

STATEMENT
OF
THEODORE B. OLSON
BEFORE THE
COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
CONCERNING
THE
INDEPENDENT COUNSEL STATUTE
(28 U.S.C. § 591, *ET SEQ.*)

March 3, 1999

STATEMENT OF THEODORE B. OLSON

CHAIRMAN THOMPSON AND MEMBERS OF THE COMMITTEE ON GOVERNMENTAL AFFAIRS OF THE UNITED STATES 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 UNITED STATES 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 UNITED STATES 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 UNITED STATES 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 PERSONS IS SELECTED FOR INVESTIGATION AND THE PROSECUTOR THEN LOOKS FOR AN OFFENSE." YET THAT IS ESSENTIALLY HOW THE INDEPENDENT COUNSEL LAW OPERATES IN PRACTICE.

1. 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.

1. 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.

1. THE INDEPENDENT COUNSEL'S JURISDICTION IS GENERALLY DEFINED BY THE APPOINTING COURT IN BROAD TERMS, WITH AN ADDED PROVISIO 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.

1. 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.

2. 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.
3. 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.
4. 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 UNITED STATES 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.