

**STATEMENT OF HENRY RUTH
BEFORE COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE - MARCH 3, 1999
RE: REAUTHORIZATION OF INDEPENDENT COUNSEL ACT**

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 twenty-eight 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 three-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, eleven of the twenty independent counsels have brought no criminal charges and ten have completed their investigations in eighteen months or less. Fifteen of the twenty offices have completed their mission in less than four years. In contrast, although most of the Watergate prosecutions were brought within three years of the June 1972 break-in at Democrat headquarters, the Watergate prosecution function served by the United States Attorney's office and later the Watergate Special Prosecution Force endured for about five years.

In addition, of the 150 to 155 million dollars expended by the twenty counsel offices created under the 1978 Act, four of the offices have spent over 85% of the total monies used for these purposes. In other words, sixteen investigations have expended an average of one million dollars each and the remaining four have expended over 135 million dollars. 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 \$6.00 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 seven-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 question 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 one 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 United States 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 six 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 ten and not more than twenty-five 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 one 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 three 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.

20 Investigations:

Jordan - 7 months

Kraft - 7 months

Donovan - 10 months

Meese - 6 months

Olsen - 3 years (incl. Supreme Court review)

Deaver - 3.25 years (incl. appeals)

Nofziger - 18 months (incl. appeals)

Under seal (4): 5 months, 15 months, 4 months, unknown Ron Brown - 16 months

Passport Office - 3.5 years

Espy - 4.25 years

HUD - 9 years

Iran-Contra - 6.75 years

ONGOING:

Whitewater - 5 years plus

Cisneros - 3.5 years plus

Alexis Herman - 11 months plus

Bruce Babbitt - 1 year plus

Summary: Of completed investigations (16):

10 under 18 months

3 under 4 years

3 over 4 years

Of incompleting investigations (4):

2 under 18 months

2 will go over 4 years

NO CHARGES FILED:

(completed) Jordan, Kraft, Donovan, Meese, Olsen, Brown,

Sealed ones (4), Passport

(uncompleted Herman, Babbitt)

CHARGES FILED:

(completed) Deaver, Nofziger, Iran-Contra, HUD, Espy

(uncompleted) Whitewater, Cisneros,

SUMMARY: 11 completed, no charges

2 uncompleted, no charges

5 completed, charges

2 uncompleted, charges

EXPENSES:

TOTAL: 150-155 million through March 1998

4 highest: Whitewater: 39.6 million

Iran-Contra: 47.9 million

HUD: 28 million

Espy: 17.5 million

TOTAL OF 4 HIGHEST: 133 million through March 1998