debated at the time.

Senator LIEBERMAN. Right.

Mr. BEALL. The fact that the Vice President was permitted to resign his office and trade that for a plea of nolo contendere and a fine and probation was the issue. The Attorney General decided, as he had to, that the country simply couldn't stand to have the President under investigation and facing impeachment and the Vice President standing in the dock in criminal court. The country just couldn't do that.

Senator LIEBERMAN. And, of course, an Independent Counsel might well have made that same judgment in that case.

Mr. BEALL. Right.

Senator LIEBERMAN. Let me ask this question. It is the only question I am going to ask, which might be called proportionality. You have each had experience that may help you answer this. One of the allegations about the current office of Independent Counsel is that if you have one person, unlimited time, unlimited budget, but set that aside—one target, that he is not going to make the kinds of judgments that prosecutors normally make because they have got a whole host of different cases in front of them. They can't go after all of them with the same zeal, so they make proportionality judgments, regarding which are most important.

And one of the ways to deal with that, I suppose, is to limit the expansion of the jurisdiction of the Independent Counsel in some way, but leave that as well. Consider it if you want, but what about that? Each of you are very experienced prosecutors. I think Mr. Holder actually gave some weight to that yesterday. Is that of sufficient weight to abolish the office of Independent Counsel?

Mr. FISKE. Well, if I could respond to that, it seems to me that if you think about it logically and you take at face value what I said a minute ago that I felt that as regulatory Independent Counsel I had exactly the same authority and jurisdiction that I would have if I had been appointed by the statute, you would have that same problem with the appointment of a regulatory counsel. So, really, the only alternative then is not to ever appoint anyone outside the Justice Department.

Senator LIEBERMAN. Good point. Mr. Beall or Mr. Ruth, do you have any comment on that?

Mr. BEALL. I really yield to these two gentlemen who actually served in the office of Independent Counsel because they are the ones who had to address and confront this directly.

Senator LIEBERMAN. Well, let me ask it in a different way, then. In your time as U.S. attorney, did you make those kinds of judg-

ments because you had so many potential cases? I suppose in the ideal world, every prosecutor would prosecute every case where they suspect that there was a crime committed.

Mr. BEALL. No question, prosecutorial discretion is highly prized and valued. And, I always felt my job was to be able to say no. It is easy to say yes. It is easy to bring criminal charges, but I always thought my job description was to see that we said no on appropriate occasions. That is easier to do when you have a lot on your plate than it is when you have one particular matter that you are pursuing.

Mr. FISKE. If I could just follow up on that because I think it goes right back to this issue of the report, I mean the ordinary situation when I was U.S. Attorney is 99 percent of the time hopefully you were conducting an investigation of something that was not public, and you did your best to make sure it did not become public until there was an indictment. And if there wasn't an indictment, then hopefully nobody ever knew about it.

In the course of that, you are constantly making value judgments. You have got so many resources to use. What are you going to use them on? We used to have weekly meetings of every unit, go through every investigation. This one doesn't seem to be going anywhere; let's close it down. Let's not spend any more time on that. Let's put it on this.

When you are appointed as an Independent Counsel to investigate a high-profile allegation against a high-ranking public official and you have a requirement that when it is all over you have to write a detailed report if you are not going to bring a prosecution explaining why you didn't do it, recognizing the political pressures both ways—you are criticized if you do, you are criticized if you don't by a different party—it is human nature that someone will prolong the investigation, running down things that an ordinary prosecutor never would do because he would be devoting resources somewhere else, to be sure that when he finally writes a report, nobody is going to be able to pick it up and say, oh, well, you should have done something else that you didn't do.

So I think although it is not exactly what your question was, I do think it ties into this reporting requirement, which is one reason I think it should not be required.

Senator LIEBERMAN. There might be pressure in a case where you announce as Independent Counsel you are not going to indict to nonetheless take some swipes at the target just to make those who wanted you to indict him feel that you had brought him up to the edge.

Mr. Ruth, my time is up, but since you favor the continuation of the office of Independent Counsel, I ask you to just address for a moment this question of discretion or proportionality.

Mr. RUTH. Actually, Senator Specter and I taught a seminar on prosecutors' discretion at Penn Law School many years ago.

Senator LIEBERMAN. How did he do?

Mr. RUTH. Actually, he did very well. He let us take 75 cases—he was D.A. in Philadelphia. We took 75 of his cases and made him explain why he brought the charge he did, and he defended himself very well.

Chairman THOMPSON. No wonder he got out of that business. [Laughter.]

Mr. RUTH. I think what you are raising, Senator Lieberman, is a fundamental question, and we heard it during the Clinton matter. All the defenders on television were saying the President can't be above the law, but he shouldn't be below the law. And I never understood that because I don't think you decide whether or not to investigate a President with the same standard that you might exercise in investigating a guy that pitches french fries at McDonald's or a salesman or a waiter. I think Presidents ought to abide by a higher standard. I think attorneys general ought to abide by a higher standard.

I felt, representing Hamilton Jordan (President Carter's Chief of Staff), that maybe the new law should say anyone that has ever represented a defendant or a target in an Independent Counsel investigation should not testify for 1 year before the Senate, because I was ready to throw this act out for at least a year after Hamilton Jordan, where the allegation was one alleged two-second use of cocaine, period, and it never happened.

But then I started to realize, and so did Hamilton at the time—he used to placate us. He used to say, look, a chief of staff to the President shouldn't be sniffing cocaine. OK, they wouldn't investigate some other guy, but they should investigate me if they think I did that. And, of course, he didn't do it and the grand jury so voted, 23–0. And Arthur Christy was a wonderful Independent Counsel. He finished in 7 months.

And when Hamilton was cleared of that—and a lot of people believed the allegation for 7 months, believe me, including most of the people in the media. But when he was cleared by an Independent Counsel, it totally went away. So although a prosecutor might have 2,000 matters in his or her office, if an allegation comes in about the President violating a law, I believe an ordinary prosecutor would assign a lot of resources to that matter.

Senator LIEBERMAN. Well said. Thank you

Chairman THOMPSON. Just on that point briefly, that is something that I have wondered about in listening to all this. You talk about how you treat a public official, above or below, but my recollection is—I don't know if they have changed or not, but when I was an assistant U.S. attorney, clearly, they would bring prosecutions against people who would set an example and people who were in the public officials.

Even if they weren't public officials, they would sooner indict an accountant for tax fraud, the IRS would, than they would some guy working at McDonald's for sure because that would have a deterrent effect. So for a long time, we have had different standards, for better or for worse, it seems to me.

Mr. RUTH. Well, I think the public trust—if you have a public trust, you better damn well live up to it.

Chairman THOMPSON. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman. When Henry Ruth reminisces about the days where we taught a law school class together, he left out the best part when we were younger lawyers, still young lawyers, but younger lawyers, playing softball together in the Philadelphia big law firm city league, or when I tried to hire

him after I was elected D.A. to be my first assistant. And he was working for the Attorney General, who threatened a war between the U.S. Department of Justice and the Philadelphia District Attorney's office if I proceeded to try to hire him. That really motivated me to work harder. I thought that would be a fair battle, but I couldn't persuade Professor Ruth to join me at that time.

I want to pick up on what you said, Henry, on who would have any faith in the result by the Department of Justice in their investigation on campaign finance reform. And those words certainly resonate in this room because at that table and in those witness chairs for months, this Governmental Affairs Committee heard testimony. And you talk about political outrage. Where is the outrage—a question which has been raised by a lot of people in a lot of contexts.

We had Charles LaBella brought in specially by the Attorney General personally to head campaign finance reform, and in a lot of ways was like a special prosecutor. He left his position in San Diego and was expecting to be the U.S. attorney in San Diego. And when he agreed with FBI Director Louis Freeh that there ought to be Independent Counsel, he lost his status, and the recommendation has been made to have somebody else appointed to be the U.S. attorney for San Diego.

When that happened last August, I pressed to have hearings on the issue. We may yet have them when the confirmation comes up as to the replacement. But there is so much to be outraged about that you really can't focus on it. How could we push a mandamus action to try to compel Attorney General Reno to appoint Independent Counsel at a time when there is an impeachment process? How can you be outraged as to Mr. LaBella when there is so much more which moves onto center stage? And when you tell the story of the Saturday Night Massacre, I think people really tend to forget it.

I think that we need more safeguards against conflict of interest, not fewer, and that is why I come back to the judicial review. Independent Counsel was appointed on a mandamus action against the Attorney General in three cases, and in all three cases overruled on grounds of lack of standing. And if we can correct the standing process, my own sense is that is where we ought to go.

I would be interested in your view on that, Mr. Fiske. What do you think about having an umpire come in when the Judiciary committees, or a majority of the majority or a majority of the minority, really feel there has been a flagrant abuse of discretion?

Mr. FISKE. Well, I am a little bit like Bob Bennett. I mean, I haven't thought this through very well, but my concern about that would be a constitutional one. I mean, basically, as I understand it, the decision whether to prosecute or not is an Executive Branch decision. The decision whether to investigate is an Executive Branch decision, and whether you do it yourself or whether you appoint an Independent Counsel to do it, it still is a decision whether to investigate or prosecute.

Senator SPECTER. We had a discussion with Joe diGenova on that very point, and Mr. diGenova said a core executive responsibility is prosecution. And my reply to that was a core executive responsibility cannot be the question of prosecuting the executive. There has to be a referee somewhere.

What do you think, Mr. Beall?

Mr. BEALL. You put your finger on a terrible dilemma. I don't have a solution. If you have an Attorney General who won't act, how can you bring about action? I don't have the answer, Senator.

Senator SPECTER. Well, the traditional way is to go to court, and three went to court and got Independent Counsel appointed but were overruled for lack of standing.

Let me pick up the question of time limits because I know that Professor Ruth and I have a difference in view on it. You talk about people going to China, running right out from under the subpoenas of this Committee. It wouldn't make any difference whether the investigator had unlimited time if they are in China; we have to revise jurisdiction, venue, and service of process to work that out.

But when I was district attorney, I had a 4-year term. It had to be completed within 4 years. I had two terms, so I had to get it done. Pennsylvania law limits a grand jury to 18 months and you have to work within the time frame, so that if you have expedited process where a court would be under statutory obligation—we have done that on speedy trial and on death penalty habeas corpus cases, etc.—they would have to decide it sooner.

And if the Independent Counsel was full-time and you have extensions for cause shown, especially where there were dilatory tactics or not, why not? My sense is we are going to have a hard time getting reauthorization of this statute. We are going to have to very sharply curtail it if we are to get the job done at all.

What do you think, Henry?

Mr. RUTH. Well, that is why I propose some accountability to the Attorney General, Senator Specter. I think if I were a defense counsel and I was representing a potential target in an investigation just announced with an 18-month time limit, and then we organize all our joint defense and all 18 lawyers sit around the table and say, well, if everybody takes the Fifth, they won't have any evidence——

Senator SPECTER. How about changing that rule, privileging joint defense——

Mr. RUTH. I used to ask that question for shock value in law school about abolishing the Fifth Amendment, but I don't remember asking it in other places.

Chairman THOMPSON. It had the same effect on me.

Senator SPECTER. Well, there is a move afoot on that that might have some currency in this room on abolishing Miranda.

Mr. RUTH. But you can delay. I mean, the average white-collar investigation by the Justice Department takes over 4 years, and that is when they are moving relatively expeditiously. We all know as a defense attorney, you have got a lot of weapons of delay, and delay is the first principle of defense and will always be, and I think you are quite aware of that. And delay with a time limit is a dream.

Senator SPECTER. Well, I have seen white-collar investigations run in a much more abbreviated time than 4 years. And it may be that after you have investigated for 18 months, if you can't find something perhaps that ought to be the conclusion of it. And if defense counsel have engaged in dilatory tactics or taken interlocu-

tory appeals, etc., or privilege questions, perhaps you can get an extension for that, but perhaps you ought to call it.

Mr. RUTH. Well, I think the Independent Counsel should have to explain to the Attorney General after 3 years and every year thereafter why the investigation must continue. And I would allow more use of the "good cause" provision. I mean, I wouldn't call this the Independent Counsel anymore; I would call it a temporary counsel. And I would set it up not as an adversary proceeding, but as two law enforcement people trying to work out a law enforcement problem.

Senator SPECTER. Mr. Fiske, I was interested in your strong endorsement of full-time practice. And, of course, you are a good example of that, and we have had some sparring and some debate that people are not going to give up their practice to come in. But my sense has been that these are very interesting appointments, sort of plum appointments, and you can work it out with a law firm to bring people of your caliber in on a full-time basis.

I would like to hear you amplify that view.

Mr. FISKE. Well, my first point, Senator, is that I said before I think the statute should be drastically cut back in terms of the people that are covered so you raise the level of the people that are covered to the very highest level. I said President, Attorney General and Vice President. Somebody else said make it the whole Cabinet, but certainly not the group of people you have now.

Once you do that, then there is going to be no problem getting good people to do it full-time, and I think there are at least three reasons why that is important. One, I think it is very important that there be an appearance that the person who is doing this is doing it on a full-time basis. Investigating people at that level—the President, the Attorney General and the Vice President—shouldn't be perceived as a part-time job.

Second, you just get the job done faster if you are doing it on a full-time basis. And, third, there is a pressure there. We are all worried about how long is this going to take. If someone that has a profitable private practice gives that up full-time until they finish the investigation, there is a not too subtle additional pressure to finish the investigation perhaps faster than it would have otherwise. So those are all reasons why I think it is important.

If I could just go back to your question to Henry about the time limits, I think I am on the same page that he is with respect to the concern that if you are going to have time limits and there is going to be some kind of a requirement that there be a showing of good reason to go forward further that the Attorney General should be the one to make that decision, not the court.

I am again concerned about the constitutional issue, and in *Morrison v. Olson,* in upholding the statute, the Court made a point out of saying once the court has appointed a counsel and defined his or her jurisdiction, it has no power to supervise or control the activities of the counsel. That was obviously important to the majority. I think if you have the court sitting in judgment on what is essentially a prosecutorial decision—is there good reason to go forward from here—you have got a problem.

Senator SPECTER. I think that is a very good suggestion. Thank you, gentlemen, very much.

Chairman THOMPSON. Thank you very much. Senator Levin.

Senator LEVIN. Thank you, Mr. Chairman.

First, Mr. Fiske, your appointment by the Attorney General is an interesting chapter in our history, and her statement to you after she appointed you that she did not expect to talk to you again until the entire matter is over is a very strong statement of independence. But it raises questions, then, about the accountability, which is one of the reasons frankly that many of us who have supported this law want to either tighten it or find another mechanism because we feel there have been excesses and extreme uses to which this law has been put and extremes to which it has been taken.

And I guess that you would never hear from her again until after it is over raises questions like staffing. If you had asked for three times as many staff, would you have had it?

Mr. FISKE. Well, I think certainly, Senator, that was the understanding that I had. Now, I don't think I abused it, but it was up to me to decide who I wanted to hire. I read their names and qualifications into the record. I think it was a very outstanding group. But there were no time limits put on me, there were no budget restraints put on me. And I guess the problem is trying to balance the tension between independence and accountability, and in my situation I felt I was free to do whatever I wanted to do.

Senator LEVIN. We have put some restraints on Independent Counsels in terms of reporting to the court, for what it is worth. At least they have got to report to a court. At least they are subject to being removed if they are nearly completed in the eyes of the Attorney General or the court, acting on its own motion. There are other restraints that we have placed on Independent Counsel. It sounds like you didn't even have that.

Mr. FISKE. No. Under the regulations, there were a couple of things. First of all, as the statute subsequently said, I was required to follow Justice Department practices and procedures, and I made every effort to do that. And I could be removed for good cause, and I think as Henry said earlier, as an example, not following Justice Department practices and procedures, I am sure, would be good cause if it could be demonstrated.

Senator LEVIN. Well, I would hope so. I am not so sure that the Attorney General is taking that position, and I am not even sure that the courts do, since apparently the removal is appealable to court. And we have had a court decision at least in one case which says that Independent Counsel in this case—this was in the Espy case, I believe, with Judge Lambreth—says that the Independent Counsel could prosecute a violation—it was an ethics violation—"even if said prosecution is contrary to the general prosecutorial policies of the Department."

Now, that really raises a fundamental question. And you have raised this, too, Mr. Ruth, because you sort of suggested that maybe there ought to be a higher standard that we hold public officials to. That suggests that we are not going to see an Independent Counsel or a special counsel or a regulatory counsel follow the policies and practices of the Justice Department because if the policy of the Justice Department is not to prosecute a private individual for whatever particular offense it is, what you are saying is, if I

heard you right, maybe we ought to prosecute that public official anyway.

Mr. RUTH. Well, the Department of Justice, as you know, Senator, has a huge policy book on criminal matters which is now on the Web, and the Department itself has different standards for prosecuting public officials. So, to me, you would be following the Department of Justice standards as to whether you would prosecute a President or an Attorney General for this, not whether you would prosecute Joe or Jane.

Senator LEVIN. Well, that is fair enough. But if the Justice Department policy is not to prosecute a public official for a particular offense that they wouldn't prosecute a private individual for, you are not suggesting, are you, that that policy should not be followed because it is a public official?

Mr. RUTH. No. I think it should be followed, and I think the Attorney General should be given, in an amendment, the right to investigate an Independent Counsel to see if good cause for dismissal exists, including good cause to dismiss for not following Department of Justice policies.

I think the case you were reading was an underling they were trying to squeeze to see if he had something to say about his boss. And the Department of Justice will prosecute sometimes in an instance where they think they can squeeze somebody after a conviction, even though they wouldn't prosecute that underling ordinarily. That is the step ladder theory. If they think somebody is a step ladder, they might well prosecute.

Senator LEVIN. Let's just focus on that issue of how do you enforce the policies and practices of the Justice Department and what investigatory powers does the Attorney General now have into the activities of an Independent Counsel to see whether or not that counsel has followed the policies and practices of the Justice Department.

Mr. RUTH. If I were Mr. Starr, I would say to Janet Reno, you all come, I didn't do anything wrong. And I think the present statute, when it says you can dismiss for good cause, inherently says the Attorney General has to have the power to investigate.

Senator LEVIN. I totally agree with that, but that is not the way this is apparently unfolding at the moment. But, nonetheless, I totally agree with that.

Let me ask you, Mr. Beall, do you agree with that?

Mr. BEALL. I do; I agree with Mr. Ruth.

Senator LEVIN. As to what he just said, because this is really a very critical point? I don't think we have to amend the statute, by the way, in order to accomplish this point.

Mr. Fiske, I am going to ask you the same question. Do you agree with that comment that the Attorney General has the authority to ask any Independent Counsel questions, and determines whether that Independent Counsel has not followed the policies or practices of the Justice Department, or, if I heard Mr. Ruth correctly, he refuses to cooperate in such an investigation, that that would be just cause for dismissal? Would you agree with that?

Mr. FISKE. Well, I think the first issue is whether or not following Justice Department practices and procedures is a good cause for dismissal. It would depend, I think, obviously, on the specific

facts. But as a generic proposition, I would think it certainly could and in many cases should. I mean, you would have to know exactly how egregious it was, and so forth, but certainly that is a legitimate area that could be covered by the "good cause" grounds for termination.

And I must say inherently it makes common sense that if the Attorney General has the power to discharge someone for good cause, which includes not following the procedures, that the Attorney General ought to have a way to find out whether the Independent Counsel is or is not following procedures. And then I guess the safeguard is that in any event, if there is a discharge, that is subject to review by the district court in the District of Columbia.

Senator LEVIN. The regulatory counsel provisions that you were appointed under will still exist even if this law expires, is that correct?

Mr. FISKE. Yes.

Senator LEVIN. I mean, unless the Attorney General repeals those regulations, we are going to have regulations on the books. Now, does that not create, in effect, the similar problem to what we have now, which is the huge political pressure on the Attorney General to appoint or seek the appointment of an Independent Counsel, if anything, would be more intense, when she can do it herself under the regulation that would continue to exist even if the law expires in June.

Would not that problem continue to be there? The opportunity to put pressure on the Attorney General to appoint a, "regulatory counsel" would continue to exist after the law expires. Let me start with you, Mr. Fiske. I will go right down the line.

Mr. FISKE. Well, just so I understand, you are saying if the statute expired and we were dealing just with the regulations, would there still be this same kind of——

Senator LEVIN. You have a regulatory counsel?

Mr. FISKE. Yes. I think that is exactly what happened in 1993 and early 1994.

Senator LEVIN. So we don't correct this problem with the Independent Counsel law that it is open to the Attorney General being put under some pretty withering fire politically to seek the appointment of an Independent Counsel if we have a regulatory counsel provision that still exists in regulation where, maybe not quite as independent as law, but nonetheless she could go and appoint one herself.

Would you agree with that, Mr. Beall?

Mr. BEALL. Senator, part of the job description of the Attorney General and any other public official, is political pressure. That is inherent. I am not sure how one could obviate that.

Senator LEVIN. I am not either, but it still would continue to exist, is that correct?

Mr. BEALL. Yes.

Senator LEVIN. Mr. Ruth, would you agree?

Mr. RUTH. I think it might even increase because the Attorney General couldn't cite a statute, which I think is the problem Senator Thompson was referring to, he or she wouldn't have the shield of a statute not to appoint.

Could I make one comment about the final reports?

Senator LEVIN. Sure.

Mr. RUTH. At the end of most of Watergate, I happened to be the surviving Watergate prosecutor after serving under Mr. Cox and Mr. Jaworski, and we were under terrific demand to release all our files. And if you look at the Watergate final report that we wrote, it is about three-quarters of an inch thick. And the Herblock cartoon the day after I left office was a baseball stadium with a batter swinging and missing, and the caption was "The Babe Struck Out." And that is mainly because we didn't release all our files. And I was hauled up to the House Judiciary Committee three times, where Elizabeth Holtzman castigated me in very unpleasant terms for hiding things.

Chairman THOMPSON. Why are you just now telling us this? [Laughter.]

Mr. RUTH. Well, it was all open, actually, and the *Washington Post* was terribly upset—George Lardner wouldn't speak to me for a while. But I think you should release that kind of limited report explaining what your policies were, what was your plea bargain policy, what did you investigate. And I recommend that the statute be amended so that if someone is cleared, a final report can say only we investigated and we found insufficient evidence to indict and no more. And you won't have a repeat of that McKay-Meese incident where Mr. McKay, which I criticized publicly at the time, basically said we didn't indict him, but by the way he is guilty. I mean, that was horrible.

Chairman THOMPSON. On the guidelines question, refresh my memory or recollection on this. It has been a long time since I have dealt with it. What if the Department itself does not follow its own guidelines? Under today's law, is that a reversible offense?

Mr. RUTH. No. If you read those guidelines, 500 pages, the last paragraph says: None of this shall bind the Department of Justice.

Chairman THOMPSON. It doesn't count.

Mr. RUTH. And, basically, I don't think you can write them any other way.

Chairman THOMPSON. Well, the Department of Justice itself, if it does not follow its own guidelines, there is really no—it does not give a defendant a right to the dismissal of an indictment or overturning of a conviction.

Mr. RUTH. No. That is a dilemma for the court because if someone violated the law, the court can't say it is illegal to prosecute a violation of the law. And Bob and George faced that as U.S. attorneys.

Chairman THOMPSON. Yes. I am not saying that is necessarily a great idea, but I thought that was the case. So the situation is the same as far as the Independent Counsel law, because there is something in the guidelines, as you point out, that also says nothing in here gives any additional rights to anyone in case we don't——

Mr. RUTH. Right. But if you use "good cause," I think in the Espy matter, an Attorney General, if there were a meaningful "good cause" provision, could have called Mr. Smoltz on the carpet and said, look, $4 million, $8 million, $12 million, $16 million investigating some gratuities? Give me a break here. Why do you think

this ought to continue? We wouldn't continue that under Justice policies.

Mr. FISKE. Senator, if I could just make one comment with respect to that, there may be a little difference. I mean, you are absolutely right. The U.S. attorneys manual—every other page says a violation of this doesn't give the defendants any right. On the other hand, internally, within the Justice Department, if someone flagrantly violates their own procedures, the Justice Department is entitled to take remedial action against them.

Chairman THOMPSON. And demand justification for doing it?

Mr. FISKE. Yes.

Chairman THOMPSON. Sometimes, there is good reason for that.

Mr. FISKE. Yes, exactly.

Mr. RUTH. My experience with that as a defense attorney is they don't do much about it. I mean, there are violations all the time of Federal investigators talking to represented targets.

Chairman THOMPSON. We keep getting back to the fact that there is no failsafe position here and we have got to continue to try to get the best people involved. For the people who say let's bring it back to Justice—what do you do if Justice is not acting right, whether it is to bring a case or not to bring a case, or refuse to bring an investigation? Their answer always is public opinion and the media pressure and things of that nature.

So you can't take Congress out of the equation. Nobody wants a Congress pushing and deciding, as we have had in the last 20 years, I must say, time after time from Capitol Hill, trying to get somebody indicted. On the other hand, if we go back to a system whereby Justice has more discretion when people see what they consider to be a flagrant violation of their duty, there is going to be that political give-and-take.

One final question. You brought up something, Mr. Ruth, in your statement that I had been grappling with and that has to do with the role of Congress. One of the things that I have been saying and thinking for some time is that, if we go back, if we move away from this Independent Counsel law, Justice is going to have to do a better job. They are going to have to have more credibility, but so is Congress. We are going to have to do a better job.

Back in the old days, back during Watergate when you and I were in town on opposite ends of the street, it worked out. We had a bipartisan investigation, essentially. We had the good fortune of having a taping system in the White House, and a President's attorney who decided to testify against him, and a few other things that tend to help an investigate along a little bit. Lately, we have not been as fortunate, for a lot of reasons.

And you pointed to something that is very obvious that I hadn't really focused in on, and that is the proclivity now for people to exercise their Fifth Amendment rights is greatly increased and enhanced. When we had Watergate, I can think of one or two instances. In the first place, you didn't have many lawyers in town who knew what they were doing and they would let their clients go before grand juries, I mean, in terms of the white-collar criminal area, frankly.

Mr. RUTH. There was no white-collar criminal bar.

Chairman THOMPSON. Well, we have created one, God help us. And people freely testified, and on up to the time of Iran-Contra. And now we have seen, of course, perjury charges and immunity deals that have gone bad, and so forth. It causes me to wonder whether or not Congress anymore can perform the historical oversight role that it performed for 200 years and say, let's take some of it out of the court system. We don't have a failsafe system. Let's let the light shine on it, let's have congressional hearings, let's get to the bottom of it.

I am wondering anymore whether or not we have—and then, of course, when we impose time lines on ourselves and we break down into partisanship, that is just additional pressure. But I am wondering now, inherently, when people are doing what they have a perfect right to do, and smart lawyers are going to encourage them to oftentimes, and that is take the Fifth Amendment, whether or not we are that much a part of the equation anymore.

And take it a step further. That causes us to tend to want to immunize witnesses, give them use immunity for their testimony in order for us to do our job. Well, of course, that creates trouble with the prosecutor. My experience has been it creates trouble with the prosecutor whether it is in Justice or an Independent Counsel.

I don't have any point here other than to say what is your thinking about all of that in terms of the issues that we have been discussing here today. Any solution to any of that?

Mr. RUTH. Well, that is why I brought up the subject, Senator, because Senator Ervin's committee, as you well know, was so successful. I mean, it was dynamite, and that is why I said this can't happen again because if you are a modestly good defense counsel, you are not going to let a mid-level or above official go before a Senate or House committee with the possibility of a prosecutor hanging out there and saying anything but the Fifth Amendment.

And the Senate or House can get documents, and you can get lower-level government employees to testify, but that is not going to move the ball. And, to me, because you lose significant congressional oversight while a prosecutor is proceeding, or even impending, that, to me, is the need more for an Independent Counsel because any prosecutor really shuts down the whole thing from public view.

Chairman THOMPSON. Well, that leads you in that direction. Does that lead you in the same direction? Do you agree with this analysis and does it lead you in a different direction?

Mr. FISKE. I don't know where we end up on this, but it does seem to me that what you are talking about is a tension here that hopefully can be cooperatively resolved between the Congress and Justice or the Independent Counsel, but most of the time, it can't be, between a legitimate desire on the part of the Senate to air everything publicly, the public's right to know, let's get all the facts out, these are political issues, the public should know about them so they can exercise their vote at the ballot box, versus the issue from the view of the Justice Department as to whether this is conduct that is more important to criminally prosecute than expose.

And being on the Justice Department Independent Counsel side of that and having taken this very position with two congressional committees that were proposing to hold hearings while I was doing

what I was doing back in 1994, I think there is obviously an enormous concern on the part of prosecutors that if people are immunized, I think the Iran-Contra aftermath in the North and Poindexter case indicates for all practical purposes they can't be prosecuted, and indeed maybe a lot of other people can't.

Chairman THOMPSON. Well, I had the privilege of bearing witness to what you are saying, as a young guy. I was even a little younger than Mr. Beall there during all of that and watched Senator Irvin and Archibald Cox argue with each other over that very thing, two giants, coming from different ends of the street, each with legitimate concerns, but having real disagreements as to what should have priority under the circumstances. And we will never get away from that, will we?

Mr. FISKE. No. Whether or not you appoint an Independent Counsel, that problem is going to be there.

Chairman THOMPSON. Senator Levin.

Senator LEVIN. Just a couple more questions. First, going back to the regulatory counsel, the regulation would continue to exist, and we have to consider that, it seems to me, when we act or don't act in terms of reauthorizing this statute.

Some parts of the regulation are actually from a perspective of trying to rein in the Independent Counsel's powers and make that person more accountable even weaker than the current law. For instance, in the current law, we have GAO requirements, GAO reports, under the law which would lapse with it. Those requirements are not present in the regulations, just for starters. There is no review of expenses, for instance, in the regulations as far as I know that the GAO does. So we have that issue that we have to contend with and it is one that I have not put much focus on myself, frankly, until I read your testimony today, Mr. Fiske.

Mr. FISKE. Senator, the GAO did regulate our expenses.

Senator LEVIN. Good; I don't think by regulation. But, in effect, if they did, it is the same thing.

Mr. FISKE. We reported to them.

Senator LEVIN. OK, then that takes care of that. There are other aspects, however. I have a list being put together here of items that are not in the regulation that we added to the law in its last reauthorization. So in some respects there are safeguards that were intended to be placed in the law by that last reauthorization that are not in the regulations. And I don't have all of them at my fingertips, but apparently there are others which would be more accurate than the one I apparently have just given.

On the question of Congress and politicization of this process, I would be deeply troubled by following the course that Senator Specter suggested here, which is to allow Congress, by a majority of the majority or a majority of the minority, to mandamus the triggering of this Independent Counsel Statute. I think that will plunge us even deeper into politicizing this statute.

I think you did not want to comment on it.

Mr. FISKE. I just raised a constitutional question of getting the court involved in that, whether it is by petition of Congress or anybody else, as to whether it is constitutional to have the court making what is, in effect, an Executive Branch decision.

Senator LEVIN. Do either of the two of you have a comment on the suggestion of Senator Specter that we be given the power by a majority of the majority or a majority of the minority to mandamus a court action as to whether or not the Independent Counsel law should be triggered? My own view I just stated, but do either of the two of you have a view on that you want to share?

Mr. RUTH. I don't think that would survive a constitutional attack, unless the court review were limited to whether or not the Attorney General was violating whatever provisions existed in the act, not as to——

Chairman THOMPSON. Excuse me. It wouldn't be only court review, I guess, but you would also have a problem between the first and second branches of government. If you are giving Congress the authority to force a prosecution, or at least the consideration by the court of—it looks to me like you have got the problem from two different directions.

Mr. RUTH. We had the problem in Watergate with one witness we made a plea bargain with, and the U.S. attorney of his district objected, I think, for political reasons and went to court to enjoin our plea bargain. And that got up to the Fifth Circuit and the Fifth Circuit said prosecutor's discretion is prosecutor's discretion. The court does not have a place, even though the U.S. attorney was the one who had sued us.

Senator LEVIN. Mr. Beall.

Mr. BEALL. I think it is a bad idea. I think it does politicize the process even further if you have the opportunity to petition. In this era of litigiousness it just, I think, invites even more litigation.

Senator LEVIN. Finally, on another constitutional issue, and that has to do with the policies and practices of the Justice Department, there have been some interesting comments here today both on the flexibility issue, that that is part of that book of policies and practices—it seems to me that is kind of an intriguing wrinkle—but also on the fact that there may already in the policies and practices be different standards for public officials than for private.

And that is something I am going to have to take into account because I have been putting a lot of emphasis on trying to find a way to enforce the law. The law is that that Independent Counsel must follow the policies and practices of the Department of Justice. And, in my judgment, that has not been the case and so I have got to now take into account these other complicating elements in terms of when I say that.

But I just want to close with this thought. That requirement in our law right at the beginning was one of the constitutional foundations for this law. In *Morrison v. Olson,* the Supreme Court specifically looked at that requirement that the policies and practices of the Justice Department be followed and said that that was one of the four reasons that this law was constitutional, the first being that it could only be triggered by the Attorney General, by the way, which gets, I think, to the mandamus issue as well.

Second, the Attorney General could fire, for cause. The third one was the policies and practices requirement, that they be followed by the Independent Counsel. And the fourth one, I forget, but there were four of them. And I just want to say that with all of the qualifications about policies and practices—the interesting one that in-

deed there is all the flexibility written in there in order to avoid creating rights in defendants, and this other point that you have made, Mr. Ruth, about there may be different policies for public officials—still, that point, to me, is critically important.

And if we can't figure out a way to basically get an Independent Counsel to treat the person that is being investigated basically the same as that person would, if a private person, be treated by the Justice Department, then I don't think we have a law that is carrying out its principal, essential purpose. We have got to find a way to do that, I think.

Mr. RUTH. I wanted to suggest that no matter what was written in the law, you would be faced with the ultimate dilemma. In the Clinton matter, you had alleged perjury by a President in a situation and as to a subject matter where maybe none of us would have been prosecuted. But who knows what the Department of Justice policy is as to a President? Should the President be allowed to commit perjury in any circumstance, since he appoints all the U.S. attorneys and all the Federal judges?

So even though you had a clear policy, you would almost have to be telling the Justice Department to write a separate chapter saying this is our policy as to the highest officials in the land. Either perjury by a President is excusable in some instances, as we seem to be saying it is—the Democrat side seems to be saying everybody commits perjury—or can we——

Senator LEVIN. I had better interrupt you quickly. That is not an accurate characterization of, "the Democratic side." That is an accurate characterization of some.

Mr. RUTH. The people on television. Let me put it that way.

Senator LEVIN. Some people on television. We have been on television so often we can quote each other, but some people on television have said that. I have been on a lot and would never say that.

Mr. RUTH. I don't want to get diverted, but you see my point, I think, that I don't know how you make that judgment. Some people will believe the President should not be prosecuted for perjury about this matter, and other people, as I believe, say if you are the chief law enforcement officer appointing all the U.S. attorneys and all the judges, you better not go before a Federal judge and a Federal grand jury and lie about anything. But who is to say who is right?

Senator LEVIN. Even your age, right?

Mr. RUTH. Yes.

Senator LEVIN. Thank you, Mr. Chairman.

Chairman THOMPSON. Gentlemen, thank you so much. You have made a major contribution to our efforts here and you have the gratitude of all of us. We sincerely appreciate your being with us.

Mr. RUTH. Thank you for the opportunity.

Mr. BEALL. Thank you.

Chairman THOMPSON. We stand in adjournment.

[Whereupon, at 1:52 p.m., the Committee was adjourned.]

APPENDIX

PREPARED STATEMENT OF THEODORE B. OLSON

Concerning the Independent Counsel Statute

(28 U.S.C. § 591, *et seq.)*

Chairman Thompson and Members of the Committee on Governmental Affairs of the U.S. Senate, my name is Theodore B. Olson. I am a partner with the law firm of Gibson, Dunn & Crutcher in Washington, D.C.

Thank you for the opportunity to testify before your Committee in connection with the future of the Independent Counsel Provisions of the Ethics in Government Act, 28 U.S.C. § 591, et seq. As I will explain, I believe, and have believed for many years, that the Independent Counsel Provisions of the Ethics in Government Act constitute a flawed policy of highly dubious constitutionality. This law should be allowed to expire.

I have had extensive personal experience with the Independent Counsel Law from a variety of vantage points over the past 18 years. As Assistant Attorney General for the Office of Legal Counsel in the U.S. Department of Justice during the years 1981–1984, I provided legal advice to Attorney General William French Smith and other Justice Department officials concerning the interpretation and implementation of the law in the early days of its operation. During that same period, my office rendered legal advice and submitted formal legal opinions concerning the law to independent counsels who were then conducting investigations. I also participated in preparing testimony setting forth the position of the Department of Justice on proposed amendments to the act as it was being re-authorized in 1982.

Two years after leaving the Department of Justice, I had the uncomfortable experience of becoming the subject of a lengthy independent counsel investigation which included an unsuccessful challenge to the constitutionality of the law in the U.S. Supreme Court (*Morrison v. Olson,* 487 U.S. 654 (1988)). Although that investigation ended with a report exonerating me and a judicial decision reimbursing me for a substantial portion of my legal fees, it is not an experience that I would want to repeat. As Justice Scalia explained in dissenting from the Supreme Court decision upholding the constitutionality of this law: "[It is] frightening to have your own independent counsel and staff appointed with nothing else to do but to investigate you until investigation is no longer worthwhile." 487 U.S. at 732.

I have also been counsel to several subjects of independent counsel investigations including former President Ronald Reagan and former White House Chief of Staff Donald Regan in connection with the Iran-Contra Independent Counsel investigation conducted by Judge Lawrence Walsh. I also represented Steven Berry, a subject of the "Clinton Passport File" Independent Counsel investigation, and I have represented witnesses in the Clinton Administration Independent Counsel investigation being conducted by Kenneth Starr.

As a result of an intensive analysis of the provisions and goals of the Independent Counsel Law, its history, the Constitution, and my own varied experiences with it, I believe that the law fails to serve the purposes for which it was intended, distorts our Constitution, and has damaging consequences to individuals subject to it and our system of government. Although honorable and conscientious individuals have served as Independent Counsel, including persons for whom I have high personal regard, the nature of the responsibility that they undertake when accepting such an assignment and the structure of the Independent Counsel Law itself lead to unfortunate consequences that, in my judgment, far outweigh the benefits that the law was intended to produce. I therefore believe that the law should be permitted to expire without amendment or replacement.

The Independent Counsel Law is fundamentally and fatally flawed. You do not have time to hear all of my objections to it, however, so I will mention only a few.

1. As Attorney General (and later Supreme Court Justice) Robert Jackson explained in 1940 to the Second Annual Conference of U.S. Attorneys, a Federal "prosecutor has more control over life, liberty, and reputation than any other person in America." He or she can order prolonged and intrusive investigations, subpoena documents, obtain search warrants, secure approval to tap telephones, compel persons to testify before grand juries, damage reputations, force people to go to trial, drive persons into bankruptcy and generally disrupt or damage lives. Any subject of a criminal investigation, especially if it is conducted, in part, in public, suffers significant and essentially irreparable damage simply by virtue of the investigation itself and its most basic consequences. While a prosecutor may be and usually is an important force for justice, as Attorney General Jackson explained, if "he acts from malice or other base motives, he [may be] one of the worst [forces in our society]."

Because a prosecutor has such awesome power, it is essential that that power be exercised with restraint and within a system of institutional checks. It is important, for example, that prosecutors investigate crimes and not target individuals for investigation to see whether a crime may be found. Any one of us would be vulnerable if a prosecutor were to be given unlimited time and resources to ascertain whether we had filed a defective tax return, violated an environmental law or filled out some government form with insufficient accuracy or detail. Nearly everyone has done something that might arguably violate some law, and most prosecutors will admit that it is not hard to convince a grand jury to indict. The problem with "special prosecutors" (a term that is certainly more accurate than the euphemism "Independent Counsel") is that they are appointed to investigate persons more than crimes and regardless of the scope of their jurisdiction, that is what they generally wind up doing.

To quote Attorney General Jackson again, "The greatest danger of abuse of prosecuting power lies in those situations where a person is selected for investigation and the prosecutor then looks for an offense." Yet that is essentially how the Independent Counsel Law operates in practice.

2. The injustice created by targeting individuals to investigate is compounded by the fact that the threshold to start an investigation under the Independent Counsel Law is a great deal lower than for other investigations. Because a criminal investigation of an individual can be such an intrusive and damaging episode, and because law enforcement resources are limited and in the usual case must be allocated among many serious law violations, criminal investigations are not normally commenced absent a relatively strong basis for believing that a crime has been committed. That important barrier to the launching of an investigation is virtually eliminated in the case of the Independent Counsel Law. Under that law, the Attorney General "*shall*" order a preliminary investigation whenever she receives "*information sufficient to constitute grounds to investigate*" whether any of the officials designated by the statute "*may have violated*" any but the most trivial of Federal laws. Unless the Attorney General determines, during a brief and limited preliminary investigation, that "*there are no reasonable grounds to believe that further investigation is warranted,*" the Attorney General "*shall*" apply for the appointment of an Independent Counsel.

This is an extraordinarily low standard. It sets in motion the appointment of an Independent Counsel, and virtually assures that there will be a lengthy, public, costly and damaging investigation, predicated on the thinnest of allegations of wrongdoing unless the Attorney General can determine that there is "no reasonable ground to" investigate further.

That is almost like having to prove that you are innocent beyond a reasonable doubt. The law thus exposes the highest officials in the Executive Branch, including the only two persons (the President and Vice President) elected by the entire Nation, to a potentially devastating and debilitating criminal investigation based upon allegations that may lack substance but which cannot be ruled out as a potential avenue of investigation. It seems ironic as well as unjust that we submit our most trusted public officials to a vastly greater exposure to a criminal investigation than any other citizen in the Nation.

3. The appointment of the Independent Counsel is the beginning of a prolonged nightmare for the subject of the investigation. Once the Independent Counsel is appointed, the investigation that follows is almost invariably more lengthy, intrusive, broad, public and intense than normal Justice Department investigations. Lawyers must be hired, friends and associates will be subpoenaed for testimony, and extraordinarily broad categories of documents must be produced.

Ordinary prosecutors are forced to allocate limited resources to the most serious of crimes, and to move on to other compelling concerns if an investigation becomes

too lengthy. These restraints are valuable institutional checks which prevent most prosecutors from investigating trivial or unintended or harmless crimes, or from pursuing a target, however deserving of investigation, endlessly. Unfortunately, the Independent Counsel Law overrides most of the normal constraints on the powers of prosecutors. Neither their resources nor their time are limited. Unlike any other prosecutor, or any other government agency, they have a blank check from Congress to spend whatever funds they deem appropriate, to hire as many assistant prosecutors as they wish, to use as many FBI agents or other government assistants as they desire, and to exercise every power given to the Attorney General of the United States for as long as they wish. As would any individual who is given unrestrained power, money, and time, the Independent Counsel will almost invariably use that discretion to interview every witness, examine every document and turn over every pebble, however insignificant.

The institutional pressures on Independent Counsel virtually assure that normal limitations will be exceeded. The designation of an Independent Counsel to investigate someone is like issuing a hunting license with the name of the target printed on the license. The prosecutor is then accorded all of the power and resources of the Federal Government to "hunt" that target. As a result, all manner of psychological forces encourage a lengthy, exhaustive investigation. Unfortunately, the virtually irresistible temptation is to bring home the game whose name is on the license, or to demonstrate at the end that no effort was spared in attempting to find a ground for doing so.

4. The Independent Counsel's jurisdiction is generally defined by the appointing court in broad terms, with an added proviso that the prosecutor can investigate other persons and any other alleged law violation uncovered during the investigation. This gives the prosecutor not only broad power over his subject, but the power to put investigative pressure on friends, associates and relatives of the target. And the prosecutor can investigate whether witnesses have been truthful or cooperative, thus putting pressure on them to help the prosecutor build a case against the target. Of course, regular prosecutors have similar authority, but they generally do not have the same public pressure to "bring in" the target named on a highly specific hunting license, because they, unlike Independent Counsels, can always move on to other targets. Nor do they have the unlimited resources that allow them to focus so intensely for so long on securing the prosecution of the identified target.

History has shown that because there are no budgetary or time constraints on Independent Counsels, they will typically investigate broadly, at great length and in meticulous detail. No Independent Counsel wants to be accused of overlooking anything. Political opponents of the targeted person will bring huge pressure on the Independent Counsel to track down every rumor, allegation or suspicion. And the Independent Counsel has no excuse, except discretion, not to investigate everything. Thus, Independent Counsel investigations get longer and longer. The first two such investigations were completed in months. Their length is now measured in years.

5. As a consequence of all these factors, the damage to targets of Independent Counsel investigations is invariably immense even where there is no indictment. They incur enormous costs. Their lives are disrupted for long periods. And, if they are top government officials, their ability to perform their job is inevitably impaired. If they have left the government, their private lives are seriously dislocated. No one survives an investigation without some serious scars. And even if a subject is not indicted, the final report is almost invariably critical of the subject in some fashion. And attorneys fees, even for the unindicted, are seldom, if ever, reimbursed in full.

6. Interim reports to Congress by Independent Counsel, authorized by the law, have been abused to make allegations and assertions regarding the subjects, or targets of investigations—something which regular prosecutors are bound not to do. And the final report requirement has turned into an excuse to file long exhaustive expositions which rationalize the investigation, describe every fact investigated, witness interviewed and document examined, offer opinions regarding and/or pronounce judgments on the individuals investigated, and generally make the Independent Counsel look good. These reports may have some benefits, as when an Independent Counsel explains that the persons who have been under a cloud for years did not violate any law. But that benefit is often outweighed by judgmental statements in reports pronouncing that persons who had not been prosecuted, or who had been pardoned, or whose convictions had been overturned, had nonetheless committed crimes, failed to cooperate, had violated the "Spirit" of the law, or had acted improperly in some fashion. These reports often contain assertions based on out-of-context fragments of secret grand jury testimony—impossible for anyone to refute.

7. The power to respond to these reports given by the law to persons mentioned in them has very little value. No one reads these responses. What the prosecutor says is news, especially if it is gratuitous slander or insult. The responses receive

little attention. Moreover, it is impossible for a subject to respond properly to these reports because neither they nor their lawyers have access to the grand jury documents or testimony on which the reports are based, or the opportunity to cross-examine witnesses. An accusation cannot be refuted without all the evidence on which it is based. That is why we have a confrontation clause in the Bill of Rights. No such right exists with respect to these reports.

8. The fee reimbursement mechanisms of the law are woefully inadequate. The subject cannot even apply for fees if he has been indicted. Given the ease with which a prosecutor can indict, that gives the prosecutor enormous leverage over the subject. And the Independent Counsel court submits attorneys fee applications for comments to the Independent Counsel and to the Department of Justice, thus requiring a subject to reveal confidential information to his adversary and the government if he expects to be reimbursed. And the Independent Counsel actually has the power to oppose payment of attorneys fees, giving him even more power over the subject of his prosecution, especially with respect to any subject—or attorney—who dares criticize the Independent Counsel or his work. Most frequently, the court awards only a portion of the fees incurred and only then well after the investigation is over. Ironically, although the investigation typically generates enormous adverse publicity to the subject of the investigation and the law allows the Independent Counsel to hire press agents and pays him for dealing with the press, the court will not reimburse the target's lawyer for his necessary dealings with the press in response. Attorneys are therefore often paid less than 50 cents on the dollar, especially when fee awards are discounted for the length of time between when the services are rendered and the date of fee recovery. This provides a substantial disincentive to represent anyone subject to this law.

For these and many, many other reasons, I see no need for an Independent Counsel Law. I see no virtue in hair-triggered, intrusive, prolonged, public investigations of our highest executive branch officials. Our Constitution vested all executive power in the President. The Department of Justice is filled with dedicated career officials who regularly investigate alleged criminal activity by public officials; they do so thoroughly and competently every day under Republican and Democrat presidents. It will be rare that political appointees could successfully stifle or sidetrack legitimate investigations in this day and age. These career officials value their integrity too much to allow that to happen except in an extraordinary setting. And if such an effort is made, there is always the possibility of a leak to the press or to Congress whenever a political appointee attempts to impede an investigation or cover up a crime. No system, unfortunately, is perfect, and the exercise of power does lead to the temptation to abuse it. But our existing systems of an independent judiciary, a free press and a vigilant Congress are better protections than a mandatory Independent Counsel Law.

If the President himself must be investigated, pressures from Congress and the press will generally assure that the investigation will be conducted by someone who has credibility. And Congress also possesses the impeachment power, which the framers of our Constitution designed to be the process by which corrupt officials, including presidents, could be removed. They did not intend, and would not have supported, "independent" prosecutors who, if anything, give Congress and the press excuses not to exercise the powers given to them.

Of course, our Constitutional system is not flawless or foolproof. But we also have regular elections which provide additional structural safeguards. And in our effort to make our system perfect, in my judgment, we have introduced more injustice into the system than we have removed.

I recognize that Congress and the American public have become accustomed to the Independent Counsel Law and many in the media seem to have become addicted to the controversy that these investigations generate. Thus, there remains considerable opposition to termination of this mechanism. If the law cannot be eliminated, I suggest that at least the following flaws in the law be remedied:

1. There should be a substantial narrowing of the range of "covered persons."
2. The trigger for seeking an appointment of an Independent Counsel should be considerably higher than "reasonable grounds to believe that further investigation is warranted."
3. The list of Federal offenses to which the law applies should be sharply limited.
4. The jurisdiction of the Independent Counsel should be narrowly defined, expanded only where there is substantial evidence that a crime has been committed and not expanded to cover new targets or subjects except in very limited circumstances.
5. An Independent Counsel should agree at the outset that his or her responsibility will be a full time engagement. While it might be argued that some Independent

Counsel investigations will not require a full time prosecutor, the temptations and distractions of a competing law practice and the need for individuals being investigated and the American public to have an expeditious resolution to these investigations suggests to me that Independent Counsel should work full time on their government duties until the mission is completed. For some investigations, career prosecutors who are already government employees could perhaps be considered for appointment as Independent Counsels.

6. The right to file "interim" reports with Congress and the responsibility to file a final report should be deleted or materially narrowed. The interim report process is not necessary and simply allows the Independent Counsel to make extra-judicial and immunized statements about a pending investigation that may be damaging to the subject of an investigation. The final report may be used unfairly to stigmatize persons who have not been charged with committing crimes. Or it may be used to express judgments about subjects or witnesses based on secret grand jury testimony that are unfair to the persons mentioned and difficult to refute because based upon sources not available to the persons commented upon. Moreover, these reports have become lengthy, government-financed, self-congratulatory tomes. The Iran-Contra Report was 565 pages and several hundred thousand words. Aside from a simple statement that certain persons had been convicted or acquitted or not prosecuted, these reports do vastly more damage than good.

7. An Independent Counsel should sign a contract with the government to the effect that he or she will receive no compensation with respect to their service as an Independent Counsel except from the U.S. Government and will assign in advance to the treasury any funds received from any source for describing or recounting their experiences as an Independent Counsel. While this will not preclude Independent Counsels from giving speeches or lectures, or otherwise writing about their experiences, it will preclude them from profiting from a book about their exploits. This should remove the temptation for Independent Counsels to have one eye on discharging their public duties and another on the book they might write glorifying their own adventures. This commitment should also be imposed on any person on the Independent Counsel's staff.

8. Attorneys fees provisions should be amended to authorize interim payments, to delete input regarding fee awards from the Independent Counsel and the Department of Justice, to cover indicted but not convicted subjects, and to cover all tasks reasonably undertaken by a subject's lawyer, including dealing with the press.

9. Independent counsels should be selected from among a list of individuals submitted by the Attorney General, which list shall include persons from each major political party, and which should be limited to persons having substantial, high level, experience in law enforcement at the Federal level.

10. Independent counsels should be encouraged to staff their offices from the ranks of Federal prosecution offices, which individuals could then be detailed to the Independent Counsel.

11. The Independent Counsel Law should not be employed in a manner that allows Congress, for political reasons, to weaken the powers of the presidency by authorizing investigations of subordinates of the President for the performance of tasks fundamental to the President's Constitutional duties except where there is substantial evidence that a crime motivated by corrupt purposes has been committed in performing those duties.

CONCLUSION

The Independent Counsel Law is a misguided effort to improve on our Constitution. Unfortunately the damage being done to individuals and to our institutions of government by this well-intended but woefully misguided law, and its enormous costs, far outweigh its extremely limited benefits. It is an idea whose time has ended.

LETTER FROM ROBERT S. BENNETT

April 6, 1999

The Honorable Fred Thompson, *Chairman*
Committee on Governmental Affairs
United States Senate
Washington, DC

DEAR CHAIRMAN THOMPSON: I testified about the Independent Counsel Act before the Senate Judiciary Committee on March 3, 1999, Senator Levin asked we to con-

vey to the Committee my views on two proposals which Senator Specter outlined. The first of these would retain the provision of the current Act which requires the Attorney General to submit a written report to the Judiciary Committee if he or she declines to go forward with an Independent Counsel appointment after receiving a request from the majority of either party's members on the Committee. The second would create a new provision to give limited standing to groups outside government to seek judicial review of any decision by an Attorney General to decline to appoint an Independent Counsel. At the time of my testimony, I had not thoroughly considered either proposal, but testifying, I have had time to review the issues and am prepared to respond. In my view, and based on my experience representing individuals who are the subject of such preliminary inquiries, I have grave concerns about both proposals.

First, as a general matter, I believe it is unwise to require written reports from an Attorney General or from an Independent Counsel at any stage of an investigation. I am sure you and many members of the Committee are aware, requiring a prosecutor to disclose his or her reasons for declining prosecution in any case is counter to well-established policies designed to preserve the integrity of law enforcement investigations and to safeguard the reputations of those who ultimately are not charged with criminal conduct. Thus, we do not compel a prosecutor to divulge his or her reasons for declining prosecution of an individual citizen. The many good reasons why we refrain from doing so in other investigations apply with equal force to investigations involving public officials, be it a preliminary investigation by an Attorney General or a full-scale investigation by an Independent Counsel.

Moreover, I believe the present provision—which permits the majority of Committee members from either party to request the appointment of an Independent Counsel and to compel a written explanation should the Attorney General decline to appoint an Independent Counsel in response to such a request—is counterproductive to the asserted goal of the Independent Counsel Act, which is to remove partisan politics from the exercise of prosecutorial discretion. The provision as currently enacted does not require the congressional referral to be based on any evidence or quantum of evidence, and leaves open the possibility that a small number of members of one party, without bi-partisan support, could trigger a distracting and intrusive inquiry into the conduct of a public official of the other party. This creates the potential that the process will, in perception or reality, be tainted with partisanship from the outset.

This problem is compounded by the requirement that the Attorney General explain in writing to the Committee any decision to decline to go forward with a referral to an Independent Counsel. Requiring such a response virtually insures that the Department of Justice will have to undertake a full-blown investigation, no matter how frivolous or politically-motivated the request, in order to demonstrate the thoroughness of his or her efforts in this written report. An Attorney General would have no choice but to go down a number of rabbit holes and pursue all leads, regardless of how frivolous, simply to attain political cover when the written report comes out.

In the end, this entire regime would become a mechanism by which politics are injected into the IC process, rather than removing politics from the process. Therefore, in my view, it should be eliminated, not re-enacted. At a minimum, if a provision for congressional referrals is to be preserved, there should be a mechanism that ensures bi-partisan support for a referral, such as approval from two-thirds of the Judiciary Committee as a whole, of a requirement that the referral be endorsed by both the Chairman and the Ranking Member, similar to the model used by the Senate Ethics Committee. And there should be no requirement of any written report if the Attorney General declines to go forward.

The second proposal which Senator Specter aired—to give groups outside of government limited standing to seek judicial review of an Attorney General's decision not to appoint an Independent Counsel, and to give a court authority to "referee" these disputes—also raises serious concerns. As you know, for a number of very important policy reasons, the exercise of prosecutorial discretion generally is not subject to judicial review in any other case. I see no justification to make an exception to this important principle and to subject a public official to a different standard of review. Moreover, to permit this exceptional treatment to be triggered by outside interest groups—many with political agendas—would infuse even more politics and grandstanding into the process. Finally, it would, in my view, be nigh impossible to create workable standards for a court to use to determine whether an Attorney General has exercised his or her discretion appropriately.

I hope this answers the Committee's questions. Thank you for permitting me to have some input into the Committee's very important undertaking with respect to the Independent Counsel Act.

Sincerely,

ROBERT S. BENNETT

LETTER FROM ROBERT B. FISKE, JR.

DAVIS POLK & WARDWELL
450 LEXINGTON AVENUE, NEW YORK, NY

March 8, 1999

Re: Hearings on Independent Counsel Act

The Honorable Fred Thompson, *Chairman*
United States Senate
Committee on Governmental Affairs
Washington, D.C.

DEAR SENATOR THOMPSON: Following up on the testimony that I gave before the Committee on March 3, I thought it might be helpful to write with some additional views on the Independent Counsel Act that I expressed orally at the hearing based on questions that arose there. I understand that this letter will be included in the record of the hearing.

As I stated at the hearing and in my written statement, if the statute is not renewed, I believe that the existing regulations providing for an Independent Counsel offer a viable basis for proceeding in the extremely limited number of situations where it may be desirable not to have the investigation handled by the Justice Department.

In those situations where an Independent Counsel brings an indictment, the result will be determined in open court, and the public is fully equipped to determine whether the indictment was appropriate. The only persuasive argument I have heard for renewing the statute is with respect to the situations in which there is no indictment. In these cases, there will be a higher degree of public confidence in the result of an Independent Counsel who is appointed by the Court rather than the Attorney General.

If the statute is to be reenacted, I would place as much authority as possible in the Attorney General rather than in the Court. To that end, I would suggest a procedure whereby the Attorney General submits a list of names to the Court for approval in advance of any particular appointment. If an Independent Counsel is needed, the Attorney General can make the choice from that list. That Independent Counsel, if he or she exonerates the subject, will have the advantage of having been specifically approved by the Court. Alternatively, although in my view less desirably, the Court could pick the Independent Counsel from a list submitted by the Attorney General.

For the reasons I stated at the hearing, if the statute were to be renewed, I would limit its coverage to the President, the Vice President and the Attorney General and would make the appointment of an Independent Counsel a full-time position. If the statute were so limited, I cannot imagine that there would be a problem finding outstanding Independent Counsels who would be willing to take a leave from their private practice to undertake such high-level investigations. The requirement that the Independent Counsel be full-time is important to ensuring public confidence in the investigation. Moreover, the requirement would help hasten the conclusion of the office's work, both because it would be a full-time endeavor and because of the built-in incentive to conclude work and return to private practice.

The statute also needs reform in the area of the preliminary investigation. Currently, the Attorney General is somewhat hamstrung during the preliminary investigation, because he or she cannot convene grand juries, plea bargain, grant immunity, or issue subpoenas. *See* 28 U.S.C. § 592(a)(2)(A). I suggest giving the Attorney General the power to convene grand juries and to issue subpoenas so that the preliminary investigation could be a meaningful one.

Furthermore, under the current statute, at the conclusion of the ninety-day preliminary investigation, the Attorney General must request that the Court appoint an Independent Counsel unless he or she concludes that there are no reasonable grounds to believe that further investigation is warranted. *See* 28 U.S.C. § 592(c)(1)(A). This standard, which has little in common with governing standards in other areas of criminal law, is ill-defined and too low. A better standard would be that proposed by Professor Ken Gormley in the *University of Michigan Law Re-*

view (December 1998): an application must be made when there exist substantial grounds to believe that a felony has been committed and further investigation is warranted.

The suggestion has been made by Senators Specter and others that there be a fixed time limit—18 months seems appropriate—after which the Independent Counsel must show cause in order to continue the investigation. To maintain authority in the Attorney General and to avoid constitutional problems concerning separation of powers, *see Morrison v. Olson,* 487 U.S. 654, 695 (1988), I would require that the showing be made to the Attorney General, not to the Court.

Finally, if the statute is to be renewed, I would suggest that the Congress eliminate the current final report requirement. First, a report which discusses the evidence at length may be unfair to the extent that it may, even implicitly, incriminate subjects who were nevertheless not indicted. Second, because of the temptation to make the report unassailable, the report requirement itself is a contributing cause to the time and expense concerns that have been so widely expressed. Although a brief summary report might be issued if the Independent Counsel sees fit in particular circumstances, there is no such requirement of prosecutors in ordinary cases and there should be no such requirement here.

Thank you for the opportunity to participate in the Committee's hearings,

Sincerely yours,

ROBERT B. FISKE, JR.

THE FUTURE OF THE INDEPENDENT COUNSEL ACT

WEDNESDAY, MARCH 17, 1999

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 9:33 a.m., in room SH–216, Hart Senate Office Building, Hon. Fred Thompson, Chairman of the Committee, presiding.

Present: Senators Thompson, Collins, Cochran, Specter, Lieberman, Levin, Akaka, Durbin, Torricelli, and Edwards.

OPENING STATEMENT OF CHAIRMAN THOMPSON

Chairman THOMPSON. The Committee will come to order, please. Today, we continue our hearings with regard to the reauthorization of the Independent Counsel Act.

Today, we are privileged to have Attorney General Reno with us. I think it is important to remember the original purpose of the Act—which was the feeling that it is very difficult, if not impossible, for the Attorney General, and the Justice Department, to investigate the President and other high-ranking government officials in the Executive Branch of Government without an obvious conflict of interest.

I think also behind the Act was the sentiment that we have all too much cynicism and skepticism today with regard to our institutions, and not only must justice be administered, but the appearance of justice is equally very important.

Attorney General Reno said in 1993, "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 conflict of interest. The Act thus served as a vehicle to further the public's perception of fairness in such matters, and to avert even the most subtle influences that might appear in an investigation of highly-placed executive officials." I think those sentiments are as valid today as they were then.

In our hearings up until this point, we have heard various criticisms of the statute. I certainly have been critical of the statute for many years. Many of the criticisms have to do with the back end of the process, so-called, and that is with regard to various actions and powers that the Independent Counsel have taken or powers that they have—too much power in too few hands; one job; too expensive; too long, and too burdensome to public officials.

However, there has been quite a bit of criticism with regard to the so-called front end of the process, too, and that is how Independent Counsel are chosen. Many people have said that one of the main problems with the Independent Counsel Act is it is triggered too easily, that there is a so-called hair trigger, that Independent Counsel are brought in in cases that never should be pursued.

The standard is, after a preliminary inquiry, whether there are reasonable grounds to believe that further investigation is needed. Many people think that almost invariably somebody will think that there are reasonable grounds to believe some further investigation is needed, and therefore the threshold is too low for triggering the Independent Counsel Act.

Also, with regard to the intent requirement, at that stage of the process the system is weighted toward the appointment of an Independent Counsel in that the Attorney General must determine by clear and convincing evidence that the subject did not have criminal intent. As the Attorney General said in her statement, it really requires proof of a negative by clear and convincing evidence.

In other words, because of the statutory requirements concerning the standard of proof, the statutory requirements with regard to intent, it is very heavily weighted toward appointment of Independent Counsels, and we have seen several who have been appointed.

But, today, I think we will be able to explore another problem that we have not had a chance to explore yet, and that is one having to do with a situation probably that is a bigger problem of public perception than anything else and that is when you are actually dealing with the President, who is really the only superior that the Attorney General has, and what happens when it appears that an Independent Counsel is called for and the Attorney General does not call for one.

We have seen in the case involving the President recently, I believe, a situation which is a classic case for the kind of situation the law was designed to cover, where it was not activated and not called for. The so-called hair trigger—even with all of the evidence presented—was not a hair trigger anymore in the case of the President.

I think we saw, for example, where, under the operation of the campaign finance laws passed back in 1974 that basically said a presidential candidate in a general election can take money out of the public treasury if he will agree not to get out into the fundraising business and not take additional monies. The clear purpose of the Act was to take presidential candidates out of that business. Pursuant to that, the President obtained $62 million in the general election in public funding after signing a certification that he would not take additional monies.

However, the President was able to raise, under his direction, an additional $44 million in large chunks, as large as $325,000, which went directly to benefit his campaign. The FEC had always taken the position that if there is coordination—which there was in this case—the President in the television ads directed the ads; he raised the money, he directed the ads, in many cases the composition of the ads, in many cases where the ads would be run. The FEC has taken the position in the past that if there is that kind of coordination with regard to television ads that contain an electioneering

message, that counts as a contribution. The Attorney General decided that there was no violation, basically because these were soft money contributions. They were run through the DNC, who in turn spent them on behalf—my contention—on behalf of the President's campaign, for the benefit of the President's campaign.

The Attorney General also held that there was no intent. In other words, she was able to get over this hurdle of proving a negative by clear and convincing evidence in this case, and held that there was no criminal intent because the President received a legal opinion, an in-house legal opinion, I believe, that this was appropriate because the television ads did not contain direct advocacy.

Of course, we have had disagreements about that for a long time now. I believe it is fair to say that never before—in the 20-some-odd-year period that, never before did any presidential candidate interpret the law that way or engage in anything remotely resembling this kind of conduct. Some say, well, the Dole campaign did it, too. Well, if they did, so be it. The same principles should apply.

But I think the real question here is, in a situation like this where the—usually, we have a situation in the Independent Counsel law where the facts are in dispute and the law is clear. Here, it is kind of reversed because the facts are so clear, but it was held that the law was confusing. And the question becomes who should decide these questions.

We will hear from witnesses today, for example, some of whom have been in this Justice Department, who feel like that this is a clearly wrong interpretation of the law. And I am not referring to Mr. La Bella here in this case either. But who decides? Should the Attorney General, in a matter concerning her superior and applying a law which is designed not only to administer justice, but to see that justice is administered, and give the appearance of it—should the Attorney General be the one making that decision or should an Independent Counsel be doing that?

I also think it is fair to say that not only is it an incorrect reading of the law, but it is bad policy. As Mr. Heymann has said, this interpretation really rules the Campaign Spending Act out of existence, and that we really have no campaign spending laws anymore.

I don't think the American people yet understand or realize the situation that we have right now. There is essentially no bar—sure you have to run it through a committee and you have to be a little careful with the wording of your ad, but there is essentially no bar to any contribution from any source, foreign or domestic, any amounts of money, corporate, large labor unions.

The Attorney General and I have had a disagreement as to whether or not her interpretation of the law allowed for foreign contributions. I have taken the position for a long time that it did. She disagreed with that, and now we have had a Federal district judge who has said indeed, yes, foreign contributions are allowable. If there is soft money, soft money is soft money, foreign or domestic.

So that is the situation that we have gotten ourselves into. It is going to have tremendous ramifications, I think, for this next political campaign. Some say that constitutionally, of course, the Executive Branch has to decide these things, and that is true. We don't

want Congress making these decisions. We couldn't under the Constitution if we wanted to.

But some say let's just make it clear that the Attorney General has the discretion anytime, not bind the Attorney General down with all these rules and regulations and confusing interpretations under the Independent Counsel Act. But let's just flatly say she has the discretion to call for an Independent Counsel anytime. Maybe this would clear things up.

The problem with that is that the Attorney General has that discretion now. Under the regulations, she can call for an Independent Counsel when she thinks it is appropriate, as well as under the statute, without having to go through these front-end hoops in terms of reaching a certain threshold.

Also, there is a statutory permission that the Attorney General has to bring in a special counsel. The Attorney General in her statement urges that we go back to that situation where special counsel be brought in. I think that is something that should be seriously considered.

In times past, there have been many instances where special counsels have been brought in. Former Attorney General Griffin Bell, for example, testified about situations that he had. Others have brought in special counsels, not with all the rubric of the Independent Counsel and all the problems connected with that, accountable to the Attorney General, but also having a measure of independence. And it has worked pretty well. But again, you know, you can't get away from the fact that it is still discretionary with the Attorney General.

We have had situations were where we have had testimony in our Committee with regard to the campaign spending laws where we had evidence of several people, some of whom have already been indicted, who raised millions of dollars for the President's campaign, much of it foreign money, some of whom were close associates to the President or the Vice President.

John Huang, hired at the DNC because the President and James Riady urged the DNC officials to hire him, made 67 visits to the White House. Charlie Trie, who was a close friend and political supporter of the President since the 1970's, laundered money from Ng Lap Seng and visited the White House 31 times. He is the one who poured out all the cash money orders on the table there for the President's legal defense fund. Mr. Wiriadinata contributed $450,000 illegally and told the President "James Riady sent me." Maria Hsia facilitated the infamous Buddhist temple fundraiser, a long-term political associate of the Vice President.

So you had many, many cases here of people, some of whom now have been charged with criminal activity, some of whom may be in the future, with close White House connections. And yet you would think it would call for at least a discretionary consideration, if not under the statute itself, as was used, for example, in the Whitewater case because the Attorney General had a political conflict of interest with James McDougal. I doubt if the Attorney General knows Mr. McDougal, but because of Mr. McDougal's association with the President, a discretionary Independent Counsel was asked for in that case.

But, again, even if you get away from the statute, you have a special counsel option, too. So all the options are there and always have been there. So the question becomes, keeping in mind the constitutional requirements of the Executive Branch to make these decisions, is there any halfway measure; is there a way that perhaps it could lodge in Justice, but under some new law or guidance or guidelines that might address some of these problems. I think that is one of the areas that we can pursue today, and we are happy to have the Attorney General with us to help in that regard.

Senator Lieberman.

OPENING STATEMENT OF SENATOR LIEBERMAN

Senator LIEBERMAN. Thanks, Mr. Chairman. Welcome, Attorney General Reno. The Chairman's references to the various decisions that you made, General Reno, regarding whether or not to appoint Independent Counsels in the particular case of the campaign finance matters say to me two things. One is why I believe we continue to need an Independent Counsel law or something like that, but, two, how complicated and how difficult the drafting is.

I don't think we are ever going to come to a point where a person making a decision, an Attorney General or any other institution or individual we give that authority, about whether and how to investigate the highest officials of our government when they are suspected of crime, that that individual will be immune from political criticism. It is just inherent in the function.

But I do think that we have an obligation to do our best to try to both establish a system which, to the greatest extent possible, guarantees not only the integrity of the investigation and prosecution, but the credibility to the public of the investigation and prosecution, and as we heard at the last hearing we held, the credibility of a decision by a prosecutor not to prosecute. And I think that credibility depends in good measure, understanding that we are never going to get political criticism out of this, on the independence of the investigation and prosecution.

I will say that the comments about your own decisions here suggest the difficulty of ever fully insulating a decisionmaker from such criticism. I don't mean to speak in defense of you. You defend yourself very well, and I am sure you will today, on these particular judgments.

But just to say by way of fact—and we talked about this some at the last hearing we held—there has been a tradition of Presidents bringing to the office of Attorney General people that they were pretty close to before. If I remember correctly—I am just going back—President Bush brought in Governor Thornburgh, with whom he had had a political relationship.

President Reagan, I think, brought his own lawyer here, William French Smith, to serve as his Attorney General. Of course, President Carter brought Griffin Bell, who was a distinguished partner in an Atlanta firm, but a very close adviser of his before. And we can keep going back. President Nixon brought John Mitchell, who was his law partner, to serve as Attorney General. President Kennedy brought his brother.

So it is interesting to me that as I think of recent Attorneys General, you are probably the one who has the fewest political, per-

sonal, and as far as I know no familial contact with the President who appointed you.

Second, as a matter of fact, in the time since 1994, when the Independent Counsel Statute was reauthorized—I was interested in going over the history when we started this series of hearings—you have actually appointed one-third of the Independent Counsels who have been appointed in the approximately two-decade history of the statute. I think you have appointed seven in the last 4 or 5 years.

So I think we have got to keep that in mind as we consider the judgments you made on the campaign finance matters. And on those—and I don't want to get into them in any detail—it just struck me one of my conclusions from the hearings that this Committee went through in 1997 was that some of the largest scandals that occurred in the 1996 election were, sadly, legal; that the standard unfortunately became for those who were actors in the campaign what was legal, not what was right, even though it was obvious that what they were doing was beyond and around the intention of our election laws.

But notwithstanding that, you are charged with the obligation of deciding what is legal or not. I leave the rest to you, but I do want to come back and say that, again, this indicates to me why we need an Independent Counsel, certainly for the second reason, which is the credibility of the investigation.

I am not speaking of what I am about to say to the Chairman because I know that his mind is open on whether to reauthorize an Independent Counsel in one form or another. But I do think it is an irony when I hear some who are clearly and absolutely opposed to reauthorization of an Independent Counsel in any form then criticize you for not appointing Independent Counsels in some of these cases.

Having said all that, I was disappointed by Mr. Holder's testimony in the House and what I take to be the direction of your testimony today, although I look forward to hearing it and discussing it with you, because I do think that though some of the Independent Counsels have functioned in ways that have been extremely controversial and subject to question by us and the public and perhaps yourself, that the basic purpose of the law is still a valid one.

I can't think of a way in which bringing this function totally within the Justice Department would serve the continuing public interest in independent investigation and prosecution when the highest officials of our government are suspected of criminal behavior. So I look forward to your testimony and to the discussion of it afterward.

Thank you, Mr. Chairman.

Chairman THOMPSON. Thank you very much. Attorney General Reno.

TESTIMONY OF HON. JANET RENO, ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Attorney General RENO. Mr. Chairman, Senator Lieberman, Members of the Committee, I appreciate the opportunity to be before you today and I look forward to working with you on what is

obviously a very complex, difficult issue in which there may be no right answer because of the structure of government that we have.

I request that my prepared statement be entered into the hearing record, and would like to summarize my remarks.

Chairman THOMPSON. It will be made a part of the record.

Attorney General RENO. I want to state an important limitation regarding my testimony. I am concerned that my comments not in any way interfere with ongoing investigations or litigation involving the Independent Counsels, and therefore I will be unable to give specific examples or direct my remarks to a specific Independent Counsel or a specific investigation, nor should any comments I make be considered to be directed toward them.

In 1993, I testified in support of the statute. I said that the law had been a good one, helping to restore public confidence in our system's ability to investigate wrongdoing by high-level Executive Branch officials. I believed then—and, Senator Lieberman, I believe now—that there are times when an Attorney General will have a conflict of interest. I also believed then as I do now that to keep the public's faith in impartial justice that in such a case someone other than the Attorney General must sometimes be put in charge of the investigation, and I think that is an important consideration.

Prior to becoming Attorney General, I had functioned under a procedure in Florida under which the governor could reassign a particular matter to another prosecutor in the event of a conflict of interest. I used that a number of times in recusing myself. This mechanism provided both for parity and accountability.

Parity was ensured because an elected prosecutor of equal rank would oversee the case as part of his or her caseload and within his or her budget, accountability because the elected governor and the prosecutor would both have to answer to the public for their actions. This procedure also ensured that the prosecutor who was recused had no further control of the case. Based on that experience, I believe that the Independent Counsel Act could have the same effect due to its particular mechanism for transferring prosecutorial power to an outside person.

From the time the Act was reauthorized, I have focused on what the Act said, not what I thought it should say, except with respect to budget provisions, so that I could ensure the most correct application of the Act according to congressional intentions.

As time came for Congress to consider reauthorization, I focused on what I thought it should say based on my experience in these 5 years, during which time I have asked for the appointment of at least seven Independent Counsels, and expanded their jurisdictions when appropriate. I have come to believe, after much reflection and with great reluctance, that the Independent Counsel Act is structurally flawed and that those flaws cannot be corrected within our constitutional framework.

In my view, the Act has failed to accomplish its primary goal—the enhancement of public confidence in the fair and impartial administration of the criminal law. This is so in large part because the Act requires the Attorney General to make key decisions at several critical stages of the process whether to open a preliminary investigation, whether to seek the appointment of an Independent

Counsel, what subject to refer to the court when seeking a counsel, and whether to remove the counsel or not.

This central role for the Attorney General was not just a congressional choice, but a constitutional mandate. In *Morrison v. Olson,* the Court make clear that the Act was constitutional because it required the Executive Branch, through the Attorney General, to play a critical role in these key decisions.

But the very thing that makes the Act constitutional is also what prevents it from accomplishing its goals, for an Attorney General, after all, is a member of the President's Cabinet, and as such his or her decisions will inevitably be second-guessed and criticized, no matter what decision is made.

On the other side of the equation, the decisions of an Independent Counsel are no less subject to criticism and second-guessing. Once again, I am not saying that this is fair or unfair, justified or unjustified, right or wrong. I am just saying that it is natural and that this climate of criticism and controversy weakens rather than strengthens the public's confidence in the impartial exercise of prosecutorial power, and that at the end of the day undercuts the purpose of the Act. Instead of giving people confidence in the system, the Act creates an artificial process that divides responsibility and fragments accountability, and I think that is key to our discussion today.

The Act has other built-in characteristics that I believe have also contributed to the public's concern over the years. We have heard much about the extraordinary expense associated with a number of Independent Counsel investigations. These costs are in large part built into a system that requires the counsel to set up a brand new office—it means hiring lawyers, administrators, clerical staff, consultants, and renting out office space—and are compounded by the unique expectations placed upon a counsel that the Independent Counsel will go down every investigative side street, that he or she will prepare a comprehensive final report, and so on.

The statute imposes other costs that are not so easily quantified, such as its effect on the role of the prosecutor and her or his relationship to the subjects of the investigation. I have been a prosecutor for most of the last 25 years, and I think I can fairly say that the Independent Counsel Act creates a prosecutor who is unlike any other.

Virtually all other prosecutors have limited time, limited budgets, and a great many actual and potential targets. And so we have to make choices. We have to identify the most important cases, make judgments about the most important allegations, and allocate our limited resources accordingly. Also, we draw upon the collective experience of senior prosecutors to develop consistent prosecutorial practices from case to case.

I am talking about what is known as prosecutorial discretion. As you know, this exercise is not a formulaic science. Rather, much like common sense judgment and wisdom, it comes with experience and it comes from handling a variety of cases, so that you learn to treat similar cases similarly. Deciding to prosecute isn't a simple matter of deciding that the law has been broken. It also entails a much more complicated judgment about competing priorities, prosecutorial policies, and the public interest.

The Independent Counsel Act distorts this process. In trying to ensure independence, the statute creates a new category of prosecutors who have no practical limits on their time or budgets. They have no competing public duties and no need to make difficult decisions about how to allocate scarce resources. They are not always required to take into account the overall prosecutorial interests or traditions of the Department of Justice.

An Independent Counsel typically is charged with investigating one person, and so all of his or her energy, ingenuity and resources are pointed in one direction. Add to this the fact that an Independent Counsel may labor in the public spotlight and under the watchful eye of history. An Independent Counsel will be judged not on the basis of a broad track record, but on one case alone. If the counsel uncovers nothing or fails to secure an indictment and conviction, some may conclude that he or she has wasted both time and money.

All of these factors combine, I believe, to create a strong incentive for the Independent Counsel to do what prosecutors should not be artificially pushed to do, that is to prosecute. Again, I am not commenting on the work of any particular Independent Counsel. These are simply the incentives that the statute creates.

It is for these reasons that the Justice Department has concluded that the Act is structurally and fundamentally flawed, and that it should not be reauthorized. But let me clear also about what our position does not mean. It does not mean that allegations of high-level corruption should be pursued with anything less than the utmost vigor and seriousness of purpose. And it does not mean that the Department considers itself capable of pursuing, in the ordinary course, each and every allegation of corruption at the highest levels of our government. We know that sometimes a special prosecutor is in order.

Yet, we have come to believe that the country would best be served by a return to the system that existed before the Independent Counsel Act, when the Justice Department took responsibility for all but the most exceptional of cases against high-ranking public officials and when the Attorney General exercised the authority to appoint a special prosecutor in exceptional situations.

Our Founders set up three branches of government—a Congress that would make the laws, an executive that would enforce them, and a judiciary that would decide when they had been broken. The Attorney General, who is appointed by the President and confirmed by the Senate, is publicly accountable for her decisions. The Attorney General must answer to Congress and ultimately to the American people. And in this day of aggressive journalism, sophisticated public advocates and skilled congressional investigators, we are held, I believe, more accountable than ever.

In contract, the Independent Counsel is vested with the full gamut of prosecutorial powers, but with little of its accountability. He has not been confirmed by the Senate and he is typically not subject to the same sorts of oversight or budgetary constraints that the Department faces day in and day out. Accountability is no small matter. It goes to the very heart of our constitutional scheme. Our Founders believed that the enormity of the prosecutorial power

and all the decisions about who, what and whether to prosecute should be vested in one who is responsible to the people

That way—and here I am paraphrasing Justice Scalia's dissent in *Morrison v. Olson*—whether we are talking about over-prosecuting or under-prosecuting, the blame can be assigned to someone who can be punished. It is for this reason that the American republic has survived for over 200 years without an Independent Counsel Act.

When high-level officials have been accused of wrongdoing, the Department has not hesitated to fully investigate. Over the last two decades, the Department of Justice has obtained the convictions of 13,345 public officials and employees from both sides of the political aisle. The Department prosecuted Vice President Spiro Agnew while he held office, and also Bert Lance, the Director of the Office of Management and Budget, soon after he left the administration.

The Attorney General has also stood ready under his or her authority to appoint a special prosecutor when the situation demanded it. Paul Curran investigated allegations concerning a peanut warehouse owned by President Carter's family while he was still in office. Leon Jaworski investigated President Nixon, members of his Cabinet, and others. And although the President ordered the firing of Mr. Jaworski's predecessor, Jaworski showed that a non-statutory special prosecutor can do exactly what must be done to investigate high-level members of an administration even when the President is bent on subverting the investigation. Perhaps the real lesson of our Nation's experience with the special prosecutor during Watergate is not that the old system was broken, but that it worked.

Apart from the major structural problems I have discussed, our experience has also persuaded us that other problems with the act further exacerbate its costs and burdens. I have discussed these other problems that may have legislative solutions in my prepared remarks. Those problems can generally be grouped into the following subject areas—the scope of the Act, the triggering mechanism, the standard for seeking the appointment, the selection process for Independent Counsels, dispute over proper jurisdiction, the removal power, and the reporting requirement.

I want to reiterate that the Department believes that any such changes, while making a bad law better, would not remedy the statute's fundamental flaws. The Department of Justice therefore joins the many experts, such as Senator Baker, former Attorneys General William Barr and Griffin Bell, and former U.S. Attorney and Independent Counsel Joseph di Genova, who have concluded that the fundamental flaws in the Act will remain even if Congress addressed all of these other problems in the Act.

In conclusion, the mission of the Independent Counsel Act is as worthy today as it was back in 1978. There are a limited number of criminal matters that should be handled in a special way in order to ensure the American people that politics will play as little role as possible in our criminal justice process. But we at the Department have come to believe that the Act's goals have not been well served by the Act itself and that we would do better without the statute.

The internal regulations that are now on the books provide a set of procedures for the appointment of such a non-statutory Independent Counsel. These regulations would naturally require review in the event the Act lapses. The Department is in the process of drafting new internal regulations that would supersede the existing ones, and we will be happy to submit them for your review early in the process so that we may have the benefit of your views. But I want to emphasize that even without any regulations at all, the Attorney General has the ability to appoint a special prosecutor, and I, for one, would not hesitate to do so in an appropriate case, should the Act lapse.

As I said at the outset, my change of heart about this statute has not come lightly. To those who question me about this or tell me, as some already have, that they told me so, I can only say this—I have now seen how the statute operates close up, probably closer up than anybody in American history, and I know more than I did before. It is as simple as that. I am reminded of something Justice Frankfurter once said, "Wisdom too often never comes, and so one ought not to reject it just because it comes late."

I thank you for inviting me to testify. The ultimate issue is responsibility. I go back to the point that I made that the system as it exists now diffuses responsibility, divides responsibility, and fragments accountability. If I am going to get blamed for it, I would like to be responsible for it and have the tools to do the job.

[The prepared statement of Attorney General Reno follows:]

PREPARED STATEMENT OF ATTORNEY GENERAL JANET RENO

Mr. Chairman, Members of the Committee:

Thank you for inviting me to present the views of the Department of Justice on the Independent Counsel Act. The Justice Department has administered the Act since its inception in 1978. It has done so under my watch since 1994, when the statute was last reenacted. Since its reauthorization, the Department has had extensive experience with the statute—experience that has influenced our assessment of it. After much reflection and inquiry, we have decided—reluctantly—to oppose reauthorization of the Independent Counsel Act.

Before explaining the reasons for this decision, I must preface my observations with a caveat. It is very important that my remarks do not, in any way, interfere with any ongoing investigations or litigation involving an Independent Counsel. And so I cannot comment on the work of any particular Independent Counsel, or provide examples or details regarding a specific investigation. I will focus, instead, on the structure of the Independent Counsel Act itself and on what I believe are its inherent, though unintended, consequences. In 1993, as many of you know, I testified in support of the statute. I said 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. I believed then, and I believe now, that there are times when an Attorney General will have a conflict of interest.

I also believed then—as I do now—that to keep the public's faith in impartial justice, that in such a case someone other than the Attorney General must sometimes be put in charge of the investigation.

Prior to becoming Attorney General, I had functioned under a procedure in Florida under which the Governor could reassign a particular matter to another prosecutor in the event of a conflict of interest. This mechanism provided for parity and accountability. Parity was ensured because an elected prosecutor of equal rank would oversee the case as part of his or her caseload and within his or her budget; accountability because the elected Governor and the prosecutor would both have to answer to the public for their actions. This procedure also insured that the prosecutor who was recused had no further control of the case. Based on that experience, I believed that the Independent Counsel Act could have the same effect due to its particular mechanism for transferring prosecutorial power to an outside person.

However, after working with the Act, I have come to believe—after much reflection and with great reluctance—that the Independent Counsel Act is structurally flawed and that those flaws cannot be corrected within our constitutional framework.

The Origins of the Independent Counsel Act

Let me begin by addressing the reasons that gave rise to the present Independent Counsel Act. Congress passed the Act as a post-Watergate reform, intending to prevent the reoccurrence of the crisis in government that arose when President Nixon directed that Special Prosecutor Archibald Cox be fired. President Nixon's decision ultimately precipitated the resignation of the Attorney General and the Deputy Attorney General.

The Act was based upon the premise that a conflict of interest may exist when the Justice Department of any particular Administration investigates the highest ranking officials of that Administration. Therefore, the Act established a prosecutorial entity to handle such cases that would be separate and apart from the Administration and the Department of Justice. Only in this way, the drafters reasoned, could the investigation have sufficient credibility to provide assurance to the American people that there had been no coverup and no undue political influence exerted in favor of the Administration.[1]

There can be no question that these goals are highly desirable. In fact, by seeking to prevent conflicts of interest, the Independent Counsel Act appeared to be consistent with the long-established practices of the Department of Justice and other prosecutorial offices, in that it provided an alternative prosecutor in those limited circumstances in which the prosecutor with original jurisdiction was forced to recuse himself or his office.

The Act Has Failed to Promote Public Confidence that Politics is Absent From the Process

Unfortunately, the Act has failed to live up to its promise. In the first place, it has failed to instill confidence among the public that politics has been removed from the process. This is so, in large part, because the Act requires the Attorney General to make key decisions at several critical stages of the process—whether to open a preliminary investigation, whether to seek appointment of an Independent Counsel, what subject matter to refer to the court when seeking a counsel, and whether to remove him or her. This central role for the Attorney General was not just a congressional choice, but a constitutional mandate. In *Morrison v. Olson,* the Court made clear that the Act was constitutional because it required the Executive Branch—through the Attorney General—to play a critical role in these key decisions. But the very thing that makes the statute constitutional is also what prevents it from accomplishing its goals. For an Attorney General, after all, is a member of the President's cabinet, and as such, his or her decisions will inevitably be second guessed and criticized no matter what decision is made.

Whenever a high-level official is accused of wrongdoing, the stakes are high. Almost by definition, these are significant cases that generate a lot of interest—in the newspapers, up here on Capitol Hill, and in political circles across the country. As a consequence, just about every decision becomes controversial—be it an Attorney General decision whether to trigger the Act and seek the appointment of an Independent Counsel, or an Independent Counsel's decision to pursue a particular, prosecutorial course. And I have come to believe that the statute puts the Attorney General in a no-win situation. Or, as I have said in the past: an Attorney General is criticized if she triggers the statute, and criticized if she doesn't.

On the other side of the equation, the decisions of an Independent Counsel are no less subject to criticism and second-guessing. Once again, I'm not saying any of this is fair or not fair, justified or not justified, right or wrong. I'm just saying that it is natural, and that this climate of criticism and controversy weakens—rather than strengthens—the public's confidence in the impartial exercise of prosecutorial power. And that, at the end of the day, undercuts the purpose of the Act. Instead of giving people confidence in the system, the Act creates an artificial process that divides responsibility and fragments accountability.

The Act Removes the Constraints of Prosecutorial Discretion

The Act has other built-in characteristics that, I believe, have also contributed to the public's disenchantment over the years. We have heard much about the extraordinary expense associated with a number of Independent Counsel investigations.

[1] H.R. Rep. No. 1307, 95th Cong., 2d Sess. 3 & n. 5 (1978); S. Rep. No. 170, 95th Cong., 2d Sess. (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 4221, 4281–82.

These costs are, in large part, built into a system that requires an Independent Counsel to set up a brand-new office—which means hiring lawyers, administrators, clerical staff, consultants, and renting out office space—and are compounded by the unique expectations placed upon a Counsel: that the Independent Counsel will go down every investigative side street, that he or she will prepare a comprehensive final report, that the Counsel will litigate attorneys fees. This is a very expensive way to do business.

The statute imposes other costs that are not so easily quantified—such as its effect on the role of the prosecutor and her or his relationship to the subjects of the investigation. I have been a prosecutor for most of the last 25 years, and I think I can fairly say that the Independent Counsel Act creates a prosecutor who is unlike any other. Virtually all other prosecutors have limited time, limited budgets, and a great many actual and potential targets. And so we have to make choices: We have to identify the most important cases, make judgments about the most important allegations, and allocate our limited resources accordingly. Also, we draw upon the collective experience of senior prosecutors to develop consistent prosecutorial practices from case to case.

I'm talking, of course, about what's known as prosecutorial discretion. Several of you are former prosecutors, and so you know that the exercise of this discretion is not a formulaic science. Rather, much like common sense, judgment, and wisdom, it comes with experience, and it comes from handling a variety of cases so that you learn to treat similar cases similarly. Deciding to prosecute, isn't a simple matter of deciding that the law has been broken. It also entails a much more complicated judgment about competing priorities, prosecutorial policies, and the public interest.

The Independent Counsel Act distorts this process. In trying to ensure independence, the statute creates a new category of prosecutors who have no practical limits on their time or budgets. They have no competing public duties, and no need to make difficult decisions about how to allocate scarce resources. They are not required to take into account the overall prosecutorial interests or traditions of the Department of Justice (they are bound only to comply with the written and other established policies of the Department of Justice to the extent not inconsistent with the purposes of the statute). An Independent Counsel typically is charged with investigating one person—and so all of his or her energy, ingenuity, and resources are pointed in one direction. Add to this the fact that an Independent Counsel may labor in the public spotlight and under the watchful eye of history. An Independent Counsel will be judged, not on the basis of a broad track record, but on one case alone. If the Counsel uncovers nothing, or fails to secure an indictment and conviction, some may conclude that he or she has wasted both time and money.

All of these factors combine, I believe, to create a strong incentive for the Independent Counsel to do what prosecutors should not be artificially pushed to do—that is, to prosecute. Again, I am not commenting on the work of any particular Independent Counsel. These are simply the incentives that the statute creates.

A Return to First Principles

It is for these reasons that the Justice Department has concluded that the Independent Counsel Act is structurally and fundamentally flawed, and that it should not be reauthorized. But let me be clear, also, about what our position does not mean. It does not mean that allegations of high-level corruption should be pursued with anything less than the utmost vigor and seriousness of purpose. And it does not mean that the Department considers itself capable of pursuing, in the ordinary course, each and every allegation of corruption at the highest levels of our government. We know that, sometimes, a special prosecutor is in order.

Yet we have come to believe that the country would be best served by a return to the system that existed before the Independent Counsel Act—when the Justice Department took responsibility for all but the most exceptional of cases against high-ranking public officials, and when the Attorney General exercised the authority to appoint a special prosecutor in exceptional situations.

Our Founders set up three branches of government: a Congress that would make the laws, an Executive that would enforce them, and a Judiciary that would decide when they had been broken. The Attorney General, who is appointed by the President and confirmed by the Senate, is publicly accountable for her decisions. The Attorney General must answer to the Congress—and, ultimately, to the American people. And in this day of aggressive journalism, sophisticated public advocates, and skilled congressional investigators, we are held—I believe—more accountable than ever.

In contrast, the Independent Counsel is vested with the full gamut of prosecutorial powers, but with little of its accountability. He has not been confirmed by the Senate, and he is not typically subject to the same sorts of oversight or budgetary

constraints that the Department faces day in and day out. Accountability is no small matter. It goes to the very heart of our constitutional scheme. Our Founders believed that the enormity of the prosecutorial power—and all the decisions about who, what, and whether to prosecute—should be vested in one who is responsible to the people. That way—and here I'm paraphrasing Justice Scalia's dissent in *Morrison v. Olson*—whether we're talking about over-prosecuting or under-prosecuting, "the blame can be assigned to someone who can be punished."

It was for this reason that the American republic survived for over 200 years without an Independent Counsel Act. When high-level officials have been accused of wrongdoing, the Department has not hesitated to fully investigate. Over the last two decades, the Department of Justice has obtained the convictions of 13,345 public officials and employees from both sides of the political aisle. The Department prosecuted Vice President Spiro Agnew while he held office and also Bert Lance, the Director of the Office of Management and Budget, soon after he left the Administration.

The Attorney General has also stood ready, under his or her authority, to appoint a special prosecutor when the situation demanded it. Paul Curran investigated allegations concerning a peanut warehouse owned by President Carter's family while he was still in office. Leon Jaworski investigated President Nixon, members of his Cabinet, and others. And although the President ordered the firing of Mr. Jaworski's predecessor, Archibald Cox, Jaworski showed that a nonstatutory special prosecutor can do exactly what must be done: investigate high-level members of an Administration even when the President is bent on subverting the investigation. Perhaps the real lesson of our Nation's experience with the Special Prosecutor during Watergate is not that the old system was broken—but that it worked.

Apart from the Act's overall structural problems, our experience has persuaded us that other problems further exacerbate the statute's costs and burdens. These other problems exist in a different category from the ones I have been talking about, as they could be addressed—with varying degrees of effectiveness—with changes to the statutory language here and there. And although I will share these thoughts with you, I want to reiterate that the Department believes that any such changes—while making a bad law better would not remedy the statute's fundamental flaws.

The Scope of the Act

First, we have concluded that the group of individuals automatically covered by the Act is too broad. By extending mandatory coverage to so many individuals including White House officials at a certain pay level, cabinet officers, campaign officers, and others the Act presumes a conflict of interest where none usually exists.

The Department of Justice can effectively, aggressively and credibly investigate or prosecute the majority of these public officials. Mandatory coverage of such a large group is particularly unnecessary in light of the Act's alternative provisions which give the Attorney General discretion to seek appointment of an Independent Counsel whenever the prosecution of any individual would constitute a conflict of interest.

The Triggering Mechanism

Another area where the Department has encountered repeated difficulties involves the mechanisms and standards by which, the Act is "triggered." Having now applied these concepts, I understand how hard it is to write into the U.S. Code the sort of intricate standards that prosecutors develop after years of experience. I can only say that the statute, while making a valiant attempt, does not succeed.

During an initial inquiry under the Act, the Attorney General must decide in 30 days whether there are grounds to investigate whether a covered person "may have violated any Federal criminal law." In making this decision, the Act requires the Attorney General to decide whether the information supporting the allegations is (1) specific, and (2) from a credible source. Now, as a prosecutor, I've had a fair amount of experience with assessing credibility. I've learned—sometimes the hard way—that credible sources are sometimes mistaken. And I've also learned that less than credible sources are sometimes accurate. The statute seems to ignore these possibilities. Also, the term "may have violated" is very broad and subject to many interpretations. As a result, the Act sometimes requires the Department to take action that it would never take in an ordinary case against a non-covered person.

The most serious problem with the Act during the initial inquiry phase, however, is its treatment of the issue of criminal intent. The Act tells the Attorney General that no matter what the evidence shows—or does not show—about the subject's intent, she is not to consider it. Now, as many of you well know, intent is often the critical question in criminal law. Forcing the Attorney General to decide whether an allegation is specific and credible—and at the same time barring her from consid-

ering the central element of intent—is unfair to the subject and misleading to the public.

The Decision Whether to Seek an Independent Counsel

Following a preliminary investigation, an Attorney General must decide whether an Independent Counsel should be appointed. She must seek an Independent Counsel if she concludes that "there are reasonable grounds to believe that further investigation is warranted." This standard, too, is unclear and subject to differing interpretations. After all, most of us think that "some" further investigation can almost always be warranted, and there's usually a doubt or two that you'd like to resolve—especially if there are no constraints on time and money. But should an investigation proceed even where there is no reasonable prospect of making a prosecutable case? The statute does not provide a clear answer to that question. And any effort to read reason into the standard in a particular case often generates much criticism and controversy.

The problem regarding criminal intent persists into this phase of the process as well. Again, the Act prohibits the Attorney General from deciding that no further investigation is warranted because of a lack of criminal intent unless, that is, there is clear and convincing evidence that the subject did not have the requisite intent. This standard—which requires proof of a negative by clear and convincing evidence—is extraordinarily difficult to apply. And it also stands traditional prosecutorial decisions on their heads. In almost every criminal case, we will not proceed without some positive evidence of intent.

Another problem with the statute is that it deprives the Department of the normal investigative tools: we cannot subpoena witnesses or documents, convene grand juries, plea bargain, or grant immunity during the preliminary investigation. Without the subpoena power, we are greatly handicapped in our search for the truth. And coupled with the short timetable for conducting the investigation, this restriction can prompt the unwarranted appointment of an Independent Counsel because we can't find all the facts that we otherwise could have, given the proper tools.

The Selection Process for an Independent Counsel

After the Attorney General has decided to seek the appointment of an Independent Counsel under the Act, the next step involves the actual selection process by the three-judge panel known as the Special Division. However, the Act gives the judges no real standards or qualifications to look for in making their choice. It provides for no selection protocol, visible or otherwise. And, as Judge Butzner has stated, in some instances the Special Division has encountered great difficulty in finding someone available for appointment as an Independent Counsel, resulting in a significant delay of the investigation.

Jurisdictional Disputes

The Act's jurisdictional provisions have emerged as a serious problem, at times leading to disagreements between Independent Counsels and the Department and often requiring a great deal of time to resolve. While most disagreements have been ironed out cooperatively between Independent Counsels and the Department, there have been several conflicts over who should handle certain matters. At the heart of these disagreements seems to be a basic and fundamentally different view as to the appropriate role of the Independent Counsel. The Department views the Act as a limited solution to a limited problem: that is, as an appropriate response when a conflict of interest precludes us from investigating specific allegations against a particular person. In our view, matters outside that limited category of cases can—and should—be handled by the Department in the ordinary course.

Given the ambiguities in the statute, however, there is a natural tendency for Independent Counsels to view themselves as full-scale prosecutors, and to believe themselves authorized to investigate all avenues—wherever (and to whomever) they may lead. This impulse to expand one's jurisdiction is, again, a natural reaction to the statutory scheme itself—and to the incentives it creates to secure convictions or to otherwise justify an investigation's time and expense.

There has been some litigation over this issue. Rejecting the Department's position that the Attorney General's consent is required, the Special Division has held that it may refer to an Independent Counsel the jurisdiction to investigate matters that are "related" to the original grant of jurisdiction without first obtaining the consent of the Attorney General.

In addition, the courts have defined a "related" matter in a way that we believe is unduly expansive. As a result, an Independent Counsel can be given jurisdiction to investigate the friends and associates of a covered person for alleged crimes that have only the most tangential relationship to the core allegations. I suggest that

this expansion goes far beyond any possible need for the statute, and that it hurts—rather than helps—the statute's effectiveness.

In addition to the "relatedness" problem, there is also confusion about what constitutes a matter "arising out of" an Independent Counsel's investigation. Remember, the statute gives an Independent Counsel jurisdiction to investigate crimes that "may arise out of" the central investigation. The Department has always taken the position, based on examples in the Act and the legislative history, that this language refers to interference with the investigation itself, like obstructing justice or committing perjury. Some Independent Counsels and some courts, however, have read the language to cover any crime unearthed by the Independent Counsel during the course of the investigation. Again, we believe that such jurisdictional expansions are unwarranted, unintended, and unwise.

Finally, there have also been disagreements between the Department and Independent Counsels over the counsels' authority to handle civil matters. The Department does not believe that independent criminal prosecutors should be able to bind the United States in civil suits and settlements. We believe that this provision was intended to be limited to instances where the civil authority is essential to the successful completion of the criminal matter, such as handling a civil contempt case involving a witness, or intervening to request that a civil case be stayed pending resolution of the criminal case.

Removal

This discussion of jurisdictional disputes and issues brings me back to the subject of checks and balances—or the lack thereof—provided by the Act. It is difficult for the Department to litigate or even express these views without being accused of improper interference with an Independent Counsel's work. Indeed, I will not be surprised if my observations today are challenged by some on that ground—though, as I said at the outset, and as I've tried to make clear, I am talking about the structure of the Act and the incentives it creates, not the actions of any particular Independent Counsel. If even such generalized testimony can be read as impinging on an Independent Counsel's independence, I would ask you to think about how much more difficult it would be for an Attorney General to exercise his removal authority under the Act. The removal provision which the Supreme Court highlighted as central to the statute's constitutionality allows the Attorney General to remove an Independent Counsel for enumerated causes. Implicit in the Attorney General's authority to remove must be the authority to investigate serious allegations of misconduct that come to her attention. But how can the Department investigate an Independent Counsel without being charged with trying to bridle the Counsel's independence? It will always be extremely difficult for any Attorney General to exercise the authority to investigate, let alone remove, an Independent Counsel.

The Final Report Requirement

A final problem that I wish to address briefly is the Act's requirement that an Independent Counsel prepare a final report. On one hand, the American people have an interest in knowing the outcome of an investigation of their highest officials. On the other hand, the report requirement cuts against many of the most basic traditions and practices of American law enforcement. Under our system, we presume innocence and we value privacy. We believe that information obtained during a criminal investigation should, in most all cases, be made public only if there is an indictment and prosecution, not in lengthy and detailed reports filed after a decision has been made *not* to prosecute. The final report provides a forum for unfairly airing a target's dirty laundry. And it also creates yet another incentive for an Independent Counsel to over-investigate—in order, again, to justify his or her tenure and to avoid criticism that the Independent Counsel may have left a stone unturned. We have come to believe that the price of the final report is often too high.

Conclusion

The mission of the Independent Counsel Act is as worthy today as it was back in 1978. There are a limited number of criminal matters that should be handled in a special way, in order to assure the American people that politics will play no role in our criminal justice process.

But we at the Department have come to believe that the Act's goals have not been well-served by the Act itself—and that we would do better without a statute. Instead, the Department would utilize the Attorney General's authority to appoint a special prosecutor when the situation demands it. The regulations that are now on the books provide a set of procedures for the appointment of such a non-statutory Independent Counsel. These regulations would naturally require review in the event that the Act lapses. But I want to emphasize that this Committee and Congress can rest assured that if the Act expires with no new legislation enacted, that the De-

partment will be prepared to enforce its regulations to address any issue that the Act was intended to cover. As we move forward in making changes to these regulations, we greatly encourage input from this Committee.

As I said at the outset, my change of heart about this statute has not come lightly. To those who question me about this—or who tell me, as some already have, that they told me so—I can only say this: I've now seen how the statute operates close-up, and I know more than I did before. It is as simple as that. I'm reminded of something Justice Frankfurter once said: "Wisdom too often never comes, and so one ought not to reject it merely because it comes late."

Again, I appreciate the chance to share my thoughts with you, and I will be happy to respond to your questions.

Chairman THOMPSON. Thank you very much, Attorney General Reno. Your criticisms are similar to many of the ones that we have heard already, and they are similar, as I recall, to my opening statement when we started these hearings. I think almost in every instance they are valid concerns. Whether or not they should be determinative, I think, is yet to be seen.

My concern and the concern of a lot of people, most of the critics of the Act, has been there from the very beginning, not because of the way a particular Independent Counsel would behave, because we all know when we create a law we have to look and see what the outermost limits are and assume that those limits will be achieved one time or another. It has to do with the structure of the law and not the individual as we analyze whether or not it is a good law.

You pointed out structural defects. I note your change of opinion. I do not criticize you for that. I think that that is commendable in many cases, if a person feels that recent events shed new light on a particular matter. But you refer in your statement to structural flaws, and those flaws have been there from the beginning. There have been amendments to it from time to time.

Certainly, back in 1993, when you supported the Act, the Department position—and you had people in the Department at that time, I am sure, who had been there for some time; some of those are still there. So there is a continuity there. We had already seen most of the criticisms of the law. They were on the table, all the ones that you raised today, all of the criticisms of Mr. Walsh's investigation, all of the criticisms concerning Mr. Meese and the fact that there was a final report that, although he wasn't indicted him, accused him of criminal conduct.

So when you refer to structural defects, what structural defects have become apparent to you in the last few years that have not been out there for all this time? Justice Scalia, I am sure, will be gratified that you are now quoting him and his dissent, but that was back in 1988, and he pointed out a lot of these things, too.

Obviously, we have experience with various counsels since then. Is that the reason for your view today, the experience with those counsels, or is it as you refer to in your statement, structural deficiencies that, while pointed out by a lot of people, were not readily apparent up until recently?

Attorney General RENO. I refer to the structural deficiencies because what I have tried to do is grapple within the last months as I faced this issue with what we could do to change the statute to address the problem of removing the Attorney General from the process.

I had expected, based on my experience in Florida, that the Act could be implemented so as to inspire public confidence. I did not account for the focus and the immediate posture of any decision I made to see it plunged into the political process, with people on one side saying I asked for too many and people on the other side saying I asked for too few, and people saying I should do this and people saying I should do that.

I obviously became a central focus for it, and so I have tried to figure out how can you design something that takes the person who has the conflict out of the process. I have gone over it and over it and over it, and I can't figure out how to do it consistent with *Morrison v. Olson.*

Chairman THOMPSON. Well, I wonder if that is a structural defect with the statute or that has to do with what you would call a political environment, or maybe if it had to do just with your decisions. I mean, frankly, you talk about damned if you do, damned if you don't. I don't really recall—and this is no reflection on you one way or the other; it is not passing judgment on your decisions, but I don't recall other Attorneys General having this "damned if you do and damned if you don't."

They have been criticized for sure, but I don't recall anything like that. And maybe that is the point you are trying to make. Attorneys General have made decisions to appoint Independent Counsels, decisions not to. But, frankly, I don't—of course, the Watergate situation, I guess, stands by itself—I don't recall all this controversy where the Attorney General is in the middle of all this until your situation.

Attorney General RENO. Well, you haven't had an Attorney General who has been around as long or who has made so many decisions or who has had to come up against probably one of the most complex, confusing laws that Congress ever passed, which is the Federal Elections Act.

Chairman THOMPSON. Well, it has been on the books for a long time.

Attorney General RENO. No. I am talking about the Federal Elections Act.

Chairman THOMPSON. Well, that has been on the books for a long time, too.

Attorney General RENO. And it becomes more confused with the passage of time.

Chairman THOMPSON. Well, it has become more confusing lately, I assure you. But for about 20 years, there were some basic assumptions there that people operated under that they can't operate under now.

But going to another point, you and I clearly are not going to resolve our different views in terms of what the election laws require. But on a slightly related point, you chose not to call for an Independent Counsel, for the views that you have stated often. But you have the option also to call for an Independent Counsel not because the criteria is reached, but because of a political conflict of interest, is what the statute allows you to do in an appropriate case. Is that not true, when you have a political conflict of interest with regard to a non-covered person, let's say?

Attorney General RENO. That is correct.

Chairman THOMPSON. And you have exercised that authority that you have in various instances, such as I mentioned the McDougal situation; Bernie Nusbaum, I believe, former counsel to the President; and the former governor of Arkansas. All of these people were not covered people, but because of what you delineated as a political conflict of interest under the wording of the statute, because of their relationship presumably to the President, you asked for an Independent Counsel in those cases. Is that not correct?

Attorney General RENO. That is correct.

Chairman THOMPSON. I would ask you whether or not, in light of some of the instances that I mentioned in my opening statement concerning the various individuals, some of whom had—well, let's take Mr. Trie, who had a relationship with the President back to the 1970's, was in and out of the White House, left the country and went to Beijing, who is back now and who has been indicted, hundreds of thousands of dollars in illegal money for the President's campaign through the DNC. I mentioned others.

Why did you not see fit to delineate that as a political conflict of interest with regard to Mr. Trie and those others as you did with regard to Mr. Nusbaum and Mr. McDougal and those people?

Attorney General RENO. Because I believed that the conflict did not exist in a way that the Department would not be able to handle it consistent with the interests of justice.

Chairman THOMPSON. Of course, Mr. McDougal and the President were not apparently very close at the time that you had to make the decision with regard to him. I think the same thing is true with regard to former governor Jim Guy Tucker. Mr. Nusbaum had already left the White House. Yet, Mr. Trie was still attending fundraisers. You had other individuals in and out of the White House apparently taking the Fifth Amendment, fleeing the country, some of whom, as I said, you have already indicted.

You saw a greater conflict with Mr. McDougal and Mr. Tucker, for example, than you did with these individuals—political conflict?

Attorney General RENO. I saw a circumstance with respect to Whitewater where I thought that the request for appointment of an Independent Counsel would be appropriate.

Chairman THOMPSON. All right.

Attorney General RENO. But, Senator, let me point out something because it really troubles me. This is the fourth or fifth hearing that I have been at when I get a question that has a passing reference to one matter, a passing reference to another, somebody taking the Fifth Amendment, the person unidentified, the circumstances having no connection with the original question. And it is these types of questions that create so much of the confusion about the Act.

Senators from that bench today have said, you appointed an Independent Counsel in such-and-such and such-and-such. I didn't appoint the Independent Counsels that the Special Division appointed, and I think it is very important that as we address these issues, we address them very, very carefully so that we can focus on the specific issue involved.

Chairman THOMPSON. Well, I agree with that, and we shouldn't use terms loosely. But I can't think of anything that I have said

that is in error or that I would take back. The point is that your suggestion here today that this be given back to Justice and you be allowed to appoint special counsel—I think it is entirely valid for me to point out that in cases that cry out, in my opinion, for the appointment of either a political conflict of interest Independent Counsel or at least a special counsel that has been utilized by others Attorneys General that in times past you have not seen fit to avail yourself.

We have got a right to feel—we talk about congressional oversight, but congressional oversight has more to do than just with asking a question or two and then moving on. I think we have got a right to get some insight as to how this Justice Department would utilize its special counsel capabilities that the statute gives it.

I think there is a relationship. I think it is appropriate to point out that in some cases you have called for a special counsel or a political conflict of interest counsel. But in other cases, it appeared to me to present an even greater conflict of interest with regard to even a more substantial matter; when you are talking about that level of money and not knowing what the sources are and that entire scandal that is somewhat unprecedented, that we don't utilize the same provisions for that.

I understand your position, but you need to understand mine, too.

Attorney General RENO. I understand yours perfectly, and I understand that you disagree with me on some of my decisions and that you agree with me on others. I understand that there are some people——

Chairman THOMPSON. Which ones do you think I agree with you on? [Laughter.]

Attorney General RENO. I have no idea, but I am sure you would be raising all of them if you disagreed with me.

Chairman THOMPSON. All right. Thank you very much.

Attorney General RENO. But let me point out, Senator, there are members of Congress that disagree with your disagreement of my conclusion. When you try to make legal decisions, they are going to be people that disagree with you. It troubles me that it sometimes gets into a divide based on party, and so I have made the judgment that I am going to make the best conclusion I can based on the evidence and the law, understanding that you are going to disagree with some of the decisions. Senator Lieberman may disagree with others, and Senator Levin may disagree with others. But I am going to call it like I see it the best way I can.

Chairman THOMPSON. All right, thank you. Senator Lieberman.

Senator LIEBERMAN. Thanks. Thank you, General Reno. I want to say I enjoy calling you "General Reno" because one of the great losses I suffered when I received the honor of being elected to the U.S. Senate from my position as Attorney General of Connecticut is that nobody calls me "General" anymore. So I am honored to be able to call you that.

Let me go to what you have cited as one of your major reasons for being against reauthorization of the Independent Counsel Act more or less as it currently exists, for bringing it back into the Justice Department, and it is cited by other witnesses we have heard

before in the public commentary about this law, which is that because the Independent Counsel is appointed without limits on time or money, focused on a particular person, if you will, there is a danger—in effect, a danger that has been realized—that the Independent Counsel will not be subject to the same kinds of resource constraints, time constraints that affect other prosecutors within the Justice Department, and that there may be real pressure not to end this until you can indict.

Now, I know we all have Mr. Starr in our minds because he is the most prominent current Independent Counsel, and I know that many felt that at times Mr. Starr seemed to be an Independent Counsel in pursuit of a person, in this case the President, as opposed to an Independent Counsel in pursuit of a crime or criminal behavior.

But trying to put that aside, the fact is that over the history of this Independent Counsel Act, as I am sure you know, more of the appointed counsels have decided not to indict than to indict, so that the record does not show at least on that part that they have felt a pressure to indict.

Incidentally, as I mentioned before—and I think it is one of the values of the Independent Counsel Act—when they chose not to indict, that certainly had more credibility than if the Attorney General appointed by the President or serving with the other Cabinet members had chosen not to indict.

I want to ask you to comment generally on that, but I want to just pose this question to you also. Obviously, prosecutorial discretion insofar as it includes a decision as to whether there is sufficient evidence to prosecute a crime—I mean, that is discretion that we hope everybody uses because that is what the justice system is about, not to prosecute unless there is sufficient evidence.

But some of the other constraints that affect normal prosecution, I don't think are virtues of the system in the sense that, well, somebody is not prosecuted even though the prosecutor may feel there is evidence that a crime was committed because there are more important crimes to prosecute. And I specifically think that is relevant when we are dealing with the highest officials of our government.

One of the witnesses we had at our last hearing—I believe it was Henry Ruth, although it is unfair to put these words in his mouth. I am going to paraphrase, but he dealt with the argument that is made that the Independent Counsel Act was designed to make sure that the highest officials of our government are not above the law. And some of the critics of the law say but they also should not be below the law. And in some cases, because of the zeal of Independent Counsels, they have been.

Mr. Ruth said, and I agree with him, shouldn't we want to hold our highest officials to the highest interpretation of the law? And if evidence exists that a crime has been committed, they should be prosecuted. The prosecution should not be constrained by resource limitations, and along the lines of the general notion that the higher you go, the higher standard you should be held to.

Attorney General RENO. I think everybody should be held to the highest standards. One of the things that I take issue with you about—you started off by calling me "General." I don't think gen-

erals belong in the law, and I think that kind of goes to my feeling about the law that we should all be subjected to the law and to the standards.

That does not mean that you do not focus responsibility on very serious cases, and in cases involving high officials of government that creates a very serious case. The prosecutor should have a budget. If that budget requires millions of dollars, then be accountable to the American people just as I am accountable for how I spend my money at the Department of Justice. I don't think those two points are inconsistent.

Senator LIEBERMAN. Well, maybe we will come back later to the question of accountability.

Attorney General RENO. And, Senator, may I just, out of great caution, make one comment? You made reference to one of the Independent Counsels. I am not making any comment, nor should it be construed as a comment on any Independent Counsel.

Senator LIEBERMAN. Understood, and I appreciate that.

Well, how do you respond to the facts that more than half of the Independent Counsels have, in fact, not indicted? Doesn't that suggest that the argument of prosecutorial discretion, or lack of it here, is not compelling?

Attorney General RENO. As I made the point in my opening remarks, I do not comment on what was done. I am simply describing the incentives of the Act.

Senator LIEBERMAN. OK. Let me go in the time I have left to what may happen either if the Department achieves the result it wants here regarding this statute or assuming that we don't do anything by the date the law expires later this year, later this spring. We may do something later, but there is a gap there, and I want to ask you about the regulations that now govern the Independent Counsels within the Justice Department, the regulations that you operate under that you cited.

Am I correct that they give complete discretion to the Attorney General regarding whether to appoint an Independent Counsel and whom to select for that position?

Attorney General RENO. My understanding of the regulations that exist and have been in existence is that they mirror the Act and were put in place should the Act not be authorized for a period of time. We are reviewing those regulations, and the regulations that we would propose would give discretion to the Attorney General.

But whatever happens, I think we can all agree—Senator Thompson, the Committee, myself—we are all interested in trying to design something that can give the American people confidence in the process. And I will be happy to work with you, share the proposed regulations, and talk with you about other avenues that we can pursue because I am very anxious to make sure that this process is as open, as understandable, and as just as possible.

Senator LIEBERMAN. I believe that the current regulations give the Attorney General total discretion regarding the appointment of special counsels; in other words, neither the mandatory nor the discretionary features that the Chairman referred to in his earlier statement and questions.

Attorney General RENO. As I made the point, I can, independent of the regulations, as I understand it, appoint a special counsel.

Senator LIEBERMAN. Let me ask——

Chairman THOMPSON. On that point—and I will give back your time—I think there is a question because the Attorney General is right. I think it does mirror the statute; the regulation pretty much mirrors the statute and it gives her, I think, total discretion in appointing one without having to go through the standards.

I think there is a real question, though, if this law lapses, whether or not that regulation would be applicable because it refers to such things as the three-judge court which, of course, under that situation would no longer exist. So I think there is a real question there as to what we would do with that regulation if the law lapsed.

Senator LIEBERMAN. Let me ask you, then, directly, assuming that the statute lapses before Congress has acted, what criteria would you apply in deciding whether to appoint an Independent Counsel if a request is made to you to do so?

Attorney General RENO. We are reviewing a proposed regulation. We have indicated to the House that we will submit it the first part of April, and what I would like to do is to submit that to you. I would be happy to come back and review it with you, work with your staff, do anything we can to address concerns, or follow up on points that you make that indicate to us that we should take a different direction.

Senator LIEBERMAN. Let me, in the time remaining, just get to another aspect of this which is critical, I think, to a lot of us and that is the decision to terminate an Independent Counsel. I notice in some of the research done that leading up to the time of Archibald Cox, I could find six occasions where special counsels were appointed by Attorneys General. This goes way back to President Grant. Interestingly, three of them were fired.

And, of course, in the current Independent Counsel Statute, an Attorney General has the power to terminate, to fire the Independent Counsel, but then that counsel can appeal to Federal District Court. If the law lapses and the regulation then prevails, the Attorney General would have absolute authority to fire a special counsel or Independent Counsel, whatever the terminology is.

Do you think that is a good situation? Should there not be some review of the Attorney General's decision to terminate an Independent Counsel when the counsel is working on an investigation of possible criminal behavior either by the President or others with whom the Attorney General serves closely?

Attorney General RENO. I think that this is always an area that can be reviewed. I think ultimately the responsibility comes back to the Attorney General, as the Constitution envisions the Executive Branch of Government having the power in this instance.

In the one instance in which I have appointed a special counsel, I went through the steps carefully. I had confidence in the person. I designed an understanding with that special counsel. And I think in all of these instances, if done properly, we can structure a system in which we can have confidence in the process and removal is not necessary.

But if there comes a situation where somebody does something that Senator Thompson thought was absolutely the worst case of prosecutorial misconduct, for some reason, that you could imagine, and that you thought the same and Senator Levin thought the same, and we all agreed this person should be removed, I think there has got to be that power to remove.

Senator LIEBERMAN. But maybe we are all wrong and maybe that person ought to still have the opportunity to appeal that decision.

Attorney General RENO. Again, those are issues that we could explore in terms of the regulation and what might be necessary. But let us put it on paper for you and let us consider it. Again, as you read *Morrison v. Olson,* as you consider the enormity of the power of the prosecutor, we want to try to devise some system that focuses responsibility, provides for some independent judgment, and yet is consistent with the Constitution.

Senator LIEBERMAN. My time is definitely up. Thank you.

Chairman THOMPSON. Thank you very much. Senator Collins.

Senator COLLINS. Thank you, Mr. Chairman.

Attorney General Reno, I really do respect your right to change your mind; all of us do from time to time based on experience. But I have to tell you that I think you had it right back in 1993. I think wisdom, in fact, came early to you on this issue when you stated that, "While there are many legitimate concerns about the costs and burdens associated with the Act, I have concluded that these are far outweighed by the need for the Act and the public confidence it fosters."

You went on to say that, "It is absolutely essential for the public to have confidence in the system, and you cannot do that when there is a conflict or appearance of conflict in the person who is, in fact, the chief prosecutor. There is an inherent conflict here, and I think that is why the law is so important."

I agree with your earlier comments on this. Don't we have a problem whenever the Attorney General is called upon to investigate her boss or a colleague in the Cabinet? Don't we have an inherent conflict of interest that doesn't go away as long as you are the person making the appointment? In other words, even if you appoint a special counsel, as long as you are the appointing authority, isn't there at least a perception of a conflict of interest that is harmful to public confidence?

Attorney General RENO. Senator Thompson sees a conflict of interest in my failing to do something. What I have come face to face with, Senator, is that the conflict exists in the Act now. Senator Thompson says that I should have sought the appointment—not appointed—of an Independent Counsel in the campaign finance case.

Chairman THOMPSON. General Reno, just a point of clarification. I think the conflict has to do with your relationship to the other party. It doesn't have to do with your particular decision that you might make.

Attorney General RENO. No, but I have a conflict. Senator Thompson, as I understand it, believes I have a conflict and that I should seek the appointment. I have a conflict in investigating the President and I should seek the appointment.

Senator COLLINS. But what I am saying is there is an inherent conflict. No matter how high the integrity of the Attorney General, there is an inherent conflict just because of the relationship.

Attorney General RENO. And what I am saying is that I agree with you that there are conflicts. I can't figure out how to get the Attorney General out of that situation and still comply with the constitutional mandates of *Morrison v. Olson.* They make the point that it is—one of the points made by the Court is that the Attorney General triggers the Act and that that decision is not reviewable. They also point out that the Attorney General can remove for good cause, and that that is reviewable. Those are two points where the Attorney General remains in the system, and I can't figure out how to avoid a conflict and still pass constitutional muster.

Senator COLLINS. But what I would contend is that that conflict and the appearance of the conflict is greatly exacerbated if the Attorney General or her appointee is making all the prosecutorial decisions along the way. I think the point is you have been subject to a great deal of criticism for your decision not to appoint an Independent Counsel in the campaign finance case. That criticism has come not just from members of Congress, but from editorial writers across the country.

Attorney General RENO. You don't pay any attention to those, do you, Senator? [Laughter.]

Senator COLLINS. But my point is a serious one. If you receive that much criticism making just the threshold decision on whether or not the Independent Counsel law is triggered, think what the cloud of suspicion and the public skepticism would be if, in fact, you or any Attorney General were taking the case to conclusion. I mean, to me, public confidence would be shaken in such a system.

Attorney General RENO. Let me give you an example of what an Attorney General can do because as I stressed in my opening remarks, I am not suggesting to you in any way that there won't be cases where there should be independent judgment. And if I were the Attorney General, I would review carefully. I would probably try to seek a person from the other party. I would review the background. I would look for prosecutorial experience. And I would make sure that the person was well qualified to pursue the investigation and the prosecution, and that they had the resources, that they had an appropriate budget, that they were accountable for it. And I think I would achieve more than what I achieve now, where responsibility is divided and the accountability process is fragmented. It can't get any worse, Senator.

Senator COLLINS. Well, let me make the point——

Attorney General RENO. And I would also point out to you, you all are saying everybody thinks I was wrong on the campaign finance decision. There are a whole bunch of people that think I was right. I don't total up the numbers. That is not the way to make a judgment about justice. I just try to make the best judgment I can.

And one of the good things about—you speak of editorial writers. If you are on the national scene, there are going to be some that say you did right and some that say you did wrong. So I am just trying to devise a process that recognizes you can't get the Attorney General out of it and still have something that passes muster with

the Constitution. And if I am going to be responsible, I would like to be responsible.

Senator COLLINS. Let me turn to a couple of other issues in my remaining time. Senator Lieberman and I have both in previous hearings raised the issue that if an Independent Counsel decides not to bring charges against the target of the investigation, there is widespread public acceptance of that decision. There is no cloud of suspicion, and indeed in most cases that has been the experience. Most recently, we think of the clearing of Eli Segal by the Independent Counsel.

Do you really think that the public would have the same degree of confidence if those decisions not to bring charges were made by the Justice Department? Don't you think it enhances the public's confidence that the decision was the correct one, that it was not tainted by politics, when the decision is made by an Independent Counsel rather than by the Justice Department?

Attorney General RENO. I think the Justice Department can appoint the Independent Counsel in that situation.

Senator COLLINS. But in that situation—and I don't question in any way that you would do your best to appoint someone who would do a first-rate job, but there is still the appearance problem as long as you——

Attorney General RENO. There is an appearance now. I am being asked why don't you do something with respect to an Independent Counsel?

Senator COLLINS. We don't have the appearance problem in cases where you have triggered the statute and the Independent Counsel has ended up clearing the high-ranking official.

Attorney General RENO. I think you can have a process as long as the Attorney General is involved, I mean has to be involved. I just think you can have a process that is designed to merit public confidence. There are going to be decisions; there are going to be political decisions that get everybody upset and Democrats are going to be against Republicans. And maybe we can't avoid controversy in all of these situations, but by focusing responsibility, by holding people accountable, by focusing accountability, I think we can really make a difference.

And one of the problems that you have by saying, oh, let's appoint an Independent Counsel to clear a person—that oftentimes means that that person is subject to a long, involved investigation, again with very little limits on it. And there again should be accountability for it.

Senator COLLINS. Don't misunderstand me. I think the law needs to be overhauled, and indeed I have been working with Senators on both sides of the aisle to try to fix some of the flaws. But I really think that we have a need for the underlying concept.

One other issue very quickly——

Attorney General RENO. Senator, let me just stress to you we agree. Where we disagree is how that person is appointed, I think, but there will be instances where there should be an Independent Counsel. I don't think we disagree on that at all.

Senator COLLINS. You know, I think that we seem to forget the many examples where the law has worked very well and exactly as Congress intended. I have quoted the recent Independent Coun-

sel's decision clearing Eli Segal as an example. There is an ongoing investigation of Secretary Herman by a very distinguished lawyer from Portland, Maine, who has conducted his investigation so quietly, so far from the public spotlight, that no one remembers that it is ongoing.

It seems to me that if you look at the history of this Act, with a very few exceptions that are not the rule, it has worked reasonably well; that the majority of Independent Counsels have completed their job in a timely fashion, at a reasonable cost, and quietly, outside of the public spotlight.

You testified 6 years ago that it isn't valid to criticize the Act for what politics has wrought, nor expect the Act to solve all crises. Hasn't the law, in fact, if you look at its entire history, worked quite well?

Attorney General RENO. I think if you said to a prosecutor—if you said to the prosecutor in Bangor, Maine, I agree with 51 percent of your cases and you have done right in those, or a majority of the cases, but there have been abuses in the other cases, but the majority wins, that is not the way we should judge prosecution. We have got to develop the best possible system we can under our Constitution that ensures justice for everyone, not just for a majority.

Senator COLLINS. And that systems needs to ensure public confidence as well.

Attorney General RENO. And we agree, and I would like to work with you in every way that we can. I am just telling you from the vantage point of someone who would like to have the responsibility as long as I am being held accountable, I think we can devise and work together to come up with a system that addresses your concerns, addresses the concerns that I have referred to, and goes a long way toward ensuring public confidence in the system.

Senator COLLINS. Thank you, Mr. Chairman.

Chairman THOMPSON. Thank you very much. Senator Levin.

Senator LEVIN. Thank you, Mr. Chairman. When this law was first written and during each of its reauthorizations, we built in or we attempted to build in limits on the powers of the Independent Counsel. We built in limits on how long somebody would be holding office, at least some mechanism that we thought would bring these investigations to some kind of an end with a 2-year rule that the court was required to follow or that you could trigger. We put in some limits on expenditures, we thought, with GAO reports on office space.

But the limit that was built in at the beginning of this law was that the Independent Counsel must follow the practices of the Department of Justice. In *Morrison v. Olson,* the Supreme Court held that this law was constitutional based on mainly four elements in the law, all involving the Attorney General.

Each one of these involved the power of the Attorney General to make sure that this person is, in fact, accountable; that there is a check on the power of this person; that the Independent Counsel is, in fact, in the Executive Branch, subject to the powers of the Attorney General, for instance, one, to seek his appointment—only you can do that; two, to remove from office for good cause; only the Attorney General can do that; three, with limited jurisdiction, as defined by the court based on facts which the Attorney General

submits; and, four, the requirement that the Independent Counsel follow the policies of the Department of Justice.

Now, each one of those rests on your action, and so the Attorney General is, as you just put it a moment ago, in the center of this. And this Act would not pass constitutional muster, as you put it, unless the Attorney General were involved in the ways that the Supreme Court found in *Morrison v. Olson.* And I want to focus on why these haven't worked.

In my judgment, Independent Counsels have gone on too long, have spent too much, have abused power, have not followed the policies and practices of the Department of Justice too often. And I would like to try to find out why these limits on the prosecutorial power of the Independent Counsel have not worked.

First, in terms of following the policies of the Department of Justice—and, again, nobody else can enforce this but you. Some of the targets of the Independent Counsel have tried to enforce this particular requirement, without success, in court. So it is left to you to enforce the requirement that the Independent Counsel follow the policies of the Department of Justice.

My first question is this. During your term of service, have there been instances, in your judgment, where Independent Counsels failed to comply with established Justice Department policies?

Attorney General RENO. Senator, I don't think I can comment on that as these are all——

Senator LEVIN. I am not going to ask you at this point to identify those instances. I am simply asking you a generic question whether or not, in your judgment, during your term there have been instances where Independent Counsels have not followed the policies of the Department of Justice.

Attorney General RENO. I do not think I can answer that question conclusively at this point.

Senator LEVIN. Conclusively?

Attorney General RENO. That is correct, sir.

Senator LEVIN. Does that mean you can't give us an answer as to whether there have been instances or not? I am not asking you how many instances. I am just simply asking you—we are trying to determine whether this Act can be salvaged, whether it ought to be modified, whether we should have a different mechanism.

And the Supreme Court said there were four fundamental pillars of constitutionality of this Act, and one of them was that the Independent Counsels must follow the established policies of the Department of Justice. Only you can enforce that, and I am asking you whether or not—and again I am not asking you to give us the instances, just have there been instances, in your judgment, where the established policies of the Department of Justice have not been followed by the Independent Counsel?

Attorney General RENO. I would stick by my previous answer.

Senator LEVIN. All right. The Supreme Court also noted that one of the key elements in supporting the constitutionality of the Independent Counsel law is the limit on the Independent Counsel's jurisdiction—"The jurisdiction of the Independent Counsel is defined with reference to the facts submitted by the Attorney General."

Now, I want to ask you about a specific case that we are all familiar with and you are all familiar with, and that has to do with

the Lewinsky matter where the Independent Counsel wired Linda Tripp for a taped conversation with Monica Lewinsky and offered Linda Tripp immunity at the same time without having jurisdiction over that investigation. My question of you is did that comply with the Supreme Court's requirement in *Morrison v. Olson* that the grant of jurisdiction of the Independent Counsel is defined with reference to the facts submitted by the Attorney General?

Attorney General RENO. I will not comment on that matter. It is still open.

Senator LEVIN. I am trying to figure out why you can't comment. Is there a criminal investigation going on? You can comment on your relationship with Independent Counsels, unless there is some kind of a——

Attorney General RENO. Mr. Starr still has——

Senator LEVIN. Excuse me, if I could finish my question.

Attorney General RENO. Sorry.

Senator LEVIN. I am trying to find out why we can't gain from you your experience in terms of implementing these critical aspects of the Independent Counsel law which, in the Supreme Court opinion in *Morrison,* made it constitutional. And you are the only one who can give us this experience, and unless there is a criminal investigation going on I am trying to understand why you can't share with us the specifics of your relationships, or even a general comment on your relationships with the Independent Counsel.

Attorney General RENO. Mr. Starr still has matters relating to Ms. Lewinsky, such as the upcoming trial of Ms. Steele, and I do not think it would be appropriate for me to comment. I understand exactly how you feel and your frustration, and I look forward to the day when I can properly discuss it. But I don't think I can discuss it.

Senator LEVIN. Even though I am not asking you about the Steele matter?

Attorney General RENO. I do not think I can discuss any matter relating to that situation because I do not want to do anything that would interfere with the investigation or the pending prosecution.

Senator LEVIN. In this Committee's 1993 report, we expressed our concern that the Department of Justice had failed to develop standards and procedures for reviewing an Independent Counsel's activities and deciding, if appropriate, to remove him or her from office.

This is what the Committee report said in 1993. When asked about this matter, the Department of Justice admitted it had never developed any standards or procedure for using this authority, and expressed little interest in doing so. In 1993, when the Committee asked the same question of Attorney General Reno, however, she expressed willingness to address this issue and develop appropriate standards and procedures.

And what we are talking about here are standards and procedures for determining whether it is appropriate to remove an Independent Counsel from office. I don't believe that the Justice Department has issued such standards and procedures to date, and I wonder if you could tell us why.

Attorney General RENO. This has been an area of frustration for me because you are correct, we have not. I had hoped that we

would be able to move into the reauthorization of the Act, if you determined to reauthorize it in 1994, and that we would have the opportunity to do it in a situation where it was not done in the context of a particular case. One thing led to another and it never seemed to be the appropriate time to be addressing it. I assume responsibility for that.

Senator LEVIN. One of the alternatives which is being looked at in order to keep a credible investigation of the high-level official against whom there is significant credible information of wrongdoing is to utilize and strengthen the office of the Public Integrity Section. And one of the possibilities in this proposal is that we make the head of that Section have a fixed term of 5 years or 7 years, possibly make that person subject to confirmation by the Senate, and provide for reporting not only to the Attorney General, but also to the Congress by that person, as we currently do with Inspectors General.

I am wondering if you could give us your reaction to that proposal.

Attorney General RENO. I am concerned that the proposal would be unworkable and would, in fact, increase political pressure. If the Attorney General did not have the power to remove the chief of the Section, it could violate the separation of powers doctrine.

But setting that issue aside, it would create enormous administrative difficulties to have a section chief equal in rank to the Assistant Attorney General for the Criminal Division. In effect, this could create a section chief who would not be obligated to follow the directives of the head of the Criminal Division. The proposal would seriously warp established lines of reporting and authority within the Department and would create a section chief who outranks the Deputy Assistant Attorney General, to whom he or she reports.

Most of the matters that the chief of the Public Integrity Section handles have nothing to do with high-level administration officials. Although I think this proposal is done with an effort to achieve what we are all trying to achieve, it would create far more problems than it would solve.

Senator LEVIN. Thank you. My time is up.

Chairman THOMPSON. Thank you very much. Senator Specter.

OPENING STATEMENT OF SENATOR SPECTER

Senator SPECTER. Thank you, Mr. Chairman.

Attorney General Reno, I would like to discuss with you some ideas on modifications of the Independent Counsel Statute. From comments that you have already heard, I believe that there are quite a number of Members of this Committee who favor reauthorization. I think it is fair to say that as the hearings have progressed, some who were initially opposed are starting to rethink that opposition so that we might most usefully focus on changes which might be made. And I would be interested in your experience on formulating those changes.

It may be that you were too persuasive when you testified back in 1993 on the reasons for the Independent Counsel Statute. And in rereading your testimony today, I believe that you articulated at that time the reasons which are very much in many of our minds

when you talked very emphatically about it is absolutely essential for the public to have confidence in the system, and you cannot do that when there is a conflict of interest or the appearance of impropriety; referred to the inherent conflict.

Your comments were very strong—"fully support reenactment of the Act." You concluded that the disadvantages are far, far outweighed by the need for this Act and the public confidence which it fosters. And then you quoted Archibald Cox, who said, "The pressure and the divided loyalty are too much for any man. And as honorable and conscientious as any individual might be, the public would never feel entirely easy about the vigor and thoroughness about the investigation."

And you made a comment that things can't get any worse. I believe that notwithstanding the differences, there has always been a civil dialogue when you have appeared before this Committee or the Judiciary Committee on oversight. And I think things can get worse, illustrated by the experience of the Saturday Night Massacre and the matters that Archibald Cox was talking about.

And when you propose to have a special prosecutor appointed by the Department of Justice and you talk about the limitations of resources, something that I understand very well, having been a district attorney, and the choices that have to be made and prosecutorial discretion, you are going to have similar considerations if you have a special prosecutor within the Department, unless somebody is going to tell that special prosecutor what to do.

And I think a very significant statement of your prepared text is, "It does not mean that the Department considers itself capable of pursuing in the ordinary course each and every allegation of corruption at the highest levels of our government. We know that sometimes a special prosecutor is in order." So giving that to the Department of Justice restates the issue, and it is a very tough matter on independence versus accountability. But my own judgment is that we need to retain the Independent Counsel Statute.

I have asked you the question that Senator Levin broached again this morning with respect to expanding the jurisdiction of Judge Starr. I asked that question last July 15 in the Judiciary Committee oversight hearing, where you said, "The application speaks for itself, Senator." And I have since referred to the application for the expansion of jurisdiction that I quoted to you last Friday when we had a Judiciary Committee hearing, at which time you said you were not prepared to talk about the Independent Counsel, but had come prepared to talk about the budget.

And in asking the question and in pursuing the subject, I do so not in context of revisiting the expansion of Judge Starr's jurisdiction, but in trying to figure out what we do next time around. I believe that we ought to limit the Independent Counsel for a full-time job and for 18 months, unless expanded for cause, and some restrictions which we have learned from our experience.

But the expansion of jurisdiction for Judge Starr appeared to me to be very problemsome at the time. And contemporaneously with the expansion, I have said that I thought it was unwise, widely interpreted to be a criticism of Judge Starr, which it was not, because you had Travelgate and you had Filegate and you had White-

water. You had so many matters where there was a public perception of a vendetta between Judge Starr and the President.

And in your application you said, "It would be"—this is the application to the Special Division to expand the jurisdiction—"It would be appropriate for Independent Counsel Starr to handle this matter because he is currently investigating similar allegations involving possible efforts to influence witnesses in his own investigation. Potential subjects and witnesses in this matter overlap with those in this ongoing investigation." Three times, you refer to the plural of "subjects," "witnesses," and "witnesses" again. Having studied the Starr report in some detail, the only overlap which he had noted was one where Vernon Jordan had sought a job for Webster Hubbell with Revlon, which was identical or very similar with Mr. Jordan's seeking a job for Ms. Lewinsky with Revlon.

So the question is what can we learn from that experience which will guide us in trying to restructure this statute, if there is a majority of the Congress which seeks to do so. And I would be very appreciative of your assistance on this matter because, like Senator Levin, I do not believe that it implicates in any way the Steele prosecution or any matters which are now pending.

Attorney General RENO. I will be happy to pursue it with you as circumstances permit me to. I do not think that I can address that issue now and not interfere with the investigation and the matters being handled by the Independent Counsel.

Senator SPECTER. Well, Attorney General Reno, what is the interference? This is a closed matter. The application has been submitted to the special court. There are representations which you have made on the record.

Attorney General RENO. I will do this, Senator. I will consult with the Independent Counsel and see if there is something that I can properly do that would not interfere. Otherwise, I do not think I can comment.

Senator SPECTER. Well, I would appreciate it if you would consult with the Independent Counsel and if you would rethink that, because at least on——

Attorney General RENO. I have been rethinking this issue since Friday. I have been sitting there as I have prepared for this hearing saying Senator Specter is going to be talking to me about this. What can I say? While others are telling me you don't have a conflict here, just think of the conflicts you will have—and, Senator Collins, this is an example, again, of what happens. There is no way out of the Attorney General being involved in this process, and I look forward to working with you all to try to, either by statute, by regulation, or otherwise, improve the system so that people can have confidence in the process.

Senator SPECTER. Well, while you were sitting there thinking about it, I was sitting somewhere else thinking about it.

Attorney General RENO. I knew you were.

Senator SPECTER. Let's think about it some more and see if we can't find some way to get your experience to help on a reformulation.

Attorney General RENO. I am very anxious to do that, sir.

Senator SPECTER. Let me pursue another idea which I have had for changes in the Independent Counsel Statute. There has been

enormous frustration, and I think with the best of intent on both sides, as you have declined to appoint Independent Counsel in campaign finance reform and as this Committee did a laborious job in 1997 on our investigation. And so many of us felt so very, very strongly about the need for Independent Counsel.

I had prepared a lengthy complaint in mandamus, recalling my days as a district attorney, where there is an outer limit to the public prosecutor's discretion. If there is an abuse of discretion, there are circumstances where mandamus is in order. Some States have statutes providing for appointment of counsel by the court where the D.A. fails or refuses to prosecute.

Now, there have been three district court cases which had, in fact, ordered mandamus of the Attorney General to compel appointment of Independent Counsel. All three were overturned on appeal because of lack of standing. And the proposed amendment which I have drafted would provide standing in a very limited circumstance for a majority in either Judiciary Committee, Senate or House, a majority of the majority or a majority of the minority, patterned after the statutory provision which authorizes and requires an answer by the Attorney General which, of course, falls far short of a mandamus action.

The constitutional requirements are rigorous, but I would be interested—aside from any reaction to not wanting to be the subject of mandamus, I would be interested in your opinion as to whether a statute can—and I know how closely you have studied the *Morrison* case, etc.—whether there is a way that you think we could structure a mandamus action which would be constitutional.

Attorney General RENO. Let me look at it carefully because I haven't really considered that, and what I would like to do is explore it with lawyers at the Department who have real expertise in this area. I have concerns because what this is doing, again, is becoming involved in a process where the executive is responsible for the faithful execution of the laws. And for Congress to be able to have standing of any sort to become involved in that process is of concern to me. But I don't dismiss it out of hand, Senator, and let me get the exact language, pursue it, and come over and meet with you on it.

Senator SPECTER. Just one more comment, Mr. Chairman, on the subject. It is delicate. I think a greater area of delicacy comes with the court's intervention. But this is like so many other matters. You have a position, articulated in good faith. Some of us disagree. The tradition is to go to the court to have a judgment made.

Attorney General RENO. What I am concerned about—and I know you see a distinction and I recognize the distinction, but the next step will be, Madam Prosecutor, why didn't you prosecute that case? The majority of Congress believes that you should and we are going to mandamus you to require prosecution of the case.

And I think that creates a very dangerous situation, but I don't want to dismiss it out of hand. Let me look at it and understand because I recognize the frustration. And I think this goes to the larger issues, Senator. We have spent hours and hours and hours on an Act that everybody agrees has problems with it, so we have got to figure out how we work on it. What we should be doing is

focusing all our attention on the investigation and prosecution of people who should be investigated and prosecuted.

Now, by failing to ask for an Independent Counsel and by determining that the law does not permit the invocation of the Independent Counsel Act, that does not mean that I don't pursue these other investigations. I just think it is important for the American people to understand that these other investigations are underway, that there are prosecutions underway, that we are not sitting back and saying—just because we haven't invoked the Act doesn't mean that we are not doing our job.

Senator SPECTER. Thank you very much, Attorney General Reno. Thank you, Mr. Chairman.

Chairman THOMPSON. Thank you very much. Senator Akaka.

OPENING STATEMENT OF SENATOR AKAKA

Senator AKAKA. Thank you very much, Mr. Chairman. I want to express my appreciation to Attorney General Reno for being with us today. Throughout these hearings, I have been struck by the caliber of witnesses who have come before us, and today's hearing is no different.

Although I know the Justice Department no longer supports the Independent Counsel law, I was interested to have the opportunity to hear your reasons why the Department has withdrawn its support of the Act. I was also pleased to hear that the Department is working on developing a plan to deal with potential allegations of wrongdoing by high-level officials.

In your 1993 testimony, you supported the concept of an Independent Counsel with statutory independence, "because there is an inherent conflict whenever senior Executive Branch officials are to be investigated by the Department and its appointed head, the Attorney General." I agree that even the appearance of impropriety is detrimental, and yet I know the Department of Justice has a distinguished record of prosecuting high-level officials without the aid of an Independent Counsel.

My question is what are your views on bringing back the functions of a special prosecutor to the Department?

Attorney General RENO. Basically, I support—when you say a special prosecutor for the Department, what I support is placing the responsibility in the Attorney General to, in those cases where it is deemed appropriate, seek an outside counsel, appoint an outside counsel. Again, I use the example that we have pursued in the one case in which I did so, in which we sat down after a comprehensive review of potential candidates, selected a person of great, good reputation, of experience as a prosecutor.

He was very emphatic that he would have, if you will, a charter about his jurisdiction, his authority, his responsibility. And we made it very clear that he would have broad responsibility, and we defined it. We made sure that he would have the resources. And I think we can achieve the same results, and better results, if we have responsibility for the process focused on the person who is involved, and again that is the Attorney General.

As Senator Levin pointed out, there is no getting around the fact that the Attorney General has got to be involved in the process if the process is to be constitutional. I want to try to work with you

all to work—there is a conflict one way or the other and we have got to minimize it and do the best we can to come up with something that will give greater confidence to the people.

Senator AKAKA. One concern that we all have in this is political influence. I am concerned about the appearance of conflict whenever anything is done. Obviously, the reason for the Act was to fully investigate allegations and evidence of wrongdoing by high-level elected officials without influence from the President.

Do you believe that public confidence would be restored if such investigations were returned to the Justice Department?

Attorney General RENO. I think it would go a long way because then the person who has responsibility under the three branches of government would have the authority to ensure that the process was done the right way. I think, again, those Senators who have made comments that there are going to be cases that no matter what you do, there are going to be problems—I think that is true and we will not be able to avoid all of those.

But it would be a much more sensible situation, rather than creating, as this Act has created, a prosecutor with enormous power that does not belong to one of the three branches of government. It is as if we have created a fourth branch of government, but we have not given that fourth branch full responsibility. We have not retained full responsibility in the Executive Branch, and that division of authority and division of responsibility has, I think, created the problem in people's minds.

Senators Specter and Levin have asked me what have you done about this and what have you done about that. Under the system that I operated under before I became Attorney General, when I was State attorney, once I had recused myself from the case, that was it, and it worked well. I don't see how we can do that under our constitutional framework.

Senator AKAKA. I am one of the members who is concerned about what would happen if we don't reauthorize the Independent Counsel Act and what would happen after that. Hopefully, your Department will be creating a plan that will help us make that transition.

Attorney General RENO. We are in the process of doing so, and I look forward to submitting it to the Chairman, Senator Lieberman, and Members of the Committee so that we can review it and get your input and try to fashion something that will address the concerns of all.

Senator AKAKA. Along similar lines, Common Cause proposed returning cases involving allegations and evidence against high-level Federal officials to the Criminal Division of the Justice Department, with final review authority given to the Assistant Attorney General for that Division. Do you believe that the Criminal Division can conduct investigations without interference from the Attorney General and those outside of the Division?

Attorney General RENO. I think the Criminal Division does a wonderful job of conducting investigations, and just the record of the number of people that they have convicted for public corruption cases in these last decades is an example.

The Assistant Attorney General of the Criminal Division is appointed by the President, and once you shift responsibility from the Attorney General to the Assistant Attorney General, appointed by

the President, we are going to be right back here, only it won't be me sitting in this seat, 10 years from now, saying probably the same thing because that doesn't shift the issue.

The problem still is that you have got to have authority within the Executive Branch. If you limit the authority within the Executive Branch so that the President or the Attorney General cannot remove a head of the Criminal Division, then you raise constitutional questions about the President's responsibility for faithfully executing the laws. It is a difficult issue and I don't think moving the boxes around is going to solve the problem.

Senator AKAKA. The Act gives tremendous authority to a prosecutor who may lack appropriate experience or who has been confirmed by Congress and who may ignore the oversight authority inherent in the Act after the last reauthorization. There has been widespread criticism of some recent Independent Counsel investigations as being too far-reaching, too costly, and lacking accountability.

I know you have focused on responsibility and accountability as being very important. If we were to reauthorize the Act, how would you restructure the Act so that future prosecutors are independent and yet accountable to the public and Congress, and to maintain their faith in impartial justice and to keep the public confidence?

Attorney General RENO. One of the steps that I have—the only comment that I have made from the beginning is the comment that there should be budget control of the Independent Counsel. This is not to suggest that because a very important case is involved that they shouldn't get money. It should be that the Independent Counsel should be responsible just like all other public officials are for developing a budget for which he is accountable. I think that is one step.

I think if you were to reauthorize the Act, some time limitation with the subject for renewal would be appropriate. I think that there has got to be a process where we clarify—and Senator Levin had raised the point that the Independent Counsel is required to comply with the policies of the Department. Not all of those policies are mandatory, but of those that are mandatory the Act specifically says "except when it will interfere with the purposes of this Act." So it gives a great exception. I think that that has got to be clarified so that the person, if you reauthorize the Act, who is the Independent Counsel has the same responsibilities, the same authorities, the same policies governing him or her that all prosecutors have throughout the country.

Senator AKAKA. Thank you very much, Mr. Chairman.

Chairman THOMPSON. Thank you.

Attorney General RENO. I would also point out one point with respect to the Common Cause suggestion. The system we have now is for the Assistant Attorney General for the Criminal Division to be responsible for that Division that has a wide range of responsibilities that have primarily a national scope.

But then there are 93 U.S. Attorneys across the country who are also appointed and confirmed by the President who have responsibilities. Again, we have got to be very careful as we approach these issues. This is an interesting proposal, and we would again like to pursue that along with all the others to see what we can

come up with that best achieves what we all want, which is confidence in the system.

Senator AKAKA. Thank you for these frank and straightforward answers. Thank you.

Chairman THOMPSON. Thank you. Senator Durbin.

OPENING STATEMENT OF SENATOR DURBIN

Senator DURBIN. Thank you, Mr. Chairman. Thank you, Madam Attorney General, for joining us today. Like yourself, I have had second thoughts about this statute and have stated publicly that I would not vote to reauthorize it.

I was intrigued by your Justice Frankfurter quote. I can give you another one. When Abraham Lincoln was accused of the same weakness in changing his position, he stated, "I'd rather be right some of the time than wrong all the time." And I have used that quite a bit in my public career.

I would like to make one observation and then two questions. The first by way of observation is you have said a lot about the budget of the Independent Counsel. I would like to ask you, as I understand it, the Criminal Division of the Department of Justice has an annual appropriation of approximately $100 million, and within that Criminal Division another $30 million of the $100 million is dedicated to white-collar crime. And within the white-collar crime section, $5.4 million, roughly, is dedicated to the Public Integrity Section, so about $5.5 million a year to that section of the Criminal Division.

In your own words, what would you describe as the responsibility of the Public Integrity Section of the Department of Justice?

Attorney General RENO. The Public Integrity Section is responsible for establishing the policies and procedures and providing the consistency with which public officials are investigated and prosecuted in this country. They work with the U.S. Attorneys around the country to ensure that these cases are appropriately handled. And where a U.S. Attorney will recuse themselves or for other reasons, because the Public Integrity Section was in the case from the beginning, they may prosecute the case. They have broad responsibility and they do an excellent job.

Senator DURBIN. And, of course, their jurisdiction applies to public officials at every level if there is a violation of Federal law.

Attorney General RENO. That is correct.

Senator DURBIN. And it is my understanding that the Public Integrity Section, with its $5.4 million annual budget, has some 43 employees. The reason I wanted to make that a part of the record is I wanted to draw the contrast with what we have done with the Independent Counsels—the appointment of Mr. Adams for 8½ years, the expenditure of $28 million during that period of time; Lawrence Walsh, 6½ years, the expenditure of $48 million during that period of time; Mr. Starr, for more than 4 years now, some $33 million of his expenditures, $6 million of his predecessor, Mr. Fiske, for $39 million, plus; and Mr. Smaltz, whose jurisdiction as an Independent Counsel went for more than 4 years and he spent more than $17 million.

The reason I wanted to make that part of the record is that I think you have made a very valid point. If you are being given lit-

erally $5.4 million a year in the Public Integrity Section of the Department of Justice to oversee the administration of justice and elected and appointed officials nationwide, and we are giving to these Independent Counsels these vast sums of money, virtually unaccountable and unchecked, I think your point is well made.

I might also add, Mr. Chairman, that I know the Attorney General has been kind enough to sit in the hot seat here with some frequency before this Committee and the Judiciary Committee. I really hope, in pursuing the goal of a balanced and complete hearing, that we will invite to this hot seat some of these Independent Counsels. I would like to have Mr. Starr here to explain his budget. I would like to have Mr. Smaltz here to explain some of the comments he made about the validity of indictments as opposed to prosecutions.

I would like to have examples of targets here, and I can tell you that the Secretary of Agriculture, Michael Espy, has told me personally he is prepared to come and testify and tell what his experience was, having been a target for more than 4 years by an Independent Counsel. I think that would give to this hearing a great deal of credibility, and I sincerely hope that the Committee and the Chairman will consider that.

Attorney General RENO. May I just make a suggestion? I don't have the Public Integrity Section's budget right off the top of my head, so I am not sure just exactly what it is. Let me confirm it with you, if I may.

Senator DURBIN. I would be happy to. My staff did check on that and I think that figure is very accurate.

Two questions I have of you, Madam Attorney General. I thought that your statement was very clear and compelling when you said that accountability is no small matter. I believe the difference between democracy and tyranny is accountability. We pride ourselves on checks and balances, and you make it clear in your testimony that there is a serious shortcoming in this law when it comes to the checks and balances and accountability of an Independent Counsel.

I listened to the question asked by Senator Levin and your response, but I want to see if perhaps I can term this question from a different perspective in a way that you might be able to respond to it. Do you believe that the current law gives the Attorney General adequate authority to restrain Independent Counsels who ignore or exceed Department of Justice policy?

Attorney General RENO. There are some policies, just taking it generally, not applying to a particular case—I just would like to read the language to you. I will get that for you in a moment.

Some of our policies are not mandatory, so there may be policies that they—there may be exceptions to the policies. But I clearly think that the person who is the Independent Counsel should be required to do what other prosecutors do around the country with respect to policy, procedures and process. The statute provides that he shall follow the policies of the Department, except where inconsistent with the purposes of this Act. And that creates a significant exception that is subject to considerable interpretation.

Senator DURBIN. I heard that comment by you before, and you think—I don't want to put words in your mouth, but you would

suggest that is a major loophole in terms of the enforcement of Department policies when it comes to Independent Counsels?

Attorney General RENO. Yes.

Senator DURBIN. Who is responsible within your Department of Justice for working with the Independent Counsels when it comes to following the departmental policies? Is there one person assigned to each Independent Counsel?

Attorney General RENO. It will vary from situation to situation. There may be calls—in some cases, Mr. Keeney, for example, has been the person who has been the contact point. In other situations, it will be Mr. Robinson. It will be a variety of people, depending on the circumstances and depending on the particular issue.

Senator DURBIN. Has it been your experience that Independent Counsels have sought your advice or counsel in terms of following Department of Justice policy?

Attorney General RENO. A number of them have been very anxious to do so.

Senator DURBIN. Thank you. The last question I have of you relates to an amendment which Senator Torricelli and I and several others will be offering perhaps very soon related to the future of the Independent Counsel, not just the statute, but those who are currently authorized by that statute to continue in their work.

Senator Torricelli and I and others believe that it is time to bring this to a close, not just in terms of the end of the statute but the end of their jurisdiction. And we are hoping that a majority of the Senate will agree with us that the responsibilities of these Independent Counsels should be returned to the Department of Justice, and particularly to the Public Integrity Section.

We talked earlier about your authority, absent the Independent Counsel Statute, to appoint an Independent Counsel. And if I am not mistaken, you did as much in appointing Robert Fiske in January 1994, and he continued for some 7 or 8 months while we were reauthorizing this statute.

If our amendment prevails and these matters are returned from the offices of the Independent Counsels to the Department of Justice, is it your belief that you have adequate authority, if necessary, to appoint Independent Counsels and continue those investigations which you think are necessary?

Attorney General RENO. Well, when you say continue the investigations, my understanding of the Act is that it provides for the continuity of the existing investigations under the law as it is. But with respect to new matters, what we are engaged in doing is developing a proposed set of regulations that we would like to share with you to show you how we would propose to exercise the power under the law, recognizing, as I would like to stress again—some people think that by advocating letting the law lapse that we are advocating a situation where we would never ask for an Independent Counsel. I think we have got to be able to do that. I think it will happen as we have seen it happen in history, and we would have regulations in place that would govern it.

Senator DURBIN. My question relates specifically to those ongoing Independent Counsels who, if we terminated funding for Independent Counsels and referred these matters to the Department of Justice—my question is whether or not you believe that you have the

authority under existing regulation and law to continue such investigations which are currently underway by Independent Counsels, whether or not you need any additional authority to do that?

Attorney General RENO. Yes, I think I have the authority to handle those cases. If you terminated the funding and made clear—and I am not sure that an amendment would be necessary, but by letting the law lapse, I think there might have to be some language that permitted us to take it over. But if you let the law lapse, if you fail to provide funding, I think we have the inherent authority to pursue it and we would.

Senator DURBIN. Well, Senator Torricelli, I am sure, is going to follow up on this, and that is exactly what we are seeking to do with this amendment. So the critics of the amendment, if there are any—I hope there aren't, but there might be—should know that on the basis of your testimony that those meritorious ongoing investigations would not be interrupted and could continue under the auspices of the Department of Justice. Thank you, Mr. Chairman.

Chairman THOMPSON. As a matter of policy, do you think it would be wise for Congress to terminate current ongoing investigations regardless of what happens after that?

Attorney General RENO. I think that since these investigations are underway that they should probably be concluded under the current framework.

Chairman THOMPSON. Senator Torricelli.

OPENING STATEMENT OF SENATOR TORRICELLI

Senator TORRICELLI. Thank you, Mr. Chairman. First, Madam Attorney General, I would like to extend some thanks. My State has had a terribly wrenching ordeal in the recent months on the question of racial profiling. Last week, Eric Holder met with a group of citizens from my State representing the civic, religious and political leadership to assure them that the Department of Justice was mindful of this problem and providing some oversight. For that, I am very grateful for Mr. Holder's time and his advice, and for the Department's. It has been very helpful to the people of my State.

Second, while I intend to use most of my time to address the question of Independent Counsel, I am mindful of the fact that most people in Washington who are thinking about the Department of Justice on this day have their minds on the question of espionage. And if not in the nature of a question, then briefly as a statement I want to make several points.

It appears to me that something of rather extraordinary historic significance is now unfolding. The people and the government of our country have not been served well. It is for President Clinton to reach judgment about whether his subordinates served him and the country properly. They are in his employment and not subject to our advice and consent. I focus separately, but I believe of equal importance on this matter on the question of the Department of Justice's own involvement, since you do have the advice and consent of the U.S. Senate. And I believe the record is troublesome.

It took 1 year for the FBI to report on measures to improve the security of the Department of Energy. The recommendations for those improvements were allowed to languish for 17 months with-

out any record of objection from the FBI or the Department of Justice that there should be a decision rendered. It took until July 1997 for there to be adequate resources provided for the investigation. Two years were allowed to lapse before a polygraph was administered to Mr. Lee.

I recognize that there are competing resources in the Department of Justice in dealing with criminal investigations in the United States, but the possible theft of nuclear secrets of this country, providing for a potential rival or adversary the resources of this government endangering our people, would be difficult to put on a par with any other investigation or any other potential matter.

I have great confidence in Mr. Freeh. I have always had a great belief in you and your tenure as Attorney General. But there are profound questions here as to why the justice system itself did not rise to the occasion, why, with all the resources of the FBI and the Justice Department, this matter was not addressed more expeditiously, more seriously, and why the people and the government of this country were not protected.

I believe it is fair to say that for there to have not been adequate resources available by the FBI or the Justice Department at a time when the Department of Justice was lending so many resources to things which were of high profile and political importance, and understandably of considerable intellectual or political interest, while the fundamentals, the most basic level of protection was not offered in an espionage case, may be debated by historians for a long time, but at the moment is of considerable import to Members of this Committee and the Congress.

I recognize the sensitivity of the issue. I don't expect you to respond, though obviously you are free to do so, though there may be little in there which you would like to address. But I would pause if there is such a desire.

Attorney General RENO. Director Freeh is testifying this afternoon before a committee in full and I think that the facts will unfold. This is obviously a matter—espionage is a matter of concern for every American and we want to do everything that we can to make sure that there are appropriate responses consistent with the law.

Senator TORRICELLI. Let me turn then to the question that is before the Committee, Madam Attorney General. There are some who are now expressing considerable surprise that Mr. Starr's investigation may have violated both the procedural requirements of the Department of Justice and even statutes of the United States. There is no reason for you or for me to be surprised.

I wrote to you on February 11, 1998, regarding Mr. Starr's conflicts of interest, regarding possible collusion with the Paula Jones legal team, raising questions about whether or not you were lied to when approached by Mr. Starr. I wrote to you again on March 6 regarding witness tampering involving David Hale; on March 18, on April 24, on May 7, regarding questions of illegal leaks of grand jury information, and again on June 9.

Indeed, it could be said that I have had more correspondence with you on the question of Mr. Starr than all members of my family combined. Yet, I received from you a single response on July 10. I want in a moment to go to the substance of some of these issues,

but let me deal first with the matter of the relationship between the Justice Department and this Committee.

I doubt that it was the belief of Members of this Committee, Democrats or Republicans, when you appeared before this Committee more than 6 years ago in the process of advice and consent that it was our interpretation that a member of the U.S. Senate, no less a member of this Committee, would write to the Attorney General of the United States on 6 occasions over the course of most of a year, not receive a response at all for 6 months, and then to have five letters generally not responded to at all.

I recognize the limitations of response. I recognize that sensitive matters cannot be addressed. I expected no particular information about criminal investigations, but simply as a member of this Senate to advise you that in my belief, the Independent Counsel law was not being followed, that justice was not being done and damage was being done to institutions of this government.

Madam Attorney General, should I, as a member of the Senate, believe that this is how our institutions should deal with each other and that this was an adequate way to deal with my inquiries?

Attorney General RENO. I apologize to you, sir. From now on, we will acknowledge receipt of the letters. It is very, very difficult, however, since there are a large number of people who have very firm notions about the facts and the evidence of this case and write both ways—quite frankly, it is very difficult to respond other than just an acknowledgement. When we respond with an acknowledgement, we get criticized for not responding in detail. We will try to do better and I apologize to you.

Senator TORRICELLI. I consider the matter closed, but an acknowledgement lets me know that you understand our concern, our interest, and have received the information. And in a matter of the administration of justice, that is sufficient for our combined responsibilities.

Proceeding on the question of the Starr investigation and Independent Counsels, and allowing me to be direct, it appears to me that in the concept of how this matter is to be governed, citing both Mr. Scalia's pressing thoughts, others' doubts during the congressional process, we have now learned what the Founding Fathers instructed us of 200 years ago that the only way to assure accountability in this government is checks and balances. "It is that ambition be met with ambition," as Madison wrote.

And in this instance, the only check, the only balance available, in fact, was your office. The ultimate accountability here is that it appears to me that you were lied to with impunity by Mr. Starr when you were not told that indeed the Paula Jones legal team was involved in the Lewinsky matter, when you were assured that there was not a leaking of grand jury information. It was more than a matter of disrespect for your office; it was acting with impunity above and beyond the law.

It seems to me, Madam Attorney General, you were the check and balance, and that in this instance the Independent Counsel law has proven not to work, and therefore, in my judgment, will almost certainly not be reauthorized because there is not confidence in this Congress that for either political reasons or institu-

tional reasons, an Attorney General of the United States is able to face an Independent Counsel when they are being misled, when the procedures of the Justice Department are not being followed, and even, it appears, when statutes of the United States are being violated, and to hold that Independent Counsel accountable. It appears to me that in the experience of the last 2 years, personally I cannot come to any other conclusion. Institutionally, this doesn't seem to be able to work.

Attorney General RENO. As you know, I cannot comment on the status of any matter with respect to that.

Senator TORRICELLI. I am not expecting you to.

Attorney General RENO. I can tell you that I am trying my level best to do my job the way I see it, and that is to make sure that I do everything possible to ensure the independence of the Independent Counsel consistent with the laws of this land.

Senator TORRICELLI. Mr. Chairman, I will conclude simply by returning to the point that the Chairman made in response to Senator Durbin's comments. Senator Durbin and I and Senator Harkin and Senator Feinstein intend as early as this afternoon to offer an amendment which will terminate the funding of Independent Counsels, in recognition of the overwhelming probability that this Congress will not reauthorize the Independent Counsel Statute, and that there should be an acceptance of that reality and a transition into the Department of Justice of these cases.

It is not our intention by ending these appropriations to end these investigations. They should continue professionally and thoroughly, but the reality is the Independent Counsel Statute is not going to be reauthorized. What I am seeking from you is an expression of confidence that if indeed in 6 months or the end of this year we continue appropriations, then allow them with sufficient notice to terminate, allowing the Independent Counsels to prepare their cases, proceed with their cases until that deadline and then simply have the files, with full consultation and preparation, go to the office of public integrity or whatever office you designate, do you have any reason to advice this Congress that the people involved in those departments, in Public Integrity, cannot deal with those cases adequately and professionally and independently, or that in any way the administration of justice would be interfered with if that is how this Congress proceeds?

Attorney General RENO. I do not foresee that the administration of justice would be interfered with in any way. There may be different views about what justice is, but we are dedicated to seeking justice.

Senator TORRICELLI. But in your view, you have confidence in your subordinates in dealing with those cases if that is how this Congress proceeds?

Attorney General RENO. I certainly do.

Senator TORRICELLI. Thank you, Madam Attorney General.

Chairman THOMPSON. Thank you very much. Senator Edwards.

OPENING STATEMENT OF SENATOR EDWARDS

Senator EDWARDS. Good morning, Attorney General Reno. There has been a lot of discussion this morning during the course of the hearing about public confidence, and I have to tell you when I

think about this analytically I think about public confidence on the one hand, and on the other hand doing what is right and just and ensuring that we can prosecute these cases in a fair and impartial way. I am not sure the extent to which those two things are linked.

But when we talk about public confidence, I am interested in asking you about public confidence not in the context of politicians and Senators sitting up here behind this desk and people sitting inside this room and perhaps people inside the Beltway, but the people I represent back in North Carolina and all across this country who get information not in detailed fashion, are not really interested or concerned about the intricacies of how these laws are structured or how they interact with one another.

And it seems to me that there are simple things that are true just based on talking to folks. I do believe that most folks believe that the prosecution that has gone on with the President—and I am not asking you to comment on this—has been extraordinarily expensive, has gone on for an awful long time, and has been highly partisan. And I think because of that specific instance, they believe that this Independent Counsel law is not working, that there is no accountability, as we have heard discussed at some length.

I have to tell you beyond that, while I share Senator Collins', Senator Specter's, and Senator Thompson's concerns about public confidence, I doubt that most Americans—most of the folks that I represent in North Carolina—lack public confidence in the Department of Justice. And I am interested in knowing just as a starting place with you the people who actually are involved in making decisions about prosecutions within the Department of Justice and who prosecute those cases—can you give me some sense just in general of the extent to which those people have been involved in both Democratic and Republican administrations?

Attorney General RENO. In the Public Integrity Section, there are some wonderful people who have been there in Republican and Democratic administrations. With respect to the implementation of the Independent Counsel Act, they have been there through it all. They have had to implement it, and they are wonderful at saying, look, this is the way we did it before. There has got to be equal justice. If we have done it wrong, let's address it. But they are very, very good at providing an anchor so that the new folks who come into the office in a change of administration have the benefit of the institutional history.

With respect to the prosecution of cases, which is so important, they have an understanding of how the prosecution of cases should be done to ensure confidence from one administration to another so that people aren't picking on somebody just because of party affiliation. I think they bring great credibility to the whole process.

And I have made a point, Senator, of saying I have a special mission while I am Attorney General and a particular mission when I leave this job, and that is to let the people of the United States know how many dedicated men and women work with them and for them in the Department of Justice who work extraordinarily long hours, are available in the middle of the night for emergencies, do so much to see that justice is done, and Public Integrity is at the core of it.

Senator EDWARDS. And I suspect, Attorney General Reno, that with the exception of politicians who, for whatever reason, on one side or the other of these issues talk at great length about this, and sometimes editorial writers that were referred to earlier write at great length about it, most Americans—and I can tell you based on my conversations most North Carolinians believe that what you say is true, that the people who work within the Department of Justice are not politically partisan. They don't make decisions or judgments for politically partisan reasons.

I am interested in knowing a couple of other things, though. Let's assume that the Independent Counsel law lapses, that the decision is made not to reauthorize it, and one of these cases comes to your attention, is referred to you, and you decide for whatever reason not to appoint a special prosecutor. I am going to ask you about that avenue later.

But, first, suppose you have made that decision. Can you tell us and describe for the American people what process the Justice Department would use in making decisions about how to investigate that case, what prosecutor or team of prosecutors would be assigned to the case, and how they would go about doing their job?

Attorney General RENO. If it were a matter of public corruption——

Senator EDWARDS. I am assuming that, yes.

Attorney General RENO [continuing]. It would be handled—it would depend on the circumstances. If it were in certain locations, it might be handled by the U.S. Attorney or it might be handled by the Public Integrity Section. If it arose, as so many of these issues have arisen, in the Washington context, it could be possibly by the Public Integrity Section or by the U.S. Attorney for the District of Columbia.

But we would make a judgment, again, based on how similar cases had been handled in the past. Who is the expert, who is the best person to handle it, who is available, and who can best handle the case to see that it is done right?

Senator EDWARDS. And what would you say to those critics, those folks who would say in response to what you have just said, that it would raise questions about accountability, about the fact that you are appointed by the President? What would you say to those people?

Attorney General RENO. I have a responsibility presently under the Act that Senator Levin has described. I would like the tools to be fully responsible and be accountable to this Committee, to the Judiciary Committees, when the matter is concluded and I can say this is what happened and this is why it happened.

Senator EDWARDS. What kind of tools are you talking about?

Attorney General RENO. The tools, for example, to make sure than an investigation is conducted thoroughly, with the tools of immunity, with subpoena power, with an ability to use the grand jury, to see just what is involved in the case. If I make a determination that there is not a conflict or that the matter doesn't warrant a special prosecutor, we can then proceed in a very orderly way to either conclude the case and say why we concluded it or go forward with the prosecution and be accountable for the prosecution.

If it should be a case in which I determine after a thorough review that an Independent Counsel should be involved, then I described the situation previously where I would identify somebody who was experienced, who was impartial, and work with them to develop a charter that would give them the tools to do the job.

One of the points that I remember is when I took office, shortly thereafter issues arose with respect to the investigation of a Congressman. People said we couldn't do it. This Department of Justice did it and I think justice was done, and I just have great, great confidence in the people in the Department.

Senator EDWARDS. Now, let me move from the cases that you would keep within the Department to the appointment of a special prosecutor. Give me some idea of—let's assume that we were concerned about the impartiality of whatever special prosecutor you might be considering, what kind of criteria would you use, what kind of guidelines? What would you do to try to establish some faith in the American people that whoever you decided to appoint as a special prosecutor was, in fact, impartial?

Attorney General RENO. Well, first of all, I would look for a former U.S. Attorney who served in a Republican administration and who had experience as a prosecutor and preferably had experience as an assistant U.S. Attorney in the actual trial of cases. I would look for somebody who had the time to do it the right way. I would look for somebody who had not expressed themselves on the subject or on points of law in any way that would indicate a bias.

I would look for somebody who didn't have association or conflict with the subject of the investigation. I would look to people that I had a regard for, people who were neutral who weren't involved in politics, to discuss with them the abilities and the talents of that prosecutor and whether they had had an experience. And then I would plead with that prosecutor to take that responsibility. I think one of the most difficult things is to get people to take these difficult cases that sometimes involve no-win situations.

Senator EDWARDS. The kind of people you are describing don't generally want to do that kind of work.

Attorney General RENO. Well, it is a great tribute to Republican U.S. Attorneys in former administrations that they have been willing, and I have been very impressed with their sense of public service and I hope that we can reciprocate, should we ever have to down the line.

Senator EDWARDS. Do you believe there should be any limitation on your absolute discretion to make that appointment? Should there be some sort of review process, anything of that nature?

Attorney General RENO. I think what you have got to figure out is what if it is the Attorney General who is the subject of the investigation and how we handle that. I think that is one of the issues that we are grappling with. If the Deputy Attorney General receives information, God forbid, that the Attorney General is somehow or another involved in wrongdoing, what can we do to make sure that there is a process that is clear?

Senator EDWARDS. Thank you, Attorney General Reno. Thank you, Mr. Chairman.

Chairman THOMPSON. Thank you very much.

Thank you, Attorney General Reno. I certainly hope that people have confidence in the Justice Department, and the Public Integrity Section as far as that is concerned. I think what we are grappling with here is whether or not people would have, in any given situation, that measure of confidence with regard to any Attorney General investigating any President, or for that matter themselves, as you point out, if the Attorney General is under investigation. That is what we are grappling with here, and your testimony has been very helpful today and I appreciate your being here.

It has been 2½ hours now. We have another panel, so with that I will thank you, and I am sure we will have occasion to discuss these issues some more.

Attorney General RENO. We look forward to doing it, and I just appreciate the thoughtfulness of the Committee, Mr. Chairman.

Chairman THOMPSON. Thank you very much.

We will now proceed to our second panel to continue our discussion of the implementation of the Independent Counsel Statute. The witnesses are John Barrett, former associate Independent Counsel for the Iran-Contra investigation; Philip Heymann, former Deputy Attorney General in the Clinton administration, former head of the Criminal Division at the Justice Department under President Carter, and former associate Watergate special prosecutor; then Charles La Bella, former supervising attorney for the Campaign Financing Task Force.

Gentlemen, your written remarks will be made a part of the record. You have been very patient. We appreciate your being here. I don't want to cut you short after all this time, but we do have your statements and if you would confine your comments to about 7 minutes and submit your statements for the record, I think that would give us more time for discussion, and I would appreciate that.

Mr. Barrett, would you like to proceed in that order? Are you prepared to comment?

Mr. BARRETT. Very well, Mr. Chairman.

Chairman THOMPSON. Thank you.

TESTIMONY OF JOHN Q. BARRETT, ASSISTANT PROFESSOR OF LAW, ST. JOHN'S UNIVERSITY, NEW YORK, NEW YORK, AND FORMER ASSOCIATE INDEPENDENT COUNSEL, IRAN-CONTRA INVESTIGATION

Mr. BARRETT. Mr. Chairman and Members of the Committee, thank you very much. My name is John Barrett. I teach as a member of the law faculty at St. John's University in New York City. From 1988 until 1993, I worked as an associate counsel on the staff of Independent Counsel Lawrence Walsh. I subsequently as a law professor have continued to study and write about the Independent Counsel Statute.

As my prepared remarks set out in greater detail, in my view the general rationale for the Independent Counsel Statute, as today's hearing and the previous hearings have been exploring, is still correct and is still valid and counsels for the reenactment of this statute. The core argument is the possibility, grounded in historical experience, that we may need Independent Counsel appointments in rare but truly significant instances.

I have recommendations that I would like the Committee to consider to increase the Attorney General's discretion so that the use of this power is limited to those core cases where the need is the greatest. I believe the statute also should contain provisions that will make it more likely that the Independent Counsels in those cases will be credible and successful after their appointments occur, as they work as regular Federal prosecutors.

I would like to describe some ideas to improve what the Chairman has referred to as the "front end" of the statute, but consider first the rationale for and the success of the statute. The unfortunate historical reality is that there will be occasions at some points in time when credible information does come to light which suggests that a President of the United States or someone who is intimately connected to the President has committed a serious Federal crime.

When that occurs, as a matter of public confidence and credibility, the Attorney General and the Department of Justice that he or she runs cannot credibly investigate that allegation and determine whether or not to prosecute the perpetrator. They all work for the President. In Watergate, for instance, what we saw was actual Executive Branch interference, additional Executive Branch efforts to interfere, and a chill from the overarching presence of the White House on the Department of Justice's work.

The right remedy is the remedy that this statute has provided since 1978—reassigning the responsibility from the Department of Justice to do that investigation and to make those prosecutorial decisions to a lawyer who will have the power to do the job and the freedom to do it outside of the direct daily supervision of the Department of Justice. In this respect, in terms of getting the appointment outside of the Department into the hands of somebody with the power and the independence to do the job credibly, the law has worked extremely well. In each of the 20-plus instances over 20 years, the Independent Counsel who has been appointed has at that moment been independent in fact and generally credible to the public.

Now, that front end of the statute, of course, still is an area where we could have substantial improvements. The statute could be improved, for example, to provide the Attorney General all the regular tools of Federal law enforcement at the front end of the statute—the subpoena power, the grand jury power, the plea bargaining power and the immunity power. There also should not be artificial limits, as the current statute has, with regard to time, but merely notification requirements on preliminary investigations, so that the Department's work will be visible, but not artificially truncated.

I think the statute also should state clearly that the Attorney General's power to trigger the statute is completely discretionary so that there will not be semantic or interpretive difficulties over whether a particular matter needs to travel through some particular preliminary investigation or result in some particular determination. Instead, in a particular case, the Attorney General should be free virtually on an overnight basis to trigger this statute if it is one of those cases that is better handled outside of the Department of Justice.

Fourth, I think the statute's current tilt toward the appointment of Independent Counsel should be reversed. A more sensible approach, rather than having the Attorney General required to prove a negative, would be a statute that directs her to pull the trigger only where she concludes that there is something like substantial and credible evidence of a serious Federal crime of a type that would be prosecuted by the Department of Justice. In other words, it should remain as a mandatory duty, but it should be a case where the Attorney General concludes there is real crime here.

Fifth, I think we have unduly politicized, or caused speculation about the politicization of, the judicial process that selects Independent Counsels. Rather than having the Chief Justice pick three judges to play that function, a random appointment process would remove harmful speculation.

Sixth, I think the Attorney General should play a role in the selection process, not merely sending a request to the court, but before that ever occurs having sent a roster of candidates, the kind of people with prosecutorial experience and the other qualifications that Attorney General Reno just described, who would, in her view, be excellent Independent Counsels, should a future need ever arise. The Special Division, the judicial panel, could then pick from that list, unless it could state some reason why that roster of candidates contained no one who was appropriate for this assignment.

Finally, seventh, I think that the jurisdiction should be exactly what an Attorney General requests and triggers. We can remove arguments about expansion, and about court-approved expansion over Department of Justice opposition, by literally confining jurisdiction to what the Attorney General requests.

Now, those proposals add up to a framework that will narrow and lengthen and in some cases close the channel that leads to the appointment of an Independent Counsel in the Attorney General's discretion in the less serious cases. But it will leave the channel quite clearly open and quite clearly formulated as a matter of statutory directive in the cases where we really want these appointments to occur.

That gets us appointments. The other issues that swirl around this statute relate to Independent Counsels in office, what the Chairman has referred to as the "back end" of the statute. And, obviously, that is a realm of very complicated issues. Some proposals to consider there include requiring Independent Counsels to announce their decisions to close investigations, rather than having a longstanding Independent Counsel and no public understanding of whether the work is done or whether phases have been concluded. The statute could encourage that kind of closure.

In addition, we should abolish or limit the various reporting requirements. I think the impeachment reporting requirement has unduly confused the legitimate congressional role with the prosecutorial role. I think the final report requirement, which was helpfully narrowed in 1994, could also be narrowed still further.

With those improvements, I think the remaining issues are largely issues of behavior, and those are extremely serious issues. Whether the perpetrator of bad behavior be an Independent Counsel or a Federal prosecutor, things like leaks of grand jury information, unjustified charging decisions, violations of Department of

Justice policy, over-investigation, profligate spending, and letting personal ambition affect prosecutorial judgment are all awful, indefensible behaviors.

Those are things that I think can be shaped culturally. Things like this hearing process, things like this reenactment process, things like the Department of Justice continuing to develop guidelines for its own personnel and any Independent Counsels who then would have to comply with those guidelines, all can correct those behaviors. We also, I think, will get less of the behaviors we may consider undesirable if the future Independent Counsels come from that roster, that all-star list of qualified, bipartisan, centrist, experienced prosecutors, that I think the statute could direct the Attorney General to submit to the court.

With those reforms and some breathing space for people who have emerged from the experiences of the last 5 years, I think we have a strong case to continue. One virtue of the statute is that it has been an ongoing experiment. It goes forward in 5-year increments. It has been improved on each occasion, and I think that is a model to retain. I think it would be unwise to permanently enact an Independent Counsel Statute, but we should attempt to preserve its core, improve its functioning, and go forward for another 5-year period. Thank you.

[The prepared statement of Mr. Barrett follows:]

PREPARED STATEMENT OF JOHN Q. BARRETT

Chairman Thompson, Ranking Minority Member Lieberman and Members of the Committee:

My name is John Barrett. I am an Assistant Professor of Law at St. John's University in New York City, where I teach criminal law and legal ethics courses. From 1988 through 1993, I served as an Associate Counsel in the Office of Independent Counsel Lawrence E. Walsh, where I worked as an attorney on Iran/Contra criminal investigations and prosecutions. In the Office of Independent Counsel Walsh, I worked under the 1987 predecessor version of the independent counsel law that the Committee is considering in this series of hearings. Since becoming a law professor, I have continued to study and have written about the Independent Counsel Statute.[1]

I appreciate very much this opportunity to testify in support of the reenactment of an Independent Counsel Statute to succeed the current version of the law. In my view, the general rationale for such a statute is still correct and compelling today, just as it was when the first Independent Counsel law was enacted in 1978 and when the successor versions were enacted in 1982, 1987 and 1994.

The core argument for an Independent Counsel act is the possibility, grounded in historical experience, that we may need Independent Counsel appointments in rare but truly significant instances. Building on that recognition, the next version of the law should increase the Attorney General's discretion to limit its use to the core cases where that need is the greatest. The next statute also should contain provisions that will make it more likely that Independent Counsel will be credible and successful after their appointments, in their work as Federal prosecutors. We should not pretend, however, that the existence of any Independent Counsel law or its demise will ensure investigations and outcomes that produce national unity and gratitude.

In this statement, I will address briefly five topics:

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[1] See John Q. Barrett, *It Can't Be Watergate Every Time,* LEGAL TIMES, February 22, 1999, at 29–30; John Q. Barrett, *All or Nothing, or Maybe Cooperation: Attorney General Power, Conduct, and Judgment in Relation to the Work of an Independent Counsel,* 49 MERCER L. REV. 519–51 (1998) (http://review.law.mercer.edu/fr49205.htm); John Q. Barrett, *Nothing Special in These Prosecutions,* LEGAL TIMES, Dec. 22 & 29, 1997, at 39–40; John Q. Barrett, *The Independent Counsel That Wasn't: Finding Lessons in the Way the Independent Counsel System Cleared George Tenet,* LEGAL TIMES, Sept. 1, 1997, at 23–24; see also John Q. Barrett, *Independent Counsel Law Improvements for the Next Five Years,* 51 ADMIN. L. REV.—(forthcoming, June 1999).

- First, in the rare instances when evidence suggests that a President of the United States or someone close to him has committed a serious Federal crime, it is not credible to ask that President's Attorney General, or any other prosecutor who is personally or professionally dependent on either the President or the Attorney General, to investigate that matter. The defining purpose and great success of the Independent Counsel law is that it has, in its twenty years of existence, provided a legal mechanism to assign these investigations to someone who is not beholden to the President.
- Second, to facilitate the process of getting the right Independent Counsel appointments in the right cases, the statute can be improved significantly for its next five years through a series of amendments that provide more investigative power to the Attorney General during preliminary investigations; that recognize and increase her discretion not to trigger Independent Counsel appointments in those cases where the need is not considerable; that change the method by which Federal judges are selected to serve on the Special Division; and that reduce their role to ministerial tasks, such as appointing qualified Independent Counsel to conduct the investigations that the Attorney General has requested.
- Third, current critics of the Independent Counsel law and advocates of various alternative mechanisms are being unrealistic in their general expectations that Federal law enforcement investigations of senior government officials can proceed without significant controversy, and that they can achieve ideal results. Critics of the statute also are mistaking issues of personal behavior and judgment that have arisen in particular criminal investigations of senior government officials for defects in the Independent Counsel law, which they are not.
- Nonetheless, fourth, the statute can be improved in this respect too, through amendments that clarify that the Independent Counsel's role is to function solely as a Federal prosecutor, and that change the current law in other respects.
- Finally, fifth, as this series of Committee hearings well demonstrates, Members of Congress and other citizens who are concerned with our national life can contribute significantly to the success of a future Independent Counsel Statute and, if future Independent Counsel are appointed, to their successful work by recognizing anew the desirability of apolitical Federal law enforcement investigations of senior officials, and by providing to investigators the breathing space and cooperation that will help that important work to occur better.

I. The Rationale for and the Success of the Independent Counsel Law

The core rationale for the Independent Counsel law begins with the belief, supported by much historical experience, that credible information can come to light which suggests that a President of the United States or some other person to whom he is intimately connected has committed a serious Federal crime.

When this does occur, an Attorney General of the United States and the Department of Justice that she or he runs cannot credibly investigate the alleged crime or determine whether to prosecute its perpetrator(s) because they all work for the President. Watergate, among other examples, confirmed that, from the President on down, executive branch officials can endeavor to impede, can actually interfere with and, simply by their supervisory presence, can chill, the proper work of Federal law enforcement in these cases.

The Independent Counsel law prescribes the right remedy for this possible conflict of interest: reassigning the responsibility for making these investigative and prosecutorial decisions from the Attorney General to a lawyer who will have the power to do the job and the freedom to do it outside of direct Department of Justice supervision. The realistic argument for the Independent Counsel law is, in other words, an argument for a process that can, when needed, appoint a credible investigator and prosecutor who does not work for the President.

In this respect, the Independent Counsel law has worked well. In each of the more than twenty instances in which statutory Independent Counsel have been appointed during the past two decades, the appointee has been independent in fact and thus generally credible to the public at the time of his or her appointment.

II. Improving the "Front End" of the Statute to Get the Right Independent Counsel in the Right Cases

As portions of these hearings illustrate, the recognized fact that we will need Independent Counsel appointments in some instances does not mean that our cur-

rent statute creates the best process by which to identify and obtain those Independent Counsel appointments.

The current law defines a sequence of events—the so-called "front end" of the law—that will precede the moment when someone becomes an Independent Counsel and commences the investigation that the Department of Justice cannot continue to conduct with public credibility and/or actual independence. This sequence includes the Department of Justice conducting a preliminary investigation of allegations that a President or someone close to him in fact or by official position has committed a Federal crime; the Attorney General determining whether the findings of that preliminary investigation require her to request an Independent Counsel; the Attorney General asking the Special Division to appoint an Independent Counsel to investigate a particular matter; and the Special Division identifying an Independent Counsel and defining the boundaries of his jurisdiction as an investigator and prosecutor.

Some of the most serious and legitimate criticisms of the Independent Counsel law today focus on these "front end" processes. Critics point to a range of "trigger"-related issues. They see the Attorney General's power during the preliminary investigative phase as too great or too small. Some believe that Attorneys General have abused their discretion by not seeking Independent Counsel in certain matters. More critics seem to claim today that Attorneys General have triggered the Independent Counsel law much too often. Others criticize the process by which the Special Division selects particular persons to be Independent Counsel.

Congress can improve the front end of the statute to address these concerns:

- First, the Department of Justice should be empowered to conduct preliminary investigations of "covered persons" with all the regular tools of law enforcement, including grand juries, subpoenas, plea bargaining and immunity orders. This would help Attorneys General make better-informed choices about which matters really need to be investigated by an outsider.
- Second, the current statute's time limits on preliminary investigations should be changed into mere notification requirements. This will keep the Department's work visible while eliminating drop dead dates that may truncate and impede the Attorney General's evaluation process.
- Third, the law should state clearly that the Attorney General may trigger an Independent Counsel appointment at any time, without the requirement that she invoke a statutory standard that explains her need to act. This will clean up any ambiguity that the current law may contain and make the Attorney General's power and discretion clear.
- Fourth, a new Independent Counsel law should reverse the current statutory tilt toward seeking an Independent Counsel when a senior official is alleged to have committed a Federal crime. Under the current law, the Attorney General must, in effect, prove a negative at the end of the Department's preliminary investigation (which is itself limited in duration and power). Unless she determines that there are no "reasonable grounds to believe that further investigation is warranted," the current law requires her to ask the court to appoint an Independent Counsel. (28 U.S.C. § 592(b)(1).) A better statute would direct the Attorney General to seek an Independent Counsel only if she concludes that there is "substantial and credible evidence of criminal conduct of a type that is prosecuted by the Department." The law should, in other words, force the Attorney General to seek an Independent Counsel only when she believes that "there is a real crime here," and it should free her not to seek the appointment when she does not.
- Fifth, the law should change the process by which Circuit Judges are selected to serve on the Special Division. In recent years, some have come to suspect that partisan politics plays a role in this process. We would avoid these corrosive suspicions if the law prescribed the random selection of three Chief Judges from the Federal Circuits to perform the appointment function.
- Sixth, the law also should change the Independent Counsel selection process. The law should require the Attorney General to give to the Special Division each year a roster of fifteen or so experienced and available persons who would, in her view, make fine Independent Counsel in the event she later requests one. The law also could direct the Special Division to pick Independent Counsel from this list or, if it did not, to state why none of the listed candidates was selected.
- Seventh, the law should require the Special Division to give Independent Counsel exactly the jurisdiction that the Attorney General has requested.

The framework in which these recommendations fit is a general idea that the Attorney General should be authorized to narrow, lengthen and close, in her discre-

tion, the channel that leads to the appointment of an Independent Counsel in the less serious cases. We should trust the Attorney General a lot more on the front end of investigations of alleged crimes by senior executive branch officials, permitting her explicitly to determine whether a matter lacking substantial and credible evidence of criminal conduct of a type that is prosecuted by the Department of Justice nonetheless should travel through that channel.

Although these proposals to empower the Attorney General would probably result in fewer Independent Counsel appointments, they would run the risk that, in the hands of a corrupt Attorney General, we would not get an Independent Counsel in the case where we needed one the most. As the bitterest opponents of the statute have pointed out, however, most Attorneys General have been and will be persons of impeccable character. In addition, in the big cases that are at issue here, the visibility of Department of Justice inaction would be a powerful check on any Attorney General's temptation to cover up for his President. An Attorney General who intentionally thwarted the Independent Counsel law by not seeking an appointment in a case where we truly needed it would also, of course, be placing us in no worse a position that we will be in if the law is permitted to lapse. Thus in the end, or at least for the next five years of experimentation with this statute that has been improved in each of its three previous reenactments, these ideas strike the right political and policy balance for our time.

III. Assessing the Criticisms of Independent Counsel Investigations in Operation

My proposals regarding the "front end" of the Independent Counsel law do not address directly the "back end" issues that so many critics raise when they attack the Independent Counsel law. In evaluating the future of this statute, the Committee, Congress and the President also must consider the powerful claims that some Independent Counsel have been, in operation, political, abusive, expensive and unproductive.

My general response is that these critics are asking the Independent Counsel law and, indeed, Federal law enforcement, to do too much. Prosecutors are human and inevitably make (we hope minor) mistakes. In addition, in the kinds of cases that result in Independent Counsel appointments, and certainly in the most serious ones that an Attorney General would choose to send to an Independent Counsel under the reformed statute described above, lack of controversy is a supremely unrealistic expectation. Whether we have Independent Counsel or not, a criminal investigation of a president or anyone close to him will be contested bitterly by the subjects of the investigation, their political allies and their excellent and numerous lawyers, and these matters will be topics of saturation media coverage. The prosecutor will feel all of that heat, however cautious and correct his behavior may be. And at the end of his work, the partisans will be, in almost every case, still fighting bitterly about what the facts were and what the investigations and prosecutions did and did not accomplish. What we got at the conclusion of Watergate, in other words—central players confessing in public to their clear crimes and implicating others; the discovery of taped evidence that corroborated their claims and made a President's crimes audible to the world; and a President and his subordinates deciding not to destroy or withhold key incriminating evidence—likely will not happen again. If people expected the Independent Counsel law to produce such outcomes, they were supporting a realistic statute for the wrong reasons.

IV. Improving the Statute's Provisions Regarding Independent Counsel Conduct in Office

That said, the back end of the Independent Counsel Statute could be improved by:

- Requiring Independent Counsel to announce their decisions to close investigations when they make them;
- Eliminating the statutory provision that permits the Special Division to expand an Independent Counsel's jurisdiction;
- Abolishing the impeachment reporting requirement; and
- Narrowing the final report requirement.

Although these amendments would produce an Independent Counsel Statute that addressed some of the criticisms of Independent Counsel investigations, they do not address some of the most personalized criticisms of Independent Counsel and their staffs. In this respect, the critics are plainly right. There are behaviors that are real misconduct if and when they happen in any Independent Counsel's office, just as they are when the prosecutor who commits these acts works for the Department of Justice. These include:

- Leaks of grand jury information;

- Charging cases that lack proof, jury appeal and/or prosecutive merit;
- Violating other Department of Justice policies that bind any regular Federal prosecutor (which is what an Independent Counsel is supposed to be);
- Over-investigating and other acts reflecting bad judgment;
- Profligate spending; and, finally,
- Personal ambition, in an Independent Counsel himself or at the staff level, that affects conduct of the public's business.

Although each of these behaviors is, if it occurs, deeply problematic, each is just that: an act of personal behavior, not a command or even a product of the Independent Counsel law. While the personal failings and mistakes of any Independent Counsel thus are not reasons to abandon the Independent Counsel Statute—the Department of Justice, after all, is filled with people, too—they are things for Congress and the Executive Branch to think about in structuring and improving the law's processes and Federal law enforcement generally, and for future Independent Counsel to address directly as public officials, leaders and managers.

V. Depoliticizing Criminal Investigations of Senior Government Officials

A final behavioral issue to consider at this time is the practice, which undeniably has become more frequent since the Independent Counsel Statute was first enacted in 1978, of treating the law as a political weapon and each Independent Counsel as a political actor. Some critics of the law argue that this phenomenon is part of a larger climate, at least in and relating to Washington, D.C., and that the Independent Counsel law itself bears some of the blame for this because it rewards such behavior. Others simply see the Independent Counsel act as a victim of a larger storm.

I will side with the optimists who know that all storms pass, and that good communities gather to repair the damage they leave behind, and to prepare themselves to fare better the next time. The Independent Counsel law does, like any of our great legal institutions, embody a certain faith in the decency and fairness of the people who deal with it, and in it, and around it. This law has the added benefit of being an ongoing experiment in five-year increments. The challenge now, as it has been on each previous occasion when the statute came up for renewal, is to step back from the particular loyalties it has challenged, to identify the real lessons of our recent experiences with it, and to use that knowledge to craft improvements in the law.

Beyond the mechanics of legislating, we should use this opportunity to craft improvements in ourselves. One area for reconsideration is the conduct of public officials while an Independent Counsel law is in effect. Some officials have, for instance, in the past, sought to force the Attorney General's hand in the direction of triggering Independent Counsel appointments in various matters. Some officials also have, at times, sought to command or to defeat an Independent Counsel's investigative and prosecutorial work. These behaviors have been parts of our experience with the current law, at least in the "covered President," big headline-type cases, and they generally have not been helpful to Attorneys General or Independent Counsel carrying out their law enforcement responsibilities under the statute.

A second behavioral issue for everyone to reconsider is the widespread practice of demonizing an Independent Counsel. At least in the big cases, the subjects of the Independent Counsel's investigation, their lawyers, their political allies, their friends and so forth begin, almost from day one, to cast aspersions on Independent Counsel. This kind of opposition may be inevitable, but each of us may be able to do small things to minimize it, and thus to enhance the quality and credibility of any Independent Counsel's proper work for the public.

The claim that the Independent Counsel law has failed is really a claim that we are not up to handling it responsibly, and thus that we can do no better than the system of apparent and real conflicts of interest that it replaced. That claim remains unproven, and our challenge to do better remains.

Chairman THOMPSON. Thank you very much, Mr. Barrett. You would recommend retaining the statute, with changes and modifications.

Mr. Heymann, I believe you have a different approach.

TESTIMONY OF PHILIP B. HEYMANN, JAMES BARR AMES PROFESSOR OF LAW, HARVARD UNIVERSITY, CAMBRIDGE, MASSACHUSETTS, AND FORMER DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, AND FORMER ASSOCIATE WATERGATE SPECIAL PROSECUTOR

Mr. HEYMANN. Yes. Thank you, Mr. Chairman, and Senator Lieberman.

There are obviously three broad alternatives. One is very well described by Mr. Barrett, renew the statute with substantial amendments, and amendments would make it better. Two is to abandon the statute and rely on the Attorney General's appointment of special prosecutors. That is what the Attorney General just urged. And the third is to build a structure within the Department of Justice itself that has enough protections built around it to give substantial assurance, and yet avoid the difficulties of the Independent Counsel law which are largely a result of the fact that you are building a special organization to investigate a single case or a single group of cases. I am urging the third. That is the position that I urged on Common Cause. Archibald Cox, Derek Bok, and I, all urged this.

Let me first describe the process and then answer the question that you haven't asked yet. Why would it work, why should we have confidence in it? This is a set of proposals that is very closely modeled on what was done during President Carter's tenure by Griffin Bell and Benjamin Civiletti. It has three total parts; two of them apply to all cases.

The two that apply to all cases are that with a very narrow exception designed to be sure that any deviation from the established process is made public, the final review of any prosecution is in the hands of the Assistant Attorney General in charge of the Criminal Division. If the Attorney General or the Deputy Attorney General wants to reverse a decision of the Assistant Attorney General, the person who is very close to line prosecutors and very much by tradition a line prosecutor himself or herself, the Attorney General would have to do it in writing and giving reasons as extensively as is appropriate.

The Assistant Attorney General in charge of the Criminal Division would not be subject to contact on a particular case by anyone in the White House or anyone in the Congress, and indeed not even at their initiation on a particular case by the Attorney General or the Deputy Attorney General. This is very much modeled after the British system, a director of public prosecutions.

What would be special only to cases involving the highest-level officials is we would build an additional set of protections in for whatever small set of officials there is most concern about. That set of protections would involve a requirement that the Assistant Attorney General give his or her reasons for not prosecuting. The Attorney General has developed that practice with regard to not appointing an Independent Counsel. And before reaching a final decision not to prosecute one of the highest-level officials, the Assistant Attorney General would be required to consult with three of his predecessors, at least one of whom would be of the opposite party. And the predecessors would be free to say what they had recommended.

The final decision would remain, with concentrated responsibility and concentrated accountability, in the hands of the Assistant Attorney General, but we would have a guarantee that it would be known publicly if one of the three predecessors, fairly chosen, felt that the decision was not a reasonable one.

Now, why should anybody believe this will work when the Assistant Attorney General is appointed by the President? There are several answers to that. One answer—there is a famous law of science, which is what that is, is possible. During the Carter administration, I was head of the Criminal Division. We investigated President Carter twice, Billy Carter once, the head of the Democratic National Committee. We prosecuted Bert Lance, the head of OMB. We ended up appointing Independent Counsels for Hamilton Jordan and another White House staff member. We didn't prosecute several Senators, prosecuted one Senator, prosecuted a number of Representatives, and it worked. Sure, there were complaints here and there, but nothing like the problem of credibility that now exists in the country.

Now, why does it work? It works because the Assistant Attorney General has no significiant contact, in general, or relationship with the President, the Vice President, or other Cabinet officials besides the Attorney General. This is not true, as I think Senator Lieberman pointed out earlier today, of the Attorney General. Attorneys General are, in most cases, close associates of the President. That is not true of Assistant Attorneys General.

Beyond that, there has been a tradition developed in that office of appointing very distinguished prosecutors. The present one, Jim Robinson, was formerly U.S. Attorney. None of them have been particularly political if you go back 20 years. Jim Robinson was U.S. Attorney in Detroit. Jo Ann Harris, before him, was head of the fraud section in the criminal division in the U.S. Attorney's office. Bob Mueller is a career prosecutor. Ed Dennis, from Philadelphia, Senator Specter knows very well; Governor Weld, Judge Jensen, Judge Trott. This office has a tradition that sustains it.

And, finally, placing that kind of confidence in the Justice Department, if merited—and I think it will be merited with these protections—is good for the system of accountability. It centralizes, it shows respect, it shows trust in the institutions of the United States. In short, history and structure suggest that it will work. You can build on to that structure an additional protection which guarantees publicity in any situation involving a high-level official.

Finally, our proposal reaches a far broader category of cases than will ever be reached in any other way. We ought to worry about cases that involve prosecution of opponents of the President as well as failure to prosecute any of a broad range of supporters of the President. It reaches all of those.

For anything else, I am going to rely on questions and let you go to Mr. La Bella.

Chairman THOMPSON. Thank you very much.

[The prepared statement of Mr. Heymann follows:]

PREPARED STATEMENT OF PHILIP B. HEYMANN

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 pre-

sented 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 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 judgment 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 judgment 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 75 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 pub-

licly (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 nonpartisan 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 2 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.

Chairman THOMPSON. Mr. La Bella.

TESTIMONY OF CHARLES G. LA BELLA, FORMER SUPERVISING ATTORNEY, CAMPAIGN FINANCING TASK FORCE

Mr. LA BELLA. Good morning, Senator. I am going to be brief. I am not a fan of the Act. I think, given the public's perception of the Independent Counsel Act today, it is going to be difficult to fix it; I don't think impossible, but difficult to fix it. Some people have articulated several fixes that are steps in the right direction.

But I guess my position is that career prosecutors can handle the bulk of these cases, and when a career prosecutor can't because of conflict of interest, then the Attorney General has the authority to appoint an Independent Counsel, and that is probably the way to go. The real challenge, I think, is what we do with the vacuum that is created if the Act lapses.

And if I have anything to contribute, I think that is where it is because I have spent just about 17 years as a prosecutor. I have been a line assistant and held all the positions all the way up through U.S. Attorney, and I think I have a unique perspective of how U.S. Attorneys' Office work and how they can handle these cases.

I have also had the pleasure of spending 1 year in Washington heading the Campaign Financing Task Force.

Chairman THOMPSON. You say that with a straight face, too.

Mr. LA BELLA. I do.

Senator LIEBERMAN. I did note a certain hesitancy.

Mr. LA BELLA. And I have seen how investigations are run inside the Department, and there is a difference between how things are handled inside the Department and how they are handled in field offices, in the 93 U.S. Attorneys' Offices that the Attorney General referred to.

I think the real challenge is going to be for the Department to find a mechanism that works to handle these cases, to put the talent that presently exists in the Department of Justice—whether here in Washington in the Department or in the field offices, to put the talent where the cases are so the investigations are conducted by career prosecutors, real career prosecutors, not people who have spent 15 years in the government and have not tried cases.

When I talk about a career prosecutor, I don't just mean a number of years in the government. I mean a man or a woman who has actually presented significant cases to grand juries, has tried significant cases to trial juries, has done a series of arguments in front of appellate and district judges, someone who knows their way around the courtroom and who knows their way around circumstantial evidence, direct evidence, and witnesses and judging the credibility of witnesses, and just has a sense of the process.

You need to put the talent where the cases are. That is the challenge for the Department, and I hope whatever plan they come up with will do that. But it is not just throwing more resources into, for example, the Public Integrity section. I don't think the answer is to hire 23 more lawyers for the Public Integrity section. I think the answer would be to hire 23 lawyers, experienced prosecutors, and direct their attention to these cases, to the extent they come in.

One of the challenges for the Department is going to be that these cases, despite events of recent years, don't walk in the door every 10 minutes. They are few and far between. You can go 2 and 3 years without getting one of these cases in the door. And it is hard to keep those sorts of people, those high-energy prosecutors, sitting on their hands for 2 and 3 years in a section in the Department of Justice waiting for something to happen, waiting for the fire bell to ring. That is not what good prosecutors do. What they do is they go out and they make cases; they go out and they try cases and investigate cases. So I think the challenge is going to be to find the good prosecutors and to put them where the cases come and when they come in the door, because they are going to come helter-skelter.

Beyond that, I really look forward to answering the questions, and hopefully I can help.

Chairman THOMPSON. Thank you very much. That is a fascinating notion. What you are suggesting, as I understand it, is basically it can be handled within the Justice Department, but that doesn't necessarily mean the traditional compartments we think of, either Criminal Division or the Public Integrity Section. But there may be career prosecutors out around the country, and U.S. Attorneys and

people who are brought in as U.S. Attorneys many times because they are very experience in the field and are used to trying big-time cases, while those in the government may have been there a long time and might provide some method by which to make sure everybody is treated fairly and in all cases have some equal treatment. But they might not be the ones that have the real experience in taking on the tough, long-drawn-out, white-collar crimes where there is a lot of additional political pressure.

I think, again, the problem becomes what about when you get to the President and the Cabinet and those top-levels. Of course, as I think about it, that is kind of what happened in the Agnew case. They went to Maryland and got the U.S. Attorney out there. He handled the Agnew case and the Attorney General gave him support and told everybody to leave him alone.

Mr. LA BELLA. And that is exactly what happened with Congressman Rostenkowski. Although that wasn't a covered person, that is a situation in which Eric Holder, as U.S. Attorney in D.C., handled the case. It was a politically sensitive, politically-charged case, and they acquitted themselves well.

Chairman THOMPSON. But career prosecutors have to have the confidence that they are not going to get the shaft when they make the tough decisions. Do you have any experience with that, Mr. La Bella?

Mr. LA BELLA. I have had a wonderful career in the Department and I appreciate the support I have gotten.

Chairman THOMPSON. That is the kind of answer I thought you would probably give.

Mr. Heymann, getting back to the question of discretion with the Attorney General—and she is correct; she has been criticized both ways. I think one of you pointed out—I think it was you—that in times past, other Attorneys General made tough decisions, but I don't recall any controversy and lack of confidence that we have seen recently.

As you have watched it unfold—and having been there on the inside, you know how these processes work, but as you have watched the whole campaign finance thing unfold and seen the determination that this is soft money so you can run it through the DNC, and it doesn't count and we can raise all that money that way and it is clearly not a violation of the law—I know by clear and convincing evidence that they didn't have the intent to violate the law. I have read some of your writings on the subject. Doesn't it seem to be a pretty clear violation at least of the intent of the law?

Mr. HEYMANN. I think it is clearly a violation of the intent of the law, Mr. Chairman, but I do think that there is a very substantial dispute as to the technical, literal illegality at the soft money practices of 1996, which I regard as illegal. Although I believe they are illegal, there is substantial dispute on that issue. I think we have to agree on that.

Chairman THOMPSON. Well, sure, there are people who feel various ways, but it certainly raises the question as to when you have a substantial dispute as to the law. Frankly, I think the very strong weight is on your side and the side of Common Cause and the side of all those others who have come out strongly on that side.

But be that as it may, if you have some dispute like that, the question becomes, who makes the decisions? When you have a question of public trust and public confidence, when you have the President himself involved, isn't that the question, who makes the decision under circumstances like that?

Mr. HEYMANN. Yes. I think I disagree with you on this particular issue, Mr. Chairman. I think if the question is a question of law and if the Attorney General is prepared to announce a position of law on whether something is a crime or not, I think the Attorney General has to make that decision. We simply don't want somebody else—let's say we continue to have Independent Counsel or special prosecutors. We don't want different people making different decisions on the question whether issue ads run through the Democratic National Committee and controlled by the President are criminal or not. We need a uniform position. Everybody has to be guilty or everybody innocent. So I think the Attorney General has to make that decision. I disagree with her decision, but I think it is hers to make.

Chairman THOMPSON. Mr. La Bella, having been there, I want to ask you some questions about how the Independent Counsel Statute has operated. I have been concerned, looking at it from our vantage point, that at the preliminary inquiry stage there is a rather narrow view that is taken by Public Integrity as to the applicability of that statute.

Can you tell us, when you came aboard and while you were there, if you recall any changes in perception, how that requirement, how that preliminary inquiry process and that requirement to determine whether or not to go forward under the Independent Counsel Act was viewed by the Public Integrity Section?

Mr. LA BELLA. It is a difficult statute to deal with, and I think people in the Department struggled to deal with it as best they could. It sets up a situation in which a prosecutor gets an allegation and the first determination to make is whether or not there is specific information from a credible source. And you can only use certain investigative techniques. Virtually all your traditional investigative techniques, once you make that threshold, are taken away from you.

The statute creates sort of an artificial way to look at a case. Prosecutors don't look at single allegations when they come in. Generally, when, in a U.S. Attorney's office, you are dealing with an allegation of wrongdoing, you may have a specific allegation of wrongdoing, but you look at the spectrum of conduct in order to properly place in context that conduct. You don't take out Tuesday morning at 10 o'clock and hold it up to the light and see if there is anything wrong with Tuesday morning at 10 o'clock. You look at Monday, you look at Tuesday, you look at Wednesday, you look at the whole week and you get a sense of where this conduct fits in the fabric of overall conduct.

If other conduct is not directly related to it, you tend not to look at it in the context of the Independent Counsel Act because if it is not specific and credible information of alleged wrongdoing, that information is put to the side, although in the context of a criminal investigation it may be very relevant. Although not criminal in and of itself, it may provide circumstantial evidence, a link to a conspir-

acy, an overt act which does not have to be criminal in and of itself. Sometimes, those things are put aside, and I think it was the awkwardness of the statute and perhaps the rigidity in which the statute was read that that process took place. But it was a very difficult statute.

Chairman THOMPSON. So, in other words, the way it was being applied in comparison to a normal prosecution of a public figure, let's say a mayor or a governor or someone like that—it was much narrower and more isolated. And Public Integrity's interpretation was that you shouldn't look at Monday and Wednesday; you ought to concentrate on Tuesday and just examine that and see whether or not that was sufficient to trigger.

Mr. LA BELLA. That was the focus of attention.

Chairman THOMPSON. So, actually, that is one of the things I think we are discovering here that so much of the criticism has been hair trigger; you have got to go ahead on all these cases. But when you get into it and see how it is applied, it is really applied in a more narrow sense where if the same individual were not subject to the Independent Counsel Act, but if you were looking at him as a U.S. Attorney in California, you would have greater leeway and look at more things in making up your mind.

Mr. LA BELLA. Clearly, we would.

Chairman THOMPSON. That is very interesting. I have always been interested, too, along those same lines as to what if you look at a covered person and the determination is made that the Independent Counsel Act would not trigger as to that covered person. You make that determination, but you are still looking at other people who may be associated with the President.

Can you ask, or are you restricted in any way from asking that other person—let's just say the President and one of his associates; the President is clear. The President is clear to the extent that the Independent Counsel Act doesn't apply. So you are asking now his associate. Is there any restriction on asking that associate, who is still under investigation, what about the President, what about your friend, what did he do, all of that, since he has been passed on by the Independent Counsel?

Mr. LA BELLA. I should say that one of the few things I have never done is I have never been a member of the Public Integrity Section, so I can't speak to their rules and regulations. All I can tell you is my interaction with the Public Integrity Section.

Chairman THOMPSON. What you were told?

Mr. LA BELLA. What I was told, what I saw and, our interaction, because I was doing the campaign financing investigation and certainly we had interactions and intersections. There was a debate for a period of time as to, because of the way the statute was written, whether or not we could ask questions about a covered person because would that not constitute an investigation of that person under the Act? And that can only be done under certain circumstances, so it was a dilemma we had to deal with.

I think ultimately we resolved it by determining that if Mr. X was a cooperating witness and it would be logical in the context of debriefing Mr. X to ask Mr. X about a covered person, we could ask the question and get the answer. Now, once you get the answer, at that point in time it may be that you have to stop the question-

ing, go back and assess whether or not that answer constitutes specific information from a credible source sufficient to trigger a preliminary inquiry. And if so, you now lose all your powers as a real prosecutor and basically you are neutered and you can only ask for voluntary disclosure of documents and you can ask for voluntary interviews. You can't subpoena people, you can't immunize people.

Chairman THOMPSON. Is it fair to say that when you came aboard, that restricted view was prevailing?

Mr. LA BELLA. I think it was a subject of debate at the time I came on board, and I think after I came on board it was resolved. I mean, I had a feeling about it.

Chairman THOMPSON. You had a strong feeling that you ought to be able to ask the question, did you not?

Mr. LA BELLA. Should I be able to ask the question? I think it got resolved that way.

Chairman THOMPSON. And you ultimately prevailed in that extent?

Mr. LA BELLA. Well, I think they agreed. I think it was a debate that was going on. I don't know that I prevailed, but——

Chairman THOMPSON. And you don't know about today, how it is being interpreted?

Mr. LA BELLA. I don't have any contact with the Campaign Financing Task Force now.

Chairman THOMPSON. Thank you. Senator Lieberman.

Senator LIEBERMAN. Thanks, Mr. Chairman. Thanks to all three of you. Your testimony has been excellent and very helpful.

Mr. La Bella, just a question or two which really follows on what Senator Thompson has been asking. It was certainly our impression here on Capitol Hill that when Attorney General Reno asked you to come on board in the campaign finance investigation, it was because of her frustration with what had been happening in the Public Integrity Section.

There was an article this morning in *The Washington Post*—I don't know if you had a chance to read it—which suggested a kind of change in the orientation of the tempo of that Section. I am trying to pick up from what was said here. Did you detect those problems? In other words, in your work there, do you think there is something inherently oriented in a direction that doesn't allow Public Integrity to conduct these investigations in a way they should be conducted?

Mr. LA BELLA. There are a lot of things that the Department does, and does very well.

Senator LIEBERMAN. Yes.

Mr. LA BELLA. And there are a lot of things the Public Integrity Section does, and does very well. I think U.S. Attorneys' Offices around the country use them as a resource very often in politically sensitive cases to get their knowledge because they do have an incredible knowledge about those cases, and they contain the historic perspective of those cases as they have been prosecuted in the United States. And they also, I think, are a good barometer of the acceptable range of what a prosecutor should do and what a prosecutor should charge in those sorts of cases.

What I don't think the Department is built for—and I guess it is going to be construed as a criticism, but I don't think what it

is built for is to run the day-to-day operations of a dynamic criminal investigation. That is not the forte of the Department of Justice. I think that is what U.S. Attorneys' Offices do day in and day out.

The vast majority of criminal cases that are investigated and prosecuted in this country are done by U.S. Attorneys' Offices, not by the Department of Justice. Very often, the Department will send its lawyers out in the field, and we work with them all the time. We work with the Civil Rights Division, the Public Integrity Section. They come to our jurisdictions and they work jointly with us on investigations, but I don't think the Department is set up, frankly—and my own experience was that it was not set up to—it did not have a decisionmaking process in place and a supervisory process in place that lended itself to efficient investigations. There are too many layers of bureaucracy. The Department is not built like a U.S. Attorney's office. It doesn't feel like a U.S. Attorney's office and it doesn't act like a U.S. Attorney's office.

Senator LIEBERMAN. So if you were advising the Attorney General now as she attempts to implement the outlines of a proposal to bring this function back within the Department, I presume I am correct in concluding that you would not advise her to give this authority of investigating high officials of our government to the Public Integrity Section alone.

Mr. LA BELLA. That is exactly right, not alone, and not exclusively. I think that it has to be a combination of—there are going to be cases where Public Integrity is the best section to do this particular investigation.

Senator LIEBERMAN. Right.

Mr. LA BELLA. There are going to be other investigations where it is best sent to a field office to investigate, where the resources are, again putting the talent where the cases are.

Senator LIEBERMAN. Mr. Heymann, would that vision be incorporated in your thoughts about giving this authority to the Assistant Attorney General, head of the Criminal Division?

Mr. HEYMANN. Absolutely, Senator Lieberman. The only reason I focus on the Assistant Attorney General in charge of the Criminal Division is, I think, that should be the final appeal. If, in San Diego, Mr. La Bella is bringing a case, someone has a right to go to Washington and say, "no, don't bring that case; to bring it is unfair or is inconsistent." I think the final appeal of the issue should be, as it is in 99 percent of the cases now, to the Assistant Attorney General in charge of the Criminal Division. But I agree with Mr. La Bella's description of who ought to do the work.

Senator LIEBERMAN. Mr. Barrett, let me get you into this, particularly since you are the one of the three who is advocating a continuation of the existing structure, though substantially modified. Do I understand you correctly that you would alter the procedure to authorize the Attorney General to give essentially a roster of nominees for Independent Counsel to the three-judge panel, who would then draw from that roster?

Mr. BARRETT. Yes. I think eligible candidates is the concept that I have in mind. There are former U.S. Attorneys—Mr. La Bella and Mr. Heymann would be two good names for that list—and the court would then have that in its file.

Senator LIEBERMAN. They are smiling, let the record note. Mysteriously, may I say.

Mr. BARRETT. It is something that would remove the question we currently have, which is where does the court find these people. And in some cases, I think the court has found people who——

Chairman THOMPSON. We need to waive the Republican requirement on these two.

Senator LIEBERMAN. Really?

Chairman THOMPSON. Yes.

Senator LIEBERMAN. Well, that is good of you.

Mr. BARRETT. I think a bipartisan list is what any sensible Attorney General would send.

Senator LIEBERMAN. Would you have the statute set out requirements, for instance, that they be former prosecutors, former U.S. Attorneys?

Mr. BARRETT. I think that kind of categorization is too rigid. I think it is generally a virtue, but it shouldn't be a per se qualification. For example, Mr. von Kann, who did a very good job in the Segal case by all accounts, was never a line prosecutor. Archibald Cox was never a line prosecutor. So you want someone of character and judgment and sensitivity to the law enforcement interests that this job entails, but a particular resume line I don't think is the right proxy for that.

Senator LIEBERMAN. Let me ask you about another aspect of the current law, which is what is the accountability of the Independent Counsel when he or she is functioning as Independent Counsel? As I have followed the discussion, it seems that the Attorney General doesn't quite think that she has oversight, and the three-judge panel has indicated that it doesn't think it has oversight.

Now, I know the whole essence of the system that you and I support is the independence of the Independent Counsel. Nonetheless, there are day-to-day questions of who is supervising as to budget, for instance, leaving aside prosecutorial questions. Have you thought about that, and what counsel would you give us if we——

Mr. BARRETT. Yes. I think there is a fair amount of accountability that comes in the daily work of an Independent Counsel's office. In part, it comes from the statute, which puts the Independent Counsel under Department of Justice policies. In part, it comes from the personnel. I think the successful Independent Counsels have been staffed with exactly the kinds of prosecutors that Mr. La Bella is describing, people who have been line assistant courtroom prosecutors in U.S. Attorneys' Offices across the country. And they bring with them the knowledge of the law, the knowledge of the Department policies, the sense of scale that he is describing, and that operates in the office.

In addition, I think successful Independent Counsel offices have a channel of communication with the Department of Justice. Its responsibility has been delegated outside the building, but a wise Independent Counsel immediately calls back in and taps into the career wisdom that the Department contains. Each investigation obviously has its own issues. Iran-Contra had classified information and Fifth Amendment immunity issues, particularly. Obviously each investigation is its own thing, but those things correspond with expertise at the Department of Justice.

I think, finally, the accountability and the check comes in the person of the Independent Counsel. The experienced person with a background in Federal law enforcement, with a background in serious governmental responsibility, with a background in high-level management, is someone who has good judgment in the exercise of this responsibility.

And so you are certainly correct. The independence comes at a risk, and the risk is unaccountability. But I think, in practice, there has really been quite a culture of restraint and accountability.

Senator LIEBERMAN. And if there is any institutional accountability, as I hear you, it is to Justice, so that the three-judge panel has accurately interpreted its role under the *Morrison* case.

Mr. BARRETT. Yes.

Senator LIEBERMAN. And it doesn't have ongoing supervisory responsibility?

Mr. BARRETT. That is my reading of the statute. I think that is what the removal power is there for. It is certainly something that every Independent Counsel is conscious of. And I actually took heart from the Attorney General's response to Senator Levin. She was unable to say, yes, that there had been a violation of Department of Justice policy by an Independent Counsel. It sounds like there is evaluation still ongoing, but in general I think that is a testament to the work of Independent Counsels, that they have stayed within that framework of constraint.

Senator LIEBERMAN. Mr. Heymann, I am intrigued by your proposal and one question I do have about it is on the matter of termination. Am I correct that under the proposal, the Attorney General would still have essentially an unreviewable power to remove the Assistant Attorney General overseeing the investigation?

Mr. HEYMANN. It could go either way, but that is what I would recommend, that she retain that power.

Senator LIEBERMAN. So you are not worried about the appearance of credibility, with the background of Archibald Cox and others before him who were terminated?

Mr. HEYMANN. I think that if there is any problem in a politically sensitive investigation, it comes at invisible stages. It comes in not investigating fully or not being energetic enough in the investigation. When you get to a stage where the Attorney General removes the Assistant Attorney General, you are going to be in a highly-charged press and congressional review. And I think that is fine. That is democratic.

Senator LIEBERMAN. Mr. La Bella, I am interested in what you think of Mr. Heymann's proposal, which is another way of my asking you what is your ideal arrangement, your suggestion to us in a case where the President, Vice President and Attorney General, at least, are suspected of criminal behavior? How would you handle the investigation?

Mr. LA BELLA. Well, that level of allegations is certainly—I think it would behoove the Attorney General to ask for an Independent Counsel, to use her inherent powers to get someone outside the Department to do that. It would be very difficult even for a U.S. Attorney, I think, under those circumstances to investigate that high-level of an official. Certainly, Attorney General, Deputy Attorney

General, the head of the FBI, one of those situations—that would be just virtually impossible, I think, for a U.S. Attorney to deal with.

Mr. HEYMANN. If I may be sarcastic for a moment, when men were men and of immense stature, we did undercover investigations of the President, of the head of the Democratic National Committee. We investigated Bert Lance. This can be done. These weren't my friends. These weren't the friends of the prosecutors. It can be done as long as it is understood that that is the responsibility of the Assistant Attorney General and that we expect it of her or him.

Senator LIEBERMAN. So it was during the Carter administration that men were men? [Laughter.]

Mr. HEYMANN. And I am not worried about making a joke like that, except for not saying and women were women.

Senator LIEBERMAN. I understand.

Mr. HEYMANN. OK.

Senator LIEBERMAN. Thanks to all three of you.

Chairman THOMPSON. Thank you. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Mr. Heymann, did I understand you correctly to say undercover investigations of the President?

Mr. HEYMANN. You understood me correctly, but maybe I better be a little more careful, Senator Specter.

Senator SPECTER. Was there an undercover investigation of the President?

Mr. HEYMANN. Robert Vesco at that time made a number of allegations of presidential wrongdoing, all of which proved to be false, and we thought they would likely prove to be false. There was never an offer of anything made to the President, but there were——

Senator SPECTER. Never an offer of anything made to the President, which President?

Mr. HEYMANN. President Carter. But there were allegations involving the Democratic National Committee and we did try to explore——

Senator SPECTER. It is easy to investigate the Democratic National Committee. It is a little different to investigate the President.

Mr. HEYMANN. It is not different if you are asking them whether they are working with the President and if you are recording what is being said, Senator Specter. It is exactly the same. We also investigated false charges against Attorney General Bell.

Senator SPECTER. When you said "undercover," what did you mean by that?

Mr. HEYMANN. I mean that—I would have to go back and just check my memory on it—I mean that the FBI arranged meetings with people who claimed they were going to meet with representatives of the Democratic National Committee as part of some alleged conspiracy which didn't exist. That is what I mean.

Senator SPECTER. Did the President know about the investigation?

Mr. HEYMANN. No. He probably will read about it tomorrow.

Senator SPECTER. He hasn't known about it up until this time?

Mr. HEYMANN. No. The President was not kept—did not expect to be kept informed and was not kept informed of ongoing investigations, including of his brother.

Senator SPECTER. I don't think he will read about it tomorrow. There is too much news coming out of this hearing. But he might see it on C–SPAN if he watches at about 3 a.m.

Mr. HEYMANN. Thanks a lot, Senator Specter. [Laughter.]

Senator SPECTER. Mr. La Bella, I congratulate you on an outstanding job which you have done for the country and the work that you have undertaken. The subject of your being passed over by the Department of Justice for the position of U.S. Attorney for the Southern District of California is one which I have taken up in some detail because you stood up and called for Independent Counsel. And the sequence whether there is a causal connection is a matter for inference. You were acting U.S. Attorney and had been appointed by the court there, and then another person was appointed to that position.

The concern I have beyond what may be personal unfairness to you is the institutional question of a chilling effect on people who step forward, as you did, and FBI Director Freeh did, in recommending Independent Counsel in the campaign finance investigation which was contrary to the wishes of the Attorney General.

As I understand it, the Attorney General visited San Diego twice when you were U.S. Attorney and, contrary to her customary policy of visiting U.S. Attorneys, did not come to visit you. And your situation was stifled in substantial effect by the Department of Justice not returning your calls.

You may not wish to comment about this, but I wanted to place it on the record. I questioned the Attorney General at some length last Friday in an oversight hearing of the Department of Justice. And any comment you would care to make would be of interest to me.

Mr. LA BELLA. No, Senator. I am content with my career. I did what I could for the Department of Justice and it is time for me to move on and I am moving on. I am very happy about my future and I am happy for the years that I had with the Department and serving the people of the United States and I appreciate the opportunity to have done so.

Senator SPECTER. One factual question. We had quite a contentious or explosive hearing in closed session on September 11, 1997 when it was disclosed that the CIA had materials in its file on campaign finance reform which had been turned over to the FBI 2 years before which had never been disclosed to the Governmental Affairs Committee.

And I note that you were appointed at about the same time, and to whatever extent your appointment resulted from that meeting I would be interested to know if you could pinpoint it, or at least pinpoint the time that you were called to take on the job of running the task force on campaign finance reform.

Mr. LA BELLA. I believe I was called shortly after that, and the only thing I was told was that they wanted me to come to Washington to talk about heading the task force because they thought it needed a new direction. And I came to Washington and I took the position.

Senator SPECTER. And that was shortly after September 11, 1997?

Mr. LA BELLA. Yes, it was. It was about that time, as I remember.

Senator SPECTER. Mr. Barrett, in your statement you have made a comment about the circumstances under which the Attorney General—you used the word "force"; I don't know if you really mean it. "The law should, in other words, force the Attorney General to seek Independent Counsel only when she believes that there is a real crime here."

That is a lead-in to the question that I would like your judgment on as to one of the amendments which I have proposed to the Independent Counsel Statute which would provide for a mandamus action to be brought in the limited circumstance where only a majority of the majority or a majority of the minority of the Judiciary committees of the House and Senate could go to court, standing on mandamus, where there is a substantial body of evidence to be decided by a court.

And I had, in fact, prepared such a mandamus action which was never brought. When you get into the kinds of issues we have had with impeachment, that subsumes everything. But in looking toward a possible renewal of the Independent Counsel Statute, I am considering that, as well as a number of other amendments.

As I had commented when Attorney General Reno was here, the district court on three occasions ordered mandamus for the Attorney General. All three were overruled on appeal because of lack of standing. We have copied the statute as to when the Attorney General may be compelled to give written answers, which is substantially different from mandamus for appointment of Independent Counsel.

But with your experience, do you think that such a provision would pass constitutional muster?

Mr. BARRETT. Well, Senator, I think that the back half is actually the trickier part. The standing problem, I think, may well be solved by such a statute. But the court then adjudicating the congressional mandamus petition, and at the end of that process potentially ordering the Department of Justice to take prosecutorial action, raises grave constitutional questions under *Morrison* and under separation of powers law generally.

So my comment would be that the preferable path is an informal resolution. Obviously, it takes——

Senator SPECTER. We have tried that.

Mr. BARRETT [continuing]. A willingness to meet, to hear, to listen, and to disclose somewhat the evidence that the Department has. I think that that kind of contact and communication is what history shows us led to many of the special prosecutor appointments.

Senator SPECTER. Well, it has not worked here. We have built up an enormous record by the hearings of the Governmental Affairs Committee. And when there is an impasse, as we all know, we go to court to try to break the impasse. As I say, three district courts did order mandamus, and you have the Attorney General actually acting. You have a lot of issues of separation of powers where the

court is the arbiter. The court makes the final decision. We know that full well.

Mr. BARRETT. But as a matter of core executive power, I think compelling the Attorney General to answer congressional questions is a less central executive function than prosecuting is, and so I believe this would implicate new issues.

Senator SPECTER. Well, I do agree with that, but this is not prosecuting. This is appointment of Independent Counsel. It doesn't go so far as prosecution. I believe there is a common law remedy for a court to authorize Independent Counsel. Some seven States have statutes which authorize the court to appoint Independent Counsel where the D.A. fails or refuses to prosecute.

Let me come to you, Mr. Heymann, for a final question, and that is I am intrigued by your idea, but I am concerned about it when you have the authority that still resides in the Department of Justice. You have an Assistant Attorney General who is under the Attorney General. There is a process, if not by direct conversation, almost by osmosis where people in the Department know what the Attorney General wants. And I am very fearful.

It is true that the Saturday Night Massacre focused a tremendous amount of public attention. But even in the face of that public attention we saw Archibald Cox fired. You had to go through the Attorney General and the Deputy Attorney General. And I am concerned that where you have the special prosecutor in the chain of command of the President that you simply invite problems.

Mr. HEYMANN. I don't think there is a worry, or I don't think there is a very serious worry about the firing because I do think that would be so public and so much a matter of concern by both parties. There is a problem, but it ends up political and in a democracy you probably can't get further than that.

I do think that you have to worry about anything that is invisible, and one thing that would be invisible would be the Attorney General somehow or other conveying his view that this was not a case that he wanted to proceed with. But if you have a statute saying that the Attorney General is not supposed to get involved in any individual prosecution, the Attorney General will do that as his peril. It never happened with Attorney General Bell or Civiletti, and I don't think it will happen if it is clear that the Attorney General is not to be making individual prosecution decisions. It doesn't happen in Britain.

Senator SPECTER. Thank you, Mr. Heymann. Thank you, Mr. Chairman.

Chairman THOMPSON. Thank you very much.

Just one or two other questions. Mr. Heymann, we had Attorney General Bell here. To what extent did he utilize what you are suggesting and to what extent did he, under 28 Section 515, utilize the authority that the Attorney General has just to appoint a special counsel? My understanding was that that is what he utilized with Mr. Curran and the peanut warehouse situation. It was also utilized by Mr. Cox, too, I think, on another occasion.

Mr. HEYMANN. Well, I think it is a very good question. The answer is that the Department of Justice ought to be free to go either direction. In other words, even if you were to adopt my view that the Assistant Attorney General should be the final review—not to

handle all cases from Washington, for many should be out in the U.S. Attorneys' Offices—but the final review of any criminal case, and this is especially true of high-level cases—even if you were to adopt that, the Department would be free to appoint a special prosecutor if that seemed wise.

Chairman THOMPSON. And that would be done by the Attorney General? Under the statute, he can delegate that authority.

Mr. HEYMANN. You could set it up either that it would be on the recommendation of the Assistant Attorney General, if Mr. La Bella is right that there are some cases that the Assistant Attorney General would just say, I am not comfortable with handling this, or it could be done by the Attorney General. But there is an advantage to the credibility that comes with building up a record in the Assistant Attorney General of making decisions, making decisions against the administration as well as in favor of the administration, that you don't get if the Attorney General decides on a special prosecutor.

Chairman THOMPSON. Mr. Heymann has an affiliation with Common Cause. Mr. La Bella, I would like to ask you, getting back to again how the statute is being interpreted, Common Cause had some allegations which I think tracked the FEC auditors with regard to the coordination and the campaign money issue. And it seemed to me like that lay dormant for a long time, that not much, if anything, happened with regard to that investigation for a long time. Can you address that situation?

Mr. LA BELLA. The only problem is since I have left the task force, I don't know what, if any, information is public and that is why I have a problem. I know it was a matter that there were public letters sent to the Department. By the time I got there, I think they had been sent about a year before, and I know we dealt with them. We dealt with the letters.

Chairman THOMPSON. Was there a period of time there when it was dormant? Was there a disagreement or differing views as to what your responsibilities were there?

Mr. LA BELLA. Right. I think there was a debate concerning how to deal with the raw allegation because, again, as we were talking earlier, if, hypothetically, you have a band of conduct, let's say, with many actors inside that band and one of the actors inside the band is a covered person, what are the implications of that? Can we start an investigation even though 99.5 percent of the investigation doesn't have anything to do with anyone who is covered? Because someone is in that band that is a covered person, can we even commence the investigation? Those sorts of debates we had all the time.

Chairman THOMPSON. Was there a period of time when the investigation was not commenced?

Mr. LA BELLA. I think it is fairer to say that there was a period of time where the debate was ongoing and it wasn't resolved quickly. It was an ongoing debate that took some time to resolve and then eventually it was resolved.

Chairman THOMPSON. About how long did it take to resolve it?

Mr. LA BELLA. Well, after I got there, it was about 6 months, I think.

Chairman THOMPSON. About 6 months before that was resolved?

Mr. LA BELLA. Six more months.

Chairman THOMPSON. And then when it was resolved, you went ahead with the inquiry?

Mr. LA BELLA. That is getting into an area I am not sure is public and I don't——

Chairman THOMPSON. All right, sir.

Mr. LA BELLA. It was resolved and I was satisfied. I can tell you I was satisfied.

Chairman THOMPSON. With the resolution?

Mr. LA BELLA. We were vindicating our responsibility and our mission at that point.

Chairman THOMPSON. Right. Well, of course, then again you have the question of a cold trail in a situation like that, don't you?

Mr. LA BELLA. Right.

Chairman THOMPSON. Senator Lieberman.

Senator LIEBERMAN. Thanks. I can't resist your presence here, particularly Mr. Barrett, and then I want to ask Mr. Heymann to react to an idea that I have heard floating of the many ideas floating around. And this one derives in some measure from the kind of frustration that the Attorney General expressed earlier here today, and in a way that the Chairman expressed earlier today, about the centrality of her role and the way in which she is subject to question as a result of it in the decision about whether to open an investigation, whether to ask for an Independent Counsel, etc.

So one of the thoughts that I have heard is about bringing in the Independent Counsel or somebody independent earlier. For instance, I am building on your idea of the Attorney General submits a roster of names to the three-judge panel. What about a situation where essentially every request for an Independent Counsel, understanding that some of them are essentially meritless, even crank requests, and they would be dismissed immediately, but would go in order to this roster? People would come in sequence, and that independent person would then make the judgment about whether to proceed with a full-fledged investigation according to the standard that you have suggested or any other.

I was going to ask you to respond to it, Mr. Heymann, because one version of it, in a sense, is an inversion of the current law, in that the Independent Counsel carries out this initial investigation. And if there is a judgment made by the Independent Counsel that there is enough there to merit an investigation, then, in fact, it might go back to the Department to be carried out within the Criminal Division.

But what do you think about that, Mr. Barrett?

Mr. BARRETT. Well, it is an interesting idea, Senator. It moves to the sort of mandatory public prosecutor proposal that the Ervin Committee made in 1974, but in the form of many different individuals rather than one individual. It raises, I think, institutional concerns for the Department of Justice. It obviously farms out a lot more of its work, and that does hurt morale. That is a complicated message to think through. It also, on the Independent Counsel end, raises the infrastructure issue multiplied many times.

Now, if it was going to be a quick circuit, where the question went to the first name on the list and he or she made an evaluation without much investigative activity, that would let the Attor-

ney General off the hook and spare that person setting up an office, but it wouldn't get you much traditional law enforcement. It would simply get you a wise man or a wise woman looking at the allegations on paper.

Senator LIEBERMAN. And if you authorize that person to do more than that, then what you are saying is you are building another structure which undercuts morale?

Mr. BARRETT. Well, it is expensive, it hurts morale, and it may turn out to spend a lot more than you need to get the exoneration that I think a lot of these allegations turn out to be about.

Senator LIEBERMAN. What would you think, Mr. Heymann, about turning the statute on its head and essentially having the initial determination made outside of the Department and then the rest inside under your proposal?

Mr. HEYMANN. Well, we come a little bit close to that under our proposal, Senator Lieberman, by requiring a consultation with the Assistant Attorney General before he or she declines to prosecute a handful of very high-level officials. But we would leave the responsibility—and I have been adamant about that—in the hands of the Assistant Attorney General just so there is a consistent source of responsibility, consistency over cases.

I do think that you are wrestling with the greatest failure of the Independent Counsel law, and that is the Attorney General is precluded from exercising much prosecutorial discretion. She hands it off through the court to an Independent Counsel, and the Independent Counsels have shown no desire to exercise prosecutorial discretion. As long as there is a case to be made, they proceed to try and make the case. And somewhere along the line, in the handoff, we have lost the discretion that is part of our system.

Senator LIEBERMAN. Thanks again to the three of you. You have been a very helpful panel. Thanks for your time.

Chairman THOMPSON. Perhaps there needs to be somewhere along the line just the simple provision or allowance for a case that might technically constitute a violation but doesn't have prosecutorial merit, which U.S. Attorneys decide everyday.

Mr. HEYMANN. And that is what is getting lost in the present system.

Chairman THOMPSON. Well, listen, I want to join Senator Lieberman in thanking you, Mr. Heymann and Mr. Barrett, a couple of the leading legal minds in this country, a very valuable contribution.

Where are you going, Mr. La Bella?

Mr. LA BELLA. I am actually going to Decision Strategies, Fairfax International, which is sort of an international investigative security consultant firm.

Chairman THOMPSON. I am very familiar with it. They are fortunate to have you. I think it is headed by Michael Hirschman, who was a former staffer on the Watergate Committee.

Senator LIEBERMAN. Yes, indeed.

Mr. LA BELLA. And by Bart Schwartz, whom I worked with in the Southern District of New York who was the chief of the criminal division. So it is actually working with a lot of former colleagues. It is a good opportunity, it is great.

Chairman THOMPSON. Well, they are fortunate to have you, and this ought to be good enough for a raise right at the very beginning, don't you think?

Senator LIEBERMAN. I think so, mentioned on C–SPAN like this.

Chairman THOMPSON. Even if it is 3 a.m.

You have rendered a great public service, Mr. La Bella, and in my own mind there is no question that you have paid a price for your honesty and straightforwardness. I think it is very unfortunate for a fellow with 17 years of service like yourself to leave without so much as a "thank you," but that is the way it is. They have the right to do that, but Congress has the right to exercise the powers that it has, also.

So I thank all of you. You have been very helpful. With that, we will adjourn. Thank you.

[Whereupon, at 1:08 p.m., the Committee was adjourned.]

APPENDIX

LETTERS FROM JOHN P. JENNINGS, ACTING ASSISTANT ATTORNEY GENERAL

U.S. DEPARTMENT OF JUSTICE
OFFICE OF LEGISLATIVE AFFAIRS
OFFICE OF THE ASSISTANT ATTORNEY GENERAL

May 4, 1999

The Honorable Arlen Specter
United States Senate
Washington, DC 20510

DEAR SENATOR SPECTER: This letter responds to questions you raised during the Attorney General's testimony before the Senate Judiciary Committee on March 12, 1999 and before the Senate Governmental Affairs Committee on March 17, 1999.

Mandamus

During the Attorney General's testimony before the Senate Governmental Affairs Committee regarding reauthorization of the Independent Counsel Act, 28 U.S.C. §§ 591–599, you inquired as to the Department's views of the constitutionality of an amendment to the Act. We believe that an amendment to the Independent Counsel Act that would confer a cause of action upon Congress as a whole, or any entity or official within the Legislative Branch, to seek an enforceable order to compel the Attorney General to appoint an Independent Counsel would be unconstitutional. In addition to significant concerns about whether plaintiffs in such a suit would have Article III standing, such legislation would contravene well-established principles of the constitutional separation of powers.

The enforcement of criminal statutes is a core duty of the Executive Branch, *see Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege,* 8 Op. O.L.C. 101, 114 (1984), and the prosecutorial discretion that the Executive Branch traditionally exercises in enforcing such statutes stems from this constitutional obligation. *Id.* at 114–15. As a consequence, our office explained in 1984 that there are "meaningful and significant separation of powers issues" raised by legislation "that purports to direct the Executive to take specified, mandatory prosecutorial action against a specific individual designated by the Legislative Branch." *Id.* at 115

Legislation that would subject the Attorney General's decision as to whether to appoint an Independent Counsel to judicial review would give rise to serious constitutional concerns precisely because it would impose an additional and significant limitation upon the ability of the Executive Branch to exercise discretion in determining whether to initiate a criminal prosecution under the Independent Counsel Act. Indeed, in upholding the Independent Counsel Act against a constitutional separation of powers challenge in Morrison v. Olson, 487 U.S. 654 (1988), the Supreme Court emphasized the degree of discretion that the Attorney General would maintain under the Act over the decision whether to appoint an Independent Counsel. The Court explained, for example, that "[n]o Independent Counsel may be appointed without a specific request by the Attorney General, and the Attorney General's decision not to request appointment if he finds 'no reasonable grounds to believe that further investigation is warranted' is committed to his unreviewable discretion." *Id.* at 696. The Court therefore concluded that the Act "gives the Executive a degree of control over the power to initiate an investigation by the Independent Counsel," *Id.,* and it determined that such control was critical in "ensur[ing] that the President is able to perform his constitutionally assigned duties" as head of the Executive Branch. *Id.*

Legislation that would authorize Congress as a whole, or any entity or official within the Legislative Branch, to obtain a judicial order that would require the Attorney General to appoint an Independent Counsel in a particular case would be particularly constitutionally problematic. Such legislation would represent a significant alteration of the statutory framework that the Court approved in Morrison. In rejecting the separation of powers challenge in that case, the Court emphasized the limited role that the Independent Counsel Act assigned to Congress with respect to the Attorney General's initiation and supervision of an Independent Counsel investigation:

> Indeed, with the exception of the power of impeachment—which applies to all officers of the United States—Congress retained for itself no powers of control or supervision over an Independent Counsel. The Act does empower certain Members of Congress to request the Attorney General to apply for the appointment of an Independent Counsel, but the Attorney General has no duty to comply with the request, although he must respond within a certain time limit. Other than that, Congress' role under the Act is limited to receiving reports or other information and oversight of the Independent Counsel's activities, functions that we have recognized generally as being incidental to the legislative function of Congress.

Id. at 694 (citations omitted).

The specific constitutional concerns identified above that would arise from legislation that would permit the Legislative Branch to seek a judicial order that would direct the Attorney General to appoint an Independent Counsel are underscored by more general separation of powers principles. In *INS v. Chadha,* 462 U.S. 919, 952 (1983), the Supreme Court explained that Congress's broad authority to take action that has "the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch," is limited by the procedural requirements of Article 1, which sets forth the requirements of bicameral passage and presentation to the President followed by presidential signature or bicameral repassage by a two-thirds majority. "The Constitution affords Congress great latitude in making policy choices through the process of bicameral passage and presentment. However, 'once Congress makes its choice in enacting legislation, its participation ends,' and 'Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation.' *Bowsher v. Synar,* 478 U.S. 7145 733–34 (1986)." Memorandum for the General Counsels of the Federal Government, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: The Constitutional Separation of Powers between the President and Congress* at 8 (May 7, 1996). As our office has explained, "[w]hile Congress may inform itself of how legislation is being implemented through the ordinary means of legislative oversight and investigation, the antiaggrandizement principle forbids Congress, directly or through an agent subject to removal by Congress, from intervening in the decision making necessary to execute the law. " *Id.* (citations and footnote omitted).

Legislation that would permit the Legislative Branch to seek an enforceable judicial order that would compel the Attorney General to appoint an Independent Counsel would be in direct conflict with these basic constitutional precepts. Once Congress has enacted legislation that establishes the legal obligations of the Attorney General with regard to the appointment of an Independent Counsel, "[Congress's] participation ends." *Bowsher,* 478 U.S. at 733. Congress may, in aid of its legislative function, exercise its traditional oversight authority in seeking information and investigating the manner in which the Attorney General has implemented such legislation. It may not, however, assign itself a legally enforceable right to direct, pursuant to court order, such implementation. Such a suit, which would seek to compel the appointment of a prosecutor charged with investigating the criminal culpability of a private individual, could in no sense be characterized as being in aid of the legislative function. *See Springer v. Philippine Islands,* 277 U.S. 189, 202 (1928) ("Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions."). The Supreme Court's reasoning in *Buckley v. Valeo,* 424 U.S. I (1976), which invalidated the provision of the Federal Election Act that vested the appointment of certain members of the Federal Election Commission in the President pro tempore of the Senate and the Speaker of the House, is instructive in this regard. There, the Court explained that:

> [t]he Commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not

> to the Congress, that the Constitution entrusts the responsibility to "take Care that the Laws be faithfully executed." Art. II, § 3.

Id. at 138.

For these reasons, we believe that legislation that would amend the Independent Counsel Act to permit Congress as a whole, or an official or entity of the Legislative Branch, to sue to compel the appointment of an Independent Counsel would be plainly unconstitutional.

United States Attorney for the Southern District of California

Mr. Gregory Vega's nomination to be the United States Attorney for the Southern District of California followed the usual course used over the last six years and what we believe to be the practice of previous administrations. Mr. Vega and others, including Charles LaBella, applied for the position. Senator Boxer asked the commission she established to assist her in the selection of Federal judges and U.S. Attorneys, to review the qualifications of those who applied and to recommend candidates. The commission members followed an established process and ultimately recommended Mr. Vega. Senator Boxer, in turn, recommended that the President nominate Mr. Vega. Again, following standard procedure, the)White House accepted the Senator's recommendation pending the background and qualifications review of Mr. Vega by the Justice Department. Based on that review, the Attorney General forwarded the name of Mr. Vega to the President and recommended his nomination based on his qualifications for the position of United States Attorney. Neither the Attorney General nor anyone else at the Department did anything to encourage Senator Boxer or the members of her commission to select Mr. Vega and nothing was done to discourage their selection of Mr. LaBella.

As the Attorney General expressed in her testimony before the Judiciary Committee, no one should have an expectation of receiving an appointment as United States Attorney even if they have been selected to serve as interim United States Attorney while the Senator is in the process of making his or her recommendation. As you know, a number of different and legitimate factors enter the determination of which candidate a Senator should recommend to the President. Mr. LaBella knew when he applied for the position and when he agreed to serve as interim United States Attorney that he might not be nominated. As the Attorney General testified and recently reiterated to Mr. LaBella, she values his long service to the Department and the American public.

You also asked the Attorney General to provide you with any documents the—Justice Department has regarding Mr. LaBella's work on the task force as it relates to the appointment of the United States Attorney for the Southern District of California. No such documents exist. The only materials regarding either candidate at the Department are letters of recommendation, the routine appointment papers for when Mr. LaBella was made the interim United States Attorney, and Mr. Vega's submissions that are required of all candidates.

Expansion of Jurisdiction of Independent Counsel Starr

During her testimony before the Senate Governmental Affairs Committee, you asked the Attorney General about the reasons why she had asked the Special Division to refer the Monica Lewinsky matter to Independent Counsel Starr as opposed to another Independent Counsel. Upon reflection, the Attorney General has determined that given the particular circumstances of this matter, any further comment by her at this time beyond the explanation provided in her public Application to the Special Division for expansion of the Jurisdiction of an Independent Counsel would be inappropriate. In addition to Mr. Starr's pending litigation, those circumstances include the fact that the events leading to the Attorney General's decision to recommend that Mr. Starr's jurisdiction be expanded to include the Lewinsky matter are under review by the Justice Department.

You suggested in the course of your questioning that the inquiry relating to the Lewinsky matter was now closed; however, an indictment brought by Mr. Starr's office of Julie Hiatt Steele based on Mr. Starr's investigation of these events is the subject of an ongoing trial, and Mr. Starr has not issued any announcement that he has closed the Lewinsky investigation. Mr. Starr has appeared before your Committee, and has provided some additional detail describing from his perspective the circumstances under which the expansion of his jurisdiction occurred, which may have helped to resolve some of your concerns.

The Attorney General understands and respects your view that her recommendation of the appointment of Mr. Starr to handle the Lewinsky matter was unwise. However, in light of the factors outlined in her Application, she determined that his office was in the best position to handle the matter, a recommendation with which the Special Division concurred.

Please do not hesitate to contact our office if we can be of further assistance.

Sincerely,

JON P. JENNINGS
ACTING ASSISTANT ATTORNEY GENERAL

U.S. DEPARTMENT OF JUSTICE
OFFICE OF LEGISLATIVE AFFAIRS
OFFICE OF THE ASSISTANT ATTORNEY GENERAL
WASHINGTON, D.C. 20530

May 24, 1999

The Honorable Fred Thompson, *Chairman*
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

DEAR MR. CHAIRMAN: Thank you for allowing the Attorney General to testify before your Committee on March 17, 1999, regarding reauthorization of the Independent Counsel Act. Enclosed is the edited transcript of the Attorney General's testimony. During the hearing, several Committee Members posed questions to the Attorney General about our proposal for handling matters relating to an appointment of an independent counsel should the Independent Counsel Act expire on June 30, 1999. Our response is set forth in the enclosed letter to Chairman Gekas, of the House Judiciary Subcommittee on Commercial and Administrative Law, which we ask you to include in your Committee's hearing record.

Also attached for the record are the budget figures for the Department's Public Integrity Section (PIS), which were requested by Senator Durbin. The current projection for the PIS expenditures for 1999 is $5.5 million, and current information suggests that the actual figure may be slightly higher by the end of the year.

Please do not hesitate to contact my office if we can be of further assistance in this matter.

Sincerely,

JON P. JENNINGS
ACTING ASSISTANT ATTORNEY GENERAL

Enclosures

BUDGET FIGURES FOR THE DEPARTMENT'S PUBLIC INTEGRITY SECTION

Public Integrity Section Personnel and Budgetary Resources

Personnel Figures	FY1995	FY1996	FY1997	FY1998	FY1999
FTP Ceiling	37	36	41	41	43
FTP On-Board					
October	34	36	36	36	36
January	32	36	35	36	37
March	31	35	36	35	36
July	32	33	34	34	N/A
PTP On-Board					
October	3*	3*	3*	3*	3*
January	3*	3*	3*	3*	3*
March	3*	4**	3*	3*	3*
July	3*	4**	3*	3*	N/A
Budget Figures					
Funds Expended	$4,783,539	$4,625,820	$5,206,103	$5,715,204	$5,831,380 (Projected)

FTP = Full-Time Permanent Employees
PTP = Part-Time Permanent Employees

*3 part-time attorneys
**3 part-time attorneys and 1 part-time professional

U.S. DEPARTMENT OF JUSTICE
OFFICE OF LEGISLATIVE AFFAIRS
OFFICE OF THE ASSISTANT ATTORNEY GENERAL
WASHINGTON, D.C. 20530

April 13, 1999

The Honorable George W. Gekas, *Chairman,*
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

DEAR MR. CHAIRMAN: In the course of Deputy Attorney General Holder's testimony before your Subcommittee on March 2, 1999, you requested that the Subcommittee be provided with a detailed plan addressing how the Department of Justice would handle matters that currently are addressed pursuant to the Independent Counsel Act, 28 U.S.C. § 591–599, were the Act to be allowed to lapse as of June 30, 1999. Since then, you have supplemented your request with a letter asking for our views with respect to several specific proposals.

As you know, after careful consideration, the Department of Justice has concluded that the Independent Counsel Act should not be reauthorized. A significant factor that led to that decision was the conclusion, supported by the consensus of a working group led by Deputy Attorney General Holder, that public confidence has not been materially enhanced by the process set out in the Independent Counsel Act.

Should Congress permit the lapse of the Act, the prosecutorial component best suited for the responsibility will handle allegations with respect to which the Attorney General does not appoint a Special Counsel (the Special Counsel is described below). The Department currently uses this process to allocate similar matters that are not handled by Independent Counsels. It can be anticipated that the Public Integrity Section of the Criminal Division, which generally handles allegations of corruption, conflict of interest and official misconduct, will be responsible for many of these matters. As has frequently been observed, however, the Independent Counsel Act is not limited in its scope to official misconduct, and allegations concerning conduct of a formerly covered public official in his or her private capacity might best be handled by the Tax Division, the Fraud Section of the Criminal Division, or a United States Attorney's Office. These decisions would be made on a case-by-case basis, determined by the particular needs of the specific investigation. It may be that some enhanced resources will be required for some of these components in order to enable the prompt and efficient handling of these sensitive and significant matters, but that is an issue that we anticipate can be worked out initially through special temporary allocations and thereafter through the normal budget process. We do not believe that any substantial change in structure of these components, specifically the Public Integrity Section, would be necessary or appropriate, although I will discuss that issue in more detail later in this letter.

As both the Attorney General and the Deputy Attorney General have emphasized in recent testimony before Congress, it can be anticipated that matters will arise in which the public confidence in the thoroughness, fairness and impartiality of an investigation would be significantly enhanced by the appointment of an individual outside the normal organization of the Department of Justice, with a substantial degree.of independence from the regularized supervisory structure of the Department. These situations can occur with respect to either allegations involving particular persons (such as the President, Vice President or Attorney General) or broader matters that pose a substantial potential for a significant conflict of interest, as did Watergate. In those situations, the Attorney General has adequate authority to name a special outside counsel to handle the matter, and to grant that individual sufficient independence to reassure the public that the matter is properly handled. Henceforth, I will refer to this individual as a Special Counsel, to distinguish the position from the current statutory Independent Counsels.

We should not be viewed as suggesting that any time a conflict of interest is alleged, a Special Counsel will be appointed. For example, many matters that might potentially create a degree of conflict of interest might be appropriately handled through recusals of those Departmental officials affected, as is routinely done now in the case of personal or financial conflicts of interest. Other matters, while perhaps hypothetically criminal if proven, are so minor or carry with them so little possibility of a successful prosecution that an investigation is not called for. In these situations, it can be anticipated that the Attorney General is unlikely to conclude that the substantial cost and burden of establishing an investigative apparatus outside the normal Departmental organization is warranted.

For those situations in which the Attorney General concludes a Special-Counsel is appropriate, the Department believes that the adoption of a structured approach to the appointment of a Special Counsel would be wise. Upon review, we have concluded that the current regulatory regime, set out at 28 CFR § 600.1600.5, is not an appropriate model for future appointments of Special Counsels.[1] A replacement set of procedures is being prepared to take effect should the Independent Counsel Act be allowed to lapse by Congress, as we believe it should. While these new internal regulations are still in the process of being developed, we anticipate that they will include the following general principles:

1. The Attorney General will appoint a Special Counsel when he or she determines that investigation of a person or matter is warranted and that an investigation or prosecution of that person or matter by a United States Attorney's Office or litigating Division of the Department of Justice would constitute a conflict of int4rest for the Department such that it would be in the public interest for an outside Special Counsel to assume responsibility for the investigation.

The decisions of whether and when to turn to an outside Special Counsel to handle a matter is one that is best left to the discretion of the Attorney General, guided by an assessment of whether the public interest would best be served by a Special Counsel assuming responsibility for the matter, in light of all the circumstances. By vesting the entire responsibility for each decision in the Attorney General, instead of diffusing it among different branches and an Independent Counsel, this system will create clear lines of accountability. If, as some have hypothesized, a corrupt Attorney General one day attempted to make decisions on the basis of nefarious personal motives, those decisions could be questioned by the Deputy Attorney General and other Department officials, the President (through the Article II supervisory and removal powers), the Congress (through the Article I oversight and impeachment powers), and, ultimately, the public.

The question of how allegations involving the Attorney General would be handled is frequently raised. We recognize that such matters create particularly pointed issues of conflict of interest. Under the Independent Counsel Act, the Attorney General is automatically recused from any participation in a matter involving herself, and the next most senior Department of Justice official not involved in the matter serves as Acting Attorney General for the matter. This practice would continue should the Act expire. The Acting Attorney General would determine whether an allegation of criminal conduct by the Attorney General, reasonably supported by the facts, calls for referral to a Special Counsel. The Acting Attorney General would carry out the limited responsibilities of oversight and budgetary review required under these procedures after referral to a Special Counsel.

2. When matters are brought to the attention of the Attorney General (or whomever is serving in that capacity) that might warrant consideration of appointment of a Special Counsel, the Attorney General may:

   A. Appoint a Special Counsel;

   B. Direct that a preliminary investigation, consisting of such inquiry as the Attorney General deems appropriate, be conducted by the Public integrity Section or other Department of Justice entity, in order to better inform the decision. In this regard, the Attorney General may also seek the assistance of any appropriate law enforcement entity, such as the Federal Bureau of Investigation; or

   C. Conclude that there is no conflict of interest such that the public interest would be served by removing the investigation from the normal processes of the Department, and that either a United States Attor-

[1] That regime was adopted in the mid-1980s, when the constitutionality of the Independent Counsel Act was under judicial review, and it appeared that there was a substantial possibility that the Act might be held to be unconstitutional. A number of Independent Counsel investigations were actively underway at the time, and it was feared that if the Supreme Court held the Act unconstitutional, their investigative work and ensuing prosecutions might be jeopardized. The regulatory scheme set out in Part 600, pursuant to which several Independent Counsels accepted parallel appointments from the Attorney General, was adopted to provide an alternative source of authority to the Independent Counsels directly from the Department of Justice and thereby protect the ongoing investigations. As a result, the scheme was drafted to closely parallel the Act itself, so that it would provide almost identical power and authority. Therefore, while well suited to its original purpose, the regulations carry with them many of the drawbacks of the current Act. Furthermore, the regulations are not designed to provide a vehicle through which allegations can be considered and selection of outside Special Counsel can be made.; they were intended to apply to Independent Counsel investigations that were already ongoing.

ney's Office or a litigating Division of the Department should handle the matter. The Attorney General may also direct that appropriate steps be taken to mitigate any apparent conflicts, such as recusal of particular officials.

There are occasions when the facts create a conflict of interest, or the exigencies of the situation mean that any preliminary investigation might taint the subsequent investigation, such that it is appropriate for the Attorney General immediately to appoint a Special Counsel. In other situations, some preliminary investigation, whether factual or legal, is appropriate to better inform the Attorney General's decision. For example, the use of the subpoena power might be necessary to develop an understanding of the facts and the veracity of allegations of criminal wrongdoing. This provision recognizes that a variety of approaches may be appropriate, depending on the facts of the matter.

3. Selection of the Special Counsel: Special Counsels shall be individuals of substantial standing in the legal community, with appropriate experience to ensure that the investigation will be conducted ably, expeditiously and thoroughly, and that investigative and prosecutorial decisions will be supported by an informed understanding of Department of Justice policies. All Special Counsel candidates must submit to a thorough ethics and conflicts of interest debriefing and undergo an expedited FBI background check. Special Counsels shall be selected by the Attorney General from outside the federal government, and shall not be motivated by partisan or ideological concerns. Special Counsels shall agree that their responsibilities as Special Counsel shall take first precedence in their professional lives, and that it may be necessary to devote their full time to the investigation, depending upon its complexity and the stage of the investigation.

Selection of an appropriate Special Counsel will be one of the most significant responsibilities of the Attorney General under a regulatory system. In order that the appointment achieve its central mission of providing assurance to the public, it is critical that Special Counsels be viewed by the public as fair and impartial, unbiased in any way toward the subject of the investigation, and in this regard substantial prosecutorial experience is invaluable. With respect to another issue that has received much discussion recently, due to the ebb and flow of work in the course of investigating any single matter, it is the Department's view that all Special Counsels should not necessarily be expected to work full time. It is a rare prosecutor who devotes his or her full time to a single case, and there is inevitable down-time in the course of any investigation, while waiting for grand jury time, for example, or awaiting a judge's ruling on a pending issue.

The issue of the application of the conflicts of interest laws to Special Counsels, and the extent to which they may retain connections with a private law firm or other outside employment, is complex. Current law may make it extremely difficult to recruit highly qualified candidates for these temporary positions. It may be necessary and appropriate to seek limited statutory changes to the current ethics laws to permit the appointment of qualified Special Counsels, a matter which is under review and as to which we will consult further with the Congress.

On another matter that has received substantial discussion, and about which you specifically requested our comment, it is our view that maintaining an ongoing register of potential applicants would not be productive. It is our anticipation that the particular facts of the matter involved will often dictate that the Special Counsel have specialized skills, such as tax expertise. In addition, the availability of any given individual, especially those as well-qualified as we anticipate would be considered, changes dramatically from time to time. We concluded that any effort to maintain an ongoing, up-to-date roster would be largely wasted effort.

The Attorney General was queried during her Senate testimony, and the statements of various commentators recently have questioned whether the Attorney General can be trusted to appoint an appropriate Special Counsel in a situation in which the Department of Justice has a conflict of interest, and whether the public will feel reassured that an individual appointed in such a manner will indeed handle these sensitive matters impartially and without.bias. We believe that the individuals she names will themselves serve to dissipate any legitimate concerns along these lines. After all, since the Attorney General is personally making these decisions and is fully accountable for them, direct and pointed public scrutiny will inevitably follow. We rely on these forces to ensure that an Attorney General will select an outstanding individual who will be able to provide this assurance to the public, both through his or her stature in the legal community and through the fair and impartial way his or her responsibilities are handled.

4. The jurisdiction of a Special Counsel shall be established by the Attorney General. The Special Counsel will be provided with a specific factual statement of the matter to be investigated. The initial grant of jurisdiction shall be deemed to include all potential federal crimes encompassed within the specific facts described in the Attorney General's appointment of the Special Counsel, whether committed by the individual as to whom the conflict exists or by others participating in the events described. It shall also include the authority to investigate and prosecute federal crimes committed in the course of and with intent to interfere with the Special Counsel's investigation, such as perjury, obstruction of justice, destruction of evidence,, and intimidation of witnesses. The Special Counsel shall report other crimes discovered in the course of the investigation to the Attorney General, who may include those offenses within the Special Counsel's jurisdiction or refer them to another appropriate prosecutorial office.

The vagueness with which the jurisdiction of Independent Counsels is defined under the Act, and the lack of direct control by the Attorney General over the definition of that jurisdiction, has been a serious continuing problem with the Act. It is our view that the Act—as well as this regulatory scheme—is intended to address a very limited problem, and that the power and authority of a Special Counsel should be limited to the particular problem that led to his or her appointment. In all other situations, the established procedures of the Department should be used to address issues of criminal liability. At the same time, the flexibility of a regulatory approach could be used to address particular problems. For example, a Special Counsel charged with investigating particular facts that form a piece of a larger law enforcement concern might work closely with a United States Attorney's Office on a large project, retaining decisionmaking authority over his or her own matter, but benefitting from the broader related investigation, without the necessity to take over the entire investigation as a ″related matter. 11

Some issues have arisen with respect to Independent Counsels pursuing otherwise unrelated possible crimes committed by witnesses viewed as being uncooperative, to gain leverage over and possible cooperation from those witnesses. While such a tactic can be an appropriate investigative, approach in certain circumstances, it largely unleashes an Independent Counsel from the bounds of his or her limited jurisdiction, inviting wide-ranging investigations of unrelated crimes based on little but speculation. A Special Counsel's desire to pursue such matters will be handled on a case-by-case basis.

5. A Special Counsel named under these regulations shall develop a proposed budget for the Attorney General's review and approval for the current fiscal year with the assistance of the Justice Management Division (JED) within 60 days of his or her appointment. In addition, 90 days before the beginning of a new fiscal year, the Special Counsel shall submit a proposed budget to the Attorney General for approval. Based on the proposal, the Attorney General shall establish a budget,for the operations of the Special Counsel. The budget shall include a request for assignment of personnel, with a description of the qualifications needed.

The Attorney General has repeatedly identified the lack of an established budget as one of the fundamental weaknesses of the operations of Independent Counsels under the current Act. On the other hand, the specific budgetary needs of a particular investigation can be difficult to predict. It is our view that with the assistance of JMD, a reasonable budget can be developed by a new Special Counsel fairly promptly, with the recognition that it may need to be supplemented from time to time.

6. Staff. The Attorney General shall make available to the Special Counsel sufficient staff and resources to fulfill his or her jurisdictional mandate. The Department shall gather and provide the Special Counsel with the names and resumes of appropriate personnel available for detail. The Special Counsel may also request the detail of named employees, and the office for which the designated employee works shall make reasonable efforts to accommodate the request. The Special Counsel shall assign the duties and supervise the work of such employees while they are assigned to the Special Counsel. If necessary, the Special Counsel may request that additional personnel be hired from outside the Department. All personnel in the Department shall cooperate to the fullest extent possible with the Special Counsel.

7. Powers and Authority. Any Special Counsel shall exercise, within the scope of his or her jurisdiction, the full power and independent authority to exercise all investigative and prosecutorial functions of any United States Attorney.

8. Conduct and Accountability.

(a) A Special Counsel shall be subject to the rules, regulations, practices and policies of the Department of Justice. He or she shall consult with appropriate Offices within the Department for guidance with respect to established practices, policies and procedures of the Department.

(b) The Special Counsel shall not be subject to the day-to-day supervision of any official of the Department. In cases where the Attorney General determines that the conduct of the investigation gives rise to questions about compliance with Department practices, policies and procedures, the Attorney General may request that the Special Counsel provide an explanation.

(c) The Special Counsel and staff shall be subject to disciplinary action for misconduct and breach of ethical duties under the same standards as are any other employees of the Department of Justice. Inquiries into such matters shall be handled through the appropriate office of the Department upon the approval of the Attorney General.

(d) The Special Counsel may only be removed from office by the personal action of the Attorney General. The standard for removal of a Special Counsel is the same one that the Attorney General would use when deciding whether to remove a United States Attorney from further representation of the United States Government in a particular matter.

The issue of the Special Counsel's accountability for specific decisions he or she makes is perhaps the most difficult to resolve. Accountability is inherently in tension with independence. It ultimately is our recommendation that the best balance is struck by making the Special Counsel similar in some respects to a United States Attorney, free from day-to-day supervision by the Department. The independence and impartiality of the investigation will be enhanced by the fact that the Special Counsel has no vested interest in the Department, no long term job at stake, and no political identification with the Administration in power. These factors will help to ensure that should the limited oversight we contemplate be exercised improperly, the Attorney General will be politically accountable for that decision. It is also our anticipation that the Attorney General's authority to inquire into a decision by a Special Counsel will be exercised rarely.

The Department believes that a Special Counsel should be given a large amount of independence it which to operate. For example, the decision of whether to immunize a particular witness, if taken in accordance with the Department's policy and practice, is not one that normally would be reviewed by the Attorney General. There may be some circumstances, such as the decision whether to appeal a particular court ruling, in which a different standard may be necessary because the system of Solicitor General approval of appeals is in place for reasons dictated by the long-term interests of the Department and the United States. Similarly, the decision of whether to indict a particular person may be such a substantial step that it would require a Special Counsel to notify, and—in some limited circumstances—possibly seek the approval of, the Attorney General beforehand. It is also our view that the Special Counsel and his or her staff should be subject to the same rules of ethical conduct and disciplinary procedures as would any other Departmental employee.

9. Notification and Reports. At the end of his or her first year in office, and thereafter coinciding with the annual budget process, the Special Counsel shall report to the Attorney General the status of the investigation, and provide a budget request for the next year. At the conclusion of the Special Counsel's work, he or she shall provide the Attorney General with a report explaining the prosecutorial or declination decisions reached by the Special Counsel.

The Attorney General will notify the Chairman and Ranking Minority Member of the Judiciary Committees of each House of Congress:

(1) upon appointing a Special Counsel, with a brief statement of the reasons and a copy of the jurisdictional statement,

Provided however, that this reporting requirement will be tolled upon the request of the Special Counsel with a statement of his or her conclusion that the intere4ts of the investigation require confidentiality. At such time

as the Special Counsel determines that confidentiality is no longer needed, the notification will be provided.

(2) upon removing any Special Counsel, with a brief statement of the reasons, and

(3) upon conclusion of the Special Counsel's investigation, with a brief statement of the Special Counsel's conclusions.

Either the Attorney General or the Congress may determine that public release of these reports to the Judiciary Committees would be in the public interest (to the extent that such release complies with applicable legal restrictions). All other public statements concerning matters handled by Special Counsels shall be governed by the generally applicable Departmental guidelines concerning public comment with respect to any criminal investigation.

These reporting requirements are designed to address several concerns that have been raised about the current Independent Counsel Act. First of all, the annual report to the Attorney General and budget request for the coming year will help to ensure that Special Counsel investigations do not continue indefinitely. This annual notification will provide the opportunity for the Special Counsel to present his or her budget request for the upcoming year as well. It should be emphasized that it is intended that this annual report be a simple status report. The Special Counsel will not be subject to the day-to-day supervision of the Attorney General or any other Departmental official, and the annual report will not serve as a vehicle for supervision.

Much concern has been expressed about the Final Report requirement of the Independent Counsel Act, both with respect to the incentives it creates to over-investigate a matter and, since it often becomes a public document, the harm it can do to legitimate privacy interests. On the other hand, it is appropriate for any federal official to provide a written record upon completion of an assignment, both for historical purposes and to enhance accountability—particularly a federal official who has functioned with substantial independence and little supervision. In major cases, federal prosecutors commonly document their decisions not to pursue a. case, explaining the factual and legal reasons for the conclusions they have reached. i. It is our conclusion that the principal source of the problems with the Final Report requirement as set forth in the Independent Counsel Act is the fact that the Report typically has been made public, unlike the closing documentation of any other criminal investigation. This single fact both provides an incentive to over-investigate, to avoid potential public criticism for not having turned over every stone, and creates potential harm to individual privacy interests.

Therefore, it is our conclusion that a limited reporting requirement should be imposed on all Special Counsels, in the form of a summary final report to the Attorney General. This report will be handled as a confidential document, as are internal documents relating to any federal criminal ' investigation. The interests of the public in being informed of and understanding the reasons for the actions of the Special Counsel will be addressed in the final set of reporting requirements, discussed below.

To enhance public confidence in the integrity of the process, we anticipate that the internal regulations we adopt will include reporting requirements to the Judiciary Committees of the Congress. We suggest that such reports should occur on three occasions: on the appointment of a Special Counsel, on the Attorney General's decision to remove a Special Counsel, and on the completion of the Special Counsel's work. We anticipate that these reports will be brief notifications, with an outline of the events and the reasons for them. Such reports will be written to comply with any applicable legal restrictions, such as Federal Rule of Criminal Procedure 6(e). Built into the reporting requirements will be a tolling provision, to be triggered by the Special Counsel, should he or she determine that temporary confidentiality is necessary in the interests of the investigation.

Finally, the internal regulations will make it clear that all other public statements with respect to any investigation or prosecution handled by a Special Counsel will comport with the established Departmental guidelines with respect to public release of information concerning criminal investigations.

This completes our outline of the principles that will guide our handling of matters currently covered by the provisions of the Independent Counsel Act after June 30, 1999, should Congress permit the lapse of the Act as we have recommended. We now address the additional questions you posed in your letter of March 10, 1999.

You first ask our views of a proposal to elevate the head of the Public Integrity Section to an Assistant Attorney General, subject to Senate confirmation. We do not

believe this proposal would be wise or practical. Some background explanation of the current structure of the Department of Justice is necessary.

The prosecutorial arm of the Department of Justice consists primarily of 93 United States Attorney's Offices, each responsible for the prosecution of federal crimes venued within its District and under the supervision of a United States Attorney. In addition, the Department includes a number of litigating Divisions, several of which have responsibility nationwide under certain circumstances for prosecutions. Among these is the Criminal Division, headed by an Assistant Attorney General. In 1976, then-Assistant Attorney General Richard Thornburgh established the Public Integrity Section within the Criminal Division as the headquarters office devoted to the prosecution of corruption cases. It should be emphasized that the great majority of federal corruption prosecutions are not brought by the Public Integrity Section; nor are they conducted under the direct supervision of the Section or the Assistant Attorney General for the Criminal Division. Rather, they are brought by the various United States Attorney's Offices.

The Public Integrity Section is a relatively small office of approximately 30 experienced, career federal prosecutors, which specializes in handling corruption, official misconduct, conflict of interest, election fraud and campaign finance prosecutions. It assumes responsibility for such cases whenever appropriate, most often because the United States Attorney's Office has found it necessary to recuse itself from the handling of the case. It also provides support, ranging from legal advice to providing prosecutors to assist with a trial, to cases within the primary responsibility of a United States Attorney's Office. Since the enactment of the Independent Counsel Act, the Section has been responsible for the Department's administration of the Act's provisions.

The Chief of the Public Integrity Section is a career federal prosecutor, named by the Assistant Attorney General for the Criminal Division. The Chief of the Section reports to a career Deputy Assistant Attorney General within the Criminal Division. The Section prides itself on its nonpolitical staff, and the fact that it is well-insulated from partisan pressures by its structure and placement within the Criminal Division. It would be a serious mistake to thrust the Section's management into the political process, by making its Chief a political appointee subject to Senate confirmation.

Furthermore, to elevate the Chief of the Section to a position as an Assistant Attorney General would further fragment coordinated decision-making on issues that affect all federal prosecutors, rather than keeping responsibility for such matters largely within the supervision of the Criminal Division. This is particularly problematic because corruption and official misconduct cases are not easily categorized, whether by statute or subject matter, and therefore they do not create a discrete category of cases, as do matters of the sort that have led to decisions in the past to create separate Divisions headed by Assistant Attorneys General. Corruption is endlessly varied, and virtually any crime in the federal code is potentially involved in a corruption case. Prosecutions brought against public officials can overlap with the responsibilities of any Section, Office or Division in the Department, rather than being discrete, as are, for example, criminal prosecutions brought by the Antitrust Division, the Tax Division, or the Civil Rights Division. They can overlap with narcotics prosecutions, in the case of a corrupt police officer providing cover for a drug ring; fraud prosecutions, in the case of an official taking kickbacks from a contractor; or theft prosecutions, in the case of a procurement officer stealing and reselling supplies. ″Corruption″ prosecutions can take the form of a false statement case, a wiretap disclosure case, a conflict of interest case, or a bank fraud case. The wide-ranging nature of those matters we describe as ″corruption″ argues in favor of continued integration of their supervision within the broader structure of the Criminal Division.

With respect to your query about whether the Chief of the Section, whether newly promoted to a position as an Assistant Attorney General or as he is now situated, should be given a fixed term in office, or given protection against his removal, we regard both steps as unnecessary and counterproductive, as well as raising potential constitutional issues. The Section has been handling sensitive, politically explosive cases since its inception, and yet it has a history of extraordinary longevity in its Chiefs. With one exception, all the Chiefs of the Public Integrity Section—and there have been only four in the 25-year history of the Section—served for a span of many years, under both Republican and Democratic Administrations. The position is a Senior Executive Service (SES) position, which carries with it certain procedural protections against being fired, although we recognize that an SES official can be reassigned.

We have already provided our views as to the subject of your next question, the idea of establishing a permanent roster of potential Special Counsels. To reiterate,

while an appealing idea, we do not believe that as a practical matter it would work. Because of the rarity with which appointments will be made, the constantly changing availability of the outstanding members of the Bar who would be under consideration for such an appointment, and the special needs that any particular matter might create, we believe that any effort to maintain an ongoing roster of potential Special Counsels would not be a fruitful effort.

Finally you ask about providing for a procedure whereby the Attorney General would be required to respond to a written congressional request for the appointment of an Independent Counsel within 30 days. Should the Act lapse, the Department will follow a procedure modeled on 28 U.S.C. § 592(g)(2) in that the Department would respond within 30 days to a written congressional request for the appointment of a Special Counsel. That response will state whether the Attorney General has begun or will begin an investigation of the matters with respect to which the request is made. The response shall also set forth the reasons for those decisions that have been taken by the Attorney General as they relate to each of the matters with respect to which the congressional request is made.

I hope you and your fellow Members of Congress find our thoughts on this difficult issue to be of assistance, and that they serve as the basis for a fruitful discussion among us. Please do not hesitate to contact me if I can be of any further assistance.

Sincerely,

DENNIS K. BURKE
ACTING ASSISTANT ATTORNEY GENERAL

PREPARED STATEMENT OF COMMON CAUSE

March 10, 1999

Senator Fred Thompson, *Chairman*
Senator Joseph Lieberman
Governmental Affairs Committee
United States Senate
Washington DC 20510

DEAR CHAIRMAN THOMPSON AND SENATOR LIEBERMAN: We are writing to present the position of Common Cause on the question of whether the Independent Counsel Act should be reauthorized.

Common Cause was an original proponent of the Act when it was passed as part of the omnibus Ethics in Government Act of 1978. Common Cause has supported reauthorization of the Act each time it has been considered. And we have defended the constitutionality of the Act in court.

Twenty years of experience under the law, however, has revealed a series of significant problems in the operation of the current Act, with the consequence that the public has lost confidence in the very law principally intended to bolster public confidence in investigations involving high level officials.

Some faults of the current Act are correctable by amendment, but two serious problems are institutional. First, politicians belonging to the party not in control of the Executive Branch find demands for appointment of an Independent Counsel to be almost irresistible as potential bombs to toss into the ranks of the party in control of the Executive Branch.

Second, the appointment itself and the assembling of a special staff dedicated to a single investigation encourage the relentless pursuit of every avenue possible, no matter how unpromising, that might lead to the conviction of the President or another high official. This almost irresistible tendency is encouraged by the absence of any criteria other than indictment, impeachment and conviction by which to demonstrate success. Few individuals can resist the temptation.

But conversely, to allow the Act to expire without replacement would leave the nation without assurance that the investigation of any serious charges of criminal misconduct by the President or other top officials would be free from suspicion of politics or personal interest.

We outline below a proposal that we believe is the best means to address this problem while avoiding the difficulties that have emerged under the existing Independent Counsel mechanism.

Our proposal is to return cases against high Administration officials to the Criminal Division of the Justice Department, but to strengthen the independence of the Criminal Division by enacting measures to insulate the Assistant Attorney General in charge of the Criminal Division from interference by the Attorney General or other Justice Department officials, from the White House or from Congress, while

also ensuring there is a public check on the Assistant Attorney General to guard against undue favoritism to the official under investigation.

This proposal is based on rules promulgated by Attorney General Griffin Bell in 1979, while he headed the Department of Justice during the Carter Administration. Attorney General Bell, through internal departmental regulations, vested final review of all prosecutorial decisions, including against the highest level officials, in the Assistant Attorney General for the Criminal Division, with only an exceedingly narrow exception. (The head of the criminal division is appointed by the President, subject to confirmation by the Senate.)

Further, the rules sought to insulate the Criminal Division from political interference by both the Attorney General and by those outside the Division (including Congress and the White House). It accomplished the first by prohibiting the Attorney General, Deputy Attorney General or Associate Attorney General (the three officials above the Assistant Attorney General) from overruling any decision made by the Assistant Attorney General in any criminal matter, unless one of those officials believed the decision was plainly in error, and his views were set forth in a written memorandum which, to the greatest extent permitted by law, was made public.

As to the second, the rules prohibited any communications about a particular criminal matter to the Assistant Attorney General or other prosecutors, from anyone in the White House, or any Member of Congress or congressional staff. If these individuals had relevant information, they could convey it to the Attorney General who would decide whether it could properly be transmitted to the prosecutors.

We urge that these rules be codified. It is our view that the statute should make these rules applicable, as Attorney General Bell did, to all investigations and prosecutions conducted by the Criminal Division—not just those involving high level officials. This would ensure cases involving high level officials are treated the same as all other Federal cases, and emphasize that decisions in all cases would be based on consistent professional judgment.

These simple rules automatically locate prosecutorial authority over all cases, including high level matters, with career prosecutors operating under the final authority of the Assistant Attorney General. The rules create a between the Criminal Division and any improper outside influence, whether it be from Congress, from the White House or from the higher level officials in the Department. In effect the rules require the higher level Justice officials to "recuse" themselves in these matters, so that they can influence these decisions only in a limited way, and then only subject to public scrutiny.

To be sure, the rules would permit the Attorney General to intervene in exceptional circumstances in order to override the decision of the Assistant Attorney General. However, this intervention would be made a matter of public record, which should serve to minimize its frequency and ensure there is public accountability. In unusual cases which might involve important considerations of national security and thus require direct Cabinet level attention—as, for instance, in a investigation involving foreign terrorism—the Attorney General could, by public notice, assume direct control of the matter from the beginning.

The statute could further provide that if the investigation by the Criminal Division concludes that a matter is not appropriate for criminal prosecution, it should be referred to the Inspector General of the Department or to the Office of Government Ethics, as appropriate, for disposition under other civil statutes or ethical standards.

This proposal does place a great deal of weight on the Assistant Attorney General as the person ultimately in command of the investigation and prosecution of high ranking officials. Although this official is a presidential appointee, he or she has historically not been someone who has had the kind of close political relationship with the President that has often been the case with the Attorney General. Further, the Senate would be expected to use its power of confirmation to exercise greater scrutiny over this appointee—much as it does with the Director of the FBI—in order to ensure that only a person of high integrity, professionalism, impartiality and independence is appointed to this office.

But we recognize that legitimate questions could be raised about whether vesting discretion in the Assistant Attorney General adequately ensures real independence—and as importantly, public confidence grounded on the appearance of real independence—in the investigation of the President and other high level officials.

To address this concern, an additional safeguard should be added in cases involving the President Vice President, senior Mite House officials or any Cabinet member. In such cases, where the allegations provide substantial reason to investigate, if and when the Assistant Attorney General begins seriously to consider terminating an investigation without further action, he should be required to consult a panel of

three of his predecessors selected according to a fair, prescribed rule, at least one of whom shall have been appointed by a President of the opposing party.

After consultation, the Assistant Attorney General should have the final decision on whether to terminate the investigation. But if he decides to discontinue the investigation, he should be required to make a statement of his reasons, and that statement should be made public to the full extent allowed by law. Any member of the outside panel should also be free to publish an explanation of his reasons for finding the decision unreasonable.

Thus, the recommendation of the outside panel would be advisory only. But the involvement of the panel would be an important check against political or personal favoritism; and in instances where the Assistant Attorney General declined to follow the recommendation of the panel, the public, press and members of Congress would be aware that an outside reviewer thought the Assistant Attorney General made an unreasonable judgment and why. We believe that even a single dissent would bring significant legislative and media attention to the matter, and a full public review.

There are several advantages to this proposal to strengthen the independence of the Criminal Division.

First, it is a mechanism which provides the "context" and "balance" that is lacking under the current statute. Because high level cases would be handled by the same prosecutors who handle other Federal investigations, these prosecutors would be most likely to apply the same standards to these cases as all others in determining whether to pursue a matter or not and how to allocate their time and resources among competing priorities. Thus, this proposal provides a mechanism to avoid the inherent tendency of an Independent Counsel to engage in an extravagant and relentless pursuit of a high level official, no matter how unpromising the inquiry.

Second, it is simple. It avoids the complexity of setting up an ad hoc prosecutorial office outside of the Justice Department for each investigation. These cases would be handled by the same career prosecutors who handle all other Federal prosecutions. It thus also avoids the exorbitant expense of the current law.

Third, the "firewall" established between the Criminal Division and higher level Justice officials, as well as White House and congressional officials, should insulate decision making in these cases from improper political influence. Virtually all other western nations maintain such a wall between the highest level elected and appointed policy makers and the handling of any individual criminal case. The standards prohibiting contact between the Criminal Division (including the Assistant Attorney General) and outside political sources would have the force of law.

Fourth, this proposal should build respect for the Justice Department by emphasizing its independence from improper political influence in criminal matters, and also by entrusting even the most politically sensitive cases to career prosecutors within the Department

Fifth, the use of a panel of former Assistant Attorneys General in cases involving the most sensitive high level positions would further protect the current Assistant Attorney General from partisan pressure while providing assurance to all concerned that his/her decisions are soundly based and not tainted by political influence of any kind.

Sixth, this approach is sufficiently different from the current statute as to present a wholly new approach to the problem, which improves its prospects for restoring public confidence in the mechanism to ensure credible investigations of high level officials. We believe this is a far better alternative than to allow the current statute to lapse and thereby to allow unconstrained control of high level cases to revert to the Attorney General who is often a close friend of the President.

We urge you and the members of the Committee to give serious consideration to this proposal. We believe it presents the best balance of addressing the problems which have emerged in the operation of the Independent Counsel Act while creating a reasonable mechanism to ensure that all Federal investigations—including those of high level officials—are conducted according to high professional standards of integrity, independence and impartiality.

Sincerely,

DEREK BOK, CHAIRMAN
ANN MCBRIDE, PRESIDENT
ARCHIBALD COX, CHAIRMAN EMERITUS
PHILIP HEYMANN, MEMBER, NATIONAL GOVERNING BOARD

THE FUTURE OF THE INDEPENDENT COUNSEL ACT

WEDNESDAY, MARCH 24, 1999

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 10:26 a.m., in room SH–216, Hart Senate Office Building, Hon. Fred Thompson, Chairman of the Committee, presiding.

Present: Senators Thompson, Specter, Lieberman, Levin, Akaka, Durbin, and Edwards.

OPENING STATEMENT OF CHAIRMAN THOMPSON

Chairman THOMPSON. The Committee will come to order.

First, I want to apologize for being late this morning. There were, as you might imagine, quite a few things going on that were somewhat unusual and needed to be attended to, but, Judge Walsh, thank you for your patience and thank you for being here with us this morning.

We continue our reauthorization hearings on the Independent Counsel with witnesses who will offer their views of the current statute and how it has operated in the past. I think that we all agree that the Independent Counsel law was first established because of concern over the Justice Department investigating high-level officials in their own administration and the inherent conflict that that presents.

We have seen, however, that in the operation of the statute in many people's views there have been excesses. So, the question now becomes whether or not we should end the statute, fail to reauthorize it or whether we should amend it.

I think it is becoming more and more apparent that what we, I am sure at least subliminally, recognized the whole time and that is that the authority to prosecute criminal matters whether they be high level or not has to reside somewhere. And that once we get down to the business of deciding where that authority should lie, problems present themselves. So, that is what we are working our way through and giving consideration to, not only what we should do but when we should do it.

More than one person now has indicated that perhaps regardless of what we do, we should wait and not try to meet necessarily a June 30 deadline, but wait until some of the feelings subside with regard to recent events before we move forward. So, that is another issue that we have.

And basically it comes down to the balance between the accountability, which a lot of people think is lacking in our current setup, versus independence, which some people think is necessary in order to give not only the actuality but the public perception of justice being done in high-profile cases.

So, as we have said, one of the things that we have been looking at is how the law has worked in the past. I think history is always very important. Our personal experiences are important. And while they are relevant, the extent to which we really do our job perhaps in large part depends on the extent we can rise above our personal experiences and rise above individual instances and look out with a broader view as to not only what has happened but what may be allowed to happen under any statutory framework that we might set up.

One focus today will be on an Independent Counsel investigation of a President where it was alleged that grand jury testimony was leaked to the press; that Justice Department policy was not followed; that $50 million was spent because of a lack of a budget and time limits; a close relative of a suspect was subpoenaed; the Attorney General was asked to launch an investigation into the conduct of the Independent Counsel; witnesses were allegedly threatened with indictment unless they implicated people higher up; the Independent Counsel's report made allegations of criminal conduct in the final report; investigation focused on getting a particular person through relentless pursuit; and there was a leak that the President may be indicted.

I am talking, of course, about Iran-Contra.

So, whether these allegations are true or not, I think that the point is that all of these criticisms of investigations under the Independent Counsel Act, now contended to be structural by the Attorney General, were raised by others before Congress considered the statute in 1993 and 1994.

So, today the Committee appreciates that Judge Walsh has agreed to appear before us to discuss what actually occurred during his investigation and offer his suggestions for changes that should be made to the law.

We are also pleased to welcome a panel of distinguished scholars who will offer their insights as well.

Judge Walsh, thank you very much. I know in your prepared comments you did not intend to go back into your own investigation all that much. I am sure you will not mind questions about it. But if you do not mind, as a part of your opening statement, you might discuss in general terms your own investigation. You are aware of the criticisms, of course, that have been lodged and you have a very intimate knowledge of the workings of the statute, yourself.

But before that, I will call on Senator Lieberman to make any comments he may have.

OPENING STATEMENT OF SENATOR LIEBERMAN

Senator LIEBERMAN. Thank you, Mr. Chairman.

I want to thank you again for this series of hearings which I think has been first rate, and very informative. I think we said at the beginning we wanted to listen. I think Members of the Commit-

tee are listening and some minds are even being opened, maybe, even changed about the whole subject matter here.

I want to welcome Judge Walsh and Professor Dash and the other witnesses. I was thinking as I was preparing for this hearing last night—and I mentioned this to Judge Walsh before the hearing—of a moment in the House Judiciary Committee impeachment proceedings where one of the members of the House Committee said to Judge Starr when he was testifying—a friendly member of the House—was reciting his record of service and said, "Is it fair to say, Judge Starr, that you enjoy a distinguished reputation in the law?"

And Judge Starr said, "Yes, I did until I became an Independent Counsel."

Well, I think Judge Walsh still enjoys a distinguished and honorable reputation even after being an Independent Counsel but his reputation certainly became more controversial and, if I may say so, in the minds of many limited to that experience. And I just want to take a moment to go over this remarkable career.

Judge Walsh was raised in Queens, New York; became an attorney during the Depression; spent 6 years working as a prosecutor in New York assisting in District Attorney Thomas Dewey's historic crusade against the New York underworld and, may I stress, Mr. Chairman, the Democratic political machine in New York at the time.

He helped to prosecute the corrupt Chief Judge of the U.S. Court of Appeals for the Second Circuit as well as leaders of the German/American Bund, the pro-Nazi organization, that existed in the period before the Second World War.

After working in private practice and in Governor Dewey's administration, Mr. Walsh was appointed by President Eisenhower to be a U.S. District Judge in 1954, and in 1958 he left the bench to serve as Deputy Attorney General in the Eisenhower Administration after which he returned to the private sector, although he continued to be a very active citizen serving, for instance, as President of the American Bar Association in 1975 and 1976.

In the mid-1980's, as I hear it, he decided to semi-retire to his wife's hometown of Oklahoma City for a relatively peaceful period of life only to be drawn from that in December of 1986 to serve as Independent Counsel in the Iran-Contra investigation. That investigation has been well documented. It has its supporters and it has its detractors. The criticisms that Judge Walsh continued his investigation for too long, that the total costs were too high, that certain of his actions were injudicious, are well-known.

But I, personally, having gone over some of the record of that investigation, have no doubt for a second that the Judge was motivated throughout by what he sincerely perceived to be the public interest in truth and in justice.

Mr. Walsh, I gather, a registered Republican for 50 years and a supporter, I also gather from some of the histories—of President Reagan's Central American policies at the time he was appointed—did what we wanted an Independent Counsel to do which is that he followed the trails where they led him.

And while it is true that his investigation was the costliest of all the Independent Counsel investigations thus far, I also believe that

the misconduct that he was investigating was very serious. And, as a result of his investigation numerous government officials pled guilty or were convicted.

Some say that the investigation would even have been more "successful", if I may use that term with quotes, in ferreting out the truth about who was ultimately responsible had the Judge not been hampered by governmental agencies' refusal to release classified information, and a possibly premature grant of immunity by Congress.

So, this experience, I think, makes you very well qualified to testify about the Independent Counsel Statute as it does Professor Dash, another witness, whose long years of service are well-known and impressive: Coming to national celebrity during his time as Chief Counsel to the Watergate Committee, then being instrumental in formulating the first proposal as part of that service for an Independent Counsel Statute.

The recommendations contained in the Watergate Committee's final report describe a statute remarkably similar to the one that was enacted by Congress 5 years later.

But Professor Dash has also served his Nation in many other capacities. I am sorry Senator Specter is not here to hear me highlight the fact that you once served as District Attorney in Philadelphia, which Senator Specter feels is an extraordinarily good jumping-off point for further public service.

He has been a committed supporter of reforms in our criminal justice system as well as an ardent advocate for human rights abroad and has for many years been a law professor here at Georgetown.

Most recently as we know Professor Dash served as ethics counsel for Judge Starr's investigation. I think his experiences, therefore, with the Independent Counsel Statute are effectively bookends to 25 years of legislative history.

Our other two witnesses have less direct personal experience, professors Julie O'Sullivan and Ken Gormley, but they have written very thoughtful articles on this subject and I am sure they will be excellent witnesses today.

I would say finally that the records of Judge Walsh and Professor Dash and the writings of Professors O'Sullivan and Gormley remind us that, as you said Mr. Chairman quite correctly, that our work here cannot be too greatly influenced by recent political controversies over this statute; that we have got to look beyond the present, both backward and forward, and to the history that led to statute and into the purposes it is designed to serve.

And I hope as we do we keep our minds and hearts open to the possibility that the participants in these struggles, past and present, were doing their best to serve the interests of justice, as were those in Congress who adopted the Independent Counsel Statute, as I am sure will be in our own current deliberations about whether and how to reauthorize this statute.

Thank you, Mr. Chairman.

Chairman THOMPSON. Thank you very much. Judge Walsh.

TESTIMONY OF LAWRENCE E. WALSH, FORMER INDEPENDENT COUNSEL, IRAN-CONTRA INVESTIGATION

Judge WALSH. Thank you, sir.

Thank you very much for permitting me to appear and I thank you all for being able to find time for attending to this subject which I believe important, notwithstanding the counter competing interests of the activities going on today and the concern we all have as to our foreign affairs.

Mr. Chairman, I can proceed in any way most helpful to you. What I would do if it is satisfactory to you is first state my position, what I hope might happen; and then I can relate the Iran-Contra matter in whatever length that you want to hear it; and then respond to questions on it.

Chairman THOMPSON. I think that would be an excellent way to proceed, and then give us about 10 minutes on your overview of Iran-Contra and that way it will not take away from question time that we will have.

Judge WALSH. All right, sir.

Now, what I hope is that we can preserve the statute, strip it down as far as we can strip it, and perhaps continue it for 1 year to get us beyond the period of intense controversy that the statute has gone through. And thinking how much the statute could be stripped and still be effective, it seems to me that there are two irreducible minima to be considered as to who should be mandatorily covered.

One is the Attorney General, herself. I do not think that the public would appreciate an Attorney General appointing an Independent Counsel to investigate her or to investigate him as the case might be. Second, I think that there is the same need for an Independent Counsel whether the subject of the investigation is the President, who appointed the Attorney General. I think that the appearance to the public when Attorney General appointed the person to investigate the person who appointed her and who might remove her is a difficult one for the public to accept. And, again, I think that an Independent Counsel appointed mandatorily by somebody else would be desirable.

As to all of the others covered by the statute I would leave that entirely to the discretion of the Attorney General. If she perceives a conflict of interest let her ask to use the mechanisms set up by the statute rather than appoint it herself. It gives her a double layer of insulation. If she perceives a conflict of interest she does not pick her substitute. It gives her an opportunity to ask somebody else to pick it. So, that is what I would suggest as the basic skeleton of the statute.

Then as to the second feature which I think is important. If there is to be an Independent Counsel, he should not be subject to arbitrary removal. As I pointed out in my statement, we have had five Independent Counsel investigating the President since World War II. Archie Cox was arbitrarily removed by the acting Attorney General just because President Nixon, whom he was investigating, asked to have him removed.

Bob Fiske started the Watergate investigation. He was not protected by this statute because it had lapsed. The three-judge panel arbitrarily replaced Fiske with Kenneth Starr. Fiske was well

along in his investigation. He had already concluded that Vincent Foster had committed suicide; that first aspect was completed. For some reason, never fully explained, the three-judge unit appointed a new person to come in and redo the Vincent Foster investigation and all the rest of the Watergate investigation.

I think it is unfortunate that Fiske was not protected by the statute.

Judge Kenneth Starr and I have also been subjected to attack and, indeed, Justice Department investigation during our periods in office, but we were protected by the statute. The statute limited the removal to removal for cause. That meant the Attorney General could not just remove us because he no longer liked what we were doing or because his judgment differed from ours. It meant that he had to specify a cause for removal and then we were entitled to a hearing before the District Court, in which the Attorney General would have to stand up and there would be a give and take in front of the public as to who was right and who was wrong.

Now, it seems to me that is a feature that should be continued no matter how narrow the Act becomes. If there is to be an Independent Counsel at least give him that much protection.

Now, there is another question that I have tried to deal with by a suggestion which I believe to be new. That is there has been a complaint as to the lack of supervision of Independent Counsel. And the problem hangs in the judicial unit which now appoints Independent Counsel and which constitutionally really cannot supervise him. Because you would have the Judicial Branch of Government intruding in an Executive Branch responsibility.

My suggestion is to get rid of the three-judge panel, not in any way to reflect on their service over the past 20 years, but because I think that the statute would work more easily if there was a group in the Executive Branch of Government with the responsibility for appointing Independent Counsel and, then to whatever extent this Committee thinks desirable, giving it oversight powers over the Independent Counsel. Something that could not be given to the three judges.

Now, there are many examples to draw from and it would not be right for me to suggest how the group might be set up. But if you take as a model the Federal Reserve Board, which is appointed on a staggered basis—no one President appoints all of the members of the Board—if we had a three-person unit in the Department of Justice. You would not really need a staff. It is just a group that can be called together when there is an Independent Counsel problem. And this Committee could prescribe the qualifications for that group. It should be a group appointed by the President and confirmed by the Senate. In other words, this group should have the public scrutiny that goes with the appointment to an important office.

You can specify what type of person should be on that, whether former Attorneys General. It would seem to me there should be at least one person on there who had held elective office, a former President or former Senator or former member of Congress who knows the stresses of that office, as well as having a former U.S. Attorney who knows the ins and outs of prosecution. It should be a balanced group. And that is my principal suggestion.

And I would hope that the statute could be kept alive long enough for this matter to get really serious consideration.

With your permission, Mr. Chairman, I will now shift over to Iran-Contra. Now, Iran-Contra grew out of three activities. The first was an effort by President Reagan to continue support for a counter-revolutionary group in Nicaragua after Congress had forbidden that support by any intelligence entity.

It was in 1984, and the President decided he did not want to make a Presidential campaign issue of it, and he attempted to circumvent the restriction of Congress with the highest intentions but that is what the problem was. So, first he secured funding from the Saudi Arabians for a year. And then the funding came from another source, which I will get to in a few minutes.

He turned over the execution of the oversight responsibility with the Contras, he took it away from the CIA because of the prohibition of the statute, turned it over to Oliver North who was on the National Security Council Staff to try to keep, as the President put it, keep the Contras together body and soul.

North developed, with private people retired from government and from others, a mechanism for supplying the Contras. And he was so successful at it that it came to the attention of Congress which required him to answer questions about what he was doing. And in responding to those questions, he denied that he was doing what he was doing and he did that at the instruction of Admiral Poindexter.

So, that is the first aspect. The second aspect was the effort by President Reagan to secure the release of hostages, American hostages held in Lebanon, a very humane effort, and one of those hostages was the Chief of Station of the CIA, who was being tortured in an effort to compel him to disclose secrets. So, we can understand the President's position.

But we had a policy against trading with hostages because if you make it profitable to take hostages they will take more rather than less. And the President was convinced that he could, by selling arms to Iran during the Iran/Iraq war when we were supposed to be neutral, by selling arms either through Israel or directly to Iran, get the Iranians to intercede with the hostage takers and release our hostages. And, so, he did that.

Now, in doing that he violated the Arms Export Control law when he did it through Israel because he was required to report that to Congress and he did not. He also violated the National Security Act when he started to do it directly using North's team, the Contra supply team, as the team to deal with the Iranians in the arms sales. So, we have the second part of the investigation.

The two combined when the Saudi money ran out and North and his colleagues decide to treble the price to the Iranians for the arms. Skim off two-thirds of it into a Swiss bank account and use that bank account to supply the Contras and, indeed, there was also some payments to North and to others coming out of that.

Chairman THOMPSON. I think that lays the groundwork. We can get into that further if you think we need to. The investigation and problems that arose during the investigation, I think, are right now, in the time that we have, probably the most important thing.

Judge WALSH. The third aspect was a coverup in which the effort was made to assert that this was a runaway conspiracy by North and Poindexter and that without the support of the administration.

Now, as part of that coverup, there was a request for Independent Counsel to investigate North and that is how I came into this. And the first request was not based on the mandatory provisions of the statute, it was because Attorney General Meese perceived a conflict of interest and wanted the Court to have someone appointed to investigate North.

The Court appointing me, expanded that jurisdiction by saying not only investigate North but anybody working with North and anybody working with anybody working with North. So, there was a double expansion of that which gave me a very broad area of responsibility, much broader than any other Independent Counsel has received. I was to investigate the entire Iran-Contra matter.

The investigation went forward. I started with a small staff. I had modest expectations. I was thinking primarily of Colonel North and maybe Admiral Poindexter. Our investigation was delayed because we needed Swiss records and it took 11 months to get those records from Switzerland.

In the meantime, Congress had a parallel investigation started with committees in both Houses working pretty much together but also preserving the separate identities. They needed the Swiss records, too. And to get that, they gave immunity to a man named Hakim who was the financial genius behind North's activity.

I was unwilling to do that because I believed I was not going to give up the opportunity to prosecute him if I could get the records from Switzerland.

Next the Committee had set a 6-month time limit on its investigation which meant that it could not wait for me to get the Swiss records.

Chairman THOMPSON. You are talking about the Congressional Committee?

Judge WALSH. Yes. The Congressional Committee. So, it gave not only immunity to Hakim but it needed a story teller so it gave immunity to Poindexter and North, too, before I was willing to indict them. I was unwilling to indict North on a superficial crime of destroying records, which was urged on me. I perceived a conspiracy to defraud the government by this diversion of funds from Iran and, so, I declined to go ahead.

The question then was should I go ahead after he received immunity and after he had also become a national hero? There was a poll taken right after his testimony of the 10 people most respected in the world and North came in number 5, and President Reagan was number 4, and the Pope was number 6.

So, the question was, should I go ahead and prosecute anyhow? Now, maybe I was over-stubborn and I decided we would go ahead. The precedents were not clear and we had protected ourselves from any exposure to the testimony. My staff had not seen any of it, heard any of it. But unfortunately we could not keep the witnesses from listening to it because they were all directly involved in what he was saying.

So, although we went ahead and got convictions of North, and felony convictions of North and Poindexter, the Court of Appeals

reversed because the witnesses had been exposed to their immunized testimony and we could not prove beyond a reasonable doubt that every one of those witnesses had not felt some subjective influence. So, we lost those convictions.

Now, the question was, should I have quit after we convicted North and Poindexter? I considered that. Believe me I had no desire to stay on. And talking with people like Dan Webb, who had been U.S. Attorney in Chicago who had tried Poindexter, we concluded that we had to at least review what was left.

So, we got Craig Gillen, who has been 14 years in the U.S. Attorney's Office in Atlanta and who was leaving and wanted to leave and wanted a place to go, he came up to review that for me. But in the course of reviewing it, these young lawyers went through the CIA cables so carefully that they developed a case against Alan Fiers, who was North's liaison in the CIA.

And what we had was that North was not working alone. There was a little unit called the Riglet that they had with Fiers from the CIA and another person from the State Department, who were supervising. They were setting the strategy, North was carrying out the strategy they set.

Anyhow, to make the story short. Fiers agreed to cooperate. And gave us testimony against the Assistant Secretary of State Abrams, against his boss, Claire George, and we had to go ahead and finish those things. George was convicted of a felony. I gave everybody a chance to plead to a misdemeanor. These were nice people who got into trouble trying to help the country as they saw it, and trying to protect the President. So, there was no effort to make it harder for them than we had to. Those who insisted on going to trial were convicted of felonies but I was glad to give anybody else a misdemeanor. Now, that is the second phase of it.

Then as we go along we get into the question of the concealment of Secretary Weinberger's notes. Secretary Weinberger had heroically tried to protect the country against this episode. He had told the President face-to-face that it was illegal and he wrote notes as he did it. But when he was called to testify before a Congressional Committee, he denied that he had notes. When we asked him for notes, he denied that he had notes.

Now, here we were confronted with a former Cabinet officer, a man who has received decorations from this country and from other countries, a fine person, but who had held up and who had frustrated the investigation. By the time we had his notes, 700 pages which were like a talking picture of this whole situation, with him telling the President that it was illegal, and that the President was saying, visiting days in prison are on Wednesdays, and Weinberger saying, none of us will be able to visit you, we will all be there.

So, with notes like that, held back which would have exposed this whole matter both to Congress and enable them to keep their 6-month commitment, and to us, enable us to prosecute people before the statute ran out, we concluded we had to prosecute Secretary Weinberger for perjury, and with great reluctance.

We offered him a chance to plead to a misdemeanor. All we asked was that he tell us the truth. But he did not want to go beyond his notes, so, we had to prosecute.

Now, there has been a lot of misunderstanding about the prosecution of Secretary Weinberger. The indictment was returned in the summer, in June, 5 months before election. But about a month before election, the judge threw out the central count for that indictment and we had to replace it and we committed to replace it before the end of October. That was the indictment that aroused so much ire as though we were intruding into an election. It was not a new indictment, it was a replacement of a count in the old indictment.

But unfortunately in that count there was a quotation that referred to Vice President Bush that he was one of five in a decision made by the President to go ahead with these arms sales and this was public. It was not new at all. Poindexter had testified to the very conversation in his testimony in Congress.

I made the mistake of thinking that that would not be newsworthy. Well, I was wrong. And, of course, the Clinton campaign caught it up very quickly and used that to contradict President Bush's claim that he was, "out of the loop," which was perhaps an overstatement.

But anyhow that is the story of Iran-Contra. Now, if you look through it, the Department of Justice, I think, could have done a great job of investigating and prosecuting North and Poindexter. The only problem comes when you come to the President of the United States. The President had memory problems. He had been called before the Tower Commission, a Commission that he had appointed. And, first, he said that he had authorized the arms sales, then he said he had not authorized them, then he said he just did not remember. So, it was perfectly clear we were dealing with an unusual situation.

We never deposed President Reagan while he was in office. All we did was send him a set of interrogatories to make sure he would not come in as a witness for North or for Poindexter. I did not try to interrogate him at all.

We did not interrogate President Reagan until he was out of office, and after I had finished everybody else and we were winding up. I felt I then had to meet with him.

And we had a very pleasant conversation but it was clear to me that his memory had failed very badly and I was through with him.

There was a report, as the Chairman said, that we were going to indict President Reagan which was absolutely—if there ever was a foolhardy report that was it, because it did not come from us. We knew we were not going to—he was not fit to stand trial and I certainly was not going to be one to do it. And his counsel knew I felt that way. And when that report leaked his counsel called me early that Sunday morning and we spent all day Sunday trying to kill that report.

So, it was an unfortunate thing. It hurt us very badly. It aroused Congress. It started investigations by Congressional committees. And it played into the hands of Secretary Weinberger's supporters when they decided to attack us.

But that is the story. I think it shows that nine-tenths of our work could have been done in the Department of Justice. The part that dealt with the President, I think, would have been very difficult for a career officer to deal with. Where you have a President

in this unfortunate situation with his memory not too clear and it is perfectly clear that people close to him had been active in the coverup of these activities.

That is all I have to say on it, Mr. Chairman.

I will be glad to respond to any questions you may have.

[The prepared statement of Judge Walsh follows:]

PREPARED STATEMENT OF LAWRENCE E. WALSH

Mr. Chairman and Senators: I appreciate the invitation to appear before you and submit my views regarding the renewal of the independent counsel law.

From December, 1986 until January, 1993 I served as independent counsel for the Iran/Contra matter. My active investigation was completed in February, 1992. My report was submitted August 7, 1992, but it was not released until January, 1993, after the court had heard arguments against release and had received for simultaneous release, responses from all of those mentioned adversely in the report. My experience before appointment was evenly divided between government appointments and private practice. My private practice was primarily litigation, trial and appellate. My government work included six years in prosecutorial offices, one year as director and general counsel of the Waterfront Commission of New York Harbor, an investigative and regulatory body, three and a half years as a United States district judge and three years as deputy attorney general of the United States. While in private practice I conducted investigations for Governor Nelson Rockefeller and for the New York State Court on the Judiciary.

As to the basic question of whether the act should be renewed, I respectfully recommend that it be drastically narrowed but continued for three purposes: First, to avoid the appearance of an attorney general under investigation naming the person who is going to investigate him or her or having a subordinate do it, second, to prevent an attorney general from selecting the person who is to investigate the President who appointed him or her, and third, to prevent an independent counsel from being arbitrarily discharged by the person he is investigating or at the direction of the person he is investigating.

These three concerns are not fanciful. Since World War II only five independent counsel have investigated a President; two were dismissed; two of us have been investigated by the displaced attorney general; only Leon Jaworski was unmolested. Not protected by statute, Archibald Cox was fired arbitrarily by the acting attorney general pursuant to an order from the President whom Cox was investigating. Robert Fiske was replaced arbitrarily in the middle of his investigation of President Clinton, by a three judge panel under circumstances not yet convincingly explained. Judge Kenneth Starr is now reported to be under investigation by the attorney general but he is protected by the statute which permits discharge only for cause and he may request a judicial hearing. Similarly, I was so protected when I was twice investigated by the criminal division of the department of justice at the direction of the attorney general. In summary, except for Leon Jaworski, everyone who has served as independent counsel investigating a President has been subjected to meaningful attacks and the danger of removal. Only those of us protected by the statute survived. The investigation of a President is likely to be difficult, protracted and controversial. It is an uninviting job. The person who takes it should not be dependent on the tolerance of the person he is investigating or that person's subordinates.

Neither should the public be misled. The appearance of an attorney general selecting the person to investigate himself or the President who appointed him lacks the public credibility of an appointment by someone less interested in the outcome. Historically, more often than not, there has been a close relationship between the President and his attorney general. Herbert Brownell was President Eisenhower's campaign manager and continued to be his political advisor. John Mitchell had a similar relationship with President Nixon. Robert Kennedy had, of course, an even closer relationship with President Kennedy. Attorney General Meese was a close personal counselor to President Reagan and, in the Iran/Contra matter, he advised President Reagan on some of the questioned transactions and he guided those close to the President when he perceived the danger of impeachment. Should a statute which presently protects against such an apparent conflict of interest be abandoned without something better to take its place?

Stripping the act to its essentials and then renewing it would be in the national interest. Several of us who have acted as independent counsel feel that the act is not necessary for the investigation of office holders other than the President and at-

torney general. Except for these two officials, the department of justice should not be displaced. Even before the exposure of the Lewinsky matter, we also argued that the expense and intensity of an independent counsel's investigation should be reserved for an investigation of an abuse of public office, an investigation of specific and credible evidence that the President or attorney general committed a crime in connection with his or her discharge of official duties. Investigation of matters which occurred before a President was elected or an attorney general appointed, we believe, should be left for prosecution after they leave office by regularly appointed prosecutors. The statute of limitations should be suspended during their time in office to permit such a delayed prosecution. Similarly, the investigation of personal misconduct of a President unrelated to the discharge of official duties, should be deferred until after he is out of office and then it should be handled by regularly appointed prosecutors. The statute of limitations on any such act should be suspended during his presidency. The prosecutorial disadvantage of stale evidence is outweighed by the national interest in an uninterrupted presidency by the person elected by the people.

If the statute is to be continued, there will be an opportunity for improvements. The present three judge appointing unit should be replaced. It has always been a risky constitutional venture to permit three judges of limited jurisdiction to make an appointment to an executive branch position—particularly of the person to conduct an investigation of a President. The analogy of a district court appointing an acting United States attorney during a temporary vacancy has been overextended. The governmental body to appoint the independent counsel to investigate a President should have national stature and its members should be appointed by the President and confirmed by the Senate. Such an agency, if this committee believes it desirable, could also have limited oversight of an independent counsel without incurring the constitutional problems of a judicial unit attempting such supervision.)While I do not favor curtailing the independence of independent counsel, and I believe it undesirable to let him share his responsibility, I simply recognize that there is strong support for such a change.

If such a change were made, the renewed statute should prescribe the qualifications of the appointees to a small new agency which could be lodged in the department of justice. By requiring Senate confirmation, those responsible for appointing an independent counsel would receive true scrutiny—public scrutiny, as distinguished from the present system, whereby the chief justice appoints three judges at will, with no public scrutiny of the appointing process.

Less basic criticisms of the act have accumulated. Having worked under it, however, I was satisfied with it. My biggest handicap was lack of control of the declassification of non-secret government information but I believe this to be a separate subject which should not intrude in this committee's more basic decision as to the survival of the act.

To sum up, the advantages of continuing a stripped down statute are that it distinguishes investigations of an attorney general and the President from those of other government officers. Second, it would provide for a credible source of appointment for an independent counsel to investigate those officers. Third, it would protect the independent counsel from arbitrary discharge. Fourth, if desired by congress, the new agency for the appointment of independent counsel could exercise oversight regarding them.

Once again, I thank the committee for this opportunity to state my views.

Chairman THOMPSON. Thank you very much.

I should have known that we could not cover that territory in 10 minutes.

Judge WALSH. I am afraid that I got carried away.

Chairman THOMPSON. That is fine. I asked you to do that. That presents me somewhat with a dilemma. I wanted to resist spending all of our time going back into ancient history. It is a little bit difficult. Many of the things that you have said are contained in your book. I understand your vantage point and we have looked at your book.

Much of what you have said from your vantage point, of course, is contested by people. You have been criticized, yourself, on many grounds as I said in my opening statement. But I think that I will put off getting into some of those specifics until a little bit later.

I would like to focus at least in this first round on what we can learn from all of that as to where we go from here. A lot has been said about the Independent Counsel becoming a political football.

I know in your recommendations you really do not do anything much with regard to the power of the Independent Counsel. You pretty much leave his authority and his power in tact. You have to do with the way he is appointed, the way he is protected and so forth but you leave the power in tact. Some have said that that sets the Independent Counsel up out there more or less unprotected. You have seen the criticism you received. You have seen the criticism that Kenneth Starr and others have received.

Do you think the way you envision it to operate in the future, that that just goes with the territory and nothing could or should be done about the fact that the Independent Counsel is now out there, you might say, unprotected, some would say, unaccountable, but also unprotected and now has become a political football?

Or is it the fact that the statute is constructed in such a way that it invites the Independent Counsel to do things that either are or appear to be abusive and, therefore, he justifiably is attacked? It seems like the attacks are coming more and more on the Independent Counsel.

And the question is, whether or not it goes with the territory. Is it inherent if you are going to investigate the President whether you are doing a good job or not? Or is it that the statute gives too much authority to the Independent Counsel that it almost demands that he get into all these things, spend all this money, spend all this time, do all these things that is justifiably subject to criticism?

Judge WALSH. Mr. Chairman, I do not think that the demands of the statute are responsible. I made every decision I made because I thought I should do it. I did not feel compelled by the statute at all except when it came to writing the final report, which nobody particularly likes to do.

But as to my prosecutorial decisions, I made those because I thought they were right, and I think most Independent Counsel have done the same thing.

I was very conscious of the expense that we were spending. Incidentally the money—I would like to just touch on that for a second. I spent about $37 million. After I left there was almost $10 million added on because the agencies who helped me charged it against my budget.

And I also was charged with the counsel fees for everybody that I investigated as a subject but did not indict. So, those are add-ons that came at the end.

I would also like to point out that one-fifth of my expenditures in our financial report, which is enclosed in my report, one-fifth of those expenditures was clearly and directly attributable handling classified information.

Chairman THOMPSON. So, you felt no compulsion because you were sitting out there and all of the attention was on you, you felt no compulsion to turn over the extra leaves, shall we say, more so than if you were within the Justice Department prosecuting a case in somewhat anonymity?

Judge WALSH. I think the exposure made, if anything, made me wish I could get back to Oklahoma City. That there was no urge

to stay on and everyone of these additional steps that I took that I tried to outline very quickly, believe me, I did it with consultations not only with staff but with others.

Chairman THOMPSON. On the isolation point, still related to the question of the Independent Counsel now being out there, some would say that unaccountable. Some would say unprotected but being out there more and more isolated, more and more subject to criticism. I believe in your book you related that it caused you to feel the need to spend some time with reporters in order to explain yourself and defend yourself?

Judge WALSH. Yes.

Chairman THOMPSON. In fact, I think that you referred to news reporters as, at one point, as your principal constituency.

How did you see that need and what did you do with regard to that?

Judge WALSH. We have an investigation that begins to stretch out. The first year everybody knows what is going on. Then as it begins to drag, as we wait for one record or wait for another, as we go through trials and we go through appeals, the group of reporters that covers me have other assignments. They drift off and do other things. We were ready to accommodate them by bringing them up to date when they came back.

I was ready to meet, once a week I would meet with two or three reporters, not to disclose anything that was not public, not to disclose evidence against any person, but to talk with them in general terms about what had happened in the last year. In other words, the thing would be after Poindexter was convicted, why do you not go home? What are you going to do now?

So, I would explain why we had not gone home. That there was a question of the relationship of the State Department, the CIA, and, of course, the National Security Council to what he had done. That he had not been out there alone and we had to look into it.

But as to telling them who I was looking at specifically, or what evidence I had, of course, we would never do anything like that.

Chairman THOMPSON. Of course.

Judge WALSH. But I thought that by my talking to them it took the pressure off my assistants, it took the pressure off the grand jurors and in Watergate there had been a grand juror who had apparently been broken down. If I was going to have anything come out of my office I wanted to do it myself.

Chairman THOMPSON. Of course, Federal law enforcement authorities ought to take the pressure off the grand jury if anybody tries to talk to them.

Judge WALSH. Well, it does not always work that way, sir. But we all recognize what should happen.

Chairman THOMPSON. So, you dealt with the press directly——

Judge WALSH. Yes, I did.

Chairman THOMPSON [continuing]. As opposed to having someone else do it. Did you have a press officer or anybody dealing with the press?

Judge WALSH. I had a press officer and over the course of 6 years there were three of them.

Chairman THOMPSON. Was not part of this due to the fact that you were under attack from the White House or from others and you felt a need to explain yourself?

Judge WALSH. We were under attack by the persons we were investigating, the persons we were trying, and by their supporters both in Congress and there were statements coming from the White House and from the State Department.

An Independent Counsel, just visualize it for a minute, you start off with 10 lawyers. You finally conclude you have got to go up to 20. And you are sitting here all alone and there you are dealing with the State Department, with its public relations staff; you are dealing with the CIA and its public relations staff; the National Security Council, the White House and then ultimately at another point the Defense Department. You are dealing with a group of people who are able to say things that are inaccurate that have to be corrected.

Chairman THOMPSON. Did you deal with the press on the record and off the record?

Judge WALSH. We dealt with them on and off, yes, sir.

Chairman THOMPSON. Getting back to your appointment, when Mr. Meese called for an Independent Counsel, and I believe you had the appointment, there was a lawsuit challenging the constitutionality of the Independent Counsel Statute?

Judge WALSH. That was *Morrison v. Olson.* That was Ted Olson's case.

Chairman THOMPSON. Well, there was a time there when you asked Mr. Meese for, I guess, a regulatory appointment in addition?

Judge WALSH. Yes, you are absolutely right. I had forgotten that. He gave me a backup appointment. When North's lawyer challenged the constitutionality of the Act and at the same time another subject of another Independent Counsel challenged it, we thought we could prevail against North but we were worried about the other one and we were afraid there would be a stay issued preventing us from going forward under the Act. And the Attorney General very cooperatively gave us an appointment as his Independent Counsel.

Chairman THOMPSON. A lot of our discussion concerning this Act has had to do with the appointment part of it. What we sometimes refer to as to the front-end of it. Most of the criticism of the statute up until now has been that there is a hair trigger, that appointments are called for too often, that it is almost automatic and all. But many people have felt that the current Attorney General, while she may have appointed some that should not have been appointed and, in at least some cases, has not appointed some that clearly should have been appointed.

I look back at your testimony and your writings in this matter and it occurs to me that at the time that you were appointed, of course, not everything was known. There were some allegations, I suppose, about arms for hostages. That, at least some people—I do not want to get into a big argument over that right now—but some people at least thought that, in and of itself, was not necessarily a violation of criminal law, and that if it was a violation of law there was no criminal statute attached to it, arms for hostages. I

mean I could foresee someone taking the position that an Independent Counsel was not called for. Many of the prosecutions that you had later on had to do with things that came out of the investigation. Some were testimony before Congress before you came along but some were later. Destruction of documents, obstruction, perjury, that sort of thing.

So, I think it just highlights the importance of the goodwill or the good judgment of the Attorney General. Because it looks to me like a good case could be made that at the time Meese voluntarily put you into play, there was at least an argument that he could have made if he wanted to that these are policy matters, mistakes were made but under the triggering mechanism, under the details of the statute does not meet the threshold as far as criminal activity is concerned.

My time is up. You can comment on that if you care to——

Judge WALSH. I can do it very quickly, Mr. Chairman——

Chairman THOMPSON [continuing]. But it all has to do with things that you did not have to deal with. You only dealt with what happened after you came into the picture.

Judge WALSH. But I can rationalize the Attorney General's action very easily for you. It was not just a question of policy. At the time Attorney General Meese asked for my appointment he had a document, by North, which outlined the diversion of government funds from the Iran arms sales into the Swiss bank accounts for the Contras.

It was there. North had failed to destroy it. And he was there with it. There was nothing for him to do except——

Chairman THOMPSON. But North was not a covered person under the Independent Counsel.

Judge WALSH. No. But North's memorandum was to Admiral Poindexter and the question was, did Admiral Poindexter give it to the President? Those were the things that——

Chairman THOMPSON. Well, that is always the question when you are dealing with close associates to the President, which makes my point as to why an Independent Counsel should be appointed with regard to the campaign finance controversy.

Judge WALSH. I just wanted to deal with the policy question. And there was this one detail that I think propelled Attorney General Meese probably quite properly to ask for an Independent Counsel.

Chairman THOMPSON. I think so. Thank you.

Judge WALSH. Thank you.

Chairman THOMPSON. Senator Lieberman.

Senator LIEBERMAN. Thank you, Mr. Chairman.

Judge Walsh, I find your ideas about what we should do now to reauthorize the law to be very thoughtful and very interesting. I want to ask you a few questions about them.

You have recommended the continuation of the law but in a very different form and specifically say that Independent Counsels ought to be appointed only regarding the possible criminal behavior by the President and the Attorney General and only when it involves their official duties.

Let me ask you a bit about that. Now, first is only a small question but I am curious that you left out the Vice President. Most

people in the stripped-down versions mention the President and Vice President, and Attorney General.

Judge WALSH. I may have gone too far. I was trying to strip it as far as I could to hold what we could.

Senator LIEBERMAN. OK.

Judge WALSH. And Vice President Agnew was, in fact, prosecuted by a U.S. Attorney, but I think in many ways the Vice President might be an alter ego for the President, particularly in election matters, which I know this Committee has been concerned about.

And it is really an open question as to whether he should be in there. I just stripped it as far as I could. I thought that the Vice President does not have an appointing responsibility as to the Attorney General. He cannot remove her and, therefore, I would leave him out of the mandatory part of the statute. But include him in her permissive, the part where she could permissively ask for it.

Senator LIEBERMAN. And if I understand what you have said this morning that in addition to the mandatory appointment for the President and Attorney General, you would give the Attorney General essentially unlimited discretionary authority——

Judge WALSH. Yes.

Senator LIEBERMAN [continuing]. To appoint Independent Counsel when he or she deemed it appropriate.

As far as I can tell only 3 of the 20 Independent Counsel that have been appointed since 1978 would have been appointed if the provisions that you recommend had been in effect for the past 20 years. I am thinking about the two investigations of Attorney General Meese and the Iran-Contra investigation.

Whitewater, for instance, would have been excluded——

Judge WALSH. Yes.

Senator LIEBERMAN [continuing]. Because it was pre-Presidential term and some of it, arguably, personal misconduct.

So, I want to ask you to make the case a little bit more about the extent of your confidence in the Justice Department to carry out essentially the other 17 Independent Counsel investigations that have occurred in the last two decades, including Cabinet Secretaries and the like.

Judge WALSH. I, of course, have great respect for the career people in the Justice Department and for the 3 years I was there, I thought highly of them. You have a section on public integrity in the criminal division that are largely career people. And, I try to think back and I do not remember any criticism of that section. They have done a good job year-in and year-out.

And it seemed to me that as to taking the ordinary cabinet officer. There was a time when the government was more intimate than it is now. But it is now spread out. And the part of the Department of Justice that deals, that advises cabinet officers is usually the Office of Legal Counsel and the Attorney General, himself, and his immediate staff and a prosecutorial group is not usually in that. And they are not usually dealing with the other departments except when they need a witness or something like that.

I do not think there is the intimacy that would require a mandatory appointment of an Independent Counsel. Now, I would leave it to the Attorney General's judgment.

Senator LIEBERMAN. OK. How about the threshold? Some say that in the existing statute the threshold for the Attorney General to recommend the appointment of an Independent Counsel is too low. Obviously in some cases, as Senator Thompson indicated, he felt and others felt that the Attorney General, nonetheless, did not act. But others have recommended that we raise it up to not quite probable cause, but something more than reasonable grounds to believe that further investigation is warranted.

Judge WALSH. I think it probably should be something like probable cause. I think the Attorney General's subjective judgment should be drawn into it. It should not be a mechanical thing. And I have a feeling that perhaps it has sort of dropped to a mechanical level in recent years.

Now, I think that something like probable cause would be desirable. I think we are all aware of the danger of letting the Attorney General go too far before turning the matter over to the Independent Counsel.

She can spoil a case if, for example, she had immunity powers.

Senator LIEBERMAN. Right.

Judge WALSH. Something like that. Or even grand jury access. But at least she should have the power of subpoena, the power to compel people to come before her and answer questions.

And there is a question whether she could call the subject of the investigation before her. I would leave that to the judgment of the Attorney General. I would give him the power. I would take a chance. I would expect them to exercise restraint where they thought it should be exercised.

I might point out that putting the unit that I suggest in the Department of Justice and getting it out of the courts enables and sets up a unit that can deal with wayward Independent Counsel if there is a concern for them. If they become too independent this Committee could put in the legislation whatever oversight powers it wants to give this group. There is no constitutional barrier any more once you get this out of the courthouse and into the Department of Justice.

Senator LIEBERMAN. That was my next area of questioning. I think that is a very interesting idea which I, at least, have not heard before, which is to create a board—and you have used the parallel to the Federal Reserve Board—appointed for staggered terms over a period of time so no one President controls the Board.

And you are absolutely right, of course, that any of the constitutional questions that have been raised, although now resolved by the Supreme Court in *Morrison,* about the Court playing a role here would be off the table.

Tell me a little bit more if you could about this question of oversight. We are appointing a counsel whom we want to be independent and, yet—here in the current circumstance, including particularly Judge Starr which has raised our interest in this—the Court feels under the *Morrison* case that the courts have no real authority to supervise, only to appoint and then ultimately hear an appeal on dismissal.

Now, the Attorney General is probing the limits of her authority to have oversight. If we were drafting a statute that created such

a three, four, or five member board in the Justice Department, what are its appropriate powers of oversight? What should they be?

Judge WALSH. I think it should be entitled to an annual report at the end of the first year and then perhaps 6-month reports thereafter. Not that it is going to substitute or not with the power to substitute its judgment for that of the Independent Counsel but at least to be kept in a generalized way advised of what the Independent Counsel is doing and why he has not gone home, what he is doing and why he thinks he has to keep on going.

If it felt that he was acting arbitrarily or unethically the unit would then, I would assume, take the initiative of doing what it had to do to correct that situation. Either reporting to the Attorney General that this is time to consider removal or telling the Independent Counsel: You have now reached and gotten down to a level where this could be better handled by the Department of Justice than by you.

And if not persuading him then, again, giving the Attorney General the information to remove him, not on misconduct grounds but on the grounds that his job is done. That the need for him has expired.

Senator LIEBERMAN. Yes. That is very helpful. And the Board would have the two critical powers also that the current three judge panel has as I understand your suggestion. One is that on the request for petition of the Attorney General the Board would actually appoint the Independent Counsel and then ultimately could hear an appeal by the Independent Counsel if the Attorney General dismissed or terminated his services.

Judge WALSH. Yes. I would give it that power. I never asked for an expansion of my power. I had more than I really would have liked at times. But I think it should be the same, whoever does the appointing should have the power to expand.

Senator LIEBERMAN. Let me ask you——

Judge WALSH. And then on that, we did talk about a final report which I know is a thorny question.

Senator LIEBERMAN. Yes.

Judge WALSH. But that again would be submitted to this panel, I think, and then to the District judge before release. It would go through those two steps. With the three judge unit out, you need someone to decide whether a report should be made public or not and it should not be the Independent Counsel, it should be some independent group. Some group independent of him.

Senator LIEBERMAN. My time is up.

Thanks very much, Judge Walsh. Your testimony has been very helpful.

Judge WALSH. Thank you, sir.

Chairman THOMPSON. You know, it occurs to me, we could talk about this later when you describe this panel appointed by the President, confirmed by the Senate in the Justice Department, criminal experience or background——

Judge WALSH. Whatever the Committee would say.

Chairman THOMPSON [continuing]. That it sounds to me like you are describing an Attorney General.

Judge WALSH. Well, I would say—no. It should have——

Chairman THOMPSON. What an Attorney General ought to be.

Judge WALSH. Well, but you have a situation where the Attorney General through no fault of hers is disqualified. I was thinking of somebody like a past Attorney General, someone who at least understood the scope of the job. Someone who had held elective office and understood that aspect, that there are things that go with that work that an assistant prosecutor does not learn very much about until he bumps into it.

I think it should be people of such statesman-like quality who are on the panel.

Chairman THOMPSON. Thank you very much. Senator Specter.

OPENING STATEMENT OF SENATOR SPECTER

Senator SPECTER. Thank you very much, Mr. Chairman.

Judge Walsh there has been a great deal of frustration about the refusal of Attorney General Reno to appoint Independent Counsel on campaign finance matters.

Judge WALSH. Yes, sir, I read that.

Senator SPECTER. So, this Committee conducted a virtually year-long investigation into that and amassed an enormous amount of evidence and notwithstanding that and in the face of recommendations by FBI Director Freeh, and Charles La Bella, who was special counsel, she has declined. She appeared here as recently as a week ago today and when asked about matters, which on their face appear to be closed and appropriate for congressional oversight, declined to answer on matters that we have to follow-up on.

And an avenue has been explored that I would like to ask you about, about a possible mandamus action which would compel the Attorney General to move to the appointment of Independent Counsel.

It is not an easy matter for a number of reasons. One is the issue of prosecutorial discretion, another is the constitutional issue of separation of powers and, third, is the issue of standing.

I have introduced a statute which would give very limited standing to the Judiciary committees in the Senate and the House, requiring that a majority of the majority Senators or House members or a majority of the minority would have standing. That is analogous to the standing to require the Attorney General to file a written answer as to appointment of Independent Counsel.

With respect to the issue of prosecutorial discretion, three District Courts have ordered the Attorney General to appoint Independent Counsel in response to mandamus actions, all were overturned on appeal because of a lack of standing.

We are still reviewing what is happening with the China issue. A number of investigations have been pending as to key figures; a number of prosecutions have been brought. From the outside it is inexplicable why some major figures have not been indicted. From the outside it is hard to understand the texture of some of the prosecutions, where some of the counts have been dismissed, and the traditional way when there is a controversy of this magnitude is to go to court.

And I would be interested in your view as to whether this would be constitutional, how it might be structured, and whether you have a better idea as to how to resolve a dispute which is long-ranging.

Attorney General Reno was in this room on May 30, 1997 and then again before the Judiciary Committee on July 15 of last year, and back here last week. And we are looking for a way to resolve the conflict. Do you have a suggestion?

Judge WALSH. You know, I am not prepared on it, Senator, to be very helpful. I just, when I hear a mandamus, I think of something that is more mechanical and less discretionary that is being ordered.

I did suggest a unit being inserted into the Justice Department to appoint Independent Counsel. It would be a matter of this Committee's judgment as to whether that unit should also have any kind of review of a refusal to appoint an Independent Counsel.

I just have not thought all that out. But if the appointing agency has moved out of the courthouse and into the Department of Justice as I suggest, it opens up a whole vista of other jobs that that agency can be given, including, if this Committee saw fit, the review of a refusal to appoint an Independent Counsel. But I just do not know how far you want to carry making decision after decision.

I understand the frustration the Committee feels on the campaign finance matters. It is a difficult law to deal with on a criminal basis because of the interpretations that have been given. But I have not really thought out the pros and cons on it.

Senator SPECTER. The option ongoing within the Justice Department is one which is under consideration. I am opposed to it because there are so many subtle ways the Attorney General has the wherewithal, the standing, and the opportunity to influence a subordinate.

Let me shift gears to a matter which you touched upon but I ask for your amplification. I continue to believe that Independent Counsel is necessary because of the reasons that you point out; your three-fold reasons articulated at the beginning of your statement.

Independent Counsel Act has come under tremendous fire and it has come under fire because of Judge Starr and the appearance of the vendetta as to the President. I am not saying there is one but that appearance has been given and the length of time and the expansion of the jurisdiction and the cost.

And that makes a natural circumstance for Democrats to oppose reappointment or reauthorization, not all but some. And frankly, the prosecution of the former Secretary of Defense Weinberger that you undertook is frequently cited by Republicans in the same vein, which is an issue which I would like to explore with you a bit.

Judge WALSH. Yes, sir.

Senator SPECTER. And I know that you had brought an indictment in the summer as to Secretary Weinberger and then you had an indictment brought for reasons because part of it had been dismissed very shortly before the November 1992 election. But why the necessity to bring it at that critical time?

Judge WALSH. The schedule was entirely fixed by the court, Judge Hogan. The dismissal of the central count in the indictment was, I think, the last day of September. And we were then pressed by the Weinberger counsel, Mr. Bennett, to get our indictment up to date because the trial date had been set for the first Monday in January. And the court had scheduled a series of hearings on clas-

sified information, the requests by the defendant for classified information and that we were scheduled beginning in mid-November.

Actually Jim Brosnihan, my associate counsel who was handling the case, asked for a week's delay which would have actually thrown it over after the election day. That was denied. And I can remember it was opposed by defense counsel.

Senator SPECTER. Asked for a week's delay, to do what?

Judge WALSH. To get our indictment in and to move back—Brosnihan had come into the case new. He had come into the case in October and he wanted to move back the schedule of the hearings on classified information to give him an extra week to prepare and Judge Hogan denied that.

Now, if he had moved those back the pressure for filing the amendment or the supplemental indictment would have gone back with it. But nobody, I am afraid, was thinking in terms of the impact on the election at the time.

Senator SPECTER. Why not?

Judge WALSH. Because the matter had all been made public and there was nothing in the indictment that was new. What the indictment did that caused the attention, it actually quoted from Weinberger's notes because this was going to be a perjury case instead of an obstruction case at the direction of the court. So, they used actual quotations of a Weinberger note which was very graphic. It said, "I opposed it, Schultz opposed it, but Poindexter and VP recommended going ahead."

Senator SPECTER. But that was new.

Judge WALSH. Well, no, it was not. Poindexter testified to it. He testified to it when he testified in Congress. Actually Brosnihan asked—I am the one who is responsible for this—Brosnihan asked me if it was all right to put that quote in. I did not want any quotes in. I thought it was bad form. But he was going to try the case and he wanted quotes and if he is going to put them in, I told him to go ahead and put it in because that was not news. That was my bad judgment.

Senator SPECTER. But Judge Walsh, just because Admiral Poindexter had testified to it, and there had been some notoriety at that time, inevitably a fresh statement in an indictment of the former Defense Secretary that the Vice President favored the arms sale on the eve of an election was recycled dynamite. There is so much that is missed the first time around.

Judge WALSH. On hindsight, believe me, I agree with you. But at the time I was very aware of Poindexter's testimony. I thought there was nothing—everybody knew that Bush had been at that meeting—and it was just, that was not secret.

Senator SPECTER. Well, at that time it highlights.

Judge WALSH. But that is how it happened.

Senator SPECTER. Those are the facts. Thank you, Judge Walsh.

Chairman THOMPSON. Thank you, Senator Specter.

Senator Levin.

OPENING STATEMENT OF SENATOR LEVIN

Senator LEVIN. Thank you very much, Mr. Chairman.

Just on that point, I have gone back to look at the transcript that Senator Specter makes reference to on this issue. And you indicate

two things on this point. One is that what you put in the indictment had already been testified to. But you also made reference to the fact that there was a new lawyer who was on the scene because the previous lawyer had been disqualified based on a complaint of Mr. Weinberger's lawyer about a conflict of interest.

So, you brought on Mr. Brosnahan and here is what the transcript says on October 22. Mr. Brosnahan was talking about a superseding indictment. And the court says, "I am going to get to that." And Mr. Bennett, who is Mr. Weinberger's lawyer says, "We are not sure when it is coming, we think next week. We would ask to get it as soon as we can get it."

So, is it not true that Mr. Weinberger's lawyer was pressing on October 22, for the superseding indictment, "As soon as we can get it"?

Judge WALSH. Yes, sir. That is true. We were under pressure to put it in before the end of October.

Senator LEVIN. And if you had been granted the delay that Mr. Brosnahan requested relative to the trial, that would have created less back pressure earlier on, is that not true?

Judge WALSH. That is right. It would move all the schedule down a week but, of course, none of us were thinking of an impact on the election but by accident, for other reasons, we had asked for a delay and been denied. So, we were not purposeful in doing any of this.

Senator LEVIN. Just to get back to the one point, forgetting the question of the one-week delay, it was Mr. Bennett who was also putting tremendous pressure on you through the court to "Get the new indictment as soon as we can get it"?

Judge WALSH. Yes, sir, that is correct.

Senator LEVIN. OK. And that was on October 22?

Judge WALSH. That sounds right, yes, sir.

Senator LEVIN. Now, you made reference in your statement that you were twice investigated by the criminal division of the Department of Justice at the direction of the Attorney General, and I am just curious as to what that was all about.

Judge WALSH. There were two things that I remember. When I went out to California to interview President Reagan, I took the exhibits to his deposition in the Poindexter case. I thought they had all been declassified. One of them had not. And the messenger that I had bringing them back had them in a suitcase that was lost. So, that was a proper basis for investigation. They understood the facts and that was that.

And then when the statute was renewed the General Accounting Office was brought in as oversight for our expenditures. And we always assumed—I think my predecessors and I had assumed that we were a Judicial Branch agency because we had been appointed by judges and we were using the guidance of the Administrative Office of the courts and the expense levels of the courts in our expenditures.

Now, when the General Accounting Office concluded that we were an Executive Branch agency, those levels were lowered. I filed a brief with them explaining what we had done, why we had done it, and not agreeing with them but accepting their decision and they gave us a waiver.

But the Department of Justice also looked at our papers on that just to make sure, I think, that we were correct.

Senator LEVIN. You have made a number of suggestions relative to amendments to a stripped down Independent Counsel law including who the mandatory subjects would be and that we limit it to just the President and the Attorney General, as I understand it.

You would keep as a backup the appointment by the Attorney General of what you have called an Independent Counsel. Is that the regulatory Independent Counsel which is sometimes referred to that the Attorney General can currently appoint pursuant to regulation or are you talking about a special counsel which, even in the absence of that regulation, could be appointed by the Attorney General?

Judge WALSH. I left it wide open for whatever the Committee decides whether it prefers a regulatory appointment or an appointment by some independent appointing body. It seemed to me that if the independent appointing body is in the Department of Justice, if I were Attorney General I would like them to make the appointment.

Senator LEVIN. All right.

And then you would have that unit inside the Department of Justice that is appointed by the President, subject to confirmation by the Senate.

Judge WALSH. Yes, sir.

Senator LEVIN. Would that unit be subject to dismissal by the Attorney General?

Judge WALSH. No.

Senator LEVIN. Can you have a unit inside the Justice Department which is not subject ultimately to dismissal, at least, for cause?

Judge WALSH. No. I, frankly, Senator, had not thought about it. But I put it in the Department of Justice. It had to be put somewhere. I did not think you would want to have it hanging loose. And I was trying to follow the analogy of the Federal Reserve Board and I do not know——

Senator LEVIN. Well, would you, for the record, give some thought to this question?

Judge WALSH. Yes, sir.

Senator LEVIN. Because I believe, I may be wrong on this, but I believe that the entity inside the Justice Department must be subject to dismissal, at least, for cause. But I am not sure I am right and I would like your thoughts.

Judge WALSH. My impression would be that the Congress could have it whatever way it wanted. I do not think there is any constitutional requirement.

Senator LEVIN. Well, if it is in the Executive Branch it has got to be subject to dismissal by somebody, I believe, otherwise, we would have a fourth branch of government. But I will leave that up to your further thought and we will do some research on that, too.

But going back to this appointed unit inside the Justice Department. You would have that unit act only upon the request, as you propose it at the moment, of the Attorney General?

Judge WALSH. Yes, sir.

Senator LEVIN. That unit would decide what the jurisdiction of an Independent Counsel would be?

Judge WALSH. Yes, sir.

Senator LEVIN. And would decide who the Independent Counsel would be, is that correct?

Judge WALSH. Yes, sir.

Senator LEVIN. Both of those issues?

Judge WALSH. Yes, sir.

Senator LEVIN. There has been some other suggested changes in the Independent Counsel law which I would like your reaction to. One is—this may already be in your proposal—as to the alleged crimes that are covered, as to whether we only want to cover allegations of misconduct after the person has either been elected to office or was running for office. Is that covered in your proposal, that issue?

Judge WALSH. Yes, sir. I suggested it only be something that happens while he is in office, and something relating to the official duties of the office.

Senator LEVIN. All right.

Now, you would have no funding limit of any kind, is that correct?

Judge WALSH. No, no funding limit. And with this new unit in the Department of Justice I still would not put in specific funding limits. I would leave it to the unit to curb the Independent Counsel if he begins to seem willful.

Senator LEVIN. So, they would be a supervisory unit, too. They would not only pick the person and set the jurisdiction but they would also supervise expenditures?

Judge WALSH. The oversight power that your Committee used to have over me, I would think that it might be somewhat broader than that and require regular reports to that extent.

Senator LEVIN. All right.

Now, would you—the law has a requirement that the Independent Counsel follow the policies of the Department of Justice, that is the current law.

Judge WALSH. Yes, sir.

Senator LEVIN. Would you keep that in the law?

Judge WALSH. I would keep that in the law. I think that probably we should keep that.

Senator LEVIN. All right.

And would you then, as I understand it, have the dismissal of an Independent Counsel be exclusively on the recommendation of that unit?

The dismissal for cause of an Independent Counsel?

Judge WALSH. I think the dismissal ought to come from the Attorney General. The unit should not be drawn into litigation. It should be an elder statesman-type unit, and I think they should report to the Attorney General and she should carry the litigation for dismissal.

Senator LEVIN. But would it be only upon their recommendation that she could dismiss an Independent Counsel?

Judge WALSH. No. If there were cause, I think she should be able to go independently.

Senator LEVIN. All right.

And, finally, we had hoped that by now the Department of Justice would have issued some formal rules about investigating complaints against Independent Counsels so that she could, if necessary, remove an Independent Counsel for cause. She has not done that.

And I am wondering whether or not you would——

Judge WALSH. I always assumed she had the power to.

Senator LEVIN. She has the power but she has not published the regulations that would guide the exercise of that power. Would you make any reference to having procedures relative to the criteria for removal, anything like that?

Judge WALSH. I think whatever the procedures are for a complaint about anybody at the Department of Justice, if the Independent Counsel is subject to complaint, she ought to be willing to hear it and whatever her procedures are.

Senator LEVIN. Thank you. Thank you, Mr. Chairman.

Chairman THOMPSON. Thank you. Senator Akaka.

OPENING STATEMENT OF SENATOR AKAKA

Senator AKAKA. Thank you very much, Mr. Chairman.

I want to thank you again for having these hearings. As I have mentioned before, I am impressed with the quality of witnesses we have had thus far and also the ones we are having today. I know that we will be better educated on the Independent Counsel law before the hearings are over.

Judge Walsh, I was interested in your comment that except for Leon Jaworski, everyone who served as an Independent Counsel, or a special prosecutor investigating the President has been a target of—and I quote—"Meaningful attacks on the danger of removal."

Do you believe that the Act, if renewed, could be reworked to better protect Independent Counsels from attack either by those who appoint them or from the press?

Judge WALSH. I think that an Independent Counsel expects to take a certain amount of public attack. And if he does not he should not take the job.

And I think the protection now against removal, except for cause, is adequate. I am perfectly willing to, if I were an Independent Counsel, expect to defend myself if there were someone seriously claiming there was cause for my removal.

And I welcome a hearing before a court to defend my action, and inquire into the motives of the person accusing me.

Senator AKAKA. Your written testimony recommends that an investigation of personal misconduct of a President unrelated to official duties should be deferred until the term of office ends.

Judge WALSH. Yes, sir.

Senator AKAKA. What would you do as an Independent Counsel if you uncovered an act of personal misconduct during an Independent Counsel investigation into matters involving official duties?

Judge WALSH. If we found evidence of personal misconduct we never publicize it and we certainly did not pursue it. I would regard that as a distraction from the job I was given. And if you investigate, 50 or 60 people, sooner or later you are going to find an

indiscretion here or an indiscretion there. And we stayed out of that.

Senator AKAKA. As I said, you mentioned that you think it would be deferred until the term of the office ends.

Judge WALSH. Yes, sir.

Senator AKAKA. Would you pursue that?

Judge WALSH. If a person is coming in with a complaint it would seem to me they should be referred to either the FBI or the U.S. Attorney and if it is a matter unrelated to the performance of office the statute of limitations should permit a delayed investigation.

I realize that no one likes a stale prosecution or investigation but it is the lesser of the two evils of interrupting the Presidency.

Senator AKAKA. Would you, at such a time, be willing to make the information public?

Judge WALSH. No.

Any personal misconduct we observed has never been made public.

Senator AKAKA. I agree with you on the comments you made on the current three-judge selection panel and that it should be replaced with a more nationally represented body. You recommend that members of such a body be appointed by the President.

Judge WALSH. Yes, sir.

Senator AKAKA. And confirmed by the Senate.

Judge WALSH. Yes, sir.

Senator AKAKA. How would you, in a case like that, keep politics out of such an appointment?

Judge WALSH. Well, dealing with high-ranking public office, I think that politics has its place. And when I was Deputy Attorney General I had the responsibility for shepherding judicial nominations through the Senate Judiciary Committee. And I must say that there were occasions when there would be a political matter that arose but with Chairman Eastland and that Committee there might be problems of delay that resulted from it but never a problem of outcome.

Senator AKAKA. One of my concerns here has been what impact there might be should the Act on the Independent Counsel expire? What would happen after that? I would like to know from you what mechanisms, if any, should be in place prior to its expiration to investigate alleged wrong-doings by high-level Federal officials?

Judge WALSH. Well, the way I would strip down the statute, as I have outlined in my statement, I think that is the minimum that we need to keep in place. And even if the Committee saw fit to recommend the extension just for 1 year to permit everything to settle down and everyone to look at other improvements that might be made I think that would be very helpful.

I think it is much easier to keep a skeleton in position and then go back and improve it than to let it go completely and then have to take the initiative of opening up the subject again.

Senator AKAKA. My concern about expiration also is whether we have any system that would be able to replace it. Do you think that allegations and charges currently referred to Independent Counsels can successfully be investigated by the Justice Department through a special independent prosecutor?

Judge WALSH. I think that most of the officers could be well investigated by the Justice Department. And if worse came to worse, and there were no statute, I think that the odds are that an Attorney General would appoint a good Independent Counsel to replace him or her.

But it is more the public appearance of the problem than my concern for the actuality of what the Attorney General would do. Most of our Attorneys General have generally been of high stature, and the Independent Counsel they have appointed have been, I think, very well regarded. The problem that I indicate was that there is no protection for them once they are appointed. They can be removed at will.

Senator AKAKA. The problem, as you pointed out is the public perception of conflict of interest even if the Justice Department took over this type of investigation.

And I wonder what you would do with the inherent conflict of interest whenever senior Executive Branch officials are to be investigated by the Department and its appointed head, the Attorney General?

Judge WALSH. It is a matter of your judgment, Senator, what you think. Having worked in the Department of Justice and having worked as Independent Counsel, it was my feeling that there is not that intimacy among the government departments that there was many years ago.

And that the prosecutorial arms of the Justice Department are not in intimate contact with the other agencies of government in such a way that they would be disqualified from acting in the ordinary course, even as to cabinet officers.

Senator AKAKA. Another concern, of course, has been the public confidence in the system. Obviously, the reason for the Act was to investigate allegations and evidence of wrongdoing by high elected officials without influence from the President. Do you believe that public confidence will be restored if such investigations return to the Justice Department?

Judge WALSH. I think that the public reaction—and this is an area where I bow to your expertness, not mine—but I think that at the present time the public is disillusioned with the Independent Counsel and I do not think they regard the office favorably. And I think the public would not be concerned to have the investigation and prosecution of cabinet officers returned to the Department of Justice.

I save only the President, himself, and the Attorney General, herself.

Senator AKAKA. Right now, I understand that should it return to the Justice Department that an Assistant Attorney General of the criminal division, who is a political appointee, might be handling this. I finally ask you whether you could recommend any steps that would ensure that this could be free of the appearance of any conflicts of interest.

Judge WALSH. If the unit I suggested were created, the Attorney General, if she perceived a conflict of interest or the appearance of a conflict of interest could refer the matter to that unit for appointment. But my own impression is that the career officers in the Department of Justice would do a good job. I do not think that the

normal supervisory office in the Department of Justice should be disqualified. I think that there is not that closeness of relationship.

I think back when I worked there, it was much smaller than it is now, but even then there was not that intimate—as Deputy Attorney General, I did not feel such an intimacy of relationship with the other government departments, even with my opposite numbers that I would feel a problem in supervising an investigation. And I believe that the Assistant Attorney General, who was even more remote than I in the criminal division, would have been perfectly able to do it.

Senator AKAKA. Well, I thank you very much, for your responses, Judge.

Judge WALSH. Thank you, Senator.

Senator AKAKA. Thank you, Mr. Chairman.

Chairman THOMPSON. Thank you very much, Judge Walsh.

We appreciate your being here today. I guess some are somewhat disappointed that we did not have more fireworks and specific interrogations on all the allegations that were lodged against you over the years. I do think that it is fair to say that some would certainly disagree with parts of your rendition in terms of your summary of what has happened.

But I do think it is important, as much as we can, to deal with the issues instead of the personalities and the details of history except for the general principles we can learn from history. Suffice it to say I think that some of the criticism that you have received is justified. Maybe even you agree.

You were talking about what was in your mind at the time you made the decision with regard to Bush or putting the Bush reference in the Weinberger indictment. And I was looking at your book and on page 448 you said, "An hour later, Brosnihan called me to make sure that I had no objection because of the Presidential campaign, to including a quotation of Weinberger's note."

And then you point out that you were unwilling to weaken any part of the indictment by eliminating a note that was material, that you thought it was already public knowledge and you did not think the quotation would be newsworthy.

So, I do not know if I heard you correctly a while ago or not, but it was in your mind, at the time you signed-off on letting that note be referred to in the indictment, that the campaign was in your mind. You just thought it would not be an issue, is that correct?

Judge WALSH. I made a mistake of judgment as to what would be of public interest.

Chairman THOMPSON. Well, I appreciate your acknowledging that.

Many people have documented criticisms and even some of the GAO and others have gone into some things. But I understand, for example, that although you are the focal point, you got a large staff working for you and you have got people who are working on a day-to-day basis on some of these things and some decisions are made and then they come to you with recommendations and you ultimately have to make the decision.

But you are the focal point, and there are a lot of other people whose judgment you have to depend on in these jobs, and also when you are in a battle and feel like you are under attack, some-

times you do things that maybe, in retrospect, you would not have ordinarily done.

I just think in summary that kind of going back to where we started, it is interesting to note that some of the same kinds of things we are seeing today were things that you experienced. The criticism with regard to dealing with the press, allegations that policy was not followed. I know of at least one occasion, a close relative of a suspect was subpoenaed. The Attorney General was asked to investigate your conduct, as you pointed out. Allegations that you were going after little people only because they might talk about higher people which, of course, happens every day in this country.

The leak that the President, you were considering indicting the President and, as you pointed out, it certainly does not help the Independent Counsel, who is under attack, when a leak comes out that he is considering indicting the President.

Judge WALSH. It was not a leak.

Chairman THOMPSON. Just the opposite.

Judge WALSH. It was just a false statement.

Chairman THOMPSON. Well, a false statement that evidently somebody put out to someone.

But I think that after all is said and done and listening to you here today I come away with somewhat of an appreciation of the fact that you are still willing to discuss these issues and take on whatever might come your way in many years of distinguished service. If it is not inappropriate, might I ask your age at this time?

Judge WALSH. I am 87.

Chairman THOMPSON. You are 87 years of age.

Judge WALSH. And incidentally, it was one of the things that gave me concern as the Independent Counsel matter continued. I was surrounded with much younger people and used them in the actual trials because I was aware that age does slow you down. So, I took that into account.

Chairman THOMPSON. Well, as I say, I just come away with an appreciation. We can disagree on a lot of this and we do, but I come away with an appreciation of many years of public service that you have given to this country and the causes you believe in. And I appreciate your—we would not have subpoenaed you if you had not agreed to come. I can assure you of that.

Judge WALSH. Thank you.

Chairman THOMPSON. But you came voluntarily and were very helpful in giving us some additional insight.

If there is nothing further——

Senator LEVIN. I would just add my thanks, Mr. Chairman.

I just want to thank the Judge, not just for his years of public service but also for the way in which he has handled the tremendous scrutiny of his efforts and I think it is important that that scrutiny take place and I think you have handled it very, very well and your work stands for itself.

I think it has withstood the test of history very well and I want to commend you for your efforts.

Judge WALSH. Thank you very much, and if there are further questions I will be glad to respond to counsel at any time.

Senator SPECTER. A concluding note, also, Judge Walsh.

Judge WALSH. Yes, sir.

Senator SPECTER. I note your resume and your prosecutorial experience with DA Tom Dewey, looks very interesting. I had the opportunity to talk to Mr. Dewey once when I ran for DA on sort of a fusion ticket in Philadelphia and comparing notes. And he was an extraordinary man and it must have been a great experience to have worked with him.

Judge WALSH. It really was. He was very dynamic and very hard-driving.

Senator SPECTER. I join my colleagues in commending you on your outstanding public service.

Judge WALSH. Thank you, sir.

Chairman THOMPSON. Thank you very much, Judge.

Judge WALSH. Thank you, sir.

Chairman THOMPSON. We will now proceed to our second panel to continue our discussion of the implementation of the Independent Counsel Statute.

The witnesses are Samuel Dash, former Chief Counsel to the Senate Watergate Committee, former ethics advisor to the Whitewater Independent Counsel Kenneth Starr; Kenneth Gormley, Professor of Law, Duquesne University; and Julie Rose O'Sullivan, former Assistant Prosecutor for the Whitewater investigation and Professor of Law at Georgetown University Law Center.

Your written remarks will be made a part of the record, and if you would summarize them for us, please.

One of my great regrets in all of this is that we get to hear some of our very best witnesses at this time of the day. But it is just as helpful and I appreciate your patience. We had a delay this morning that could not be avoided.

Mr. Dash, it is like old times for you and me in a way, but under different circumstances.

Mr. DASH. Yes, it is. And it is an honor to be able to be present before this Committee and you, Mr. Chairman.

Chairman THOMPSON. Well, I appreciate that very much. We have had an opportunity over many years to discuss many issues, and I appreciate your being here and presenting your comments for us today. So, if you would begin, I would appreciate it.

TESTIMONY OF SAMUEL DASH, FORMER CHIEF COUNSEL TO THE SENATE WATERGATE COMMITTEE AND FORMER ETHICS ADVISOR TO WHITEWATER INDEPENDENT COUNSEL KENNETH STARR

Mr. DASH. I understand the schedule of the day and the shortness of time that I have to at least give some summary of my statement in oral testimony. I would like to read it because there are certain things I want to say and I do not want to take too much time doing it.

Senator LEVIN. Mr. Chairman, in terms of our schedule, I am just wondering about how long are witnesses expected to be before the questions begin? If Mr. Dash reads his testimony——

Mr. DASH. Very short. It is about——

Senator LEVIN. How long?

Mr. DASH. About 7 minutes.

Senator LEVIN. And the other witnesses, would we expect, Mr. Chairman—I am just curious because of my own schedule—they will take about the same length of time?

Chairman THOMPSON. Well, usually we ask for 7 to 10 minutes, somewhere in that range, if possible.

Senator LEVIN. Thank you, Mr. Chairman.

Mr. DASH. These hearings, Mr. Chairman, and Members of the Committee are being held at a critical time in the history of the Independent Counsel Statute. A statute to which Senator Ervin and the Senate Watergate Committee gave priority to assure public confidence in Federal law enforcement of high Executive Branch officials.

Since 1978 when it was enacted, the Independent Counsel Statute has worked well. Congress has repeatedly shown its faith in it by reauthorizing it every 5 years it came up for review except in 1992, when Congress allowed the statute to lapse; and I may say, and quickly regretted having done so.

History repeats itself today. This Committee's review in 1999 is a mirror image of the hostility the Committee observed in 1992 that was directed against the statute. Then, like now, an Independent Counsel Lawrence Walsh, who has just spoken to the Committee, was bitterly attacked for being out of control, unaccountable, a rogue elephant and taking too much time and spending too much money in the Iran-Contra investigation.

Today it is Independent Counsel Kenneth Starr who is attacked as unaccountable and out of control. But as Congress later found in Walsh's case in 1993, there is nothing in the statute or in the Independent Counsel conduct that justifies this criticism.

Far from being unaccountable, an Independent Counsel has more eyes and ears probing him than does the Attorney General. In my full written statement, I illustrate the various limitations and restrictions which push an Independent Counsel to caution in making any decision and I certainly would be willing to answer any questions concerning them.

As we know, in 1993, Congress recognized it had been wrong to let the statute lapse, just 1 year before, and reauthorized the statute for 1994 to 1999.

I submit that nothing has changed since 1993 to provide any sound reason for this Committee not to recommend reauthorization now. I know you have been given lots of reasons to drop the statute from powerful and influential former avid supporters of the legislation, chief among whom, is Attorney General Janet Reno.

But I submit, respectfully, that they and, particularly, Attorney General Janet Reno, are not credible in their present position which completely contradicts their 1993 ardent support of the statute when it was under attack for the identical reasons it is now.

They have now either been influenced by the same unfounded hysteria in 1992 or have succumbed to the pressures of an administration's understandably desire to kill this legislation.

Attorney General Reno was much more credible in 1993 when she urged reauthorization having been newly appointed and having begun to establish a reputation for courage and independence. Then she labeled the attacks on Lawrence Walsh, in 1992, as having been wrought by politics.

And she stated that Walsh's investigation, far from justifying doing away with the statute, demonstrated the need for the statute. She was right then.

She said that she and her Department could not have credibly conducted that investigation because of their inherent conflict of interest.

The American Bar Association and Common Cause enthusiastically supported reauthorization in 1993 for the same reasons the Attorney General did. They, too, were right then.

Now, in 1999, they have all contradicted themselves. They now find the statute, which they argued in 1993 was so essential to public confidence in Federal law enforcement, so structurally flawed now that it induces irresponsible prosecution.

I challenge them to point to a single provision of the statute or anything about its structure that permits prosecutorial misconduct. It is a simple statute providing for an auxiliary Federal prosecutor when the Attorney General has a serious conflict of interest.

The only authority and power the statute gives to the Independent Counsel is the same that is given to the Attorney General or U.S. Attorney, nothing more. If the Attorney General abuses that power do we recommend getting rid of the Justice Department?

As she demonstrated in 1993, Attorney General Reno knows the statute does not cause prosecution excesses unsanctioned by her. She knows that the Independent Counsel investigation conducted by Starr have not been irresponsible, that they have been conducted by career Federal prosecutors and FBI agents on loan by the Justice Department to Starr. She knows that the aggressive tactics of these Federal prosecutors, working for Starr, do not represent out of control misconduct.

But they represent, instead, standard operating procedures of Federal prosecutors all over the country, approved by her and the Federal Courts, including the Supreme Court.

If Congress and the public are outraged by some of these tactics by Federal prosecutors, the remedy is not to terminate the statute, which authorizes none of them, but to raise the standards of Federal prosecution generally.

Mr. Chairman and Members of the Committee, we have just emerged from a terrible period of crisis for the country, for Congress, and for the President. Admittedly most people were offended by the subject matter of Starr's Monica Lewinsky investigation. But this was neither Starr's nor the statute's fault.

Rightly or wrongly, Attorney General Reno decided a criminal investigation had to be conducted in the Monica Lewinsky matter. She correctly decided that she could not conduct it because of a clear conflict of interest. She gave it to Starr.

What should Starr have done? Rejected it? Only make a superficial investigation? He had taken an oath to enforce the laws of the United States and he did so in this case through his borrowed Federal prosecutors who aggressively pursued the investigation as they were used to doing in the U.S. Attorney's offices in which they had worked.

As Attorney General Reno said in 1993 about Walsh's investigation, Starr's Monica Lewinsky investigation proves the need for the statute, not its termination.

For the very reason that the subject matter was so offensive and impossible for the Attorney General to investigate, the statute worked as it was intended to by enabling an Independent Counsel to investigate even though that investigation was highly unpopular.

Here we are, where we were in 1992, with a bitter feeling about this necessary but distasteful investigation. Once again, angry voices are calling for hating the messenger, and not the message.

I urge the Committee to filter out this emotional noise and listen again to what Attorney General Reno, the American Bar Association and Common Cause told you in 1993. The statute is necessary, it has worked well, there really is no alternative.

And I just have to say that I do not believe Judge Walsh's recommendation of bringing it back into the Justice Department with a special board has any chance of working at all but certainly will not be seen by the public as impartial investigation.

It would be tragic for the country if Congress gave back to the Department of Justice, as the Department now requests, control over these politically sensitive investigations of high Executive Branch officials.

Now, having said that, I have over the years and the experience I have had with the statute and particularly the experience I had working inside Starr's office, have observed that there are changes that must be made. Not changes that wipe out the independence of the Independent Counsel, not changes that restrict his authority or his power but changes that narrow it because, as I recall when Congress was willing to create this new institution, something that James Madison said, "That we always need auxiliary precautions to make our check and balance system work."

It was never intended to give the Independent Counsel a broad mandate of prosecution; rightfully that is the Justice Department's responsibility. It was always meant to be a narrow exception for major and serious matters that the Attorney General and the Justice Department could not handle themselves because of conflict of interest.

And, so, I have, in my full written statement, made a number of recommendations for change which I think would take care of some of the more responsible criticism of the statute and I would be willing to answer questions as to those, should the Committee want.

[The prepared statement of Mr. Dash follows:]

PREPARED STATEMENT OF SAMUEL DASH

Chairman Thompson, Senator Lieberman and Members of the Committee: I am pleased once again to have the honor to appear before this Committee to testify in favor of the reauthorization of the independent counsel legislation. As Chairman Thompson and other Members of the Committee know, as Chief Counsel of the Senate Watergate Committee, I urged that Committee to make this legislation a priority recommendation shortly after President Nixon fired Special Prosecutor Archibald Cox. It was the Committee's first recommendation in its Final Report. Senator Sam Ervin, the beloved and respected Chairman of the Senate Watergate Committee, strongly supported the Independent Counsel legislation up until his death in 1985. Because of the many conversations I had with Senator Ervin about this legislation, I feel certain that if he were alive today, he would appear before this Committee to urge the reauthorization of the legislation. He frequently expressed his firm belief to me of the need of an independent counsel to obtain the public's confidence in federal criminal justice when specific and credible criminal charges are made against the highest federal public officials in the country.

From 1978, when the statute was first enacted, until 1992, when it was allowed to lapse, Congress was very supportive of the legislation, and re-endorsed it, with corrective changes, each time it came up for review under the sunset provision of the act. Bipartisan support was accomplished through the leadership of Senator Carl Levin and Senator William Cohen. During that period the legislation had the complete support of the American Bar Association, Common Cause and numerous other organizations promoting accountable democratic government. The principal opposition came from the Justice Department which saw the legislation as an insult to the integrity of federal prosecutors. Ignoring history and logic, the Justice Department, in the 1978–1992 hearings on the Independent Counsel Statute, rejected claims it had a conflict of interest in any investigation of the President or his cabinet members. The legislation was opposed by every attorney general until Janet Reno was appointed attorney general.

Then, in 1993, in a remarkable turnaround for the Justice Department, Attorney General Reno appeared before this Committee and enthusiastically urged the Committee to reauthorize the legislation. She rejected prior Justice Department claims that the department had no conflict in investigating high Executive Branch officials. Instead, she stated that the reason she supported the independent counsel legislation was 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." Attorney General Reno's 1993 testimony on the impact of this conflict on public confidence in federal law enforcement directly contradicts her present position before this Committee that the Justice Department now should be trusted with these investigations. She said in 1993:

> The attorney general serves at the pleasure of the President. Recognition of this conflict does not belittle or demean the professionalism of the department's career prosecutors. . . . They are not political, they are splendid lawyers . . . I still feel there will be a need for [this legislation], based on my experience as a prosecutor for 15 years in Dade County. It is absolutely essential for the public, in the process of the criminal justice system, to have confidence in that 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.

Attorney General Reno's break with the position of prior attorneys general was remarkable, especially considering the context in which she testified in 1993. In the first place, Attorney General Reno supported reauthorization of the legislation at a time when the Whitewater charges mentioning President Clinton and the first lady had become public. Second, only one year before, in 1992, Congress had allowed the independent counsel legislation to lapse in outraged protest against the alleged abuses of Independent Counsel Lawrence Walsh in the Iran-Contra investigation. If you were to look back at the news stories and editorials of that time you would find Walsh being bitterly attacked as "out of control", "rogue elephant", "unaccountable", and running a "political witch hunt". Walsh was accused of taking too much time—7 years—and spending too much money—60 million dollars. The complaint was made then that the statute was fatally flawed. Not only did Attorney General Reno reject this complaint, so did the American Bar Association, Common Cause and former Watergate Special Prosecutor Archibald Cox.

The near hysterical attacks against Walsh should sound familiar today. As in 1992, this Committee is holding hearings in the midst of an onslaught of accusations of abuse against Independent Counsel Kenneth Starr. The attacks against Starr are, for the most part, the same as those against Walsh, and as Attorney General Reno found in Walsh's case, they are similarly unsubstantiated. They are the understandable result of a publicized investigation against the President, unleashing White House counter attacks in a scorched earth public relations war to destroy the prosecutor. Members of this Committee should recognize this strategy.

Janet Reno recognized this when she testified in support of the legislation in 1993. She knew of the counter attacks against Walsh and of the complaint that the legislation was so flawed by the abuses it allegedly permitted that it could not be rescued. She rejected these complaints then, and said, instead, "It is neither fair nor valid to criticize the act for what politics has wrought." Contrary to widespread arguments made in 1992 that Walsh's handling of the Iran-Contra investigation justified the termination of the statute, Attorney General Reno testified in 1993:

> While there are legitimate concerns about 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 con-

> viction that the law is a good one, helping to restore public confidence in our system's ability to investigate wrong doing 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. (Italics provided).*

Janet Reno was right then. The American Bar Association and Common Cause echoed her views, and they were right then. On the basis of their testimony at that time, they should be here now before the Committee saying the same sensible things about the publicly distorted image of the Whitewater and Monica Lewinsky investigations by Independent Counsel Kenneth Starr, and urging the need for this legislation. Instead, they have reversed themselves and are urging this Committee to recommend allowing the legislation to lapse and to entrust the Justice Department in the future with investigations of the President and cabinet members.

Why? What has changed since 1993? For the record, they say they now support the old complaints against Walsh, now reincarnated as Starr, that the independent counsel is not accountable, is prone to abusing power, is unmindful of time or money, and, like Inspector Javert in Les Miserables, relentlessly pursues a single target. The sad fact is that the attorney general knows better. She knows that there is no fatal flaw in the structure of the statute permitting prosecution excesses unsanctioned by the Justice Department, Clearly, nothing in the legislation permits this. To the contrary, the statute defines the power and authority of the independent counsel as the same as the attorney general or a United States attorney. Nothing more. The attorney general has been close enough to Starr's investigations to appreciate that they have been conducted no differently from the traditionally aggressive federal investigations conducted by regular federal prosecutors. Indeed, she knows that Starr's investigation has been conducted by federal prosecutors and FBI agents on loan to Starr. Also, she knows that the alleged abusive conduct charged to Starr, represents, for the most part, standard operating procedures and strategies of Justice Department prosecutors with her approval and support.

Changing her position from what she testified in 1993, the attorney general now claims, without explanation or example, that the structure of the statute makes the independent counsel unaccountable. Far from being unaccountable, the independent counsel has more eyes and ears probing him than does the attorney general. In the first place, Congress has oversight powers over the independent counsel, and can call him to account at hearings. The independent counsel's expenditures are now audited by the GAO with the additional requirement that the independent counsel file financial reports to Congress. Because of the nature of the targets, the independent counsel operates in a gold fish bowl with the media breathing over his shoulder from morning until night. As any other federal prosecutor, the independent counsel's investigation before a grand jury is supervised by the federal judge in charge of the grand jury. How can the attorney general forget so soon Judge Norma Holloway Johnson's frequent hearings into charges against the independent counsel's office? Any prosecution the independent counsel brings is supervised by a federal trial judge, and is reviewable by appellate courts, including the Supreme Court. The independent counsel is bound by the Federal Rules of Evidence and the Federal Rules of Criminal Procedure, as well as the Rules of Professional Conduct. And, of course, the independent counsel is restricted by the Supreme Court's interpretation of the Bill of Rights protections for the criminally accused.

The attorney general also knows that complex white collar crime cases, as are given to an independent counsel, take a long, long time to investigate and cost a lot of money. When she now talks about the resource limitations on federal prosecutors, she is wrongly comparing the case load of a United States attorney's office with the exceptional investigation responsibilities of the independent counsel. She knows that charges against high government or corporate officials for corruption or fraud are traditionally assigned by her to task forces or the public integrity section. These complex white collar crime cases take the Justice Department just as long or longer to process and cost just as much or more than an independent counsel's investigation. Both Senators Levin and Cohen emphasized these facts at the 1993 hearings. Senator Levin said:

> Another criticism has been the length of the investigations. Some of them have taken a long time, some of them have not. Complex federal criminal cases often take years to investigate. I think you [Attorney General Reno] would concur. The McDade case [Pennsylvania congressman charged with

> bribery]—there were four years of investigation before indictment; III Wind [Pentagon procurement fraud], six years so far.

Senator Cohen made this point again when he said:

> I would also point out . . . this notion that somehow we impose greater expense upon those who are investigated by independent counsels is so far greater than imposed by the Justice Department. I daresay, as Senator Levin's pointed out, Joseph McDade was investigated for four years prior to the bringing of an indictment. Six years for the prosecution of Noriega. III Winds and Abscam took years.

With regard to the criticism that the independent counsel is able to employ substantial resources in pursuing an individual target, Senator Cohen added:

> And so I would say that when the Justice Department focuses upon an individual, be it a member of Congress or not a member of Congress, there are substantial resources brought to bear against that individual.

So, what has changed since 1993 to cause such powerful and influential supporters of the legislation to reverse their positions and now oppose reauthorization of the statute? I believe nothing substantive has changed to cause this reversal. Rather, I believe that the attorney general, the ABA and Common Cause have succumbed to partisan and emotional attacks on the independent counsel and the legislation creating him. Although the attorney general carefully refused to comment on the conduct of any particular independent counsel, the clearly identified culprit charged with creating this hostility to the legislation is Independent Counsel Kenneth Starr and his Whitewater and Monica Lewinsky investigations. I believe it would have been more helpful to this Committee if the attorney general had specified what had gone wrong in these investigations as a result of the structure of the legislation. Instead, she confined herself to broad conclusions which directly contradicted her 1993 testimony.

The question this Committee must now resolve is whether the attorney general and other critics of the legislation are right that the legislation, itself, is fatally flawed and induces improper criminal investigations against high Executive Branch officials. For example, was the Whitewater investigation an improper one? Did the charges involve serious enough crimes to warrant a criminal investigation? The federal bank regulators clearly believed so. So did Attorney General Reno when she appointed a regulatory special prosecutor to investigate these charges. They involved the looting of a savings and loan bank in Arkansas by its owners, lawyers and coconspirators causing ordinary bank customers to lose millions of dollars in savings.

Robert Fiske, a highly qualified former federal prosecutor recognized for his integrity and skill, was appointed by the attorney general as her special prosecutor in the Whitewater matter because she recognized she had a conflict of interest where the investigation would be of former business partners of the President. Fiske conducted an aggressive investigation not much different from Starr's later investigation which depended, in large part, on evidence he obtained from Fiske. Yet despite Fiske's excellent qualifications, as well as his being a Republican, Republican leaders, followed by some main line press, raised doubts as to his impartiality and called for the reauthorization of the independent counsel legislation. As we have seen, Attorney General Reno, supported this position because she believed that a special prosecutor appointed by her would not have the same public confidence as an independent counsel.

Ironically, she proved to be right. When Fiske thoroughly and objectively investigated the mysterious death of Vincent Foster, he concluded that it had been a suicide and not a murder, and filed a report supporting this conclusion. Fiske was harshly criticized publicly for this report as having done a shoddy job to protect the White House. Yet when Starr was appointed independent counsel under the newly reauthorized legislation and redid the Foster investigation, and filed a report agreeing with Fiske that Foster's death was a suicide, that conclusion was generally accepted publicly, except for some die hard conspiracy theorists.

There are other examples of this difference of public perception of a Justice Department appointed special prosecutor and an independent counsel. Frequently cited are the decisions by two separate independent counsels not to bring any criminal charges against former Attorney General Edwin Meese. Then and now the observation is made that if the Justice Department or a Justice Department special prosecutor had cleared Meese, news headlines would have screamed "white wash" and "cover up." Yet the decisions of the independent counsels were publicly well received

and accepted without any critical comments in the media. An independent lawyer had looked at the evidence and found it insufficient for prosecution.

During the 1993 hearings, Senator Joseph Lieberman gave another striking example of this public perception:

> Perhaps our most recent, vivid example of the problem that the independent counsel law aims to address was Judge Lacey's investigation into the Department of Justice's handling of the BNL case [Banca Nazionale del Lavoro 5.5 Billion bank fraud]. Judge Lacy carried out that investigation as a special prosecutor, not as an independent counsel. He was appointed by the attorney general, not by a court. And he served at the attorney general's pleasure, and reported to the attorney general. When Judge Lacey announced that he found no misconduct, howls of protest went off that his decision was a political whitewash, rather than one based on the facts and law.

Senator Lieberman observed that Judge Lacey's findings would have had much more legitimacy if he had been an independent counsel.

Going back to the attorney general's position that somehow the structure of the legislation causes improper investigations, was that true in Whitewater, or what it actually became, the Madison Bank fraud case? Was this fraud investigation by the independent counsel's office flawed because of the statute? It was a difficult and complex federal white collar fraud case, involving the uncovering of many devious schemes and the analysis of hundreds of documents collected as evidence. Any fair review of that investigation will demonstrate that it was a classic example of difficult white collar crime prosecution by the Justice Department. The case was so strong that a Little Rock jury, otherwise unsympathetic to the independent counsel, returned verdicts of guilty against the governor of Arkansas, James Tucker, and Jim and Susan McDougal. A number of the other co-conspirators had pleaded guilty and cooperated with the prosecutors as witnesses.

Yet, some critics of Starr, including prominent media columnists, judged this prosecution a failure because Starr didn't "get" the President or First Lady. I need not tell this Committee how deplorable this view is. A fair and honest prosecutor does not bring charges unless his evidence is strong enough to convince a jury of the accused's guilt beyond a reasonable doubt. If the prosecutor decides not to prosecute because the evidence is insufficient, that is not a failure of prosecution, but a success and a vindication of the principles of fair administration of criminal justice.

Starr has been attacked most severely for his Monica Lewinsky investigation. These attacks no doubt caused the otherwise deliberative and discriminating ABA and Common Cause to abandon the independent counsel legislation. If the evidence of perjury and obstruction of justice—albeit about a sexual relationship—contained in Linda Tripp's tapes had involved not the President, but a judge or a congressman, what would the Justice Department have done? Ignored it or cover it up? What howls of public protest would there be when the story leaked out!

Indeed, after Starr corroborated the informer evidence Tripp brought, he went to the Justice Department and suggested that he may not have jurisdiction over the matter and asked the deputy attorney general whether the department should take it over. The deputy attorney general sent two assistants to Starr's office to listen to the tapes. When they reported back, Attorney General Reno quickly decided that an investigation was necessary, but could not be made by her department, and referred it back to Starr, notifying the special division of the court of the referral. Of course, she was right. How could anybody even imagine these particular charges against the President being investigated by the Justice Department or any appointee of the department?

Underlying most of the criticism of Starr's investigation was the sordid and seamy nature of the subject matter. However, as an investigation had to be made by someone, and the attorney general had taken the Justice Department out of it, could Starr do anything else than conduct an aggressive investigation into the facts? The success of this investigation was demonstrated in the impeachment proceedings in the House and the Senate. Rightly or wrongly, the entire body of evidence during the impeachment hearings in the House Judiciary Committee and in the Senate trial came from Starr's investigation and referral to the House of Representatives. In both bodies of Congress, this evidence was not questioned for its credibility or strength. Rather, the debate was over whether the crimes identified in the referral report met the constitutional standard of high crimes and misdemeanors.

The important point I want to make from all these facts is that the independent counsel legislation did not fail in these independent counsel investigations, but worked as it was supposed to work, even under such powerful pressures and attacks from the White House. Clearly, as Attorney General Reno said about Walsh's Iran-

Contra investigation, Starr's Monica Lewinsky investigation far from proving the legislation should be done away with, proves, instead, its need. In no way could the Justice Department have credibly undertaken this investigation. And if the independent counsel legislation lapses, and the department refuses or can't be trusted to conduct this kind of an investigation, who will? Is this what we really want—a vacuum in federal law enforcement?

The attorney general now infers that the Monica Lewinsky investigation did not accomplish the purpose of the legislation which was to assure public confidence in federal law enforcement. The polls demonstrated that the public did not like Starr and what he was doing. This reaction of the public is not surprising when you consider the high volume of unfounded partisan inspired attacks on Starr dumped every day on the public. The real question, however, as to the need of the statute, is how much less confidence would the public have had if Janet Reno and her Justice Department had undertaken the Monica Lewinsky investigation. As much as the public was persuaded to dislike Starr, they could have no faith, whatsoever, in any impartial investigation by the Justice Department into the sordid events of the Monica Lewinsky matter.

Also, Common Cause and Attorney General Reno now argue that the Justice Department can be trusted with investigations of the President and high Executive Branch officials, either through the criminal division or by appointing a regulatory special prosecutor. Most astonishingly, they point to the Watergate experience as justification for keeping these investigations in-house. Showing complete ignorance of history, they say that the appointment of Leon Jaworski after Cox was fired demonstrated that a special prosecutor appointed by the President could be trusted to make an impartial and strong investigation of the President. If this were so, why did Congress believe it necessary to enact the independent counsel legislation in the first place? The reason, known by anyone familiar with those tragic events 25 years ago, is that Jaworsky's appointment was not a voluntary one by President Nixon. He had hoped to end the criminal investigation by firing Cox. But what was unique at that time was the fact that the American people had become outraged by the revelations of the Watergate scandal during the televised hearings of the Senate Watergate Committee, and fully understood the gravity of the firing of Cox. They responded angrily by the millions to the firing, writing an calling their congressmen and the White House, demanding a new special prosecutor. President Nixon had no choice but to appoint one, and could not, in that atmosphere, interfere with the new special prosecutor. These were unique events, that cannot be expected to be repeated in any later scandal investigation. It was because there could not be any realistic expectation that the public would be similarly informed of presidential wrongdoing so vividly as in Watergate that Congress decided it could not rely on the presence of public outrage to protect a future Justice Department appointed special prosecutor. It chose, instead, to provide for a prosecutor who would be independent of the President and the attorney general. The need for such an independent counsel is as strong today as it was in 1978.

Therefor, I urge this Committee to recommend the reauthorization of the independent counsel legislation for the public good, and to reject the Justice Department's efforts to get back control over politically sensitive investigations of the President and high Executive Branch officials.

Recent experience, however, has shown that there are some corrective changes needed in the statute, and, as I've done before, I would be willing to work with the chief counsel of this Committee and his staff on the needed changes. For example, the present provisions allow the independent counsel too much freedom to expand his investigation by allowing him to look into "related" matters. The legislation was never meant to give a roving hunting license to the independent counsel, who should be restricted to a narrow mandate created by the Justice Department's conflict of interest. Therefor, the independent counsel should be prohibited from investigating any matter outside his mandate unless that investigation is essential for him to fulfill his mandate, and the decision whether it is or is not essential should be made by the attorney general.

In addition, I have developed serious doubts about the usefulness and fairness of a final report to the special division of the court. Regular federal prosecutors do not file such reports after an investigation, whether they decide to prosecute or not, It is basically unfair for an independent counsel to spell out why a target who was not been indicted still is believed to be guilty. The 1994 reauthorization act made some changes here, but it is still permissible for an independent counsel to label a target as guilty, even though the evidence was insufficient for an indictment. Further, the requirement to file a final report tends to lengthen the investigation. It leads the independent counsel to want to show in the report that substantial work was done and that he has dotted every "i" and crossed every "t." An example of this

was Starr's conclusions on the Foster suicide, which could have been publicly released at least two years before the written report was filed. The need for the written report and the controversy over Fiske's findings compelled Starr to continue to make an exhaustive investigation, piling up evidence on top of evidence, well after he had become convinced that the death was a suicide.

There are additional recommendations others have made to which I would subscribe. They include narrowing the group of covered persons; giving the attorney general more investigative authority to determine whether there is need for further investigation; requiring the independent counsel to spend full time in the office and not take on private matters, and providing tighter qualifying standards for appointment of an independent counsel, such as requiring extensive federal prosecution or defense investigation and trial experience. Starr had no such experience, and heavily relied on the career federal prosecutors he had borrowed.

But I strongly urge this Committee not to recommend limits on time of the investigation or on the resources available to an independent counsel. As all federal prosecutors know, and Janet Reno recognized in 1993, a prosecutor limited in time and resources is a boon to the targets of the investigation who, through numerous strategies, can wait out the prosecutor and make the investigation moot. Tough financial audits and oversight by Congress is what is needed, not the tieing of the prosecutor's hands.

Chairman THOMPSON. Thank you very much.

Well, Ms. O'Sullivan, has he persuaded you?

Ms. O'SULLIVAN. No. I am not willing to concede unfounded hysteria either at this point.

Chairman THOMPSON. Well, you are outnumbered on the panel here today as far as the statute is concerned, but you have been one of the more eloquent advocates of taking another approach. So, if you would proceed.

TESTIMONY OF JULIE ROSE O'SULLIVAN, FORMER ASSISTANT PROSECUTOR OF THE WHITEWATER INVESTIGATION AND PROFESSOR OF LAW AT GEORGETOWN UNIVERSITY LAW CENTER

Ms. O'SULLIVAN. Thank you, Chairman Thompson and Members of the Committee.

Thank you for giving me the opportunity today to express my sole view, apparently, that the statute should be allowed to lapse or, at the very least, should be substantially revised.

I would like to, hopefully, briefly address what I think is the heart of the controversy in the reauthorization issue. And it seems to me both proponents and opponents of the statute agree that the statute is over-used and at the very least it should be drastically curtailed. And I think we have heard that here today and I think we hear that consistently.

So, assuming that there is a consensus to limit the mandatory use of this extraordinary device to Presidents or to Presidents and Attorneys General and Vice Presidents, the question then becomes whether we need a statutory regime or whether ad hoc appointments by the Attorney General pursuant to DOJ regulations is sufficient. And it seems to me that the latter is the better of these, admittedly, imperfect alternatives.

The statute, obviously, is intended to ensure that executives cannot sweep wrongdoing under the rug and that the result of an Independent Counsel investigation will be credible because it is independent. And to further these ends, it seems to me the statute supposedly has three advantages over the regulation.

First, the statute purports to force an Attorney General to make a referral in qualifying cases. Second, selection of the Independent

Counsel by the special division is intended to ensure that the Independent Counsel is not beholden to the administration and, therefore, the Independent Counsel's result is credible.

And, third, there is tenure protection through the good cause removal standard and the provision for judicial review of removals.

I submit that these provisions in practice have not and cannot achieve their purposes. It seems to me that regulations would be equally effective or frankly equally ineffective to further these ends but would, at least, ensure accountability. And by accountability—I think I would define it slightly differently than Professor Dash—that implies to me some measure of ongoing control to prevent abuses.

I do not intend today to address whether or not specific ICs have abused their powers. In particular I would rather avoid speculating about Judge Starr's investigation because I think that the jury is still out on a lot of these issues.

But I do think that in general we can say that regulations at least have the potential for enhancing the accountability of special prosecutors and the accountability of the appointing administration for the actions and inactions of the Independent Counsel.

With respect to forced referrals. The statute, obviously, cannot constitutionally divest the Attorney General of the power to make a referral or to initiate criminal investigations. So, if the statute's object is to force the Executive to investigate criminal wrong-doing, it simply cannot do that. No matter what standard the Congress selects, the Attorney General under the regulations must have the unreviewable authority to refuse to make a referral for legitimate or illegitimate reasons. So, the regulations and the statute seem to be on a par there.

I think regulations actually may be preferable in this circumstance because in practice the highly technical triggering mechanism of the statute has, in fact, provided a shield against political accountability; rather than saying I am not going to appoint a special counsel on a particular case because I do not wish to, an Attorney General can hide behind these technical triggering mechanisms of the statute and simply make technical arguments.

With respect to selection of an Independent Counsel by the special division. The theory is that this mechanism is necessary to ensure credibility and, in particular, that if an Independent Counsel is appointed by an Attorney General and that Independent Counsel declines a case, that declination—that refusal to go forward—can never be credible because people can never be sure whether or not the declination was related to the source of the IC's power.

I quarrel with the theory that no regulatory Independent Counsel's results are ever credible but I do accept the argument that the fact that a regulatory Independent Counsel is selected by an Attorney General gives political partisans additional ammunition with which to impeach the final result as a white-wash.

It seems to me that this is the principle rationale for the reenactment of the statute: This idea that declinations will only be credible if rendered by an independently selected as well as an independently functioning counsel.

The difficulty I see is that the statutory Independent Counsels seem to me subject to the exact same dynamic in different cir-

cumstances. It is not inherent in the statute, but it is a result of the statutory dynamic.

Experience demonstrates that in high-profile cases at the heart of the statute those under investigation or their political allies—and this speaks to a number of different administrations over the time—have every incentive to impugn the conduct, the integrity, the impartiality of any Independent Counsel who finds wrongdoing or is threatening to find wrong-doing. And they are able to do this precisely because the Independent Counsel is independent of the administration and, thus, can be painted as hostile to it.

So, where a regulatory Independent Counsel's perceived connection with the administration gives partisans ammunition with which to impeach a declination, a statutory Independent Counsel's distance from and perceived hostility to the administration can be used by the opposing partisans to discredit any eventual finding of criminality. And it seems to me perfectly clear that this political dynamic is escalating: The attack on Independent Counsels now begin early and escalate throughout the course of their investigation.

It is my belief then that the principal consideration arguing for statutory treatment—that appointment by the special division is necessary to ensure credibility—simply does not prove true in today's environment. That is a shame but it is, in my view, uncontestable.

If the statute is not effective in many cases to ensure the appearance of impartiality and credibility that we are looking for, would regulations be better or worse? As I said, regulations are not necessarily better in terms of appearances, especially where there is a declination. But I do think that the use of a regulatory Independent Counsel will address at least one-half of the perception problem. In cases where wrongdoing is found, or feared to be found it will be very difficult for an appointing administration to trash their own regulatory Independent Counsel, that is, to basically attack their credibility or integrity in an effort to attack the credibility of the eventual result.

Further, I think that an Attorney General may be able to blunt, if not eliminate, criticism of any eventual declination decision by making a very wise and bipartisan choice of regulatory Independent Counsel, especially if Congress is willing to consider requiring such regulatory Independent Counsels to be passed on by the Senate.

Turning to the accountability of an Independent Counsel I think that you witness under the regulations the same tension between true independence and accountability. And it is the same under the statute as it would be under the regulations. I think Mr. Fiske probably made that pretty clear to you.

It seems to me, however, that even if an Independent Counsel is independent under DOJ regulations, the Attorney General would likely suffer at least some political fallout if that Independent Counsel proves to be corrupt, has incredibly bad judgment, is ineffective or abuses the powers of his office.

The Attorney General must stand behind his choice and the Attorney General must stand behind his choice not to remove. Depending, too, on the content of the regulations the Attorney Gen-

eral may be able to exert some measure of control on an ongoing basis.

My final point is with respect to the tenure provision, the good cause removal standard. Existing DOJ regulations have the same provisions in them with respect to good cause and reviewability. So, regulations can potentially provide largely the same tenure protections.

I believe, however, that this protection is probably unnecessary and is largely counterproductive. It is my personal belief that excepting truly extraordinary circumstances, when an Independent Counsel is patently out of control, it will be politically untenable and, at least today, politically counterproductive for that individual to be fired.

Further, I believe that removal at will is actually a good thing. It ensures IC accountability. If an Independent Counsel is abusing his office he should be fired. It also makes the appointing authority accountable. The administration cannot say that the Independent Counsel is unfair, biased and is abusing the powers of the office, but there is nothing we can do about it.

The good cause removal standard in a sense allows people to take their shots at the Independent Counsel while hiding behind this protection.

Thank you very much, for the opportunity to testify.

[The prepared statement of Ms. O'Sullivan follows:]

PREPARED STATEMENT OF JULIE ROSE O'SULLIVAN

Chairman Thompson and Members of the Senate Governmental Affairs Committee, my name is Julie Rose O'Sullivan, and I am a professor of law at Georgetown University Law Center. I appreciate the opportunity to appear before you to express my view that Congress should allow the Independent Counsel ("IC") statute to lapse, or should at least substantially revise that statute. My view is shaped by my experiences as an Assistant United States Attorney in the Southern District of New York from 1991–1994, and as an Associate Counsel in the office of the regulatory Whitewater Independent Counsel, Robert B. Fiske, Jr., and in the office of the statutory Whitewater Independent Counsel, Kenneth Starr, in 1994. In my incarnation as a law professor, I have studied this issue and published two law review articles on the subject of the independent counsel mechanism.[1] I have appended to this statement one of those articles, which sets out at some length the full basis for the opinions I express in summary form today. A few preliminary points seem to me clear:

First, the statute, as presently constituted, is not achieving its intended purpose: Ensuring the appearance and the reality of equal justice in cases where allegations of wrongdoing have been lodged against public officials of importance to the Executive Branch. The IC statute is overused; it is invoked to displace the Department of Justice ("DOJ") in many cases where, in public perception and in reality, the likelihood is low that political pressure will taint the investigation. Thus, the statute guards against the appearance of a DOJ conflict in lower profile cases where no such problem exists. In the higher profile cases at the heart of the statute, and particularly where the President is the subject of the investigation, the statute creates political incentives for partisans to attack the appearance of impartiality the statute is intended to safeguard. Given the visibility of the statute, and press and public interest in its workings, the political consequences of a referral and either an indictment or a declination in a high-profile case are too serious for political actors to leave the process unattended. Politics today seem to demand that doubt be cast on the independence, judgment, or ability of an IC where the actions of that IC may interfere with partisan interests, either of the administration or of its political foes.

[1] Julie R. O'Sullivan, *The Interaction Between Impeachment and the Independent Counsel Statute,* 86 Geo. L.J. 2193 (1998); Julie R. O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy,* 33 Am. Crim. L. Rev. 463 (1996).

Thus, the administration under investigation and its allies have every interest in appearing cooperative while attacking as biased or incompetent any IC who actually uncovers criminal conduct. The opposing political party has every incentive to keep the case in the news, to press for a result discrediting the person under investigation and the administration with which that person is affiliated, and to attempt to create questions about the judgment of an IC who exonerates the subject. In the high-profile cases at the heart of the statute, then, the partisan object—and the predictable consequence of this political dynamic—is to undermine what the statute seeks to promote: Public confidence in the results of an IC investigation in politically sensitive cases.

Even if the statute does not effectively cure "appearance" problems, one could argue that it is necessary to ensure the "reality" of the equitable administration of the criminal laws. The statute has increasingly come under attack because of perceived inequities and excesses in IC functioning. It is my impression that the IC statute, while deeply flawed, is not as pernicious as is presently perceived. It seems to me likely that at least some of the allegations of IC abuse currently circulating will not be proved or will, in retrospect, be thought to be problems endemic to the vast powers and discretion vested in federal prosecutors in general and not to ICs in particular. However, for all the reasons set forth in the attached article, I do believe that in the final analysis the statute, and the political dynamic it generates, creates unique incentives for ICs to employ their vast, unchecked powers to impose a harsher and potentially inferior brand of justice upon those subject to IC investigations. On balance, it seems to me that the IC statute is not worth its high cost in human, financial, and systemic terms.

Second, there is no magic solution to the problem sought to be addressed through the statute. Any proposed solution—whether it be a substantially revised statutory independent counsel regime or regulatory treatment by the Department of Justice—will be subject to criticism and will ultimately depend upon the good faith, ability, and perceived honesty of future Attorneys General and investigating attorneys.

Third, despite this, we cannot simply abandon the effort to arrive at the best possible solution. A critical part of that solution is narrowing the scope of the problem by separating those potential targets that require the extraordinary intervention of an IC from those that do not. In presumptively covering persons by reference to their office, and not distinguishing among subjects by reference to their actual importance to the President, the heavy artillery of the IC statute is often brought to bear on persons and cases that do not warrant it in terms of any realistic likelihood of the actual or perceived subversion of law enforcement. We all know that the operation of the statute—and the operation of politics and the press on the statute—mean that IC targets will be subjected to scrutiny that is longer, more intensive, more invasive, more expensive, and more public than that which the average citizen would suffer. If such burdens are imposed where there is no reason to suppose that they are necessary to ensure the appearance or reality of equal justice, it seems to me very unfair and very wasteful. Overuse also needlessly undermines public confidence in the integrity of the DOJ—a systemic consequence that should be of major concern to all involved in criminal law enforcement.

Fourth, as even the most vocal critics (myself included) of the IC statute concede, there must be some mechanism through which serious charges of criminal misconduct by the President or those closest to him can credibly be investigated and resolved. The challenge is selecting the approach that has the best chance—given institutional and political realities—of promoting the appearance and reality of justice in these extraordinary cases and of providing some means of political accountability in the event justice is not done. The choice, it seems to me, comes down to whether Congress should enact a truncated statute that requires the Attorney General (or her delegee in situations of conflict) to appoint an IC when allegations of qualifying criminal misconduct have been lodged against the President, and perhaps the Vice President and Attorney General, or whether the appointment of ICs should be effected through DOJ regulations in appropriate cases.

I believe the latter option is the better one principally because it holds out at least the possibility of political accountability for the selection and conduct of an IC. The advantages of such accountability outweigh whatever price may be paid in perceived independence, especially given my thesis that the political dynamic growing out of the statute works to severely undermine the public credibility of IC results. Commentators have traditionally isolated the tradeoff between independence and accountability as the heart of the difficulty in allocating responsibility for criminal investigations of important Executive Branch officials. The way that this is normally expressed is that the prosecutor's independence from executive control is indispensable to a credible result. Yet with true independence comes the potential for prosecutorial abuses of power because ICs are, for practical purposes, not accountable

to or controllable by anyone. Since the last reenactment of the statute, commentators have increasingly come to recognize that the accountability tradeoff is more complex and more serious than was previously discussed. Viewed from the IC's perspective, the more independent an IC is, the more vulnerable he is to politically-inspired attacks. The fact that an IC is not appointed by the administration or confirmed in the normal course means that no politically responsible person stands behind the IC and everyone can take a shot—with predictable consequences for the perceived politicization of the investigation. The accountability that has been traded for independence, then, is not simply the accountability of the prosecutor for his own actions, but also the political responsibility of public officials for the actions of the IC. By returning responsibility to the DOJ for the choice of ICs, and giving DOJ some limited authority in the IC's investigation (by, for example, controlling the IC jurisdiction and budget), we can potentially address both accountability concerns: An abusive IC can be reigned in, and the appointing administration will have to take political responsibility for the actions (or inaction) of the IC.

To illustrate, three cardinal features of the IC statute are designed to ensure that the public can have confidence in an independent investigation of executive wrongdoing. An examination of each reveals that regulations probably would be equally effective in furthering this congressional objective while increasing the potential for political accountability.

1. *"Forced" Attorney General Referrals.* The statute purports to restrict the Attorney General's discretion in appointing an IC. By having allegedly mandatory triggers with respect to certain "covered persons," the statute attempts to ensure that the executive will not simply sweep wrongdoing under the carpet when allegations are leveled against the Executive Branch officials presumed to be closest to the President and Attorney General. In response to the failure of an Attorney General to refer matters to the Special Division in instances where Congress felt such referrals were warranted, Congress has constrained the scope of the Attorney General's referral discretion and mandated a very low referral standard. The problem is, of course, that Congress constitutionally cannot divest the Attorney General of authority regarding the initiation of criminal investigations. Thus, Congress's efforts do not change the fact that an Attorney General still has the unreviewable power to refuse to make a referral for illegitimate reasons—for example, because an IC investigation would be politically injurious to the administration. All that Congress has succeeded in doing, then, is forcing an Attorney General who is committed to the principled application of the statute or who is not particularly concerned about the fallout in cases of little political importance to refer a great many more cases than the purposes of the statute require.

Perhaps more important than the statute's inability to achieve its aim is the fact that the highly technical statutory triggering mechanism may in fact provide a sort of shield against political accountability. If complete discretion for the appointment of an IC were returned to the Attorney General, he would be subject to pressure to appoint an IC without respect to the technical requisites of the statute. An Attorney General, then, would have to take responsibility for a failure to appoint an IC when, in public perception, it is necessary. The focus of the debate would not be technical arguments about whether certain evidentiary standards have been met but rather whether the interests of justice require an IC appointment under the circumstances.

A regulatory regime in which the Attorney General is solely responsible for its invocation potentially would have another benefit: Ensuring that (what should be) the extraordinary IC mechanism is only invoked in instances where the DOJ truly has an appearance of a disabling conflict. A statute that presumes that the DOJ will be conflicted with respect to office, rather than the perceived importance or connection of a particular person to the Attorney General or President, will necessarily be both under- and over-inclusive.

2. *Selection of the IC by the Special Division.* The statute attempts to ensure the appointment of someone not beholden to the administration by vesting appointment powers in the U.S. Court of Appeals for the District of Columbia Circuit, Special Division for Appointing Independent Counsels ("Special Division"). The theory is that if an IC appointed by the Attorney General declines a case, that declination will always be suspect because the public can never be entirely certain that the failure to go forward was not influenced by the source of the IC's power. As I understand it, this is one of the principal reasons articulated for the continuation of the statutory IC regime—that it is critical to ensure public confidence in declinations involving highranking Executive Branch officials. My quarrel with this evaluation is one of degree—I do not believe that a declination by a regulatory IC can never be credible because credibility depends to some extent on who the IC is, how the IC has conducted the investigation, and what the IC has found. I do concede, how-

ever, that the fact that an IC was chosen by the Attorney General will provide hostile partisans with additional ammunition with which to attempt to impeach the eventual result of an investigation if that result is a declination.

In determining whether this factor should be determinative, one must examine whether a statutory IC is immune from this dynamic. I submit that experience demonstrates that statutory ICs are subject to a similar problem. In a high-profile case in which, for example, the President is under investigation, and where the Special Division appoints the IC, those under investigation or their political allies have every incentive to impugn the integrity and impartiality of any statutory IC who uncovers wrongdoing. They are able to do so precisely because the IC was not chosen by the administration and thus can be painted as inevitably opposed to it. Selection by the Special Division, far from providing an IC cover against political attack, may actually aggravate the problem because partisans may call into question the impartiality of that body. Thus, where a regulatory IC's perceived connection with the administration may be employed by partisans to discredit an eventual declination, a statutory IC's distance from, and perceived hostility to, the administration may be used by partisans to discredit an eventual finding of criminality.

In the end, given the political incentives created by the existence of any independent counsel investigation where the President or those closest to him are under investigation, it may well be that no statutory or regulatory IC will emerge entirely unscathed but some results will be more immune from attack than others. Where a declination is the eventual result of the investigation, it will be most credible if rendered by a statutory IC; if, however, a criminal prosecution is instituted, it will probably be most credible if initiated by the administration's own regulatory counsel. The difficulty is, of course, that we cannot forecast the result of any investigation in advance and use the appointing mechanism that will likely generate the most credible result. Further, to some extent the degree to which politically motivated attacks may be successful in undermining the public confidence necessary to a successful IC investigation—whether under statute or regulation—may depend on the credentials, vulnerabilities, and conduct of the IC at issue and not on the person who actually performed the selection. We simply cannot today forecast how future regulatory or statutory ICs will fare.

That said, we know that the statutory selection mechanism probably will not achieve its desired end in many cases. It also may have serious collateral consequences in that the incentive it creates for partisans to attack sitting federal judges as politically motivated may impair the confidence of the American public in the impartiality of the federal judiciary generally. It is time, then, to consider the advantages inherent in Attorney General selection under DOJ regulations.

The principal virtue of this approach would be to return the entire responsibility for the fair and effective administration of justice in these difficult cases to the Attorney General. Even where a regulatory counsel is under the regulations "independent," the Attorney General would likely suffer at least some of the fallout if the IC proves to be dishonest, ineffective, or abuses the powers of his office. No longer will politically unaccountable and publicly invisible actors—the Special Division—be the sole persons standing behind an IC. The Attorney General—a politically accountable actor—will be responsible for his choice. At the very least, it will be much more difficult for political partisans to undermine the result of a criminal investigation by creating a perception that an IC is operating out of personal or political animus. I think it fair to say that an administration under investigation will have greater difficulty calling into question the integrity of an IC selected by that administration and thereby undermining public confidence in a determination of executive wrongdoing. Finally, an Attorney General may be able to blunt (although likely not eliminate) criticism of any eventual declination decision by making a wise and bipartisan selection of the regulatory IC. Serious consideration should also be given to submitting the name of proposed ICs to the Senate for its advice and consent, as was done once in the past.[2] Such a procedure presumably would provide additional bipartisan credibility to regulatory ICs.

3. *"Good Cause" Removal.* The statute attempts to ensure true independence by making an independent counsel removable by the Attorney General only upon a determination of "good cause," which determination is reviewable in court. Removal of any IC in a high-profile case will, except in extraordinary circumstances where it is obvious that such removal is justified, be politically untenable (and in today's environment, even politically counterproductive). The "good cause" requirement, then, is probably unnecessary. Further, it is my belief that the "good cause" requirement is also unsound because it affirmatively shields both ICs and Attorneys Gen-

[2] For an excellent discussion of the advantages of such a procedure, see Brett M. Kavanaugh, *The President and the Independent Counsel,* 86 Geo. L.J. 2133, 2146–2151 (1998).

eral from responsibility. If this requirement were removed, it "not only would make the special counsel accountable, but it also would force the President and his surrogates to put up or shut up," that is, to fire an IC who the administration alleges is demonstrably and unfairly . . . out to get" the President.[3] Finally, even were this safeguard deemed necessary and desirable, DOJ regulations have, and can in future, contain the same "good cause" removal standard.

If Congress rejects the above thesis and determines to reenact the IC statute,[4] I respectfully submit that the following amendments are critically important:

1. The list of "covered persons" under § 591(b) should be reduced to one individual: The President. The discretionary referral standards of § 591(c) should be retained. All other cases should be investigated, where possible, by federal prosecutors located not in main Justice but rather in local U.S. Attorneys Offices.

2. The Attorney General should be given full powers to investigate allegations of wrongdoing (§ 592(a)(2)(A)); she should be able to decline a case upon satisfying herself by a preponderance of the evidence that no criminal intent is present (§ 592(a)(2)(13)(i), (ii)); and she should only have to make a referral if she discovers substantial evidence of a federal criminal violation (§ 592(b)(1), (c)(1)(A)).

3. Some mechanism should be put in place for pre-qualifying persons subject to appointment by the Special Division (§ 593(b)(2)). All such persons should have some experience in federal criminal law enforcement and should agree to undertake the appointment on a full-time basis.

4. The Attorney General, not the Special Division, should define the jurisdiction of the IC at the inception of the investigation and throughout its course (§ 593(b), (c); § 594(e)). Should the IC decide that he wishes to pursue other matters not obviously within his mandate, the IC should work out the appropriate allocation of jurisdiction with the DOJ.

5. The statute should make clear that the Special Division's responsibilities are limited to selection of an IC from the pre-qualified list and adjudicating attorneys fees provisions (§ 593).

6. The present statute provides that "[a]n independent counsel shall, *except to the extent that to do so would be inconsistent with the purposes of this chapter,* comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws." (§ 594(f)) This italicized exception is sufficiently vague to render the primary prohibition meaningless. DOJ policies are rarely worded as categorical rules. Because they permit sufficient room for the exercise of discretion in particular cases, this imprecise exception is not needed. Further, it being unclear what, if any, remedy there is for IC violations of section 594(f), the entire provision is virtually unenforceable. The statute should make absolutely clear that ICs shall follow DOJ policy, except with respect to securing approvals from the Attorney General for anything except wiretap authority, and that failure to adhere to DOJ policy may constitute good cause for removal.

7. The reporting requirement should be amended to require (and permit) ICs only to concisely state the result reached at the conclusion of their investigation (§ 594(h)).

8. The impeachment referral provision should be eliminated (§ 595(c)). This omission should not alter Congress's ability to gather relevant raw evidence, from an IC and other sources, by subpoena.

Chairman THOMPSON. Thank you.

Mr. Gormley, will you present your testimony, please.

TESTIMONY OF KENNETH G. GORMLEY, PROFESSOR OF LAW, DUQUESNE UNIVERSITY

Mr. GORMLEY. Thank you, Senator Thompson and Senator Specter—from my own State of Pennsylvania—and Senator Levin. My name is Ken Gormley and I am a professor at Duquesne University School of Law in Pittsburgh. It is an honor to appear before this distinguished Committee.

I have a particular interest in the Independent Counsel law. I am the author of a book called, "Archibald Cox: Conscience of a Nation," the biography of the first Watergate special prosecutor. Flow-

[3] *See* Kavanaugh, *supra* note 2, at 2151.

[4] Many of these suggestions would be equally applicable to a revision of the DOJ regulations governing the appointment of regulatory ICs. *See* 28 C.F.R. § 600.1 *et seq.*

ing from my work on that book I have more recently written academic pieces in the *Michigan Law Review* and *Stanford Law Review* analyzing the failures of the Independent Counsel law and proposing extensive reforms.

I agree with most of those who have testified thus far, before this Committee, that the statute suffers from serious, horrible design defects that have become increasingly apparent. Unlike many other witnesses, however, I do believe that the statute can and should be salvaged in some form—but only after certain major overhauls are accomplished that reserve this extraordinary machinery for rare and extraordinary cases.

I want to begin by agreeing with Senator Howard Baker when he testified, I believe, last week that there should be a sort of cooling off period before this Committee makes any irrevocable decisions concerning the Independent Counsel law. Having just bandaged up the wounds from an extremely divisive impeachment trial flowing from one of the most controversial Independent Counsel investigations in our history, it seems risky for Congress to scrap this piece of legislation that was adopted after many years of hard work, public debate and soul searching.

Times of turmoil and government stress, I believe, are perhaps the worst time to make sweeping decisions to abandon entire legislative schemes. And so, it seems far more prudent perhaps to put a little more time and distance between the events of the past year and the ultimate decision that this Committee and this Senate make concerning the fate of the Independent Counsel law.

I do believe, incidentally, that in the wake of the Monica Lewinsky affair public trust in the American system of government is shaken no less than it was after Watergate. Restoring that trust, I believe, will not be accomplished by an abrupt return to the *ad hoc,* pre-Watergate method of appointing Independent Counsels which, after all, caused the breach of public trust in the first place.

My own view expressed in the *Michigan* article is that the present statute—or at least its framework—still does fulfill a very important function, especially when it comes to significant criminal investigations involving top members of the Executive Branch. My fear is if today's Congress eliminates the Independent Counsel law entirely, future Congresses will inevitably be forced to reinvent the statute in one form or another, because the need for the law simply will not die.

So, in future years, when a scandal erupts involving the President, Vice President, or Attorney General what rules will we have to govern the process? Americans have come to rely upon the Independent Counsel law, become comfortable with the notion of independent prosecutors. I believe, Congress, and the Justice Department itself.

And, so, where are we left if we get rid of these rules and we simply scrap the thing? I think we go back to, again, the *ad hoc* method. If the Attorney General is investigating a President or Vice President, for instance, who appointed the Attorney General, and if the Attorney General is tainted by the scandal, himself of herself, we have problems. That, of course, was the scenario, unhappily in both Watergate and Teapot Dome.

During Watergate, Attorney General Elliott Richardson and Archibald Cox, who was Special Prosecutor, scribbled out ideas on hotel napkins when they were trying to figure out what rules would govern this thing because, of course, it was a makeshift operation, a very fast-moving criminal investigation. Many members of this Senate, of course, worked with Cox and Richardson in order to grind out a fair, impartial charter to govern the Special Prosecutor in order to establish parameters so that all parties involved could respect the process and the public could trust it, in general.

One of the points of enacting the Independent Counsel Statute in the first place, of course, was Cox's firing and the infamous "Saturday Night Massacre." It was designed to eliminate this haphazard approach so that in future Special Prosecutor investigations, when future crises arose, the government simply would not have to make up the rules anew.

So although it is true that the Nation survived Watergate without an Independent Counsel Statute, the story almost had a different ending. President Nixon, my research indicated in working on this book, came very close to aborting entirely the Watergate investigation. The very reason that Congress in the 1970's adopted the law—and people like Cox and Richardson testified in favor of it in the Senate—was that they recognized the dangers inherent in operating without a pre-established set of rules, especially when a serious crisis of the magnitude of a Watergate or a Teapot Dome struck.

Congress spent 5 years constructing this statute, as has been mentioned. It has been reauthorized three times, each time with significant amendments. And I believe that rather than throwing away this significant piece of legislative work-product it is far more productive to construct a leaner Independent Counsel law that is, indeed, reserved for special and rare occasions as Congress initially envisioned.

The three initial aims of this legislation—restoring public trust in government, reserving the statute for major crises, and carefully circumscribing the Special Prosecutor's jurisdiction—I believe, still remain noble goals. I have argued that over a dozen specific reforms are essential if the Independent Counsel law is to be returned to its original sensible purpose. These can roughly be organized into three major categories.

The first major category is that reforms must be instituted relating to the method by which Independent Counsels are appointed and the frequency of their appointment. To this end, and I think most people agree that the triggering device should be retooled so that it only leads to a mandatory appointment at least where there exists what I have argued should be "substantial grounds to believe that a felony has been committed."

Second, I agree with Judge Walsh that the Attorney General must have power to conduct a real preliminary investigation and have subpoena power.

Third, the list of covered individuals should be shrunk to the essentials to cover only the President, Vice President, Attorney General and I add, the top officials on the Committee to Elect and Reelect the President who act in essence as alter egos for the President when it comes to the very difficult area of fund-raising.

Fourth, I believe the statute should be limited to crimes committed while in Federal office or in seeking that office. All of the other investigations, most of the other investigations, would then return to the Justice Department where they have been handled professionally for over 200 years.

The second big category of reforms relates to the role and power of the Independent Counsel. Questions were asked of Judge Walsh—should that power be reined-in? I believe it should be. Most significantly here, where I see a defect is that the Independent Counsel's jurisdictional limits that are spelled out in his or her original charter must be strictly enforced. And I believe that a new statutory presumption should be created against expansion of jurisdiction.

Second, the existing provision in the statute that requires the special court to review Independent Counsel investigations, periodically every 2 years, and bring them to an end if they are "substantially completed"—which has never been used—should be given some real teeth.

Third, Independent Counsels should be required to work full-time.

Fourth, the "impeachment referral" provision should be eliminated so that the Independent Counsel has nothing to do with the quite separate political impeachment process.

Fifth, the final reporting requirement should be sharply limited so that nothing but a lean, straightforward, report is required.

And, finally, the last category of reforms relates to the special court. The special court should be specifically authorized to consult with the Attorney General in selecting an Independent Counsel. There is no reason that the Attorney General's input should be excluded.

The court should be given power to replace an Independent Counsel under certain unusual circumstances. Most importantly, this court's duties and powers have to be more clearly spelled out so that they can actually play some role under this statute. As with any other court, I believe, a written comprehensive set of rules should be established so that the court and the parties are no longer forced to operate in the dark.

I do agree with witnesses who have suggested, in testifying before this Committee. that the statute should be permitted to temporarily lapse this year, in 1999. I believe that it is better for the statute to lapse temporarily than for Congress to rush to meet deadlines after this time-consuming and draining impeachment proceeding, and risk creating problems of the past anew. Because I think that burying the statute is not going to eliminate the need for it. It is better to build on our experience of the past 20 years, become toughened by these crises, rather than to presume we are not going to face the same problems in the future.

It is easy enough to let the Independent Counsel Statute expire. I believe that the greater challenge is through hard work to make the Independent Counsel law accomplish the laudable purpose for which Congress originally constructed it.

And through the wisdom reposed in this body, I believe that it is possible to accomplish that end for the good of the American people.

I thank you very much for the privilege of testifying before this distinguished Committee.

[The prepared statement of Mr. Gormley follows:]

PREPARED STATEMENT OF PROFESSOR KEN GORMLEY

Good afternoon. My name is Ken Gormley. I am a Professor of Constitutional Law at Duquesne University in Pittsburgh. I greatly appreciate the opportunity to express my views to this Committee regarding the reauthorization of the Independent Counsel Act of 1978. It represents, I believe, one of the most important issues facing Congress at this critical juncture in American history.

I have a particular interest in the subject of the independent counsel law. I am the author of "Archibald Cox: Conscience of a Nation" (Perseus Books 1997), the biography of the first Watergate Special Prosecutor. Flowing from my work on the Cox book, I have (more recently) published academic pieces analyzing the failures of the independent counsel law, and proposing extensive reforms. I published an article in the December issue of the *Michigan Law Review,* entitled "An Original Model of the Independent Counsel Statute," advocating dozens of specific reforms designed to bring the statute back to its original (and laudable) purpose, restoring it to those sensible foundations that prompted Congress to enact it in the first place, in the aftermath of Watergate. I also published an article in the January issue of *Stanford Law Review,* entitled "Impeachment and the Independent Counsel: A Dysfunctional Union," advocating that the "impeachment referral" provision be dropped from the statute entirely.

I agree with many of those who have already testified before this Committee, that the statute suffers from horrible design defects that have become glaringly apparent with the passage of time. Unlike many other witnesses who have addressed this Committee, however, it is my belief that the Independent Counsel Statute can and should be salvaged, but only after radical overhauls have been accomplished that reserve this extraordinary machinery for truly rare and extraordinary cases.

Let me begin by agreeing with the comments of Senator Howard H. Baker, Jr., when he appeared before this Committee last month. Senator Baker advocated a sort of "cooling off period," before this Senate made any irrevocable decisions about the independent counsel law. I believe that is a sound approach. Having just bandaged up wounds from a bitter and divisive impeachment trial, flowing from one of the most controversial and divisive independent counsel investigations since the statute was enacted in 1978, it seems ill-advised for Congress to scrap legislation that was adopted after five years of hard work, public debate and difficult soul-searching. Times of turmoil and governmental crisis are the worst time to make sweeping decisions to abandon entire legislative schemes. It seems far wiser to put a little distance between the events of the past year, and the ultimate decision concerning the fate of the independent counsel law, so that this important issue can be considered dispassionately. It seems better to allow the statute to lapse, temporarily, and revisit the subject after having studied all options thoroughly, than to make a hasty decision that may obliterate a valuable piece of legislative work forever.

The Monica Lewinsky affair—in the year 1999—has shattered the public trust in our institutions of government, no less than the Watergate affair did in the 1970's. Cab drivers and school teachers now distrust legislators, presidents, attorneys general, and special prosecutors. Burying the independent counsel law will only return us to the flawed pre-Watergate method of *ad hoc* appointment of special prosecutors, which generated so much public distrust in the first place. It is far better to seek to turn 20 years' worth of legislative effort into a productive, rehabilitated statute.

The Senate will therefore achieve the best result for this nation if it proceeds cautiously. It must consider the long-term ramifications if the statute is scrapped entirely; it must examine possible substitutes for the existing statute; and it must consider ways to significantly overhaul the law that might make it work as Congress deems useful. Without considering all possibilities, this body will be incapable of determining the best alternative for the nation.

My own view, as expressed in the *Michigan* article, is that the present statute can be restructured to operate in a productive fashion. The first question that must be answered, however, is: Do we really need an independent counsel law, in the year 1999? Why renew a statute in a hostile climate after this legislative scheme has created so many problems after a short twenty-year existence?

My own conclusion is that this statute—or at least its framework—fulfills an important function in significant criminal investigations involving the Executive Branch. If today's Congress eliminates the statute entirely, I fear that future Con-

gresses will find it necessary to re-invent the statute in one form or another, because the need for the law will not die. There have been twenty independent counsels in the same number of years, with the list growing steadily. Some of this reflects a statute run amok, admittedly. But some of it reflects a legitimate perception by this Congress, by the Justice Department, and by the American public that fairness must be carefully and specially safeguarded in certain high-level investigations involving the Executive Branch.

In future years, when the public cries out for an investigation after some new scandal erupts involving the President, Vice-President or the attorney general, what rules will govern this process? Americans have grown to rely upon independent counsels, despite the skepticism that attaches to specific investigations. The Justice Department itself has grown comfortable with the notion of appointing neutral outside prosecutors, at least in certain cases involving high-level members of the Executive Branch. So where is our legal system left, if the Independent Counsel Statute is simply scrapped? Is our nation to return to the old wing-and-a-prayer method of *ad hoc* appointment—wait for a crisis and leave the investigation to the whim of each attorney general, even if she is investigating the President or Vice-President whose election led to her appointment, or if she is tainted by the scandal herself? (Watergate and Teapot Dome both presented such unhappy scenarios). The reason that Democrats and Republicans alike supported special prosecutor legislation, during the tumultuous months of Watergate, was that public confidence in the existing *ad hoc* method was shattered. The American public, and Congress in the 1970's, recognized that certain extraordinary cases involving the Executive Branch required a set of rules that minimized the chance of bias, or abuse of the criminal justice process. The American public, and Congress, also recognized that in some cases institutional chaos might arise if one branch of government forced a constitutional showdown—as the Executive Branch did in Watergate—where no rules were in place to resolve the showdown in advance.

During Watergate, Attorney General-designate Elliot Richardson and his choice for special prosecutor, Archibald Cox, scribbled out ideas on hotel napkins to establish a make-shift set of rules to govern a fast-moving criminal investigation that required a neutral outside prosecutor. Many members of this Senate worked with Cox and Richardson to grind out a fair, impromptu charter for the special prosecutor, in order to establish parameters that the parties could respect and the public could trust. One of the points of enacting a statute, after Cox's firing in the infamous "Saturday Night Massacre," was to eliminate this haphazard approach to special prosecutor investigations, when serious crises arose in the future.

One common response to all of this is "we succeeded just fine in Watergate, didn't we? There was no special prosecutor law on the books at that time, yet the combination of political pressure, public pressure, and pressure from the American news media forced the appointment of a neutral outside prosecutor with the power to conduct a fair investigation—indeed a second prosecutor was hired once Cox was fired. These two outsiders ultimately brought the President to justice, did they not?"

There is some truth to this retort. But it overlooks one important fact. After spending seven years studying, and writing about, the events of Watergate—particularly those involving the tenure of the first Watergate Special Prosecutor, Archibald Cox—I can tell you that President Nixon came very close to succeeding in his plan to abort the Watergate investigation entirely. Although it is true that after Cox's firing during the "Saturday Night Massacre," the American public rose up and President Nixon was ultimately forced to disgorge the subpoenaed tapes, this story almost had a different ending. In the week prior to his firing, Archibald Cox came extremely close to succumbing to the pressure of the White House, and agreeing to a secret compromise that would have allowed President Nixon (at least in large part) to preserve the secrecy of his tapes, in order to avoid a Constitutional showdown. Cox was acutely aware that if he pushed the Executive Branch too far, he might reveal the ultimate weakness of American democracy—that no one branch within the tripartite system (including Congress or the courts) can force another branch to act against its will, without risking serious damage to the entire structure.

It is true that this nation survived Watergate without an Independent Counsel Statute. But the very reason that Congress in the 1970's adopted that law, and people like Archibald Cox and Elliot Richardson testified in support of it in this Senate, was that they recognized the dangers inherent in operating without a pre-established set of rules, especially when a crisis of the magnitude of Watergate (or Teapot Dome) struck. President Nixon came very close to succeeding in his plan to shut down the Watergate investigation. He failed only because of Cox's strength of character, the fact that there were very few college football games televised the day of Cox's final press conference, and other twists of fate. That is why nine days later,

both Democrats and Republicans in Congress introduced legislation to create a special prosecutor law. They did not wish to risk being caught off-guard again.

Congress spent five years constructing this statute. It re-authorized the legislation three times, each time with significant amendments. Rather than throwing away this careful piece of legislative work-product, I believe that it is far more productive to examine the failures of the statute over the past two decades, and construct a much leaner independent counsel law that is reserved for rare and special occasions, as Congress initially intended following the Watergate debacle.

What exactly did Congress in the 1970's envision when it constructed this law? A few things can be gleaned from the legislative history—not only by studying the legislation that succeeded, but by examining the numerous bills that failed.

First, the statute's overarching purpose was to drag certain investigations out of the muck of partisan politics in order to restore public confidence in government. Watergate had virtually destroyed public trust in government—particularly in the presidency, but tainting all three branches. Reversing this lack of trust, by adopting legislation that addressed the appearance of conflict as well as actual conflict, was a goal that transcended all others. And it remains a worthwhile goal.

The second lesson that jumps out of the statute's protracted history is that it was originally conceived to address "big problems." It was primarily designed to deal with rare, major crises in the Executive Branch—like Watergate in the 1970's and the Teapot Dome scandal in the 1920's—rather than the ongoing stream of picayune matters that inevitably dog high-level executive officials during any administration. The rejection of S. 495 and other bills advocating the creation of a permanent special prosecutor, in the latter part of 1976, confirms that the special prosecutor law was never meant to establish a permanent inquisitor. The temporary special prosecutor was expected to come alive only under extraordinary circumstances involving major conflicts. Indeed, the hearings and debates are littered with references to Watergate and Teapot Dome as models. Both of these affairs shared much in common. Both involved allegations of criminal activity by high-ranking executive officials while holding federal office. Both involved a tainted Justice Department that was embroiled in scandal and could not be trusted to conduct a neutral investigation. Both involved a well-developed crisis, that threatened to consume the government if left unchecked.

A final lesson that can be gleaned from the legislative history is that the scope of the special prosecutor's job was meant to be narrowly circumscribed. Both proponents and opponents of the law understood that if the special prosecutor's jurisdiction were not carefully limited, the statute would be patently unconstitutional because it would create an unaccountable fourth branch of government. The creation of a temporary (rather than a permanent) special prosecutor with a passport identifying his or he precise jurisdiction, was meant to avoid this dangerous precipice.

The three principal aims of the legislation—restoring public trust in government, reserving the statute for major crises, and carefully circumscribing the special prosecutor's jurisdiction—remain noble goals.

Over a dozen specific reforms are essential if the independent counsel law is to be returned to its original, sensible purpose. These can be roughly organized into three categories: (1) Reforms relating to the appointment of special prosecutors; (2) Reforms relating to the role and powers of special prosecutors; and (3) Reforms relating to the duties of the special court. I will address each in turn.

I. REFORMS RELATING TO THE METHOD AND FREQUENCY OF APPOINTING INDEPENDENT COUNSELS.

Since the statute's adoption in 1978, there have been 20 independent counsels appointed, some branching off into multiple investigations.

The runaway nature of the statute is not attributable to a single independent counsel or a single political party. Members of both parties have discovered how to push the buttons and tilt the machine, in the years following Watergate, in order to create problems and nightmares for political foes. As both parties have perfected this game of political pinball, they have abandoned the original notion that the special prosecutor law should be reserved for rare and special crises. The over-use and trivialization of the independent counsel law is thus the single greatest flaw that has emerged since the adoption of this legislation in 1978.

But how does Congress prevent the statute's overuse and trivialization? In several ways.

A. Amend the Triggering Device.

Most scholars, and those who have first-hand experience working with the Independent Counsel Statute, are in agreement that—if the law is to function properly—critical adjustments must be made in retooling the statute's triggering device con-

tained in Section 592. The existing standard, that sets off the extraordinary independent counsel mechanism whenever there exist "reasonable grounds to believe that further investigation is warranted," unleashes the enormous power of this special office prematurely. The triggering device is set so low that every puff of smoke that resembles an allegation of criminal wrongdoing is sufficient to set off alarm bells and prompt (at least potentially) the appointment of an independent counsel. This hardly reserves the special prosecutor statute for special occasions. It allows it to be easily manipulated for political purposes, and to be used for exploratory digging rather than for serious emergencies.

The statutory language should be amended to require the appointment of an independent counsel only when there exists "*substantial* grounds to believe that a *felony* has been committed and further investigation is warranted." Not only does this language ratchet the threshold upwards, but it provides a nice balance between weak, premature allegations (which should *not* trigger the statute) and well-developed allegations (which *should* cause an independent counsel to be appointed).

Not until the triggering mechanism is significantly adjusted in this fashion will the statute begin to operate in a restrained (and sensible) fashion.

B. Allow the Attorney General to Exercise More Power in Conducting the Preliminary Investigation.

The second reform necessary, as it relates to the statute's triggering mechanism, involves allowing the attorney general to exercise more authority in conducting the preliminary investigation. As presently drafted, Section 592 sharply constricts the powers of the attorney general. She is not permitted to convene grand juries, engage in plea bargains, grant immunity, or issue subpoenas. Although it is certainly important to prevent the Justice Department from jumping headlong into an investigation because it might "spoil" the case for an independent prosecutor, the current statute goes too far by preventing any meaningful preliminary investigation. If the attorney general is to make an informed decision whether the appointment of an independent counsel is justifiable and sensible, she *must* be permitted to subpoena witnesses and gather reliable evidence. Moreover, the provision in Section 592 that requires the attorney general to ignore the question whether the alleged criminal conduct was inadvertent or negligent (as opposed to knowing or intentional) is unduly restrictive and takes away the attorney general's ability to exercise sound judgment in determining whether picayune offenses should be prosecuted.

If the attorney general were granted greater power to conduct a meaningful preliminary investigation—at the earliest stage of the process—there would exist far fewer marginal independent counsel investigations.

C. Limit the Categories of Persons Covered by the Statute.

The third essential reform, that garners almost universal support among commentators and former special prosecutors, relates to the list of individuals covered by the statute. Presently, Section 591(b) sweeps within its ambit not only the President and Vice-President, but a laundry list of other executive officials. In all, nearly 240 persons are covered, most of whom hold considerably subordinate positions in the executive hierarchy.

Not only is this list of "covered individuals" absurdly broad, but it cheapens the Independent Counsel Statute by forcing its application in cases that are far from kindling for incendiary national crises.

At least when it comes to the *mandatory* application of the statute, the law should be amended to reduce the list of covered individuals to an essential core. Specifically, the statute should be limited to the President, Vice President, and the attorney general. These three key members of the Executive Branch must be covered by the law, since it was primarily designed to ensure that individuals at the top of the executive ladder could not investigate themselves. Likewise, the highest officials on the committees to elect and re-elect the President, who have been covered by the statute since its adoption in 1978, should remain so. These individuals act as *alter egos* for the President and Vice President with respect to fund-raising—an activity that inherently creates potential for criminal abuse under the American electoral system.

But that should be the extent of the mandatory coverage of the statute.

With respect to the laundry list of other cabinet officers, sub-cabinet officers, and administrative heads presently covered by Section 591 of the statute, these should be moved into an "optional" category. When it comes to allegations of criminal activity involving such lower-level officials, the attorney general should be *permitted*—but not required—to set the statute into motion. However, this should be left to the sound discretion of the attorney general. In some cases, the attorney general might find it beneficial to invoke the provisions of the statute for a lower-level official, par-

ticularly where a conflict of interest—or the appearance thereof—exists. Otherwise, the attorney general should remain free,to decline utilizing the statute at all, or remain free to appoint her own neutral independent prosecutor, as several past attorneys general (such as Griffin Bell) have done. The attorney general's determination, when it comes to these optional cases, should be final and non-reviewable.

The statute should also be narrowed by amending Section 591 to limit it to crimes committed while in federal office, or in seeking that office. The purpose of the statute is to address public actions of public officials. Other extraneous matters should be handled by traditional investigations conducted by federal and state investigative authorities. This can be accomplished competently, and satisfactorily, without grave danger to the nation.

D. Leave Other Investigations to the Justice Department.

Assuming that the above reforms are implemented, all other investigations concerning alleged wrongdoing by high-level executive officials would return to the Justice Department. Investigations such as those involving Secretary of Agriculture Mike Espy, HUD Secretary Henry Cisneros, and most of the other 20 independent counsel investigations to date would have never been covered by such a revised statute, at least in terms of the *mandatory* application of the law. They would have been returned to the state and federal criminal justice systems, that have successfully handled such matters for the past 200 years.

Much of the problem relating to the runaway nature of the modem special prosecutor law flows from the fact that the nation, traumatized by Watergate, foreswore its trust in the attorney general and other government lawyers. These government attorneys have supervised difficult and sensitive cases in a capable fashion since 1789, often in investigations involving corrupt public officials including members of the Executive Branch. The presumption should no longer be that any allegation involving a hint of potential conflict—because it relates to an actor within the Executive Branch—must be removed from the Justice Department and farmed out to an outside prosecutor. Rather, the reverse presumption should apply. Except where there exists substantial evidence that a serious felony involving one of the covered individuals exists—and unless the alleged criminal wrongdoing relates to conduct committed while in federal office—the mandatory provisions of the statute should not be triggered.

This reform would assist in reserving the statute for rare and special occasions, so that it would be used primarily as a failsafe mechanism—to prevent serious constitutional meltdowns—rather than as a reflexive response to every allegation lodged against a member of the Executive Branch.

II. REFORMS RELATING TO THE ROLE AND POWERS OF INDEPENDENT COUNSELS.

Besides radically adjusting the manner in which the independent statute is triggered, and the group of officials to which it applies in a mandatory fashion, the law should be reformed in another important way. The job description of the independent counsel himself—and the scope of his extraordinary power—should be significantly reined in.

A. The Independent Counsel's Jurisdictional Limits Must Be Strictly Controlled.

One of the most serious breakdowns in the Independent Counsel Statute in recent years relates to jurisdictional limits. Although few newspaper or television accounts cast it in these terms, the recent Monica Lewinsky scandal (for instance) raised serious questions about the operation of the statute when it came to controlling the jurisdictional boundary-lines of special prosecutors.

One of the hallmarks of the legislation, that was designed to save it from patent unconstitutionality, was its careful limitation of the special prosecutor's field of authority. The Congressional debates are abundantly clear in this regard. One of the ways that the 1970's Congress sought to ensure that the special prosecutor could not run amok—or become a roving "Frankenstein monster" (as one Representative put it)—was to narrowly constrain his or her scope of authority and nail down his or her jurisdictional limits in a clear written charter.

The sweep of the independent counsel's jurisdiction is broad in one sense—allowing him or her (in essence) to stand in the shoes of the attorney general in conducting a particular inquiry. Yet it is meant to be narrow in another more crucial sense. Unlike an ordinary prosecutor, sitting at a desk in the Justice Department or in the U.S. Attorneys Office, this *special* prosecutor was not meant to be free to investigate and prosecute any federal crime placed on his or her desk. Rather, he or she was to be forever tied to the written statement of jurisdiction, formulated by the attorney general and reduced to writing by the special court. Indeed, if this were not the

case, the statute would be patently unconstitutional, because it would be creating an unaccountable fourth branch of government.

Chief Justice William H. Rehnquist made this precise point in affirming the constitutionality of the statute in *Morrison v. Olson.* The Chief Justice explained: "Unlike other prosecutors, (the independent counsel) has no ongoing responsibilities that extend beyond the accomplishment of the mission that she was appointed for and authorized by the Special Division to undertake."

Regrettably, the Independent Counsel Statute has evolved in such a way that the jurisdictional constraints envisioned by Congress in the 1970's have been rendered worse than impotent. The independent counsel's office has been able to transform itself into a free-floating satellite branch of government unaccountable to any other, a cardinal sin under our tripartite constitutional system. This has been accomplished, primarily, through the defective provision contained in section 593(c), dealing with expansion of jurisdiction.

The relatively benign-looking provision contained in section 593(c) directs the special court, upon the request of the attorney general, to "expand the prosecutorial jurisdiction" of the independent counsel under certain circumstances. This section establishes an abbreviated period in which the attorney general may conduct a preliminary investigation, and requires the attorney general to give *"great weight to any recommendations of the independent counsel"* concerning the expansion of jurisdiction. The special court is then required to ratify the expansion of jurisdiction—or appoint a separate independent counsel—if so requested by the attorney general.

The net effect of these statutory provisions is to create a chamber of horrors for potential targets of an investigation. It almost guarantees—indeed it almost mandates—that the expansion of jurisdiction will occur if an independent counsel aggressively seeks it. The expansion of jurisdiction by Independent Counsel Kenneth Starr, from the Whitewater investigation to the Monica Lewinsky investigation, provides a simple case in point. Mr. Starr's staff requested that Attorney General Reno expand jurisdiction into the largely unrelated Lewinsky matter. (There did exist a potential link between the two investigations—in the form of Clinton friend Vernon Jordan allegedly providing consulting work and job assistance to Webster Hubbell and Monica Lewinsky—but the attorney general never carefully explored this link to determine how substantial it was.) After conducting a truncated preliminary investigation (in one day), Attorney General Reno approved the expansion, giving great weight to the recommendations of the independent counsel. The three-judge panel was then virtually required by statute to approve this expansion of jurisdiction.

This relatively facile ability of an independent counsel to leapfrog from one subject to the next represents one of the most serious defects in the statute. It defeats the elaborate system of controls built into the special prosecutor law by the 1970's Congress, and creates a separation of powers nightmare. It means that, as a practical matter, the independent counsel can spring from one matter to the next, becoming (in effect) a permanent inquisitor of a President or some other target of choice—even though this is not what Congress intended when it formulated the statute. It also means that the essential pronouncement of the Supreme Court in *Morrison v. Olson,* that the independent counsel shall have "no ongoing responsibilities that extend beyond the accomplishment of the mission that she was appointed for and authorized by the special division to undertake," becomes a hollow incantation.

The statute should be amended to create a presumption against expansion into matters unrelated to the special prosecutor's original charter. First, the statute as currently configured creates the real danger that an independent counsel may operate outside the sphere of political and constitutional accountability, since it allows relatively easy expansion from the prosecutor's narrow jurisdictional charter. Second, the statute as currently configured makes hash of the ability of the attorney general to engage in any sort of meaningful preliminary investigation in determining whether an expansion is appropriate. Third, the existing provisions dealing with expansion of jurisdiction undermine the principal goal of the statute, which is to select the most neutral individual available for any given investigation. An existing independent counsel, however honorable and trustworthy, arrives with the baggage of his or her extant investigation on his or her back. Given the inevitable split of public opinion as to whether a special prosecutor in any case—particularly one involving the President or a high administration official—is motivated by political bias, an existing independent counsel is almost never the best choice for a new investigation.

Therefore, section 593(c) should be revised to give the attorney general a full 90-day period in which to complete her preliminary investigation, when the independent counsel seeks to expand jurisdiction. Section 593(c) should also be amended to strike the language that requires the attorney general to "give great weight to any

recommendations of the independent counsel" in this regard. In its place, language should be inserted stating that "there exists a presumption against expansion of jurisdiction into subjects unrelated to the original grant of jurisdiction to the independent counsel by the special court." If a new subject arises that warrants investigation, a new independent counsel should be appointed (assuming that the usual high hurdles can be met) in order to ensure absolute neutrality.

In making a determination whether expansion of jurisdiction is appropriate, the attorney general should be required to take into account the "degree of relatedness" between the two matters. The more remote the connection between the new matter and the independent counsel's original charter, the stronger the presumption should be against expanding jurisdiction. The attorney general's determination, in the event she decides not to expand jurisdiction, should be final and nonreviewable. In the event that the attorney general recommends expansion, the special court should be permitted to review this recommendation and determine for itself whether an enlargement of the jurisdictional boundary lines is prudent.

Once the existing presumption is switched in this fashion, facile expansions of jurisdiction will be eliminated, and one of the greatest deficiencies of the statute will be corrected.

B. The Duration of Investigations Should Be Controlled Through Periodic Review.

One recurrent criticism of the statute, after 20 years, is that there is no realistic limitation upon the length of time a particular investigation may take. Some commentators have proposed statutory caps on investigations, in order to deal with this perceived flaw.

Yet the idea of a rigid time-limit on investigations is unsatisfying. If arbitrary time limits are placed on investigations, targets of investigations and their political allies will easily find creative ways to sabotage the work of a special prosecutor by stalling until the deadline ticks to a close. The nature of a criminal investigation is such that its precise duration can never be mapped out in advance. The Teapot Dome Scandal of the 1920's took nearly six years to investigate, from start to finish. Watergate took 2½ years, from the time Archibald Cox was appointed until the time the Special Prosecution Force's final report was issued in October of 1975.

Rather than placing artificial time limits upon the duration of an independent counsel's work, the simpler (and more sensible) approach is for Congress to insert teeth into the existing provision that requires the special court to review the status of an independent counsel investigation every two years. Section 596 of the statute already mandates that the special court periodically assess the independent's counsels work and determine if it is "substantially completed," allowing the court to terminate an office once its work has reached substantial completion. By ensuring that periodic reviews actually take place, and by establishing concrete standards by which the court must make its assessment (as discussed in the next section), Congress will strengthen the incentive for the independent counsel to wrap up his or her work expeditiously, and avoid being terminated for overstaying his or her welcome.

In assessing whether an investigation is "substantially completed" under section 595, Congress should require the special court to evaluate the following factors: (1) The amount of work that has been completed by the independent counsel and the amount of remaining work that he or she can reasonably anticipate; (2) The amount of remaining work that relates to the subject matter of his or her original jurisdictional statement, and the amount of remaining work that is peripheral (the more work that is peripheral, the more reason to conclude that the assignment is "substantially complete"); and (3) The amount of remaining work that could be completed by the Justice Department without the danger of conflict or appearance thereof.

The statute should authorize the special court to seek input from the attorney general and the independent counsel, in determining whether the above criteria compel a conclusion that a special prosecutor's assigned task is near completion. In this way, lingering investigations will be brought to a definitive close, and artificial time limits will become unnecessary.

C. Each Independent Counsel Should Be Required to Work Full-Time.

Another controversy that has reached a crescendo in recent years relates to the question of whether a special prosecutor must work full-time. Although some special prosecutors have not undertaken their positions in a full-time capacity, it is wise to build such a requirement into the statute.

A commitment to work full-time as an independent counsel has many things to recommend it. First, an attorney general is not permitted to engage in private legal practice, during the term of his or her office. There is no reason to permit independ-

ent counsels, who stand in the shoes of the attorney general and wield extraordinary power in cases of critical importance, to live by a different set of rules. Second, such a requirement would boost public confidence in the independent counsel's office, something that is desperately needed at this stage of American history. Third, such a requirement would help screen out frivolous cases. Few prominent attorneys would drop their careers and make financial sacrifices to work on marginal cases that were not of sufficient public import. Just as importantly, a full-time requirement for independent counsels would bring investigations to a close much more swiftly. Archibald Cox was paid a salary of $38,000 per year as Watergate Special Prosecutor, and took a leave from his tenured position on the Harvard Law School faculty to accept the post. Leon Jaworski, who succeeded Cox as Watergate Special Prosecutor, likewise left behind his lucrative Texas law firm practice to re-locate to Washington throughout the duration of his service. In each case, the special prosecutor had a powerful incentive to complete the investigation, wrap up his work, and go home.

It is wise and appropriate to give the same incentive to each independent counsel, so that investigations do not linger beyond their useful lifetimes.

D. The Independent Counsel Should Be Distanced From the Impeachment Process.

Section 595(c) of the Independent Counsel Statute mandates that "an independent counsel shall advise the House of Representatives of any substantial and credible information which such independent counsel receives, in carrying out the independent counsel's responsibilities under this chapter, that may constitute grounds for an impeachment." This referral provision, which has been contained in the statute since its adoption in 1978, was added to ensure that the product of an independent counsel's work would be available to Congress in the event that a criminal investigation led to an impeachment inquiry. Yet as recent events have highlighted, the referral provision is troublesome as a policy matter and leads to a host of constitutional and legal nightmares.

First, the referral provision turns the independent counsel into a pre-impeachment deputy for the House of Representatives, causing him (and the Executive Branch) to perform political functions that the Framers carefully reserved to Congress.

Second, as applied to a sitting President, it is highly questionable whether a President can be criminally prosecuted while in office. The referral provision thus encourages a premature use of the grand jury and the independent counsel's extraordinary prosecutorial power, again in order to facilitate a purely political process.

Third, Section 595(c) forces the independent counsel to wear two incompatible hats: One as a detached criminal prosecutor hired to conduct a neutral criminal investigation on behalf of the Executive Branch, and the other as a pre-impeachment deputy for the House of Representatives, gathering evidence that may be relevant to Congress's impeachment work. The latter job inevitably clashes with the prosecutor's ability to handle his or her criminal case in a responsible fashion. Good prosecutors stay far away from the political process, in order to avoid destroying their criminal cases. They do so in order to avoid the danger that pretrial publicity may make it impossible to find an impartial jury; in order to avoid shattering the secrecy of grand jury proceedings; in order to ensure that defendants are guaranteed a fair trial and procedural due process; and in order to eliminate any contention that the prosecutor has exhibited bias or conflicts-of-interest with respect to the targets of the investigation. The impeachment referral provision thus interferes with the special prosecutor's foremost duty to act as a responsible prosecutor, and jeopardizes the integrity of his work.

Fourth, Section 595(c) also disrupts the work of the grand jury, which (in effect) is encouraged to accuse public officials of wrong doing without indicting—something that is generally disfavored in American jurisprudence.

Finally, the impeachment referral provision causes Congress to evade its own constitutional responsibility for initiating impeachment proceedings, and allows the House of Representatives to pass off this duty to an outside entity, thus sidestepping the political accountability that was an essential ingredient of the Framers' impeachment plan.

For all of these reasons, the impeachment referral provision is inconsistent with the proper functioning of the independent counsel's criminal investigation. It is also inconsistent with Congress's independent duty under the Constitution to initiate and conduct its own independent impeachment inquiry, within the distinct political arena.

It is therefore essential that the impeachment referral provision of Section 595(c), which caused so many uncomfortable moments for both Independent Counsel Ken-

neth Starr and the House of Representatives during the Monica Lewinsky investigation, be eliminated entirely.

E. The Final Reporting Requirement Should Be Sharply Limited.

Section 594(h) of the statute requires that, before the office of independent counsel is terminated, such counsel must "file a final report with the division of the court, setting forth fully and completely a description of the work of the independent counsel, including the disposition of all cases brought." This section requires (in effect) that every special prosecutor, prior to leaving office, must fully explain the work history of his or her operation, and justify his or her actions.

This is a daunting, costly, and time-consuming task. Most independent counsels will tend to err on the side of over-completeness, preparing vast reports that leave no stone unturned, in order to justify their work and defend their reputations in politically-charged investigations. Lawrence Walsh's Iran-Contra investigation report, which consisted of three bound volumes comprised of nearly 1500 pages, kept his office working long after the subjects of the investigation had left office.

Not only is the final reporting requirement costly and time-consuming, but it raises serious concerns about basic fairness. Criminal investigations are traditionally shielded from blow-by-blow accounts and detailed public scrutiny. Particularly where no indictment is lodged and no prosecution is commenced, there is a tradition in the American criminal justice system that prosecutors remain circumspect and silent, in order to safeguard the reputation and privacy of those individuals under investigation. The "final report" requirement casts these cautions to the wind, and forces an independent counsel to air the dirty laundry of his targets.

Congress should dramatically shrink the scope of information that must be provided at the conclusion of the independent counsel's work. Since the independent counsel must provide periodic reports to the special court at 6-month intervals, accounting for each expenditure, the court will have ample chance to become familiar with the nature of the work being performed by the independent counsel's office. At the conclusion of the investigation, the statute should require. nothing more than a reckoning of expenditures, a review of personnel information, and a concise summary of the work performed by the office. If the special court wishes to obtain further information on particular subjects, the statute should authorize the court to request additional details from the special prosecutor. Yet the presumption should be toward a lean, straight-forward report. Grand jury information and other material generally shielded from public disclosure should be excluded from the principal report. If the court determines that such confidential information is essential to complete its own review, Congress should permit the independent counsel to provide a sealed, supplemental report to the court containing such information. A short and pithy report—in conjunction with the budget reports periodically supplied to the special court—will more than suffice to inform the court in most investigations.

This approach will not only save taxpayers enormous costs, but it will allow independent counsels to wrap up quickly and return to their chosen professions.

III. REFORMS RELATING TO THE DUTIES OF THE SPECIAL COURT.

One of the great failures of the Independent Counsel Statute in recent years has been that the body that Congress envisioned acting as a moderating and restraining influence on special prosecutors—the special three-judge panel—has all but relinquished any meaningful role in the process. In the debates that shaped the original statute, Congress settled upon the judiciary to appoint and monitor this special prosecutor because it believed that the special three-judge panel could act as a wise and moderating influence in politically treacherous cases. The courts appeared to be the safest haven to locate the appointment and oversight power, with respect to the special prosecutor, in order to avoid any possible corruption of the process.

Congress's specific purpose in investing a three-judge panel with the power to appoint and monitor the special prosecutor was to shift this duty away from the Justice Department (where potential conflicts existed), and move it down Constitution Avenue to the special court. After all, Watergate's special prosecutor Archibald Cox had been fired by President Nixon because he was an appointee of the Executive Branch, directly accountable to Attorney General Elliot Richardson. The whole point of the new legislation was to fight off potential conflicts and prevent incidents like the "Saturday Night Massacre" from recurring, by moving oversight responsibility to a neutral court.

There is no indication that Congress in the 1970's intended the court to remain invisible. Elliot Richardson, as the Attorney General overseeing the Watergate case, had played a cautious but essential role in interfacing with, and maintaining a check over, special prosecutor Cox. Congress seemed to envision that a similar oversight function would be carried out by the special court under the statute. This was

the only guarantee, layered into the statute, that the special prosecutor would not become an unaccountable fourth branch of government. Someone had to mind the store. The "someone" to whom the special prosecutor was meant to be answerable was the three-judge panel, in conjunction with the attorney general whose direct control was filtered through the special court. Unfortunately, the court has managed to shrink its own role in the process to almost nothing. After appointing an independent counsel and establishing his or her jurisdiction, the court has done little more than rubber-stamp those special prosecutors' actions.

It is true that if a special court became unduly immersed in the workings of the special prosecutor, this would create separation of powers problems. That point was made by Chief Justice Rehnquist in *Morrison v. Olson,* when the Chief Justice warned against allowing the special court to "supervise" the independent counsel in the exercise of his or her investigative or prosecutorial powers. Yet Chief Justice Rehnquist also acknowledged that a number of functions of the special court legitimately—and necessarily—interfaced with the prosecutor's work. A certain amount of interplay between various branches of government is not only common, but an essential part of the American scheme of government. (As James Madison discussed in *Federalist* No. 47.)

Unfortunately, the wishy-washy language of the statute has contributed to the court's abdication of responsibility under the independent counsel law. The statute fails to spell out even the most basic duties of the three-judge panel. It also fails to explain how the court is supposed to carry out those duties that are listed in the statute. In reforming the independent counsel law, Congress must face and resolve this fundamental question: Is the special court the monitor of the special prosecutor, or is no branch of government the monitor? Does the court have a role after the independent counsel is appointed, or none at all? If the latter, the statute must be junked as patently unconstitutional, since no branch of government is minding the store. If the former is true (as Congress in the 1970's seems to have intended), Congress must carefully spell out the courts' powers and responsibilities in painstaking detail, or the judiciary will continue to bury its head in the sand.

It is not necessary to broaden the powers of the special court in order to make it operate properly. Rather, its duties must be spelled out more clearly so that it is empowered to carry out the functions that Congress has already given it, and that the Supreme Court has already affirmed. At least three adjustments are essential to make the special court more effective.

(A) Authorize the Special Court to Consult With the Attorney General in Selecting an Independent Counsel.

Some observers have questioned the secretive nature of the appointive process, and the political overtones of that process. Some would change the system to allow the President to nominate five or ten potential independent counsels, to be confirmed by the Senate. From this list the special court would then be required to select its appointee.

But such efforts to squeeze every drop of political influence from the selection process are impractical and yield undesirable results. The prospect of allowing the President himself to appoint an independent counsel defeats the whole purpose of the statute. It heightens the public perception that the decks are being stacked from the start. President Ford submitted such a proposal in 1976, and Congress definitively rejected it in the form of S. 495. Moreover, few lawyers of the caliber sought for high-profile special prosecutor investigations will commit to being considered for such a position until they know the precise circumstances, the timing, and all of the nuances of the case. The better approach is to allow the special judicial panel to choose the independent counsel as it sees fit, but to amend Section 593(b) to specifically authorize the court to consult with the attorney general in making its selection.

As drafted, Section 593(b) sets no real ground rules for the selection process. The special panel simply gathers recommendations from a wide variety of sources and makes its decision. Such an informal process is perhaps inevitable. However, the statute should build in an ounce of prevention by specifically authorizing the three-judge panel to obtain input from the attorney general before making its selection. First, this will help to ensure that an individual *perceived* to be biased against the President or other target will not become the court's appointee. Since the purpose of the statute is to select an independent counsel who is perceived to be independent by all concerned, it can only enhance that goal if the attorney general is permitted to raise red flags with respect to potential special prosecutors who may be viewed as politically tainted. Congress in the 1970's built the Independent Counsel Statute so that the special court and the attorney general would be in a position to cautiously interact. That was a healthy thing. The attorney general is meant to provide

input at appropriate stages under the statute. The critical appointment decision is one of those stages. Ultimately, the special court must (and will) decide whom to appoint, unconstrained by political shackles. Yet this decision should be informed by the same relevant facts that the attorney general would have at her disposal in seeking to select an unbiased appointee.

Congress should make explicit the special court's authority to consult with the attorney general in making appointments, in order to eliminate any uncertainly on this score.

(B) The Court Should Be Given Express Power to Carry Out its Duties.

A principal reason that the special court has shrunk from accepting any role in keeping the independent counsel law on course is that the statute itself gives scant direction as to how the court is to carry out its duties. Fearful of stepping over the boundary line by interfering with the prosecutorial function, the court has instead elected to remain passive to a point of paralysis. If the court is going to perform its statutory duties in a responsible fashion, it is essential that the three-judge panel have a means by which it can gather information, hold limited (if necessary, closed-door) proceedings, and otherwise equip itself to carry out the essential role that Congress fashioned for it.

With respect to each specifically enumerated power delegated to the court, from the beginning of an independent counsel investigation to the end, the statute should make explicit what is implicit in Congress's scheme: That the court shall possess the power to gather information, review materials in camera, request written input, convene limited proceedings (where necessary), and otherwise exercise those auxiliary powers that courts routinely rely upon to do their jobs properly. Rather than violate separation of powers, this limited involvement would ensure that the court possessed the tools to do its job competently, and thus protect the institutional interests of all three branches of government.

Second, it is imperative that some sort of comprehensive rules (covering filing practices, service of process, hearings, etc. in the special court) be implemented if all parties are to be treated uniformly and fairly in proceedings before that tribunal. At present, much of the interaction among independent counsel, the special court and the attorney general seems to be based upon *ad hoc, ex parte* contacts. To correct this flaw in the statute, Congress should authorize the Supreme Court, pursuant to its rule-making power, to establish rules and standards for the special court such that the ground rules for all litigants are clear and even-handed.

If the special court is to have some role to play (however limited) in keeping the independent counsel's investigation on track, the rules governing this secretive panel must be spelled out on paper—like the rules governing any other judicial body.

3. The Court Should Be Granted the Power to Replace an Independent Counsel Under Certain Circumstances.

The statute never addresses whether the special court is empowered to replace one independent counsel with another, subsequent to appointment. It is thus wise for Congress to insert a provision into Section 596, specifically authorizing the court to relieve an independent counsel and substitute a different individual in his or her place, in the unusual event that the court concludes that the person originally appointed for the task is no longer capable of remaining (or appearing to remain) objective and neutral.

The legislative history makes clear that the hallmark of the independent counsel law was to foster public trust in the American system of government, by replacing the attorney general with a dispassionate outsider in certain high-profile cases. To the extent that this schema is frustrated by the appointment of a prosecutor who turns out to be biased in fact or in perception, the statute becomes a greater burden on the system than a benefit.

In every politically-charged investigation, there will inevitably be impassioned and recurrent allegations that the independent counsel is "out to get the President" or other target. This alone should not justify a "substitution." At the same time, in extreme cases the court should retain the power to assess, after receiving input from the attorney general, whether bias or the appearance thereof have crippled the particular independent counsel and rendered him or her incapable of continuing in the position. The beauty of the independent counsel law is that it enables the judiciary to select from a pool of thousands of distinguished lawyers, from across the expanse of the United States, in order to choose the very best person—a 100 percent neutral individual—suited for the sensitive contours of the particular case. Section 596 of the statute should be amended to facilitate that goal, by allowing the court to reassess and adjust its selection along the way, in the unusual event that neutrality de-

teriorates, or the appearance of perceived bias undermines the public trust in the process.

IV. CONCLUSION.

There is no magical solution to resolving the defects within the folds of the Independent Counsel Statute that have become so glaring in recent years. It is perhaps easy and tempting to scrap the statute. Yet the American society has become accustomed to, and reliant upon, special prosecutors. They will not disappear regardless of which course Congress chooses. If the Independent Counsel Statute is simply allowed to expire in 1999, the Justice Department will necessarily revert to more *ad hoc* appointments of special prosecutors, and the public will demand more congressional appointments of special investigators, whenever allegations of serious misconduct in the Executive Branch arise.

In the wake of the Lewinsky affair, public trust in the American system of government has been seriously damaged, no less than it was after Watergate. Restoring that trust will not be accomplished by an abrupt return to the pre-Watergate system that caused the breach of public faith in the first instance.

It is far more prudent to maintain some statutory mechanism, with an established set of ground rules, than return to a hit-or-miss approach that depends upon the vagaries of politics to guard against conflicts within the Executive Branch. There are (admittedly) different ways to construct such a mechanism. Establishing a statutory scheme by which independent counsels are appointed by the President with the advice and consent of the Senate is one approach—but this is subject to the obvious criticism that the President will "stack the decks" from the start. Another approach is to vest the power to investigate high-level executive officials in the Executive Branch itself, and build a "Chinese wall" around that operation. However, such an arrangement leads full-circle to the Watergate dilemma—the President can terminate the special prosecutor at will, creating the prospect of another "Saturday Night Massacre" which led to the adoption of the statute in the first place. A third option is to create a *permanent* special prosecutor's office, within the Justice Department or within a special agency. But this would institutionalize the position of independent counsel, and create a breed of professional bureaucrat-prosecutors whose sole mission in life (and justification for existence) was to sniff out scandal and get an occasional politician convicted. This would trivialize the statute and exacerbate its potential for fomenting political mischief. The present statutory model, which combines limited control by the Justice Department with ministerial oversight by a special judicial panel, may not be perfect. But it is better than any other system that has yet been invented.

The framework is sound. It has been hammered out through 20 years of hard work in Congress. It is an unfortunate waste of legislative ingenuity to throw away the fruits of that labor, simply because the statute has proven itself flawed. The more productive approach is to radically overhaul the statute so that it accomplishes precisely what Congress intends it to accomplish.

The major reforms outlined above would achieve that result.

The Independent Counsel Statute should be reserved for those extreme crises in American government—such as Watergate, Teapot Dome, and a handful of others—that require a failsafe mechanism to deal with percolating crises in government. The statute would be constrained in this fashion by re-tooling the triggering mechanism; sharply narrowing the category of individuals and offenses covered; reining in the special prosecutor and controlling his or her jurisdiction; restoring more power to the Justice Department; and spelling out the special courts' duties so that it could intelligently monitor cases. The statute would thus become a back-up mechanism, to deal with the infrequent case in which a) serious allegations of criminal wrongdoing at the top of the Executive Branch surfaced; b) those charges were well-developed; and c) a presumption was met that the Executive Branch would not be capable of conducting a fair and neutral investigation of itself. Independent counsels, under the plan outlined above, would become a rare species, rather than a common group of dinner guests in Washington.

I agree with those witnesses who have suggested, in testifying before this Committee, that the statute should be permitted to lapse in 1999. It is far better for this statute to expire temporarily, than for Congress to rush to meet deadlines after a draining impeachment proceeding, and thus create problems of the past anew. Without dramatic changes in the statute of the sort outlined above, few individuals worth attracting to public office—Presidents, Vice Presidents, cabinet officers, or hundreds of other public servants—will be willing to endure public service in the next century. That should give us great pause.

At the same time, without some device in place to deal with extreme crises that threaten the trust of the American public in their system of government, all of the

well-intentioned explanations in the world will not convince the American citizenry that the process is operating fairly, when a serious scandal next strikes the Executive Branch. That prospect should also cause members of this Committee concern.

Burying the statute will not eliminate the need for it. It is better to build on experience, and become toughened by crises weathered in the past, than to tear down the safeguards constructed by American history and presume that they will not be needed in the future.

It is easy enough to let the statute expire. The greater challenge is to determine, through hard work, how to make the independent counsel law accomplish the laudable purposes for which Congress originally constructed it. Through the wisdom reposed in this representative body, it is possible to accomplish that end for the good of the American democratic experiment.

Thank you for the privilege of testifying before this Committee, on a matter of such great national importance.

Chairman THOMPSON. Thank you very much.

Listening to you, it occurs to me that the issue is well-joined and we frame it in terms of accountability versus credibility but credibility to me really gets down to the basic philosophical question of the extent to which we think that government can fix complex political situations and whether or not we can continue to make changes to the Act with ever increasing levels of perfection, until we reach Nirvana some day. I guess it reminds me of somebody's description of a second marriage is the triumph of hope over experience.

Mr. DASH. Mr. Chairman, may I respond somewhat to that?

I do not think that you can tinker with machinery over and over again and get what everybody will be happy with as an independent prosecutor, who everybody will love. The history of the legislation is that most people, including both parties, pretty much liked the Independent Counsel at the beginning—all those 12 in the beginning, who have made an investigation and did not bring prosecutions.

Remember when two separate Independent Counsel found no prosecution should be brought against former Attorney General Edmond Meese. If this had been a Special Prosecutor appointed by the Attorney General the editorials and the headlines would be white-wash. But an independent lawyer did a careful investigation and concluded that is the underlying basis for the public confidence.

Now, it is true that because of the emotional nature of the Monica Lewinsky investigation, Ken Starr is not a popular figure with the public. You do not say that the public has great confidence in him.

But what I would also argue is that the public has much less confidence that Attorney General Reno could do this and I just want to give one example.

Bob Fiske—who I believe is one of the finest prosecutors in this country, a man of great integrity and great qualification and experience, and my colleague, Julie O'Sullivan, worked aggressively for him—he was appointed Regulatory Special Prosecutor because the statute had lapsed.

And almost anything he should have done should have had the credibility of an independent prosecutor and then Kenneth Starr was appointed as Independent Counsel when the statute was reauthorized.

The point I want to make is that Bob Fiske made a thorough, careful investigation of the death of Vincent Foster and filed a report to Congress. He was blasted for being not hard-working enough and trying to be partial in protecting the White House. That same investigation had to be redone and I agree with Walsh—it is a shame that you have to redo these things—but an Independent Counsel, Ken Starr at that time, made the same investigation and issued a report agreeing with Fiske and it was generally accepted by everybody except there are some——

Chairman THOMPSON. Well, he got blasted a little from——

Mr. DASH. Well, by some of the conspirator theorists who will always blast him but not the same as Fiske.

And this is not to mean that Fiske——

Chairman THOMPSON. Let me jump in here a little bit. It looks to me like you could make a case for the contrary based on your hypothetical. If, given that somebody is going to be criticized, everybody is going to be criticized all the time from one side or the other, but if there had been no Independent Counsel situation brought into play, an Attorney General could have stuck with a guy like Fiske and would not have had to give it to a three-judge court. She could have made the decision herself and said he is receiving criticism but everybody who knows anything about the situation knows the guy is of the highest integrity and he is credible and stick with him.

Mr. DASH. I agree.

Chairman THOMPSON. I think you have got to assume criticism all the way around but does it not depend to a certain extent on Attorney General's appointment? Does it not ultimately depend to a great extent on who the appointee is? Have we gotten so cynical in this country so that no matter who is brought in that if they come up with the wrong decision that not only is the other political party going to blast them, which is always going to happen, but the American people have no confidence in him?

Mr. DASH. I would like to answer it this way. I have no doubt that if there had been no reauthorization of the Independent Counsel and Robert Fiske was the Regulatory Special Prosecutor in Whitewater and also if he was made aware of the Monica Lewinsky matter, Robert Fiske would have done a thorough, aggressive, Federal prosecution job and he would evoke the same reaction from the White House and the same tear-down manner and the pressure on the Attorney General to rope him in.

And the difference is not the quality of the individual but the——

Chairman THOMPSON. But how could the White House attack him if Janet Reno had appointed him?

Mr. DASH. Well, that would not be difficult for them.

Mr. GORMLEY. That is exactly what Richard Nixon did to Cox.

Chairman THOMPSON. Sure.

Ms. O'SULLIVAN. And he suffered the consequences.

Senator LEVIN. Look what happened——

Ms. O'SULLIVAN. Yes, and this is not——

Mr. DASH. No. But what happened by the way is——

Chairman THOMPSON. That is another——

Mr. DASH [continuing]. What happened was that Jaworski was appointed. That is not a lesson to follow. Because President Nixon

was not about to appoint a new Special Prosecutor. He thought the investigation was over and it is the fact—and as you well know, Mr. Chairman—that publicity that the Senate Watergate Committee gave out that summer so outraged the American people that they, in millions of protests, forced the hand of the President to appoint one.

We cannot rely on that happening again. There are lots of situations where both the media coverage and the investigation coverage does not get that articulated to the public so that they know they have got to talk back.

Chairman THOMPSON. Well, let us broaden this thing up just a little bit in my time. This is going to be great.

Mr. Dash, you and Professor Gormley, both of you, in fact, all three of you, that if you have an Independent Counsel, the Attorney General should be given more authority upfront. But it looks to me like Professor Gormley and Professor Dash, your approach keeping the Independent Counsel and yet giving the Attorney General more authority is in some way the worst of both worlds.

I mean you know what my pet peeve in all this is, in terms of current circumstances and that is that, as has been pointed out, we cannot do anything about the Attorney General's fundamental discretionary authority as to what she does.

Now, you are saying not only are we going to give her the discretionary authority she has to interpret whether or not she should go forward, but we are going to give her additional investigative powers so that if she is of ill-will—which all of this is based upon the possibility that he or she in the future would be of ill-will—she has a chance to mess up the investigation on the front-end before it is ever turned over to anybody.

Mr. DASH. Yes. That is the theory of the statute that limited——

Chairman THOMPSON. Well, I do not think that is the theory of the statute.

Mr. DASH. No. The theory of statute that limited her power was exactly as you said.

Chairman THOMPSON. Yes.

Mr. DASH. And the only reason I am recommending not a broader authority but some authority to conduct the investigation, like subpoena, is that in *Morrison v. Olson,* I think that it was recognized that the constitutionality of the statute depends on the active role of the Attorney General.

Chairman THOMPSON. Mr. Gormley, jump in there on that one, if you would?

Mr. GORMLEY. Yes. I believe, Senator Thompson, that the only way this statute makes sense is if it is reserved for big deals when the evidence is fairly well developed. It does require, incidentally, political pressure to be brought to bear on the Attorney General and on the Justice Department.

So, you are right—if an Attorney General is bent on thwarting something, under my system that could happen in certain investigations. But the idea of not having an Independent Counsel at all, and having my system in place, is really the same . . . except we have a backup fail-safe mechanism in mine—a system in place—to deal with it. The political pressure still has to force this Attorney

General, if she or he decides just to ignore the rules, to go forward. There is no question about that.

Chairman THOMPSON. Professor O'Sullivan has an idea here that I think is very interesting and as I understand it, Professor, you are essentially saying she has the discretion anyway, fundamentally. So, why not give her the responsibility and focus the attention on her?

You articulated what one of my concerns has been. And I have not been able to put it in very good words. But what we have seen is we have been getting caught up in the technicalities of the wording of the Independent Counsel Statute. And the Attorney General is allowed to come forth and say, well, A, B, C, and X, Y, Z, which nobody understands and her interpretation of how all that interrelates and how it does not apply or does apply, and avoid the obvious conflict of interest.

So, as I understand what you are saying is get rid of all of that. And say, OK, it is in your lap, you have total discretion and if you want to withstand an obvious conflict of interest, at least, the American people will see it and understand it.

Ms. O'SULLIVAN. Right.

Chairman THOMPSON. And, therefore, you have accountability.

You sacrifice, of course, some independence, some would say credibility, but thereby you would have more accountability. Am I articulating that correctly?

Ms. O'SULLIVAN. That is exactly right because the only guarantee for an Attorney General actually appointing an Independent Counsel, whether statutory or regulatory, is political pressure. The statute gives her technical requisites behind which she can hide or he can hide—I do not want to target anyone here. Assuming that an Attorney General is saying I am not going to do this because I do not believe this particular portion of the triggering mechanism has been met, that is really not the question.

Chairman THOMPSON. And the American people and some in the press and some members may be saying, well, maybe we are not qualified, we are not lawyers, we are not qualified to second-guess——

Ms. O'SULLIVAN. Right.

Chairman THOMPSON [continuing]. Her interpretation of this arcane——

Ms. O'SULLIVAN. That has been my reaction when I have been asked about it. I do not know about the facts, the law and, frankly, I am not——

Chairman THOMPSON. But if you would say that then I would imagine that a few million other people think it, too.

Ms. O'SULLIVAN. Mr. Chairman, if I could just add one thing to something you said before. I do think it is important to recognize that I am not being a complete cynic. I do not believe that the political dynamic will permit partisans to rip down every individual who takes this job. I do think that the Attorney General or the special division can influence the credibility of the result by the person they select.

And, frankly, while I will concede that Bob Fiske would have been subject to the same kind of dynamic and I am really not trying to take a shot at Judge Starr here, but I think a lot of people

who accept his good intentions also say he had something of a political tin ear in certain situations and he has made some judgments that have played into giving people ammunition with which to attack him and I am not sure that Fiske would have done that. So, we will not know.

Chairman THOMPSON. Well, I do think it is very difficult to judge someone's political tin ear in advance.

Ms. O'SULLIVAN. Yes.

Chairman THOMPSON. And no one has ever——

Ms. O'SULLIVAN. That is right, it is a matter of luck.

Chairman THOMPSON. Sometimes they get to the Senate and still do not have much of an ear. [Laughter.]

But no one has ever had experience in doing what these Independent Counsels now adays are called upon to do.

Ms. O'SULLIVAN. Because all these individuals are incredibly—you can look at Bob Fiske's credentials, you look at Ken Starr's credentials, and you look at Judge Walsh's credentials, you could not find better people.

Chairman THOMPSON. Sure. Senator Levin.

Senator LEVIN. Thank you, Mr. Chairman.

I am coming from the position of someone who supports the principle of this statute, has supported it, feels that there is a need for some additional element of independence in certain circumstances in order to give the public confidence that the investigation is, in fact, an objective one when there are serious allegations of wrongdoing against high-level officials. That is my starting point.

Each time we have reauthorized this statute we have tried to tighten it. There were restrictions on the powers of Independent Counsel that were written-in right at the beginning. I do not think those restrictions have succeeded.

I believe that, for instance, that Judge Starr exceeded the powers that were intended in that law in many ways, powers that were relied upon by the Supreme Court in the *Morrison* case as being essential for the law's constitutionality.

That is where I am coming from and, so, I am trying to figure out whether we can save the concept of this statute. Can we write-in greater protections against excess, or do we have to look for a different mechanism?

But I am very much open to trying to find those ways to preserve the principle, the core principle of this statute, if I think we can do it in a way which works. I just do not think that the mechanisms that we put in here to prevent excess, a prosecutor who has no limit basically on funding or personnel, have worked.

Now, one of the limits on the jurisdiction of the Independent Counsel that the *Morrison* case relied upon was that the Independent Counsel's office is limited in jurisdiction. The Court said, "And an Independent Counsel can only act within the scope of the jurisdiction that has been granted by the special division pursuant to a request of the Attorney General." It is a limit. It is a restriction. And then the Court said also the jurisdiction of the Independent Counsel is defined with reference to the facts submitted by the Attorney General.

So, that is the limit on the jurisdiction. But I am interested in how this has worked in practice and, so, Mr. Dash, I want to ask

you the first question to see how this did work in practice about what happened in January 1998, when Linda Tripp contacted the Starr office about the Jones matter.

There was no jurisdiction at that point to look into the Paula Jones matter that I know of. In fact, they went to——

Mr. DASH. Not in the Jones matter, Senator Levin.

Senator LEVIN. In fact, there was a request to the Court in order to get jurisdiction. And the Attorney General went to the Court. But without jurisdiction, at that point, we had the Independent Counsel grant immunity to Linda Tripp, there was an actual grant of immunity, as I understand it, to Linda Tripp, although there was no jurisdiction at that point that the Court had granted or that the Attorney General had granted to look into the Jones/Lewinsky matter.

That is a pretty serious exercise of prosecutorial discretion to grant immunity. And also to use electronic surveillance with Linda Tripp, without a Court or an Attorney General grant of jurisdiction. That came later.

And, so, my first question to you is, Mr. Dash, how, without a grant of jurisdiction, through either the Court or the Attorney General, could at that time those prosecutorial tools have been used: The granting of immunity and the use of electronic eavesdropping?

Mr. DASH. Unfortunately, I am going to say and I can spell it out, that the statute permits this. It is one of the areas that I strongly recommend amendment. You are quite right that the Supreme Court emphasized the narrowness of the jurisdiction that is handed down by the application of the Attorney General and the mandate from the special division.

But in the statute, it says: Or any related matter. And related matter has been so broadened so that Kenneth Starr, who initially was mandated to the narrow investigation of Whitewater which became Madison Bank fraud, to a slew of other things because of relatedness. And I would suggest that there be no expansion of jurisdiction unless the additional investigation is absolutely essential to carry out the primary mandate.

Senator LEVIN. Was that relatedness not approved by the Attorney General?

Mr. DASH. No. Actually the statute permits an Independent Counsel to make that decision but most Independent Counsel, including Starr, have tried to get the Attorney General to second-guess it or the special division. But the statute permits today, which I would disagree with, that the Independent Counsel who makes a conclusion that this branch of an investigation is related to that, he can then embark on it.

And what I would recommend, as I did in my statement, is that no such expansion can be made until the Attorney General approves it but not only approves it, but finds that it is essential to carry out his original mandate.

Now, on the facts of that case, however one looks at it, the Linda Tripp information revealed that Vernon Jordan had been used in order to provide some help to Monica Lewinsky.

There was an ongoing investigation under Ken Starr's jurisdiction of Web Hubbell. And part of that investigation had to do with certain jobs or other things done for Web Hubbell in which Vernon

Jordan had been utilized. And the tie-in between Vernon Jordan being sent to Monica Lewinsky and Vernon Jordan being sent to help Web Hubbell started a relatedness under the statute.

And what I think Ken Starr did is before going to the Attorney General, this was informer information that was not necessarily reliable, through Linda Tripp, that he wanted to corroborate it. And he did corroborate it within the powers of a prosecutor, that the Supreme Court has upheld.

Wiring people to get information from a target has been upheld by the Supreme Court and is standard operating procedures by Federal prosecutors every day.

Now, the important thing though is that when he saw what he had—and I think this has been completely mis-stated in the press—he sent his deputy to the Deputy Attorney General Eric Holder and I have read the notes of that meeting and it goes something like: This is a messy thing. We do not believe we may have jurisdiction over it. But somebody has got to investigate. Would the Attorney General like to take it over?

And they sent Assistant Prosecutors from the Department of Justice to listen to the Linda Tripp tapes and when they reported back to Janet Reno she said, it has to be investigated, but not us. And I think she was right. How could she? And she gave it to Starr.

Should she have given it to another Independent Counsel? Maybe. All I am saying is that the disfavor that has developed from how Starr got this investigation in the first place has been distorted to some extent. I think he believed he was acting within the statute and he did go to the Attorney General and, rightly or wrongly, the Attorney General told him to do it.

Senator LEVIN. The Attorney General went to Court and sought expansion of the jurisdiction.

Mr. DASH. Yes.

Senator LEVIN. So, that the Attorney General never determined that this was related.

Mr. DASH. Correct, sir.

Senator LEVIN. All right. But Starr decided.

Mr. DASH. No. Starr even told the Attorney General when he went to them——

Senator LEVIN. Before he went, when he wired Tripp, and when he granted her immunity he did that under a theory that it was related in some way, yet the Attorney General decided it was not related, and sought expansion. Just quickly, because of time, is that not accurate?

Mr. DASH. Yes, it is accurate. But by then when he went to the Attorney General he, too, had taken the position that it was not related. It was the narrow issue of Web Hubbell that he thought made it related.

Senator LEVIN. Did he seek the Attorney General's approval of his taking jurisdiction in this matter?

Mr. DASH. Ultimately, yes.

Senator LEVIN. He did seek the approval of the Attorney General?

Mr. DASH. No. Well, he went to the Attorney General.

Senator LEVIN. To seek approval——

Mr. DASH. He did not ask it. No, he did not—the notes of that meeting do not demonstrate that Kenneth Starr sought approval of his taking it over. He sought to report to her, tell her that he did not think that he had jurisdiction and that maybe she would want to take it over.

Senator LEVIN. To wind this one question up, though, he did send a letter seeking jurisdiction based on the relatedness, did he not?

Mr. DASH. I do not know the actual language of the letter but at the time that that letter was sent it had to do with already all this review by the Attorney General and the decision that it would be assigned to him.

Senator LEVIN. All right. What you are saying is that you believe under the current statute that the Independent Counsel had the authority to grant immunity and to use electronic surveillance relative to Linda Tripp, under the current statute?

Mr. DASH. Yes.

Senator LEVIN. Because he believed that this fell within his jurisdiction?

Mr. DASH. Yes.

Senator LEVIN. All right, but he still, after he——

Mr. DASH. Not fell within his original jurisdiction but was related to the original jurisdiction.

Senator LEVIN. Yes. But he still, after he did that, then he went to the Attorney General to seek approval of jurisdiction, is that correct?

Mr. DASH. Yes.

Senator LEVIN. Now, one of the issues—my time is up.

Chairman THOMPSON. Go ahead.

Senator LEVIN. Another issue of concern has to do with the appearance of conflicts. Whether or not we should, if we are going to continue this statute, write-in a provision relative to the conflict or the appearance of conflict that Independent Counsel might have. And that issue has come up with Mr. Starr because of his conversations with Ms. Jones' counsel about the civil action in——

Chairman THOMPSON. Excuse me, Senator, that is a different subject. I do not want to prejudice my friend over here. We have time to cover it in a moment.

Senator LEVIN. That is fine.

Chairman THOMPSON. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

I do not want to spend a great deal of time on the expansion of Judge Starr's jurisdiction but I do believe that the application that the Attorney General filed with the Court was inadequate, and I questioned her last week about this subject, stated that Judge Starr had been investigating witnesses, in the plural, beyond Webster Hubbell, or at least on the face of it. And she declined to answer, saying it was a pending matter and we are going to have to pursue that further.

I said on the record last week that I did not see how that could be construed a pending matter. But it was not answered by Attorney General Reno.

But on the face of her application it was, as you have related, Professor Dash, an overlap on an individual getting Ms. Lewinsky

a job with the same company in New York who had gotten a job for former Associate Attorney General Webster Hubbell.

The really critical issue it seemed to me was the lack of wisdom in expanding Judge Starr's jurisdiction in the face of what had happened and the public perception, rightly or wrongly, of a vendetta after such a long investigation on Whitewater and Travelgate and Filegate, etc.

And I do believe, I concur with Senator Levin that we ought to retain the Independent Counsel Statute but we ought to narrow expansion of jurisdiction.

Professor Dash, on the issue as to how Judge Starr handled the investigation and his relations with the press, and I appreciate the contacts that you and I have had on an informal basis over the course of the time you served with him, and I also appreciate the informal contacts we have had going back to 1955, when you were District Attorney of Philadelphia, and I complement you on a very distinguished career. But it seems to me that there is a lesson to be learned from Judge Starr to speak directly to the press and to tell the press what is happening on an ongoing basis.

His expanded jurisdiction has never really been understood, although there was an exchange on the Senate floor back on January 27, 1998, shortly after his jurisdiction was expanded. And you and I talked about the long delays that he had had on many matters such as the prosecution of Governor Jim Guy Tucker and the need for Independent Counsel to speak out.

I think as a generalization, the prosecutor has to be very, very circumspect on what he says. But when he is under attack for having an expensive long-term investigation there is justification for commenting to the press.

With respect to the provision of law on referrals to Congress, my sense is that we, or the House of Representatives on impeachment proceedings, my sense is that we ought to change that because it is an invitation for the House of Representatives not to conduct its own investigation. I would be interested in hearing from you with more particularity, why you think Judge Starr exceeded the bounds of propriety which led to your resignation?

Mr. DASH. Yes, Senator Specter.

I do want to emphasize that this was a singular disagreement and it was on principle. But in my letter of resignation I said what I have said before this Committee that he conducted himself in accordance with law and ethics, particularly as a Federal prosecutor. So, I was not criticizing the conduct of his investigation.

But when it got to this very special provision, Section 595(c) of the statute, which mandates an Independent Counsel to provide credible and substantial information to the House of Representatives that may constitute grounds for impeachment, it was my view, and I believe it is a correct view, that the only thing that provision tells the Independent Counsel is he is a forwarder of information.

I did not care that if, in forwarding that information, he even became somewhat of an advocate on the issues of the crimes that were committed. That is what a prosecutor does. But the one thing that the Constitution and the statute does not give him the right

to do is take that next step and become the advocate for impeachment.

There is nothing in his report and referral to the House that argues that perjury or obstruction of justice in the context of this investigation amounts to high crimes and misdemeanors and, therefore, the President can be impeached. That is out of the report, it is not in it, and I played a role in keeping that out of the report.

But when he is invited by the House Judiciary Committee to come in and play the role of counsel for the House Judiciary Committee and take that next step interpreting whether perjury in that context, in fact, is an impeachable offense, that is not the role of the Independent Counsel.

He endangers the statute, he intrudes on a constitutional sole power of impeachment of the House——

Senator SPECTER. I understand your point.

Mr. DASH. And I presented that to him when I got the draft of what he was going to say——

Senator SPECTER. Professor Dash, I have one more question that I want all three of you to answer.

I want to come back to a central problem that I have that you heard me talk to Judge Walsh about and that is when there is a disagreement on such sharp terms as we have had with the Attorney General on not appointing Independent Counsel and coming to the idea of the mandamus and I know all three of you were in the room when I described this special provision as to standing and the problems as to having mandamus, although three District Courts did order it, the Circuit Courts reversed on lack of standing and on the constitutional issue.

And it is very, very frustrating. We are still stewing, frankly, about what is happening now with the China matter. And the China matter has proliferated into other dimensions. And we do not know why major participants have not been indicted.

We do not know what is happening with cases where counts have been dismissed and every time we seek to have oversight, even in camera, even in secret, we are rebuffed at our efforts to do that. So, we are searching for a way to have an Independent Counsel Statute, if we are to have one, which works, and which does not give carte blanche discretion to the Attorney General if she says there is to be no Independent Counsel.

And there are precedents for having court-appointed counsel if the prosecutor fails or refuses to act under some circumstances on flagrant abuse of discretion. And, of course, the appointment of Independent Counsel is lesser than ordering a prosecution.

Let me start with, and let me compliment you, Professor O'Sullivan, on your outstanding record. You have a terrific curriculum vitae. We really ought to get you over here to help the Committee in more ways instead of leaving you in law schools, as we got Sam Dash to do in the byg1 years and also Professor Gormley, the authorship of that important book.

Would you have any suggestion, Professor O'Sullivan, as to how we might have a referee come in where committees feel as strongly as this Committee and Judiciary feel about finding some way to get Independent Counsel appointed?

Ms. O'SULLIVAN. Unfortunately, Senator, I do believe that under *Morrison,* an effort to have a mandamus provision that permits Congress essentially to seek to mandamus the appointment of an Independent Counsel would, in all likelihood, be found unconstitutional as a separation of powers problem.

If political pressure does not work, which normally would be the first line of attack——

Senator SPECTER. It has not.

Ms. O'SULLIVAN. Right, and oversight hearings do not help, which they——

Senator SPECTER. They have not.

Ms. O'SULLIVAN [continuing]. Have not. I am not making any suggestion because I am already on the record here as having said that I do not take a position on whether the Attorney General should have referred the fundraising controversy to an Independent Counsel. But what the Framers contemplated as the ultimate check in this situation was impeachment. If you view an executive officer as not doing his or her job, you should impeach him or her.

Senator SPECTER. Well, that is hardly an answer when the appointing authority is the one to be investigated. It is unlikely that President Clinton would appoint anybody more sympathetic. The yellow light is on so let me turn to you, Professor Gormley.

Would you have an idea, given your experience in the field, as to how we might do this constitutionally

Mr. GORMLEY. I am not sure I can be of much more help, Senator Specter. I agree with Professor O'Sullivan. It would most likely be unconstitutional under the separation of powers doctrine if you were able to literally mandamus the Attorney General. I do think that one of the problems you are seeing here is the wishy-washy language of the statute.

I think that, technically, you could put almost any of these investigations under the Independent Counsel law as currently drafted and trigger it. I think what we are seeing is the Attorney General recoiling, in a sense, because of so much political heat and so much controversy over the statute.

Certainly, one could take the China matter or the campaign finance matter and make a credible argument that it does justifiably trigger the statute as configured. That is one of the big problems with it.

You know, I think the only recourse is for Congress, itself, to conduct an investigation, I suppose. That is what happened in Teapot Dome. And that is the kind of political pressure that continues to force the Executive Branch to do what you believe it should do.

Senator SPECTER. Well, we had three District Courts grant mandamus. This issue was not faced in a head-on way and we have the courts under Article III making many decisions on separation of power and it might be having the Court order—the Court orders the Executive to do a great many things which are Executive functions, under a variety of circumstances to order the Attorney General. Maybe that would salvage its constitutionality.

If you have any new ideas, keep us posted.

Ms. O'SULLIVAN. Well, I think the problem here is not necessarily—well, it may be in part the Judiciary forcing the Executive to do purely Executive functions such as initiate a criminal pro-

ceeding. But more troubling might be the fact that it is Congress forcing the Judiciary to do it.

So, it is not just the Judiciary reaching in and interfering with the Executive function, it may also be perceived to be Congress encroaching on the Executive.

Senator SPECTER. Thank you very much.

Chairman THOMPSON. And we have problem enough with standing. I guess a private citizen would have even more of a problem with that I suppose.

I have a question for each of you, if I may.

Professor Gormley, you have discussed section 595(c). In your statement you said, this section forces the Independent Counsel to wear two incompatible hats. One is a detached criminal prosecutor hired to conduct a neutral criminal investigation on behalf of the Executive Branch, and the other as a pre-impeachment deputy for the House of Representatives, gathering evidence that may be relevant to Congress' impeachment work.

The latter job inevitably clashes with the prosecutor's ability to handle his or her criminal case in a responsible fashion. I get it that you think that the problem that Professor Dash was talking about with Ken Starr is in some ways inherent in the statute. That it creates a conflict situation within his duties. Frankly, I do not know how you report on a possible impeachable offense without explaining why you think that it is an impeachable offense.

But am I characterizing your analysis correctly

Mr. GORMLEY. Yes. I understand. It is a good question. I do think that a big part of the problem is with the statute. I think that by dictating that the Independent Counsel must turn over information relating to, substantial and credible information relating to impeachment, he or she has to come up with something. That is a problem.

However, I understand also Professor Dash's line of distinction there, because I think that when the Independent Counsel starts arguing in favor of impeachment, that is slightly over the line.

And, in fact, in Watergate you may remember that Leon Jaworski sent his report to the Judiciary Committee and it was kind of a roadmap and carefully took pains not to take positions with respect to impeachment——

Chairman THOMPSON. That was before the Independent Counsel Act.

Mr. GORMLEY. Yes. But I think it was done for the same reason that a present Independent Counsel does not want to be encroaching upon the territory of——

Chairman THOMPSON. The Independent Counsel Act gives the Independent Counsel an affirmative duty.

Mr. GORMLEY. Yes, absolutely. It is a problem. Let me just say that one of the interesting things in working on some of this research was to look at the past Independent Counsel investigations including Judge Walsh's, Cox's, and Jaworski's. They all stayed as far away from you all—Congress—as they could. Because they did not want you to destroy their cases.

One of the problems with that provision is that it almost forces them into a position that they are jeopardizing their criminal cases. So, I agree that it is, indeed, a problem with the statute.

Chairman THOMPSON. Thank you very much.

Sam, let me take you back a few years.

Let us talk about Congress' role in all of this. You certainly have a unique perspective on that and we share a lot of mutual experiences along those lines from the old Watergate days.

One of the things I have wondered about is Congress' role in all of this. And I think Professor O'Sullivan rightfully puts it back in our lap. I mean we do a lot of talking but ultimately we have certain powers: The power of the purse, the power of appointment, power of impeachment, all those things we can do if we choose to exercise them.

Part of this also has to do with Congressional oversight. Judge Walsh had criticism, of course, back when Congress was investigating that matter, about the granting of immunity. I wonder sometimes whether or not that has changed—whether or not Congress, in today's environment, can carry out the traditional role of oversight, investigative oversight as they have in the past because of perhaps increased partisanship that we have, increased media coverage, increased television media coverage. The demand for new stories every day, the lack of ability to build a complex story.

Then you get into the actual workings of the problem that has come about since the Iran-Contra matter and that is Congress is giving immunity much more dangerous now than probably we thought it was back on the Watergate Committee. It has proven to be much more dangerous. The courts have been much more strict on that than I ever thought that they would be.

So, it leaves me to wonder—we have the responsibility and we must try it—but I am wondering whether or not for all those reasons that Congress is going to have to come up with some new ways of doing things or new tools or something in the current environment to carry out its responsibility whether it is to be to oversee the Attorney General—the Attorney General claims that she gets blamed for whatever she does, but, of course, if we raise a question about what I believe to be the most egregious conduct and decisions with regard to the Justice Department we are playing politics—so, we are in the same position.

It is a broad question—but what is your view on that?

Mr. DASH. Well, I am glad you gave me the opportunity to speak to this, Mr. Chairman.

I hope you do not change what I believe is the most powerful protections of our democratic government—the oversight powers of Congress in the Executive. I think that as former President Wilson wrote, "Congress, in overseeing the Executive Branch, must look broadly, talk frequently, and have impact on the American people." Because it is the only way to allow the American people to play a part in democracy and they are the ultimate sovereigns.

Independent Counsels, I think, are significant but their role is narrow, they are Federal prosecutors, they are aiming to find evidence of guilt of innocence or a further prosecution.

The difference that I saw and I am sure you saw, Senator Thompson, in Watergate when Archie Cox asked us to close up our investigation because we would interfere with his investigation, it was that his job was separate and our job was separate.

And it was the position that the Watergate Committee took.

Chairman THOMPSON. Well, a lot of people do not remember or maybe even realize that Senator Ervin and Mr. Cox had——

Mr. DASH. Had quite a fight.

Chairman THOMPSON [continuing]. Had quite a fight over that issue.

Mr. DASH. And the positions that Ervin took with the full support of Senator Baker and the other members of that committee was that the important role of the Congress, a Special Select Committee, was to be the spokesman for the public, to report to the public not a narrow criminal issue but a broad issue of scandal and harm to democratic government.

And it seems to me that role must remain with Congress and Congress must have the courage to use it even though they will be sometimes criticized——

Senator AKAKA. Let me interject. I agree with you. But let me interject a practical point.

That is back when you were Chief Counsel and I was Minority Counsel on the Watergate Committee, you could have gotten all the criminal defense lawyers behind that table that you are sitting behind in this town. Now, you could not get them in this room.

And they are all very sophisticated and very knowledgeable and you cannot find a potential witness now days, hardly, that will not exercise their constitutional right to claim the Fifth Amendment. And now we have the dangers of immunity.

Have there been practical impediments placed in Congress' path, you feel, in the last several years from some of these developments?

Mr. DASH. To some extent, I agree with you, Mr. Chairman, that the interpretation by the D.C. Circuit on the extent of the impact of the Congressional immunity on a trial surprised many of us. And it did cause Congress to step back a bit. If you remember in the Whitewater investigation the Committee did the resolution, did the unusual thing for Congress and abdicate and said you will not grant immunity unless the Independent Counsel okayed it. I think that is wrong.

I think that immunity, in any event, ought to be carefully considered by the Congress. And if what they are investigating cannot be judged by them, a paramount importance for the public to know, but it is just they are really exploring, then I do not think they should interfere with, under the new case decision, the prosecutor's immunity power.

But I believe that if the Congressional committee, through its Chairman, concludes that the information they need is essential for the public to have, then damn the prosecution, I think Congress' exploration and report to the people is much more important.

Chairman THOMPSON. Thank you very much.

Professor O'Sullivan, if I might, as I understand it, your preferred outcome would be not authorizing Independent Counsel but going back to the regulatory Independent Counsel?

Ms. O'SULLIVAN. That is right.

In qualifying cases. I think the vast majority of cases can be handled by the Department of Justice or U.S. Attorneys' Offices.

Chairman THOMPSON. Would these changes that you suggest—I think that they were under the assumption perhaps if we kept the current situation.

Ms. O'SULLIVAN. Right.

Chairman THOMPSON. The ending, the reporting requirement or changing that in any way give the Attorney General more—limiting the duties, requiring criminal experience, would you bring all of those changes to the Regulatory Independent Counsel if that is what we wound up with? So, you take not only what we have now—the Regulatory Independent Counsel which gives the Attorney General much greater leeway on the front-end—but you would also adopt these changes? In other words, you are not saying that only in your worst case scenario if you are going to do it, make these changes under current law, but if you take your best case scenario, you would also make these changes under the Regulatory Independent Counsel?

Ms. O'SULLIVAN. Yes. I actually would make further changes. The regulations are very weird. They reflect an earlier iteration of the statute in major part and then there are some 1994 amendments that do not really bring it up to date. It is a very strange regulation in my view and I think that is because it was cobbled together to respond to the problem of a potential invalidation of the statute. In any case, I think they have to be substantially revised. I would not even have a triggering mechanism nor would I have a good cause removal standard.

I am fairly extreme in that respect. I would take out the impeachment referral. There is an impeachment referral provision in the regulations and I would take that out.

Chairman THOMPSON. Limit it to the President?

Ms. O'SULLIVAN. No. It is the same impeachment referral provision that is in the statute. So, that is what I mean about their taking the statute and throwing it into regulations and——

Chairman THOMPSON. And under the regulatory scheme, if we went back to that and just relied on that, would you limit those referrals to just the President as you suggested in your——

Ms. O'SULLIVAN. No. I would probably make it completely discretionary.

There may be instances where——

Chairman THOMPSON. Changes you are laying out here are not necessarily——

Ms. O'SULLIVAN. Those were intended to address the statute if it is reenacted.

Chairman THOMPSON. That is what I was——

Ms. O'SULLIVAN. But I think a lot of them would also relate to the regulations.

Chairman THOMPSON. OK. Senator Levin.

Senator LEVIN. Thank you, Mr. Chairman.

The letter which was written (back to the discussion we had before, Mr. Dash) by the Independent Counsel to the Attorney General on January 15, sought the referral of a related matter. It was not just "we are bringing this information to your attention, what do you want us to do?" The Independent Counsel actually sought referral of the Vernon Jordan matter.

Just for the record, this is a January 15 letter.

Second, relative to this, even though you thought that you had jurisdiction because you felt under the original grant of jurisdiction and the Independent Counsel felt that he had jurisdiction because

he had the right to investigate Whitewater or related matters, when you went to the Attorney General to seek that referral of a related matter which she has the right to do, she rejected that and went to court supporting the expansion of jurisdiction. Am I accurate so far?

Mr. DASH. Well, to some extent because—and obviously, everything you say in the letter and how you read it is accurate. But there was a preliminary—that letter is written, I believe, by the way, I had nothing to do with those determinations. I was not consulted and I learned later.

And my knowledge today is an investigation I mounted to see whether or not what Starr did was proper. And what I learned is that before the request for a referral, there was the meeting with the Deputy Attorney General and the reporting to him that maybe we did not have jurisdiction and that maybe they should take it over. It was the Attorney General's decision to have the Independent Counsel do it that led to the letter and I think even the Independent Counsel at that time knew that they were not operating under a related matter but an expansion of the jurisdiction.

Senator LEVIN. My only point being that if the justification for granting immunity and using electronic eavesdropping for Linda Tripp was that this was within your original jurisdiction where you had the jurisdiction to investigate Whitewater or related matters, the Attorney General found that this was not a related matter. That is my only point.

Mr. DASH. Well, that is quite true. My problem with the statute is and I think it is a weakness, the Independent Counsel Statute allowed Ken Starr to make that decision initially.

Senator LEVIN. But also allowed him to go to the Attorney General to seek it and when he did she disagreed. So, he could have gone to the Attorney General prior to his grant of immunity and prior to——

Mr. DASH. Things were moving so fast.

Senator LEVIN. But he could have.

Mr. DASH. Yes.

Senator LEVIN. Yes.

On the ethics issue which we began to discuss, that has to do with whether or not if this statute can be saved with radical surgery and I have not reached a conclusion that it can, but I hope that we can have some mechanism to protect the independence of these investigations.

And one of the issues is the question of where an Independent Counsel has the appearance of a conflict. And in this case, these were some of the facts and I want to just ask all of you, about conversations in 1994 that the Independent Counsel had with the attorneys of Ms. Jones about her civil action.

And apparently the attorney for Ms. Jones said there were three to six conversations between him and Mr. Starr. In addition, in 1994, there were discussions with the Independent Women's Forum about filing an amicus brief in the Supreme Court on behalf of Paula Jones.

And between 1994 and 1998 there were contacts between a partner in Mr. Starr's law firm and persons associated with Paula Jones' civil action. My question to you is whether or not these mat-

ters should have been disclosed to the Justice Department and to the special court where they occurred prior to requesting action by either the special court or by the Justice Department, and whether or not either we should write-in a provision requiring such disclosure or whether or not an ethics counselor such as yourself can handle the matter?

Mr. DASH. Well, the answer to that question, Senator Levin, is exactly what were their conversations, if they had conversations? I would agree that if Kenneth Clark was entering into the strategy of the sexual harassment case that Paula Jones was planning to bring and that later he got information that would affect that case, that he should not have approached the Attorney General without fully divulging what relationship he had in the earlier part.

As I understand it, the only conversation that may have taken place—and it was publicized at the time of his appointment, everybody knew about it. You did not have to tell the Attorney General. It was headlined in all the newspapers. He had offered, as in his later speech, he had offered to file an amicus brief not on the merits of the sexual harassment case but on whether or not a sitting President could be sued in civilly court while in office?

Now, that matter does not put him in conflict of anything. And there is no doubt in my mind that the Attorney General fully knew of that because he was highly criticized publicly of it when he was appointed that he was biased.

Senator LEVIN. Are you saying that the conversations between Ms. Jones' counsel and Mr. Starr, those three to six conversations, were public conversations?

Mr. DASH. No. I am referring to that. I am saying that the fact that the conversations were taking place in which he was indicating an interest in filing an amicus brief did become publicized.

Senator LEVIN. OK. But was this something you were involved in, as ethics advisor?

Mr. DASH. No. Well, at that time, this was before he was appointed Independent Counsel.

Senator LEVIN. I am referring also when the extension of jurisdiction came about and he represented to the Attorney General that he sought an expansion of his jurisdiction into the Jones' matter. At that point, some years before, he had had and he knew that he had had, apparently, three to six conversations with Ms. Jones' counsel. My question is, was that disclosed to you; was that disclosed to the Attorney General?

Mr. DASH. No. It was not disclosed to me. What was disclosed earlier and I knew about the fact that he had asked to file an amicus brief. But this entire Tripp tapes and getting to Monica Lewinsky and asking for jurisdiction all went so fast. I am not a member of the staff, I was not there all the time, and they did not consult me. I learned about it afterwards and then conducted an investigation.

And I concluded that though I may have made, would make another judgment on those things, that he had done nothing illegal or unethical.

Senator LEVIN. All right.

By the way, do either of our other witnesses want to comment on whether or not we need to write-in a requirement that prior

contacts with lawyers for persons who are now involved in an investigation should be disclosed to the Attorney General and/or special court, if we keep the special court? Should we write-in that kind of provision or do the usual ethics laws purportedly cover this?

Mr. DASH. Well, I think the usual ethics laws——

Senator LEVIN. I was going to ask the other witnesses

Mr. GORMLEY. Yes, Senator. I think that this is the kind of thing that should be disclosed. I also think that one of the big problems here again relates to the fact that there was no real preliminary investigation at all. Had there been, there would have been an opportunity for the Attorney General to probe that.

Also, let me say that I believe that an existing Independent Counsel—such as Mr. Starr was with respect to Whitewater—is never the right person for a completely unrelated matter like that. He or she, no matter how good he or she is, has the appearance to at least a chunk of the American public of being biased. Why in the world take that person to conduct a neutral investigation?

So, I think that it has the appearance of conflict all over it, just based upon the existing investigation that is going on.

Senator LEVIN. OK. Ms. O'Sullivan.

Ms. O'SULLIVAN. I would assume common sense would cover such inquiries. When somebody is being appointed to a job you would ask them, do you have a conflict?

Senator LEVIN. Or an appearance of a conflict? Would you include that?

Ms. O'SULLIVAN. Yes. Certainly if I wanted to make a good appointment I would ask that question. I assumed that the special division did ask that question and satisfied itself that at least they thought it was fine.

As far as jurisdiction is concerned, if you do not mind, I would like to make a point. I think jurisdiction is a lot more complicated than it is being presented.

For example, if you do not refer expansions to Independent Counsel and say it is a qualifying matter, does that mean, for example, we would have had a different Independent Counsel for Filegate, for Whitewater for every matter that has been referred to Ken Starr? So, we would have to pay for five different IC offices?

I think there is a practical problem there. I also think that in terms of vastly cutting down jurisdiction you have to be real careful. For example, there will be cases where you are trying to get someone to cooperate against the principal and you believe that individual has extensive knowledge and will only yield that knowledge against the principal target if you can squeeze them on another case. Well, that case may not be within your related jurisdiction, it may be something where you have to get an expansion or the like. And you could significantly impair an investigation by not allowing Independent Counsels to go after potential cooperating witnesses or unrelated matters.

So, I think it is just a little more nuanced than is often discussed.

Senator LEVIN. My time is up. Thank you.

Chairman THOMPSON. Thank you very much.

Well, listen, we could go on for a long time, but I know that you are as hungry as we are.

So, thank you very much, this has been extremely helpful. Senator Levin.

Senator LEVIN. Mr. Chairman, could we ask our witnesses whether they might be willing to answer some questions for the record? I do not know if that is common practice here with non-government witnesses.

But they are so helpful and they are so knowledgeable.

Chairman THOMPSON. Sure, it is totally up to them. But if you would be willing to——

Senator LEVIN. To answer questions sent for the record, I am saying, because the Chairman wants to bring the hearing to a close at this point, and I am just asking the Chair whether the three of you might be willing to answer questions for the record?

Mr. DASH. Sure.

Ms. O'SULLIVAN. Sure.

Mr. GORMLEY. Sure.

Chairman THOMPSON. OK.

Ms. O'SULLIVAN. That is what we, academics, thrive on.

Chairman THOMPSON. We appreciate that.

Thank you very much.

Mr. DASH. Thank you very much.

Chairman THOMPSON. We will adjourn at this time.

[Whereupon, at 1:38, the Committee adjourned.]

APPENDIX

QUESTIONS AND ANSWERS FOR SAMUEL DASH FROM SENATOR LEVIN

1. Were you privy to any conversations between agents of the Office of Independent Counsel Kenneth Starr and the Department of Justice with respect to the written or other established policies of the Department? If so, in any of those conversations, did the Department question any action by Mr. Starr's office because it violated the written or other established Department policies? If so, please describe and explain all such conversations. In any of those conversations did Mr. Starr's office and the Department disagree on an interpretation of the Department's policies? If so, what was the outcome? Did the Department threaten to take or actually take any action with respect to Mr. Starr's office to enforce the Department's written or other established policies?

Answer: I was not privy to any conversations between Kenneth Starr's office and the Department of Justice regarding written or other policies of the Department. After Mr. Starr received expanded jurisdiction in the Monica Lewinsky matter, I did accompany Mr. Starr to one meeting at the Department with Attorney General Reno and Deputy Attorney General Holder, where the subject matter was Mr. Starr's request for the Department's help in investigating alleged leaks from his office. To the best of my recollection, the subject of Department guidelines and policies was not discussed, except as related to Department policy considerations which might or might no permit the Department from actively working with Mr. Starr in an investigation of alleged leaks from his office. I recall that Attorney General Reno made complimentary remarks about Mr. Starr's work and committed herself to not infringe in any way on his independence.

Further, with regard to compliance with the Department's guidelines, as generally required by the statute, I was present a number of times at independent counsel staff meetings where the subject of Department polices and guidelines was constantly raised and researched to assure that any planned course of action would be consistent with these policies and guidelines. I, personally, raised this question at every decision making meeting I attended. Mr. Starr's staff had a reservoir of experience on this issue because of the many career Federal prosecutors present at these meetings who had been borrowed from United States Attorney's offices. These lawyers, who were experienced in the application of the Department's guidelines, frequently double checked their views by further reviews of the Departments guidelines and policies.

2. In the attached letter of January 15, 1998, Mr. Starr is seeking referral jurisdiction from the Attorney General of the Monica Lewinsky matter on the basis that it is "related" to Mr. Starr's original grant of jurisdiction. The Justice Department did not agree with Mr. Starr and instead sought an expansion of Mr. Starr's jurisdiction with the special court to cover the Lewinsky matter. So from January 12, 1998, the day Linda Tripp contacted Mr. Starr's office about the Lewinsky matter, until January 16, 1998, the day the special court expanded Mr. Starr's jurisdiction to include the Lewinsky matter, Mr. Starr did not have jurisdiction to investigate the Lewinsky matter. Yet, during those four days, Mr. Starr wired Linda Tripp in a conversation with Monica Lewinsky and offered her a grant of Federal immunity. Were these actions by the independent counsel in the days preceding the expansion of jurisdiction lawful and appropriate? Please explain your answer in detail and specifically reference the relevant statutory cites.

Answer: I want to preface my answer to this question by stating that I was not privy to, or informed at the time about the events involving Monica Lewinsky and Linda Tripp and the confrontation between agents of Ken-

neth Starr and Ms. Lewinsky during the period of January 12–16, 1998. As an independent contract consultant, I did not accept or perform any operational or active investigative functions, and I was not present on a daily basis in Mr. Starr's office. For this reason, I sometimes learned after the fact about an investigative action that may have raised ethical or legal issues. When I learned about the events referred to in your question 2, because of the ethical issues raised by them, I went to the independent counsel's office and asked to be informed on the details of these events. My answer to your question is based on what I was told and materials I was shown by Mr. Starr and members of his staff.

When Mr. Starr's office received Linda Tripp's information and tapes, Mr. Starr and his staff believed that they had jurisdiction to make a preliminary investigation because the subject of this information included a matter related to an on-going investigation over which they did have jurisdiction. Because of the emergency referred to in my answer to your question 3, it was essential that Mr. Starr's agents act immediately in the interim on this matter to corroborate informer information from Ms. Tripp. Nothing in the statute prohibits or prevents such necessary interim law enforcement action. Starr's letter of January 15, 1998, to Attorney General Reno, a copy of which you have provided to me, sets out his reasons for why he reasonably believed it was a related matter. Both the statute (18 USC §§ 592(d) and 593(b)(3)) and the special division of the court's mandate authorized Starr to investigate not only the specific subject matter of his jurisdiction, but in addition, "all matters related to" the subject matter. The fact that Starr quickly requested referral of this related matter from Attorney General Reno, consistent with his deferral to the Department of Justice on these decisions, did not negate his jurisdiction to begin, at least, a limited investigation into that matter, on an interim and emergency basis to prevent loss of evidence.

As I testified at the hearing, I was informed and shown supporting material that at the time of the meeting with Deputy Attorney General Holder an the evening of January 15, 1998, Mr. Starr's representatives expressed the view that Mr. Starr may not have jurisdiction over the entire matter of Monica Lewinsky's relationship with President Clinton, and they raised the question of whether the Department should take it over. I was also informed by Mr. Starr's representatives, who had been consulting with the Department of Justice, that after she learned about the contents of Linda Tripp's tapes, Attorney General Reno chose not to have the Department investigate any of the allegations of perjury or obstruction of justice that may involve the President, and authorized an expansion of Mr. Starr's jurisdiction to go beyond even the matter he had requested to be referred to him.

For these reasons, I believe the decision of the independent counsel's office to begin to investigate related matter information received from an informer prior to the time Starr's jurisdiction was expanded was lawful and appropriate under the statute.

3. Mr. Starr contacted the Justice Department on an emergency basis with a request for jurisdiction to investigate the Lewinsky matter; the Attorney General then petitioned the Special Court "on an expedited basis" for the expansion of jurisdiction. Please describe the basis for the urgency in taking these actions.

Was the office aware prior to January 14'hthat President Clinton's deposition was scheduled for January 17'? Was the President's upcoming deposition discussed with the lawyers in Mr. Starr's office? Was it a factor in the decision of Starr's office to seek expansion of jurisdiction on an emergency or expedited basis?

Answer: My answer here is also based not on my personal knowledge, but on information I received from Mr. Starr's office after I became aware of these alleged events.

I was informed that Mr. Starr acted quickly and sought authority to investigate the Vernon Jordan-Monica Lewinsky matter on an emergency or expedited basis because a journalist had learned of the substance of some of the Linda Tripp tapes, and was planning to publish a story about it. Mr. Starr and his staff believed that if the story was published, the chances of obtaining reliable evidence would be compromised. I was told that Mr. Starr's office requested the journalist to delay his story, and represented orally to the Department of Justice this need for an expedited decision.

I believe Mr. Starr's office would have been aware on January 14, 1998, that President Clinton's deposition was scheduled for January 17, 1998, because I understand that this information was publicly reported by the news

media. I was not privy to any discussion at that time by or with the lawyers on Mr. Stair's staff about the President's deposition. I did not participate in the decision to seek referral or expansion of jurisdiction on an expedited basis, and therefore have no personal knowledge of whether the deposition was a factor in that decision.

4. Monica Lewinsky stated during her grand jury testimony that when she was confronted by Mr. Starr's office on January 16, 1998, she was asked to secretly tape conversations with Vernon Jordan and the President. Ms. Lewinsky's attorney, her father and her mother also have affirmed Ms. Lewinsky's statement. Did Mr. Starr's office ask Monica Lewinsky to secretly record conversations with Vernon Jordan or the President of the United States? If not, how do you explain Ms. Lewinsky's grand jury testimony, memos prepared by Mr. Starr's agents referencing possible wiring, and the statements of Ms. Lewinsky's lawyer, father and mother?

Answer: I have no personal knowledge of what communications occurred between Mr. Starr's agents and Monica Lewinsky when they confronted her on January 16, 1998. Later, when I read the press accounts, I specifically asked Mr. Starr and his top deputies whether his office asked Ms. Lewinsky to secretly tape her conversations with the President. They denied that such a request was made. I have no personal knowledge of whether Mr. Starr's agents asked Ms. Lewinsky to secretly tape any conversations she had with Mr. Vernon Jordan.

I do not have personal knowledge of the facts, or of Ms. Lewinsky's reasoning, to explain her testimony before the grand jury, if she so testified, that she had been asked by Mr. Starr's agents to secretly tape her conversations with the President and that she had also informed her lawyer and parents of this request. I do not recall reviewing any memos prepared by Mr. Starr's agents referencing "wiring". I specifically inquired about any evidence or information concerning any request by the office to Ms. Lewinsky to secretly tape her conversations with the President, and, as stated above, I was informed that no such request had been made.

5. Do you think Mr. Starr should have disclosed his involvement with the Paula Jones lawsuit to the Justice Department and the special court at the time of his emergency request for jurisdiction? Should he have disclosed, for example:

- his 1994 conversations with Ms. Jones' counsel about the civil action? (Jones' prior counsel, Gil Davis has said that he spoke with Mr. Starr from 3 to 6 times.)
- his 1994 television appearance and public statements about the Paula Jones civil action, prior to his appointment as independent counsel?
- his 1994 discussions with the Independent Women's Forum about filing an amicus brief in the Supreme Court on behalf of Paula Jones, again prior to his appointment?
- 1997 interviews with Arkansas State Troopers conducted by Mr. Starr's office which, according to the press, sought information about Ms. Jones?
- 1994 and 1998 contacts between Richard Porter, a partner at Mr. Starr's law firm, Kirkland and Ellis, and persons associated with the Paula Jones civil action?
- a conversation on or about January 8, 1998, which allegedly informed Mr. Starr's office that it would be contacted with information related to the Paula Jones civil action?

Were you aware of the 1997 interviews with the State Troopers referred to above, and do you know if Mr. Starr's office did follow-up to those interviews by actually interviewing the women identified by the State Troopers? Did Mr. Starr's office ever interview Paula Jones?

Answer: I was neither privy to, nor had any personal knowledge of any of the matters itemized in this question. Before becoming a contract consultant to Mr. Starr, and before his appointment as independent counsel, I recall reading press accounts about Mr. Starr's views on the subject of whether Ms. Jones' civil suit could be brought against a sitting president, and of his interest in filing a brief *Amicus* in the Supreme Court on that specific question. His position was widely publicized and had to be known by the President and all top officials in his administration. When Mr. Starr was appointed independent counsel by the Special Division, his appoint-

ment was publicly criticized on the ground he had shown bias against the President by offering to support the right of Paula Jones to bring her civil action against a sitting President, Later, after Attorney General Reno expanded Mr. Starr's jurisdiction to investigate possible perjury and obstruction of justice by the President in the Jones civil case, I became aware, from press accounts, of criticism of Mr. Starr for a perceived conflict of interest at the time he received his expanded jurisdiction because of his alleged contacts with lawyers representing Ms. Jones. I specifically asked Mr. Starr to describe the nature of such contacts, if they had occurred. He explained that any contacts he had with Paula Jones' lawyers were prior to his appointment as independent counsel, and concerned only his interest in filing an *Amicus* brief in the Supreme Court on the issue before the Court of whether a civil suit could be brought by a private person against a sitting president. He said that none of such contacts were concerned in any way with the merits of Ms. Jones' civil action. In my opinion, these facts, as related to me by Mr. Starr, did not establish that Mr. Starr had a conflict of interest in pursuing the investigation authorized by the expanded jurisdiction, and did not require any disclosures to Attorney General Reno when Mr. Starr requested a referral of a related matter, and received, instead, expanded jurisdiction.

For what it is worth, at the time Mr. Starr was publicly expressing his views on this narrow jurisdictional issue, I was publicly taking the opposite position.

I was neither aware, nor had any personal knowledge of any interviews with Arkansas State Troopers by any of Mr. Starr's staff in 1997. When the story about such interviews was first published by the press, I asked Mr. Starr for an explanation of the reasons for any such interviews, particularly as they may have concerned any women who had been associated with then Governor Clinton. Mr. Starr and his top deputies informed me that these interviews were part of his staffs effort to locate additional witnesses who had close personal relationships with then Governor Clinton, and who, on the basis of such relationships, might have learned about information relevant to the Whitewater and Madison Bank investigations, which were still ongoing at that time.

I have no personal knowledge or information about whether Mr. Starr's office ever interviewed Paula Jones. I believe, however, that if such an interview had occurred, I would have ultimately been informed about it by Mr. Starr or one of his top deputies.

I have no personal knowledge of any telephone call by Mr. Marcus to Mr. Rosenzweig. I was not informed at the time of any such call. I believe I was informed later by Mr. Rosenzweig who told me that he was the one who received the call because of an earlier law school relationship with Mr. Marcus, and that Mr. Starr had nothing to do with the call. I have no personal knowledge or information about what exactly Mr. Marcus told Mr. Rosenzweig, and, therefore, cannot answer those of your questions requiring a knowledge of what was said.

6. Some press articles claim that a number of lawyers, known to Mr. Starr through such organizations as the Federalist Society, were links between the Paula Jones legal team and the Starr office. These links supposedly include Richard W. Porter of Chicago, Jerome M. Marcus of Philadelphia, George T. Conway, III of New York, and Ted Olson, Ann Coulter, James Moody and Lucianne and Jonah Goldberg in the Washington, D.C. area.

Can you confirm whether any of these individuals or others acted as links between the Starr office and the Paula Jones legal counsel, conveying information or taking other actions?

Have any of these individuals conveyed information to you personally about events, witnesses, evidence or other matters associated with the Paula Jones civil action?

In February 1998, the Chicago Tribune reported that someone from the Kirkland and Ellis office in Chicago had faxed them a copy of an affidavit in the Paula Jones civil action before that affidavit was filed in court. Do you know who faxed the affidavit from Kirkland and Ellis to the Chicago Tribune? Do you know whose affidavit was involved? Do you know how the law firm got the affidavit prior to its being filed in court?

Jerome Marcus telephoned Paul Rosenzweig of Starr's office on or about January 8, 1998, and told him that Mr. Starr's office would soon be contacted with information about a sexual liaison between President Clinton and an intern. Mr.

Rosenzweig then supposedly told Jackie Bennett of Mr. Starr's office about the call. Were you informed about the phone call? Did you have any concerns about it? What exactly did Mr. Marcus tell your office? Did he mention tapes? Did he mention granting immunity to the individual in order to acquire the tapes? Was there any discussion about examining this topic during the President's January 17th deposition? Did Mr. Marcus explain how he had come by this information?

Answer: I have no personal knowledge with regard to your suggestion, based on press reports, that certain lawyers identified in your question 6 served as links between the Paula Jones legal team and Mr. Starr's office. Mr. Starr has always insisted to me that neither he, nor his office, maintained any links or relationships, directly or indirectly, with any lawyers representing Paula Jones.

None of the individuals identified in your question, or any other person involved with Ms. Jones or her lawyers in her civil suit, ever contacted me or conveyed any information to me at all, and specifically not about "events, witnesses, evidence or other matters" associated with the Paula Jones civil action.

I have no personal knowledge or information concerning any affidavit in the Paula Jones case reportedly faxed by the law firm of Kirkland and Ellis to the Chicago Tribune.

7. In 1994 we wanted to be sure that attorneys working for independent counsels were paid at a rate comparable to attorneys working in U.S. Attorney offices. The law states:

"Such employees shall be compensated at levels not to exceed those payable for comparable positions in the Office of United States Attorney for the District of Columbia . . . but in no event shall any such employee be compensated at a rate greater than the rate of basic pay payable for level ES–4 of the Senior Executive Service Schedule. . . ."

In the conference report we said, "No independent counsel should pay all or even most staff attorneys at the maximum permissible rate, nor should part-time counsel be paid at the billable hourly rate they receive when privately employed."

Were you an employee or a contractor of the Office of Independent Counsel? If you were an employee, you were subject to a salary comparable to that of a person in a similar position at the US Attorney's office. If you were a contractor then you were subject to the provision in the law which says, "An independent counsel shall comply with the established policies of the Department of Justice respecting expenditures of funds. . . ." Do you believe that that paying a contract rate of $400 an hour for an ethics adviser would be within the established policies of the Department of Justice?

Answer: I served as an independent contract consultant to Mr. Starr, and not as an employee, or a member of his staff. My contract consultant's fee of $400 per hour is my usual rate for government agencies and private law firms. The Department of Justice has approved this fee rate in a contract I had with the Department, under which I served as an independent contract consultant on legal ethics to the prosecution team of the United States Attorney's office in Miami, Florida, in the Calli Cartel prosecution.

While this rate was also approved in my contract with Independent Counsel Starr's office, a cap was placed on the total compensation I could receive per week under this rate to make my compensation proportionate to salaries authorized by the statute. Under my 1997 and 1998 contracts, for example, I was limited to receiving compensation for my services for only 5 hours per week at my hourly rate, which was stated as no more than $2,000 per week. In most weeks I worked substantially more than 5 hours—often 15 and 20 hours more. Under my contract I was not compensated for these additional hours of service. Although I wanted my usual hourly rate to be a matter of record, I never billed the independent counsel's office for any work beyond the cap of 5 hours per week. This resulted in my actual compensation for my work as a contract consultant amounting to an hourly rate closer to $100, rather than $400.

Therefore, on the basis of the actual facts set out above. I believe that my compensation under my contract with Mr. Starr's independent counsel office was fully and clearly consistent with the established policies of the Department of Justice.

8. The independent counsel law specifically recognizes the oversight role of Congress. It says: "The appropriate committees of the Congress shall have oversight ju-

risdiction with respect to the official conduct of any independent counsel appointed under this chapter, and such independent counsel shall have the duty to cooperate with the exercise of such oversight jurisdiction."

At another place in the statute, where there is a limitation on the disclosure of the application for appointment of an independent counsel, the statute states explicitly that "Nothing in this chapter shall be construed as authorizing the withholding of information from the Congress."

I wrote to Mr. Starr back in November of 1996 as a member of the Governmental Affairs Committee with jurisdiction over the statute asking a number of questions about his expenditures and compliance with the independent counsel law. Mr. Starr refused to respond.

Were you aware of this request for information and Mr. Starr's refusal to answer? What is your position with respect to an independent counsel's responsibility to respond to inquiries from Members of Congress, particularly Members on the committee of jurisdiction over the independent counsel law?

Answer: I do not recall knowing, at the time you sent it, about your November 15, 1996 letter and series of questions to Mr. Starr. I also do not recall knowing of any refusal on his part to answer your questions. I believe I had terminated my contractual position prior to that time to accept an invitation to become an exchange professor at the University of Heidelberg Law School in Germany. When I returned to Washington, Mr. Starr asked me to renew my contract, and it is my recollection that I did not do so until the end of 1996 or the beginning of 1997.

Congress clearly has important oversight responsibilities with regard to the Executive Branch and the implementation of its legislation. Not only is this authority implicit in Congress' constitutional legislative power, as the Supreme has consistently held, it is also essential to our democracy as part of our check and balance system. However, this oversight function is delegated by both the Senate and the House of Representatives to specific committees, operating under their rules, and not to individual members of a committee.

I believe that many of your questions to Mr. Starr, dated November 15, 1996, were relevant inquiries concerning the conduct of an independent counsel under the statute. As a matter of courtesy to you, he should have answered them, to the extent that such answers did not reveal grand jury information or the strategies of an on-going criminal investigation. I believe, however, he did not have an obligation to reply to your questions, as he would have had if they had been asked by the committee, or if the chairman of the committee had co-signed your letter.

THE FUTURE OF THE INDEPENDENT COUNSEL ACT

WEDNESDAY, APRIL 14, 1999

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 9:36 a.m., in room SH–216, Hart Senate Office Building, Hon. Fred Thompson, Chairman of the Committee, presiding.

Present: Senators Thompson, Collins, Cochran, Specter, Gregg, Voinovich, Levin, Lieberman, Akaka, Durbin, Torricelli, and Edwards.

OPENING STATEMENT OF CHAIRMAN THOMPSON

Chairman THOMPSON. Let the hearing come to order, please.

This will be the fifth and final hearing on reauthorization of the Independent Counsel Act. We started these hearings with the idea in mind that we would have a good constructive discussion and debate on the Independent Counsel Act, and I believe that we have been able to do that.

We have heard from various government officials. We have heard from targets of the Independent Counsel, that is attorneys for targets of Independent Counsel. We have heard from current and former Independent Counsel. We have heard from various scholars, and I believe that we have had a very good set of hearings. Certainly, that is going to be continued here this morning.

The issue, as we set it out in the very beginning, is basically the same, and that is how do we handle those rare situations when high-level government officials are accused of misconduct. How do we have accountability, and how do we have a certain amount of independence? How do we have the appearance that justice is being done?

We start out, of course, with the basic premise that law enforcement is essentially an executive power, and traditionally, we left that power with the Executive Branch and with the Attorney General with regard to accusations of high-level wrongdoing. But in 1978, we tried something different. We tried an experiment that really involved all three branches of government in a kind of attempted delicate balance to not run afoul of the Constitution and the Separation of Powers Doctrine and to try to come up with a combination of factors that would result both in some accountability and some independence, with the idea being that not only would justice be served in most cases, but that it would give an appear-

ance of justice being served and therefore enhance public confidence.

We, of course, have seen unintended consequences come from this, as we often do with regard to legislation that has passed.

We have seen that Independent Counsel have oftentimes very wide jurisdiction and wide leeway. Some would say much more than a typical prosecutor would have. Some would say that because of the inherent setup that an Independent Counsel will go further and take longer and spend more money than a normal prosecutor would.

On the other hand, we have the Independent Counsel set up so that he cannot really defend himself from the inevitable attacks that come more and more in this era that we live in when the Independent Counsel is always attacked by those who are being investigated.

We, therefore, wind up with possibly less public confidence in our process than when we started out, at least some think so.

Another unintended consequence, I think, is something that was not fully foreseen—the fact that although the Attorney General is required to seek an Independent Counsel—the language is mandatory—in some cases actually that requirement has no teeth. Then, the Attorney General can avoid acting under the law, even when she apparently is required to, with impunity.

We have a situation where Independent Counsel are appointed for people receiving football tickets and allegedly lying about payments to a mistress and things like that, but we do not have an Independent Counsel appointed for the largest fund-raising scandal in the history of the country.

We now have evidence that Mr. Chung, apparently, was funneling, in his case, $300,000 from the head of Chinese intelligence, during which time he was having 50 trips to the White House, and funneling money into the DNC, and the Independent Counsel is not appointed. Or evidence that Charlie Trie, longtime friend of the President was supposedly soliciting a million dollars from the Chinese government in order to put money into the DNC. No Independent Counsel appointed there.

So, really, what are we doing if in fact in big cases Independent Counsels are not appointed and in little cases they are? As an Independent Counsel, with all of its complexities and all of its barriers and hurdles that you have to overcome, such as the sufficiency of the evidence on the front end and whether or not it meets certain thresholds and all in order to activate the request to the three-judge panel and all that, we get lost in the maze of the requirements of the Independent Counsel and not the basic question of whether or not there is a conflict of interest here, which in order to ensure public confidence we need somebody else to come in and do this.

So the old way of doing business and bringing in a Special Counsel is really kind of forgotten. If the technicalities of the Independent Counsel law is not triggered, then we would have no one at all brought in from the outside. So what do we do about all of that? Well, that is what we are here today to continue to discuss.

For my part, I had started out with great concerns about the statute from a lot of different standpoints. I have had that concern

since long before I was in the Senate, but I have had some good discussions with my friends here, and we have got some time and I am going to take some time for my part. Whether it is before or after June 30, I am going to take advantage of the opportunity that we have, which is somewhat unusual around here, and that is to not have to rush to judgment on exactly what we ought to do about this.

We have been very fortunate, I think, in being able to have such well-presented statements and positions and hearings in the midst of kind of a volatile situation, to say the least, when feelings are high and emotions are high, but we have been able to get through that pretty well, and I think as time passes, that atmosphere will probably be even better. We are going to have an opportunity to study the details of the proposals that have been presented to us, the reasons and rationales, and to consult with each other.

Senator Lieberman and I, I think, as I say, have had some good discussions. Senator Levin, of course, has been a leader in this area for a long, long time. Then perhaps, we make some recommendations or decide that no recommendations are needed.

This morning, we are especially fortunate. We have Independent Counsel Kenneth Starr and the Special Division of the U.S. Court of Appeals. It has been a long time since I kept a Federal judge waiting for this long, and especially a three-judge panel, but we appreciate their being with us here today, and we will be getting to the three-judge panel as soon as Judge Starr is finished.

Judge Starr has a long record of distinguished public service. In working in the Justice Department as counselor to the Attorney General, he was appointed to the U.S. Court of Appeals for the District of Columbia. In 1989, he became Solicitor General of the United States. His appointment to both the Court of Appeals and to the Solicitor General's office received unanimous Senate confirmation.

Most recently, Judge Starr was selected to assist the Senate and review a former member of the U.S. Senate's diaries. The then-Chairman of the Ethics Committee, Senator Bryan, selected Judge Starr for his intelligence and probity, and the Special Division selection of Judge Starr to succeed Robert Fiske as Independent Counsel in Whitewater was fitting, since Attorney General Reno had selected Fiske after narrowing her choices to him and Judge Starr.

As Independent Counsel, Judge Starr has presided over an investigation that resulted in the conviction of a sitting governor and then the obtaining of a guilty plea from the Associate Attorney General, the highest officials ever convicted in an Independent Counsel's investigation, at least convictions that were upheld. He obtained 12 guilty pleas, obtained three trial convictions, and more than $1 million in restitution.

In the Appellate Courts, his record is 17 wins and 1 loss—I assume that is up to date—winning historic successes on executive privilege and heretofore unimagined Secret Service protective-function privilege, and the accuracy of his reports on Vince Foster and Monica Lewinsky have never been questioned.

At the same time, he has weathered withering attacks while restricted by various ethical considerations on prosecutors that thwart his ability to respond.

Judge Starr, thank you for being here today. You, no doubt, are aware that a lot of people would argue that you are a part of the problem as to why we should change the Independent Counsel law.

I was struck by the fact that in listening to Judge Walsh, who was here before, that in every category of cases, down to leaks about indicting the President, down to being investigated yourself, in every category of cases where you have been criticized, Judge Walsh was criticized at that time.

Although I am sure we will have an opportunity to discuss some of those details here today, I know that we are going to have an opportunity to get into some substance, also, and I really commend the statement that you submitted. Not only is it well-thought out, somewhat surprising, I guess, to some people, but it is extremely well-thought out from someone who has had the advantage of the vantage point from both inside Justice to, of course, Independent Counsel.

After all of the other controversy, disputes, and so forth that we might have, at the end of the day we are going to have a much better understanding of really how this thing works and what the upsides and the downsides are, and it is going to help us in our determination as to what to do with the Independent Counsel law.

With that, I will turn to Senator Lieberman and proceed from there.

OPENING STATEMENT BY SENATOR LIEBERMAN

Senator LIEBERMAN. Thank you, Mr. Chairman.

Thank you particularly for the very fair and open-minded way in which you have conducted this series of hearings on the Independent Counsel Statute, which conclude today with these very important witnesses.

It struck me as I was looking at the witness list today that in the lore of my own State of Connecticut, we pay special honor to three judges, Whalley, Goffe, and Dixwell, who played a critical role in obtaining freedom from the British Crown in establishing the rule of law in Connecticut and this country.

We have today not just three, but four judges who have similarly been involved in implementing the rule of law, and perhaps to their own regret, most controversially in regard to the matter that we have before us today, the Independent Counsel Statute. I welcome them and thank them for being here.

Mr. Chairman, as you know, I have said throughout these hearings that we should not allow our consideration of the Independent Counsel reauthorization to be driven by the conduct of one or another Independent Counsel, nor to be mired in partisan controversies, nor used to settle lingering political scores.

In fact, we have benefited from hearing a wide variety of perspectives that have contributed significantly to the informed discussion we have had over the last several weeks.

At the same time, Mr. Chairman, Members of the Committee have not flinched from asking witnesses tough questions when we felt it was necessary to get at substantial issues, which in turn, I

think, has helped crystallize some critical arguments on both sides of this debate about reauthorization. I expect the same today.

There has, of course, already been abundant public analysis and commentary on the way Judge Starr has conducted his investigation of Whitewater and other matters relating to the President.

Some of the criticisms of his work, I believe, are irrelevant to our deliberations, but some go to the heart of the Independent Counsel Statute and the questions we have been asking over the last several weeks in these hearings. In that respect, it is certainly appropriate for us to ask Judge Starr what his conduct as Independent Counsel reveals about the law that authorized and governed his investigation.

Twenty years ago, when Watergate was the Nation's most recent resonant political scandal, Congress passed the statute we are now reviewing. Our predecessors were clearly motivated by the highest of ideals to ensure that the rule of law would be applied scrupulously, even in cases involving our Nation's most powerful leaders, even in cases involving the President.

In my opinion, the law has worked in support of that worthy purpose more often than not, and I note that most Americans seem to agree; at least that is what the polls indicate, that a healthy majority actually support reauthorization of the statute, notwithstanding the recent controversies that have surrounded it.

Yet, in Congress, there is deep dissatisfaction with the law, to the point that its reenactment is seriously in doubt, and there is no escaping the fact that Judge Starr's investigation, just as Judge Walsh's at an earlier time did, is coloring the views of many of our congressional colleagues about the Independent Counsel Statute.

Many have cited what they view as Judge Starr's missteps as powerful evidence of the law's failings and justification for its termination.

As you know, Mr. Chairman, I do not agree that the law is fatally flawed, but I do believe that there are areas where we need to make significant reforms, and although I do not share the most critical opinions of Judge Starr's conduct, I do agree that his term as Independent Counsel illuminates the need for some substantial reforms in this law.

For example, should Judge Starr's work as Independent Counsel have been allowed to go on so long and so far from his original mandate? The Independent Counsel Statute allowed Judge Starr's investigation to mushroom beyond Whitewater, not just into related matters, but also into seemingly unrelated matters. The statute was intended to give the public confidence in the impartiality of prosecution, but the sequential extension of Judge Starr's jurisdiction gave much of the public exactly the opposite impression, that this was an Independent Counsel in pursuit of a person, not a crime; that what began as a prosecution seemed to many Americans to end as a persecution.

So does this experience compel us to consider changes in the statute that would prohibit extensions of an Independent Counsel's jurisdiction into unrelated areas and to limit its length in time? Those are some questions that I would like to ask this morning.

One of the fundamental purposes of the Independent Counsel Statute was to guarantee that our Nation's most powerful leaders

are treated like any other citizen when suspected of criminal conduct. The Department of Justice is currently considering whether Judge Starr failed to follow certain Department of Justice guidelines, which are supposed to apply to him.

So I would be interested in learning how much weight Judge Starr gave to those guidelines in his conduct as Independent Counsel, how he feels about the guidelines, and whether we should find a way to better emphasize adherence to them and require consultations with the Department.

We have been hearing from some of the witnesses who come before us that the statute would work better if the Independent Counsel was required to have criminal law enforcement experience. Without the budgetary restraints and competing priorities faced by regular prosecutors, an Independent Counsel presiding over a complex and wide-ranging investigation has to exercise much more discretion.

This should be the decision of an Independent Counsel, of course. Judge Starr has been a distinguished private attorney, professor, counselor to the Attorney General, Solicitor General, and Federal judge, but never served as a prosecutor. Did that affect the quality of his service here? Did it lead him to rely more than was appropriate on the advice of his subordinates who had prosecutorial experiences?

Finally, Judge Starr's investigation attained its greatest notoriety the day he delivered his impeachment referral and supporting evidence to Congress, pursuant to Section 595(c) of the Independent Counsel Statute.

His critics have questioned whether he crossed the line and became an aggressive advocate for impeachment. Some have used this experience to argue for amending the law to ensure that Independent Counsels in the future do not intrude upon Congress' constitutional powers of impeachment. I would like to ask the Judge about that today.

So I look forward to hearing his thoughts on these and other matters. If the advance reports in the media about Judge Starr's testimony today are accurate, I am disappointed by the conclusion that he has reached which supports the expiration of the law, but I look forward to what I expect will be his reasoned analysis and argument on that matter.

The Judge's position today raises the fundamental question about whether the shortcomings he sees in the law justify the loss of the independence of prosecution which the law guarantees and which I think all, including Judge Starr's most severe critics, would say his investigation evidences, he certainly was independent in all that he did.

May I say briefly, Mr. Chairman, that we are also fortunate this morning to have all three Federal judges who currently make up the division of the Appeals Court responsible for appointing Independent Counsel. The operations of this division have been the subject of much speculation in recent years. I hope we can learn more about the internal functioning of this uniquely configured, to the public somewhat mysterious, court. I hope we can learn about the process by which Independent Counsel are selected, and whether we can improve it.

I am hopeful that Judges Sentelle, Fay, and Cudahy will also have some insights on some of the difficult questions the law forces the division to face, such as how an Independent Counsel's jurisdiction should be interpreted, when it should be expanded, and to what extent the Special Division can oversee the Independent Counsel's work without violating the Constitution's Separation of Powers Doctrine.

So, again, I thank your witnesses for appearing today, and I thank you again, Mr. Chairman, for organizing and conducting these five hearings in such a fair manner. I think we have learned a lot about how the statute has operated, and the challenge now before us is to decide what to do.

For those of us who support the retention of the statute, I think we have to win over the many doubters by curbing the flaws in the statute that our hearings have revealed, but to preserve what I still believe is its vital and unique purpose, we must assure the public through this statute that no government official, not even the President, is above the law.

Thank you, Mr. Chairman.

Chairman THOMPSON. Thank you very much. Judge Starr, you can proceed with your statement.

TESTIMONY OF THE HON. KENNETH W. STARR, INDEPENDENT COUNSEL

Judge STARR. Thank you, Mr. Chairman, Senator Lieberman, and Members of the Committee.

I am grateful for your invitation to testify today. This law represents one response to a very enduring question, and a question that seems to take on more immediacy each day: How can the government retain the trust of the people when high-level officials stand accused of misconduct?

In answering the question, we, of course, are not writing on a blank slate. We are mindful of the strictures laid down by the Founders, who themselves were seeking to promote trust in government, and we are mindful, too, of the lessons of history and experience.

The principles guiding us are crucial ones. I have thought about them in my various roles that have been graciously described by the Chairman, including as Independent Counsel, and the first—and this, I think, goes directly to Senator Lieberman's observations—to be assigned five distinct investigations, and then the first to inherit the already wide-ranging work of a regulatory Independent Counsel, the very distinguished lawyer, Robert Fiske.

I am sure the Chairman and the Members are aware that my current role limits my comments and remarks in one important respect, and that is I cannot address certain topics in light of grand jury secrecy and pending prosecutions and investigations. I ask your forbearance, but I shall try to be completely responsive within those legal limitations.

Judge Learned Hand, a very wise judge, observed once that a law is "at once a prophecy and a choice." The prophecy and the choice embedded in the Independent Counsel provisions were from the first enactment of it, 21 years ago, rather tentative. Unlike most laws, this one was slated to expire, unless reauthorized, after

5 years, and it has, of course, been re-tooled and reauthorized since that time on three occasions, but always with the sunset provision.

Now, once again, the experiment is scheduled to come to a close, unless reauthorized, and once again, the witnesses have drawn varying lessons from the experiences of the last 5 years.

I, too, have drawn some lessons, and I will try to explain those, but I do think it important for me to be clear in my own perspective at the outset: I am not here to outline a perfect solution, and to the contrary, I believe this law by its very nature requires us to make painful tradeoffs. As Attorney General Reno testified, we face, in her words, "a very complex, difficult issue in which there may be no right answer." I think she is right.

Let me briefly discuss two key issues because I think those structural issues are quite important in illuminating the path before us.

First, as the Chairman noted, the statute makes the appointment of the outside counsel or prosecutor mandatory under certain circumstances and, second, the appointment of the prosecutor by a three-judge court. The three judges are with us today.

Let me start with the mandatory language. Attorneys General historically enjoyed absolute discretion on whether to appoint outside lawyers to handle particular investigations, but the statute, of course, commands that under certain circumstances, the Attorney General must do so. This represented a dramatic break from our traditions.

It also represented a break from broader legislative trends underway at the time. The statute was first passed in an era of deregulation, as we were moving away from familiar command-and-control regulatory approaches, but the statute is also unusual in what it seeks to regulate: The professional legal judgment of the Attorney General of the United States with respect to a criminal investigation. Rarely, if ever, had Congress tried to regulate so specifically such unquantifiable matters, and rarely had Congress sought to tell the Attorney General precisely how, and how not, to reach a professional judgment.

There is another more fundamental anomaly in the statute. When Congress regulates through broad language, the phrase "public convenience and necessity" in the 1934 Communications Act, by way of example, it ordinarily relies on that administrative agency, there the FCC, to flesh out the statutory generalization through detailed regulations. The courts then review those regulations in what amounts to a back-and-forth dialogue with the agency, which in turn informs the actions of Congress.

The regulatory regime of this law is strikingly different. An Attorney General's decision on triggering the statute is not subject to judicial review. In a sense, then, Congress enacted a statute covering situations where the Attorney General's objectivity—and I am speaking generally, not of the actions of any one Attorney General—but his or her objectivity, for one reason or another, cannot be trusted, and then placed total, unreviewable trust in the Attorney General.

Now, there are powerful constitutional concerns underlying this anomaly. It is the President's solemn duty to take care that the laws be faithfully executed, his basic duty under Article II.

When asked to direct the exercise of this core duty, the courts—and I think I can speak with some familiarity, having been privileged to serve as a judge—the courts are ill at ease, and perhaps they are institutionally ill-equipped. So, for a variety of reasons, the Independent Counsel law only partially reflects the regulatory model of legislation. Two consequences bear mention.

First, reflecting the lack of judicial review, Attorneys General are free to make completely ad hoc decisions. That is anathema in administrative law. They must explain some, but not all of their decisions. But they are never required to reconcile a current decision with the Department's past interpretations of the statute.

Second, the public does not apprehend the magnitude of the Attorney General's discretion under the law. So an administration is not held fully accountable for the exercise of that discretion. People tend to believe that laws are enforceable by the judiciary. This one, in substantial part, is not.

Along with the ostensibly mandatory but, as the Chairman noted, essentially toothless statutory language, the second major shift concerns the selection. From the Whiskey Ring scandal of the 1870's in the Grant administration to Watergate, a century later, in the 1970's, which gave birth of course to the statute—and as I set this forth in my written statement—the administration itself chose the Special Counsel. Under the statute, by contrast, the three-judge panel makes the appointment. Like the statute as a whole, this provision grew out of concerns about public trust.

Soon after Leon Jaworski's appointment, the *New York Times* editorial page said this: "Mr. Jaworski's personal integrity is not in doubt, but he is fatally handicapped from the outset because he enters the Watergate investigation as the President's man." If the Attorney General could not be trusted to conduct the investigation himself or herself, then perhaps he or she could not be trusted to select the investigator either.

That principle led to my appointment, and Senator Lieberman will have questions with respect to that.

When Congress reauthorized the Independent Counsel law in 1994, the Attorney General asked the three-judge panel to appoint her regulatory counsel, Mr. Fiske, as statutory Independent Counsel. But, although the division will speak for itself, because the law suggested that Independent Counsels were not to be chosen by the Attorney General, the three-judge panel selected someone else.

Let me turn briefly to the Independent Counsel's investigation. The statutory goal, again, is to bypass the administration's conflict of interest, to empower an outsider to investigate and, if appropriate, to prosecute; in other words, to do exactly what the Justice Department would do, but for the disabling conflict. That is the theory.

The reality is more complicated. For one thing, an Independent Counsel must start from scratch. Judge Walsh made this point well in his final report on Iran-Contra. In his words in the report: "[An] Independent Counsel is not an individual put in charge of an ongoing agency. He is a person taken from private practice and told to create a new agency. . . ." Doing so not only takes time; the costs can be substantial.

An Independent Counsel's office is then obligated to do for itself what the Justice Department does for most Federal prosecutors. Some lawyers in Independent Counsel offices get diverted from their prosecutorial work by Freedom of Information requests and the like. The point is an Independent Counsel's office cannot benefit from the economies of scale that the Justice Department has been able to achieve over time, and this, too, increases the cost. But more fundamentally, the Independent Counsel is a prosecutor of limited jurisdiction. And jurisdiction is one of the key and core issues that I know is before this Committee.

He or she possesses authority to investigate the subject matter that led to his or her appointment, and in the words of the law—and these are critical words—"all matters related to that subject matter." But that is all.

Now, these jurisdictional limits are entirely understandable, but they complicate our investigations enormously. A U.S. Attorney, or one of his or her assistants, can sometimes persuade a witness to cooperate by gathering evidence of an unrelated crime that the witness may have committed. A Statutory Independent Counsel, in contrast, must seek jurisdiction to cover that unrelated crime, and without it, he or she may not be as effective.

These jurisdictional limits also give rise to a powerful weapon for delay. Witnesses or subjects fighting subpoenas or indictments can argue in court, and frequently do, that the Independent Counsel has exceeded his or her jurisdiction. Such arguments arise even when the Independent Counsel has scrupulously followed the law for establishing jurisdiction, and that, like all litigation, can take enormous amounts of time, as I try to show in the written statement with two specific examples from our investigation.

An Independent Counsel differs from a Justice Department prosecutor in another important respect, and it has been alluded to in the opening comments, the duty to report.

Independent Counsels originally were required to produce final reports discussing, among other things, their reasons for not prosecuting any matters within their jurisdiction. Federal prosecutors do not ordinarily allege improprieties without charging them in court. Congress, concerned about this deviation from normal practice, modified the reporting requirement in 1994, but did not drop it. Here as elsewhere, if I may say so, Congress seemed to be trying to use the Independent Counsel mechanism to achieve ends and goals traditionally served by Congress itself; in this case, public hearings and reports.

The witnesses before this Committee have been virtually unanimous in their opposition to final reports, and I concur in that. If the statute is reauthorized, I respectfully recommend that Congress eliminate the final report requirement.

In addition, Independent Counsels are subject to a second reporting requirement that does not apply to ordinary prosecutors. Senator Lieberman referred to it—the requirement that an Independent Counsel inform the House of Representatives of particular information that, in the words of the statute, "may constitute grounds for an impeachment."

In our report to the House last fall, we summarized the evidence and its relevance, and we explained that our judicial system takes

perjury and obstruction of justice very seriously, a point that was quite forcefully made this week by Chief Judge Susan Webber Wright.

While we did our best to heed this provision, I question its wisdom. For one thing, it is curious to impose the statutory duty on one, and only one, Federal prosecutor. In addition, this responsibility further politicizes Independent Counsel investigations.

An impeachment inquiry, Alexander Hamilton predicted in *Federalist 65,* often, in Mr. Hamilton's words, "will connect itself with preexisting factions, and will enlist all their animosities, partialities, influence, and interest on one side or . . . the other."

More important, impeachment is a central, nondelegable Congressional duty. As Professor Akhil Amar of the Yale Law School has pointed out, it is curious for the Legislative Branch to defer on so vital a matter to an inferior officer of the Executive Branch.

Impeachment is not unique in this regard. When a government scandal arises, we often face a choice between prompt public disclosure of the facts or vindication of the criminal laws.

In the main, Congress can get facts out quickly, including by immunizing witnesses, but as the Iran-Contra investigation demonstrated, immunized testimony can vastly complicate criminal prosecutions.

The criminal justice process, in contrast, ordinarily will not disclose all the facts. That is true in our investigation. Prosecutors often talk of the gulf of what they know and what they can prove beyond a reasonable doubt to a fair-minded jury. In addition, the criminal justice process may not disclose critical facts for months or years.

Now, facing this choice between prompt public disclosure and vigorous law enforcement, Congress in 1978 struck the balance in favor of law enforcement. It seemed all to the good, but we must also consider that when a scandal is eroding public confidence, speedy disclosure is preferable to slow justice.

Moreover, citizens' political and policy judgments will be shaped quite properly by an unfolding congressional investigation. If an administration withholds documents or testimony on the basis of executive privilege, for example, citizens ought to be able promptly to incorporate that into their assessment.

Now I would like to very briefly discuss accountability of a different sort. In the written statement, I refer to amicus briefs that the Justice Department has filed in Independent Counsel cases. That practice may come as a surprise to some, but it should not. But, in theory, shouldn't the two entities be walled off from each other? Perhaps in theory they should be, but in practice, they are not, and we will be talking about DOJ policies. And institutionally, in fact, they cannot be.

To a much greater degree than people realize, the Department of Justice can help or hinder an Independent Counsel. The statute specifically provides that an Independent Counsel, in the words of the statute, may request assistance from the Department of Justice, and the Department of Justice shall provide that assistance, but the Department has the raw power to refuse to provide assistance or to drag its feet. In this regard, an Independent Counsel is

dependent upon and thereby vulnerable to the administration that he or she is investigating.

The tension I emphasize is an institutional one, one which exists regardless of the particular administration or Independent Counsel, but Independent Counsels are vulnerable in a larger sense, and the Chairman referred to this.

In high-profile cases, as Professor O'Sullivan testified, "those under investigation or their political allies have every incentive to impugn the integrity and impartiality of any statutory IC who uncovers wrongdoing." For Presidents who are under investigation, Henry Ruth, a veteran of Watergate, observed, the lesson of recent history is: "[A]ttack. Attack the lawyers, attack the witness[es], attack the prosecutor, attack the laws the prosecutor seeks to enforce."

There are several dimensions to this attack strategy. First, independence can be misrepresented as antagonism.

Second, the Department of Justice, which has incentives to come to the aid of a U.S. Attorney or a regulatory Independent Counsel, has no incentive to help a statutory Independent Counsel. With no institutional defender, Independent Counsels are especially vulnerable to partisan attack. In this fashion, the legislative effort to take politics out of law enforcement sometimes has the ironic effect of further politicizing it.

And I cite other points in the written statement.

Independent Counsels are not the only such target. The three judges on the Special Division likewise have been subjected to attacks to which they could not respond.

In the midst of the tumult last year, we found ourselves litigating executive privilege, government attorney-client privilege, and a Secret Service privilege. We won virtually every case. Most of the rulings came quickly, thanks to the tireless labors of highly conscientious Article III judges, and Chief Judge Johnson in this district in particular, but the litigation did consume months of time.

While the judges worked diligently inside the courthouse, a carnival-like atmosphere prevailed outside. Some grand jury witnesses cowered in anguish as they were pursued by TV cameras. Other witnesses used the cameras for their own ends, including to disseminate falsehoods about what had transpired in the grand jury room.

Meanwhile, the assaults took a toll. A duly authorized Federal law enforcement investigation came to be characterized as yet another political game. Law became politics by another means. The impact on public attitudes was unmistakable, as the comments of the potential jurors in the Susan McDougal trial demonstrated. As noted by others, including Attorney General Reno, the statutory mechanism intended to enhance confidence in law enforcement had the effect of weakening it.

After carefully considering the statute and its consequences, both intended and unintended, I concur with the Attorney General, who has aligned herself with her predecessors. The statute should not be reauthorized.

At a minimum—I gather from the Chairman's comments, this may be under consideration—Senator Howard Baker's thoughtful suggestion for a cooling-off period deserves careful consideration.

The reason is not that criminality in government no longer exists. As Mr. Hamilton said in *The Federalist*, "If men and women were angels, government would not be necessary." Nor is the reason that the public has grown indifferent to our tradition of holding government officials to a high standard. Rather, the reason is this. By its very existence, the Act promises us that corruption in high places will be reliably monitored, investigated, exposed, and prosecuted through a process fully insulated from political winds. But that is more than the Act delivers and more than it can deliver under our constitutional system.

The statute, in sum, tries to cram a fourth branch of government into our three-branch system, but invariably this new entity lacks, in Mr. Madison's phrase, "the constitutional means . . . to resist encroachments." The results are structurally unsound, constitutionally dubious, and, in overstating the degree of institutional independence, disingenuous.

To be sure, returning to the pre-Act regime entails undisputed disadvantages. There was no golden age of special prosecutors.

If the past is any guide, more investigations are likely to stay in the Justice Department, with no outsider appointed. That means more politically tinged cases in which the investigation will be seen, fairly or unfairly, as something less than thoroughgoing.

Professor Case Sunstein, though he opposes the statute, acknowledges that this law probably has deterred crime by, in his words, "letting high-level officials know of the serious consequences of any illegal conduct." So, as investigations into public corruption are seen as becoming less vigorous, the deterrent effect will diminish. We should not overlook these risks.

In conclusion, I think it is fair to say that the Act has been a worthwhile experiment. It has yielded significant results. The results, I believe, support this conclusion: Jurisdiction and authority over these sensitive matters ought to be returned to the Justice Department. And who will oversee them? The Congress, the press, the public.

This is not, as I said at the outset, a perfect solution. It will no doubt give rise to decidedly imperfect outcomes, but it puts me in mind of Winston Churchill's famous remark about democracy, the worst system, he called it, except for all the others. Returning authority over these prosecutions to Attorneys General, and relying on them to appoint outside counsel when necessary, is the worst system, except for all the others.

In this difficult realm, solutions are bound to be transitory. It is 25 years after the Saturday Night Massacre, and we are still searching for a reasonable, effective, and constitutional approach. No matter what the Congress decides, no matter what microsurgical precision is applied to fine-tune the statute, these problems are destined to ensure. Thank you, Mr. Chairman.

[The prepared statement of Hon. Kenneth W. Starr follows:]

PREPARED STATEMENT OF INDEPENDENT COUNSEL KENNETH W. STARR

Mr. Chairman, Senator Lieberman, and Members of the Committee:

I am grateful for your invitation to testify today on the reauthorization of the Independent Counsel Act, and possible alternatives to the Act. This law represents one response to an enduring question, a question that seems to take on more immediacy each day: How can the government retain the trust of the people when high-

level officials stand accused of misconduct? In answering that question, we do not write on a blank slate. We are mindful of the strictures laid down by the Founders, who themselves sought to promote trust in government. We are mindful, too, of the lessons of history and experience.

The principles that guide us are crucial ones. I have thought about them as Counselor and Chief of Staff to the Attorney General of the United States, as an appeals court judge, as the Solicitor General, as a teacher of constitutional law, and now as an Independent Counsel—the first Independent Counsel to be assigned five distinct investigations, and the first to inherit the wide-ranging work of a regulatory special counsel, the distinguished lawyer Robert Fiske. My evaluation of the statute grows out of the whole of this experience.

My current role must limit my remarks in one important respect. I cannot address certain topics in light of grand jury secrecy, pending prosecutions, and ongoing investigations. I respectfully ask your forbearance.

* * *

Judge Learned Hand observed that every law is "at once a prophecy and a choice." The prophecy and the choice embedded in the Independent Counsel statute were, from the law's first enactment 21 years ago, somewhat tentative. Unlike most laws, this one was written to expire after five years. It has been retooled and reenacted three times since, but always with this sunset provision.

Now, once again, the experiment is scheduled to come to a close. And once again, witnesses have drawn varying lessons from the experiences of the last five years.

I too have drawn some lessons, as I will explain. But I must make one point clear from the outset: I am not here to outline the perfect solution. To the contrary, the Independent Counsel law forces us to make painful trade-offs. Not all of our goals can be achieved. As Attorney General Reno testified, we face "a very complex, difficult issue in which there may be no right answer."

This is the core of that issue: On occasion, government officials face actual or apparent conflicts of interest. Their judgment might be swayed by outside considerations. Even if some of them are capable of superhumanly blocking out such concerns and deciding solely on the merits, the public may distrust them.

The classic example, the one underlying this law, is when an Attorney General tries to investigate criminal allegations relating to the President or those close to the President. In the words of Archibald Cox, testifying in the 94th Congress: "The pressures, 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 essential." By appointing outside counsel, we seek to ensure three things: (i) that government officials are held to the highest standards; (ii) that allegations of misconduct are closely scrutinized; and (iii) that those who betray the public trust are prosecuted vigorously.

This practice was established long ago. Presidents or their Attorneys General appointed prominent outside lawyers to investigate and prosecute the Whiskey Ring in the 1870's, Teapot Dome in the 1920's, corruption in the Justice Department in the 1950's, and Watergate in the 1970's. While political pressures were sometimes brought to bear, Presidents retained their full discretion. No law forced the appointment of these historic Special Prosecutors.

And no law regulated the firing of them, as was done to Archibald Cox. In response to the public outcry, the Administration installed a new Special Prosecutor, Leon Jaworski. The investigation proceeded, leading to the conviction of a number of Administration officials and, ultimately, to the resignation of the President.

Although we commonly hear that the system worked in Watergate, success was not preordained. Testifying before this Committee last month, Henry Ruth—a senior official in the Watergate Special Prosecutor's office—described the period between Archibald Cox's dismissal and the appointment of Leon Jaworski by saying: "it's impossible to describe how thin a thread existed."

In the years after Watergate, Congress pondered various reforms. Many deemed it essential to take at least some investigations and prosecutions out of the hands of a presidentially appointed Attorney General, and to do so through the force of law, lest Henry Ruth's "thin thread" give way. Some favored creating a permanent, independent office to investigate and prosecute high government officials. Others recommended making the Justice Department as a whole independent of the Administration. Senator Sam Ervin proposed an autonomous Attorney General who would serve a fixed term longer than the President's.

Such proposals raised pragmatic as well as constitutional issues. For example, Theodore Sorensen, the author (and attorney) who had served in the Kennedy White

House, wrote that such well-intentioned reforms would diminish the potency of voters in our system. As he noted, some citizens, perfectly appropriately, decide how to vote based on such issues as civil rights, antitrust, environmental protection, and the war on drugs—issues that would be largely expunged from the presidential campaign if Attorneys General became autonomous. In this respect (as in many others), politics ultimately cannot be separated from accountability.

While rejecting the notion of an independent Justice Department, Congress continued to seek some statutory solution. The ultimate approach—the Independent Counsel provisions of the Ethics in Government Act—sought to institutionalize what had been done ad hoc: the selection of outside lawyers to conduct certain sensitive investigations.

But critics have argued that our efforts to institutionalize have only worsened the problems. Former Attorney General Civiletti, for example, told the House Judiciary Committee last month that "the Act is hopelessly flawed and cannot be repaired," a belief rooted in what Mr. Civiletti diagnoses as "insurmountable inherent problems with the structure and operation of the Act." Attorney General Reno and Deputy Attorney General Holder made similar points in their testimony here and in the House.

* * *

Let me briefly discuss two key changes from the pre-Act status quo. *First,* the language of the statute makes the appointment of an outside prosecutor mandatory under certain circumstances. *Second,* this outside prosecutor is selected by a special three-judge court.

* * *

I start with the mandatory language in the statute. Attorneys General historically enjoyed absolute discretion on whether to appoint outside lawyers to handle particular investigations. As enacted in 1978 and reenacted since, the statute commands that, under certain circumstances, the Attorney General *must* do so. This represented a dramatic break from our traditions.

It also represented a break from broader legislative trends. The statute was first passed in an era of deregulation, when the legal constraints on many important Article II functions were being loosened, and when we were moving away from the familiar "command and control" regulatory approaches.

The statute is also unusual in *what* it seeks to regulate: the professional legal judgment of the Attorney General as to a criminal investigation. The evaluations of evidence, including its specificity and credibility, are not like parts per million of a toxic substance in groundwater. Rarely if ever had Congress tried to regulate so specifically such unquantifiable matters. And rarely had Congress sought to tell the Attorney General precisely how, and how not, to reach a professional judgment. The statute, in its current form, bars Attorneys General from using grand juries, plea bargains, immunity, or subpoenas in their preliminary investigations, and it restricts their ability to consider one element of most crimes, the individual's state of mind.

There is another, more fundamental anomaly, one that colors the statutory system as a whole. When Congress regulates through broad language—the phrase "public convenience and necessity" in the 1934 Communications Act, for instance—it ordinarily relies on an administrative agency (such as the FCC) to flesh out the generalization through detailed regulations. The courts then review those regulations in what amounts to a back-and-forth dialogue with the agency, which in turn informs future Congressional action.

The regulatory regime of the Independent Counsel law is strikingly different. An Attorney General's decision on triggering the statute is not subject to judicial review. In a sense, then, Congress enacted a statute covering situations when the Attorney General's objectivity, for one reason or another, cannot be trusted—and then placed total, unreviewable trust in the Attorney General. The language of the statute evokes the regulatory model, but the language proves, in practice, hortatory, not mandatory.

There are powerful constitutional concerns underlying this anomaly. Law enforcement is at the heart of the Executive power under our Constitution. It is the President's solemn duty to take care that the laws be faithfully executed. When asked to direct the exercise of this duty, the courts are ill at ease (and perhaps institutionally ill-equipped).

Indeed, many students of the Constitution believed that the Independent Counsel statute, even absent judicial enforcement, would be found unconstitutional as a violation of the separation of powers. That was my own view. But, in *Morrison v.*

Olson, the Supreme Court upheld the law. The Court stressed that the law did not and could not substantially trespass on the Executive power of law enforcement. The Justices noted the "unreviewable discretion" conferred on the Attorney General in certain matters. So, for a variety of pragmatic and constitutional reasons, the Independent Counsel law only partially reflects the regulatory model of legislation. Two consequences bear mention.

First, as I noted, the lack of judicial review bars the sort of evolution that we see in other regulatory realms, where the agency, the courts, and Congress conduct a continuing dialogue. Under this law, Attorneys General are free to make completely ad hoc decisions. They must explain some but not all decisions, but they are never required to reconcile a current one with the Department's past interpretations of the statute.

Second, I believe that the public, for perfectly understandable reasons, does not fully apprehend the magnitude of the Attorney General's discretion under the statute. As a result, an Administration is not held fully accountable for the exercise of that discretion. People tend to believe that laws are enforceable by the judiciary. This one, in substantial part, is not.

* * *

Along with the superficially mandatory but legally toothless statutory language, a second major shift from past practice concerns the selection of the outside prosecutor. The job of choosing the outsider is no longer in the Administration's hands. Instead, the three-judge panel makes the appointment.

Like the statute as a whole, this provision grew out of concerns about public trust. Soon after Leon Jaworski's appointment, the *New York Times* editorial page asserted that "Mr. Jaworski's personal integrity is not in doubt, but he is fatally handicapped from the outset because he enters the Watergate investigation as the President's man." If the Attorney General could not be trusted to conduct an investigation, then perhaps he or she could not be trusted to select the investigator either.

That principle led to my appointment. In 1993, the Justice Department was investigating Madison Guaranty Savings & Loan, Whitewater Development Corporation, and the relationship between the two. Pressure mounted for the Attorney General to appoint a regulatory special counsel to take over the investigation—a counsel, that is, whose independence would be protected only by Justice Department regulations, and not by Federal statute. Attorney General Reno resisted. Echoing the 1973 *New York Times* editorial, she argued that people who didn't trust her to conduct the investigation wouldn't trust her to select the investigator.

Then, in early 1994, the President himself requested that she appoint a special counsel. The Attorney General complied. Senior Justice Department staff sounded out several candidates—I was one of them—before the Attorney General decided on Robert Fiske.

Six months into Mr. Fiske's investigation, the 103d Congress reenacted the Independent Counsel law. Pursuant to the statute, the Attorney General asked the three-judge panel to appoint an Independent Counsel to carry the investigation forward. She recommended the statutory appointment of Mr. Fiske. But the judges decided to appoint someone new—*not,* they emphasized, because of any dissatisfaction with Mr. Fiske's performance, but rather because of the philosophy underlying the statute. The law said that Independent Counsels were not to be chosen by the Attorney General, so the three-judge panel appointed someone else.

A word about party identification. Like Mr. Fiske, I am a Republican assigned to investigate a Democratic official. This has been the usual practice. Someone identified with the party out of power has ordinarily been chosen to conduct the investigation. In Watergate, for example, Professor Cox was a Democrat who had held positions in three Democratic administrations. Senator Thurmond said at the time that he was pleased to have a Democrat investigating President Nixon, because "it might instill more confidence in the investigation."

If the statute is not reenacted, I anticipate that this practice will continue. Indeed, Attorney General Reno told this Committee that she would appoint as special prosecutors (if the occasions arose) such individuals as "a former U.S. attorney who served in a Republican administration."

* * *

Those, then, are the key features of the statute concerning the appointment of an Independent Counsel. Let me turn now to the Independent Counsel's investigation. The statutory goal, again, is to bypass the Administration's conflict of interest—to

empower an outsider to investigate and, if appropriate, to prosecute. In other words, to do what the Justice Department itself would do but for the conflict.

That's the theory. The reality is more complicated.

For one thing, an Independent Counsel must start from scratch. Judge Walsh made the point well in his final report on Iran-Contra: "[An] Independent Counsel is not an individual put in charge of an ongoing agency as an acting U.S. attorney might be; he is a person taken from private practice and told to create a new agency . . . ." Doing so not only takes time; the costs can be substantial.

In addition to the start-up costs and delays, an Independent Counsel's office is obliged to do for itself what the Justice Department does for most Federal prosecutors. In practice, this means that some lawyers in Independent Counsel offices get diverted from their prosecutorial work by Freedom of Information Act requests and the like. An Independent Counsel cannot benefit from the economies of scale that the Justice Department has achieved over time. This, too, increases the cost of Independent Counsel investigations.

Alongside these prosaic distinctions, there is a fundamental difference between an Independent Counsel and a U.S. Attorney. The Independent Counsel is a prosecutor of limited jurisdiction. He possesses authority to investigate the subject matter that led to his appointment, and (in the words of the law) "all matters related to that subject matter." But that's all. As Deputy Attorney General Holder testified before the House, Independent Counsels simply do not possess "all the authority that other prosecutors have," and they cannot "investigate and prosecute all avenues, wherever those avenues may lead." My office, like other Independent Counsel offices, has referred matters outside our jurisdiction back to the Justice Department.

The jurisdictional limits on Independent Counsels are entirely understandable. The statute seeks to shift responsibility for the rare investigation that raises a conflict, not for Federal law enforcement in general. The strict limits on the Independent Counsel, moreover, were central to the Supreme Court's constitutional holding in *Morrison.* An Independent Counsel's jurisdiction may be "fuzzy at the borders," as the D.C. Circuit said a few years ago, but there *are* borders. Constitutionally, there have to be.

Still, these limits complicate our investigations enormously. A U.S. Attorney sometimes can persuade a witness to cooperate by gathering evidence of an unrelated crime that the witness committed. Mr. Fiske followed this tack as regulatory special counsel investigating Whitewater. A statutory Independent Counsel, in contrast, must seek jurisdiction to cover the unrelated crime. Without it, he or she may not be as effective.

More important day to day, the jurisdictional limits give rise to a powerful weapon for delay. Witnesses or subjects, fighting subpoenas or indictments, can argue in court—and frequently do—that the Independent Counsel has exceeded his or her jurisdiction. Such arguments arise even when the Independent Counsel has scrupulously followed the steps in the law for establishing jurisdiction. And that, like all litigation, can consume enormous amounts of time.

For example: On June 7, 1995, a grand jury in Little Rock indicted then-Governor Jim Guy Tucker and two associates, in a matter initially investigated by Mr. Fiske and then, after reenactment of the statute, specifically referred to my office by the Attorney General. Three months later, the Little Rock trial judge dismissed the indictment on jurisdictional grounds. We appealed, with the aid of the Justice Department (which filed an amicus brief on our behalf), and the Eighth Circuit not only reversed this unfounded ruling, but assigned the case to a different judge. The defendants took months unsuccessfully seeking further review. The last step—the Supreme Court's denial of certiorari—came on October 7, 1996, exactly sixteen months after the grand jury in Little Rock had returned the indictment. (Mr. Tucker eventually entered a guilty plea in February 1998, almost 3 years after the indictment.)

We faced jurisdictional issues again last year in the tax case against former Associate Attorney General Webster Hubbell. To confirm that a particular matter falls within the office's jurisdiction, an Independent Counsel can go *either* to the Attorney General *or* to the Special Division under Section 594(e) of the statute. We had made a prudential decision, under the circumstances, to seek Special Division authorization for matters related to Mr. Hubbell rather than going before his former colleagues at the Department. The Special Division unanimously confirmed that we possessed the necessary jurisdiction, and we proceeded. The grand jury indicted Mr. Hubbell and three other defendants on April 30, 1998. But the district court here in Washington dismissed the indictment. We appealed. On January 26 of this year, the D.C. Circuit reversed the trial court's jurisdictional ruling and reinstated the indictment. Further appellate review remains possible.

We lost 16 months to the Tucker jurisdictional battle and, so far, nearly a year to the Hubbell one. These are battles that a U.S. Attorney's office would not have

to fight. This is a serious problem, one that is inherent in the Independent Counsel structure.

* * *

An Independent Counsel differs from a Justice Department prosecutor in another important respect: the duty to report.

In his testimony before this Committee in 1973, Archibald Cox—who had not yet taken office as Special Prosecutor—observed that the public wanted enforcement of the criminal laws *and* prompt public disclosure of the facts. Professor Cox told the Committee that "the focuses of these two inquiries . . . their character and the responsibilities wouldn't always be identical."

Indeed they are not. Independent Counsels originally were required to produce final reports discussing, among other things, their reasons for not prosecuting any matters within their jurisdiction. Federal prosecutors do not ordinarily allege improprieties without charging them in court. Congress, concerned about this deviation from normal law-enforcement practice, modified the reporting requirement in 1994 but did not drop it. Here as elsewhere, Congress seemed to be trying to use the Independent Counsel mechanism to achieve ends traditionally served by Congress itself, in this case public hearings and reports.

The witnesses before this Committee have been virtually unanimous in their opposition to final reports. I concur. If the statute is reauthorized, I respectfully recommend that Congress eliminate the report requirement. Compiling the report and (as the statute dictates) seeking comments from persons named in it are burdensome and costly tasks. And, as Mr. Fiske said in his testimony here, the requirement may encourage Independent Counsels to continue turning stones after they have concluded that no prosecutable criminal case exists. We should leave to others—to Congress, journalists, and, ultimately, the people—the task of making broader judgments about matters under investigation.

* * *

In addition to the final report requirement, Independent Counsels are subject to a second reporting requirement. It, too, is one that does not apply to ordinary prosecutors. This is the requirement, embodied in Section 595(c) of the Act, that an Independent Counsel inform the House of Representatives of particular information that, in the words of the statute, "may constitute grounds for an impeachment."

When we searched the legislative history for guidance on this provision, we found almost nothing. The root of the requirement seemed to be Leon Jaworski's report to Congress during the Nixon impeachment. We learned that the Justice Department opposed the provision in 1977, arguing (presciently) that, "[i]n view of the ambiguity of what constitutes grounds for impeachment, this provision will only serve to create confusion."

We could have shipped the raw evidence with nothing more last fall, but we believed, like Mr. Jaworski, that we were obliged to try to bring order and coherence to the information. In 1974, with House impeachment proceedings already underway, this was a relatively straightforward task for Mr. Jaworski. Under different circumstances and with a different legal obligation, we believed that we needed to include a fuller analysis.

Indeed, we felt we had some obligation to explain to Congress why, in our judgment, this information met the 595(c) standard. The law required us to decide whether particular presidential acts might be impeachable, and we believed that we ought to share our reasoning, at least to the extent of explaining how the evidence comported with the elements of particular Federal felonies and with the apotheosis of impeachable misconduct, abuse of power.

We limited our report to matters that we had investigated, and we limited our investigation to possible crimes related to *Jones v. Clinton.* We omitted from the report certain information in our possession, including now-public, gravely serious allegations, because evaluating those matters was beyond the scope of our law enforcement investigation.

While we did our best to heed Section 595(c), I question its wisdom. For one thing, it is curious to impose this statutory duty on one, and only one, Federal prosecutor. Justice Department attorneys may come across information that might lead to the impeachment of Federal judges, for instance, but there is no parallel disclosure requirement. Whatever rule is adopted, it ought to apply to *all* Federal prosecutors.

In addition, this responsibility further politicizes Independent Counsel investigations. An impeachment inquiry, Alexander Hamilton predicted in *Federalist 65,* often "will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other." By com-

plying with Section 595(c), we were invariably but wrongly seen as part of the political proceeding of impeachment.

More important, impeachment is a central, nondelegable Congressional duty. As Professor Akhil Amar of Yale Law School has pointed out, it is curious for the legislative branch to defer on so vital a matter to an inferior officer of the Executive Branch.

* * *

Impeachment is not unique in this regard. Testifying here last month, former Senator Baker observed that the Independent Counsel mechanism has encouraged Congress to back away from its oversight responsibilities and (in his words) to "say, not only [that] the independent counsel will handle it, but that perhaps there's something not quite right about Congress looking into the matters that are being investigated by an independent counsel."

When a government scandal arises, we often face a choice between prompt public disclosure of the facts or vindication of the criminal laws. In the main, Congress can get the facts out quickly by immunizing witnesses, but, as the Iran-Contra investigation demonstrated, immunized testimony can vastly complicate prosecutions. The criminal justice process, in contrast, ordinarily will not disclose all the facts. Prosecutors often talk of the gulf between what they know and what they can prove beyond a reasonable doubt to a jury, bearing in mind the elements of the crime and the limits on admissibility of evidence. The breadth of their inquiries also differs. As Professor Sam Dash has observed: "The scope of congressional committee investigations and hearings is generally broader than those of investigations and prosecutions conducted by independent counsel." And the criminal justice process may not disclose critical facts for months or years—especially when, as I have noted, the prosecutor must frequently litigate over jurisdiction.

Facing this choice between prompt public disclosure and vigorous law enforcement, Congress in 1978 struck the balance in favor of law enforcement. It seemed all to the good, but we must also consider that when a scandal is eroding public confidence, speedy disclosure is preferable to slow justice.

Moreover, citizens' political and policy judgments will be shaped, quite properly, by an unfolding Congressional investigation. If an Administration withholds crucial documents or testimony on the basis of Executive privilege, for example, citizens ought to be able promptly to incorporate that into their assessment. The American people can get that information in a timely manner from a Congressional investigation. Not so with a grand jury investigation.

When Congress defers to the criminal justice system, presidential accountability thus may suffer. As former Assistant Attorney General Timothy Flanigan testified before the House Judiciary Committee last month, the Framers would have said that the cure for misconduct by Executive Branch officials is "vigilance on the part of the Legislative Branch and appropriate use by Congress of its investigative and, yes, even its impeachment powers."

* * *

Now I would like to discuss, briefly, accountability of a different sort. I mentioned that the Department of Justice filed an amicus brief on our behalf in the *Tucker* litigation. It may surprise some to learn that the Justice Department is filing briefs in Independent Counsel cases. The Independent Counsel possesses, in the words of the statute, "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice." Shouldn't the two entities be walled off from each other?

In theory, perhaps they should be, but in practice they are not. Institutionally, in fact, they cannot be. To a much greater degree than people realize, the Department can help or hinder an Independent Counsel.

The statute provides that an Independent Counsel "may request assistance from the Department of Justice . . . and the Department of Justice shall provide that assistance." But this provision, like so many parts of the statute, lies beyond judicial review.

The Department has the raw power to refuse to provide assistance, or to drag its feet. In this regard, an Independent Counsel is dependent upon, and thereby vulnerable to, the Administration that he is investigating. The tension is an institutional one, which exists regardless of the particular Administration or Independent Counsel. As Attorney General Reno testified in 1993, "the relationship between the Department and Independent Counsels [is] difficult at times," characterized by "undue suspicion and resistance, on both sides."

The Justice Department also has ample power to hinder an investigation directly. In Judge Walsh's words, "Since World War II only five independent counsel have investigated a President; two were dismissed; two of us have been investigated by the displaced attorney general; only Leon Jaworski was unmolested." Mr. Jaworski of course took office under exceptional circumstances. History thus teaches that outside prosecutors investigating Presidents are likely to be scrutinized, impeded, and sometimes fired.

* * *

Independent Counsels are vulnerable in a larger sense as well. In high-profile cases, as Professor Julie O'Sullivan said in her testimony, "those under investigation or their political allies have every incentive to impugn the integrity and impartiality of any statutory IC who uncovers wrongdoing." For Presidents under investigation, Henry Ruth observed, the lesson of recent history is: "[A]ttack. Attack the lawyers, attack the witness[es], attack the prosecutor, attack the laws the prosecutor seeks to enforce."

There are several dimensions to this attack strategy. First, independence can be misrepresented as antagonism. As Professor O'Sullivan noted: "[P]recisely because the Independent Counsel is independent of the administration . . . [he] can be painted as hostile to it."

Second, the Department of Justice—which has incentives to come to the aid of a U.S. Attorney or a regulatory special counsel under assault—has no incentive to help a statutory Independent Counsel. With no institutional defender, Independent Counsels are especially vulnerable to partisan attack. In this fashion, the legislative effort to take politics out of law enforcement sometimes has the ironic effect of further politicizing it.

Third, it is impossible for an Independent Counsel to respond effectively to attacks. The Justice Department, as part of an Administration, can invariably get its message out, but an Independent Counsel who responds to criticism simply invites more of it.

* * *

Prosecutors investigating public figures, of course, are accustomed to brickbats. The point was well stated in an article co-written a few years ago by Deputy Attorney General Holder: "[P]owerful figures increasingly seem to characterize criminal investigations of their alleged illegal conduct as 'political witch hunts.' This type of epithet only serves to unfairly impugn the motives of prosecutors and to undermine our legal system. . . ."

But I think we have seen something more than the norm. Our office was subjected to what the *Washington Post's* Howard Kurtz has termed "an extraordinary assault on a sitting prosecutor."

My office was not the only target. The three judges on the Special Division likewise were subjected to remarkable attacks, to which they could not respond.

In the midst of this tumult, we found ourselves litigating Executive privilege, governmental attorney-client privilege, and a Secret Service privilege. We won virtually every case. Most of the rulings came quickly, thanks to the tireless labors of highly conscientious judges (Chief Judge Johnson in particular), but the litigation consumed months of time.

While the judges worked diligently inside the courthouse, a carnival-like atmosphere prevailed outside. Some grand jury witnesses cowered in anguish as they were aggressively pursued by TV cameras. Other witnesses used the cameras for their own ends, including to disseminate falsehoods about what had transpired in the grand jury room.

Meanwhile, the assaults took a toll. A duly authorized Federal law-enforcement investigation came to be characterized as yet another political game. Law became politics by other means. The impact on public attitudes was unmistakable, as the comments of potential jurors in the Susan McDougal trial demonstrated. As noted by others, including Attorney General Reno, the statutory mechanism intended to enhance confidence in law enforcement thus had the effect of weakening it.

After carefully considering the statute and its consequences, both intended and unintended, I concur with the Attorney General. The statute should not be reauthorized.

The reason is not that criminality in government no longer exists. Nor is the reason that the public has grown serenely indifferent to our tradition of holding government officials to a high standard. Rather, the reason is this: By its very existence, the Act promises us that corruption in high places will be reliably monitored, investigated, exposed, and prosecuted, through a process fully insulated from political

winds. But that is more than the Act delivers, and more than it *can* deliver under our constitutional system. Briefly:

- The statutory trigger is unenforceable. If we're going to rely on the Attorney General's good faith, then we should do so forthrightly. We should acknowledge that the Attorney General is the indispensable actor in Federal law enforcement, and hold her accountable for the exercise of that authority. Significantly, this is the view of Attorney General Reno and all of her predecessors who have testified here or in the House this year.
- The mechanical simplicity of the language in the statute camouflages the inescapable exercise of professional judgment and discretion. The focus should be on whether the Department is capable of conducting an impartial investigation. The statute, by trying to create a litmus test for partiality, distracts us from that central concern.
- Because the Independent Counsel is vulnerable to partisan attack, the investigation is likely to be seen as political. If politicization and the loss of public confidence are inevitable, then we should leave the full responsibility where our laws and traditions place it, on the Attorney General (or, where she deems it appropriate, her appointee as special counsel) and on the Congress.
- The statute leaves the Independent Counsel substantially dependent on the Department of Justice, which may have incentives to impede, or at least not assist, his work.
- The law may have the unfortunate effect of eroding respect for the judiciary, through attacks—unanswered and institutionally unanswerable—on the Special Division. It is one thing to turn the political attack machine on a prosecutor; it is quite another to turn it on the judiciary.
- The law also may have the effect of discouraging vigorous oversight by the Congress, in a departure from our traditions.
- In a variety of ways, the statute tries to cram a fourth branch of government into our three-branch system. But, invariably, this new entity lacks (in Madison's phrase) the "constitutional means . . . to resist encroachments." The result is structurally unsound, constitutionally dubious, and—in overstating the degree of institutional independence—disingenuous.

To be sure, returning to the pre-Act regime entails undisputed disadvantages. There was no golden age of special prosecutors.

If the past is any guide, more investigations are likely to stay in the Justice Department, with no outsider appointed. That means—again, if the past is any guide—more politically tinged cases in which the investigation will be seen, fairly or unfairly, as something less than thoroughgoing.

Then there is the possibility that politics will play a role. On occasion, as Timothy Flanigan pointed out last month, "men and women who are deeply involved in the political passions of their times" will be overseeing a law enforcement investigation "that may have far-reaching political implications."

Professor Cass Sunstein, though he opposes the statute, acknowledges that the law probably has deterred crime by (in his words) "letting high-level officials know of the serious consequences of any illegal conduct." As investigations into public corruption are seen as becoming less vigorous, the deterrent effect will diminish.

When a case is closed with no indictments, the public may be more skeptical. As Nathan Lewin pointed out, a statutory Independent Counsel provides additional reassurance of fairness and thoroughness in such instances.

More gravely, restoring the regime of regulatory special counsels may invite another Saturday Night Massacre, this time with a different outcome. The "thin thread," as Mr. Ruth put it, may give way the next time; the final cover-up may succeed—as, in the view of some historians, occurred in the 1870's when President Grant fired a special prosecutor at a crucial moment of the investigation.

We should not overlook these risks. But we have to make trade-offs. In light of all the factors, I respectfully recommend that the statute not be reenacted.

* * *

If, however, the Congress does decide to modify and reenact the statute, I urge you to beware of gimmicks. Attorney General Reno said of the current system, "It can't get any worse. . . ." With all due respect, I disagree. The system could indeed be made worse, and one of the proposals before you would have just that effect.

I speak of the proposal to impose a time limit on investigations. As Senator Levin said in 1993, "Complex Federal criminal cases often take years to investigate." And, as Senator Levin also wisely noted, many of the people who complain the loudest

about the slow pace of an investigation tend to be the ones who themselves have delayed it.

Remember, too, the tactics of defense attorneys. According to his biographer, the legendary trial lawyer Edward Bennett Williams invariably employed the same strategy in each major criminal case that he handled. The strategy: Delay. As Mr. Ruth said before this Committee last month, "[t]he second you set a time limit, 23 people get a one-way trip to China," for "delay is the first principle of defense."

A time limit, even if it allowed extensions in unusual circumstances, would confer few benefits while imposing significant costs. Any attorney worth his or her salt knows how to delay proceedings in subtle and not-so-subtle ways, such as the sixteen months we lost while litigating jurisdiction in the *Tucker* case. A Procrustean time limit would invite lawyers to run out the clock.

If you do reauthorize the statute, I urge you to broaden the Attorney General's discretion. Greater emphasis should be placed on Section 591(c), which gives the Attorney General the authority to seek appointment of an Independent Counsel whenever an investigation raises a conflict of interest. The list of categorical triggers in Section 591(b) should be shortened. As for the preliminary investigation under Section 592, the time limit should be extended or abandoned. The Attorney General should be given authority to use traditional law enforcement tools to gather information, and the authority to take into account the full panoply of traditional prosecutorial considerations.

Some witnesses have suggested that the Independent Counsel's jurisdictional limits be tightened, perhaps by eliminating the provision for expansions. In the view of these witnesses, an Independent Counsel with an expanding mandate, as the law now permits, may appear to be pursuing a personal vendetta, or at least a prosecutorial fiefdom.

In our investigation, the Department and the Special Division expanded our jurisdiction four times, to cover matters related to the firing of White House Travel Office employees, the accumulating of FBI files in the White House, the Congressional testimony of a former White House Counsel, and, finally, Monica Lewinsky. In some of those instances, the expansion came at the Department's initiative; we agreed to accept the added jurisdiction, which we had not sought. The number of expansions is unique, and it may have fed the misconception that we were investigating individuals rather than crimes. Let me make clear: That was not the case. Indeed, I am as proud of our decisions *not* to bring several indictments as I am of anything else we have done.

Keep in mind that in each of the jurisdictional expansions, the Attorney General concluded that she faced a conflict of interest. If she had not acted to expand our jurisdiction, she would have been obliged to seek the appointment in each instance of a *new* Independent Counsel. Eliminating jurisdictional expansions thus will substantially increase start-up costs and delays. It also may produce even more litigation over jurisdiction, leading to still greater costs and delays.

There is one proposal that I endorse wholeheartedly: Senator Baker's suggestion that the Congress postpone any decision on the statute for a cooling-off period, or, perhaps more aptly, a ceasefire. Let the statute lapse. Monitor the Justice Department's record in selecting regulatory special counsels. And then reassess after the current intensities have passed, and when—in the words of *Federalist 2*—no one will be "influenced by any passions except love for their country."

* * *

In conclusion, I think it is fair to say that the Act has been a worthwhile experiment. Like most experiments that are professionally conducted, it has yielded significant results. The results, I believe, support this conclusion: Jurisdiction and authority over these cases ought to be returned to the Justice Department. And who will oversee them? The Congress, the press, and the public.

This is not, as I said, a perfect solution. It will no doubt give rise to imperfect outcomes. But it puts me in mind of Winston Churchill's famous remark about democracy—the worst system, he called it, except for all the others. Returning the authority over these prosecutions to Attorneys General, and relying on them to appoint outside counsel when necessary, is the worst system—except for all the others.

In this difficult realm, solutions are bound to be transitory. Twenty-five years after the Saturday Night Massacre, we are still searching for a reasonable, effective, and constitutional approach. No matter what the Congress decides, no matter what microsurgical precision is applied to fine-tune the statute, these problems will endure.

Chairman THOMPSON. Thank you very much, Judge Starr.

It occurs to me at the outset that this Committee, at least in one regard, has been able to bring about perfect harmony between you and the administration on one area.

Judge STARR. You are exactly right.

Chairman THOMPSON. Well, your statement is clearly well-thought out, and as I said probably surprising to some people that you would advocate now letting lapse the statute under which you have been operating for some time.

I think also, as I listened to you, it occurs to me that what we are about here is nothing less than the pursuit of justice. For hundreds and hundreds of years in the world, there was a discussion underway about what justice is, and whether that was resolved or not, we got off into how to achieve our notion of justice. We have a long tradition in this country, of course, based upon the English common law tradition, and we came up with such things as a jury system, whereby we know sometimes the guilty go free and the innocent are convicted, but it is the best system that we can come up with in order to do justice most of the time. That is what we are trying to achieve here in terms of high-level officials who are accused of wrongdoing, justice, of course, having to do with making sure that the innocent is not unfairly treated as well as that the guilty is prosecuted.

What kind of a system can we achieve to make sure that that will happen in more cases than would happen in any other system? I think what the Independent Counsel law represents is an attempt to have accountability and the appearance of fairness and independence at the same time.

I think it is fair to say that your conclusion is that accountability is more important than independence. Is that a fair assessment?

Judge STARR. Yes, it is.

If I could elaborate just briefly, I think that accountability is vital and critical, and that the degree of independence enjoyed by an Independent Counsel may be less than meets the eye, for reasons that I try to enumerate in the written statement in particular, but I do think I would say this. The Statutory IC mechanism, and you have had testimony to this effect, is absolutely ideal under certain circumstances. It is the perfect mechanism when the IC is appointed, does his or her work, concludes promptly that there is no wrongdoing. There, the level of confidence is extraordinarily high, and the extent of the Independent Counsel's labors are sufficiently limited that serious issues of accountability at a practical level do not rise, in contrast to a lengthier investigation, especially one that involves a very high-ranking official of the Executive Branch, especially the President.

Chairman THOMPSON. You say that the accountability perhaps is not as great as one would think.

Judge STARR. Or the independence.

Chairman THOMPSON. I am sorry. That the independence is not as great as one would think.

Without elaborating in too much detail, could you tick off some of the reasons for that? You do discuss that somewhat in your statement, but a lot of the criticism of the statute has been just to the contrary, and that is that the Independent Counsel is too independent. They are accountable to no one.

We have set somebody up here totally outside the system.

Judge STARR. Yes. And I think those criticisms reflect an inadequate understanding of the mechanisms of accountability that are in fact there. That is to say, I think Congress was very clear with respect to its concern about jurisdictional limitations, and what I sought to do throughout the investigation is to repair quickly to the Justice Department with respect to issues that raise jurisdictional questions.

If there might be—and we learned very quickly that, as they should, able defense lawyers would come up with arguments to the effect of the prosecutor is outside his jurisdiction, and usually with a few epithets thrown in, and we would respond and say here is our charter from the Attorney General of the United States.

Chairman THOMPSON. The idea that an Independent Counsel can go traipsing around through the fields and looking behind any and every bush that he wants to is not a valid one, as I understand it.

Judge STARR. An utter shibboleth.

Chairman THOMPSON. Well, that sounds pretty serious. [Laughter.]

Judge STARR. Completely wrong.

Now, we have had litigation in Judge Walsh's experience. Namely, he was proceeding, and because these are obviously part of the public history, I feel I am constrained with respect to naming names, shall I say, in some of what I say, but with respect to one facet of his investigation, namely his prosecution of General Secord, he did not go to the Attorney General to secure confirmation of related-to jurisdiction. Thus, the issue was litigated, and Chief Judge Aubrey Robinson of this district determined: You do have jurisdiction. Judge Walsh, you are exactly right. General Secord, you are going to have to face trial.

Learning by that, we always, Mr. Chairman, went to the Attorney General to say: Here is an issue that has arisen. We want to bring it to your attention. We believe it is "related to" and thus within our jurisdiction—you may have a different view, and the like.

And the Attorney General can say: I disagree. You do not have related-to jurisdiction.

Chairman THOMPSON. Jurisdiction—what would be your second point that you would perhaps disabuse the public of their notion of so much independence?

Judge STARR. Well, I think, as I tried to say in the written statement, any Independent Counsel is very much dependent upon the Justice Department for assistance through the FBI and the like, as well as prosecutors, and at times——

Chairman THOMPSON. They are required to give you assistance when you ask for it, but there is no judicial review. If they decide not to follow that law, there is absolutely nothing you can do about it. Is that correct?

Judge STARR. That is correct.

And again, I do not want to be seen as talking about a specific episode.

Chairman THOMPSON. I understand.

Judge STARR. The Attorney General was very gracious and discreet when she was here, and so I am talking about the theoretical

workings of the statute, but the idea that the Independent Counsel—and I know it is a widespread view—is out running freely beyond his or her jurisdictional limits is, upon close examination, not supported by the facts.

Chairman THOMPSON. Let me move to another point, within my time. You touched on this briefly, and I perhaps look at the same problem the same way. I would like to know how you feel about it.

It seems to me that in a way, instead of being a method by which high-ranking officials are investigated, the Independent Counsel laws, in some respects, has turned into a shield. We get so caught up into the intricacies of the law, and we are looking over here to that and ignoring the big conflict of interest perhaps that might be there.

Mr. LaBella, who headed up the campaign task force, testified here 1 day, rather late, after most everyone had left, but I thought he gave one of the most interesting—some of the most interesting comments that we saw throughout the entire hearings. He was talking about how, from an investigator's standpoint, they were using the Independent Counsel or approaching the Independent Counsel law at the Justice Department. He said that unless you had sufficient grounds to really pursue an Independent Counsel determination with regard to a covered person, while investigating another person—maybe a friend of a covered person—you could not ask that person about the covered person.

Judge STARR. I see.

Chairman THOMPSON. So you were drawing a line there that under normal prosecution, if you were investigating a mayor or a governor or a Senator or someone like that, you would not have those lines drawn, so that you could not even ask a question about that person unless you already had enough evidence. It is almost a circular kind of a problem.

It occurs to me that, as I say, the Independent Counsel law, in some cases, anyway, is perhaps being used as a shield that would result in fewer prosecutions than if we had no such law at all. Is that a valid observation, do you think? What is your analysis there?

Judge STARR. I do not think I am qualified to comment on what happens inside the Justice Department and the way that operates, even though I am a two-time veteran of the Justice Department. So I do not think I should comment about that, but I do agree that the same principle, Mr. Chairman, is at work in terms of using these jurisdictional limits as a shield when a U.S. Attorney, as I indicated in the opening statement, would go out and try to conduct an investigation using traditional methods that experienced prosecutors would use, at every turn.

Certainly, if that is an exaggeration, quite frequently the Independent Counsel investigators would be met with: You do not have jurisdiction. The U.S. Attorney says: Here is 18 U.S.C. I have jurisdiction.

Chairman THOMPSON. My time is up. Thank you very much.

Judge STARR. Thank you, Mr. Chairman.

Chairman THOMPSON. Senator Lieberman.

Senator LIEBERMAN. Thanks, Mr. Chairman.

Thanks, Judge Starr, for what I thought was a very thoughtful statement, and I appreciate your insights and recommendations with regard to the report requirement of the Independent Counsel and your suggestion that we eliminate the requirement that led you to make the report to Congress under the impeachment powers.

I thought what was also interesting in this noble attempt by our predecessors to establish independence of prosecution, there was a very unusual, perhaps unprecedented mixing of functions of the different branches, witness the role that the judges play in appointing a prosecutor, but I thought your points about Congress giving the Office of Independent Counsel some responsibilities that are more typically legislative was a good point, such as the reports and the involvement in the impeachment process. I hope that we can be mindful of those, as those of us who want to preserve the law go forward and try to amend it.

Let me focus for a moment on what I take to be your central point, which is that notwithstanding the worthy motivations, that Congress had adopted this law post-Watergate, to insulate prosecution from politics that in fact in some unintended ways as you experienced it, this law more greatly politicized the prosecution as, I believe you said, law became politics by another means.

Let me make this case. And then you talked about the attack-attack-attack approach that Professor O'Sullivan and Mr. Ruth referred to here before us. Let me just state this case and ask you to respond to it: Obviously you were subjected to attack in a way that most Federal prosecutors are not, and some of your more controversial predecessors have been subjected to attack.

There is no question that affected public opinion. I remember during your testimony before the House Judiciary Committee, one friendly member of the House committee suggested you had had a very distinguished record. You said until you had become Independent Counsel.

Judge STARR. I did not mean to whine.

Senator LIEBERMAN. No.

But to me, the important point is that you retained under the law true independence of investigation and prosecution, to the extent that many thought you broadly overstepped what a normal prosecutor would have done. Incidentally, I would say to those critics—and I agreed with some of the citizens, and I disagreed with others—even if he did, ultimately, he is not the last word. The courts have to make a judgment in the case of criminal prosecutions, and in the case of impeachment, the Congress has to make a judgment and we did.

I would refer back to something the Chairman said before I ask you to respond, which is that one of the points that has been made by previous witnesses in these hearings, one that honestly I had not focused on, one of the most important goals of the Independent Counsel Statute may not only be to guarantee independence of prosecution, which is to say to protect the prosecutor from being influenced against prosecution of a high-ranking official, but to enable the Independent Counsel to decide not to prosecute and for that decision to be credible because the counsel is not accountable

in any way or obligated in any way to the official that is being investigated.

The fact is that in some interesting ways, your investigation does reveal that aspect of the law. I mean, you have chosen not to proceed against the President in Travelgate and in so-called Filegate. In fact, even in the impeachment referral to the Congress, you said the evidence against the President in the Whitewater matter was not sufficient to justify a referral to the House of Representatives.

Though it may have been missed in the fog of partisan and political and legal controversy, I do not know that the Attorney General could have reached a similar conclusion with equal credibility as you did, and I think we lose that, both of those aspects, independence of investigation and prosecution, and credibility of a decision not to prosecute if we let this law expire.

Judge STARR. I agree that those are the most serious tradeoffs that would be lost by a non-reauthorization.

And I must say with respect to independence and jurisdiction and the process of politicalization, your opening comments did bring to mind the fact, and your question now, with respect to the other branches of jurisdiction, I think with the benefit of hindsight, it would have been better for the Attorney General not to have expanded our own jurisdiction to include Travel Office and FBI files and the like. I am sure we will come to the most recent expansion of jurisdiction in the course of the colloquy. I think for that very reason, in terms of public perception, that why is he still in business. I think that is one of the reasons just in terms of stepping back and trying objectively to assess how this statute operates. I think I cannot overemphasize the uniqueness of the combined experience, each of which is without precedent, of an Independent Counsel stepping into the shoes of a regulatory Independent Counsel.

So that, when I flew to Little Rock on August 9, 1994, Bob Fiske advised me: Move to Little Rock. I do not want to speak for Bob Fiske. He can very ably speak for himself, but I think some of his colleagues, very able young men and women, believed they would be in Little Rock for 6 months and wrap it all up and go home.

It was clear when I arrived that there were serious matters on a variety of areas, including bankruptcy fraud. I can speak of this. It is in the public domain, Governor Tucker's bankruptcy fraud, the bankruptcy fraud of Chris Wade. On and on the list went, campaign finance issues involving the Governor's 1990 campaign, and to be blunt, I was a bit taken aback by the breadth.

I was fortunate in attracting some of the most able colleagues from around the country. I followed Bob's advice, which is: This is a nationally significant inquiry, do not just look to people who you might know from the Washington area.

We built a team of terrific people, building on what Bob had done, of people from around the country to begin that part of the investigation, which was unique, and then, 2 years later, to have additional components of Travel Office and the like assigned to us for efficiency reasons.

Senator LIEBERMAN. Would you forgive me if I interrupt?

Judge STARR. Yes, I am sorry.

Senator LIEBERMAN. No. Your answer has been responsive.

Let me ask you this. Would you, then, if we reauthorize the statute suggest that we limit the extension of jurisdiction of an appointed Independent Counsel to try to more narrowly define related matters or to limit it entirely?

For instance, in the Lewinsky matter—I do not want to argue this with you—just from your original mandate——

Judge STARR. Right.

Senator LIEBERMAN [continuing]. Wouldn't it have been better if the Attorney General had appointed a separate Independent Counsel? I am not asking your response on that, more on the legislative question we have before us.

Judge STARR. Right. I think that this experience suggests that an Independent Counsel's portfolio can for efficiency, economies-of-scale reason, be expanded in ways that do not at the end of the day promote the public trust and confidence in light of the current atmosphere of, shall I say, attack the prosecutor.

Senator LIEBERMAN. You have been subject to criticism, which I alluded to in my opening statement, because in spite of your varied and distinguished record in the law, you had not been a prosecutor.

Judge STARR. Right.

Senator LIEBERMAN. The allegation is, as a result, that you relied too much on the professional prosecutors who you retained underneath you and therefore did not have sufficient control of the investigation yourself.

Let me add to that, if you would answer at the same time, the criticisms, somewhat related, about the fact that during a substantial part of your tenure, you were not full time as Independent Counsel.

If we reauthorize the law, should we require Independent Counsels to have prosecutorial experience and require them to serve full time?

Judge STARR. With respect to the criminal justice experience, I think it is whether you want to follow an Archibald Cox model or not. That was the original model.

Fortunately, I had had a variety of experiences, had argued criminal cases, but you are quite right. I had not been a line prosecutor. I had not been a U.S. Attorney, and certainly, it would have been helpful had I been, but I will say this. It is not true that I relied unduly or gave undue weight to the professional judgment of one or two prosecutors. I made these assessments myself. I am responsible for them. I have to live up to that responsibility and to answer questions with respect to the discharge of that responsibility.

But it was thought in light of the Watergate experience that the kind of person who would be useful to serve in this kind of role would be, for example, a former judge or a former Solicitor General, bringing different judgments to bear.

I must say, facing issues like executive privilege and the like, I am not sure that someone, no matter how able she was as a prosecutor, would be quite accustomed to dealing with some of the great issues that we were confronted with in the course of our work.

With respect to full time, I think that is a judgment call by the Congress. The entire structure of the Act is designed for part time.

We are treated as part time by the apparatus of the administrative branch. They get uncomfortable when you say: I am full time. May I earn leave? They are a bit taken aback because that was not the structure originally envisioned.

For my part, I will say that I always devoted the time that I felt was needed to the investigation, especially since ultimately the Independent Counsel is called upon for his judgment, for making the critical decisions that need to be made, and I always made myself available.

I do not think that a trial lawyer can carry on, frankly. Fortunately, the kind of practice that I had more readily lent itself to more of an appellate specialty approach, but I do not see how in a busy investigation a trial lawyer could carry on his or her practice.

Senator LIEBERMAN. Thank you. Thanks, Mr. Chairman.

Chairman THOMPSON. Thank you very much. Senator Collins.

Senator COLLINS. Thank you, Mr. Chairman, and thank you, also, for holding these very far-reaching and extensive hearings.

Good morning, Judge Starr.

Judge STARR. Good morning.

Senator COLLINS. I am among those on this panel who support the Independent Counsel law. Although I believe it needs reform, I think that we are always going to need a mechanism to handle cases where the Attorney General has an inherent conflict of interest in investigating the person who appointed her or her colleagues on the Cabinet.

It is ironic, as the Chairman noted, that your position against renewing this statute may be the one thing that you have in common with some of your harshest critics.

In cases where the Independent Counsel clears a high-ranking official of wrongdoing, I think that the law promotes public confidence in that decision.

It may be difficult for you to imagine the scenario I am about to pose, but let's say that you concluded that President Clinton committed absolutely no wrongdoing. Wouldn't you agree that such a finding on your part would be much more accepted by the public than if an identical finding had been made by the President's Attorney General?

Judge STARR. I do agree with that. May I elaborate just briefly?

I do think we have had some experience with that. For example, with respect to the Attorney General appointing an outsider—and I cite the example of Paul Curran in the President Carter warehouse matter, and Mr. Curran has talked about this and has written about it—all privileges were waived. There was complete cooperation, complete access to documents. Mr. Curran, a Republican appointed to investigate a Democratic President, quickly concluded that there was no basis for wrongdoing.

I think that that was accepted by the public. I have not made a study of it in terms of the level of acceptance, and so the point I would say is it is not Independent Counsels or nothing, but, there, Judge Bell used his judgment to say I am going to go to an outsider and appoint an outside counsel, just as my colleague, then-General Barr, went three times to retired judges and former judges as Attorney General appointees, recognizing these very concerns.

But I think you are right, and in closing—and I apologize for the long answer—the maximum effect, the maximum assurance of thoroughness and the like would come with an independent Statutory IC who does his or her work promptly and determines there is nothing there. What an ideal thing for the country's sake.

Senator COLLINS. Your answer raises——

Judge STARR. Wish I had been one of those IC's. [Laughter.]

But remember my trip to Little Rock in that first session with Bob Fiske. It was clear that I was going to be in business for a while.

Senator COLLINS. Your answer raises an interesting question, however, and that is, it depends on the Attorney General choosing someone who has public confidence, who has the integrity, who has the impartiality.

A flaw with the existing law, which gives the Attorney General far less discretion, or at least it is supposed to, is, as you point out in your testimony, that the Attorney General's decision to trigger the statute, it is not subject to judicial review, and, thus, she or he is not held fully accountable for a decision.

And we have seen that in the case where the Attorney General failed to appoint an Independent Counsel that many of us felt was necessary to investigate the campaign finance abuses of the last Presidential election.

Is there any way in your judgment to have a check on the Attorney General's decision not to appoint an Independent Counsel that would pass constitutional muster?

Judge STARR. No.

As a matter of separation of powers, I believe that was the tradeoff in *Morrison v. Olson.* That at the core of *Morrison v. Olson,* in the majority opinion, and as I indicate in my written statement, I disagreed at the time and it was my view that it was unconstitutional, notwithstanding the care that Congress obviously had devoted to addressing a very serious problem.

The majority in *Morrison v. Olson,* speaking through the Chief Justice of the United States, reached its decision based upon the kind of compromises of checking the Attorney General authority, and *Morrison v. Olson* uses the term "unreviewable discretion." So I think that is the system, Senator, that as I read it—and I have been wrong before on constitutional issues—that I do not think that it would pass constitutional muster.

Senator COLLINS. I think you are correct, and that is why doing away with this law and giving the Attorney General complete discretion on whether or not to appoint herself, to invoke her own authority to appoint an Independent Counsel or a Special Counsel is troubling to me because, even in the statutory scheme that we now have, we have seen cases where many of us would argue that the Attorney General did not follow her responsibility to appoint an Independent Counsel.

Let me turn to another related issue that you raised. You mentioned in your testimony that given the Independent Counsel's reliance on the Department of Justice that, in fact, the Justice Department has the ability to make life miserable for the Independent Counsel.

Your words were that the Department has the raw power to refuse to provide assistance or to drag its feet in this regard the IC is dependent upon, and thereby vulnerable to the administration that he is investigating, which is an interesting point.

Did you experience problems in getting the assistance that you needed from the Department of Justice?

Judge STARR. Well, I would say over time that the Department has been very responsive to our needs.

At the outset, for example, it was clear to me, since so much of our work was investigated, that this case had the full support of the director of the FBI, with whom I met early on. He was in Little Rock, otherwise engaged in his responsibilities.

I know that the commitment, in terms of the necessary resources, what was viewed as a major white-collar investigation into a financial institution, Madison Guaranty, was very supported.

I also believe that in my early going in my tenure that the Department was very responsive whenever I would raise a jurisdictional issue, and I was dealing with very able career persons in the Justice Department. The Attorney General was very gracious when I was first appointed and indicated I would have a contact person, and she would be the very able head of the Criminal Division. And I was dealing very comfortably with the Criminal Division.

I do not want to be an ingrate, but I think the last year has been difficult for a variety of reasons because we have found ourselves in litigation against the Justice Department.

I know that the Attorney General has said to me personally, time and again, that she does not want to do anything to intrude into the independence. There are times that there are issues, and perhaps after I have had a chance to reflect more fully on the variety of experiences, I could provide insight, but I think throughout my tenure, the Justice Department has tried to be, in the main, supportive.

Senator COLLINS. Wouldn't the potential problem that you have identified or perhaps the actual problems that you have experienced in the past year be exacerbated and far more serious in a case where the AG has directly appointed the Independent Counsel or the Special Counsel and the counsel is accountable to the Justice Department?

I cannot, for example, imagine in such a case that the Special Counsel would proceed with a court case, as you had to do with the Justice Department, on the other side.

Similarly, while in your case there was an unprecedented attack on your investigation, at least that assault was public. It was something the press was aware of, and Congress was aware of. Whereas, if the Special Counsel is reporting directly or was appointed by the Attorney General, it seems to me there are far more opportunities for the Justice Department to control or direct the investigation in some subtle and not-so-subtle ways.

At least with the current framework, it seems to me it is much more difficult for the Justice Department to influence the outcome of the investigation and to do so secretly or without public scrutiny.

Judge STARR. I certainly agree in theory, but when I also look to practice, frequently it boils down to this: Do you have women and men of integrity and honor because the person who did the

toughest job with—I do not think interference, and I am aware of his reflections—was Leon Jaworski, who was appointed by the Attorney General. I think other Attorney General-appointed Special Counsels, and I know several of them, would say that they were given full support.

I will be very brief on this. Here is a very practical reason. The Attorney General has a real incentive to support the work of her own appointee. If she appoints a judge, a retired judge to carry on an investigation, as General Barr did on three separate occasions during his tenure as Attorney General, I assure you, as an advisor to General Barr during that period, that General Barr was determined that those judges would have full support and would enjoy practical independence.

I think General Barr is a person of integrity. I think if you look back to Judge Bell and his appointment of Paul Curran, Judge Bell was a person of complete integrity, and he would not allow—and a good Attorney General would not allow that kind of interference. But I agree with you in theory. I think it can work in practice with an Attorney General-appointed outside counsel.

Senator COLLINS. Thank you, Judge Starr.

Chairman THOMPSON. Thank you very much. Senator Levin.

Senator LEVIN. Thank you, Mr. Chairman.

It has been said by others, the Independent Counsel law was enacted to ensure that our top government officials are treated no better than a private citizen with respect to criminal investigations, and equally important, no worse. That has been the basic tenet underlying this statute for its 20-year history.

Central to that principle is the requirement that an Independent Counsel must be bound by reasonable limits on his or her power, and that is why, for instance, that we have required from the inception of this statute that the Independent Counsels follow the policies of the Department of Justice.

This principle is so important that the Supreme Court found it essential to the constitutionality of the Independent Counsel law.

In *Morrison v. United States,* the Supreme Court found that the Independent Counsel law was constitutional and not in violation of the separation of powers for four key reasons.

In addition to the requirement that the Independent Counsel must follow the policies of the Justice Department, the Attorney General was given the sole discretion to seek an Independent Counsel's appointment in the first place, the Attorney General lays out the grounds and the terms of the Independent Counsel's jurisdiction, and the Attorney General can fire the Independent Counsel. Those were four critical elements in the Supreme Court's upholding the constitutionality of the Independent Counsel law.

In each reauthorization over the past 20 years, we have had to gauge whether the law has worked with respect to these limits, limits that were intended to be placed on the power of the Independent Counsels.

When we have identified a problem, we have tried to fix it. For example, in 1983, we reviewed the investigation of President Carter's chief of staff, Hamilton Jordan, and learned that he was investigated for a matter that the Department would have never brought in the first place, but left for possible State prosecution.

We immediately clarified in the statute that the Attorney General must apply the same standards in seeking the appointment of an Independent Counsel that a U.S. Attorney would apply in deciding whether to pursue a case, and with respect to Hamilton Jordan, no U.S. Attorney would have pursued that case.

Over the years, we have added numerous other provisions to ensure that an investigation by an Independent Counsel is handled in the same way as an investigation by a U.S. Attorney or the Department of Justice of a private citizen. We have added budget restrictions, reporting requirements, consultation requirements, Department reviews and court reviews. Each time, we were trying to put reasonable limits on the power of Independent Counsels because no person and no agency in this government should be without effective checks on their power.

Looking at the record of your office, Mr. Starr, in my judgment, despite our best efforts to establish reasonable limits on the power of Independent Counsels, you and your office have managed to exceed those limits.

In the *ABC News* case, you stated to the court that the relevant Justice Department regulations did, "not govern an Independent Counsel," and that is the way your office seems to have operated generally.

In my judgment, you have gone beyond what an average prosecutor would do in the investigation of a private citizen, and you have failed to comply with Justice Department policies as intended under the Independent Counsel law.

For instance, you enforced subpoenas of Secret Service personnel over the direct opposition of the Department of Justice. The issue is not whether a court would rule that a Secret Service person could be subpoenaed. It did so rule. The issue here is the policy of the Department of Justice, which said that you should not subpoena those personnel.

For instance, you discussed immunity with a potential target outside the presence of an attorney that she had requested be present, and 28 CFR 77 prohibits Federal prosecutors from initiating discussions or engaging in negotiations with a person regarding immunity without the presence and consent of the person's requested legal counsel.

For instance, you wired and gave immunity to Linda Tripp without having the jurisdiction to do so. The Attorney General determined that in effect when she did not grant your request for jurisdiction based on your argument that the Lewinsky matter was related to your original jurisdiction, but instead days after you acted without jurisdiction, the Attorney General obtained a court order expanding your jurisdiction.

For instance, you spent millions of dollars to pursue a case of possible perjury in a civil suit that top prosecutors of both political stripes, who are not personally involved in the matter, have said that no reasonable prosecutor would pursue.

For instance, Thomas Sullivan, U.S. Attorney for the Northern District of Illinois and a prosecutor whom Congressman Hyde referred to as having extraordinarily high qualifications, testified before the House that it was his opinion that the case set out in the

Starr report would not be prosecuted as a criminal case by a responsible Federal prosecutor.

For instance, you became such an unrestrained advocate of impeachment and went so far beyond the requirement of Section 595(c) to report on possible grounds to impeach somebody that your own ethics advisor quit, and by the way, your reference in your testimony that a Professor Amar of Yale Law School pointed out that it is curious for the Legislative Branch to defer on so vital a matter to an inferior officer of the Executive Branch is in a sense a curious reference itself because there is nothing in Section 595(c) which says that the Legislative Branch will defer to an outside prosecutor. It is supposed to receive any information. That is it, but there is no reference to deferring to an outside prosecutor as the House of Representatives did.

Now, one question before me, as someone who would like to see if we can salvage the important principle of this law is whether it is possible to enforce limits on Independent Counsels as the law intends.

If the Attorney General believes that an Independent Counsel has gone beyond the specified jurisdiction for that Independent Counsel, or if an Attorney General, for instance, determines that an Independent Counsel has not followed the policies of the Justice Department, the Attorney General has the power to dismiss an Independent Counsel. But as a practical matter, we can see how such an ultimate weapon has very little real force, since were the Attorney General to use it, she would be the subject of a huge political outcry and would be charged with a coverup.

So the key limits that the law intended to put on the power of Independent Counsels have not proven effective, and I believe that we need to determine in the months ahead whether or not we can amend the statute or remedy that problem as I perceive it, so that the limits on power which are so important to the constitutionality of this statute and to its fairness can be made practically effective.

The first question that I have for you relates to the law's requirement that an Independent Counsel follow the Department of Justice policies. Again, the Court in *Morrison* held that that was one of the critical requirements for this law's constitutionality that Independent Counsel follow the policies of the Justice Department, except where doing so would be inconsistent with the purposes of the statute.

You said in your annual status report to Congress in August 1997 that, "In conducting its investigations in prosecutions, your office has complied with the policies of the Department of Justice, except to the extent that doing so would be inconsistent with the purposes of the statute."

Could you tell us the instances in which your office has not complied with the policies of the Department of Justice, and would you explain why it was that you believe that not following them would have been inconsistent with the purposes of the Independent Counsel law?

Judge STARR. Well, let me say, if I may, Senator, that in this context of reauthorization, I made no suggestion with respect to the requirement imposed on Independent Counsels to follow DOJ practice. I think that is sound. It is important. I quite agree, even if

it were not one of the pillars of *Morrison v. Olson,* and we may agree to disagree, but it is important for us to follow DOJ policy and practice. I have accomplished that in a variety of ways, and I am going to come to the Secret Service example in just a second.

One of the ways that I sought to do that, Senator, was to make sure that I had highly experienced prosecutors who themselves were steeped in DOJ policy and practice. They included two John Marshall Award winners—that is as high as it gets in the Justice Department—one awarded by Attorney General Reno. I have been very fortunate in that respect.

Second, you mentioned Sam. I think we all know Professor Dash, and the Chairman worked with Professor Dash. He has a wonderful independence of mind, and I have had my disagreements with Sam. One of them was, of course, rather public, but I love Sam Dash and have the highest regard for his integrity and his views, and I think he has shared with you his view that we have followed DOJ policy and practice and procedure.

You have mentioned several examples, and I think I should address Secret Service because I think there may be a disagreement here in terms of what our obligation is.

I do not believe, Senator, that a litigating position taken by the DOJ in the process of an Independent Counsel discharging his or her obligations and gaining evidence is what is meant by the statute, and if it is, perhaps there needs to be a clarification, but could you imagine a DOJ policy that there shall be no subpoenaing of Presidential tapes in Watergate? It is just unthinkable, and so it was that we tried as carefully as we could, as thoughtfully as we could, to accommodate the interest of the Secret Service.

I met personally with—and I do not want to extend the point, but I met personally with the very distinguished former director, Mr. Merletti. I said, "I represented the Secret Service when I was at the Justice Department. We need to gather the information, but we need to do it in a way that is fully consistent with the mission of the agency." And we unfortunately ended up going to litigation, but I would respectfully disagree that a litigation position taken by the Justice Department to prevent an Independent Counsel from gaining evidence is in fact a "policy" within the meaning of the statute, and we may just disagree about that.

Let me say with respect to Linda Tripp—you mentioned that specifically—of proceeding without jurisdiction, I think, with all due respect, you are mistaken, and I think Sam Dash would agree with us that in our view—and we set it out and I know you are quite familiar with the letter, our letter to the Attorney General of January 15—we did what we felt reasonable, prudent prosecutors should do.

We assessed the credibility of this witness. We did not go immediately to the DOJ, even though there is no policy that says you cannot, but I think a prudent prosecutor would in fact take the steps that we took with respect to Linda Tripp to determine whether these very serious allegations of possible crimes by the President of the United States had any foundation in fact or whether they were simply, shall I say, unreliable.

One should not go to the Justice Department lightly. I crafted this letter. I stand by this letter. I think this letter to the Attorney

General of January 15, 1998, embodies our desire to remain closely in touch with the Justice Department, to provide them with whatever information they wanted, to be as transparent as we could be with them. So I respectfully disagree that we have not been following DOJ policy and practice.

With respect to the issue of immunity discussions, *ABC News* and the like, I would rather say something specific to you in a more formal way, if I may.

Chairman THOMPSON. Thank you very much. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Judge Starr, I am a little surprised at the forcefulness of your denunciation of the Independent Counsel Statute, structurally unsound, constitutionally dubious, overstating the degree of institutional independence, disingenuous.

The basic question that I would start with, prior to reading in the morning press your statement and hearing it today, is your jurisdiction to prosecute President Clinton criminally if—when his term of office expires, if you decide to do so, and I am not going to ask you if you intend to do that. That is a judgment that a prosecutor has to make.

I had taken the position months before the impeachment proceeding started that there ought not to be impeachment; that given the political temper of the times with it being virtually conclusive that there would not be two-thirds and it would be disruptive, that the Congress ought to forego impeachment and leave it to the discretion of the prosecutor after his term had ended.

But when you characterize your own view of your office as being structurally unsound, constitutionally dubious, overstating the degree of institutional independence, being disingenuous, before I ask you about your jurisdiction to prosecute, let me ask you about your status to continue as Independent Counsel in light of your condemnatory language of the statute you operate under.

Judge STARR. Well, Congress frequently passes laws, the wisdom of which individuals may question, but their duty as law officers is to live up to their legal obligations. One cannot quote Mr. Bumble in a Dickensesque fashion and then say, "I refuse to enforce or carry out those laws."

I remember all too vividly one of my mentors, may he rest in peace. William French Smith said when we took office in January of 1981, "Some of"——

Senator SPECTER. I remember. We were all both younger.

Judge STARR. Exactly.

Senator SPECTER. And you were carrying a briefcase in the back of the room.

Judge STARR. Developing, Senator—I started to say "Your Honor"—a case of tendinitis in the process. He had a heavy briefcase.

But the Attorney General said some of the President's friends think that the election of 1980 repealed laws that they did not like. We are going to enforce the law. That is our duty. That is our obligation.

So I have given you my plain—I hope it is plain speaking—opinion with respect to the wisdom of this law, and I think it is, the things that I have set forth, but it is the law, and, Senator, so long

as it is the law, we are duty-bound as law officers to faithfully enforce it and as cheerfully as we can. It does not mean that we like it.

Senator SPECTER. Well, if it is as bad as you say it is, maybe we ought to abrogate it now.

Judge STARR. Well, I am suggesting that it not be reauthorized.

Senator SPECTER. That is different from abrogating it now.

Judge STARR. Oh, I think that is unwise. Well, you could provide. You could provide, and I know that there was a——

Senator SPECTER. If we listen to your characterization, it is abhorrent.

Judge STARR. I did not suggest that. You have invited views with respect to reauthorization. I think complete abrogation would raise profound prudential reasons in light of we are there.

Mr. Madison thought the First Bank of the United States was unconstitutional, but he reauthorized the Second Bank of the United States.

Senator SPECTER. Judge Starr, let me move on to another question because the time is very limited, and that is, do you have jurisdiction to prosecute the President criminally after his term of office expires?

Judge STARR. Yes.

The reason I say that is under the grant of jurisdiction sought by the Attorney General. In her submission to the Special Division on January 16, 1998, and then the division's grant of jurisdiction, which is quite specific, whether Monica Lewinsky or others, and then several Federal criminal offenses are enumerated.

Senator SPECTER. The President's lawyers in the impeachment proceeding cited my op-ed piece in *The New York Times* as the reason why the President should not be impeached, but instead ought to be held accountable through the criminal process after his term ended.

We had a proceeding. I do not call it a trial because we had no witnesses. We had what I think was a sham trial. Now you have Judge Wright's contempt citation where she makes a factual matter, I think fairly stated the perjury. So that question is very much open, but I shall not pursue it beyond the point of just asking for your view of your authority and jurisdiction.

Judge Starr, one of the problems which I think has followed you has been the expansion of your jurisdiction, and you are just being a good soldier in carrying out what the Attorney General asked you to do and what the three-judge court has authorized by way of expansion.

There are a number of us who are trying to work through to see if we can structure an Independent Counsel Statute which will cure a lot of the problems that we have, such as making it a full-time job, such as limiting the term perhaps to 18 months, the length of a grand jury to be extended for cause, or to be extended automatically for delays on appellate litigation with priority consideration by the courts.

The issue of expanding jurisdiction is one which my own view is we ought to limit. When you went to the Department of Justice with the information which you had gotten from Ms. Linda Tripp, which had similarities between the way Ms. Lewinsky was treated

and the way Webster Hubbell was treated, being offered a job at the same company, under very similar circumstances, and they asked you to take on the additional jurisdiction, did you have a concern that it would be misunderstood publicly that you had been investigating the President for more than 3 years, the move from Whitewater to Travelgate, etc., to the FBI files, that there would be, not that there was, at least a public perception of a vendetta or bad blood between the two of you that would lead to a lot of public doubts as to the integrity of the investigation?

Judge STARR. Perhaps I should have, but I did not, and in my letter to the Attorney General—and I think that a careful, fair-minded reading of the letter would indicate, look, this information has come to us from a witness whom we know. We have used her in the investigation with respect to the disappearance of documents from Vincent Foster, Jr.'s office, and one of the things she is telling us, among other things, is: I did not give you all the information that I had.

Now, this is someone who had worked in the White House, who was an employee of the Defense Department, and we said what do we do with this information. She also said: I do not trust the Justice Department. She was more polite about that, but she said: I have come to you.

Now, we did not know a lot of what was underway, to be sure, but the core of her allegations were then buttressed by then what we heard in the consensual monitoring when we reviewed the tape. So what we did, Senator, is we hastened to the Justice Department, and we said this is what we have.

Senator SPECTER. I think you did exactly the right thing.

Judge STARR. Well, we tried to, and I think we did do the right thing, and this letter——

Senator SPECTER. But I do not think the Attorney General did. We questioned Attorney General Reno about this very closely, and in a prior hearing, she said, "well, the petition speaks for itself, and the petition says nothing."

Judge STARR. Well, that is right. It does not tell the background of this, and in terms of the dynamics, it is very important, I think, to know that things were moving extraordinarily quickly, and what we were suggesting, among other things, Senator Specter, to the Attorney General—really, we were dealing primarily with the Deputy Attorney General and his very able people—was perhaps a joint collaborative arrangement in light of all the circumstances.

Senator SPECTER. Judge Starr, let me move to a final question.

A number of us have been sitting down trying to work through the issues and the problems and find remedies to cure it.

One of the objections which was raised—and I do not know the factual basis—is that an immunity grant had been given without counsel being present, and it was not in conformity with Department of Justice rules, but you could take a generalization of something that Independent Counsel had done which did not conform to the Department of Justice rules.

We were thinking about structuring a remedy so that if the individual who felt—or counsel for the individual concluded that the individual had been treated at variance with Department of Justice rules, that that individual would have a right to go to the Attorney

General personally, as the statute requires the Attorney General's personal action on dismissing Independent Counsel. It would make it a very high level of review, but to isolate the problems that people have found with what you have done—and I am not saying you were wrong, but I am trying to address their concerns to what other Independent Counsel have done—and structure a limited right of review which would give more accountability if the Attorney General personally felt that Independent Counsel should have acted differently and then to overrule Independent Counsel on a specific matter, what do you think of that?

Judge STARR. One very quick factual point. With respect to immunity, and I ran out of time, we abided by DOJ policy with respect to that, and I am prepared to demonstrate that in the appropriate forum. You have the allegations. So what do you do structurally with the statute? I would simply raise this cautionary flag. Defense counsel—and there are very able defense lawyers—will immediately hasten to the Attorney General and to say, "Do you know that that Independent Counsel, Judge Walsh, who is investigating the President, who hired you, is violating your policy? Would you go look into that Independent Counsel?"

Now, the present statute—and I think that is a serious issue of conflict—you can say can we have an Office of Professional Responsibility (OPR) remedy. There are different ways of looking at it, but how is OPR structured? To whom does OPR report and the like? I would raise the conflict-of-interest question on the Attorney General's part. One would not want the Attorney General to have even a subtle desire, would one, to find something wanting in the Independent Counsel's stewardship, in the exercise of his or her authority, when the Independent Counsel has been charged with investigating the President at whose pleasure she serves?

Senator SPECTER. If I may make one final comment, Mr. Chairman.

But the problem is if you send it back to the Department of Justice, the Attorney General is going to have greater authority. So it is a matter of trying to strike a balance and structure something, if it is a written DOJ, Department of Justice, regulation which somebody can make a factual showing of violation, trying to find a way to inject that level of accountability to save your office.

Judge STARR. I would also just urge you to take allegations of violations of DOJ policy with an enormous grain of salt.

Senator SPECTER. I do.

Judge STARR. Enormous grain of salt.

Now, criminal defense lawyers are very skillful and resourceful. They will argue until the proverbial cows come home. They should. That is their job. They are to vigorously and zealously represent the interests of their client, and you see the kitchen sink thrown in.

But when we go to court and there are issues with respect to judicial enforceability—and I do not mean to sound self-congratulatory, but we win in court. It is one thing to go out on the steps of the courthouse and say the prosecutor is out of control. Let's go see the judge. How frequently does the judge, supervising the grand jury, say the prosecutor is out of control? To us, none. Not once have we been found to have conducted ourselves inappropriately.

Now, there is an issue pending, and I think everyone knows what it is, the unmentionable, with respect to grand jury secrecy, but let's allow that process to unfold. Let's let the judges do their job. The judges do a wonderful job. They do it quickly. They may not like the job, but they are the unsung heroes in all of this, as opposed to simply taking slavishly the self-interested charges laid at the feet of any and every prosecutor and to say, well, we need to have some new device, some new statutory remedy, which will then become yet another arrow in the already formidable quiver of the criminal defense bar.

Chairman THOMPSON. All right. Thank you very much. Senator Durbin.

Senator DURBIN. Thank you, Mr. Chairman.

Thank you, Judge Starr, for appearing.

I will have to tell you, quite honestly, Judge Starr, I was stunned this morning when I turned on "The Today Show" and heard that Judge Kenneth Starr is calling for the end of the Independent Counsel Statute. In a time, in a place, where the unusual is commonplace and the bizarre is routine, the fact as probably the most notorious or noteworthy, depending on your point of view——

Judge STARR. I prefer the latter formulation, Senator.

Senator DURBIN [continuing]. Independent Counsel in modern memory, it came as quite a surprise.

I assumed that you would come here today and prevail on this Committee and say, "Stop me before I prosecute again under this unwise statute." You have decried this statute as structurally unsound and constitutionally dubious and disingenuous and so forth, and yet, I have to ask you a very basic question.

I know that the American people have reached an overwhelming verdict on your work product in the impeachment, and I can sense that there is a whiff of reform in the air here, but, honestly, during the impeachment trial, someone on your staff said, "You know, I think in maybe 2 more years, we can probably get this all wrapped up." And we know statements are being made about this dogged pursuit of Susan McDougal and Webster Hubbell until you finally get them back in jail.

I have to ask you point blank. How can we justify continuing your authority or the authority of any Independent Counsel under this constitutional monstrosity of a statute, as you have described it?

Judge STARR. I have given you my views because I was asked to give the views, but, Senator, as you well know, my views were not shared in the 1980's when I had occasion first to think through the issues raised by the statute, and I thought, but I was wrong, that the Supreme Court would strike the statute down as unconstitutional, just as the D.C. Circuit had done.

A U.S. Court of Appeals for this very jurisdiction, in which I was privileged to serve, struck it down as unconstitutional. Well, my crystal ball was again cloudy.

So I would not allow my views to then frame what should be done in terms of a going-forward basis, and frankly, I am very proud—you may disagree, and I am sure you do—of the record that my career prosecutors have amassed against very difficult odds, the conviction of a sitting Governor of the State, the conviction of the

then-recently resigned Associate Attorney General of the United States, and 14 others. We found, Senator, serious criminality and the two individuals whose names you mentioned stand as convicted felons.

And one of them chose to appeal her conviction, and her conviction was unanimously confirmed by the U.S. Court of Appeals. So there were serious crimes, serious wrongdoing.

So what do we do in terms of a going-forward basis? I do think, to come to your "what should we do," I should have said in response to Senator Spector, but I think it is responsive to your inquiry, Section 599 of the statute does raise an issue in terms of a going-forward basis, once the statute lapses. Once the statute lapses, the Independent Counsel is called upon to make a professional judgment as to whether it is required that he continue certain matters, and that is a judgment that I have not had to face yet, but, presumably, I may or will have to face that on June 30.

Senator DURBIN. And it is possible that Congress may intervene and decide that in its judgment it is time for you to head off to some university, or whatever your future plans may entail.

Judge STARR. I tried to do that once.

Senator DURBIN. I know you did.

Judge STARR. It did not work out, but maybe you can do it for me, Senator.

Senator DURBIN. Be careful what you wish for.

Let me ask you this. Mr. Starr, you said at one point here in your testimony, and I read, "The law also may have the effect of discouraging vigorous oversight by the Congress in a departure from our traditions."

My colleague and friend, Senator Levin, was too much of a gentleman to raise the question, but I will, and that is, why it took more than a year for you to respond and blow off Senator Levin's request for an accounting about how much money you were spending and the activities of your office.

It strikes me that if you are not accountable to Congress and your only accountability to the Attorney General is removal and nothing else, that frankly, this is a constitutional monstrosity. How can you on one hand testify today that this law discourages vigorous oversight by Congress when you defied Congress and refused to even tell us how you were spending your money, how you were doing the most basic things in terms of conducting your investigation?

Judge STARR. Well, Senator, it will not surprise you to hear that I respectfully but emphatically disagree with your characterization, and I will now come to Senator Levin's letter of Thanksgiving time of 1996.

We do receive inquiries from members, and I have the greatest respect for all 535 members of the U.S. House of Representatives and the U.S. Senate.

Senator DURBIN. Now your credibility is in peril, but go ahead.

Judge STARR. I do. I have great respect, and from the perspective of our limited resources, we have chosen not—and you can criticize an Independent Counsel for not doing this—we have not erected an Office of Congressional Liaison and so forth. So you have talked about the statute. If you are suggesting a statutory duty to respond

to each member of the U.S. Senate, then I think the law should be changed and then I should have an Office of Congressional Liaison and the like.

Senator DURBIN. Let me just ask you a more basic question. What restrained you, if anything, when it came to the amount of money you spent in this investigation?

Judge STARR. Jurisdictional limits, a constant GAO auditing function, which is every 6 months, which it is my understanding, that is very intense. It is certainly more intense than my recollection of the GAO functioning the audit review, functioning——

Senator DURBIN. Mr. Starr, we have rooms in this Capitol filled with GAO reports, observations and recommendations largely ignored.

You are not held accountable as an Independent Counsel. You can spend as much money as you want to spend. You can defy the GAO and Congress, as you defied Senator Levin's request for information, and that element of unaccountability is one that troubles me greatly. That is, as you say, structurally unsound and constitutionally dubious, and I am sorry, Mr. Starr, you were as guilty as any Independent Counsel in abusing it.

Judge STARR. Well, I disagree, and could I respond to that?

Senator DURBIN. Of course.

Judge STARR. Because that is a fairly serious accusation.

I do not think that I agree with your characterization of the GAO function. We have found them to be very professional and thorough, and you have the benefit of our reports that need not gather dust. They are available. They will indicate that we have abided by all laws and applicable regulations in our stewardship.

Now, I will say this, and I tried to point it out in the opening statement, that the very structure of an Independent Counsel—this does not raise a constitutional issue at all, it does raise wisdom/public policy questions—is you have got to go out and get office space. You have got to go get your photocopiers and the like. Is that the way to run the governmental railroad? Very perfect, appropriate questions.

But just so you know, to provide you with assurance, we have on our staff persons who originally came to us from the Justice Department. My effort has been, and I think some disagree with that, to mirror what would happen in the Justice Department with respect to the substantive side of our work and the administrative side of our work.

Now, should there in fact be budget limitations? I will say this. I think it would be a singularly unfortunate idea to impose a specific time limit, but to have other budgetary checks and the like is certainly a sensible and appropriate——

Senator DURBIN. Well, let's talk about time limits. Was your staff attorney, whoever reported it to the press, accurate when he said during the impeachment trial that you needed 2 more years to wrap up your work?

Judge STARR. This is—I do not monitor all the press—the first I have heard of that. I would never say 2 years. I think it is absolutely perilous to make those predictive judgments, but I will say this. If the statute lapses, I would just refer you again to Section 599, which is going to cause me to have to make a decision and my

fellow Independent Counsels as to how to proceed and our relationship with the Justice Department, under the law as it is presently structured.

Senator DURBIN. Do you think there was any conflict of interest in your representing the Brown and Williamson Tobacco Company through a private law firm at the same time as you were serving as Independent Counsel? Do you think that if this statute is to continue that we should make it clear that it is a full-time undertaking by Independent Counsels, so that there is not even an appearance of impropriety, as some might suggest in your case?

Judge STARR. With respect to the specifics, Professor Dash took an examination or a look at this when the issue was first raised. I must say the issue was first raised by Governor Tucker during the early phases of the investigation. It frankly was not taken seriously until certain matters became, shall I say, more national in interest. There is no conflict of interest under any applicable conflict-of-interest rule and regulation.

Senator DURBIN. Well, appearance of impropriety?

Judge STARR. Well, I do not believe so because to the extent that you allow an Independent Counsel—and I can come to that in just a moment—to carry on his or her private law practice, not infrequently the client being represented will be taking a position that is adverse to the position of the U.S. Government, and Congress has focused on those very issues in this law and addresses conflict of interest. Frankly, my representation of that particular client had absolutely no bearing or relevancy to the conflict-of-interest provision that Congress has seen fit to set forth.

Should it be full time? I think that is a judgment call. I always tried to devote the time that was necessary, and I saw that I was increasingly having to devote more than full time to the investigation.

Some investigations may not do that, and again, it is a tradeoff. You are asking someone to sever his or her ties with a law firm rather abruptly. Perhaps the person will be able to do it.

I would say this, I would be cautious about erecting a system that will essentially result in a cadre of individuals who would like to have the job. I did not seek it.

You want individuals who, whether they serve well or not in the fullness of time, are not out there job-seeking to become Independent Counsel with an eye to the future.

Chairman THOMPSON. Thank you very much. Senator Gregg.

Senator GREGG. Thank you, Mr. Chairman.

Judge what was Governor Tucker convicted of?

Judge STARR. Governor Tucker stands convicted of conspiracy and fraud in connection with the Madison Guaranty Savings & Loan relationship to Capital Management Services and in the background the Whitewater Development Company. He was convicted by a Federal jury after a 3-month trial, and his conviction was affirmed on appeal, with one issue with respect to the jury. He thereafter pled guilty to a misdemeanor offense in connection with the tax case that I mentioned.

Senator GREGG. And what was Webster Hubbell convicted of?

Judge STARR. Mr. Hubbell pled guilty in 1994 to fraud in connection with his billings at the Rose Law Firm to, among other clients, agencies of the United States.

Senator GREGG. Now, those are pretty serious charges, and I am sort of surprised to hear Members of the other side of the aisle basically characterizing these individuals as victims.

Isn't the public the victim when the governor of a State abuses the office in a manner that creates the fraud? Isn't the public the victim when an Assistant Attorney General, one of the most highly ranked members of the Justice Department, a Department that demands absolute integrity, is convicted or agrees to plead to an issue of fraud?

Judge STARR. I think it was a terrible tragedy for the people of Arkansas, and then, more generally, the people of the Nation.

Senator GREGG. So I would say to you, Judge, that you did your job.

Judge STARR. Thank you.

Senator GREGG. Your job was to protect the people from individuals who had violated their oaths of office, and in those two instances and in the 14 other convictions, one presumes there was a serious event that required the public's rights to be protected. So I do not think they were the victims, although we may hear that from the other side of the aisle.

Let me ask you another question. Is being held in civil contempt for lying under oath an action which would lead you as an attorney to be disbarred in most jurisdictions?

Judge STARR. It certainly could lead to that. It may have that effect. It would be in the hands of the decision-maker, here a State Supreme Court typically.

Senator GREGG. If you were the Attorney General of the United States and you were charged with civil contempt for lying under oath, how would we adequately as a government respond to that?

Judge STARR. If the Attorney General—and Attorneys General have suffered contempt in their official capacities in order to appeal a matter. So it is not unheard of for an Attorney General to be held in contempt, but not in connection with wrongdoing.

Senator GREGG. Well, we are talking about lying under oath. That is a little different than——

Judge STARR. I would tend to think that that would result in rather serious consequences, including political consequences. It would be the judgment of the Congress of the United States if the individual said, "I am cheerfully remaining in office to assess the appropriateness."

Senator GREGG. And what would be the recourse? What would be the recourse that the Congress would have? In other words, my question is, without a special prosecutor, what is the recourse if the Attorney General of the United States were to lie under oath and be cited in civil contempt by a Federal judge?

Judge STARR. I think the essential remedy envisioned by the Framers is that of removing the individual from office if the misconduct is seen by the people's duly elected representatives as rising to the level of seriousness that warrants a determination of official unfitness.

Senator GREGG. Is that an impeachment procedure?

Judge STARR. That is an impeachment procedure.

Senator GREGG. Would it be your expectation or would you in your interpretation of the statutes and the Constitution believe that a bill of impeachment would lie against an Attorney General who had committed civil contempt for lying under oath?

Judge STARR. Yes, because Congress enjoys plenary authority and responsibility for determining what in light of our common law and constitutional traditions constitutes an impeachable offense, and there is a good deal—and this body is very familiar with that body of learning with respect to what does constitute an impeachable offense.

Senator GREGG. Now, I guess my question to you is this. If we repealed the Independent Counsel Statute completely and we have a corrupt Attorney General and we have a Congress which is political and which is unwilling to pursue that corruption, should it be left there, or should we have an Independent Counsel who at least has the rights to investigate, if no one else, at least the Attorney General, since the Attorney General is the chief law enforcement officer?

Judge STARR. Well, Congress could see fit to create its own special mechanism. Shall I say, it might not survive veto, but it could in fact create, as some special prosecutors in our Nation's history have been, actually submitted to the U.S. Senate in the advice-and-consent function, but that, of course, has been when the executive has been in agreement, as in Teapot Dome, that the allegations are very serious and warrant extraordinary steps to try to restore public confidence.

Senator GREGG. I am not a great fan of the Independent Counsel Statute, but I guess my major concern is how do you deal with the three major constitutional officer-holders, the President, the Vice President, and the Attorney General, and specifically how a Congress, which is politicized, deals with an Attorney General who is corrupt, without having an independent agency to make the evaluation.

I think the example of civil contempt cited for lying under oath by a Federal judge is probably the best example of when a Congress who is politicized is unable to reach a conclusion and not having an agency which is able to evaluate it objectively, and that is why, I guess, the Independent Counsel Statute still has some attraction to me in that limited scope.

On the issue of the GAO and your accountability as an officer of the Justice Department, in your opinion, did your office ever do anything that was unethical?

Judge STARR. Unethical? No.

Senator GREGG. Did your office ever do anything——

Judge STARR. Wait, I cannot say never. I cannot say that, but I would prefer not to answer further because there is a certain matter that is under proceeding.

We all sin and fall short of the glory of the Creator, and so people do at times make mistakes, but, Senator, I have been overwhelmed—and I hope this does not sound empty and hollow. It is meant from the bottom of my heart—with how strong and courageous our career people have been, career FBI people, career IRS people, and career officers of the Justice Department, U.S. Attor-

ney's officers, and then others who have come to join with us and to assist in this enterprise, and who try steadfastly to conduct themselves honorably, decently, and the like in what has been a difficult environment.

Even judges sometimes get it wrong, and the key is are you trying to get it right? Are you trying to get it right? And that is a big and basic moral test. I am confident that every one of my colleagues, past and present, has tried to get it right.

Senator GREGG. In this instance where you think there wasn't an ethical problem, but which is being investigated, did that have an impact on your professional action that would have impacted a decision that you made?

Judge STARR. No, not in terms of any of our substantive work.

Senator GREGG. Did your office at any time, in your opinion, spend any money inappropriately that the taxpayers have a right to be reimbursed for?

Judge STARR. I was adjudged, and I wrote the government a check for $10,000, to my sorrow, with respect to my use of an apartment in Little Rock, which I thought was fine, and I was told it was fine. But GAO did the audit, and I could have sought a waiver, but I said, if you have decided that I was not completely consistent, unbeknownst to me, so an innocent mistake. I blame no one, and I do not think there is any blame to go around. It was simply a catch of—ooh, look at the travel regulations.

Senator GREGG. So you were under fairly strict review process which you have responded to by actually paying some money that you felt you probably should have been reimbursed for.

Judge STARR. It could have gone to my kids' tuition. [Laughter.]

Senator GREGG. Which is fairly high at Stanford.

Judge STARR. And Duke.

Senator GREGG. I guess my time is up. Thank you, Mr. Chairman.

Chairman THOMPSON. Thank you very much. Senator Torricelli.

Senator TORRICELLI. Thank you, Mr. Chairman, very much.

Mr. Starr, I find this day proof to the old adage that if you live long enough, you will experience everything. Because I find myself in large agreement with your conclusions about the Independent Counsel Statute and your analysis. I never expected to be sharing that judgment with you, but I thought it was a very thoughtful presentation.

Judge STARR. Thank you.

Senator TORRICELLI. I am, however, struck by the real tragedy of the moment. You served your country, as solicitor general and as a Federal judge, with distinction. It is arguable that, but for this tragedy, you might have 1 day served on the Supreme Court of the United States. Your life has taken a very different turn, and in attempting to understand whether the Independent Counsel Statute should be reenacted, it is impossible to separate that judgment from what has transpired in your life and the decisions that were made in the last few years. You are now indelibly written in the same page of history.

You will forgive me, but I do not understand how a learned man of good judgment allowed things to get to this state of affairs. It is true that you were under merciless attack. But it was not nec-

essary to pin a target to your chest on all occasions either. And to be fair, you were a contributor to some of your own public demise in the eyes of the American people.

I have a belief that the—as I remember from law school, though I will never remember the professor who said it—that the law, without reason, is tyranny. Even in good causes, there are excesses.

Let me quote for you something about Susan McDougal.

"When transported, she was in shackles at all times, including when required to urinate. She was allowed one visit per week and only through glass. She was forbidden any family or friendly contact through visitation. She was denied, at times, potable water while under transportation. She could drink only from a sink attached to a toilet. She was allowed no reading materials except for the Bible, which would have been useful except she was denied reading glasses, even when she offered to buy them."

"When transferred to another facility, she was in a work camp with women who were serving 30 and 40 years on narcotics charges. She was placed in isolation with one tiny slit in a door. The windows were covered with barbed wire. She had a single peephole where she could see the light of day. For 22 hours a day, she was in complete isolation."

"During one facility, in which she was incarcerated, she was awakened every 20 minutes by flashlight. She was forced to wear a prison uniform colored red, which is the color to indicate a murderer or an informant."

I do not know how a good, and learned and decent man can participate in such judgments. I am left simply to believe that, Mr. Starr, it is not you. It is how the law was written and how, as we have often been told in history, when extraordinary power is placed in the hand of an individual, but it is unchecked and it is unguarded, the law becomes a force of tyranny.

I am going to allow you to respond in a minute, but I want to finally share this analysis with you. Mr. Starr, I do not believe that that jury in Little Rock thinks that Susan McDougal did not commit civil contempt. I do not believe that Susan McDougal did not commit civil contempt. I think she is guilty.

I think 12 Americans came to the judgment that, as you balanced her offense against the excesses of power in the hands of the government and the Office of Independent Counsel, it was time to make a judgment and believe, I think, it is the finest statement about American democracy; that where the media may have been compromised, and the Congress did not make a strong judgment, and a statute was passed which never should have been enacted, and people like myself voted for it in a failure of our own judgment, 12 ordinary Americans finally took a stand and said, "No, enough. Better the guilty should go free than the government should operate in this excessive power."

I believe there is virtually no chance the Independent Counsel Statute will be reenacted and, indeed, I believe in this last, final chapter of this sorry episode you have done a service to the Nation by participating in its demise. But this has been an extraordinary story, Mr. Starr. The Lewinsky matter, the Steele matter, the Wiley matter are an example of what unchecked power does to good people.

Julie Hiatt Steele's daughter's boyfriend was questioned before the Grand Jury about whether he ever had sex with Mrs. Steele. How much worse does this get? The subpoenaing of book store records on what Ms. Lewinsky may have read. I understand the Justice Department now is looking at the way Ms. Lewinsky was handled; held for 11 hours at the Ritz Carlton, the question of whether or not she was allowed to have access to her lawyer, threatening her with 27 years in jail, dissuaded from calling her mother, and her brother's dormitory or fraternity being visited by five FBI agents. Good people can have bad judgments if they are unchecked.

Mr. Starr, I only hope that you have a successful career from this moment on. I was genuinely sincere when I believed that in previous years you have served your country and this government admirably. And though the pain has been considerable and the scars are deep, we have all learned by this episode. And now, as we did for almost 200 years, trusting the professional prosecutors of the Justice Department, trusting that ultimately in a democracy there is no protecting people from themselves, if ultimately there is not the integrity of the Attorney General, and professional prosecutors and members of the bar by government service, if we are of the state in our culture where they cannot be trusted to enforce the law and defend our democracy, no statute, no Independent Counsel will save American democracy.

I think we are now back to where the republic began, believing ultimately in that good judgment. I know, Mr. Starr, I have said some strong things about you and your service, and I want to be fair to you, so with the time that remains I would be glad to yield to you.

Judge STARR. Well, thank you. I agree with some of the things that you have said. [Laughter.]

Senator TORRICELLI. There are some you take issue with.

Judge STARR. Yes, a gentle issue, but perhaps even more than that.

I have made some notes. Let me just quickly tick them off. One, with respect—and then you raised broader issues, so let me kind of work my way, if I can, from the specific to the more general.

One, with respect to the treatment of Susan McDougal. You have read very dramatically, and I hope that you will address those questions to the Attorney General who is responsible for those conditions. I am not. I have no control whatsoever. So I might say, "Why don't we have some more Apache helicopters on the Albanian border. Let's have the—" I have just as much power over the U.S. Marshal Service as I do over our forces in Europe. I am saying that because it is unfair to my colleagues and to the institution of the Office of Independent Counsel to be placing responsibility and blame where it simply does not belong.

Senator TORRICELLI. Mr. Starr, I am going to give you the time, and I will only interrupt you this one time. But it is my understanding that Ms. McDougal went to court and made appeals. Did your lawyers intervene or were they heard at any time on this issue when the question was raised about the nature of her confinement? Because if, indeed, you entered the Court and agreed

that these conditions were harsh or onerous or unfair, then you have my apology.

Judge STARR. I accept your apology because the record will show that whenever an issue was raised about her conditions of confinement and brought to our attention——

Senator TORRICELLI. You said they were unfair?

Judge STARR. I did not say they were unfair. We looked into them because, Senator, I will also tell you your facts are wrong. And if you send an investigator out to examine some of these things you will find, someone can say, "I believe that the moon is made of cheese." What are the facts? And the facts that you have recounted them are, with all respect, unfounded in reality. They make for a wonderful and very theatrical story. But they are unfounded in fact.

Senator TORRICELLI. Mr. Starr, we are not here for theatrics. We are here for the truth.

Is it not true that she was held in solitary confinement for 22 hours and was shackled? Because the facts being, as I saw them through the media, I never saw her being transported when she was not shackled, and her lawyers have told me, when they visited her, she was in solitary confinement and was denied family visitation for a civil contempt charge.

Judge STARR. She was in different facilities and, again, over which we had no control, and when we were informed about medical issues and the like, we inquired. We wanted to make sure that because she was there under order of civil contempt, which means, as you well know, that she had the keys to her own confinement. She could have been out like that, and she could have done what any number of other persons have done, including the President of United States, and appear before a Grand Jury. She chose not to.

And now I want to come to your very specific point. You are, as we say in the law, with all due respect, you are assuming facts not in evidence. You have come to a belief with respect to the trial in Little Rock. I would say suspend judgment. I am happy to get you a transcript of that trial, including, as you know, the jurors had questions. Questions such as, "What is innocent reason?" We have one public statement by—I am not saying this is fact. I am just aware of one public statement—by a juror to the effect that this was not a trial of the Independent Counsel. We were going to what was in her mind.

If you are suggesting the nullification of the law, I think you are, with all respect, offending the jurors who struggled with issues of intent. What was her intent under these instructions. They had the instructions before them.

You talked about Monica Lewinsky. The story you are telling is the stuff of theater, but is ungrounded in fact. And there are, in your talk, your bottom line is—you talked about unchecked power. Senator, there are judges here, and in their Article III capacities, they exercise judgment. Many of the issues that have been bruited about the American public and have come to be accepted as fact are calumnies and false, absolutely falsehoods, and individuals have gone out of the Grand Jury and have lied to the American people about what transpired. That is a serious abuse of trust as

to which there is no remedy. If the prosecutor, however, is abusing his unchecked power, that is why court is set.

And with respect to the treatment of Monica Lewinsky and the like, these issues were before the distinguished chief judge of this district. I will be happy to share with you a copy of her April 28 Memorandum of Opinion where she finds facts not as reported by a criminal defense lawyer, not as reported by a journalist, but as reported in the process that keeps the country together in difficult times, and that is a sense that we do have courthouses. They are honest and, yes, jurors play a very important part on that as part of this checking process.

But the final thing I would say is, in each of the instances in which we acted, we acted under a jurisdictional grant. An unchecked prosecutor is someone who does not have the authority to do what he or she is doing in each instance. And frequently our jurisdiction, Senator, is called into question. We have prevailed. Not once has there been a final determination—we have been found by two district judges to have exceeded our jurisdiction, but, Senator, they were wrong.

They were wrong, and they were told they were wrong by the U.S. Court of Appeals. And one was so wrong, among other reasons, that he was directed to leave the case. Why? Because in Arkansas and elsewhere, even in this body, feelings run high. Impressions can be reached and judgments reached on the basis of who are my friends, and that is exactly what Mr. Hamilton said in *Federalist 65*. You accuse my friend of something, I am going to line up on the other side.

Chairman THOMPSON. Thank you very much. Senator Cochran.

Senator COCHRAN. Mr. Chairman.

My recollection, Mr. Starr, is that when matters that were not really related to Whitewater would come up during the course of the investigation that you were conducting, that the procedure would be that you would report that to the Attorney General, and the Attorney General would make a decision as to whether or not she should proceed or the Department of Justice should proceed to investigate that or, if it was not sufficiently important, not to investigate it and to do nothing in effect.

I am referring, first of all, to Travelgate. There was the question of Billy Dale's file that came up and came to the attention of the prosecutor. My understanding is that in each of these instances you would go then to the Attorney General.

Tell us what would happen next. She makes a decision, and then how did you come to proceed to review, and investigate and then to bring charges in some of these cases? I think there were four separate, at least four separate events that became widely known. Could you tell us about that and why they were handled as they were?

Judge STARR. Yes. And in certain instances, the Department made an assessment on its own that the matter—and that happened in Travel Office and in FBI files—should, in fact, be investigated and should be investigated by an Independent Counsel; that is, independently of our bringing issues and information, as we did in the Lewinsky matter.

The Department would be doing its job in saying here are issues with respect to the Travel Office. Let's make a preliminary investigation. This is entirely without the Independent Counsel participating, not even knowing about it. And then the Justice Department, after working its will, determines we want to seek—it needs to be handled by an Independent Counsel—and we will now seek, through the Special Division, under the statute, an expansion of the Independent Counsel's jurisdiction. That is what happened in 1996. The Attorney General came to that judgment, sought an expansion, and I agreed to accept the expansion; so, too, with the FBI files matter.

So under the statute and in my experience, there were times when, yes, I would bring things to the Attorney General's attention, and if I could speak just a second about Lewinsky, the Lewinsky matter, and then there were other times when the Justice Department would say, "We want you to take this matter on."

And I think that raises some very interesting policy questions in light of the public perception of why is this Independent Counsel still in business and so on and so forth.

Senator COCHRAN. The suggestion that you unilaterally determined that you were going to reach out and proceed to investigate issues that were not within your original jurisdictional terms and that, therefore, you are too aggressive, you are out to get the President and all of those associated with him in Little Rock and in Washington, are not supported by the facts as they developed and the application of this law. As I recall, there were very few of us who opposed the reauthorization of this law and urged that amendments be approved by the Senate that would restore accountability in the Attorney General. But, no, we were not only to reauthorize it, we were to expand it to include other covered persons in the terms.

And then now to denounce you as someone who is unfit to serve as a Supreme Court justice because you were in the position where the Attorney General was asking you and asking you to get permission from the Court to handle these things, and now you are criticized, and I think very unfairly, for doing the duties that you assumed.

Judge STARR. Well, I thank you for that. Could I just add one brief comment about the Lewinsky matter which, of course, has been the most controversial?

In my initial letter to the Attorney General of the United States, 72 hours into the information having come to us, and we had already been in communication with the Department—and I frequently talk about "mother justice." We remain in touch with the "mother ship" and explain what it is that we are doing, in terms of our jurisdiction, while seeking to vouchsafe our independence—these sentences, if I could burden the record with this, this is the Independent Counsel to the Attorney General:

"We recognize that the investigation may well unearth allegations that lie outside our jurisdiction." We had framed it to include two individuals, Vernon Jordan and Monica Lewinsky. We had not included the President.

We then said, "It is certainly not our intention to undertake an investigation of possible perjury in every civil matter involving the

President. Accordingly, we will consult further with the Justice Department, as events warrant, and we will promptly refer any matters falling beyond our scope back to DOJ for your careful evaluation."

What we tried to do, and you can come to a different judgment, but what we tried to do is to say the information has come to us, it is serious, it is unfolding, it is fast moving. We need to have mechanisms of communication so we do it right.

And I think this correspondence and the history of what we were communicating with the Justice Department, since the matter came to us, was we said, joint, "Do you want to do it," and then in her submission to the Special Division she said, and she refers to the tape that has so concerned members of this body, she refers to it in her filing with the Special Division. That does not sound like a renunciation of a particular prosecutorial practice. To the contrary, we were being transparent, we were sharing with the Attorney General everything that we had, and she then comes to her judgment and says, "I have determined that it would be a conflict of interest for the Department of Justice to investigate Ms. Lewinsky for perjury and suborning perjury as a witness in this civil suit," and then she goes on.

So she could have appointed or said, "Please appoint someone else." She then says—now this is the Attorney General. This is not the Independent Counsel—"It would be appropriate for Independent Counsel Starr to handle this matter" for various reasons, and I accepted that.

Now, the buck stops here in the sense that perhaps I should have said——

Senator COCHRAN. You could have said no.

Judge STARR [continuing]. "I don't think so." But under the circumstances, I think it would have been odd for me to have said that.

Senator COCHRAN. But it was not your idea to reach out and bring this within your powers. It was the Attorney General who asked that you accept the responsibility.

Judge STARR. She asked that we accept it after we brought the information to her. It was collaborative. I am not trying to say that she is doing her own work independently, as in Travel Office. And that is why I thought it important for the very different set of circumstances in the Lewinsky matter to be better understood.

Senator COCHRAN. Let me ask you another question, too.

Based on your experience, and you had the job of investigating the President as well as others, is it different, in terms of the responsibilities under this statute to investigate the President, than it is to investigate a cabinet officer or other subcabinet-level employees or even members of Congress who, some suggest, ought to be covered by this statute?

Judge STARR. Yes, I think there is. And I think where we have seen the statute work, leaving all of the other policy and constitutional issues aside, but just does it work, just good old American common sense, is this the way to do it? There are 13 instances when I think everyone would say, "Gee, that is Phi Beta Kappa summa cum laude because there is no evidence of criminality

there, and the determination was made by an Independent Counsel."

Unfortunately, those have not involved the President of the United States and, thus, we are left with a system in which the two Independent Counsels whose unhappy lot it was, but life is tough all over, to investigate a President of the United States where there were serious allegations of wrongdoing, involving potentially the President himself, were the subject of vitriolic attack, and that is our system.

The problem, as I see it, with that Independent Counsel and what I tried to at least adumbrate in my opening comments, was that a statutory Independent Counsel is out there alone, and I think that is not the case if—and I just keep going back to the Judge Bell/Paul Curran model. Paul Curran was investigating the President of the United States, and he was appointed by Judge Bell to do it, and Paul Curran did it without, apparently, serious difficulties, attacks and so forth.

Now, he said one of the things that was met, he was met with full cooperation. I think it is a matter of public record we were not met with full cooperation in this investigation.

President Carter said, in essence—I am obviously paraphrasing—"I have nothing to hide. Here it is. Take it all. Bring your dump truck. Examine everything, and you will find that I have conducted myself properly, honorably and ethically," and President Carter was right. Now, that was done under the aegis of Judge Bell, Attorney General of the United States-appointed "Special Counsel" or "Independent Counsel," and I think that worked very well.

Senator COCHRAN. You have brought a lot of charges against a lot of different individuals or at least under the authority of the Independent Counsel Statute charges have been brought under your control and direction by the people who were working with you. Were there any charges that you came across that you could have brought that you did not bring?

Judge STARR. There were certainly times, Senator, when we considered bringing charges against one or more persons, and we determined that we could not satisfy the DOJ, the Justice Department, standard; that it is more likely than not that a fair-minded jury would convict this person, through the admission of admissible evidence, beyond a reasonable doubt.

That is a daunting standard. And we did, in fact, winnow out matters that could have been brought, both in Washington, D.C., and elsewhere, by virtue of that, very appropriately, daunting standard erected by the Justice Department and the U.S. Attorneys' Manual being satisfied.

Chairman THOMPSON. Thank you very much. Senator Edwards.

Senator EDWARDS. Mr. Chairman, Senator Akaka has arrived. I do not know if you wanted to let him go first.

Chairman THOMPSON. We are trying to come under a first come, first served——

Senator EDWARDS. Fine. I appreciate that. Good morning.

Judge STARR. Good morning.

Senator EDWARDS. Do you prefer to be called Judge Starr or Mr. Starr?

Judge STARR. Well, most people call me Ken, but either way.

Senator EDWARDS. Do you want me to call you Ken?

Judge STARR. Fine. That is fine by me, Senator. [Laughter.]

But you are very kind to ask. Whatever suits you.

Senator EDWARDS. Tell us, if you would, how you believe your investigations as Independent Counsel, on the firsthand, have hurt the country and, on the secondhand, have helped the country.

Judge STARR. Well, I think there has been injury to public confidence in the sound and orderly administration of justice for the reasons that have been put before this Committee by others more dispassionate and, undoubtedly, more eloquent, but certainly more able to objectively analyze from a public policy and good government perspective.

I think that statutory Independent Counsel investigations of the President, unless the President is entire—and I am referring to structure. I am not referring to a particular individual—are going to find the process enormously politicized. When war is openly declared, and when noncooperation, while cooperation is said; they cry peace, but there is no peace; they cry cooperation, and there is certain indicia of cooperation, but the reality of cooperation—and I mean by that the President Carter reality of cooperation—is not there, and at the same time the—and others are better able to describe this than I am, and have described it. Mr. Stephanopoulos has in his book. Certainly Mr. Kurtz has in his book—there is a very formidable process of hurling invective at duly constituted law officers, and I think that is bad for the country.

Now, I know Judge Bell, and I have been privileged to know most of the recent Attorneys General. Let us just deal with a hypothetical—if the White House had turned an attack machine on President Carter's Independent Counsel appointed by the Attorney General, I know Judge Bell, it would have stopped. It would have stopped quickly, immediately, and I believe some heads would have rolled, and it would not have been Paul Curran's head. It will not do to have a system and then to mock the system through constant attacks that, again, politicize the process in the way that I think has been done with respect to both Judge Walsh's investigation and my own.

How has it helped the country? I am old-fashioned. I believe that the truth shall set you free. It is a scriptural admonition and, for better or for worse, I think it is always for better. The country knows the facts. And as Nathan Lewin, a very able criminal defense lawyer, who was here before you and whom I have represented in private practice, let the record show, said the one thing that he knows about an Independent Counsel investigation is that it is going to be thorough and you are going to get the facts. I have said earlier that I have serious problems about referring the facts to the House of Representatives in the form of an impeachment report. I think that is unwise.

But the facts will come out eventually. What I have said, however, is I think the country is best served when there are allegations and some fairly serious comments have been made here about the conduct of the U.S. Marshal Service. Apparently, they are behaving, in the view of a U.S. Senator, in an inhumane way. To me, that suggests Congress, as the people's representative, engaging in

that oversight authority so that those kinds of abuses, if they are abuses—I do not happen to agree with the characterizations—can be checked.

And so I would simply leave you—and you were very kind to ask a question that invited some philosophizing—I would leave you with the thought that it would have been better for these facts to have come out much more readily, outside the criminal justice process. So that instead of having courthouse carnival/circus-type atmospheres, witnesses who are intimidated by the very crush of humanity and the like, and then going into the Grand Jury with the defense lawyers—they are good defense lawyers. They are very able—making charges at every turn, "Ah, the prosecutor is doing this bad thing," let us just have Congress engage in its oversight capacity. Easy for me to say having been there from the perspective of an Independent Counsel charged with the weighty responsibility and the unwelcome responsibility of investigating a President.

Senator EDWARDS. If I can, let me ask you a little more pointed follow-up to that.

Judge STARR. Sure.

Senator EDWARDS. As opposed to the inherent damage that these kind of investigations do, and things which you have talked about, to some extent, are outside your control, do you believe there are things about the nature of the way you conducted your investigations, looking back in hindsight, that you would have done differently, and that you think caused harm or damage?

Judge STARR. Well, in terms of the conduct, I can say, and I think that, obviously, many thoughtful people will disagree, and I recognize that and respect not only their right, but the basis of their disagreement. In this investigation, Senator, we followed DOJ procedures and practices, including the controversial wiring of Linda Tripp. That is exactly what a prosecutor, an investigator, would, in fact, do to ensure reliability.

The Supreme Court of the United States has expressly approved that kind of procedure in the *Lopez* case. That is part of our custom, practice and law, and yet that is viewed as being over the top. The subpoenaing of a family member is viewed as over the top. The Justice Department does that. Usually, it does so quietly because we do not have the spotlight, the glare of publicity——

Senator EDWARDS. Excuse me for interrupting you, and I apologize for that.

Judge STARR. Please.

Senator EDWARDS. But what I am interested in knowing is whether you believe, not whether others believe, whether you believe that there are things in your investigation that looking back with 20/20 hindsight you would do differently today.

Judge STARR. I would do one huge, not in the investigation—that is why I was dwelling on specific episodes—the treatment of Monica Lewinsky, completely bogus allegations that continue to be bandied about and even belied by her book when she talks about, "I was trying to warn the President. I knew I was free to go," the judge, finding no violations of her rights, and yet there is an impression abroad that she had her rights violated. Not so, and adjudicated by a Federal district judge and not appealed during her prior lawyer's tenure. She has since gotten, may I say, highly pro-

fessional lawyers, and our relationship has been a much more professional and amicable one since that time.

I would do one thing differently. I would be much more emphatic, in light of the unhappy responsibility that fell to me under Section 595(c), the referral, I would be much more emphatic with the House of Representatives in saying treat the material cautiously, in light of the nature of this material. I do not think I did enough.

Senator EDWARDS. Anything else that you would change, as you sit here today?

Judge STARR. I believe I honestly tried, and I will tell you what is coming to mind, is our relationship with the Secret Service, and I am searching; could I have done more to try to obtain the information in a less painful way, and I do not think so. I really do not.

And with respect to other controversial things, Senator, I do not apologize for trying to gather the facts consistent with the way FBI agents assigned by Louis Freeh, a very distinguished and able director of the FBI, following their customary procedures. And each time there has been an allegation raised, oh, this person was mistreated, we have had one individual, who I am not going to talk about because of pending matter whose name was raised, all of her allegations have been rejected by a chief judge of a District Court. That does not stop the lawyer from continuing to make the allegations, and not adding the somewhat inconvenient fact that the allegation were presented to a judge and the judge rejected the allegation.

So I think there are ways in which I do search my memory and conscience, and could we have done something in a less public way, especially with the Secret Service, and I despair, we tried any number of ways, but that is certainly one example that comes to my mind.

Senator EDWARDS. Tell me, if you would, what you see as the difference, if you see one—and I am not talking about statutory difference. I am talking about philosophical difference—between the role of a prosecutor and the role of an Independent Counsel. And if you could answer that as quickly as you can because I have got at least one other thing I want to ask you about.

Judge STARR. I think that the Independent Counsel Statute tries to create this hybrid with the reporting requirements, which I suggest in my opening statement, do away with them, stop the Independent Counsel requirement, if you continue it, from reporting, and I simply refer you to my opening statement.

But we also ask him to be a prosecutor, but we ask him to be a prosecutor within jurisdictional limits. And at times that becomes a real handicap in terms of what a U.S. Attorney's Office in the Middle District of North Carolina would do if next door is an Independent Counsel's Office, they have to put on very different lenses, and the U.S. Attorney's Office, the AUSA, is simply saying, "Look, what is in the 18 U.S. Code? This information has come to me. Let's see what is out there, and what we can do in terms of trying to get witnesses to cooperate and encourage." Not everyone wants to cooperate with Federal law enforcement. What can we do to encourage that? Independent Counsels frequently cannot act like traditional prosecutors.

Senator EDWARDS. I want to talk to you for just a minute about the public faith which of course is, in large part, what one of your responsibilities was, one of the things you were charged with, trying to enhance public faith and accountability of high-level public officials.

And I will just tell you that I have a concern that, at some point, these investigations have great potential instead of increasing and improving the public faith in the accountability of public officials, instead of having just the opposite effect of decreasing public faith, of causing people to have little or no faith in the accountability of high-ranking public officials. And I am just wondering, from your perspective, where on the spectrum do you draw the line and how do you make a determination? I mean, you have been through this. How do you make a determination at what place you are doing more damage than good in these sort of investigations?

Judge STARR. Well, I think the prosecutor—and an Independent Counsel is a prosecutor with a reporting requirement—has to do his or her dead-level best to get to the bottom of the jurisdictional grant. What was, in my case, the relationship between Madison Guaranty Savings and Loan, Whitewater Development Corporation and Capital Management Services. That was a very broad mandate and that, in itself, was, shall I say, a very formidable mandate, and I think it is just extraordinarily difficult to put that—when a subject could be the President of the United States—on an outside Independent Counsel who will not enjoy the protections that a Paul Curran or, frankly, a Leon Jaworski enjoyed. No one was going to touch Leon Jaworski. No one, because of the integrity of Judge Bell, and the integrity of President Carter and their Justice Department, was going to touch Paul Curran. That is my answer.

And if the attacks come, if war is declared against an Independent Counsel and every move that he or she makes is subject to attack, then the Attorney General of the United States has a solemn and weighty responsibility to rally quickly to the side of the Independent Counsel and to say, "Call off the attack dogs and do it now."

Chairman THOMPSON. Thank you very much. Senator Akaka.

Senator AKAKA. Thank you very much, Mr. Chairman. I guess I will call you Hon. Starr. [Laughter.]

Thank you for being here this morning with us. In questioning some of our witnesses, we have found that there have been changes of minds as to how they felt about this Act. I understand that you now oppose the reauthorization of the Independent——

Judge STARR. I always did oppose it, Senator.

Senator AKAKA. Yes.

Judge STARR. When I was at the Justice Department, I was an opponent of the statute. So I did not mean to interrupt. I apologize.

Senator AKAKA. My question, and you probably answered it, was whether you initially supported the enactment of this?

Judge STARR. I should not have been rude. I did not. In 1978, to be honest, serving then—I had been fortunate to be law clerk to the Chief Justice of the United States—I was in private practice, and I did not think hard about it, to be honest. So I did not have certainly a considered view with respect to the wisdom of this.

But I have been very privileged to clerk on the great old Fifth Circuit, now both the Fifth and the Eleventh, and I had come, fortunately, into the orbit of Judge Bell. And I had total, and continue to have total, respect and the highest regard, personally and professionally, for him. I know that his able advisers and counselors in the Justice Department respectfully disagreed with President Carter, who thought it was a good idea and who thought it was important to promote public confidence.

And the Justice Department, as an institution, was saying do not go there, do not go there. Yes, we have lived through Watergate. No system is perfect, but it is, as I quoted Mr. Churchill, "It is the best that we can do. Hold yourself accountable."

And then Judge Bell, again before the Independent Counsel Statutes were enacted or before they were effective, had the occasion then, unhappily for him, to appoint his own regulatory Independent Counsel. So someone whom he could have fired, Mr. Curran, whose name I have now mentioned more than once, and it worked.

And so I think it can work, and there you have the assurance that the Attorney General of the United States will stand by the Independent Counsel, will not find herself in institutional—and I am talking about institutional tensions. I am not talking about personality conflicts and the like—but the institutional tensions that are inherent in a statutory Independent Counsel Statute, and I just did not see those in my experience at the Justice Department with respect to a Special Counsel or Independent Counsel appointed by the Attorney General himself or herself. It just did not arise.

Senator AKAKA. You made comments emphasizing that the House treats referral materials cautiously. You correctly state that the Act requires an Independent Counsel to inform the House of Representatives of information and, "that may constitute grounds for an impeachment," and you felt obligated to bring order and coherence to the information you passed on.

It appears from your testimony that you felt the requirement, and this is apart from how you would comply with it, could further politicize the Independent Counsel investigation, and I think this has been a concern. What did you feel the results would have been if your office had provided the House only raw evidence regarding the *Jones v. Clinton* matter?

Judge STARR. I think, Senator, and it is a very thoughtful question, that it would have put an undue burden of organization on the House of Representatives, the Judiciary Committee and the professional staff of the Judiciary Committee. And so if you simply said, and we thought about this early on in the investigation, "Can we just send the material that we have up there? Would that be complying with the law?" I felt that it would not be complying with the law. It sure would have been easier for us to have just sent it up, and then you go through it, the Judiciary Committee, and decide.

But the reason, and you were kind enough to quote we thought we had to bring order and coherence, the statute, as it is presently constituted, and I hope, again, you will just do away with this particular provision entirely, but the statute seems to suggest and command—not command—but suggest order and coherence, and that meant analysis in putting together in a referral form. And at

that point, reasonable minds are going to differ. Sam Dash then said, "The referral is fine. By your testimony, you became an advocate."

And I said, "Gosh. I do not think so." I kept saying, "This is up to you all." As we say in my native Texas, it's "Y'all." I have given you the information, and I have given it to you coherently and in an organized fashion. But you all decide what to do with it, including throwing it in the trash can. But Sam, who I hold in the highest regard and much beloved to me, and with anguish on both our parts, separated from me because he believed I became an advocate. I, to this day, respectfully disagree.

But I think it is part, Senator, of the mischief of this particular provision because Hamilton, *Federalist 65,* and that feelings are going to run so high in an impeachment setting that I think it is a very unwise, if I may say so, and I do not mean disrespect, responsibility to vest in a single inferior officer of the Executive Branch.

Senator AKAKA. My question does not suggest that your office's active role in the House impeachment process was undertaken with malice. I am not suggesting that. However, you were strongly criticized for taking over the House of Representative's constitutional duty to investigate potentially impeachable offenses. In hindsight, would you have presented your evidence in a different manner?

Judge STARR. Well, in hindsight, in light of the criticism, my inclination would have been to stretch the statute and just send the truck up with the raw information, and say I respectfully decline to provide any analysis whatsoever. And once you then crossed—and we spent a long time thinking about this internally in our office, how do we put this referral, as we call it, together? What should it look like? And, again, I do not mean to show disrespect to the Congress or to your predecessors, but we had no guidance whatsoever. There was nothing whatsoever in the legislative history or other materials to give us any guidance. And so we gave it our best judgment call, and I think we did not stray beyond the bounds of simply living up to our obligations.

But I have to live with the fact that a lot of thoughtful people believe that just the appearance was I was an advocate, and certainly my dear Sam Dash believed that I had crossed that line, and I lament that to this day.

Senator AKAKA. In your testimony, you recommend that if the Independent Counsel Act is reauthorized, that the requirement to issue a final report be eliminated and to let Congress, the media and the public make the final determination about matters under investigation. Depending on how the media treats someone under investigation, but never indicted, would the elimination of a final report be harmful to these individuals?

Judge STARR. I do not think so because what I see the conclusion, Senator, as being is just a determination by the Independent Counsel that no criminal charges would be brought, period, full stop. That is it. It is all over at that stage.

Whereas, the reporting requirement does, and others have talked about this, require, or at least creates a dynamic that could cause a thoughtful, reasonable Independent Counsel to say, "I have got to go an extra mile in order to have a report that will withstand

the most searing scrutiny by individuals who would want to be quite critical of it and call the professionalism of the report into question."

So I think the report creates a very unfortunate dynamic and is not necessary, because I think there are other ways that control or accountability values can be served.

Senator AKAKA. My question is on referrals. You noted that, as an Independent Counsel, you are a prosecutor of limited jurisdiction and have authority to investigate matters that led to your appointment. In fact, you state that you have referred matters outside of your jurisdiction back to the Justice Department. Separate from issues that were eventually included in your jurisdiction, what criteria did you use to determine if something was outside of your prosecutorial jurisdiction?

Judge STARR. The most obvious candidate that comes instantly to mind is where we believed, and I think rightly, that, as a matter of law, only the Justice Department enjoyed jurisdiction to evaluate and consider charging violations of the Privacy Act. That is one specific example which, as I say, comes readily to mind. We just do not have jurisdiction over that.

And so if we saw a potential Privacy Act violation, we might—we would simply refer the matter back to the Department inasmuch as we do not have, by statute, jurisdiction over those matters.

Senator AKAKA. My final question is, do you know what the Justice Department has done with these referrals?

Judge STARR. I do not.

Senator AKAKA. Thank you very much, Mr. Chairman.

Chairman THOMPSON. Judge Starr, thank you very much. We have been at it for over 3 hours now, and I just want to express my appreciation for your coming and helping us with this task. I think we have a much better understanding now of what it is like from the inside, so to speak, in addition to a well thought out and intellectual approach and position with regard to the benefits and the detriments of the statute that we have now. So, again, I would not keep these judges waiting any longer than we have to. I am sure it probably will not meet with your objection. So, with that, I will just thank you and express our heartfelt appreciation for your being here today.

Judge STARR. Thank you, Mr. Chairman.

Chairman THOMPSON. Thank you very much.

We will now proceed to our second panel to continue our discussion of the implementation of the Independent Counsel Statute. The witnesses are Judge David Sentelle of the D.C. Circuit; Judge Peter Fay, Senior Circuit Judge of the Eleventh Circuit; and Judge Richard Cudahy, Senior Circuit Judge from the Seventh Circuit.

All three are members of the Special Division of the Court of Appeals that appoints and oversees Independent Counsels pursuant to the Act.

Gentlemen, thank you very much for being here. These nonlawyers do not understand how rare it is that people would have the temerity to keep three senior Federal judges waiting this long, but we appreciate your being here. Some of us are especially sensitive

because we never know when this job is going to play out, and we are back in the courtroom again. [Laughter.]

But, clearly, you have become a part of a unique experiment that we have had here, and that is the involvement of all three branches of government in an endeavor that we have here with regard to the Independent Counsel Statute. And you have been selected, under the statute, to make the determination as to which Independent Counsel should be appointed in appropriate circumstances, and then you have a relationship that carries on there. And I think that both of those areas are ones that we want to explore with you today as to how that is working out.

I appreciate your statement that has been made that it would not be appropriate for you to be an advocate for or against the statute as such, but we certainly would appreciate your insight as to the details of how it is working.

Judge Sentelle, would it be appropriate for you to make a statement? Any statement you have will be made a part of the record.

Judge SENTELLE. I think Judge Cudahy has an opening statement he would like to make. I think Judge Fay does not. So, Judge Cudahy, if you want to proceed, and then I will follow you with mine, if that is agreeable to the Committee.

Chairman THOMPSON. That is agreeable. Judge Cudahy.

TESTIMONY OF HON. RICHARD D. CUDAHY, MEMBER OF THE SPECIAL DIVISION OF THE COURT OF APPEALS

Judge CUDAHY. Mr. Chairman, Senator Lieberman, and 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, I think, my relative inexperience. So I will be correspondingly brief in suggesting the few impressions that I have formed up to this point.

One area that has struck me as very important and, I think, deserving of close attention is control of costs. The Special Division participates, to a degree, in this important function by, for example, authorizing for 6-month periods the incurral of commuting expenses by OIC 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 because the Supreme Court, of course, instructed us not to engage in supervision of the Independent Counsel. I think 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, I think, has not 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 guess that has not been a great deprivation based on—— [Laughter.]

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. And 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 I suppose this might reintroduce 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 the Counsel and the Division. Rather, I think 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 probably 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, of course, authorizes investigations of a much broader array of officials. This narrowing would accomplish two things: One, 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, second, it would assure the availability of only the most highly qualified attorneys as Independent Counsels.

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

Chairman THOMPSON. Thank you very much. Judge Sentelle.

TESTIMONY OF HON. DAVID B. SENTELLE, PRESIDING JUDGE OF THE SPECIAL DIVISION OF THE COURT OF APPEALS

Judge SENTELLE. Chairman Thompson, Senator Lieberman, and Senators. I would note at the outset, Senator Thompson, that one Member of the body did used to appear in front of me in court, and I hope I was nice to him on those occasions—— [Laughter.]

Senator EDWARDS. I guess we will find out, Judge Sentelle. [Laughter.]

Judge SENTELLE. I was thinking, Senator Edwards, that on each of the last two times we interacted, both when you were appearing in front of me and when we were representing opposed parties, you left with a seven-figure check. [Laughter.]

I cannot arrange that for you today I am afraid. [Laughter.]

Senator LEVIN. But he was after an eight-figure check. [Laughter.]

Judge SENTELLE. I cannot arrange that either.

My appearance here today is in response to the request of the Committee, as authorized by Canon 4 of the Code of Judicial Conduct, our appearance, which provides that judges may consult with a legislative body on matters concerning the administration of justice.

As I stated in my letter to the Committee, and I will use generally the first-person singular, I will use the "we," I hope, only

when the Court either has not constituted or previously has officially acted. If my colleagues catch me overstepping, I am sure they will let me know.

As I see it, I cannot speak to the political question of whether to reauthorize the Act, but rather to the mechanics of how it operates. I also will not breach the confidence of my colleagues, present or past, on matters that occurred in camera. I will try to address specific issues that have been presented to us before insofar as I can, consistent with the Canons of Ethics.

First, the Committee has expressed an interest in my views concerning the appointment process. I can only relate to you the mechanics of the appointment process, as followed in the last 6½ years of my service as presiding judge, and from what I have gathered from the files, correspondence, and conversations, frankly, with my immediate predecessor, the Hon. George E. MacKinnon, who served for approximately 7½ years next preceding me.

During my tenure, the Court has maintained a Talent Book that includes the names and brief biographies of attorneys of relevant skill, particularly in Federal and white-collar crime. We have emphasized those attorneys who have experience as either Federal prosecutors, Federal judges or both. The names are drawn from our personal experience and recollection of the judges comprising the panel, and we have accepted suggested names from anyone who chose to submit either themselves or anybody of their acquaintance.

At such time as the Attorney General has requested the appointment of an IC, I first search the files for the names that I think belong on a long list of possible attorneys for that particular investigation. Each of my colleagues comes up with such names either from the Talent Book or elsewhere, as he has thought appropriate, and has taken the names off my list that he had some objection to. Most of the names may come from the Talent Book because we try to keep it current and comprehensive, but at times they do not and, indeed, we have appointed at least one person who first came to our attention while we were in the process of seeking Independent Counsel.

When we have satisfied ourselves that we have removed all of those names of persons who have obvious conflicts or who, for any other reason, one of the panel thinks would not be an appropriate nominee, we take the resulting shorter list and either I or a colleague contacts each person on the list to ask if he or she is interested in serving as an Independent Counsel for that particular matter. Now, understand this, it may well be that it is still under seal as to what that matter is at that point, so we have to be guarded in how much information we share until we get the list very short.

Now, once we get the person to respond, if they are interested, we then inquire if they know of any conflicts of interest. We ask them to check their firm to see if there are conflicts. That has generally resulted in a reduction of the list down to a short list in the range of four to seven names.

At that point, we submit the list to the FBI for a name check. They give us back anything they have in file, as far as previous clearances or previous job application backgrounds they have done.

And in almost every—no, every instance we have received from the FBI files of previous investigations that were sufficiently current that they provided good information. Now, if any of the name checks has negative information, we take that name out; the FBI comes up with something that disqualifies them.

We then schedule interviews for the remaining potential nominees, and that is usually about three or four. We have held, typically, the interviews here in Washington with all three judges present, except during the 2-year tenure of Judge Joseph Sneed of the Ninth Circuit. He developed some health problems and was unable to travel, so that we worked by conference telephone with regard to the interviews during Judge Sneed's tenure.

Now, at the interviews, we explore any possibilities of conflict that might have been theretofore overlooked. Because the list is short and because we are insisting on confidentiality, we do go into more detail on the subject matter of the investigation. That process usually results in the removal, or sometimes does, of still further names. So we get down to only two, three or four names eventually, and from that remaining very short list, we have been able to achieve consensus on the person to be appointed. In a few instances, the interview process has resulted in the removal of all of the names we had left, so that we had to go back, start a new long list and work our way down again.

From what I have gathered from the files of Judge MacKinnon and from John Butzner, who served on both the MacKinnon panels and my panels, the process was very much the same except that they did not maintain a Talent Book, as such. They kept the files from their prior inquiries, but not in the formal nature or informal nature or whatever of a Talent Book. It also appears that in at least one or two instances the MacKinnon panel had to start over when it exhausted all of the possible nominees.

You have asked me secondly, to address the question of whether the Court can exercise any oversight over an Independent Counsel. My answer is that the panel can exercise no, or at least virtually, no oversight. As is suggested by the categories that Senator Levin suggested earlier in the Supreme Court opinion of *Morrison v. Olson,* the Supreme Court upheld the Act precisely because the powers bestowed on the panel by the Act, and I am quoting now, "do not impermissibly trespass upon the authority of the Executive Branch," as evidenced by the four categories Senator Levin suggested.

Since we do not trespass upon the authority of the Executive Branch, we cannot supervise an Executive function. If we were put in as supervisors—and the word "overseeing" the Independent Counsel is used informally, but it is not in the Act. We do not oversee the Independent Counsel. We appoint the Independent Counsel—if we supervised, we would cross the line of the separation of powers, and I do not think the Supreme Court in *Morrison* would have upheld a statute that allowed for that.

You further asked that I address the manner in which the existing Independent Counsel's jurisdiction can be expanded. There are two ways that might roughly fall within that nomenclature. The first is the literal expansion of jurisdiction, which is pursuant to Section 593(c). Under that section, "The Division may expand the

prosecutorial jurisdiction of an Independent Counsel and such expansion may be in lieu of the appointment of another Independent Counsel." But we may make that expansion only upon an application from the Attorney General. So that an actual expansion of jurisdiction, in the terms of the statute, must originate with the Attorney General, and the Independent Counsel must accept the expanded jurisdiction. So it is essentially the same thing as the appointment of a new Independent Counsel, except it is appointing the same person to do an expanded job as Independent Counsel.

And Section 593(c)(2) provides the procedure by which the Independent Counsel, upon finding information concerning possible violations not encompassed within the original jurisdiction, may submit that information to the Attorney General preliminary to such an expansion.

Now, the second category that might be said to have expanded the jurisdiction of the existing Independent Counsel is the referral of a related matter, under Section 594(e). Under that section, the Independent Counsel may apply either to the Attorney General or directly to the Special Division for the referral of matters related to the Independent Counsel's prosecutorial jurisdiction. If the Counsel applies to the Attorney General and she rejects that application, under our case law, we have held that the panel cannot reconsider her rejection. Her word is final. If she grants the application, then the panel routinely must accept it.

If the Independent Counsel applies directly to the Court, to the panel, we can then make an independent determination as to whether the matter in question is a sufficiently related matter within the terms of the statute, if it is, we can so hold, and we can make a referral placing the matter within the jurisdiction of the Independent Counsel. We have held that such a referral must be demonstrably related to the Independent Counsel's current jurisdiction.

Finally, you asked that I address the Court's role in determining whether an IC's investigation has been substantially completed. The present version of the statute, Section 596(b)(2), provides for termination by the Court upon the Court's determination that Independent Counsel has so substantially completed the assigned investigation or investigations that it would be appropriate for the Department of Justice to complete the investigation.

We have considered that question on a few occasions. We have never found ourselves in a position to order determination where the Independent Counsel has not asked for it. I might disagree with my colleague, Judge Cudahy, and say that since we are not a supervisor, I do not think we are well suited to make that determination absent a proceeding initiated either by the IC, the Attorney General or someone who is the subject of the investigation.

On at least two occasions, parties other than the IC have asked the panel to declare that a task of the Independent Counsel has been substantially completed, terminate the office. We heard from the Independent Counsel. In neither instance were we convinced that this was appropriate.

That concludes the matters about which you had asked me directly. With the indulgence of the Committee, I would like to speak to a few of the proposals that I have been advised may come before

the Committee as revisions if the statute is retained. I am not speaking to whether it should be retained, but if it is retained.

Under Section 599 of the existing statute, if the existing statute is allowed to lapse by its terms, ongoing investigations continue. I understand that there are proposals to set termination dates for continuing investigations. In the interest of the administration of justice and as a former trial judge, a former Federal prosecutor and a long-time defense attorney, I suggest that a deadline like that would be inimical to the ends of justice. It would provide dual perverse incentives. It would be an incentive for prosecutors to act in haste, either precipitously indicting people who should not be indicted or dismissing cases that should not be dismissed. On the other hand, it would give defense attorneys an incentive to cause delay. That is a big enough problem with defense attorneys already. I know, I was one. [Laughter.]

And the two features of the existing Act that I suggest the Committee might wish to revisit if it proposes to continue the legislation, first, is the requirement of the existing Act that the Independent Counsel file a final report setting forth fully and completely a description of the work of the Independent Counsel, including the disposition of all cases brought. That report requirement has no counterpart in Federal criminal law outside the Act. It exposes the subjects of investigation to derogatory information that has never been tested by trial process, and apparently was not even sufficient to be the foundation for an indictment.

The present version is an improvement over the version before 1994. That version required that the report include the reasons for not prosecuting any matter within the jurisdiction of such Independent Counsel. That earlier provision made it perhaps impossible for an Independent Counsel to file a report without that kind of derogatory information. The present requirement at least creates an atmosphere in which it is likely to happen. The old one, it made it virtually impossible for someone like Judge Walsh without disseminating that kind of derogatory information.

And let me say, as a footnote, that I would join my friend Bob Bennett in what he said to the Committee a few weeks ago; that any Independent Counsel ought also to sign a contract not to write a book about his investigations.

As a footnote to the discussion of the reporting requirement, I would say that the Committee might reexamine the part of Section 594(h)(1) that requires the filing of 6-month expenditures with the Court. I think GAO and other accounting agencies can do some good with that report. Filing it with us does not do a whole lot of good. We are not given any authority or responsibility for doing anything with it. So we get it, we file it, it is there. It does not hurt anything, but it takes up additional administrative time.

Finally, on the award of attorney's fees, Section 593(f), I am not objecting to the concept of that. It does not have any counterpart anywhere else in criminal law, but the idea was to put subjects of Independent Counsel investigation on the same basis as if the statute had not been passed. If we do not have the report, which I would like not to have if we have the statute, the job will be harder, and you might want to consider laying out some more objective

criteria as to how those awards of attorney's fees are to be measured.

That would be my suggestions.

[The prepared statement of Hon. David B. Sentelle follows:]

PREPARED STATEMENT OF JUDGE DAVID B. SENTELLE

My appearance is in response to your request and is authorized by Canon 4 of the Code of Judicial Conduct which provides that judges may "consult with a legislative body . . . on matters concerning the administration of justice." Code of Conduct for Judges, Volume II, Chapter 1, Canon 4.

As I stated in my letter to the Committee of March 25, 1999, I cannot ethically speak to purely political questions, including the fundamental question of whether to reauthorize the Act. Further, I cannot breach the confidence of my colleagues on matters on which the Court conferred *in camera.* I will however attempt to address the specific issues suggested by Senators Thompson and Lieberman in their letter of March 19, 1999, as well as some other areas consistent with the administration of justice exception created in Canon 4.

First, as to the areas mentioned in your letter:

(1) The Committee expresses an interest in my views concerning the appointment process. I can only relate to you the mechanics of the appointment process as followed in the last 6½ years under my service as Presiding Judge and what I have gathered from the files and correspondence of my immediate predecessor The Honorable George E. MacKinnon who served for approximately 7½ years next preceding me. During my tenure the Court has maintained a Talent Book including the names and brief biographies of attorneys of relevant skill, particularly in Federal and white collar crime. We have emphasized those attorneys who have experience as Federal prosecutors and/or Federal judges. The names are drawn from the personal experience and recollection of the judges comprising the panel and we have accepted suggested names from anyone who has chosen to submit either themselves or acquaintances as possible nominees. At such time as the Attorney General has requested the appointment of an independent counsel, I have searched the file of names to assemble a long list of attorneys whom I believed to be qualified and well-suited for the particular investigation at hand. Each of my colleagues has added names which he considered appropriate possible nominees and deleted such names from the list as he might consider inappropriate. Most but not all of the names we consider have come from the existing Talent Book. Others have been suggested by members of the panel or outside sources.

When we have satisfied ourselves that we have removed all those names who have apparent conflicts or for other reasons might not be appropriate nominees, we take the resulting shorter list and either I or one of my colleagues contacts each person on it to ask if he or she is interested in serving as an independent counsel for the particular matter at hand. If so, we inquire whether the person knows of any conflicts of interests which might create a problem. This has generally resulted in a reduction of the list to a short list from four to seven names. We have then generally submitted that list to the Federal Bureau of Investigation for a name check. If any of the name checks had resulted in sufficiently negative information, we have removed that name. We then schedule interviews with the remaining potential nominees. These interviews have been held with all three judges present in Washington, except during the 2-year tenure of Judge Joseph Sneed of the Ninth Circuit who was unable to travel for medical reasons. During that period, the interviews were often done by conference telephone call. At the interviews, we have explored any possibilities of conflict that might have been theretofore overlooked. Because of the shortness of the list and the confidentiality of the setting, we have been able to go into more detail on the subject matter of the investigation. This process has often resulted in the removal of still further names so that only around two, three, or four possibilities remained. From that remaining very short list the Court has usually been able to achieve consensus on the person to be appointed. In a few instances the interview process resulted in the removal of all potential nominees and the panel had to begin the process all over.

From what I have gathered from files of my predecessor, Judge MacKinnon's panels followed approximately the same process, with the exception that he did not maintain a Talent Book although he did keep files of persons considered in previous appointments but rejected for case-specific conflicts. It appears from the records that in at least one or two instances, those panels also rejected all possible nominees and started over.

(2) You have asked me to address the question whether the Court can exercise any oversight over an Independent Counsel. My answer is that the panel can exercise no or at least virtually no oversight. When the Supreme Court upheld the constitutionality of that portion of the Ethics in Government Act creating Independent Counsels and empowering the Special Division to appoint them in the *Morrison v. Olson* opinion, it upheld the Act as constitutional precisely because the powers bestowed on the Panel by the Act, "Do not impermissibly trespass upon the authority of the Executive Branch." 487 U.S. 680–681. Therefore, the Supreme Court held that the Act as a whole "does not violate the separation of powers principle by impermissibly interfering with the functions of the Executive Branch." *Id.* at 696–97. In short, we are an Article III panel. If we supervise the carrying out of Executive functions, we then cross the line of separation of powers by interfering with the carrying out of Article II of the Constitution by an Article II officer. While there may be peripheral matters within the relationship of the Independent Counsel to the Courts which could be said to be within the oversight of the Article III institution, in the end the short answer is that we do not oversee the functioning Independent Counsel and cannot constitutionally do so.

(3) You have further asked that I address the manner in which an existing Independent Counsel's jurisdiction can be expanded. There are two. The first is a literal "expansion of jurisdiction" pursuant to 28 U.S.C. § 593(c). Under that section, "the Division . . . may expand the prosecutorial jurisdiction of an independent counsel and such expansion may be in lieu of the appointment of another independent counsel." The Division may make such an expansion only upon the request of the Attorney General. Thus, for actual expansion of jurisdiction in the terms of the statute to occur, the Attorney General must request such an expansion from the Division and the Independent Counsel must accept that expanded jurisdiction just as in the case of an appointment of a new independent counsel. Section 593(c)(2) provides the procedure by which the Independent Counsel upon finding information concerning possible violations of criminal law not encompassed within the original jurisdiction may submit such information to the Attorney General preliminary to such an expansion.

The second manner in which an existing Independent Counsel might be said to be expanded is through a referral of a related matter pursuant to § 594(e). Under this section the Independent Counsel may apply either to the Attorney General or directly to the Division for referral of matters related to the Independent Counsel's prosecutorial jurisdiction. If the Counsel applies to the Attorney General and she rejects that application, under our case law, we have held that the Court cannot reconsider her rejection, but that her word is final. If she grants the application, then the panel routinely accepts it. If the Independent Counsel applies directly to the Court, we can then make an independent determination as to whether the matter in question is a related matter within the terms of the statute. If it is, we can so hold and make a referral placing the matter within the jurisdiction of the Independent Counsel. We have held that such a referral from the Court must be "demonstrably related" to the Independent Counsel's current jurisdiction. In re Espy, 80 F.3d 501, 509.

(4) Finally, you have asked that I address the Court's role in determining whether an Independent Counsel's investigation has been substantially completed. The present version of 28 U.S.C. § 596(b)(2), provides for termination by the Court upon the Court's determination that the Independent Counsel has so substantially completed the assigned investigation or investigations that it would be appropriate for the Department of Justice to complete that investigation. Although we have considered this question on a few occasions, we have never as yet found ourselves in a position to make the determination that an Independent Counsel's task has been substantially completed absent an application by the Independent Counsel. Because we are an Article III body and not a supervisor, we are not well-suited to make that determination absent a proceeding initiated either by the Independent Counsel, the Attorney General, or a subject of the investigation. On at least 2 occasions, parties other than the Independent Counsel have asked the Court to declare a task of an Independent Counsel substantially completed and terminate the office. We then heard from the Independent Counsel. In neither instance was the court convinced that this was appropriate. As an Article III body, we are ill-suited to decide that question in the abstract, and I would reserve an answer for specific facts that might be brought before the Court.

That concludes the matters about which you had asked me directly. With the indulgence of the Committee, I would like to speak to a few of the proposals which I have been advised may come before the Committee as revisions if the statute is retained at all. Before making these remarks I would hasten to say that I am NOT taking a position on whether the statute should be continued in existence, but rath-

er simply making some observations based on my experience that I hope the Committee will consider if it does decide to continue the statute.

(1) Under Section 599 of the existing statute, if the statute is allowed to lapse by its terms, ongoing investigations continue. I understand that there are proposals to set termination dates for continuing investigations. In the interest of the administration of justice and as a former trial judge, Federal prosecutor, and defense attorney, I would suggest that such a deadline would be inimical to the ends of justice. Such a deadline would provide dual perverse incentives. It would first be an incentive to prosecutors to act in haste, perhaps precipitously either indicting people who should not be indicted or dismissing cases that should not be dismissed. Conversely, it would give an incentive to defense attorneys to cause delay, already a great problem with the courts.

(2) There are two features of the existing Act that I suggest the Committee might wish to re-visit if it proposes to continue the legislation in effect. Both relate to the avowed purpose of the Congress in enacting the original statute of placing persons within an administration on the same footing as other citizens who might potentially become the subjects of criminal investigation and prosecution. The first is the requirement of the existing Act that the Independent Counsel file a final report, "setting forth fully and completely a description of the work of the Independent Counsel, including the disposition of all cases brought." This report requirement has no counterpart in Federal criminal law outside the Act and exposes the subjects of investigation to derogatory information that has never been tested by a trial process and was apparently not sufficient to be the foundation for an indictment. The present version of the Act is an improvement over the pre-1994 version which required that the Report "includ[e] the reasons for not prosecuting any matter within the prosecutorial jurisdiction of such Independent counsel." Compliance with that earlier provision made it difficult, if not impossible, for an Independent counsel to file the Report without such derogatory information but it remains problematic even without the express requirement. I therefore suggest that the Committee, if it decides to propose a continuance of the statute at all, seriously consider revision or deletion of the final Report requirement.

Almost as a footnote to my discussion of that reporting requirement, I would further suggest that the Committee might reexamine § 594(h)(1)(a) which requires the filing with the Court of 6-month reports of expenditures by each Independent Counsel. That section neither requires nor empowers the Court to do anything with those filings so that we review and file the reports at the expense of the taxpayers and the Courts to no good end. Other provisions of law require that the Independent Counsel make financial reports to the accounting arms of the Congress. Accounting entities are far better equipped to deal with the financial reports than the Courts. The General Accounting Office is a much more appropriate recipient of such reports than the Court and the Committee might consider deleting the requiring of the filing with the Court in any future version of the Act.

Finally, § 593(f) of the statute provides for the award of reasonable attorney's fees to any individual who has been the subject of an Independent Counsel investigation but was never indicted and would not have incurred the attorney's fees in question except for the requirements of the Independent Counsel Statute. Like the reporting requirements, this attorney's fees award has no counterpart in standard Federal criminal law. I am not suggesting that the award provision should necessarily be deleted from any new version of the statute, but I note that its administration will be more difficult if the reporting requirement is deleted as I have suggested it might be. I would therefore suggest that the Committee might give serious consideration to a more specific statute setting forth the criteria for the award in more specific terms. I do not suggest that the Court could not manage to administer the present provision with the well-advised input of both the Independent Counsel and the Department of Justice, but I do suggest that Congress might consider giving more specific guidance.

That would conclude my prepared remarks.

Judge SENTELLE. Judge Fay, do you have anything to add?

TESTIMONY OF HON. PETER T. FAY, MEMBER, SPECIAL DIVISION OF THE COURT OF APPEALS

Judge FAY. No. Thank you very much.

Mr. Chairman, I apologize, because of personal problems, I was not able to prepare an opening statement, but if I had, I would have agreed with everything that Judge Sentelle outlined for you.

Obviously, I am delighted to be here and answer any questions that you have, as best we can.

I have served on the Special Panel since October 1994, primarily with Judge Sentelle and Judge Butzner. And Judge Cudahy replaced Judge Butzner recently. So we are delighted to be here.

Chairman THOMPSON. Well, thank you very much, and we are delighted to have you. You have raised a lot of interesting points here that we will just get right to.

The first one for me is the selection process. Talk to us a little bit more in detail about how that first list of attorneys comes about. The request comes to you and, as I understand from your written statement, you and your colleagues get together a list of names. I am wondering about how many you usually come up with from that first list, and is it usually—I am sure there are different things happening at different times—but is it usually based on the personal acquaintances or reputations that you, as judges, have?

Judge SENTELLE. It has a strong ad hoc component so far as the composition of the list in a particular case. Each Independent Counsel investigation is different. As far as the names in our book, which is what I start with, number in the dozens, and they are not very selectively compiled. Pretty much the case that if somebody sends us a name of an attorney with reasonable experience, we put it in the book. Judge Butzner, and I am not telling tales out of school because he said this publicly before, strongly believed that the former judges were the best candidates. He kept us current with a list of the recently retired judges, not senior judges, but retired judges from Federal service. We put that in the book among the names. Anybody in the United States, and they came from judges across the country, as well as lawyers, who wanted to send us a name, we put it in.

Now, we would cull it to the extent that if it looked like somebody just did not have the experience, we did not put them in. We had one former judge who had been convicted of some crimes. We did not put him in. [Laughter.]

But beyond that, I would look through those dozens of names, each of my colleagues had corresponding lists, and I would eliminate those that I thought, for one reason or another, were not sufficiently experienced.

Chairman THOMPSON. But from all of those names, if I could interrupt you for just a second, I assume that there are probably several names in there of people that you know absolutely nothing about.

Judge SENTELLE. Right. What we have, in addition to the names, and I should be more specific, we go to Martindale and we go to Who's Who, and we get the biographies of the people. We do a Westlaw "all news" search, and we get any news accounts of the people that are relevant, and that is included along with their name in the Talent Book. It is not just a raw name. It is a biography.

So by looking through those biographies, if I see that somebody has made a career out of representing Indian tribes and the particular matter under investigation involves allegations concerning receiving money from Indians, we would not put that name on the

list. That is an example. But we try to find the 12 or 16 or 18 people who look best qualified for this investigation.

I send my long list out. Judge Fay, and Judge Butzner, and now it would be Judge Cudahy, may come back and say I do not think you ought to have so and so on there for such and such a reason or I just do not think that person can handle this job. I think they have got a conflict. That name goes off.

If they say I know somebody else in Richmond who has done this kind of work that we do not have on the list, we put them on. When we get that worked out to our own satisfaction that we have removed those with obvious conflicts or obvious inadequate experience, that leaves us usually with a list in the range of seven or eight or nine, which we then contact to see if they are even interested.

Chairman THOMPSON. It sounds to me like, before we get off that stage, although you have got some information about some of them whom you do not personally know or know their reputation, it is still probably pretty heavily weighted toward people that you either know or know their reputation or have known of their reputation. Is that a fair assessment?

Judge SENTELLE. I will say this: You were in the book before you decided to run for Senator, and I do not think I knew you personally at the time, but we did know the reputation of most of the people in there——

Chairman THOMPSON. I was in the book. I thank God I was not called. [Laughter.]

Judge SENTELLE. We know most of the people by reputation at least. Now, I was active in the white-collar bar before I went on the bench and, therefore, I know a fairly large sample of those people who might be qualified. Judge Butzner, believing, and I think he has a point, that judiciary is the best place to look for experience, has been in the judiciary a long time, and he knows an awful lot of the judges.

We came from different parts of the country. Judge Fay has been a judge of trial and appellate nature and knows the lawyers in the Southeast.

Chairman THOMPSON. So just the lawyers that have appeared before you over a period of years, you get a pretty good feel for that.

Judge SENTELLE. Yes. But they are not, by any means, the exhaustion of it. Because as I say, we get——

Chairman THOMPSON. I understand.

Judge SENTELLE [continuing]. Judges in California who will send us names now.

Chairman THOMPSON. What if we came up with a requirement that the Independent Counsel must have criminal law experience, for example, having been an old-line prosecutor? Would that change your job really any substantively?

Judge SENTELLE. It would not change the job. It would change the list. That is, to me, a good model for service as an Independent Counsel, having been an old-line prosecutor. In fact, as an old-line prosecutor, I think it is a good experience for anything, Senator Thompson. But, now, Judge Butzner would have disagreed. He felt that experience in the judiciary gave people a broader perspective. And he said this publicly so, again, I am not telling tales out of

school. And if you used that criterion, you would have eliminated not only Judge Starr, whom it has been directed at, but Judge Walsh, Curtis Von Kann, who has been a much praised Independent Counsel, Jacob Stein, who was one of the really good ones, and the patron saint of Independent Counsels, Archibald Cox.

Chairman THOMPSON. You would have eliminated some pretty good Attorneys General, too.

Judge SENTELLE. Yes. If you applied that criterion to Attorneys General, although Janet Reno supervised prosecutors, I do not think she ever tried any cases at all.

Chairman THOMPSON. Let me ask you something different. Section 593 of the Act permits the Special Division to request a further explanation from the Attorney General when he or she determines that there are no grounds to commence an investigation. That is apparently after a preliminary inquiry. This is a means to provide some accountability over an Attorney General who refuses to perform their duty. Has the Special Division ever made such a request?

Judge SENTELLE. The short answer is no, and I think that is only half the story. I do not think we are likely to because I do think if we get in the business of second guessing her decision on that, we are endangering the constitutionality of the application of the statute because we are very close to invading the Article II function of the Executive Department.

Chairman THOMPSON. But it does allow you, whether you exercise it or not, the authority to request it.

Judge SENTELLE. And if we tried to exercise it, it would not be an as-applied challenge to the constitutionality. I do not know.

Chairman THOMPSON. I see.

Judge SENTELLE. I am not saying we would not. I have never seen a case so far that caused us to think we were going to kick up our heels and take that task on. If it happened, I would expect an as-applied challenge.

Chairman THOMPSON. Well, there seem to be several provisions here that apply to the three-judge panel that really have been rendered ineffective or a nullity or not practical and, for all practical purposes, they are not really a part of the operative law. This Section 593 is one. You also state that, and of course it does not say so in the statute, but a lot of people think that the three-judge panel is supposed to provide some kind of supervisory power over an Independent Counsel. And as you point out, it would be unconstitutional if you had it.

Judge SENTELLE. Yes. *Morrison v. Olson* made that plain that would be unconstitutional.

Chairman THOMPSON. Also, you have the authority to see whether or not, make a determination as to whether or not the investigation has been substantially completed. And I believe what you say there is that you are really not well suited to get in there and make that determination as judges.

Also, there is the reporting of expenses requirement. The requirement is there, they file their report, and you do not do anything with it.

Judge SENTELLE. We have neither authority——

Chairman THOMPSON. You do not have any authority to do anything on it?

Judge SENTELLE. No.

Chairman THOMPSON. So, at a minimum, it would seem to me that we have several provisions there that are on the books that are just rendered a nullity for all practical purposes. So I think, with that, I will pass the baton here.

Thank you very much. Senator Lieberman.

Senator LIEBERMAN. Thank you, Mr. Chairman. Thank you, three judges. Thank you very much for being here.

It strikes me, as I think about the history of this statute, that this unusual grant of authority to this panel was obviously intended as part of the overall effort to protect the process from politics and to provide for the independence of the prosecution here.

Judge Sentelle, I am going to address these questions to you because they go to the episodes at the outset regarding the appointment of Judge Starr, which have obviously been somewhat in the public eye in the past, and I think they help to illuminate some of the pluses and the minuses of the current system. One may be that inevitably, when you involve the Court in a function of this kind, it may subject the Court to a kind of politicization itself that it otherwise would not have.

But just, briefly, as I understand it, the Independent Counsel Statute was reauthorized in 1994, which gave the panel the responsibility to appoint Independent Counsel, presenting the panel that you were on at that point with the responsibility for doing so in the Whitewater matter. Mr. Fiske had served as a Special Counsel, regulatory counsel, and Attorney General Reno, as I recall, recommended that Mr. Fiske be appointed permanently or under the statute. The statute provided for his appointment.

And a number of members of Congress and others who felt that he was not pursuing some of the cases with adequate energy, including, as I recall, particularly the Vince Foster case, asked that he not be appointed.

Among those leading that was our former colleague, Senator Faircloth. There is this much-discussed lunch that you had on July 14, 1994, with Senator Faircloth and Senator Helms, and then on August 5, 1994, you appointed Mr. Starr. Obviously, there were questions, as you know, raised about whether Senator Faircloth had spoken with you about this decision.

As part of the comprehensiveness of the hearings we are doing, I wanted to ask you what led to your decision, before I get to Mr. Starr, why you appointed him, what led to your decision not to appoint Mr. Fiske over the recommendation of Attorney General Reno that it be done and, of course, the question of whether that was discussed at all in the lunch you had with Senator Faircloth.

Judge SENTELLE. I will start with the statement you made that the statute provided for the Appointment of Robert Fiske. The statute would have permitted the appointment.

Senator LIEBERMAN. Yes, indeed.

Judge SENTELLE. The statute says that no one who serves in an office of trust or profit for the government can be appointed. It did create an exception that we could have appointed him. Now, the statute, in its total structure, was the Independent Counsel Act, as

it had been before. The "independent" in the statute refers to independent of the administration that is under investigation.

We—and here I will use the word "we" because we have a unanimous public opinion on this subject of the three judges—did not feel that we could, consistent with the independence contemplated in the statute, appoint the person who had been appointed by the administration. I grant you Congress said we could. Congress, had it thought we had to, would have said we had to.

If you had thought that that was something that was a requirement, as opposed to merely a possibility, you people can tell us what to do. You have done so on other occasions, and you would not have had any problem doing so that time.

We took it that you had intended for us to use our discretion. We used that discretion, and we determined from the outset, and it was not hard, that we could not appoint the person the administration had appointed. That is nothing against Robert Fiske.

Senator LIEBERMAN. That is what I was going to ask.

Judge SENTELLE. If they had appointed Ken Starr, we might have appointed Robert Fiske.

Senator LIEBERMAN. In other words, no reflection on him personally, or on the job he had done there.

Judge SENTELLE. No.

Senator LIEBERMAN. It was that he had been appointed by the administration, by General Reno, and that your conclusion was that he would not be adequately independent.

Judge SENTELLE. We stated that in a public opinion, and I responded in writing to members of Congress before who have asked me why we did it, and I said here it is. Here is a copy of the opinion where we said why.

Now, as far as the lunch with Lauch Faircloth——

Senator LIEBERMAN. How about the lunch, did this matter come up at all at the lunch with Senator Faircloth.

Judge SENTELLE. If there was any mention of Independent Counsel at all, and it is entirely possible that Lauch or Jesse or one of the other Senators who stopped by to say hello that day, Chris Dodd or somebody else, may have said, "Have you guys appointed an Independent Counsel yet?"

Senator LIEBERMAN. An unlikely suspect, Senator Dodd, I mean.

Judge SENTELLE. Yes. May have said, "Have you appointed an Independent Counsel yet?" and I would have said, "No." There may have been some discussion in one sentence of had we done it. I do not recall if there was or not, but there was no substantive discussion about the Independent Counsel process whatsoever. As Senator Levin knows, various members of Congress were in touch with me and with my predecessor on a regular basis, either personally or through staff. There is no exception for Jesse Helms and Lauch Faircloth, just because they are old friends of mine, that I cannot have lunch with them when I can talk with the staff of other Senators, members of the House, or George MacKinnon could work out regularly with Al Gore when they were both using the House gym as former members.

There was nothing unusual about that lunch, nothing improper about that lunch, and I have never done anything in my life as innocent as that and had as much made of it. There is no vast right-

wing conspiracy out to get anybody, and if there was one, we would not meet in the Senate dining room. We would do it by telephone or in secret somewhere. If we were that nefarious, we are not that dumb.

Senator LIEBERMAN. I know that is true.

I presume that if there had been a discussion at the lunch, beyond the kind of passing question that you talk about, that you would have recalled it; is that a fair——

Judge SENTELLE. If there had been any such discussion, I would have put an end to it. I would not have discussed it under those circumstances.

Senator LIEBERMAN. You would have put an end to it. And to the best of your recollection, apart from the lunch, Senator Faircloth—now, I understand from Judge Edwards' opinion in this matter, where he dismissed allegations of judicial misconduct against you, he concluded that even if you had talked about it, it would not have been an act of judicial misconduct. But just for the comprehensiveness of the record, apart from the lunch, did Senator Faircloth at any point talk to you about his opinion that Mr. Fiske should not be appointed?

Judge SENTELLE. No.

Senator LIEBERMAN. And your answer is no.

Judge SENTELLE. Never.

Senator LIEBERMAN. Let us go to how Judge Starr was appointed. Was he in the Talent Book?

Judge SENTELLE. We did not have a Talent Book yet. That is when we started the Talent Book. We had George MacKinnon's files, and we had lists for each of the members of the panel, and I am the only one left so I have to speak to it because it was Joseph Sneed, John Butzner, and I, who were the panel then.

We each came up with our own list of possible nominees. I started mine with the names that were in George McKinnon's files from prior nominations, and I think Judge Butzner did too. I do not know where Kenneth Starr's name first came from. We all knew him personally, to a greater or lesser extent. Judge Sneed had known him before the longest. He taught him at Duke and Starr was, to some extent, a protege of his. Starr had been a colleague of mine. Judge Butzner knew him at least as an attorney and by reputation. We all knew that he had been the man selected by appropriate representatives from the Senate to review the Packwood diaries as the most fair and impartial possible arbiter they could find. We all knew he had been Solicitor General and who first originated his name, I do not know.

He was part of a rather long list that we worked down to a short list, and then we had the FBI do name checks. That did not help. So we interviewed I believe half a dozen people, though I could not now tell you precisely whom, and we decided Starr, after much discussion, decided Judge Starr was the best choice.

Senator LIEBERMAN. Am I hearing you correctly that, to the best of your knowledge, and I understand you do not remember exactly, that it is probable that Judge Starr's name first was raised among the three of you on the panel?

Judge SENTELLE. I do not know for sure. I think it likely that it was——

Senator LIEBERMAN. It might have come from us.

Judge SENTELLE. But there were people all over the country, especially judges, who were sending—it happens every time that judges, because they know us and feel free to take advantage, will send us the names of the people who appear in front of them who are good, white-collar criminal defense attorneys or prosecutors, in particular. But judges send us lots of names and whether Starr's name came—how many different ways Judge Starr's name came, I do not know. I know more than one.

Senator LIEBERMAN. As you know, again, in all of the difficulty of creating independence and the appearance of doing something that is not subject to criticism, the panel, after Judge Starr was appointed, was criticized, at least by a few newspapers, because Judge Starr had worked on an Amicus brief in the *Clinton v. Jones* case on Ms. Jones' behalf.

Did you know that when he was appointed? And if you did, what weight did you give it?

Judge SENTELLE. I do not think we knew.

Senator LIEBERMAN. You did not know it.

Judge SENTELLE. I do not think we knew it.

Senator LIEBERMAN. Let me ask you a final question, very different, in terms of if we reauthorize this statute.

One of the ideas that was raised here by one or more witnesses before us was that, in fairness, and in some ways in light of the kind of questions I have been asking you, if we reauthorize, maybe what we really ought to do is create a panel within the Justice Department, not judges but leading citizens. Try to insulate it from politics; somebody used the Federal Reserve Board analogy, where you have sequential appointments and have them perform the role you are performing. What would you think of that?

Judge SENTELLE. It would take a lot of work off of us, Senator. I have no particular objection to it. In fact, it might be constitutionally less suspect than the present arrangement.

Senator LIEBERMAN. Right.

Judge SENTELLE. By taking the Article III body out of the Article II loop.

Senator LIEBERMAN. Sure. Thanks very much for your responsiveness.

Thank you, Mr. Chairman.

Chairman THOMPSON. Thank you. Senator Levin.

Senator LEVIN. Thank you, Mr. Chairman. Let me add my thanks to the judges for their patience and for their service.

On the last question that Senator Lieberman asked, which had to do with the appointment of Judge Starr and what the process is in that case, very shortly after your appointment of Judge Starr, I wrote you, Judge Sentelle, which I am sure you remember. It was August 12, 1994. You may not remember the date, but I think you probably remember the letter, and I will read it.

"As Chairman of the Senate Subcommittee . . . " at that time I was the Chairman of a Subcommittee. Things have changed since then. At least half, probably 55 percent of the Senators would say for the better, 45 percent would say not. But "As Chairman of the Senate Subcommittee with jurisdiction over the Independent Counsel Law and primary sponsor of the Independent Counsel Reau-

thorization Act, I feel it is appropriate to express my concern at the appointment of Kenneth Starr as Independent Counsel in the Madison Guaranty matter."

"In 15 years of operation of the Independent Counsel Law, the independence of an Independent Counsel has never been at issue. That is because the Court has taken great care to appoint persons who are sufficiently removed from partisan activity. That is not the case with Mr. Starr, and this appointment puts at risk the historical public acceptance of the Independent Counsel process."

"The issue, with respect to Mr. Starr, is not his personal integrity or competence, it is that he lacks the necessary appearance of independence essential for public confidence in the process. Mr. Starr's recent partisan political activities cannot help but raise questions about the appearance of his impartiality in this case and suggests that the Court was unaware of all of the relevant facts at the time of his appointment."

"Mr. Starr's participation and current position as co-chair of a highly partisan Republican congressional campaign in Virginia and his recent participation in a televised debate in the Paula Jones lawsuit are particularly troubling. While surely no one questions Mr. Starr's right to engage in highly visible partisan political activities, the issue is whether those activities should disqualify him from taking charge of the Madison Guaranty investigation."

"The Court has stated that it decided not to continue Mr. Fiske in the Madison Guaranty matter because the Independent Counsel law, 'contemplates an apparent as well as an actual independence on the part of the Counsel.'" The same standards should apply to Mr. Starr.

"I urge the Court to ask Mr. Starr to provide a complete accounting of his recent political activities. The Court should then issue a supplementary opinion stating whether these activities impair the appearance of independence that is so critical to the proper functioning of the Independent Counsel Law. If they do, the Court should ask Mr. Starr to withdraw. If they don't, the Court should explain why it believes the appearance of independent standard, which the Court evoked in its decision not to reappoint Mr. Fiske, has been met in the appointment of Mr. Starr."

"The Court's selection of Counsels who are independent, in fact, and appearance, is the foundation of the law's success and essential to public acceptance of prosecution decisions."

"It is in the Court's hands to review the facts and take whatever action is necessary to ensure the continued effectiveness of the Independent Counsel Law."

And then there was a paragraph on a related matter which had nothing to do with this, and then I said, "I appreciate the cooperation," and so forth. I sent a copy to Attorney General Reno, Judge Butzner, Judge Sneed and to Ken Starr.

You issued an order saying "This matter comes before the Court on the letter . . . " my letter " . . . which the Court hereby orders filed with the clerk, treats as a motion seeking to have the Court ask the Independent Counsel herein for an accounting of his political activities and issue an opinion passing on the relationship between those activities and his role as Independent Counsel." And

then, "For the reasons set forth in the attached per curiam opinion, the motion is denied."

And then your per curiam opinion said that "Senator Levin seeks to have the Court require of the Independent Counsel an accounting not contemplated in the statute. This division of the Court has no powers beyond those set out in the statute." The Supreme Court, in the past, has stated, "'We emphasize nevertheless that the Special Division has no authority to take any action or undertake any duties that are not specifically authorized by the Act'," and then you cited *Morrison v. Olson.*

"The decision by the Supreme Court in *Morrison* was not merely a matter of statutory interpretation. It is a narrow construction expressly complying with the duty of the Court to construe a statute in order to save it from constitutional infirmities."

And then you say "To undertake the duty of advising the Independent Counsel on this disclosure not required by the statute amounts to the very sort of supervisory role that the Supreme Court found not consistent with our role as part of the Article III judiciary. The Act simply does not give the Division the power to supervise the Independent Counsel in the exercise of his or her investigative or prosecutorial authority."

I would ask, Mr. Chairman, that this correspondence be made part of the record.[1]

Chairman THOMPSON. It will be made part of the record.

Senator LEVIN. Based on your reading of *Morrison v. Olson,* I do not quarrel with your finding. The question, though, comes up as to whether or not there should be a greater inquiry in advance of appointment of potential conflicts or appearance of conflicts. I am not so worried about technical or legal conflicts, here, as I am with the appearance issue, which you are very sensitive to, in the Fiske decision that you made.

Even though the Congress had said you can reappoint Fiske, you felt the appearance that would be created within the context of this law suggested that you exercise discretion not to, and I happen to disagree with that exercise of discretion (given the fact that Congress specifically said you could)—deciding you could not or should not. But, nonetheless, that is not my question either.

My question is this. Under your current system where you have this book, do you make an effort to ask people if they have had any contact with the issue or the parties or whether they have taken a position, legal or factual, whether they have an opinion on whether somebody might be guilty or innocent that they are going to be investigating? Is there an inquiry which you now make on the issue of appearance of conflict and/or real conflict?

Judge SENTELLE. You have raised a lot of issues in the way you state that. I mean, the question itself is a lot shorter than the background you gave it.

Senator LEVIN. Well, I wanted to read most of your opinion.

Judge SENTELLE. If I could back up and cover a couple of matters?

Senator LEVIN. Sure, absolutely.

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[1] The letter dated August 12, 1994, appears in the Appendix on page 507.

Judge SENTELLE. First, with all due respect, you are mixing two different concepts. The independence concept that we are dealing with in the case of Robert Fiske is not the same as the conflict-of-interest concept that we are dealing with anybody else.

The independence, as you know—you were here, as the legislative history makes pretty plain—the independence contemplated by the statute is independent from the administration under investigation. Fiske did not have that, and as much as I respect Robert Fiske—and I would say *The Washington Post* did me the wonderful flattery of putting my name under his picture when they were covering this, but be that as it may, he did not have the independence, and that is the way we saw it and I make no apologies.

As far as conflict, being on the opposite political side is not, in my view, a conflict. I thought Archibald Cox, and still think, was an ideal mold—aside from not having been a line prosecutor, other than that he was a good mold for an Independent Counsel. That is a man who in fact had been a respected public servant, who had been active on the other side of the political fence.

Attorney General Reno alluded to that concept when she was here recently that you want, if possible—and we have not always, but you want, if possible, to have somebody from the other side so that, when they say there is no wrongdoing here, it has credibility.

Therefore, I do not consider that having been an active Republican disqualifies somebody from investigating Democrats or vice versa.

Senator LEVIN. I agree with that.

Judge SENTELLE. The hardest concept was probably the Janet Mullen's investigation, which never would have occurred if this other statute had not been lapsing. That was an example of where time deadline caused a precipitous decision, but in that one, we had the potential for both sides being under investigation because it started with allegations concerning false allegations, as it turned out, concerning Bill Clinton's passport, followed up with misconstrued allegations concerning what a Republican official did with Bill Clinton's passport, so that at that time, we had a hard time figuring out who was going to be embarrassed the most, but it turned out nobody except the people who made the allegations.

As far as attempting to determine what kind of public positions have been taken that might generate criticism, yes, we did. Judge Butzner in particular was very thorough about that, but we all did.

When we made the first examination of the people's resumes, we looked to see who they had represented, who they had been employed by, and if that conflicts in appearance, we take those names right off the beat.

Then we get it down to the semi-short list. When we called them, we told them the general subject matter of the litigation, asked them did they have any conflicts, and please do a conflict check in their law firm before we go any further and find out.

Then, when we get to the interview, we actually cross-examined them pretty thoroughly, and as I recall, on one, we got down to three or four really good people, none of whom thought they had conflicts, but when we cross-examined them, we all thought they did have something that would have caused a bad appearance. That left us with one excellent choice. We were glad to have her,

but it did eliminate some very good other people because we saw things we thought might cause problems.

Have we been perfect? No. Have we tried? Yes.

Senator LEVIN. In terms of the reauthorization, though, the question is whether or not we put in some kind of a provision here. It seems to me it is important that, for instance, before you grant or expand jurisdiction, as you did in this case, that the fact that there had been apparently several consultations between Kenneth Starr and Paula Jones' lawyers should be brought to the attention of the court for whatever determination you might make. And the fact that that was not done here, according to your testimony, is something which I think could be corrected with by your own process or by a change in the law.

Judge SENTELLE. I would say, I think we have gotten better as we went along. I started to say the first, it was not the first. It was the first, except for the Janet Mullen's one in which we had participated as a panel. Judge Butzner had been around a while, but I had not.

Senator LEVIN. My time is up, Mr. Chairman.

I would ask unanimous consent that another document be made a part of the record at this point. If I could just take 30 seconds to explain what it is?

Chairman THOMPSON. Yes.

Senator LEVIN. I asked the court for copies of certain Independent Counsel sealed documents. I asked the court for those documents as an individual Member of this Committee.

Mr. Barrett who was the Independent Counsel objected to that request, saying that only the Committee as a whole could request those documents. I filed a brief counter to Mr. Barrett, saying that a Member of this Committee as an individual could seek and was intended by law to constitute Congress for the purpose of the law, and I very much appreciated the court determining that my inquiry and request for copies of certain documents was in fact within the meaning of the laws referenced to Congress. Copies of the court's decision here were sent to the Attorney General and to our Chairman, to the Independent Counsel, Mr. Barrett, and, of course, the two other judges who were involved in this received copies.

I just simply want to thank the court for their responsiveness, as well as the subject of the answer, which probably was somewhat controversial with an Independent Counsel, Mr. Barrett. I would ask the Chairman if we could also make this part of the record.[1]

Chairman THOMPSON. All right, it will be made a part of the record.

The record will be open, let's say, for 5 days for questions of any of our witnesses.

I need to review that file. I had a letter in there somewhere to Judge Sentelle myself with regard to this matter, and I want to see whether or not I want to make that a part of the record.

Thank you. Senator Durbin.

Senator DURBIN. Thanks, Mr. Chairman.

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[1] The copies of the court decisions referred to appears in the Appendix on page 516.

Thank you, Judges, for joining us today, Judge Sentelle, Judge Fay, and Judge Cudahy, my neighbor in Chicago. Thank you for being here as well. I appreciate it.

I am going to try to ask four questions very briefly to try to establish some points that I think might add some merit to the record.

If my staff could put a chart up that I would like to show you.[1]

There appears to be under the statute at least an admonition, a requirement or whatever, that the members of the Special Division are appointed for a 2-year term. With the exception of Judge Cudahy, who has actually served a 2-year term, no one else has.

Judge SENTELLE. Judge Sneed.

Senator DURBIN. Judge Sneed, all right.

If you could turn that chart a little bit this way, so we could see it as well.

My question to you is: What occurs at the end of a 2-year term which permits your division, those of you serving, to continue to serve?

Judge SENTELLE. Chief Justice reappoints us, just like at the end of your 6-year term, your constituents reelect you.

Senator DURBIN. Yes.

Judge SENTELLE. At the end of our 2-year term, our constituent reappoints us.

Senator DURBIN. I see.

Judge SENTELLE. It is a very similar process.

Senator DURBIN. So the question I am raising, obviously, is that there was some suggestion in that statute that we would have some new blood and new people making this decision.

Judge SENTELLE. No, sir. You are mistaken on that. It does not specify any kind of term limitation at all.

Senator DURBIN. There is no term limitation, correct?

Judge SENTELLE. It is the same as yours in that regard. You get 6 years and 6 more and 6 more. We get 2 years and 2 years and 2 more.

Senator DURBIN. Successive 2-year periods. I can understand that there is no prohibition against the reappointment, but let me say in the interest of independence, which is the goal of this particular statute, I think this raises some serious questions that some judges would stay on this indefinitely.

You have indicated in your testimony that this is a burden and one that is not a happy burden at times, and it seems odd that people would continue to want to stay on there for long periods of time, year after year.

Judge SENTELLE. Institutional memory and efficiency is very important when we are doing an unfamiliar task. If you put new judges on each time, we do not have any staff to speak of to maintain the institutional memory.

You can see our full-time staff is seated in the first seat on this row here, and our chief clerk, our chief deputy clerk of court, who in addition to her other duties, assists us. Beyond that, my secretary adds that to her regular load.

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[1] The chart entitled "Who Appoints Independent Counsels: Special Judges and Their Terms," appears in the Appendix on page 525.

The institutional memory has to be composed of the judges. If the Chief Justice swept us out each time, it would be reinventing the wheel every time we started over on any task, particularly the oversight of the reports at the end of it.

We learn by doing, and the institutional memory has been important. Judge Butzner was very important to me when I came in.

Senator DURBIN. I am not going to argue with your conclusion that there is some value in institutional memory, but I do believe that in the interest of the independence of the counsels being chosen that some change might be made from time to time.

Judge FAY. Senator, if I could add one comment?

Senator DURBIN. Sure.

Judge FAY. You used the term "want." I had no desire to continue serving. I was called by the Chief Justice, and he knows I will do anything he asks me to do. He asked me if I would mind being reappointed, and I said, "No, sir. I will do whatever you ask me to do." That is the only reason I had any term after the original 2 years.

Senator DURBIN. I wish I could direct the question to him, but I cannot.

So I will just say, as I understand it, 7 of the 11 judges who have served on this panel have been Republican-appointed, including all three judges who have headed the panel. I am just curious as to why that would be the case.

Judge SENTELLE. None of us made the appointments, but I think if you took the judges and multiplied by terms served, you would come out with a nearer balance because, if you look at how many years John Butzner served—Butzner was appointed to the Circuit by President Johnson, to the District by President Kennedy. I think he was an appointed State judge, a Democrat in Virginia.

If you took the number of judge years, I do not think the imbalance is great at all.

Senator DURBIN. Well, the reason I raised that, obviously, is because then when you look at the Independent Counsels that have been chosen, 11 of the 14, with party affiliations, have been Republicans. So we have a panel largely chaired by Republican-appointed judges, picking Republican Independent Counsels.

If this were to pick a partisan counsel, I could understand this, but to pick an Independent Counsel, I think it raises some questions about the process.

Judge SENTELLE. Well, I agree with General Reno that the usual practice should be to aim for somebody of the opposite party. We have not always.

Ms. Bruce, I think, is a Democrat. I think Mr. Pierson—do you know Mr. Pierson?

Judge FAY. Yes.

Judge SENTELLE. He is a Democrat.

Judge FAY. Yes. Mr. Pierson is a longtime Democrat.

Judge SENTELLE. I imagine there have been others. I do not know the accuracy of your figures.

Senator DURBIN. This was a *Legal Times* article of March 24, 1997, 11 of the 13 at that time Independent Counsels, with party affiliation. Some said they were independent. They had been Republicans.

Let me go to a specific question that came up just recently. The Court of Appeals has made it clear the Special Division's authority to appoint rises not from Article III, but from the appointments clause, Article II, Section 2. The statute makes it clear the Attorney General has the sole responsibility for dismissing an Independent Counsel.

Can you explain the basis, if any, for the Special Division to intervene in the decision of an Attorney General on whether to dismiss an Independent Counsel?

Judge SENTELLE. We did not. *The Washington Post* got that story wrong. I think my colleagues will back me 100 percent. We did not intervene. *The Washington Post* said we did. All we did, we got the motion filed by Landmark. The clerk's office had no choice but to accept it. We issued a routine one-sentence briefing order that asked the Attorney General and the Independent Counsel to give their views.

I do not think there is any basis for us to intervene at all. We wrote an opinion that said there is no basis to intervene, and *The Washington Post* said: "Well, they are writing that opinion, but they should not have intervened in the first place." We did not intervene.

Senator DURBIN. It is hard to imagine the press would get anything wrong, but at least we made a record of that today.

Judge SENTELLE. Actually, a lawyer who used to work for *The Washington Post* told me he called the editorial writer and said: "What do you think the court could have done any less than they did?" And he got an anatomically impossible suggestion from the editorial writer, and that was the end of the conversation.

Senator DURBIN. You need not go into it in detail.

Judge SENTELLE. Thank you.

Senator DURBIN. The statute includes a reform added during 1994 reauthorization which requires the Special Division on its own motion to review the status of an Independent Counsel's progress 2 years following his appointment, then 2 years thereafter, then at 1-year intervals.

Many investigations have clearly gone beyond the 2-year mark. What actions has the court taken in accordance with the statute to determine whether an Independent Counsel's work is "substantially completed"?

Judge SENTELLE. All we have done—and it may not have been enough—is inquire of the Independent Counsel for response on that.

There is one now pending that I think we might or should have gone further on, and I take responsibility for us not going further because I misunderstood the response.

That is, the never-ending Sam Pierce investigation, which I guess is about the second most-expensive.

Senator DURBIN. Is that still going on?

Judge SENTELLE. It is going on because of one matter, and that is the Deborah Gore Dean case, which for whatever reason—nobody knows. Deborah Gore Dean after appeals was sent back for resentencing.

Senator DURBIN. How many years is that?

Judge SENTELLE. It still depends, 9 years, I think.

We told the Independent Counsel there, look, you cannot terminate, but go ahead and file a final report and then supplement it if that case ever gets over. It is very possible we should have terminated that one. We did all but terminate it.

I thought that the Independent Counsel had tried to resubmit it to Justice, and they had refused to take it.

I am now advised when I inquired, because of inquiries from the Committee, that I had either mis-remembered or he had misspoken, but in any event, we told him to do everything. Close down to one person, file the report, and we will accept the report. We will not press you for anything else.

We probably should have asked him to show cause why it should not be terminated.

Senator DURBIN. Do you think you have authority under that statute to basically close down the activities of an Independent Counsel?

Judge SENTELLE. I think if we did so, it would have to be an extreme case. We would have to have probably the agreement of the Attorney General to do it. We certainly would have to have a factual record that showed there was not anything left to do.

A subject of Judge Walsh's investigation moved us to terminate. We asked Judge Walsh to respond and show cause why he should not. He showed us plenty of cause, and we did not, but if somebody came back and said, "No, I am not doing anything else," I think it would be so ministerial that we probably could do it under the statute.

Judge FAY. We really have to rely on what the Independent Counsel tells us, Senator, and it is more administrative than anything else.

Senator DURBIN. Judge Fay, that is our concern here.

Judge FAY. I am sure.

Senator DURBIN. We have had the Attorney General come testify that she does not believe that in fact she can terminate an Independent Counsel. In law, she can, but, politically, she cannot. It is another Saturday Night Massacre.

Judge FAY. Certainly.

And we can make inquiry, but we are not in a position to really cross-examine or to question. I guess we could hold a hearing if we thought there was some reason to.

Senator DURBIN. That is, of course, the reason why Judge Starr joined, I think, our belief today that this statute is so fatally flawed constitutionally because there is just no accountability here. I hear your testimony. It is largely ministerial. You are awaiting for replies from the Independent Counsel as to whether the investigation should continue, and probably would not terminate absent some instruction from the Attorney General along those lines.

Judge FAY. I think that is accurate, Senator.

As the Supreme Court pointed out in *Morrison v. Olson,* one of the reasons that is so is we just cannot have much authority in this situation or the statute will be unconstitutional.

Senator DURBIN. Go ahead, Judge Cudahy.

Judge CUDAHY. Judge Sentelle, I think, indicated that I might differ with him in this area, in his statement.

I was just, I think, talking about attitudes and procedure, that possibly we can approach these things on an informal basis, some kind of a middle ground with Independent Counsel as to the question of termination, rather than just resorting to formal procedures. I do not know whether that is affected by the *Morrison* case or not.

Senator DURBIN. I agree with you.

Judge CUDAHY. It is something we ought to try, I think.

Senator DURBIN. When you hear 9 years of an investigation over a Secretary, I guess appointed under President Reagan—I am not certain, but I think that is the case—and the testimony today from Judge Starr which suggested no end in sight to what he is up to, it really raises some question as to whether the controls are there.

Thank you, Mr. Chairman.

Chairman THOMPSON. Thank you very much.

It is good to have another convert to term limits. [Laughter.]

Senator Edwards.

Senator EDWARDS. Thank you.

Good morning, Judge Sentelle. How are you? Judge Cudahy and Judge Fay, it is nice to see all of you. We appreciate you taking the time to be here.

I wanted to ask some questions—and, Judge Sentelle, let me ask them to you, since you have been doing most of the talking this morning—about this list. I have got a copy of the list of—what do you all call it? A Talent Book?

Judge SENTELLE. Yes.

Senator EDWARDS. It appears to me, just from looking, I think almost all of the North Carolina lawyers who are on this list, Richardson Pryor and Jim Neal from Nashville, whom Senator Thompson and I both know, Howard Manning and Harry Martin—is that Justice Harry Martin?

Judge SENTELLE. That is Justice Harry Martin. Justice Martin wrote and volunteered, and I should not get personal, but I do not think he is eligible because I think he had said at the time he submitted it, some kind of responsibility to the Fourth Circuit that would put him under the disqualification in the statute.

Senator EDWARDS. I would just comment, knowing these lawyers and former judges personally, they are all highly qualified.

Judge SENTELLE. If he has completed that task, he would be a heck of a choice.

Senator EDWARDS. Every one of them are highly qualified. I cannot imagine you could do any better.

So I want to know why you have not picked anybody from North Carolina.

Judge SENTELLE. I have had enough criticism just for having lunch with people from North Carolina, and by the way, I will eat with other Senators from North Carolina, if you are ever available.

Senator EDWARDS. I am glad to hear that.

Let me ask you—I do, actually, though, have a concern about what you described, I think, accurately and fairly, as the ad hoc way that this list is put together, and I think there would be some people who do not know some of these lawyers and former judges personally the way you and I do and these other judges do, who might have some concern about that.

If you were starting this from scratch and assuming the Independent Counsel law was going to be reauthorized, which we all know is subject to serious question right now, but if that were to occur and if in fact a three-judge panel were making the determination, you were on it, don't you think there is a better way to come up with a list of people to consider other than you judges just talking to each other and talking about who you know and whatever happens to come in from other people?

Judge SENTELLE. No.

Senator EDWARDS. For example, don't you think there is some more systematic way of using people like the American Bar Association and others?

Judge SENTELLE. The American Bar Association, frankly, has become so politicized, I would distrust them as a source, Mr. Edwards.

Senator EDWARDS. I guess my concern is——

Judge SENTELLE. I am one of the judges, and I am by far not the only one who has disassociated from the American Bar Association because it has taken political positions.

Senator EDWARDS. I did not mean to get into a thing about the American Bar Association, one way or the other. I mean any group, any group or coalition of groups that could more systematically provide names and possibilities.

You know as well as I do that there is—I am not suggesting for a minute that any of you have done it, but there is obviously the possibility that this process could be abused if people sought to do it, and I am just wondering if we could not figure——

Judge SENTELLE. The lists aren't exclusive.

Senator EDWARDS. I was just wondering if we could not figure out some way, if we are going to continue to use the Independent Counsel Statute, to eliminate any public concern about that sort of thing, and I will ask Judges Fay and Cudahy the same question.

Judge SENTELLE. So many names have come in by this method, I cannot see anything we would gain.

Like I said, we are all expert in the qualities the bar needed, and I do not see what we would gain by asking any particular group, when it is open to all groups now.

If they are interested enough, they send us names now; that people volunteer their own names. One person we appointed, a name came from somebody else. We asked would you be interested. That person said no, I am just getting too old, but why don't you talk to thus and such other person, who had not been on our list. We all looked at the bio, thought it was a great idea, and ultimately appointed him, not to that IC slot, but to the next one that we had.

I think as far as the list is working, I think it is working well now.

Senator EDWARDS. Excuse me for interrupting for just a minute.

I guess what I think about the way, for example, each of you were appointed and, Judge Sentelle, when you were appointed originally to the Federal District Court bench, where these other folks may not know, but I know you were a fine trial judge before you became an appellate judge, the process——

Judge SENTELLE. Like I said, he walked away with a seven-figure check out of my court.

Chairman THOMPSON. That sounds pretty fine.

Senator EDWARDS. The very thorough investigation that you all have gone through, including FBI investigations, including appearing before Congress and going through the confirmation process—now, I recognize that Independent Counsel is not supposed to be a lifetime appointment, but I just wonder if we could not find some middle ground, something that is a little more—I also would add, in addition to my concern about how the list is compiled, I heard you say, although I was out of the room—I think I heard you say earlier in response to one of the questions that you do not believe you have any memory of being aware of Judge Starr having been involved in any way in the Paula Jones case.

Judge SENTELLE. I have no memory of that. I cannot swear that he did not say it, but I have no memory of it.

Senator EDWARDS. I fully accept your response to that.

Judge SENTELLE. As far as the FBI, we do submit the names of the short list, not just the appointee, but the whole short list to the FBI before we get down to interviews.

Senator EDWARDS. You do that?

Judge SENTELLE. Yes, we do. They have not conducted a fresh investigation, but in each instance, for somebody we have appointed, there has been a fairly recent FBI investigation on file to which we had access. So we have had the benefit of the FBI investigations in each time that we have appointed.

Senator EDWARDS. I guess the point I am getting to, it seems to me that we would want to know—and I do not mean this in any partisan way, Democrat or Republican, whatever. We would want to know if that candidate for Independent Counsel had some connection; for example, if Judge Starr had a connection with the Paula Jones case or some other potential Independent Counsel had a connection that at least in the eyes of some people may raise a conflicting question.

I just wonder if the way we go about it—I am not suggesting that you all do not adequately cross-examine these people, but, obviously, there is a potential for holes. I am just curious about whether you do not believe there is a better way to do that, Judge Fay?

Judge FAY. I would be opposed to giving it to any other association, unless that is what you are going to do in the statute. In other words, if you are going to limit it to names from the ABA, then let the ABA select the Independent Counsel. Whatever group you select, it is going to have its own politics going on.

As Judge Sentelle has stated, for totally different reasons, I resigned from the ABA years and years ago. The ABA is a very political organization. There is nothing wrong with that. It is just that I did not think they represented me, and I did not think an Article III judge should be involved in that type of controversy. If you go to the Florida Bar, the Georgia Bar, the Alabama Bar, you are going to have the same situation.

As it is now, we are delighted to receive names from any source, and we seriously consider names from any source, but I would merely suggest to you, if there is a better way or a better body, then give the appointment to that body.

Senator EDWARDS. To that body, OK. That makes sense.

I guess my concern is twofold, and I would like for each of you to address it. First, it is making sure that the group of potential candidates is sufficiently open that we get a wide variety of highly qualified people to consider, Democrat, Republican, Independent, or apolitical, which may often be the best choice.

Second, we should make sure that we have the information we need to make a determination, we being you in this case if you are making the determination, to make an objective determination about whether that person should serve as an Independent Counsel.

Judge FAY. I would toss out one additional thought. Labels are very dangerous. I was appointed by two Republican Presidents, one to the District Court, one to the Court of Appeals. I had more Democratic support than I ever had Republican support, and I enjoyed your campaign last summer. We spend our summers in the mountains.

I was a former plaintiff's trial lawyer. Plaintiff's trial lawyers are frowned upon.

Senator EDWARDS. Is that right?

Judge SENTELLE. Criminal defense lawyers are, too.

Senator EDWARDS. I have never heard that.

Judge SENTELLE. Not from North Carolina, apparently.

Judge FAY. So I think the labels are always a little dangerous.

I have been a Federal judge now for 29 years. I can assure you, I have no politics. I mean, I am about as apolitical, I guess, as a creature could become. The longer you are a judge, you are just totally removed from it.

Senator EDWARDS. I guess the second question I am asking is: Do you get the information you believe you need to have to make this kind of determination about objectivity of an Independent Counsel?

Judge FAY. We certainly hope we do. Maybe there are steps that we could take that we have not taken. We do check with the FBI. Maybe we could develop a very lengthy questionnaire.

As you pointed out, before you have an appointment as an Article III judge, you answer just numerous questions on all types of subjects. We could certainly develop something like that.

There are problems with that. There are problems with it being public. Some of those were touched on before. We heard your discussions about full-time/part-time.

Keep in mind that every time you put a step like this in there, you are narrowing the pool, and you may indeed be keeping the very people you want out of the process.

Senator EDWARDS. Judge Cudahy, did you have a comment about that?

Judge CUDAHY. I certainly have no reason to disagree with those who have been over the road and know where the bumps are. I have not participated in a selection of a counsel to date.

The existence of the book, I think, as far as I know, the names in the book are qualified people, and if we have to make further investigation, we ought to make it.

Just as an illustration of the ad hockery involved in this, though. I have personally only added one name, I think, to the list. When it was in the newspaper that I was going to be on this panel, I got a letter from a lawyer who happens to be a father of a friend of

my daughter's in school who said, "Well, I would love to get one of those appointments sometime." I am sure I may get quite a few letters of that sort over the years.

I checked up on him. He seemed to be a very qualified fellow. So I suggested that we add him to the list, but there is a lot of ad hockery, obviously, but that is not all bad. You get a lot of different sources for these things.

I do think, as I said in my initial statement, however, a really large part of it, I think, is the matter of public perception. To some extent, there is a little bit of a problem. There is this mysterious panel of judges out there, and judges are sort of mysterious, anyway. So they are all coming up with these names and how do they do it. I guess this discussion we are having here today will sort of dispel some of that, but that is, I think, inherent in anything in this country.

There have been a lot of suggestions made: The Attorney General ought to supply some names, and from there you would get better qualifications, and maybe the bar associations.

In my statement, it is in there suggesting the bar association. That is not because I have anything against the ABA, but I guess there may be people who do.

So there are a lot of sources of people who know a lot about qualified lawyers, and either formally or informally, it could be part of the statute or not as to how these people were referred to us.

Now, whether they would do it on an exclusive basis, whether those are the only names we consider, or whether it would be unexclusive, I do not know, but I think anything that would demystify the process a little bit would be a good thing.

Senator EDWARDS. Thank you all very much. Judges Fay and Cudahy, thank you for your comments. Judge Fay, I appreciate your comment about the campaign, and I am glad you have come to North Carolina. We welcome you there. We love the mountains in North Carolina, as Judge Sentelle well knows, and, Judge Sentelle, it is nice to see you at some place other than a courtroom. I think the last time we spent any extended time together was in a courtroom in the mountains of North Carolina.

Judge SENTELLE. Many consecutive days in the courtroom at Asheville, North Carolina.

Chairman THOMPSON. It reminds him of fun things.

Senator EDWARDS. That is exactly right.

I do want to say that while I appreciate your comments and certainly have great respect for all three of you, I continue to believe that the ad hoc way this list is put together and the nature of the investigation, it is certainly worth looking at if this Independent Counsel law gets reauthorized.

Judge FAY. Senator, could I add two short comments?

Chairman THOMPSON. Absolutely.

Judge FAY. First, I have suggested several times that we ought to have a sanity check on any one who says they are willing to do it.

The other thing I will tell you, and I tell them all, I think the country should be very grateful to all of these Independent Counsel

who have been engaged in this process because it really is a very tough job.

Senator EDWARDS. Thank you all very much.

Chairman THOMPSON. Thank you very much.

Senator SPECTER. Thank you, Mr. Chairman.

I have just a couple of questions. I regret that I could not be here for the entire proceeding, but will be able to check the transcript.

We are looking for a way to provide some accountability and some supervision, and one idea is to have some limited right to take an issue to the Attorney General, which I discussed briefly with Judge Starr.

The question in my mind is whether there might be some supervision that would come from the appointing panel. Judges and grand juries supervise the prosecutor to an extent.

Is that feasible at all, Judge Fay?

Judge FAY. I do not think in view of what the Supreme Court has said in *Morrison v. Olson* that you could give us any supervision that is going to have any meaning, if you are talking about supervising the investigation.

We are obviously in a position to rule on legal matters, jurisdiction, authorities such as that, but if you are talking about real supervision, as I understand the term, I think the Supreme Court has said that we do not have any supervisory authority, and that is one reason it is not unconstitutional.

Senator SPECTER. I am thinking about a question as to whether the Independent Counsel has observed the Department of Justice regulations, and I had discussed with Judge Starr the question of taking it to the Attorney General personally. He responded: "Well, there could be a conflict there."

Judge FAY. I think if there were a factual dispute of that nature and you wanted to give this special panel that jurisdiction, we could hold a hearing and make a judicial ruling as to whether or not the policy had been violated or complied with.

Senator SPECTER. What do you think about a limit right there, Judge Sentelle?

Judge SENTELLE. As far as a matter of law, I think I would agree with my colleague that I see no reason why it would necessarily be unconstitutional if you had an adversarial proceeding created to where facts were being taken and conclusions of law drawn.

That is a long way from saying whether I think it would be a good or a bad idea, but I do not immediately react that it would be unconstitutional if you had a hearing with the Attorney General having the right to have input and the Independent Counsel having the right, and possibly interested complaining parties having the right to put in as well. I do not see why such a proceeding would necessarily be unconstitutional or otherwise in violation of the law.

Senator SPECTER. Judge Cudahy, let me shift to the second question, and that is, on the issue of expanding jurisdiction, I had commented to Judge Starr, as I had with Attorney General Reno at a prior hearing, that the expansion to the Ms. Lewinsky matter raised a lot of public question. Do you think it would be wise, or does your court undertake the consideration of the factors on expanding jurisdiction, or is it more ministerial if the Attorney Gen-

eral comes to you and says I want jurisdiction expanded for Mr. Starr to take Monica Lewinsky?

Judge CUDAHY. No, I do not think that is ministerial, but, of course, it is an expansion and designated as such, rather than something that is a related matter.

It must be asked for by the Attorney General, as you know. That is essential.

Senator SPECTER. On expansion.

Judge CUDAHY. Then it comes to the division of the court; I do not know it has ever happened, but I think the court can reject the request of the Attorney General.

Senator SPECTER. Finally, let me pose a question which may be beyond what is appropriate for judges to answer. It is not so difficult in setting to stay within the bounds, but you experienced judges will stay there, regardless of what the question is.

A number of us have done a lot of work on a mandamus concept, and the *Morrison* case has some language which raises a question about it, but where you have an abuse of discretion or you have the mandatory language of the statute and you have an overwhelming factual situation, we have considered going into court on a mandamus action.

Three District Courts have granted mandamus against Attorneys General on an application. All three were overturned for lack of standing in the Circuit Courts. One idea to perfect standing would be to use the analogous provision on getting a report, a majority or a majority of the minority, of Senators of the Judiciary Committee or Members of the House Judiciary Committee would have standing.

We have had a very frustrating time in this Committee on campaign finance reform and also on the Judiciary Committee, and we are searching for some way out. I do not know if it is something you would be willing to venture a comment on, Judge Fay?

Judge FAY. My only comment would be my reading of the Supreme Court cases indicates that standing is a hot topic and rather difficult to establish.

Senator SPECTER. If we could satisfy standing, do you think we would be on appropriated grounds seeking mandamus to appoint Independent Counsel?

Judge FAY. Again, with the proper input from all sides, yes, I think what you are setting up would be well within the reign and realm of what courts do and what judges do in making that type of decision.

I do not suggest to you, it would be easy to do, but I think, hypothetically, yes.

Senator SPECTER. Hypothetical and the most extreme sort of case——

Judge FAY. Yes.

Senator SPECTER [continuing]. Which we think we have.

Judge FAY. And mandamus is extreme.

Senator SPECTER. Yes.

Judge FAY. It is an extraordinary writ, rarely used. With all those protections, I think it is certainly possible.

Senator SPECTER. Judge Sentelle, what do you think?

Judge SENTELLE. I would start with the standing because the standing that is lacking is not just prudential standing that you can confer by statute. It is constitutional standing, and I am not sure how you are going to get around the three-step constitutional requirement for standing that you have to have an injury particular to the plaintiff that is redressable in the action and caused by the action of the defendant. I am not sure how you would get that particularized injury, but assuming that you have got constitutional standing, which I think it would be a very high hurdle, if you did, I would disagree with my colleague.

I think that that would be invading the Article II function. I think it is the core executive to make those prosecutorial decisions.

I would compare it, Senator, to the executive trying to bring an action in court to make the Congress pass a law. We cannot do that. The passing of the laws is an Article I function, that Articles II and III cannot get involved in.

Similarly, I think that prosecutorial decision is Article II, and Article I and III cannot get involved.

Senator SPECTER. Well, but Article III judges have a lot of power. I do not have to tell you——

Judge SENTELLE. Some of them try to have too much.

Senator SPECTER [continuing]. As it has evolved.

What is your view, Judge Cudahy?

Judge CUDAHY. Assuming you got beyond the standing problem, which is a problem all in itself, I thought that mandamus was available only for nondiscretionary acts of executive officers.

Senator SPECTER. I think it is also available for abuse of discretion.

Judge CUDAHY. Abuse of discretion?

Senator SPECTER. I think so.

Judge CUDAHY. At least in the black letter, it has been intended mostly for nondiscretionary acts.

Senator SPECTER. Ministerial. I think there is an avenue, a narrow one——

Judge CUDAHY. I think we are moving into a new area here, in any event.

Senator SPECTER [continuing]. On abuse of discretion.

Well, thank you very much, Judges. We very much appreciate your being here.

Thank you, Mr. Chairman.

Chairman THOMPSON. Thank you very much.

We do thank you all very much for being here. I think that as I sit here and listen to you that what we are doing here is a never-ending battle that we have to strive for the perfect statute and the perfect balance and the perfect system and the perfect method and all of that, and if we just put it together just the right way, then the results will be perfect, even though we find out time and time again that it is improbable, if not impossible.

Certainly, we know more now about how the statute operates and how the three-judge panel operates, and I think that is good in and of itself. I think there have been some misconceptions about how you operate.

I think that you have given us an insight we did not have before. My own opinion is that the people that have been appointed Inde-

pendent Counsel has been exemplary individuals and top of the line. I agree with Senator Edwards in terms of the names that I recognized as far as your book is concerned.

Senator Lieberman, unless you have any comments, we will finish.

Senator LIEBERMAN. Mr. Chairman, thank you. I would just thank you again for the fair and bipartisan way in which we have conducted these hearings.

I thank the judges for coming forward and helping us fulfill our Article I responsibilities to consider whether to reauthorize this statute. Your testimony here was very helpful.

I would say very simply that we are not going to achieve a perfect answer here, but one of our favorite legislative maxims in times of crisis, in those rare times of humility that we have around here, is that the perfect is the enemy of the good. So, hopefully, we will be able to work together and come up with a good answer to this challenge.

Thanks very much.

Chairman THOMPSON. All right. We are adjourned.

[Whereupon, at 2:12 p.m., the Committee was adjourned.]

APPENDIX

LETTER TO DAVID B. SENTELLE FROM SENATOR LEVIN

UNITED STATES SENATE
COMMITTEE ON GOVERNMENTAL AFFAIRS
WASHINGTON, DC

August 12, 1994

THE HONORABLE DAVID B. SENTELLE
Presiding Judge
Independent Counsel Division of the U.S. Court of Appeals for the District of Columbia
U.S. Courthouse
Washington, D.C. 20001

DEAR JUDGE SENTELLE: As chairman of the Senate subcommittee with jurisdiction over the independent counsel law and primary sponsor of the Independent Counsel Reauthorization Act of 1994, I feel it appropriate to express my concern at the appointment of Kenneth Starr as independent counsel in the Madison Guaranty matter.

In 15 years of operation of the independent counsel law, the independence of an independent counsel has never been at issue. That's because the Court has taken great care to appoint persons who are sufficiently removed from partisan activity. That is not the case with Mr. Starr, and this appointment puts at risk the historical public acceptance of the independent counsel process.

The issue with respect to Mr. Starr is not his personal integrity or competence; it is that he lacks the necessary appearance of independence essential for public confidence in the process. Mr. Starr's recent partisan political activities cannot help but raise questions about the appearance of his impartiality in this case and suggest that the Court was unaware of all the relevant facts at the time of this appointment. Mr. Starr's participation on and current position as co-chair of a highly partisan Republican congressional campaign in Virginia and his recent participation in a televised debate on the Paula Jones lawsuit are particularly troubling. While surely no one questions Mr. Starr's right to engage in highly visible partisan political activities, the issue is whether those activities should disqualify him from taking charge of the Madison Guaranty investigation.

The Court has stated that it decided not to continue Mr. Fiske in the Madison Guaranty matter because the independent counsel law "contemplates an apparent as well as an actual independence on the part of the counsel." The same standard should apply to Mr. Starr.

I urge the Court to ask Mr. Starr to provide a complete accounting of his recent political activities. The Court should then issue a supplementary opinion stating whether these activities impair the appearance of independence that is so critical to the proper functioning of the independent counsel law. If they do, the Court should ask Mr. Starr to withdraw. if they don't, the Court should explain why it believes the appearance of independence standard which the Court evoked in its decision not to reappoint Mr. Fiske has been met in the appointment of Mr. Starr.

The Court's selection of counsels who are independent in fact and appearance is the foundation of the law's success and essential to public acceptance of prosecution decisions. It is in the Court's hands to review the facts and take whatever action is necessary to ensure the continued effectiveness of the independent counsel law.

On a related matter, I support the Court's recent decision to disclose the letters it received in connection with the Madison Guaranty case. I urge the Court to extend this procedure to other independent counsel proceedings as well so that, in all cases within the public domain, correspondence read by the Court concerning its de-

liberations will be made part of the public record. This course of action will ensure that the public is kept informed of the arguments presented to the Court in these sensitive matters.

I appreciate the cooperation the Subcommittee has had with your office and look forward to your response.

Sincerely,

CARL LEVIN, *Chairman*
Subcommittee on Oversight of Government Management

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIVISION FOR THE PURPOSE OF
APPOINTING INDEPENDENT COUNSELS

Ethics in Government Act of 1978, as Amended

In re: Madison Guaranty Savings & Loan Association (Levin Letter/Motion) — Division No. 94–1

Before: SENTELLE, *Presiding,* BUTZNER and SNEED, *Senior Circuit Judges*

ORDER

This matter comes before the Court on the Letter of the Honorable Senator Carl Levin which the Court hereby orders filed with the Clerk and treats as a Motion Seeking to Have the Court: (1) Ask of the Independent Counsel herein an accounting of his political activities; and (2) Issue an opinion passing on the relationship between those activities and his role as Independent Counsel.

For the reasons set forth in the attached Per Curiam opinion, that motion is denied.

Per Curiam
For the Court:

RON GARVIN, *Clerk*

Per Curiam: Movant Senator Levin seeks to have the Court require of the Independent Counsel an accounting not contemplated in the statute. This Division of the Court has no powers beyond those set out in the statute. The Supreme Court in the past has stated "[W]e emphasize, nevertheless, that the Special Division has no authority to take any action or undertake any duties that are not specifically authorized by the Act." *Morrison v. Olson,* 487 U.S. 654, 684 (1988) (emphasis in original). The decision by the Supreme Court in *Morrison* was not merely a matter of statutory interpretation; it is a narrow, construction expressly complying with the duty of the court to "construe a statute in order to save it from constitutional infirmities." 487 U.S. at 682.

To undertake the duty of advising the Independent Counsel on this disclosure, not required by this statute, amounts to the very sort of, supervisory role the supreme Court found not consistent with our role as part of the Article III judiciary. "The Act simply does not give the Division the power to 'supervise' the independent counsel in the exercise of his or her investigative or prosecutorial authority." *Morrison,* 487 U.S. at 681.

The further relief sought by movant, which is that the court issue a "supplementary opinion" passing on the fitness of an independent counsel already appointed and as to whom the Court has no current power of either supervision or termination, requests nothing more nor less than an advisory opinion. Again, the Supreme Court in *Morrison* commented on the lack of authority of this Division to issue advisory opinions, specifically stating

> [W]e . . . think it appropriate to point out not only that there is no authorization for such actions (the issuance of advisory opinions) in the Act itself, but that the Division's exercise of unauthorized powers risks the transgression of the constitutional limitations of Article III that we have just discussed.

Id. at 684–85.

Therefore, we deny the relief prayed by the Movant.

LETTER FROM KENNETH W. STARR TO SENATORS THOMPSON AND LIEBERMAN

OFFICE OF THE INDEPENDENT COUNSELWASHINGTON, DC

April 15, 1999

THE HON. FRED THOMPSON, *Chairman*
THE HON. JOSEPH I. LIEBERMAN, *Ranking Member*
Committee on Governmental Affairs
United States Senate
Washington, DC.

DEAR SENATOR THOMPSON AND SENATOR LIEBERMAN: Thank you for the opportunity to appear before you yesterday at the Committee hearing.

During my testimony yesterday, I made one inadvertent misstatement of fact. In discussing the concept of the "related to" jurisdiction of an Independent Counsel, I said that my Office had "always" sought confirmation of our "related to" jurisdiction from the Department of Justice. I mistakenly neglected to mention the exception to that general rule: For matters "related to" our investigation of former Associate Attorney General Webster L. Hubbell, we did not seek confirmation of our jurisdiction from the Department of Justice. We did not wish to place the Department in the uncomfortable and conflicted position of having to pass on matters relating to a former Department political appointee. In that circumstance, we sought confirmation of our "related to" jurisdiction directly from the Special Division, a method later approved by the D.C. Circuit when Mr. Hubbell challenged our actions.

I respectfully request that you make this communication a part of the Committee's Hearing record.

Sincerely yours,

KENNETH W. STARR
Independent Counsel

LETTER FROM GAO TO SENATOR THOMPSON

UNITED STATES GENERAL ACCOUNTING OFFICE
ACCOUNTING AND INFORMATION MANAGEMENT DIVISION
WASHINGTON, D.C. 20548

June 4, 1999

B-282703

SENATOR FRED THOMPSON, *Chairman*
Committee on Governmental Affairs
United States Senate

Subject: *Independent Counsels: GAO Audit Responsibilities After OIC Termination*

DEAR MR. CHAIRMAN: This letter is in response to a question from your office regarding our audit responsibilities for independent counsels who have completed their investigations or whose offices have been officially terminated.

Public Law 100–202 established a permanent, indefinite appropriation to fund independent counsel operations. Independent counsels are required under 28 U.S.C. 596(c)(1) to prepare reports on their expenditures from the appropriation for each 6month period in which they have operations, including the periods in which they complete their investigations, and to provide the reports to us within 3 months after the end of the 6-month reporting period. Independent counsels whose offices are officially terminated have 3 months from the date of the termination to provide us their final reports. To satisfy the requirements of 28 U.S.C. 596(c)(2) and Public Law 100–202, we audit the expenditure reports and issue our audit report by March 31 and September 30 of each year in which expenditures occur.

Independent counsels continue to have expenditures from the appropriation between the time they complete their investigations and the time their offices are officially terminated. These expenditures typically occur due to the need to archive records and because of the time lags between the dates (1) vendors or others provide goods and services, (2) invoices or bills are received, verified, and authorized for payment, and (3) expenditures are made. Expenditures can also occur after an independent counsel's office has been officially terminated. For example, one independent counsel who completed his investigation in 1995 and whose office was officially terminated in 1998 received a bill in 1999 for travel expenses incurred by detailees

from another Federal agency during the independent counsel's investigation. Another independent counsel who completed his investigation in 1997 and whose office was officially terminated in 1998 had not received final bills for office rent as of May 1999. The timing of the completion of an investigation or the termination of an office of independent counsel has no bearing on our audit responsibilities. Our audit responsibilities are driven by the expenditure of funds from the permanent, indefinite appropriation.

For purposes of efficiency, we perform much of our audit work at the Administrative Office of the U.S. Courts (AOUSC). AOUSC provides administrative support to all the independent counsels and processes and maintains a centralized record of all independent counsel expenditures. Our interaction with independent counsels after they have completed their investigations or after their offices have been officially terminated has been limited to reviewing documentation for the remaining expenditures and obtaining representations regarding final expenditure reports.

We are sending copies of this letter to the Members of the Senate Committee on Governmental Affairs and the Director of the Administrative Office of the U.S. Courts. We will make copies available to others upon request. Please contact me at (202) 512–9489 if you or your office have any questions.

Sincerely yours,

DAVID L. CLARK
Director, Audit Oversight and Liaison

LETTER TO ELISE BEAN FROM STEPHEN A. KUBIATOWSKI

OFFICE OF THE INDEPENDENT COUNSEL
January 17, 1997

ELISE BEAN, ESQ., *Minority Counsel*
Subcommittee on Oversight of Government
Management and the District of Columbia
Committee on Governmental Affairs
United States Senate
Washington, DC.

DEAR MS. BEAN:

In his letter to us of November 15, 1996, Senator Levin inquired about the speaking engagements in which Independent Counsel Starr has participated since his appointment on August 9, 1994. As you know, Mr. Starr continues occasionally to speak on various topics. Enclosed are copies of his speeches since his appointment as Independent Counsel that relate to independent counsel matters. Included is a copy of a speech that Mr. Starr will be delivering this evening to the Virginia Bar Association at its 107th Annual Meeting in Williamsburg, Virginia. This speech has been embargoed from public disclosure until 5:00 p.m. E.S.T. today. We have also included a copy of Mr. Starr's October 4, 1996, speech at Regent University, because Senator Levin specifically inquired about it, although it did not relate to independent counsel matters.

We are continuing to evaluate the extent to which we can respond to the remainder of Senator Levin's inquiries, and to gather relevant information.

If you have any questions, please feel free to contact me at (202) 514–8688.

Sincerely

STEPHEN A. KUBIATOWSKI
Associate Independent Counsel

LETTER TO KENNETH W. STARR FROM SENATOR LEVIN

UNITED STATES SENATE
COMMITTEE ON GOVERNMENTAL AFFAIRS
WASHINGTON, DC

October 20, 1997

MR. KENNETH W. STARR, *Independent Counsel*
101 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

DEAR MR. STARR: I am very concerned about your lack of response to my letter dated November 15, 1996, which requested information about your activities as an independent counsel and the operation of your office.

Your letter dated January 19, 1997, provided information relative to only one of the sixteen questions I asked you to answer. You indicated, at that time, that you were evaluating the extent to which you could respond to the remaining questions. Numerous attempts have been made by my office to obtain your answers, but I still have not received your response.

The Governmental Affairs Committee has oversight and legislative jurisdiction over the independent counsel law and the offices created pursuant to it. 28 U.S.C. 595(a)(1) states ". . . such independent counsel shall have the duty to cooperate with the exercise of such oversight jurisdiction." The questions that were asked of you are appropriate and relevant to overseeing the implementation of the independent counsel law.

I would appreciate a response by October 31, 1997, to all of my questions in the November 15 letter or a written justification as to why you cannot provide this information. Gale Perkins of my staff can be reached at (202) 224–4551 if you have any questions.

Sincerely,

CARL LEVIN

LETTER TO SENATOR LEVIN FROM KENNETH W. STARR

OFFICE OF THE INDEPENDENT COUNSEL
THE REDDING BUILDING
1701 CENTER VIEW DRIVE, SUITE 203
LITTLE ROCK ARKANSAS 72211

October 30, 1997

THE HONORABLE CARL LEVIN
Committee on Governmental Affairs
United States Senate
Washington, DC 20S10–6250

DEAR SENATOR LEVIN: I write in response to your letter of October 20.

We fully appreciate the institutional interest of the Congress in the ongoing work of our Office. Congressional oversight is an essential element of the Independent Counsel system created by the Ethics in Government Act. In formulating the statute, Congress carefully and specifically provided mechanisms for oversight.

Pursuant to Section 596(c) of the statute, the General Accounting Office has just completed a thorough analysis of our expenditures. To ensure that your office remains fully informed, we have sent a copy of the GAO report to Gale Perkins of your staff, who has been in contact with our Office. On August 9, 1997, in addition, we submitted our annual status report to Congress pursuant to Section 595(a)(2) of the Act. We sent copies of the report to, among others, the Chairman and the Ranking Member of the Senate Committee on Governmental Affairs. I enclose a copy in case you have not seen it.

After the most careful consideration, I have concluded that the proper oversight mechanisms in this instance are the ones set, forth in the Ethics in Government Act: the appropriate Committee of Congress and the General Accounting Office. While mean no disrespect, the statute contemplates oversight action by these designated entities, not by individual Members. See 28 U.S.C. §§ 595(a)(1), 596(c).

More to the point, and upon very careful attention to the matter, we despair at our ability to address fully the extraordinarily detailed questions posed by your office. We cannot call upon the infrastructure of the Justice Department's Management Division or its Office of Legislative and Governmental Affairs for assistance in such matters. Gathering and summarizing the information requested would necessitate either the diversion of resources from our investigation or the expansion of our staff. with all respect, neither alternative is feasible—particularly when our investigation is at a pivotal juncture, with grand juries active in two cities.

Finally, I cannot help but note that responding fully to any one Senator, no matter how senior, would suggest that our smalloffice is duty-bound to respond fully to all 535 Members of Congress, each with ample staff capacity for devising numerous and meticulously detailed questions. Such an obligation could have the predictable

effect of diverting our office from the investigative and prosecutorial tasks assigned to us by the Attorney General.

Yours sincerely,

KENNETH W. STARR
Independent Counsel

LETTER TO DAVID B. SENTELLE FROM SENATOR JOHN GLENN

UNITED STATES SENATE
COMMITTEE ON GOVERNMENTAL AFFAIRS
WASHINGTON, DC

February 6, 1998

THE HONORABLE DAVID B. SENTELLE
Unites States Circuit Judge
United States Court of Appeals for the
District of Columbia Circuit
Special Division
333 Constitution Avenue, N.W.
Washington, D.C. 20001–2866

DEAR JUDGE SENTELLE: This letter relates to the request by my colleague, Senator Levin, for copies of certain documents filed with the Special Division under seal in connection with the investigation of Henry G. Cisneros by Independent Counsel David M. Barrett.

I serve as Ranking Minority Member on the Senate Governmental Affairs Committee, the committee with Jurisdiction over the Independent Counsel law. As you probably know, the law expires in 1999. The Committee expects to hold hearings relating to its oversight and reauthorization this year. Over the years, Senator Levin has played a leading role both in oversight and reauthorization of the law, particularly as he served as chairman of the Subcommittee on Oversight of Government Management.

The documents Senator Levin requested are important to conducting oversight of one aspect of the Independent Counsel law, the provisions for expanding an independent counsel's prosecutorial jurisdiction. I urge the Court to provide Senator Levin with copies of the documents.

Thank you for your consideration and cooperation in this matter.

Sincerely,

JOHN GLENN,
Ranking Minority Member

LETTER TO DAVID B. SENTELLE FROM SENATOR LEVIN

UNITED STATES SENATE
COMMITTEE ON GOVERNMENTAL AFFAIRS

February 10, 1998

THE HONORABLE DAVID B. SENTELLE
Unites States Circuit Judge
United States Court of Appeals for the
District of Columbia Circuit
Special Division
333 Constitution Avenue., N.W.
Washington, D.C. 20001–2866

Re: Request for Copies of Certain Filings by Independent Counsel Barrett

DEAR JUDGE SENTELLE: This responds to, your letter of January 5, 1998, relating to my request for copies of certain documents filed with the Special Division in the case of Henry G. Cisneros. In that letter you inquired, on behalf of yourself and another Judge of the Special Division, whether the request was being made in my individual capacity or on behalf of the Committee on Governmental Affairs.

I make my request in my capacity as a senior member of the Governmental Affairs Committee and as the ranking minority member of the Subcommittee on International Security, Proliferation and Federal Services, one of the Committee's two standing legislative subcommittees. The Governmental Affairs Committee has legis-

lative jurisdiction over the independent counsel statute and oversight jurisdiction over its operation. As you know, the independent counsel statute is set to expire next year. In my capacity as chairman of the Subcommittee on Oversight of Government Management in 1987 and 1993–94, and as ranking minority member of the Subcommittee in 1981–82, I have played a leading role in each of the prior reauthorizations of the statute and have been integrally involved in coordinating congressional oversight of its operation over the past nineteen years. See, e.g., S. Rep. No. 100–123, at 4 (1987), reprinted in 1987 U.S.C.C.A.N. 2150, 2153 ("the Subcommittee on Oversight of Government Management, under the chairmanship of Senator Cad Levin, has examined the statute's implementation and effectiveness since its reauthorization in 1982.").

Next year the full Committee will be assuming the responsibility for reauthorization of the independent counsel statute. My documentary request is intended to further my responsibilities in connection with oversight that I expect the Committee to conduct over the course of the coming year in preparation for consideration of the law's reauthorization. I am the ranking Democrat on the Committee (after Senator Glenn, who has announced his retirement from the Senate at the end of this year). Issues concerning the statutory procedures and standards for defining and considering requests for expanding an independent counsel's jurisdiction, *see* 28 U.S.C. § 593(b)–(c), are certain to be prominent in the legislative reauthorization process. I am requesting copies of the specific filings enumerated in my letter of November 20, 1997, to enable myself and other members of the Committee to inform ourselves in preparation for the initiation of formal oversight, including hearings, on these important questions prefatory to consideration of reauthorization. In this connection, we have enclosed a supporting letter from Senator Glenn, Ranking Minority Member of the Committee, endorsing this request.

The Independent Counsel law expressly provides for congressional oversight "with respect to the official conduct of any independent counsel" by appropriate committees of the Congress, in this instance the Senate Governmental Affairs Committee, and states that "such independent counsel shall have the duty to cooperate with the exercise of such oversight jurisdiction." 28 U.S.C. § 595(a)(1). As you know, on April 23, 1997, the Special Division granted my request on behalf of the Committee for a member of the Committee's staff to be provided access to all independent counsel filings, including those under seal, in all independent counsel matters since 1994, when the independent counsel law was last reauthorized. It has been my understanding that the Special Division's approval of this request reflected the Court's recognition of the constitutional and statutory oversight role assigned to the Governmental Affairs Committee. A member of my Subcommittee staff was designated to review the filings in accord with the Special Division's order. My pending request for copies of particular filings follows from my staff member's identification of these filings, based upon this review, as pertinent to oversight issues before the Committee.

Regarding your inquiry about whether my request is made on behalf of the Governmental Affairs Committee, which I hope I have adequately answered, I would further note that the Court has declined, in the context of congressional requests for Executive Branch records, to distinguish "between a congressional committee and a single Member acting in an official capacity." *Murphy v. Department of the Army,* 613 F.2d 1151, 1157 (D.C. Cir. 1979) (holding, in FOIA context for purposes of waiver analysis, disclosure of document to single Member falls under statute's special reservation for Congress); *FTC v. Owens-Corning Fiberglas Corp.,* 626 F.2d 966, 974 n. 16 (D.C. Cir. 1980) (Members of Congress should be afforded status of Congress as a whole for purposes of disclosure of information from Federal Trade Commission). The Court observed in *Murphy* that "[a]ll Members have a constitutionally recognized status entitling them to share in general congressional powers and responsibilities, many of them requiring access to executive information." 613 F.2d at 1157. The Court continued:

> It would be an inappropriate intrusion into the legislative sphere for the courts to decide without congressional direction that, for example, only the chairman of a committee shall be regarded as the official voice of the Congress for purposes of receiving such information, as distinguished from its ranking minority member, other committee members, or other members of the Congress. Each of them participates in the law-making process; each has a voice and a vote in that process; and each is entitled.to request such information from the executive agencies as will enable him to carry out the responsibilities of a legislator.

Id.

I would also like to take this opportunity to address some of the points expressed by Independent Counsel Barrett in his letter opposing this request. First, Mr.

Barrett's assertion that I am "attempting to intrude" on his investigation is inappropriate, as it fails to respect both the legitimate and proper exercise of the constitutional functions of a coordinate branch and his statutory "duty to cooperate with the exercise of such oversight jurisdiction." 28 U.S.C. § 595(a)(1). I am requesting copies of these filings neither in the search of underlying investigative details gathered by Mr. Barrett's office, nor out of any interest in second-guessing investigative or prosecutorial decisions made by Mr. Barrett or his staff.

Second, Mr. Barrett's contention that approval of my request is barred by 28 U.S.C. § 695(a)(2) is plainly incorrect. That provision directs the independent counsel to submit an annual report to Congress in which he "may omit any matter that in the judgment of the independent counsel should be kept confidential." Mr. Barrett has submitted a three-page 1997 annual report to Congress, and I do not question his authority to submit that report, including and omitting such matter as he chose. My request is grounded, however, not on the annual report provision, section 595(a)(2), but rather, as I have outlined, on the oversight provision, section 595(a)(1). Further, section 593(g) vests the Special Division with full authority to "allow the disclosure" of filings such as those that are the subject of this request. Thus, taken together, section 593(g), the disclosure provision, and section 595(a)(1), the oversight provision, provide ample authority for approving this request.

Third, Mr. Barrett incorrectly argues that Federal Rule of Criminal Procedure 6(e), which generally protects grand jury materials from disclosure, bars the Court from approving my request for copies of these materials. Although Mr. Barrett is correct that the Rule 6(e) exception relating to disclosure in connection with judicial proceedings has been held not to apply to routine congressional oversight activities, Mr. Barrett errs in asserting that the itemized exceptions to Rule 6(e) are exhaustive or exclusive. To the contrary, Federal courts have inherent discretion to allow access to protected materials when presented with "special circumstances." *See In re Craig,* 131 F.3d 99, 103 (2d Cir. 1997); *In re Hastings,* 735 F.2d 1261, 1267–69 (11th Cir.) *cert. denied,* 469 U. S. 884 (1984); *In re Biaggi,* 478 F.2d 489, 492–93 (2d Cir. 1973) (Friendly, C.J.); *see also In re Craig,* 131 F.3d at 103 nn.3–4 (citing decisions of other circuits, including D.C. Circuit, to express doubt over claim of circuit split on question). To the extent that my request may in any way implicate Rule 6(e), I believe that, in the "special circumstances" of Congress's oversight and legislative responsibilities over the unique independent counsel regimen, and in light of the particular statutory disclosure authorization of 28 U.S.C. § 593(g), a request for documents, like the instant one, focused on the statutory reauthorization issues I have outlined, warrants a favorable exercise of the Court's inherent discretion. Certainly, narrow redaction, rather than blanket denial, would suffice to accommodate any remaining grand jury confidentiality concerns.

Moreover, in reauthorizing the independent counsel statute in 1987, the Governmental Affairs Committee specifically anticipated a contention like Mr. Barrett's. The Committee noted, in its discussion of the issue of the Special Division's disclosure of filings, that "the argument that all litigation connected with independent counsel proceedings will necessarily reveal grand jury proceedings is not tenable; greater discernment should be exercised in these matters." S. Rep. No. 100–123, at 21 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2170.

Finally, I take strong issue with Mr. Barrett's opposition to the extent that it is predicated on the assumption that I will publicly "disseminat[e] the sealed pleadings and evidence." As Mr. Barrett is aware, in my original request I assured the Court that I would see to it that the documents are "handle[d] with the appropriate care and confidentiality." I recognize the sensitivity of these filings and assure the Court and Mr. Barrett that I take my responsibilities seriously in ensuring their confidentiality. This Circuit has repeatedly admonished that "[tlhe courts must presume that the committees of Congress will exercise their powers responsibly and with due regard for the rights of affected parties." *Exxon Corp. v. FTC.,* 589 F.2d 582, 589 (D.C. Cir. 1978) *cert. denied,* 441 U.S. 443 (1979); *FTC v. Owens-Corning Fiberglas Corp.,* 626 F.2d 970; *Ashland Oil v. FTC,* 548 F. 2d 977, 979 (D.C. Cir. 1976)(per curiam). The Court has previously granted my staff access to the sealed filings, and no inappropriate disclosures have occurred. There is absolutely no basis for denying me this presumption of responsibility to which Congress is entitled.

I trust that this letter is responsive to the Court's inquiry. Approval of this request will enable my colleagues and me to fulfill the equally important responsibilities that the Constitution and the independent counsel law vest in our Committee. Thank you for your consideration and cooperation in this matter.

Sincerely,

CARL LEVIN

LETTER TO SENATOR LEVIN FROM DAVID B. SENTELLE

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, DC

March 20, 1998

THE HONORABLE CARL LEVIN
Committee on Governmental Affairs
United States Senate
Washington, DC 20510–6250

DEAR SENATOR LEVIN: Thank you for your letter of February 10, 1998, responding to the Court's inquiry of whether your request for copies of certain independent counsel sealed documents was being made in your individual capacity or on behalf of the Committee on Governmental Affairs. After reviewing your letter and the supporting letter from the ranking minority member of the Committee, the Court is satisfied that your request was made in your official capacity as a member of the Committee. Consequently, the requested documents are enclosed herewith.

As you requested the documents in your capacity as a senior member of the Committee, I am forwarding a courtesy copy of this letter and the attached documents to the Chairman of the Committee.

Sincerely,

DAVID B. SENTELLE

Attachments:

Documents pertaining to *In re Cisneros* and attached to 3/19/98 letter to Senator Carl Levin:

(1) *Sealed Application for the Referral of Related Matters Pursuant to 28 U.S.C. § 594(e),* filed January 29, 1997;

(2) *Notification to the Court Pursuant to 28 U.S.C. § 592(a)(1) of the Initiation of a Preliminary Investigation, Application to the Court Pursuant to 28 U.S.C. § 593(c)(1) for the Expansion of the Jurisdiction of an Independent Counsel and Opposition to Request for Referral of Related Matter,* filed February 28, 1997;

(3) *Office of Independent Counsel's Reply to Department of Justice's Opposition to the Request for Referral of Related Matters, and Memorandum in Support of the Request,* filed March 13, 1997;

(4) *Order Expanding and Amending Jurisdiction of Independent Counsel,* filed March 18, 1997;

(5) *Amending Order,* filed March 26, 1997;

(6) *Opinion and Order,* filed April 10, 1997.

POST-HEARING QUESTIONS AND ANSWERS FOR JUDGE SENTELLE FROM SENATOR LEVIN

1. Did Kenneth Starr disclose to you—either before his initial appointment or at the time of the expansion of his jurisdiction in the Monica Lewinsky matter—that he had consulted with Paula Jones' lawyers? If so, please explain what he told you and your response.

Answer: I do not to this day have any knowledge that Kenneth Starr consulted with Paula Jones's lawyers.

2. a. In conducting background checks with respect to potential independent counsels, do you confer with the American Bar Association, the Department of Justice, local bar associations, Federal judges? Please describe the persons and organizations whom you routinely contact with respect to the selection of independent counsels.

b. Does your review of potential independent counsels include a list of written questions to be answered by potential candidates? If so, please provide a copy of such questionnaire.

c. What kind of questions do you ask a candidate in order to screen for possible conflicts of interest or partisan activities?

Answer: I do not think it appropriate or necessary that I violate the confidentiality of the conferences with my colleagues any more than I have already done in my oral testimony before the Committee. I will say that there are no standard form questionnaires used in any of the independent counsel appointments.

3. Section 596(b)(2) of the independent counsel law gives the Special Division the responsibility to regularly review whether an independent counsel has "substantially completed" his or her work so that the office should be terminated. What information or evidence does the Court look at in determining whether to terminate the office of an independent counsel under this provision? Does the Special Division request written reports or briefings from the independent counsels? Does the Special Division seek the opinion of the Department of Justice in evaluating the termination of an independent counsel?

Answer: I covered this subject as completely as I think appropriate, and indeed possible in my testimony before the Committee.

4. Under the independent counsel law, an independent counsel may apply to the Attorney General or the Special Division for jurisdiction of a related matter. Does an independent counsel have jurisdiction over a related matter without going to the Department or the Special Division under the original grant of jurisdiction, or must he or she seek jurisdiction from the Special Division for all related matters?

What if an independent counsel thinks he or she has related matter jurisdiction, but the Department of Justice subsequently disagrees? What is the status of any actions an independent counsel may have taken under the mistaken assumption he or she had related matter jurisdiction?

Answer: As you are aware, the original jurisdictional grants do contain the words "related matters." Any further answer would call for the expression of an opinion of law which I will do only when confronted with such a question in an Article III context.

SEVENTEEN COURT ORDERS SUBMITTED BY SENATOR LEVIN

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIVISION FOR THE PURPOSE OF
APPOINTING INDEPENDENT COUNSELS

Filed: Sep 15 1995

Ethics in Government Act of 1978, as Amended

In re: Samuel R. Pierce, Jr. Division No. 89–5

Before: SENTELLE, *Presiding,* BUTZNER and FAY, *Senior Circuit Judges.*

O R D E R

Pursuant to the Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103–270, 108 Stat. 732, §§ 3(h) and 7(f) (to be codified at 28 U.S.C. §§ 591–599), the court, on its own motion, concludes that termination of the office of Independent Counsel in the above-captioned matter is not currently appropriate under the standard set forth in 28 U.S.C. § 596(b)(2).

Per Curiam
For the Court:

MARK J. LANGER, *Clerk*

by

MARILYN R. SARGENT,
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIVISION FOR THE PURPOSE OF
APPOINTING INDEPENDENT COUNSELS

Filed: Sep 15 1995

Ethics in Government Act of 1978, as Amended

In re: Janet Mullins Division No. 92–9

Before: SENTELLE, *Presiding,* BUTZNER and FAY, *Senior Circuit Judges.*

O R D E R

Pursuant to the Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103–270, 108 Stat. 732, §§ 3(h) and 7(f) (to be codified at 28 U.S.C. §§ 591–599), the court, on its own motion, concludes that termination of the office of Independent Counsel in the above-captioned matter is not currently appropriate under the standard set forth in 28 U.S.C. § 596(b)(2).

Per Curiam
For the Court:

MARK J. LANGER, *Clerk*
by
MARILYN R. SARGENT,
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIVISION FOR THE PURPOSE OF
APPOINTING INDEPENDENT COUNSELS

Filed: Aug 05 1996

Ethics in Government Act of 1978, as Amended

In re: Madison Guaranty Savings & Loan Association Division No. 94–1

Before: SENTELLE, *Presiding,* BUTZNER and FAY, *Senior Circuit Judges.*

O R D E R

Pursuant to the Independent Counsel Reauthorization Act of 1994, 28 U.S.C. §§ 591–599 (1944), the court, on its own motion, concludes that termination of the office of Independent Counsel in the above-captioned matter is not currently appropriate under the standard set forth in 28 U.S.C. § 596(b)(2).

Per Curiam
For the Court:

MARK J. LANGER, *Clerk*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIVISION FOR THE PURPOSE OF
APPOINTING INDEPENDENT COUNSELS

Filed: Sep 09 1996

Ethics in Government Act of 1978, as Amended

In re: Alphonso Michael (Mike) Espy Division No. 94–2

Before: SENTELLE, *Presiding,* BUTZNER and FAY, *Senior Circuit Judges.*

O R D E R

Pursuant to the Independent Counsel Reauthorization Act of 1994, 28 U.S.C. §§ 591–599 (1944), the court, on its own motion, concludes that termination of the office of Independent Counsel in the above-captioned matter is not currently appropriate under the standard set forth in 28 U.S.C. § 596(b)(2).

Per Curiam
For the Court:

MARK J. LANGER, *Clerk*

by

MARILYN R. SARGENT,
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIVISION FOR THE PURPOSE OF
APPOINTING INDEPENDENT COUNSELS

Filed: Sep 13 1996

Ethics in Government Act of 1978, as Amended

In re: Samuel R. Pierce, Jr. Division No. 89–5

Before: SENTELLE, *Presiding,* BUTZNER and FAY, *Senior Circuit Judges.*

O R D E R

Pursuant to the Independent Counsel Reauthorization Act of 1994, 28 U.S.C. §§ 591–599 (1944), the court, on its own motion, concludes that termination of the office of Independent Counsel in the above-captioned matter is not currently appropriate under the standard set forth in 28 U.S.C. § 596(b)(2).

Per Curiam
For the Court:

MARK J. LANGER, *Clerk*

by

MARILYN R. SARGENT,
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIVISION FOR THE PURPOSE OF
APPOINTING INDEPENDENT COUNSELS

Filed: Oct 18 1996

Ethics in Government Act of 1978, as Amended

In re: Samuel R. Pierce, Jr. Division No. 89–5

Before: SENTELLE, *Presiding,* BUTZNER and FAY, *Senior Circuit Judges.*

O R D E R

Pursuant to the Independent Counsel Reauthorization Act of 1994, 28 U.S.C. §§ 591–599 (1944) and having met with the Independent Counsel in the above-captioned matter, the court, on its own motion, determines that termination of this Office of Independent Counsel is not currently appropriate under 28 U.S.C. § 596(b)(2). The Independent Counsel is hereby ordered to make another report to this court within six months of the date of this order, if necessary.

Per Curiam
For the Court:

MARK J. LANGER, *Clerk*

by

MARILYN R. SARGENT,
Chief Deputy Clerk

Dated: October 18, 1996

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIVISION FOR THE PURPOSE OF
APPOINTING INDEPENDENT COUNSELS

Filed: Apr 21 1997

Ethics in Government Act of 1978, as Amended

In re: Samuel R. Pierce, Jr. Division No. 89–5

Before: SENTELLE, *Presiding,* BUTZNER and FAY, *Senior Circuit Judges.*

O R D E R

Pursuant to the Independent Counsel Reauthorization Act of 1994, 28 U.S.C. §§ 591–599 (1944) and having met with the Independent Counsel in the above-captioned matter, the court, on its own motion, determines that termination of this Office of Independent Counsel is not currently appropriate under 28 U.S.C. § 596(b)(2). The Independent Counsel is hereby ordered to make another report to this court within three months of the date of this order, if necessary.

Per Curiam
For the Court:

MARK J. LANGER, *Clerk*

by

MARILYN R. SARGENT,
Chief Deputy Clerk

Dated: April 21, 1997

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIVISION FOR THE PURPOSE OF
APPOINTING INDEPENDENT COUNSELS

Filed: May 27 1997

Ethics in Government Act of 1978, as Amended

In re: Henry G. Cisneros Division No. 95–1

Before: SENTELLE, *Presiding,* BUTZNER and FAY, *Senior Circuit Judges.*

O R D E R

Pursuant to the Independent Counsel Reauthorization Act of 1994, 28 U.S.C. §§ 591–599 (1944), the court, on its own motion, concludes that termination of the office of Independent Counsel in the above-captioned matter is not currently appropriate under the standard set forth in 28 U.S.C. § 596(b)(2).

Per Curiam
For the Court:

MARK J. LANGER, *Clerk*

by

MARILYN R. SARGENT,
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIVISION FOR THE PURPOSE OF
APPOINTING INDEPENDENT COUNSELS

Filed: Jul 14 1997

Ethics in Government Act of 1978, as Amended

In re: Ronald H. Brown Division No. 95–2

Before: SENTELLE, *Presiding,* BUTZNER and FAY, *Senior Circuit Judges.*

O R D E R

Pursuant to the Independent Counsel Reauthorization Act of 1994, 28 U.S.C. §§ 591–599 (1944), the court, on its own motion, concludes that termination of the office of Independent Counsel in the above-captioned matter is not currently appropriate under the standard set forth in 28 U.S.C. § 596(b)(2).

Per Curiam
For the Court:

MARK J. LANGER, *Clerk*

by

MARILYN R. SARGENT,
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIVISION FOR THE PURPOSE OF
APPOINTING INDEPENDENT COUNSELS

Filed: Aug 26 1997

Ethics in Government Act of 1978, as Amended

In re: Samuel R. Pierce, Jr. Division No. 89–5

Before: SENTELLE, *Presiding,* BUTZNER and FAY, *Senior Circuit Judges.*

O R D E R

Pursuant to the Independent Counsel Reauthorization Act of 1994, 28 U.S.C. §§ 591–599 (1944), and having met with the Independent Counsel in the above-captioned matter and having been advised of the status of pending litigation involving the Office of Independent Counsel, the court, on its own motion, concludes that termination of this office of Independent Counsel is not currently appropriate under the standard set forth in 28 U.S.C. § 596(b)(2). The Independent Counsel is hereby ordered to make another report to this court within three months of the date of this order, if necessary.

Per Curiam
For the Court:

MARK J. LANGER, *Clerk*
by JUANITA MATHIES
for MARILYN R. SARGENT,
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIVISION FOR THE PURPOSE OF
APPOINTING INDEPENDENT COUNSELS

Filed: Jan 14 1998

Ethics in Government Act of 1978, as Amended

In re: Samuel R. Pierce, Jr. Division No. 89–5

Before: SENTELLE, *Presiding,* BUTZNER and FAY, *Senior Circuit Judges.*

O R D E R

Pursuant to the Independent Counsel Reauthorization Act of 1994, 28 U.S.C. §§ 591–599 (1944), and having spoken with the Independent Counsel in the above-captioned matter, the court, on its own motion, concludes that termination of this office of Independent Counsel is not currently appropriate under the standard set forth in 28 U.S.C. § 596(b)(2). The Independent Counsel is hereby ordered to make another report to this court within three months of the date of this order, if necessary.

Per Curiam
For the Court:

MARK J. LANGER, *Clerk*
by
MARILYN R. SARGENT,
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIVISION FOR THE PURPOSE OF
APPOINTING INDEPENDENT COUNSELS

Filed: Jun 02 1998

Ethics in Government Act of 1978, as Amended

In re: Samuel R. Pierce, Jr. Division No. 89–5

Before: SENTELLE, *Presiding,* BUTZNER and FAY, *Senior Circuit Judges.*

O R D E R

Pursuant to the Independent Counsel Reauthorization Act of 1994, 28 U.S.C. §§ 591–599 (1944), the court, on its own motion, concludes that termination of the office of Independent Counsel in the above-captioned matter is not currently appropriate under the standard set forth in 28 U.S.C. § 596(b)(2).

Per Curiam
For the Court:

MARK J. LANGER, *Clerk*

by

MARILYN R. SARGENT,
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIVISION FOR THE PURPOSE OF
APPOINTING INDEPENDENT COUNSELS

Filed: Aug 4 1998

Ethics in Government Act of 1978, as Amended

In re: Madison Guaranty Savings & Loan Association Division No. 94–1

Before: SENTELLE, *Presiding,* BUTZNER and FAY, *Senior Circuit Judges.*

O R D E R

Pursuant to the Independent Counsel Reauthorization Act of 1994, 28 U.S.C. §§ 591–599 (1944), the court, on its own motion, concludes that termination of the office of Independent Counsel in the above-captioned matter is not currently appropriate under the standard set forth in 28 U.S.C. § 596(b)(2).

Per Curiam
For the Court:

MARK J. LANGER, *Clerk*

by

MARILYN R. SARGENT,
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIVISION FOR THE PURPOSE OF
APPOINTING INDEPENDENT COUNSELS

Filed: Aug 12 1998

Ethics in Government Act of 1978, as Amended

In re: Janet Mullins Division No. 92–9

Before: SENTELLE, *Presiding,* BUTZNER and FAY, *Senior Circuit Judges.*

O R D E R

Upon consideration of the "Motion of the Department of Justice Pursuant to 28 U.S.C. § 596(b)(2) for the Termination of an Office of Independent Counsel," filed with the court on July 31, 1998, it is hereby

ORDERED that the Motion be granted. The Office of Independent Counsel Michael F. Zeldin is terminated as of the date of this Order.

Per Curiam
For the Court:

MARK J. LANGER, *Clerk*

by

MARILYN R. SARGENT,
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIVISION FOR THE PURPOSE OF
APPOINTING INDEPENDENT COUNSELS

Filed: Sep 08 1998

Ethics in Government Act of 1978, as Amended

In re: Alphonso Michael (Mike) Espy Division No. 94–2

Before: SENTELLE, *Presiding,* BUTZNER and FAY, *Senior Circuit Judges.*

O R D E R

Pursuant to the Independent Counsel Reauthorization Act of 1994, 28 U.S.C. §§ 591–599 (1944), the court, on its own motion, concludes that termination of the office of Independent Counsel in the above-captioned matter is not currently appropriate under the standard set forth in 28 U.S.C. § 596(b)(2).

Per Curiam
For the Court:

MARK J. LANGER, *Clerk*

by

MARILYN R. SARGENT,
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIVISION FOR THE PURPOSE OF
APPOINTING INDEPENDENT COUNSELS

Filed: Dec 11 1998

Ethics in Government Act of 1978, as Amended

In re: Eli J. Segal Division No. 96–1

Before: SENTELLE, *Presiding,* BUTZNER and FAY, *Senior Circuit Judges.*

O R D E R

Upon consideration of the information submitted by the Independent Counsel in his October 15, 1998 letter to the Attorney General, on the Court's own motion it is hereby

ORDERED that the Office of Independent Counsel Curtis Emery von Kann is terminated, effective November 30, 1998.

For the Court:

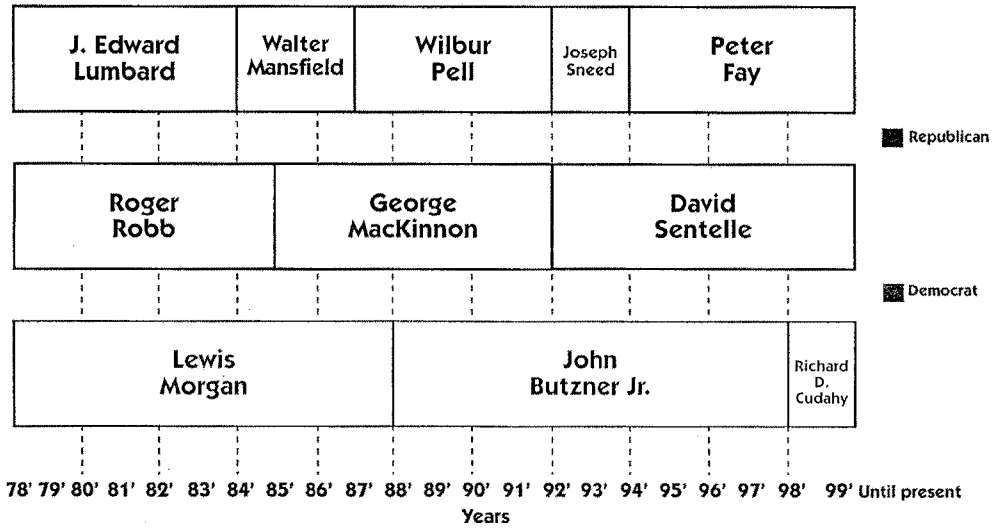
MARK J. LANGER, *Clerk*

by

MARILYN R. SARGENT,
Chief Deputy Clerk

WHO APPOINTS INDEPENDENT COUNSELS :

SPECIAL JUDGES & THEIR TERMS



THE INDEPENDENT COUNSEL ACT:

WHAT CONGRESS SHOULD CONSIDER IN 1999

By David C. Vladeck
Alan B. Morrison

Public Citizen Litigation Group
February 1999

Joan Claybrook, President

DAVID C. VLADECK is the Director of Public Citizen Litigation Group and Visiting Professor of Law at Georgetown University Law Center.

ALAN B. MORRISON is the founder and former Director of Public Citizen Litigation Group, and was principal counsel for Ralph Nader and three members of Congress in *Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973), which held that the firing of Watergate Special Prosecutor Archibald Cox was illegal.

Public Citizen participated in the legislative debate that led to the enactment of the Independent Counsel Act, and it has monitored the Act's implementation. Public Citizen's Congress Watch has also been actively involved in matters relating to governmental ethics, including the recent amendments to the Ethics in Government Act.

THE INDEPENDENT COUNSEL ACT:
WHAT CONGRESS SHOULD CONSIDER IN 1999

By David C. Vladeck
Alan B. Morrison

The Issue

The Independent Counsel Act, 28 U.S.C. 591-599, was enacted in the aftermath of the Watergate scandal, impeachment proceedings in Congress, and the resignation of Richard M. Nixon. The Act was a direct response to President Nixon's firing of Watergate Special Prosecutor Archibald Cox, who had insisted that Nixon comply with subpoenas after Nixon had unsuccessfully exhausted avenues of judicial review. Congress enacted the Act to ensure that future independent counsel, charged with investigating certain criminal conduct by high-level federal officials, were effectively insulated from White House and Department of Justice pressure.

The Independent Counsel Act is slated to expire on June 30, 1999, *see* 28 U.S.C. 599, and its scheduled expiration raises a number of profoundly important policy questions that should be explored now, as the political battle over the fate of the Act is being joined. There are three overarching questions:

(1) Whether some form of Independent Counsel Act should be reauthorized, or is it instead preferable to revert back to the pre-Act practice of having the Attorney General designate a Special Prosecutor or Counsel (typically a lawyer outside the Department of Justice, as was done in Watergate) or appoint

someone within the Department of Justice to head the prosecution team?[1];

(2) Assuming that the Act should be retained, what reforms are needed to avoid the abuses that have been seen with the Act in its current form?; and

(3) Assuming that Congress decides that the Act should not be retained, should Congress institutionalize an office within the Justice Department (new or existing) and assign it responsibility for investigations and prosecutions arising out of allegations of high-level corruption, and what measures should be imposed to insulate that Office from untoward interference by the Attorney General or President?

Our conclusion, which we set forth in more detail below, is that neither the label attached to the office nor its location within the Executive Branch resolves the question of how to insulate a prosecutor investigating credible allegations of criminal conduct by senior officials from political interference, while, at the same time, holding the prosecutor accountable and assuring a swift and competently conducted investigation. The question of how to strike the right balance, it seems to us, depends far more on the powers granted to the prosecutor, and the controls placed on his or her exercise of those powers, than anything else.

We also conclude that significant reforms are needed if the Act is to be reauthorized. We recognize that the Act succeeds in its mission of insulating the Independent Counsel from Executive Branch political interference. Indeed, many of the Act's proponents point to the formal separation between the Justice Department and the Office of Independent Counsel as the Act's chief virtue. *See* 28 U.S.C. 594(i) (providing that Independent Counsel "are separate from and independent of the Justice Department"). We recognize as well that many investigations and prosecutions

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1 For simplicity's sake, we shall refer to a Special Prosecutor or Counsel appointed by the Attorney General on an *ad hoc* basis to investigate allegations of wrongdoing by senior officials as a "Special Prosecutor."

under the Act have been performed with competence and little political controversy. But there is a growing concern, which we share, that the Act strikes the wrong balance because it fails to impose sufficient constraints on the Counsel, and therefore can be a breeding ground for prosecutorial abuse.

On the other hand, there are real problems in having Special Prosecutors appointed by, and therefore subservient to, the Attorney General. Proponents of maintaining a separate office for Independent Counsel, outside of the Justice Department, argue that it is essential to ensure that prosecutors investigating high-ranking officials are not subject to the control of the Attorney General. It is also argued, with considerable force, that separateness is the only way to truly guarantee independence. We do not disagree with the fundamental insight that any Special Prosecutor should not be a subordinate of the Attorney General. We also agree that, to the extent that the Attorney General is empowered to remove a Special Prosecutor, the removal power should be carefully circumscribed. These measures, of course, form the heart of the Independent Counsel Act as currently framed, and could easily be imported into legislation governing the Justice Department's appointment of Special Prosecutors or, for that matter, into legislation establishing an office within the Department of Justice designated to investigate charges of criminal conduct by senior officials. As discussed in more detail below, however, we do not agree with the proposition that the location of the office of a Special Prosecutor or Independent Counsel — inside or outside of the Department of Justice — is the crucial or determinative factor.[2]

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[2] The purpose of this paper is not to explore the history of the Independent Counsel Act, the experiences of the Counsel appointed under it, the experience with Special Prosecutors appointed prior to the Act, or outside of the Act, as President Carter did to investigate allegations against his brother. These issues have been addressed at length elsewhere. *See, e.g.,* Symposium, *The Independent Counsel Act: From Watergate to Whitewater and Beyond*, 86 Geo. L. J. 2011 (1998). Our more modest effort is to highlight those issues that we believe are central to the forthcoming congressional debate over whether the Act warrants reauthorization.

I.

Location of the Prosecutor's Office: Inside or Outside of the Justice Department?

The first question that must be explored is whether it makes sense to provide for an Independent Counsel outside the Department of Justice. After all, allegations of wrong-doing by high-ranking officials are not new, and historically such concerns were addressed by either the appointment of a Special Prosecutor by the Attorney General on an *ad hoc* basis or the designation of an in-house Department of Justice lawyer to spearhead the investigation and prosecution.[3]

At least until Watergate, there were strong arguments — rooted in both accountability and efficiency — that supported the practice of having the Attorney General appoint a Special Prosecutor to investigate charges of wrongdoing by high-level government officials. Even when an outside lawyer is appointed Special Prosecutor, he functions within Department of Justice channels, and hence is directly accountable to the Attorney General. Moreover, the practice is to have Special Prosecutors work closely with, and draw on the expertise and resources of, the Justice Department. This not only adds to the accountability of the Special Prosecutor, but also hedges against the possibility that a Prosecutor would engage in politically motivated conduct — for instance, conduct designed to embarrass the President politically. To take one illustration, it is hard to imagine that a Special Prosecutor would have compelled the First Lady to go to the courthouse (and run a gauntlet of reporters) to appear before a grand jury. While at times Special Prosecutors have been drawn

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3 For an excellent discussion of the historical practice prior to the enactment of the Independent Counsel Act, as well as an appraisal of the performance of Independent Counsels appointed under the Act, *see* Donald C. Smaltz, *The Independent Counsel: A View From Inside*, 86 Geo. L. J. 2307-25 (1998).

into political battles — and at times their independence was subject to legitimate question — the record suggests that they performed their responsibilities reasonably well. At least prior to Watergate, there was no shared consensus that the process was tainted or that some other means should be employed.

Watergate changed the landscape. Above all else, Watergate revealed the Achilles' heel in having a Special Prosecutor function as part of the Justice Department framework. As proponents of the Act rightly point out, the at least nominal subservience of the Special Prosecutor to the Attorney General raises the possibility that the Attorney General, or the President, would be in a position to exert political pressure to subvert the work of the Special Prosecutor or to punish him or her by removal.

In our view, however, the evidence that the pre-Act system is seriously flawed is somewhat overstated. After all, although President Nixon did seek to interfere with the work of Special Prosecutor Cox, and ultimately directed the Attorney General to fire him, even Nixon's discharge of Cox — the infamous "Saturday Night massacre" — did not derail the investigation significantly. Indeed, Cox's discharge was quickly followed by the appointment of Special Prosecutor Leon Jaworski and others, who capably concluded the investigation Cox started, forced Nixon out of office, and successfully prosecuted many of Nixon's staff. Moreover, the courts made it clear that Cox could have sought judicial intervention to preserve his position had he chosen to do so, because the Justice Department regulations under which he had been appointed limited his discharge to matters involving "extraordinary cause" — a standard that had not been met. And from a political standpoint, the act of discharging Cox played a key role in sealing Nixon's fate. Both Congress and the public recoiled from Cox's firing, and the President was rightly seen as engaging in an effort to obstruct justice. No President would follow Nixon's path unless, like Nixon, he was desperate to stave off inevitable impeachment. Thus, there

is something to the notion that we should let the Attorney General appoint Special Prosecutors when the need arises, and do no more.[4]

Moreover, the Attorney General's power to appoint and remove is not necessarily a significant barrier to the independence of a Special Prosecutor, as the vigorous and highly successful investigation into Watergate shows. Nor does the Independent Counsel Act wholly solve the problem of subservience to the Attorney General, since the Act itself assigns the Attorney General the responsibility for discharging an Independent Counsel for "good cause," or mental or physical incapacity. 28 U.S.C. 596(a). While the Attorney General's removal power may not constitute the sort of "here and now" subservience that makes Independent Counsel subject to day-to-day control by the Attorney General, it is certainly not an empty provision. It surely empowers the Attorney General to discharge an Independent Counsel who, for instance, consistently fails to abide by established Department policies, as the ICA requires. 28 U.S.C. 594(f). Thus, as we see it, the real value of the Independent Counsel Act is the physical and political separation of the Counsel from the Attorney General and the Executive Branch.

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[4] Existing statutes permit the Attorney General to appoint an outside Special Prosecutor, should she see the need to do so, as might be the case if charges were leveled against the President, the Vice-President, or the Attorney General. *See* 28 U.S.C. 515, 543. That course does not preclude active congressional involvement. The regulations governing Cox's office, although issued by the Justice Department, were negotiated with the Senate Judiciary Committee. It is true that the Senate Committee had substantial leverage because, at the time, it had pending before it the nomination of Elliot Richardson for Attorney General. But the Senate Judiciary Committee always has considerable political power, and there is every reason to believe that it could exert influence sufficient to insist that no Special Prosecutor be appointed without meaningful protections against arbitrary or politically-motivated removal.

There is, however, one benefit from a separate Independent Counsel investigation that is very difficult, if not impossible, to replicate for a Special Prosecutor or an in-house Department of Justice proceeding: When there is a need to clear a subject of wrongdoing — as was the case for Attorney General Edwin Meese or Labor Secretary Raymond Donovan — an outside investigation has far more credibility than one conducted by Justice Department insiders. The only way that an Attorney General could accomplish this in the absence of an Independent Counsel, appointed by the Special Division, would be for the Attorney General to appoint a truly independent prosecutor (a member of the opposing political party, for example), a power she currently possesses. *See* 28 U.S.C. 515, 543. But even with that power, an outside office would plainly be preferable.

In the end, the question whether an Independent Counsel statute should be re-enacted is one requiring a delicate balancing of competing interests. On the one hand, the Act has the indisputable virtue of insulating an Independent Counsel as much as possible from the supervision and control of the Executive Branch, of which he is nonetheless a part. On the other hand, the Act suffers from the indisputable vice of handing great power to an individual who, in marked contrast to other government servants, functions almost autonomously.

We leave it to others to resolve this balancing. We offer below first our thoughts on the considerations Congress should review in evaluating how to prevent abuses under the current Act, and then suggest how Congress should proceed if it decides not to reauthorize the Act. We urge Congress in the strongest terms, however, not to just let the Act expire, but to confront the important issues laid out in this memorandum and elsewhere and either reauthorize an Act with the sort of reforms we suggest, or strengthen the Justice Department's authority to handle public corruption cases. This issue is too important for Congress just to punt.

II.

Recommended Amendments to the Independent Counsel Act

Should Congress decide that it is preferable to retain the current system of appointing a counsel independent of the Department of Justice, then the question becomes, what should be done to improve the Independent Counsel Act? In addressing that issue, it will be crucial to put the question into perspective by inquiring whether the law worked tolerably well until the Whitewater investigation. After all, many Independent Counsel have done an effective job in conducting thorough investigations, exercising reasonable prosecutorial discretion, deciding not to proceed with prosecutions where the circumstances did not warrant action, and bringing wrongdoers to justice. Independent Counsel Starr's investigation into Whitewater, however, has suggested structural flaws in the statute that should be rectified by Congress, if it decides to retain the Act.

1. Who Should Serve? One problem stems from the lack of specified qualifications for the job. Nothing in the Independent Counsel Act provides any meaningful guidance about the qualifications necessary to perform as Independent Counsel. Indeed, as currently written, the Act simply directs the Special Division to "appoint as independent counsel an individual who has *appropriate* experience." *See* 28 U.S.C. 593(b)(2) (emphasis added).[5] Starr's tenure illustrates at least *four* flaws in the appointment process that should be rectified.

First is the conflict of interest problem. It was at best unseemly for Starr to represent private clients, like General Motors and major tobacco companies — many of which had

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5 The Special Division is a panel of court of appeals judges selected by the Chief Justice of the United States to exercise responsibility under the Independent Counsel Act. Although the Special Division is housed along with and is nominally part of the United States Court of Appeals for the District of Columbia Circuit, it functions as a completely separate court. 28 U.S.C. 49. *See id.* at 7-8.

business before the Executive Branch — at the same time he was investigating the President. There ought to be an iron-clad requirement that no one serving as an Independent Counsel should be permitted to engage in any private work involving the United States during the time in which he or she is serving as an Independent Counsel. Consideration must also be given to how far the disqualification should extend — just to the Counsel? To the Counsel's law firm?

The second problem relates to Starr performing his job as a part-time prosecutor and the delays that were occasioned by Starr's inability or unwillingness to devote his full attention to the work of the Counsel's office. We recognize that, for some investigations involving less senior officials, there may be no need for a full-time Independent Counsel. But when the President or the Vice President is or may be the target of the inquiry, the Independent Counsel should assume his duties full-time and shed all private clients. At the very least, in every case, the Attorney General should make a recommendation to the Special Division as to whether the appointment should be on a full-time basis, and the Special Division should have the power to require full-time status initially, or as the investigation develops. Although the Special Division should not generally become enmeshed in the supervision of the Independent Counsel's work, this limited role does not appear to violate separation of powers principles or to constitute an inappropriate exercise of judicial authority. In any event, this course is preferable to the Attorney General having the right to decide whether the Counsel should serve full or part-time.

Third, nothing in the law requires an Independent Counsel to have relevant experience in criminal law. This appears to be a critical oversight. After all, service as an Independent Counsel should not entail on-the-job training. Thus, we urge that the statute explicitly provide that significant experience in criminal law is a prerequisite to appointment.

Fourth, persons clearly identified with a political party — such as individuals having previously served in elected

office with a party affiliation, or as a senior appointee in the Administration — should be disqualified from service as an Independent Counsel. We recognize that an across-the-board disqualification would be problematic. But we see no reason why the Act could not provide that, in order to be eligible for service, a prospective Counsel could not have served in elective office, or as a Presidential appointee, in the recent past (perhaps five years). This requirement would significantly reduce the possibility of partisanship.

While this thought is tentative, one solution might be to have a standing list of pre-screened lawyers, compiled with the assistance of the Department of Justice, from which the Special Division could make a selection. Not only would this system depoliticize the selection process, but it could guarantee that appointees have actual criminal justice experience, be willing to work full-time, and be willing to jettison private clients.

2. Appointment to the Special Division. Another problem relates to the body charged with the responsibility of appointing Independent Counsel. Under the law, it is the Attorney General who is responsible for conducting a preliminary investigation to see whether the appointment of an Independent Counsel may be warranted. In making this inquiry, there are strict limitations on the ability of the Attorney General to gather information (no grand juries, no subpoenas, no grants of immunity, etc.). 28 U.S.C. 592(a)(2). The denial of compulsory process requires the Attorney General, as a practical matter, to rely on the voluntary cooperation of witnesses and document custodians. Nor may the Attorney General base a decision not to request an Independent Counsel on "lack of criminal intent," absent "clear and convincing evidence" on that point. *Id.* 592(a)(2)(B)(11). Nonetheless, the Attorney General is required (the Act says she "shall apply") to seek the appointment of an Independent Counsel if "there are reasonable grounds to believe" that further investigation is warranted, although the decision whether to refer an investigation to the Special Division is not subject to judicial review.

The problem comes in two places: *First*, the Court that appoints and supervises Independent Counsel is a Special Divi-

-sion of the U.S. Court of Appeals for the District of Columbia Circuit. 28 U.S.C. 49. Judges are selected to serve on this Court by the Chief Justice of the United States for two-year terms. There is no bar to their reappointment, and the practice has been to allow members of this panel to serve in virtual perpetuity. Giving the Chief Justice the right to select the judges can result in a panel dominated by judges of one particular political orientation, as happened with the panel that appointed Starr.

Several measures should be taken to ensure that the Special Division is free from political bias. To begin with, judges should be selected at random from all currently active court of appeals judges with at least three years tenure. Next, the terms of the Judges on the Special Division should be limited to three years. Moreover, we would propose that political balance on the Division be mandated, by requiring that no more than two judges on the panel have similar party affiliations. Appointments should be made by unanimous votes of the panel. Finally, as noted above, the Special Division's appointment of Independent Counsel should be made from a pre-existing, pre-screened list of candidates.

Another complication is that the Chief Justice also presides over impeachment trials in the Senate, if it comes to that. Thus, the same Chief Justice who appointed the Special Division, which in turn appointed the Independent Counsel, presides over the impeachment trial. Some may see this as too close a relationship, which would further counsel in favor of reducing the Chief Justice's role in the appointment of the judges who serve on the Special Division through the means addressed above.[6]

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6 Another suggestion that should be explored is whether the statute ought to explicitly forbid judges of the Special Division from having any *ex parte* discussions with members of Congress or their staffs concerning the appointment of, and all matters relating to, Independent Counsel. This proposal responds to press reports that Judge David Sentelle, the Chief Judge of the Special Division, had lunch with Senators Lauch Faircloth and Jesse Helms immediately prior to the removal of Robert Fiske and the appointment of Kenneth Starr to replace him.

Second, the Special Division also has important supervisory responsibilities over Independent Counsel. Not only is the court empowered to terminate the office of Independent Counsel when it believes that an investigation has run its course, but, perhaps more importantly, the Court is also empowered, upon the request of the Attorney General or that of the Independent Counsel, to define and expand the scope of the Independent Counsel's jurisdiction.

Repeated requests for expanded grants of jurisdictions were a central problem with Starr's investigation. On several occasions, Starr asked the Attorney General to approve expansions in the scope of his investigation. If the Attorney General's approval was not forthcoming within thirty days, Starr would have been able under existing law to take his requests to the Special Division. 28 U.S.C. 593(c)(2)(C). Through this process the Whitewater investigation evolved into one concerning the White House's travel office, the death of Vincent Foster, the use of FBI files, and then Paula Jones and Monica Lewinsky — quite a remarkable trajectory. Given the political sensitivity of the issue of referrals to the Attorney General and the relatively low threshold for referrals (a point discussed below), there is a concern that the Attorney General had little practical ability to reject Starr's requests. Thus, even though there are finite constitutional limits on the supervisory role of the Special Division, it may be that the Division is the only institution that can exercise meaningful control on an Independent Counsel dead-set on expanding the scope of an inquiry. This makes it doubly important to have politically impartial judges on the panel.

3. Modify or Eliminate the List of "Covered Persons." As currently written, the Independent Counsel Act applies to a broad array of senior government officials. *See* 28 U.S.C. 591(b) (listing covered officials). Obviously, the frequency of appointments under the Act is at least partially dependent on the number of officials covered by the Act. One question is whether the current list of covered persons should be continued. One idea would be to make

the statute apply only to the President, the Vice-President, and the Attorney General, and to give the Attorney General the discretion to invoke it for other senior officials. This approach would mitigate the other difficulties with the Act, and has been advocated by certain bar groups.

4. How Should the Independent Counsel be Held Accountable? This is the most vexing problem in reforming the Act. At root, the problem is both a pragmatic and constitutional one, because there is no clear-cut answer to the question of "what individual or institution in the government should hold an Independent Counsel accountable?" For obvious reasons, the statute must insulate the Independent Counsel from any control or supervision by the President. Nor can the courts direct or supervise the work of Independent Counsel. As the Supreme Court explained in *Morrison v. Olson*, 487 U.S. 654 (1988), although it is constitutionally permissible for the courts to appoint Independent Counsel, Counsel are nonetheless part of the Executive Branch of government, and it would be too great an encroachment on Executive Branch prerogatives for the courts to assume greater supervisory power over the work of Independent Counsel than is already assigned to them under the Act. The same separation of powers problem precludes active supervision of the work of the Independent Counsel by Congress, *see Bowsher v. Synar*, 478 U.S. 714 (1986). And making the Independent Counsel accountable to the Attorney General is fraught with complexities and is ultimately self-defeating, since the professed goal of the Act is to ensure that Independent Counsel "are separate from and independent of the Justice Department." 28 U.S.C. 594(i).

As currently written, the Act addresses the accountability problem by placing a number of constraints on the Independent Counsel. First, the Department of Justice is directed to provide assistance to the Counsel, and the Counsel is supposed to comply with established Justice Department policies relating to the enforcement of the criminal laws. Second, the Counsel is required to cooperate

with the appropriate congressional oversight committees, and make an annual report to Congress.[7] Third, the Attorney General can remove an Independent Counsel for cause or mental or physical disability, and the Special Division may terminate an investigation where it believes that the investigation should be concluded. In our view, these measures are too weak and diffuse to impose any meaningful limitation on the day-to-day operations of an Independent Counsel.

The most substantial constraint on the activities of the Independent Counsel is the determination as to the scope of the investigation, which is at least preliminarily set jointly by the Attorney General and the Special Division. As we discuss below, one important reform that needs to be explored is whether a stricter standard should be used for initial and subsequent referrals and to evaluate requests by Independent Counsel to expand their jurisdiction. The Clinton case makes this point well. Because of the low threshold for expansions of jurisdiction, and the requirement that the Attorney General defer to the Independent Counsel's judgment, it is hardly surprising that requests by Starr to expand his investigation were routinely approved, even though the connection between the new matters and Whitewater seemed ephemeral or non-existent.

5. What Should be the Legal Standard for Referrals? As just noted, the Act sets quite a low legal standard for both initial and subsequent referrals. This reflects the statute's strong preference for having the Independent Counsel conduct investigations, even where there is only scant evidence of possible wrongdoing. The Attorney General's role is first to conduct a preliminary investigation to see whether a covered person may have violated any federal criminal law, excluding only minor misdemeanors or other non-serious infractions. If the Attorney General finds that there is "specific" information

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7 The Act also requires the Attorney General to provide an accounting to Congress annually on the "amounts paid during that fiscal year for expenses of investigations and prosecutions by independent counsel." 28 U.S.C. 593(d)(2).

from a "credible source" suggesting wrongdoing, then she must open a formal preliminary investigation that must be completed in 90 days to see whether there are "reasonable grounds to believe that further investigation is warranted." If so, she must ask the Special Division to appoint an Independent Counsel. Not only is this a fairly low threshold for referral, but it is also somewhat of a straightjacket for the Attorney General. As mentioned above, she cannot use any of the traditional investigatory techniques such as compulsory process to conduct her own inquiry into the likelihood of a violation, but must instead rely on the voluntary cooperation of witnesses and document-holders. Nor may she base her decisions on lack of criminal intent, unless the evidence on that point is clear and convincing. Handcuffed in these ways, the Attorney General is very restricted in the scope of the preliminary investigation she can make. As a result, more cases than should be are referred to the Special Division for the appointment of an Independent Counsel.

There are really two questions regarding referrals that should be laid bare and addressed separately. First, there is the question of what standards should be set for initial referrals. And second, there is the question of what showing should be required to expand upon the jurisdiction conferred on an Independent Counsel. We address these questions in turn.

A. Initial Referrals. There are several modifications to the standard governing initial referrals that would make the referral process more rational and reduce, albeit modestly, the number of cases available for referral.

(i) We would propose that the Attorney General be given broader investigatory power (but probably not the authority to confer immunity, which could well hamper the Independent Counsel's subsequent investigation) in screening cases. We recognize that the hurdle for referrals should not be too high, since the whole point of the Act is to divest the Attorney General of substantial authority. As the law now stands, the Attorney General is essentially barred from making

any independent investigation into the facts — including potentially pivotal questions of criminal intent. As a result of these strictures, truly minor or collateral matters are referred for investigation by Independent Counsel, even if they would never be prosecuted by the Justice Department. That trivializes the law and should be rectified.

(ii) Consideration should be given to a statutory presumption that allegations that also amount to state law crimes should first be evaluated by state law enforcement officials. For example, there is no reason why state prosecutors could not have considered whether the allegations of narcotics use against former presidential advisor Hamilton Jordan or the allegations of racketeering against former Labor Secretary Raymond Donovan for activities that allegedly occurred before he took office should have been prosecuted. The statute ought to embody the presumption that matters like these — allegations that, if proven, would plainly constitute offenses under state as well as federal law — will not give rise to the appointment of an Independent Counsel unless it is clear that there has been a declination by the appropriate state officials. The Attorney General would then take into account the declination in determining whether there are in fact reasonable grounds for further investigation.

(iii) This presumption should be doubly strong — and perhaps irrebuttable — where the alleged conduct occurred before the official took office. Consider the allegations against Webster Hubbell. Stealing from one's clients is undoubtedly a crime even under Arkansas law. Was there any need to have an Independent Counsel handle that investigation, particularly before the Arkansas law enforcement officials had considered the matter and formally declined to pursue it?

(iv) Next, ongoing crimes *not* related to the allegations contained in the referral, such as the charges of perjury in the Paula Jones case, should not be referred to

an Independent Counsel.[8] Aside from the practical problems of making referrals on a short timetable — problems that have been evident in the Clinton matter — and the need to continually alter and update the jurisdiction of the Independent Counsel, there is a structural problem of having an Independent Counsel involved in what is, at essence, the law enforcement side of the investigation. Independent Counsel should not be cops; they should investigate crimes that allegedly have been committed. Appointing them to investigate ongoing crimes, unrelated to the matter they have been asked to investigate, only blurs the line between those roles.

(v) There is no reason to appoint Independent Counsel to investigate the conduct of *former* federal officials, regardless of rank. For example, an Independent Counsel was appointed to investigate the conduct of Agriculture Secretary Michael Espy after he left office. It is difficult to see why the Justice Department could not have handled that investigation. At least the Justice Department ought to be given the discretion to handle investigations of former covered officials. However, conduct prior to entering federal office should not be immune from Independent Counsel investigation where the offense relates directly to federal service. Thus, for instance, allegations of election fraud or other election-related offenses, or allegations of perjury or other crimes in order to secure confirmation, ought to be within the Counsel's purview.

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8 As the Act itself and the case law interpreting it make clear, there is no question that the Independent Counsel is authorized to pursue "all matters related to" the subject matter of the referral or that "may arise out of the investigation or prosecution of the matter with respect to which the Attorney General's request was made, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses." 28 U.S.C. 593(b)(3). *See also United States v. Blakney,* No. 98-3036 (D.C. Cir., Jan. 26, 1999), slip op. at 7-10; *United States v. Hubbell,* No. 98-3080 (D.C. Cir., Jan. 26, 1999), slip op. at 10-20. We do not advocate a change in this standard. What we are concerned about here is the practice of referring matters *not* related to or arising out of the initial referral to an Independent Counsel solely because they may pertain to the same target.

B. Independent Counsel Requests for Expanded Jurisdiction or Additional Referrals. It is critically important that Congress address and set a high threshold for referrals of subsequent matters to Independent Counsel who have already been appointed or expansions of jurisdiction. As currently written, the Act simply incorporates the standard for initial referrals to Independent Counsel to assess requests by an Independent Counsel to expand his jurisdiction. *See* 28 U.S.C. 592(c) (initial referrals), 593(c) (expansions of jurisdiction).[9] One reason why sequential referrals are a real problem is that, no matter how limited the Attorney General's discretion is with regard to initial referrals, it is, as a practical matter, even more circumscribed with regard to subsequent ones. The Independent Counsel has far greater access to the facts than does the Attorney General, and this superior position gives the Independent Counsel enormous leverage when requesting that the scope of an investigation be expanded. Compounding the problem, the Act directs the Attorney General to "give great weight" to the Independent Counsel's request. And should the Attorney General fail to agree with a request within thirty days, the Independent Counsel can seek expanded jurisdiction by going to the Special Division, which is in an even worse position to make judgments about whether it is appropriate to expand an investigation.

(i) One way of raising the referral bar would be to explicitly deal with the question of sequential referrals in the Act and to provide:

1. That additional referrals should be governed by the same substantive standard that applies to initial referrals; namely that there must be reasonable grounds to believe that further investigation is warranted; *and also*

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9 The law regarding expansions of jurisdictions and additional referrals is hardly a model of clarity, as a pair of recent D.C. Circuit cases make clear. *United States v. Blakney,* No. 98- 3036 (D.C. Cir., Jan. 26, 1999); *United States v. Hubbell*, No. 98-3080 (D.C. Cir., Jan. 26, 1999).

2. That no subsequent referral shall be made unless the alleged misconduct arises from same transaction or occurrence or involves a common nucleus of operative facts as the initial referral.

Put more bluntly, the aim of this provision would be to reverse the existing presumption, under which virtually any allegations involving the same target are referred to an existing Independent Counsel. Under the standard we advocate, expansions of jurisdiction would be made only if there are compelling reasons rooted in efficiency to do so, and if there was a congruence or overlap between the alleged criminal violations.

(ii) Because many of the materials relating to requests by Independent Counsel for expansions of jurisdiction are not available to the public, it is difficult to know what quantum of information is required by the Special Division when it evaluates additional referral requests. We believe that a heavy burden should be placed on an Independent Counsel who is seeking to expand his jurisdiction to demonstrate that both factors mentioned above are satisfied and that the additional referral would not unduly protract the investigation.

(iii) We see no reason why the Attorney General should be compelled to give "great weight" to the Independent Counsel's recommendation when it comes to expanding his jurisdiction. The Attorney General should be free to reach her own determination, even if it is at odds with that of the Independent Counsel.

6. Should Some Limits be Placed on the Time and Resources Available to the Independent Counsel? Making unlimited resources available to Independent Counsel skews the investigatory process considerably, since in the real world prosecutors make decisions regarding how hard to press an investigation in part on the basis of available resources. The present statute requires an Independent Counsel to "conduct all activities with due regard for expense," and incur only expenses that are reasonable. But these are just precatory

-cautions; there is no real limit on the time and resources an Independent Counsel can spend trying to find a crime by the target to prosecute. Nor does the Act set any time limit on the duration of the investigation. As we have seen with the Clinton investigation, the ability of a Counsel to proceed at a leisurely pace is a powerful and coercive tool, and can have a debilitating effect on the officials under investigation.

Some have suggested that the appropriate response to these concerns is to set time and expenditure limits in the statute for future Independent Counsel to follow. That approach seems artificial and inflexible. One tentative idea is to have the Attorney General, at the time of the referral, make estimates about the duration and cost of the investigation that would be transmitted to the Special Division, which would set some preliminary parameters within which it expected the Counsel to act. The drawback of this approach, of course, is that the Attorney General may not fully grasp the complexity of the undertaking given the bare-bones nature of her investigation. Another approach would be to require the Court to direct the Independent Counsel, within ninety days of the referral, to set a preliminary budget and tentative timetable. While neither of these predictions would be iron-clad, the burden would fall on the Independent Counsel to justify, and seek court approval for, any deviation. There may well be other ways of placing meaningful discipline on the Independent Counsel, and this is an area that warrants further thought.

7. Clarify the Role of the Independent Counsel in Potential Impeachment Proceedings. In its current form, the Act fails to address critical questions about the role of the Independent Counsel in matters that could be the subject of impeachment inquiries, especially those concerning the President. All the Act now says is that an Independent Counsel "shall advise the House of Representatives of any substantial and credible information . . . that may constitute grounds for impeachment." 28 U.S.C.

595(c). The Act neither says when the Independent Counsel should report to Congress nor what form the report should take. Many have criticized Independent Counsel Starr for waiting as long as he did to refer the Clinton matter to the House of Representatives, and some have suggested that it was inappropriate for Starr to compel the President's Grand Jury appearance before he had referred the inquiry to the House. Others have contended that the Starr Report was too accusatory in tone, and provided far more than a recitation of the "information" available to Starr that might "constitute grounds for impeachment." And Congress has given no guidance about whether the report should be made public, and, if so, when and under what conditions to safeguard the privacy interests of those named in the report.

We acknowledge that the question of the timing of the referral is a difficult one, with legitimate arguments to be made on both sides. Nonetheless, Congress should be quite explicit about the role that it wants Independent Counsel to play in possible impeachment inquiries. Congress should also address what it wants in the way of a report where impeachment is a possibility; does it want the sort of non-adversarial, just-the-facts recitation that was supplied by the Watergate Special Prosecution Force, or does it prefer the more accusatory and argumentative report furnished by Starr that reads like a prosecution brief?

8. Congress Should Clarify Its Intent Regarding the Final Reports It Wants an Independent Counsel to File. We have noted above the issues surrounding the impeachment- related reports, but the law now requires final reports in *all* cases, whether there have been indictments or not. There are serious questions about the value of such reports, their appropriateness (given the sensitivity and privacy interests inherent in the subject-matter), and their costs. We take no position on the situations in which such reports are appropriate, but Congress should focus on this issue if it decides to retain a reporting requirement. Thus, in cases where the Independent Counsel decides not to

prosecute, some report may be essential.[10] But in other cases, like Iran-Contra, serious questions were raised about the highly-detailed nature and accusatory tone of the report. And undoubtedly there will be a sharp division of opinion on the nature of Starr's final report to Congress.

9. The Act Should Provide Indemnification to Federal Officials Involved in the Investigation. The Act should also be modified to provide indemnification or "insurance" for federal officials who, through no fault of their own, are caught up in these investigations and incur frighteningly high financial costs in hiring lawyers to advise them. Most of President Clinton's closest advisors have been accused of no misdeed, and have not been alleged to have participated in any coverup or untoward activity. Yet many have had to hire lawyers and bear monumental legal fees. Part of the problem stems from the very aggressive use of grand jury proceedings by Starr and his staff; part of the problem is inherent in any criminal investigation. Although this problem would arise even if the investigatory job reverted to the Justice Department, it seems to be more acute where an autonomous Independent Counsel handles the investigation. Some provision — such as indemnification or low cost insurance — needs to be made to blunt the financial hardship on public servants. It is simply unacceptable to have the best and brightest be deterred from public service because of the potentially crushing financial blow of being caught up in the grips of an Independent Counsel investigation.[11]

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10 A report would presumably be necessary to vindicate the reputation of the target of the investigation, whose reputation has been tarred by the appointment of an Independent Counsel to investigate his conduct. Under these circumstances, fairness seems to dictate the issuance of a report clearing the target of criminal wrongdoing.

11 The Act recognizes elsewhere the financial hardships that are imposed on "subjects" of Independent Counsel investigations who are not indicted and would not have been investigated in the absence of the Act, and allows them to shift the cost of their attorneys' fees to the government. 28 U.S.C. 593(f)(1). As a result, unindicted targets of Independent Counsel investigations are better off as a financial matter than their non-target colleagues who expend substantial sums on legal representation without any chance of recompense. This makes no sense and should be corrected.

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In our view, no single amendment will eliminate all of the problems with the Independent Counsel Act, nor will the failure to adopt any one of the amendments proposed above guarantee continued problems. However, the enactment of these or similar proposals should alleviate, if not eliminate, the most serious problems that have been encountered under the Act.

III.

Statutory Insulation of Justice Department Prosecutors

If Congress decides not to reauthorize the Independent Counsel Act, it must then face the question of what, if anything, should be put in its place. As we outline below, there are two basic options that Congress should consider, although they are not mutually exclusive. First, Congress can establish an office within the Justice Department to investigate and prosecute charges of criminal conduct by high-level government officials. It Congress chooses this option, then its focus should be on how to insulate career government prosecutors within the Justice Department from political interference by the President and the Attorney General.

Second, Congress could opt to revert to the pre-Watergate practice of having the Attorney General appoint, on an *ad hoc* basis, outside lawyers to serve as Special Prosecutors. Appointment decisions would rest solely with the Attorney General, and neither Congress nor the courts would be empowered to overturn a decision by the Attorney General. Since statutory authority for the appointment of such prosecutors already exists, this approach does not even require new legislation. Nonetheless, if Congress decides to proceed down this path, we urge Congress to restrict the Attorney General's removal power with regard to such appointees, and to consider whether other measures — such as rules prohibiting Executive Branch contacts with prosecutors while investigations are pending — should be imposed by statute as well.

A. Establishment of an Office Within the Justice Department. One approach to institutionalizing and strengthening the ability of the Justice Department to handle cases of high level corruption would be for Congress to establish an independent office in the Justice Department and assign it the job of investigating and prosecuting charges of criminal conduct by senior government officials. Several measures would have to be taken, however, to ensure adequate political insulation for the career Justice Department prosecutors assigned to this office.

First and foremost, the head of such an office should be appointed by the President with the advice and consent of the Senate for a term of years (such as seven) and removable only for cause personally by the Attorney General. *cf.* 28 U.S.C. 596(a)(1) (empowering Attorney General to remove independent counsel only "for good cause," "physical or mental disability," or "any other condition that substantially impairs the performance" of the Counsel).[12]

Next, Congress should consider enacting restrictions to prevent senior Executive Branch officials from having contact with prosecutors in this office while an investigation is pending. During the Watergate investigation, restrictions such as these were imposed by Justice Department regulation. There is no reason why Congress should not weigh in on the value of these protections and, if deemed appropriate, enact them into law.

In order for such an office to operate effectively, Congress would have to resolve four additional overriding issues, apart from protecting the office head from politi-

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12 Congress could assign these responsibilities to the Office of Professional Responsibility, which already has responsibility to enforce the Ethics in Government Act. The head of that office is already subject to removal protection, although he is currently appointed by the Attorney General,'not the President. Congress could also assign these responsibilities to the Office of Public Integrity within the Criminal Division, since it handles public corruption cases.

-cally-motivated removal. *First,* Congress would have to mandate that all allegations of wrongdoing by covered officials be referred to that office, with no filter of any kind being applied within the Department of Justice. This referral system would have to be categorical and automatic. And it should be made clear that the office does not need the approval of the Attorney General to obtain an indictment and proceed with a prosecution. *Second,* Congress would have to create a mechanism to allow the office to seek immediate judicial review of privilege claims made by the White House and other Executive Branch entities. *Third,* Congress would have to empower the office to forward matters relating to impeachment directly to Congress, without control of any sort by the Attorney General or the President. And *finally,* Congress should create a special budget line for that office, so that the Attorney General or the Office of Management and Budget would not be able to use fiscal measures to place pressure on the office.

There are significant merits to this approach. It goes a long way toward eliminating the political element of investigations of high-ranking officials; it ensures that investigations will be conducted by experienced career prosecutors who presumably have no axe to grind; it allows prosecutors to take full advantage of the Justice Department's resources and expertise; and it avoids the "tunnel vision" problem of having an Independent Counsel appointed to investigate a single target. Above all else, it sends a message that Congress, and the American people, have faith in the ability of the Justice Department to investigate charges of criminal conduct by high-level officials professionally and impartially. On the other hand, this proposal suffers from the one flaw many see as fatal, namely that the Counsel would not be "separate from and independent of the Justice Department." *See* 28 U.S.C. 594(i).

B. Revert to the Practice of Ad Hoc Appointments of Special Prosecutors by the Attorney General. Assuming that the institutional Justice Department model is not acceptable to Congress, then the remaining alternative

would be to return to the pre-Watergate practice of *ad hoc* appointments of Special Prosecutors by the Attorney General. Under this system, which is authorized by existing law, the Attorney General has essentially unreviewable power to appoint Special Prosecutors, and to define and control the exercise of their power. *See* 28 U.S.C. 515, 543 (empowering Attorney General to appoint special attorneys on an *ad hoc* basis). There is nothing inherently wrong with this option. As noted earlier, this was the approach that was followed prior to and during Watergate, and although it is imperfect, it may not be any more imperfect than the other approaches outlined in this memorandum.

We believe that, even if Congress opts for this approach, it should not leave the question of insulating Special Prosecutors from political interference in the hands of the Attorney General. To be sure, the Attorney General could promulgate regulations that restrict her removal authority and prohibit contacts by senior Executive Branch staff with Special Prosecutors and their assistants. The Justice Department promulgated rules that did essentially that during Watergate. But in our view it would be far preferable for Congress to impose these controls by statute. Indeed, each of the measures outlined in Part III.A. above could be applied with equal benefit here, and we urge Congress to carefully consider doing precisely that if it chooses this approach.

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As we said at the outset, the debate over the reauthorization of the Independent Counsel Act raises difficult questions about balancing independence and accountability. While we make no recommendation as to whether the route of reauthorization is superior to other approaches, there is one point on which we take a strong position: Congress should act one way or another to address these serious issues. Congress should legislate either to reform the Independent Counsel Act to make

Independent Counsel more accountable, or to establish procedures within Justice Department channels to ensure that any prosecutor charged with investigating and prosecuting criminal conduct by senior government officials can do so without fear of political interference or reprisal.[13]

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13 This memorandum was subject to modest, non-substantive revisions on February 22, 1999.

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