STATEMENT OF NATHAN LEWIN
BEFORE THE SENATE COMMITTEE
ON GOVERNMENTAL AFFAIRS
ON THE REAUTHORIZATION
OF THE INDEPENDENT COUNSEL ACT

MARCH 3, 1999

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 <u>can</u> 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 United States 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 United States 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 United States 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.

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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 defined, 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).

(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 United States Senate shall provide to the Director of the Administrative Office of the United States 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 United States 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 United States 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 United States 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 United States 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 six months after the date of his or her appointment and for each six-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.