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The Independent Counsel Process: Is It Broken and How Should It Be Fixed?

The Independent Counsel Process: Is It Broken and How Should It Be Fixed?

A Five-Panel Program Presented at the
Opening Session of the

SIXTY-SEVENTH JUDICIAL CONFERENCE OF THE FOURTH CIRCUIT

The Homestead
Hot Springs, Virginia
Friday, June 27, 1997

The Editors of the Washington and Lee Law Review are pleased to publish this panel discussion held at the Fourth Circuit's Sixty-Seventh Judicial Conference. The Washington and Lee University School of Law has always enjoyed a close relationship with the Fourth Circuit. Many notable W&L alumni have served in the Fourth Circuit, including Judge Hoffman, to whom we dedicate this issue, and Justice Powell, who sat in senior status with the Fourth Circuit for many years after his retirement from the Supreme Court. For twenty-five years, the Law Review published an annual review of cases from the Circuit and will soon publish biographical profiles of the Fourth Circuit judges from the last fifty years. Last fall, a Fourth Circuit panel held oral arguments in the Moot Court Room at the Washington and Lee University Law School – among the few times the Circuit has held oral arguments at a law school. The Editorial Board is honored that the Fourth Circuit chose the Washington and Lee Law Review to publish its in-depth discussion of the Independent Counsel statute.

The Judicial Conference presented an interesting investigation into the Independent Counsel statute, its faults and failings, and suggestions for changes. The discussion included an impressive panel of learned judges, attorneys, and special prosecutors who have been intimately involved in this process. The Editors would like to acknowledge the invaluable assistance of the Honorable J. Harvie Wilkinson III, Chief Judge of the Fourth Circuit, and the Honorable T.S. Ellis, III, Judge, Eastern District of Virginia. To preserve the open nature of the proceedings, the Law Review presents the text in its raw format, although the participants did have an opportunity to review and make minor changes to their language. The Editors and participants have indicated source references where appropriate.

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Honorable Henry J. Hyde, Chairman, House Judiciary Committee, United States House of Representatives, Washington, D.C.
Theodore B. Olson, Esq., Gibson, Dunn & Crutcher, Washington, D.C.; Former Counsel to President Reagan, Iran-Contra Investigation

Sixty-Seventh Fourth Circuit Judicial Conference at The Homestead, June 27, 1997

Standing (left to right): T.S. Ellis, III; Richard J. Leon; Robert B. Fiske, Jr.; Jacob A. Stein; Charles F. Haden II; Andrew M. Davis; Terry H. Eastland; Theodore B. Olson; William P. Barr; William L. Osteen, Sr. Sitting (left to right): Jamie S. Gorelick, John D. Butzner; Larry D. Thompson; Archibald Cox; J. Harvie Wilkinson III; Lawrence E. Walsh; David B. Sentelle; Cameron McGowan Currie; John W. Nields, Jr. Not pictured: Henry S. Hyde.

Foreword

Honorable J. Harvie Wilkinson III

The Judicial Conference of the Fourth Circuit Court of Appeals has a long tradition. Chief Judge John J. Parker convened the first circuit-wide judicial conference in Asheville, North Carolina, in 1931. The conference has flourished throughout the years. The sixty-seventh annual gathering of bench and bar took place at the Homestead in Hot Springs, Virginia, on June 26-28, 1997. Like all of its predecessors, the conference was an agreeable and convivial occasion.

The circuit conference, however, has always had a more serious aim than mere sociability. The statutory purpose of such gatherings is to review "the business of the courts" and to consider improvements in "the administration of justice."[1] For most of the year, judges and lawyers are properly attentive to their individual cases and clients. The conference is one occasion when we can step back and survey the broader landscape.

The independent counsel statute[2] is an ideal topic for a judicial conference. The statute is an intersection between the strongest imperatives of the rule of law and the most basic prerogatives of democracy. How we approach this statute will have a lot to say about what kind of republic we will have. The statute asks the most fundamental questions involving public responsibility. It challenges us to consider to what and to whom our highest officials are ultimately accountable.

In recognition of that fact, we have drawn our panelists for this program from a wide variety of backgrounds. Represented on the panels are Justice Department officials, judges of the Special Panel for the Appointment of Independent Counsel, former special prosecutors, the Chairman of the House Judiciary Committee, congressional investigators, and other experts in the independent counsel process. The panelists on our program represent different and divergent points of view. What they have in common, however, is an intimate acquaintance with how the independent counsel process works.

The ensuing dialogue follows that process from start to finish. It begins with an examination of requests for an independent counsel from the Department of Justice. It then discusses the appointment of independent counsel, prosecutorial investigations and decisions, and congressional investigations that parallel the prosecutors' work. The program then concludes with a discussion of whether the statute should be retained or how it may be improved in the future.

Inasmuch as the statute involves the potential prosecution of the top public officials of our country, any discussion of its operation is bound to be politically charged. That is all the more reason for a program such as this one. We have

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1. 28 U.S.C. § 333 (1994).
2. 28 U.S.C. §§ 591-599 (1994).

asked the panelists to separate their judgments from the political temptations of the moment and to ask what is ultimately the only question worth asking: whether and how the institution of independent counsels serves the public interest and the ultimate well-being of this republic.

Honorable T.S. Ellis, III

Few topics in recent memory have been as widely discussed in the media as the activities of the independent counsel and the operation of the independent counsel statute. Yet it is also true that most members of the public, including many lawyers, do not know the statute's history, the details of how it operates, or the results of its use. In recognition of this, the conference committee responsible for planning the program decided to distribute to conference members a "fact sheet" setting forth some of this information for those members who might not be fully familiar with the statute. The intricacies of the statute are summarized below.

The statute is a relative newcomer to the political-legal landscape in this country. For almost two centuries there was no established institutional means for investigating and prosecuting senior-level officials in the Executive Branch. Instead, such investigations were carried out either by the Department of Justice, the Attorney General, or in some exceptional circumstances, by other ad hoc means.[3] The enactment of the independent counsel statute in 1978 changed

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3. As noted by the United States Court of Appeals for the District of Columbia Circuit, "[t]he need for a special counsel who is to some extent independent of the Justice Department and free of the conflicts of interest that exist when an administration investigates the alleged wrongdoing of its own high officials has been demonstrated several times this century." *In re* Olson, 818 F.2d 34, 39 (D.C. Cir. 1987).

For instance, in 1875, President Grant's personal secretary was implicated in the Whiskey Ring scandal, which involved a group of moonshiners bypassing the revenue laws through bribery. *See* Robert G. Solloway, Note, *The Institutionalized Wolf: An Analysis of the Unconstitutionality of the Independent Counsel Provisions of the Ethics in Government Act of 1978*, 21 IND. L. REV. 955, 958 (1988). President Grant fired the Federal District Attorney investigating the crime and appointed a "special prosecutor" to complete the prosecution. *Id.*

A more familiar example was the Teapot Dome scandal, which involved the Secretary of Interior taking bribes in connection with the lease of government oil reserves. *See* Peter W. Rodino, Jr., *The Case for the Independent Counsel*, 19 SETON HALL LEGIS. J. 5, 31 n.6 (1994); James B. Doyle, Note, *"Who Will Watch the Watcher?": Using Independent Counsel to Compel Federal Facilities to Comply with Federal Environmental Laws*, 26 VAL. U. L. REV. 671, 699 n.169 (1992). Although a subsequent congressional investigation revealed the Secretary's wrongdoing, the Department of Justice refused to conduct a full-fledged investigation. Rodino, *supra*, at 31 n.6. In response, President Coolidge appointed Harlan Fiske Stone as Attorney General, "with special instructions to clean up the Department." *Id.*

A final, somewhat prophetic example occurred during the 1950s, when the Truman administration was plagued with allegations that both the Department of Justice and the Bureau

this, institutionalizing in our law for the first time the circumstances and mechanism for appointing independent counsels and for conducting investigations and prosecutions of high-ranking, executive-branch officials.

The triggering event for the enactment of the statute, of course, was the so-called Saturday Night Massacre.[4] Following that fateful event, many lawmakers became convinced that legislation was needed to deal with the special and thorny problem of investigating and prosecuting criminal wrongdoing of high-ranking, executive-branch officials. Ultimately, this sentiment led to the statute in existence today. Originally enacted as Title IV of the Ethics in Government Act of 1978[5] and subject to a five-year sunset provision, the statute has been

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of Internal Revenue (the predecessor to the IRS) were corrupt. President Truman first directed Attorney General McGrath, and then Newbold Morris, an outside "Special Assistant to the Attorney General," to investigate the allegations. *See* Joseph R. Biden, Jr., *Shared Power Under the Constitution: The Independent Counsel*, 65 N.C. L. REV. 881, 886 (1987); Rodino, *supra*, at 31 n.6. Morris publicly announced his own independence from the Executive Branch and declared that he would even investigate the Attorney General. *See* Solloway, *supra*, at 958. McGrath fired Morris when the latter inquired into the former's personal finances and official files, and then President Truman fired McGrath. *See* Biden, *supra* at 886; Rodino, *supra*, at 31 n.6. Under President Eisenhower, the Department of Justice ultimately secured several convictions in this matter. *See* Biden, *supra*, at 886; Rodino, *supra*, at 31 n.6.

4. The circumstances comprising this infamous event of Saturday, October 20, 1973, grew out of the now familiar investigation of the bungled Watergate burglary: Once the Watergate scandal reached full stride, Attorney General Elliot Richardson issued regulations that created, within the Department of Justice, the Office of Watergate Special Prosecutor. The eponymous position was held by Professor Archibald Cox, one of the program panelists. When Professor Cox subpoenaed tapes and documents in President Nixon's possession, Nixon ordered Richardson to fire Cox. (Cox was protected from removal unless there were "extraordinary improprieties on his part." 28 C.F.R. § 0.37 (1973).) Richardson refused, choosing instead to resign. Deputy Attorney General William Ruckelshaus, faced with the same directive from the President, also relinquished his office. Next in line was Solicitor General Robert Bork, who, as Acting Attorney General, fired Cox.

Three days later, Bork abolished the new office Richardson had created and ordered that the Watergate investigation be conducted out of the Department of Justice's Criminal Division. In the face of growing public concern, Nixon authorized Bork to appoint a new Special Prosecutor. Bork tapped Leon Jaworski, Cox's former assistant. At Jaworski's insistence, Bork also issued regulations reestablishing the office that Richardson had created, and that Bork had abolished, only weeks before. For a general discussion of the Saturday Night Massacre, see *In re* Olson, 818 F.2d at 41-42; Carl Levin, *The Independent Counsel Statute: A Matter of Public Confidence and Constitutional Balance*, 16 HOFSTRA L. REV. 11, 11-13 (1987); Rodino, *supra* note 3, at 10; Alton L. Lightsey, Note, *Constitutional Law: The Independent Counsel and the Supreme Court's Separation of Powers Jurisprudence*, 40 U. FLA. L. REV. 563, 566-67 (1988); Solloway, *supra* note 3, at 958. Moreover, the regulations provided that the Special Prosecutor would not be removed unless the President first consulted with the majority and minority leaders of both Houses, and the chairmen and ranking members of the two Judiciary Committees. *See* 38 Fed. Reg. 30,738-39 (1973).

5. *See* 28 U.S.C. §§ 591-598. The Supreme Court upheld the constitutionality of the independent counsel statute in the face of separation-of-powers challenges in 1988. *See*

reauthorized by Congress three times since.[6]

By its terms, the statute covers the President, the Vice President, Cabinet officers, top officials in the White House and Justice Department, senior officers in presidential campaigns, and any persons investigation of whom might present a conflict of interest for the Department of Justice.[7] When the Attorney General receives information that any one of these persons may have engaged in criminal conduct other than a petty offense, she must review that information to determine whether it constitutes "grounds to investigate."[8] If the Attorney General finds that the information is specific and from a credible source, or if she is unable to reach a decision on these matters within thirty days of receiving the information, she must initiate a "preliminary investigation."[9] This investigation must be completed within ninety days, with a single sixty-day extension available.[10]

Upon completing the investigation, the Attorney General must file a report with the Independent Counsel Division of the Court of Appeals for the District of Columbia Circuit, in which she either declines or requests appointment of an independent counsel.[11] This Division – a special court, really – consists of three Article III judges appointed for two-year terms by the Chief Justice of the Supreme Court. One of these judges must be from the District of Columbia Circuit.[12] If counsel is requested, the Independent Counsel Division appoints the independent counsel and defines the counsel's prosecutorial jurisdiction.[13] The counsel, in turn, has "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice," including conducting grand jury investigations, granting immunity to witnesses, inspecting tax returns, and receiving appropriate national security clearances.[14]

The independent counsel has no specified term of appointment, but instead serves until the duties defined by the jurisdiction granted have been fulfilled.[15] Prior to such termination, only the Attorney General may remove the inde-

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Morrison v. Olson, 487 U.S. 654 (1988).

6. The current statute will expire June 30, 1999, unless reauthorized. *See* 28 U.S.C. § 599.

7. *See id.* § 591(b)-(c).

8. *See id.* § 591(d)(1).

9. *See id.* § 591(d)(2).

10. *See id.* § 592 (a)(1), (a)(3).

11. *See id.* § 592 (c). The Attorney General's decision in this respect is unreviewable in any court.

12. *See id.* § 49. Since its inception, ten judges have served on the three-judge panel.

13. *See id.* § 592(c)-(d).

14. *See id.* § 594(a).

15. *See id.* § 596(b).

pendent counsel from office, and she may do so only for cause or mental or physical impairment. Such removal may be appealed to the District Court for the District of Columbia.[16]

Since enactment of the statute in 1978, independent counsels have been appointed to investigate, inter alia, allegations of drug use, perjury, bribery, conflicts of interest, financial improprieties, lying during an FBI background check, and abuse of executive power. To date there have been at least eighteen independent counsels appointed, some of whose investigations are still pending. These independent counsel investigations have cost the United States almost $115 million. The table below sets forth more specific information regarding these various investigations.

INDEPENDENT COUNSEL INVESTIGATIONS: 1978-PRESENT[17]			
Independent Counsel	*Subject(s)*	*Result(s)*	*Cost*
Arthur H. Christy (1979)	Hamilton Jordan	No Charges	$182,000
Gerard J. Gallinghouse (1980)	Timothy Kraft	No Charges	$3,300
Leon Silverman (1981)	Raymond Donovan	No Charges	$326,000
Jacob A. Stein (1984)	Edwin Meese III	No Charges	$312,000
Alexia Morrison (1986)	Theodore B. Olson	No Charges	$2.1 million
Whitney N. Seymour, Jr. (1986)	Michael K. Deaver	1 Guilty Plea	$1.6 million
Lawrence E. Walsh (1986)	Elliott Abrams Carl Channell Alan Fiers Albert Hakim Robert McFarland Richard Miller Richard Secord Thomas Clines John Poindexter Oliver North Clair George Duane Clarridge Joseph Fernandez Caspar Weinberger	7 Guilty Pleas 4 Convictions, 2 Overturned on Appeal 6 Presidential Pardons	$47.4 million

16. *See id.* § 596(a)(1), (a)(3).

17. Participants received a substantially similar table with their conference materials. This updated table reflects the latest available data from the General Accounting Office Report dated September 30, 1997. *See generally* GENERAL ACCOUNTING OFFICE, FINANCIAL AUDIT: INDEPENDENT COUNSEL EXPENDITURES FOR THE SIX MONTHS ENDED MARCH 31, 1997 (1997).

Independent Counsel	*Subject(s)*	*Result(s)*	*Cost*
James C. McKay (1987)	Lyn Nofziger Edwin Meese III	1 Conviction, Overturned on Appeal 1 Acquittal	$2.8 million
James R. Harper (1987)	Confidential	No Charges	$50,000
Sealed (1989)	Confidential	Confidential	$15,000
Arlin M. Adams (1990) Larry D. Thompson (1995)	Samuel Pierce Deborah Dean Tom Demery Phillip Winn S. DeBartolomeis Lance Wilson Carlos Figueroa J. Queenan Ronald Mahon Catalina Villapando Robert Olson Len Briscoe Maurice Steier Elaine Richardson Sam Singletary Victor Cruise	7 Guilty Pleas 11 Convictions 1 Acquittal (Investigation is ongoing)	$27.1 million
Sealed (1991)	Confidential	Confidential	$93,000
Joseph diGenova (1992) Michael F. Zeldin (1996)	Janet Mullins Margaret Tutwiler	No Charges	$3.2 million
Robert B. Fiske, Jr. (1994)	William Clinton et al.	3 Guilty Pleas	$6.1 million
Kenneth W. Starr (1994)	William Clinton et al.	6 Guilty Pleas 3 Convictions 2 Acquittals (Investigation is ongoing)	$25.6 million
Donald C. Smaltz (1994)	Michael Espy	1 Guilty Plea 2 Convictions 2 Acquittals (Investigation is ongoing)	$11.9 million
David M. Barrett (1995)	Henry G. Cisneros et al.	Ongoing	$3.8 million
Daniel S. Pearson (1995)	Ronald H. Brown	Terminated (subject deceased)	$3.2 million
Sealed (1996)	Confidential	Confidential	$48,784

Program Introductory Remarks

CHIEF JUDGE WILKINSON: I welcome you to the Sixty-Seventh Annual Fourth Circuit Judicial Conference, and I think we've got a great program for you this morning.

The independent counsel statute, when we started planning this program some eight or nine months ago, seemed an ideal one for a Judicial Conference, and that was because the operation of this statute involved all segments of the legal profession, members of the Executive Branch, members of the judiciary, members of the House Judiciary Committee and Senate Judiciary Committee, Congress and members of the private bar.

So there is no topic that takes in more different aspects of the legal profession than this one does.

I want to say a brief word about the organization of this morning's proceeding.

We are going to go forward in five segments. There will be five different panels, and each of those panels will deal with a different phase of the independent counsel process. The idea is to try to take you through the independent counsel process from start to finish, from the very first time that a complaint comes in and the question of whether to refer that to the special court for appointment of counsel, all the way through the prosecutorial and investigative process, and then finally we are going to take a look at the independent counsel statute and what modifications or amendments, or whatever, should be done in terms of the future.

I don't think we have ever had a finer group of people available to discuss this problem. I have seen some discussions here and there on the independent counsel statute, but never before have I seen a group of people with such a breadth of viewpoints and such a range of experience as we have assembled here this morning, and I want to thank the Program Chairman for his indefatigable efforts in trying to get the very best commentators in the country on this question which has such a profound effect on our republic.

Tim Ellis has been absolutely dedicated in trying to put together a program that would really get to the bottom of the hard questions dealing with the operation of this statute.

We want, in the final analysis, not only to examine the nuts and bolts of this statute, the day-to-day operations of it, but to ask some pretty important overall questions: Has the effect of the independent counsel statute upon American government been good or bad? Should we applaud this institution of the independent counsel? Should we modify it or should we simply jettison it altogether?

Without further ado, I would like to ask Judge Bill Osteen from the Middle District of North Carolina to bring up the first panel members and introduce them to us.

Bill.

Panel One - Requests for Independent Counsel

JUDGE WILLIAM L. OSTEEN, SR. (U.S. District Judge, Middle District of North Carolina): All right. Thank you.

Ladies and gentlemen of the Conference and guests:

From the time this program was first conceived, the universal acclamation has been, "Wow, what a timely and interesting program we're going to have."

Our enthusiasm was heightened considerably after that when we found out who the panelists were going to be. So we are delighted to have the panels here for the five sections that we are going to have this morning.

Now, we could spend a lot of time introducing them – and they are properly deserving of the accolades that they have accomplished throughout their span of public service – but I think they have acceded willingly – and I know you will accede willingly – to the fact that we would rather hear from these people than to hear all of the accolades to which they are entitled. So for that reason, we are going to dispense with the customary introduction of our guests, and I would simply ask you to welcome, after I introduce both of them, first former Attorney General William Barr, and secondly, former Deputy Attorney General Jamie Gorelick.

Please welcome them here this morning.

(Applause.)

JUDGE OSTEEN: Our section of the panel deals with as you may guess, the introductory section of the statute.

Many of you already know that Title 28 of the United States Code, Sections 591 through 599, provides the independent counsel authority, formerly known as the special prosecutor section.[18] It is a law that came into effect in 1978.[19] It has been renewed from time to time since then and has a sunset provision which I believe expires in about 1999.[20]

Our section deals with the preliminary portion, and so we will concentrate first on Section 591.[21] That section, in summary, provides that the Attorney

18. *See generally* 28 U.S.C. §§ 591-599 (1994).

19. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1867, 1867-75 (codified as amended at 28 U.S.C. §§ 591-599).

20. *See* 28 U.S.C. § 599 (stating that statute will expire five years after date of enactment of Independent Counsel Reauthorization Act of 1994).

21. *Id.* § 591.

General shall conduct an investigation to determine whether an investigation is necessary for certain people who may have violated the federal law.[22] Those people whose investigation is mandated, including the President, the Vice President, members of the Cabinet, certain other members of the presidential staff, certain other members of the Attorney General's Office, and other people, such as the CIA Director and Deputy, and a few other officials, are covered under this section.[23]

The statute goes further to say that the Attorney General shall consider the credibility and the specificity of the information that comes to the Attorney General in making a determination of whether to proceed further.[24]

There is another section that is more inclusive from the standpoint of persons covered, but is not mandatory as Section 591(a) is.[25] Section 591(c) provides that the Attorney General may conduct an investigation where it appears that there may be a conflict of interest arising from financial, personal, or political interests.[26]

Our panelists will discuss those matters.

I think there were two groups or two persons that I left out of the mandatory section. Those include people who are managers or heads of the Reelection or Election Committees of presidential candidates.

I would like now to turn to our panelists and ask Ms. Gorelick if she would sort of explain to us how these investigations begin, how many there are generally, and give us the preliminaries, please.

MS. JAMIE S. GORELICK (Vice Chair, Fannie Mae Corporation, Washington, D.C.): Surely.

Thank you very much for the opportunity to be here to discuss this important subject.

Let me try to set the scene a little bit and give you some numbers from the period '87 to '92. I use that period (1) because I am not comfortable in discussing any cases that may be open at the moment or that were opened during my tenure, and (2) because Senators Levin and Cohen put to the prior administration the question of how many cases had been reviewed by the Justice Department during that period and what the results were, so we have the history. I don't think the pattern is significantly different in recent years.

Suffice it to say that dozens and dozens and dozens of allegations appear at the Justice Department every year – assertions that an independent counsel

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22. *Id.* § 591(a).
23. *Id.* § 591(b).
24. *Id.* § 591(d)(1).
25. *Id.* § 591(a).
26. *Id.* § 591(c)(1).

inquiry is warranted. These may come in over the transom from citizens or may be announced on the steps of the Capitol by members of Congress. And so you have the full gamut of allegations.

Many people do not understand what the independent counsel law does and does not do, so you get a very wide variety of allegations. This group of allegations is reviewed by a special unit within the Public Integrity Section of the Criminal Division, and this work keeps that group busy full-time, reviewing these allegations to determine whether a preliminary inquiry is warranted.

As Judge Osteen said, there are requirements before even a preliminary investigation is triggered. There must be specific and credible evidence as to a covered person for the mandatory section of the Act requiring an independent counsel to be triggered. In the period 1987 to 1992, there were specific and credible allegations made as to eight people who were not covered – and those were principally cases involving a person who was associated with a covered person, such as a family member or a close business associate – who had done something alleged to be wrong and it was alleged that the conduct reflected in the same way on a covered person. On these eight allegations, initial inquiries were undertaken and it was determined that they did not justify a referral. Thirty-five preliminary inquiries were undertaken where it was determined that the evidence was not sufficiently specific or credible to warrant a preliminary investigation. In nine cases, there was specific and credible information as to a covered person, but it was determined that no referral was appropriate because "no further investigation was warranted," which is the standard to get to the next stage. In five cases, there were applications for an independent counsel.

So that just gives you a sense of the numbers.

In the past four years, we saw a similar pattern, probably with a greater number of cases coming in over the transom, and a similar winnowing process.

The process involved is this: There is a thirty-day period for an initial inquiry, that is, thirty days from the time in which the Public Integrity Section gets the matter for a determination as to whether there should be a preliminary investigation. And that is where, in my view, the teeth in the statute are: at that stage, you need to determine whether there is specific and credible information as to a covered person. Once you do that and you begin a preliminary investigation, the standard for determining whether to go to the court and seek the appointment of an independent counsel is whether further investigation is warranted; and it is often difficult to conclude that no further investigation is warranted. And so relatively few of the cases that go to preliminary inquiry are turned back at that stage, and you can see that in the numbers that I just read.

During that preliminary inquiry stage, the Department cannot use the normal tools that a prosecutor uses; that is, you cannot subpoena records; you cannot use the grand jury process; you cannot summon someone to a grand jury; you

cannot give a witness immunity. And so you are very much limited in the kind of investigation that you can undertake.

That's the scene.

JUDGE OSTEEN: All right. Thank you very much.

General Barr, would you please comment on what sort of standard you thought was appropriate in determining whether there was any credible information and if there was enough specificity to warrant going ahead.

MR. WILLIAM P. BARR (Executive Vice President and General Counsel, GTE Corporation, Stamford, Connecticut): The standard for commencing a preliminary investigation is very low. It is not evidence of a crime. It is information sufficient to warrant an investigation as to whether a person has violated the law; and once that is triggered, once you get that information, you are basically locked into going to court for an independent counsel, unless you can do a couple of things.

One, to avoid the preliminary investigation, as Jamie said, you have to say you don't have any credible information or you don't have any specific information; or the one most usually used, and is being used today, primarily is, "It's not a covered person; we don't have any information as to a covered person." And it is very hard to knock out an allegation on the grounds of lack of credibility because 90 percent of these things come from the newspapers; there are some facts set forth; congressmen then push it to get an independent counsel named – either Congress, congressional committees writing the Attorney General and producing more facts and submitting more documents. It is very hard to do it on credibility grounds. About the only way you can do it on credibility is when you get one of these letters in the mail, you know, with writing crammed in, written by someone who says that the head of the CIA requires them to wear a colander on their head to avoid getting rays, or something like that. But otherwise, it is very hard to knock it out on the basis of credibility and specificity. So you launch the preliminary investigation. And, as Jamie said, the real problem in this statute – she didn't say this was a real problem, but she said there are limitations on the Attorney General during this investigative phase, and the Attorney General of the Justice Department cannot compel testimony or production of documents, no subpoena power, can't use a grand jury – those are the two principal impediments – can't grant immunity. And if you can't do that during your preliminary investigation and then you reach the end of the preliminary investigation phase, for the Attorney General to stop the thing at that point, the Attorney General has to say that there are no reasonable grounds to believe that further investigation is warranted. The Attorney General can't say, "I don't think further investigation is warranted, exercising my discretion and my judgment here, because even if we found

particular facts, I'm not going to prosecute this case" or "This is not really a prosecutable case."

The standard is: No reasonable grounds to believe that further investigation is warranted.

It is very hard to conceive of a case where you can make that call where you haven't subpoenaed documents and you haven't brought witnesses before the grand jury, you haven't compelled certain people to speak to you, especially when a lot of these allegations have to do with lying – you know, "You misled Congress," or what have you.

So basically it creates a situation, a dynamic, under which it is virtually impossible, once information comes to you about a covered person, to prevent the naming of an independent counsel because your hands are tied during the investigation phase, you can't get all the facts, and ultimately you have to say, "There is no basis for further investigation." That's the tension in the statute that sort of creates the drive to name an independent counsel even on, you know, stuff that normally the Justice Department wouldn't be driving for a prosecution on.

You know, if an Inspector General gets mad at the Cabinet secretary and drops a dime on him for misuse of the vehicle, or something like that, you know, that is not the kind of thing that, in the ordinary course, you necessarily prosecute somebody over for a federal felony. But the statute creates a dynamic where you're going to name an independent counsel, hire people, and they're going to be driving against that individual because he misused his government automobile.

JUDGE OSTEEN: What happens generally if the preliminary investigation cannot be terminated and finally must go on, but you begin to find that people named who are not mentioned in this statute? Do you obtain the authority to keep that in the department or does the whole ball of wax go with the one independent agency?

MR. BARR: Well, I think the Attorney General has a lot of discretion as to what to refer to the court and what to keep. I think, as a practical matter, if it is part of one transaction, as long as you have a covered person in there, you really can't refer a case as to one individual when you are dealing with a group of subjects. So, usually the whole subject matter goes over to the independent counsel.

MS. GORELICK: And if I might add a point there.

There recently was an instance in which an independent counsel sought to pursue matters that the Justice Department thought were not related to his original jurisdiction and the Justice Department opposed his application to the Special Division for an extension of his authority to that matter which he

considered to be related. In that case there was an exception to the general rule that no independent counsel can be appointed without the Attorney General seeking to give an independent counsel that case, because the Special Division decided, over the objection of the Attorney General, to grant the IC that jurisdiction.

So even the one fail-safe, which is that the Attorney General must be the person seeking the appointment of an independent counsel, has been whittled away some in the recent past.

MR. BARR: I would like to point out that there is an ambiguity – at least I think there is a big ambiguity in the statute.

It is not really an ambiguity. It is, I think, a failure to address what they really intended to do; and that is that technically the Attorney General doesn't have to go forward if he determines that there is no basis for further investigation. So there is a situation where the Attorney General says, "You know, I think I have all the facts here, and as the Justice Department, we would normally not continue an investigation at this time so I'm not going to go to the court for an independent counsel," and then actually rule on the case – essentially exercise his discretion and say, "we wouldn't prosecute this case, so we're not going to prosecute it, no grounds for further investigation."

The only time you have to go to the court is when there are grounds for further investigation, and I don't think that's the purpose of the statute. I think the purpose of the statute is to remove from the Attorney General those kinds of judgments and calls and decisions as to the prosecutive merit of the case.

MS. GORELICK: There is one element here that I think is very significant, which is that at the end of the Bush Administration the statute was changed to prohibit an Attorney General from declining to investigate and declining to refer on the basis of a lack of intent; that is, unless the Attorney General can find, by clear and convincing evidence, that the person had no intent to violate the law, the Attorney General must seek an independent counsel.

Now, anybody who practices in the white-collar area knows that what defines most crimes is intent. A failure to list an asset on a financial disclosure form is not a crime unless it was done with willful intention of not disclosing that asset, and yet that element of the offense is basically removed from the Attorney General's discretion. And so you get even greater pressure than Bill described in those cases where the only difference between a crime and an infraction of some administrative sort is intent.

JUDGE OSTEEN: Go ahead. Do you have something?

MR. BARR: That is an area of great mischief, because I would say most of these cases turn on intent and it sort of reverses the burden to say that the Attorney General can't dispose of this unless he has clear and convincing evi-

dence of that, because ultimately the prosecutor has to have proof beyond a reasonable doubt; and what happens is, even though it is pretty clear that the prosecutor will not be able to prove beyond a reasonable doubt, the Attorney General still has to go to an independent counsel, down the independent counsel track, and the independent counsel's investigation really consists of, you know, months or years of trying to dig up some ancillary evidence somewhere to somehow prove a state of mind. I mean, you can pretty much say up front that it is going to be something that is going to be difficult to prove.

JUDGE OSTEEN: Thank you.

Ms. Gorelick, would you please tell us why section (a)[27] is mandatory and section (c)[28] is discretionary in the preliminary investigation?

MS. GORELICK: You ought to ask Congress that question.

JUDGE OSTEEN: Did you find that a difficult line to make a determination on whether you should, in your discretion, look at this or whether you are mandated to look at it?

MS. GORELICK: Well, the mandatory sections are easier to interpret. I think that the discretionary sections ought to be used in only rare circumstances.

That is my own personal view.

I think Attorney General Barr could investigate almost anybody, with very, very few exceptions, without having a so-called political conflict of interest. Now, if he had a financial relationship with someone under investigation, that is another story; but that is not what comes up. It is the so-called political conflict.

I think that it undermines our system of justice to say that our primary institution of justice, the Department of Justice, cannot find the wherewithal, with all of those career prosecutors, with only a very thin overlay of political appointees, to investigate most cases. And so I would, if I were Attorney General, take a very, very narrow view of the discretionary power to seek an independent counsel.

MR. BARR: I took a very narrow view of it, too, because I disapproved of the statute in general and I wasn't going to invoke the statute unless I was absolutely compelled by the law to invoke the statute. So I never used the discretionary provision, but I do believe that there are quite a few cases that don't necessarily involve covered people, or don't clearly involve covered people, that should not be handled on a business-as-usual basis by the Justice Department with people, in the bowels of the department, carrying out the

27. *Id.* § 591(a).

28. *Id.* § 591(c).

investigation. I believe that high-level people of some stature with a little bit of distance and independence should be assigned those cases, and take responsibility for those cases, ultimately under the responsibility of the Attorney General.

So what I did was I used my inherent authority as Attorney General when these cases arose, and I brought people in from the outside. On the so-called Inslaw Octopus Scandal, whatever that was all about, I brought in Judge Bua from Illinois to take a look at; on the Iraqgate nonsense, I brought in Judge Lacey from New Jersey to take a look at; and on the House Bank, which didn't involve executive branch people, but created a lot of political tension because people who were involved in our oversight, and so forth, were involved, I asked Judge Wilkey to take a look at that.

So I did that on my own nickel, not under the statute.

JUDGE OSTEEN: Thank you.

Now we are going to depart from our prescribed program and give each one of our panelists a free shot in saying why they think the statute is good, bad, or anything they wish to say. We are going to designate four minutes of free time for each one.

Ms. Gorelick.

MS. GORELICK: Well, I will be very brief about this.

Number one, I think that the statute ought to be restricted in its coverage. I don't think that there is any reason why Attorney General Reno couldn't investigate Henry Cisneros. I just don't. There are lots of examples of independent counsel designations that we have had that I think were unnecessary. I think it is overused – witness the number of calls now, on a routine basis, for independent counsels – and I think it undermines our fundamental respect for our institutions of justice. I do think that you need to have one, and the ability to seek one, in the most extraordinary cases, and I would limit the statute to the President, the Vice President, the Attorney General, and maybe the Deputy Attorney General, or the head of the FBI. You do have special issues when there is credible evidence of a crime at the highest level of the Department of Justice. But I would limit the scope of the Act considerably.

In the absence of that change, I would radically change the coverage with respect to campaigns because you end up with people who are covered persons who had, in fact, much less power and authority in the political process than people who are not covered. It is really serendipitous, depending on who was serving on what committee with what title, and that part of the statute does not work at all.

Third, I think you need to have some standard with regard to the importance of the underlying allegation. I haven't tried to articulate it – and I'm sure it is harder to be specific than it is simply to state the idea – but the issues under review by an independent counsel should be only those that are extraordinarily

serious. I would limit the use of an independent counsel to activities by someone while in office and of a serious nature, but I think that there is room for debate on the scope in this regard.

Fourth, I certainly would eliminate the reverse burden of proof for the Attorney General on the issue of intent. There are a number of independent counsel referrals that we did make which would not have been made in any sensible world, simply because we could not adduce clear and convincing evidence that there was not intent to break the law. That should happen.

Fifth, I would change the process by which an independent counsel creates authority under the "related matter" heading. If you have information that might implicate Mr. Barr, who might implicate Judge Walsh, who might then implicate the subject of an independent counsel's inquiry, under the case law, as it has developed on the issue of "related," I, as an independent counsel, would have jurisdiction to investigate, even though I would be looking at you, who is not a covered person, for something that has absolutely nothing to do with the original grant of jurisdiction.

Now, anybody who has been a prosecutor knows that you have to have some ability to deal with people who are potential witnesses against your target, but, in my personal view, there are no practical limitations on the jurisdiction of an independent counsel who wants to take his investigation out beyond secondary and tertiary witnesses to the "nth" degree. We have seen some of that and we have seen some litigation over that. And I would certainly make it very clear, if I were in Congress, that the Special Division has no authority to grant related-matter jurisdiction without the Attorney General having sought that in the first instance.

JUDGE OSTEEN: Thank you very much.
General.

MR. BARR: Well, I have always been against the statute. I still am.

During the transition, Bernie Nusbaum came in and asked me for some advice and I said, "We killed the independent counsel statute. Take my advice, don't breathe new life into it. As a Republican, I'd love to see you live under it, but as an American, I can tell you it would be bad news if you get that thing going again."

He said, no, that they had a higher standard and they were going to resuscitate the statute.

I agree, there are some quick fixes you can do on the scope, and other things like that, but the problem – and Jamie was talking about this problem – you really can't draw a line on the seriousness of the matter because ultimately what you really are talking about are judgments, judgment, prosecutive merit of the case, the exercise of discretion, and common sense. And what the statute does is it takes it away from executive branch officials and an institution that

is making those judgments every day, and has a track record of making those judgments, and puts it outside and gives it to somebody else to make, someone who I don't feel has enough accountability, someone who has too narrow a scope and loses perspective as to where they are going and to drive against an individual.

I think that's bad and I think it's unfair.

So my substitute for the statute is, if you accept the premise that the Attorney General, you know, may cut someone a sweetheart deal and you can't trust them to exercise discretion, then the answer to that is to have the court put in somebody who is looking over the shoulder, writes a report, blows the whistle, announces to the world that a non-bona fide judgment has been made, something that is not within the realm of proper prosecutive discretion, and let the Justice Department explain its decisions and open up its decisions to these individuals, but let the decision ultimately be made by the politically accountable official.

You know, let's take the situation of – and obviously, this is suggested by the situation of Vice President Gore – but suppose the Vice President of the United States did make some fund-raising phone calls from the White House.

You know, call me a softy, but I don't think we should tie up the government by prosecuting the Vice President of the United States for a federal crime because he used the telephone in making a few fund-raising calls.

But under this is a statute, you know, you look for the technical federal felony, you find it, bring in an independent counsel, turn all the fund-raising of that party up on its ear because of those phone calls, looking for some indication of what the intent was.

I mean, as Attorney General, I'd try to find out what the facts are, let the political check operate in that case. Unless it was particularly contumacious behavior, rather than stupidity or ignorance of the law, or what have you, I would say I'm not going to prosecute the Vice President of the United States because he made five phone calls to raise money from the White House – it's ridiculous. It's not in the public interest – and let the Attorney General take the heat, if there is heat, publicly for it – the political check – and let the administration or the Vice President take the heat, if he did wrong.

But this criminalizing of every bit of conduct by executive branch officials is a political weapon. These things come in during election years; they're brought by political opponents: it's a political device, and it's wrong. And I say we can have more reliance on the political check than just removing these important judgmental issues from the people who should be making them.

JUDGE OSTEEN: I know you want to join me in thanking our panel.

(Applause.)

Panel Two – Appointment of Independent Counsel

CHIEF JUDGE WILKINSON: The next phase of our discussion of this statute deals with the appointment process of the independent counsel and the court that does that, and I would like to ask Judge Cameron Currie from the District of South Carolina to bring Judge Sentelle and Judge Butzner to tell us about how the court goes about appointing independent counsel.

JUDGE CAMERON MCGOWAN CURRIE (U.S. District Judge, District of South Carolina): Thank you, Chief Judge Wilkinson, and good morning, everyone.

I knew that we had a timely subject here when, in the recent *New Yorker*, the cartoon shows the waiter arriving at the table with his tray and a man sitting on the tray and says, "Who ordered the special prosecutor?"

We are going to talk now about who does order the special prosecutor, and the panel members who are with me here today were not selected by anyone who had anything to do with this program, but rather by the Chief Justice of the Supreme Court pursuant to federal law.

These two gentlemen are two of three members of the Special Division of the United States Court of Appeals for the District of Columbia Circuit, which is the court established under Title 28[29] to go with, or go along with, the act and provide a mechanism for appointment of the special counsel.[30]

To my left is Judge David Sentelle of the D.C. Circuit; to my right is Judge John Butzner of the Fourth Circuit.

Together, these gentlemen have a great institutional memory. Judge Butzner has been a member of this special division for a number of years and he is, as Judge Sentelle referred to it, the institutional memory of the court, and Judge Sentelle is now in his third two-year term on this court.

The third member of this court is Judge Peter Fay of the Eleventh Circuit in Miami.

The way in which this works is that the independent counsel statute established the court and said that the court shall appoint appropriate independent counsel and shall define that counsel's prosecutorial jurisdiction.

So we have the appointment authority; we have the defining authority in terms of jurisdiction; and, as I have learned in studying this statute, there is also quite a bit of other work that goes along with being a member of this court. So these gentlemen spend a great deal of time working on matters that have to do with the independent counsel statute and, as I said, they are appointed for two-year terms.

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29. 28 U.S.C. § 49 (1994).

30. 28 U.S.C. § 593(b) (1994).

The statute requires that priority in selection be given to senior circuit judges and retired justices, and the statute also specifically requires that one member of the panel be a member of the D.C. Circuit.

The Clerk of this court is the Clerk of the D.C. Circuit and, as Judge Sentelle has indicated, he gets one additional staff member to assist in the work of this court.

Now, the first and most interesting part of their job is the appointment of the independent counsel, and so we will go first to that.

Assume for a moment that there has been an application filed by the Attorney General for appointment of counsel. Judge Sentelle, can you tell us what that does as far as your court? What do you have to do at that point?

JUDGE DAVID B. SENTELLE (U.S. Circuit Judge, District of Columbia Circuit Court of Appeals): We, of course, first have to review the application. If it appears to be in order in terms of the statute – and they always have been – it becomes our duty to select and appoint an individual to conduct the investigation.

Do you want me to go into where we get the person from now or –

JUDGE CURRIE: That's fine.

JUDGE SENTELLE: We maintain a talent book, but it is, by no means, exclusive, that contains the names and brief biographies of a large number of attorneys around the country whom we consider as possibilities for independent counsel. Those names can come to us from anywhere – first, from Judge Butzner's institutional memory or our own official institutional memory where we've accumulated names in prior instances. We don't throw them away. We keep them in the book for the next time.

I had an extensive white-collar crime background, not doing it but defending it. My former affiliation with the ABA was in the Criminal Law Section, White-Collar Committee, and my American Inns of Court is the White-Collar Inn, and so I know most of the practitioners nationally in that field.

So my memory, John's contacts in the judiciary, and at Judge Butzner's suggestion, we obtain from the Administrative Office of the Courts the names of the most recent resigned judges in the last several years. We also just get suggestions from attorneys and judges who just call us or mail us the names of people who they think would be good. We keep virtually all of them and we review that talent book, winnow it down to a short list, take off anybody who we see has obvious conflicts of any sort, and then we call them and see if they're interested in meeting with us and interview and decide if they should be an independent counsel.

JUDGE CURRIE: Judge Butzner, Judge Sentelle mentioned conflicts. Is there a problem in determining conflicts and have conflicts caused you to have to continue to move down the list extensively to find independent counsel who can accept the appointment?

JUDGE JOHN D. BUTZNER, JR. (Senior U.S. Circuit Judge, Fourth Circuit Court of Appeals): Oh, yes. The conflicts arise not because of any nefarious action, but simply because a member of the applicant's law firm or the potential appointee's law firm may represent a party that will have some effect in the investigation. A good example of that was in HUD.

It seemed like every law firm in the country, from New York to Chicago, to Miami, had some contact with HUD, and not necessarily in the area where the investigation was leading but just some contact.

For instance, I remember one law firm had litigation over a garage in New York. The investigation had nothing to do with a garage in New York. But we draw a strict line and since we don't know what's going to happen in these investigations, we cut that applicant out and went on to somebody else. Fortunately, we found a retired judge from the Third Circuit, Arlin Adams, who recently retired. He was an outstanding lawyer, a man of great integrity, whom we knew personally, and fortunately his law firm – after he retired, he joined his old firm – had no contacts at all with HUD. He undertook the job of independent counsel and did it very well.

That is the type of thing we run into.

Most of the Washington law firms have some kind of contact with the various departments, and for that reason, we look around the country and hope to get independent counsel who have no conflicts. But again I emphasize, these are not conflicts in the sense that there is anything wrong about them, they're just conflicts.

JUDGE CURRIE: Judge Sentelle, we have a list in our materials of a number of individuals who have been appointed independent counsel, and I wonder if you could comment on whether or not political affiliation is ever a factor in the decision of the court in determining who should be appointed independent counsel.

JUDGE SENTELLE: Obviously, in the first instance it is because the purpose of the independent counsel statute – and I want to underline the "independent" – is to find a special prosecutor or independent counsel who is free of connection with the administration that is under investigation. So if you have someone who is politically connected with the President or with the covered individual who is the subject of the investigation, that person doesn't have the kind of independence contemplated by the statute and we wouldn't choose that person. Beyond that, political affiliation per se is not really a consideration; it exists.

Nearly everybody who is qualified to be independent counsel has some kind of political involvement in their background. If there was someone directly connected in some way with the person under investigation, then we wouldn't have the independence. But beyond that, I think – I've seen Professor Cox in the front row there – I think of the Archibald Cox mode of what is a really good special prosecutor or independent counsel. A person who was, for example, Solicitor General in the administration before the one under investigation, as Archibald Cox was, who was perhaps active in the other party than the one under investigation, as he was, really is an ideal independent counsel because they underline the integrity of the investigation, that they have no ax to grind to defend any abuse of power that might exist. It puts the covered person in the same position they would be if they had been in a prior administration and the present Justice Department was investigating them.

So I guess, to that extent, you would say we know about the political affiliations, but beyond the obvious ones where they lack independence, we don't make it a part of our *sine qua non* at that point.

JUDGE BUTZNER: Let me add to that. Certainly when we get to the point of interviewing a person or people that we think would be independent counsel, we ask very pointed questions and expect very honest answers about contributions to a party – either party – and how much were those contributions and to whom did they go.

Now, many, many lawyers make contributions at a local level to their congressman. But some lawyers make contributions to both candidates, and we have to ask, "How much was it?" and if it was a large amount, why, we would rather have someone who wasn't that much interested in the election of that congressman.

It is not exactly a conflict of interest. It is sort of a judgment call. If it was not a large amount and we found out that that's generally what's going on, we would not necessarily disqualify the person for making the contribution to his congressman. But if the contribution was to the President or the candidates for President, I should say, either party, we generally – I should not only say generally but invariably – we will not accept that person because, by the terms of the statute, the investigation is going to be an investigation of the Executive Department.[31]

JUDGE CURRIE: Judge Sentelle, some commentators about the statute have stated that the independent counsel should be a full-time position and other commentators have suggested that perhaps there should be some sort of in-depth investigation of the person appointed as independent counsel before they are appointed.

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31. *Id.* § 591(b).

Do you have any comments to make on those suggestions?

JUDGE SENTELLE: I suppose two.

Judge Butzner and I and Judge Fay have discussed that question of full-time independent counsel before, and while that model can exist, it would so greatly limit the people that you could find who would be willing to undertake this that we think could go on for years and years and years; and the attorneys who have the ability, the reputation and the proven integrity for the job do not want to give up years of their career that they have spent their lifetime up to now establishing – to take years of it out in order to do something that will be lower paying, unpopular, and may not lead to anywhere.

So the idea of requiring full time is something that, while it might not make our job impossible, would make our job very nearly impossible. Maybe a full-time staff could be found by the independent counsel particularly by detailing from Justice or from the U.S. Attorneys' Offices, but as far as the independent counsel himself, I don't think it can be done as a practical matter.

JUDGE BUTZNER: Let me add to that that the independent counsel is paid according to level 4 of the Executive schedule.[32] He is paid on an hourly basis, and that amounts to $55.43 an hour, with a maximum of $115,682. So you can see that we would find it very, very difficult for someone who has a good law practice. That is the reason we have tried to get, and have gotten in some instances, retired judges – not senior judges; we can't touch them – but retired judges who can devote a great deal of their time because of the pension.

JUDGE SENTELLE: Even with that model, we have to find those who are not planning to spend the next several years doing a lot of particular kinds of practice because they are going to have to give it up, if they were to come full time. So it just may not work, if that were a requirement, of full time. We might find such a person in a given case; we might not.

The second part of your question was about the background.

What we do now – and some people might say it's not enough – but what we do now is, we contact the FBI. We have them send us what background they have already on the person we have under consideration. These people are usually public figures, with well-established reputations. Without exception, the FBI has investigated them for something in the past – they've been appointed or nominated – I don't mean they've investigated them as subjects of criminal – but they've been appointed or nominated or otherwise have been cleared by the FBI. So although we do not have it updated by an independent investigation, we have the benefit of often classified information that exists from the FBI.

32. *Id.* § 594(b)(1).

It may be that Justice should furnish us with an FBI agent to do a full background. I would have no objection to doing that, to get a more current background, but it has not really proven to be a problem in the past. It could in the future, and maybe if somebody wants to change the law to that effect –

Judge Butzner and I have agreed that we're not going to make a suggestion of how to change it. We follow the law however Congress gives it to us.

JUDGE BUTZNER: Yes. And we find a good deal of current information from LEXIS-NEXIS –

JUDGE SENTELLE: Yes.

JUDGE BUTZNER: – to supplement what the FBI has.

JUDGE CURRIE: The second part of the independent counsel division's work is defining the scope of jurisdiction of the independent counsel.

Judge Sentelle, could you comment on what that involves for the court?

JUDGE SENTELLE: Very little.

The Attorney General sends us a request which has within the request a requested scope. If we review that and it's legal – and it always has been – that's what we – we might change a word here and there.

Now, Ms. Gorelick referred to the fact that we did, in a recent case, grant, according to the words of the statute, when the application was made to us, an extension which looked to us like a clarification to cover a related matter. That was a very tiny modification of the original.

We had the statute before us; we reviewed it; we reviewed Justice's arguments and decided that the statute said "related matter"; it said we could do it. If the statute meant anything, it had to mean we could do that part.

Beyond that, I don't think we have ever done anything in defining the scope of an independent counsel's work that did not come from Justice. I think maybe in one instance we cut back on what Justice had asked for, but most of the time our job in defining scope is very, very little. We just have our secretaries lift out of Justice's document the part that defines scope and plug it into our document in most instances.

JUDGE CURRIE: Once the independent counsel has been appointed and the order signed defining his scope, what does the court have to do as far as the investigation?

JUDGE BUTZNER: Very little, and less than that.

The Supreme Court has made it very clear that we have no supervisory control over an independent counsel, and the reason for that is the doctrine of

Separation of Powers.[33] The independent counsel is an officer of the Executive Branch and the judiciary cannot tell the Executive Branch how to conduct its business. The statute provides that the Attorney General may remove an independent counsel for cause, but that hasn't ever been done – but it's there and it could be used.[34] The statute also provides that the appropriate committees of Congress shall have oversight of the independent counsel, and that is done up to a certain amount.[35]

The independent counsel has to report financially what he is spending and what he intends to spend in the next six months in broad categories.[36] That report goes to the Congress. We get a copy of that – it is a public document, I think – and we have no way to say "You're spending too much; you're not spending it on the right things."

We get complaints about independent counsel, and we have to explain that we have no supervisory authority and we cannot, without violating the Constitution, exercise supervisory authority, as the Supreme Court has held.

JUDGE SENTELLE: There are a few little administrative details that we tend to such as if the independent counsel is using assets or personnel from his own law firm, there are certain waivers that we have to approve to make sure they are not running afoul of some conflict statutes. Under the last amendment to the act, if the independent counsel or his personnel are drawing per diem beyond certain dates, we have to annually review that and approve it or disapprove it.[37] We've always approved it.

As Judge Butzner said, we get copies of the financial reports, although I am not at all sure why because we have no power to do anything with it except look at it and put it in the files. Congress can act on it or maybe GSA. There is nothing we can do about it.

We get motions from time to time – usually a request from the Attorney General for an expansion of jurisdiction or a motion by the independent counsel to expand. We have had one or two of those that came directly to us from the IC.

Beyond that, during the course of the investigation, our role is just limited to those administrative things. It is only when we get to the end and get to the reporting phase that we get very busy and then inundated with work to do again.

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33. *See* Morrison v. Olson, 487 U.S. 654, 677-85 (1988) (discussion application of Separation of Powers doctrine to Special Division).

34. 28 U.S.C. § 596(a)(1).

35. *Id.* § 594(a)(1).

36. *Id.* § 594(h)(1)(A).

37. Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, 108 Stat. 732, 733 (codified in 28 U.S.C. § 594(b) (1994)).

JUDGE CURRIE: One of the little known aspects of the work of the Special Division involves attorneys' fees of targets and subjects.

Under the law, someone who is a target or a subject of an investigation but who is not indicted is entitled to seek reimbursement of his attorneys' fees incurred in connection with the investigation, and so the annotations to the statute contain numerous cases of petitions for attorneys' fees.

Judge Butzner, do you spend a lot of time reviewing petitions for attorneys' fees?

JUDGE BUTZNER: Yes, we do. We have to look and see whether they were in fact a subject of the investigation.[38]

Remember, by this time, the report of the independent counsel, which has not yet been released to the public, is available to us and we can go through that report and determine whether the person was a subject. Also, the person who is applying for counsel fees usually has a very articulate lawyer who understands the statute and points us to the fact, or presumed fact, that this person was a subject. Then we have to see that the fees are reasonable and that but for the Act, they would never have been incurred.

Every ruling we make on this is published. We have a firm rule that we will not dispense any money without making it public. Usually it is made public by a per curiam opinion, which Judge Sentelle has always kindly prepared, and it is published in West and available on the Internet.[39] But we don't want to spend any tax money privately.

We have requests to do that. We have motions, "Please don't make this request for fees public," and we deny those motions.

JUDGE SENTELLE: One other thing – and these are hard questions about whether a person is a subject and whether the "but for" standard is met as far as they wouldn't have incurred these fees but for the Act – on those and on the reasonableness, we are directed by statute to obtain the views of the Attorney General, and in the amended statute, also the views of the independent counsel.

It used to be we sent it to the Attorney General and they often said, "We don't know; we didn't have anything to do with this investigation."

So the amended statute says we must also serve the independent counsel and get the IC's views on attorney fee requests before we –

JUDGE BUTZNER: And that means, long after the independent counsel has filed his report, he's going to be busy.

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38. *See* 28 U.S.C. § 593(f) (stating that subjects of investigations may recover attorney's fees).

39. *See, e.g., In re* North (Reagan Fee Application), 94 F.3d 685 (D.C. Cir. 1996); *In re* Mullins (Mullins Fee Application), 84 F.3d 459 (D.C. Cir. 1996); *In re* North (Cave Fee Application), 57 F.3d 1117 (D.C. Cir. 1995).

JUDGE SENTELLE: And isn't on the payroll any more and may not get reimbursed in any fashion for having to do a document for us that may take considerable time.

JUDGE BUTZNER: Now, the way we handle the report –
Do you want to take that up now?

JUDGE CURRIE: I think some other panels are going to cover some of that, but you're welcome to go ahead and –

JUDGE BUTZNER: Well, I will limit it to this.

We notify everybody who is listed in the report that they can go to the Clerk's Office, or their attorney can go to the Clerk's Office, and will have available to them that part of the report which pertains to them so that they can see what the independent counsel has said about them.[40] They couldn't function without that.

In the end, we direct the independent counsel to take all those applications for fees and responses to the report – and then sometimes there is criticism of the report – and to put it in an appendix and it is published in – not the application for the fee. I misspoke there – but the criticism of what the report says, and that is published in an appendix to the report when the report is released.

So far, we have released all reports, but there are several cases in which even the appointment of the independent counsel has not been released because it appeared to the Attorney General and it appeared to us that it would not be in the public interest to do it if this thing was –

Well, for example, a tax case, you look into it and it turns out to be a civil case the Department of Justice would never have prosecuted. It's settled civilly. There is no intent to evade the taxes. We usually try and get a good tax lawyer, as independent counsel, and he looks into it.

JUDGE SENTELLE: Those remain sealed and you never hear about them at all – not just the report but other things.

JUDGE BUTZNER: But I think, in the last eight or ten years, there have only been two cases like that.

JUDGE CURRIE: The only silver lining in all of this for lawyers is that the defense attorneys who defend the subjects and targets are not limited to $55 an hour and are obtaining what is called a reasonable attorney's fee in line with the market in the area.[41]

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40. 28 U.S.C. § 594(h)(2).

41. *See id.* § 593 (f) (allowing for subject of independent counsel investigation to receive compensation for reasonable attorneys' fees if independent counsel does not bring indictment

Thank you very much to our panel members.

(Applause.)

Panel Three – Prosecutorial Investigations and Decisions

CHIEF JUDGE WILKINSON: We next come to the prosecutorial stage of this process, and I will ask Judge Ellis if he will please assemble his panel and come up.

JUDGE T.S. ELLIS, III (U.S. District Judge, Eastern District of Virginia): Good morning, members of the Conference and guests.

My name is Tim Ellis. I'm a district judge from the Eastern District of Virginia, and it is my privilege this morning to preside over the panel that focuses sharply on the conduct of the independent counsel investigation. And for that purpose, we have assembled a panel of four very distinguished lawyers who have served as independent counsel. These individuals are not distinguished because they were appointed, but rather they were appointed because they are distinguished by virtue of a long and exemplary period of service at the bar or on the bench and, as you heard from Judge Sentelle and Judge Butzner, their sterling reputations for unshakable integrity.

Let me introduce them to you now.

On my far right, your far left, is Robert Fiske, a litigation partner in the firm of Davis Polk & Wardwell, and he was appointed in March of 1976, by President Gerald Ford, as United States Attorney for the Southern District of New York, and he has also served in other distinguished posts, but he was a United States Attorney, which I think is an interesting and important previous experience for an independent counsel. He will have, I think, an interesting perspective, as we will be asking the panel questions about the differences between serving as an independent counsel and as a United States Attorney.

In January of 1994, Mr. Fiske was appointed by Attorney General Janet Reno as independent counsel to conduct the Whitewater-Madison Guaranty investigation.

On my far left, your far right, is Mr. Jacob Stein, a partner in his own law firm in Washington, D.C., and those of us from the Washington, D.C. area are well familiar with Mr. Stein as one of the deans of the D.C. Bar for a very long time, young though he is.

In 1984, he was selected by the Special Division of the U.S. Court of Appeals to serve as the independent counsel in the Edwin Meese matter.

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against subject).

Incidentally, in your materials, you should have received a handout that summarizes some of the essential terms of the statute and some of the experience under the statute.

Then on my immediate left, closest to me, is Larry Thompson, a partner with the law firm of King & Spalding in Atlanta, Georgia. He was appointed as independent counsel by the special panel of the United States Circuit Court of Appeals, which you heard from previously, to investigate allegations concerning the Secretary of Housing and Urban Development.

Then to my immediate right is Lawrence Walsh. Lawrence Walsh was previously a U.S. District Judge for the Southern District of New York. He also served as President of the New York and the American Bar Associations, and he was appointed in 1986 and he served from 1986 to 1994 as the independent counsel to investigate the Iran-Contra matters.

So as you can see, we have assembled an absolutely magnificent panel to discuss with us today the independent counsel investigation process.

Now, the question most frequently, insistently and, indeed, urgently asked about the independent counsel investigation is: What are the supervisory checks that exist, or should exist, with respect to the independent counsel's authority?

And let me begin, in that regard, perhaps giving us some contrast with his experience as a U.S. Attorney, with Mr. Fiske.

MR. ROBERT B. FISKE, JR. (Davis Polk & Wardwell, New York, New York): I think the answer to that is pretty clear.

As United States Attorney for the Southern District of New York, I was part of the Department of Justice, headed, of course, by the Attorney General in Washington, and there is a whole system of review procedures in place that control what Assistant U.S. Attorneys or United States Attorneys can do in the investigation and prosecution of criminal cases. You can't take certain kinds of investigative steps, like subpoenaing members of the media. You can't bring certain kinds of cases, such as racketeering cases, without getting the approval of career people in the Justice Department. And the whole purpose of that is so that there can be a uniform, cohesive system of law enforcement throughout the United States, with the centralized control in Washington, to make sure that some Assistant or some U.S. Attorney isn't going off half-cocked in a way that would be detrimental to law enforcement in general.

There are no such checks or balances in the case of the independent counsel who, once appointed, has all of the authority of the Attorney General and the independent counsel doesn't have to seek authority from anybody to do anything. He or she can do whatever they feel is appropriate, without any review by anyone.

JUDGE ELLIS: Isn't it true, though, that in the case of *Morrison v. Olson*, the Supreme Court concluded that the independent counsel clearly fell within

the executive-branch side and that, therefore, counsel would be subject to supervision?[42]

Indeed, the opinion is replete with references to the extent to which there are supervisory powers.

Let me turn to Mr. Thompson and see if you agree that there is a difference between the fact and the possibility – in other words, there isn't in fact any supervision, but there could and should be?

MR. LARRY D. THOMPSON (King & Spalding, Atlanta, Georgia): Well, I don't know, in reality, whether the difference in terms of the potential for supervision that you have in a regular criminal case is any different than what you have in an independent counsel situation.

I was United States Attorney at some time in my career in the past and I have dealt with situations involving high-profile criminal investigations, and what you really have now, I think – and it varies from administration to administration – if you have a high-profile criminal investigation, you typically have a very senior and very good Assistant United States Attorney on the case, and in reality – and I understand what Bob said with respect to certain kinds of charges, like RICO charges, and certain kinds of conspiracy charges that need to have review in Washington – but in reality, you do not really have, from a practical standpoint, very much supervision today; and I don't think, from a practical standpoint, there is a real difference between the authority that an independent counsel exercises and the authority that a regular criminal prosecutor exercises in terms of supervision.

I would think, and I would submit to this audience, that the real authority to control an abhorrent prosecution or investigation lies with the judiciary.

Article III judges have supervisory authority over grand juries. Lots of times these motions are brought by good, competent defense counsel. You certainly have supervisory authority over the conduct of an investigation after indictment; and I think, with respect to the independent counsel, that it is no different than any other prosecutor. Ultimately he or she is going to have to prove the case in court, and that's where the authority should lie with respect to a criminal investigation.

JUDGE ELLIS: All right.

Judge Walsh, do you agree that the ultimate repository of supervision is in the Article III branch?

JUDGE LAWRENCE E. WALSH (Crowe & Dunlevy, Oklahoma City, Oklahoma): It is, if the independent counsel strays beyond the assignment of the appointing court.

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42. *See generally* Morrison v. Olson, 487 U.S. 654 (1988).

There are two checks, really, on the independent counsel.

The first is the scope of his authority as defined by the appointing court.

Now, this is, as Judge Sentelle explained, usually the authority that the Attorney General asks to have granted to it. So the Attorney General is in there at the beginning and there is no independent counsel ever appointed except at the request of the Attorney General, and there is no review of the Attorney General's decision. If he or she decides not to appoint an independent counsel, there is none.

Now, once she asks for his appointment, the court lines out his area of jurisdiction.

As I say, there have been motions brought by defense counsel challenging my activities as exceeding its defined scope.

The next check on independent counsel is the power of the Attorney General to remove him for cause.

Now, cause is an elastic category, but if there is anything unprofessional, unethical, or if he begins to stray from his activity, the Attorney General can raise that by a removal proceeding which is, in turn, reviewed by the district judge in the district in which the independent counsel is acting.[43] So although he seems to have an unsupervised way of going, he is conscious at all times of the intense public supervision that he is receiving, and often the supervision of a hostile administration.

MR. THOMPSON: Judge Ellis, –

JUDGE ELLIS: Yes.

MR. THOMPSON: – I would like to just point out, too, that the independent counsel at all times is subject to the code of professional responsibility of his or her state bar association, and many times those codes involve issues of conduct for public prosecutors, and that is another area of control or check, I think, on an independent counsel.

JUDGE ELLIS: Well, are you suggesting that if an independent prosecutor were to violate any of those provisions, that the state bar involved could then take action?

MR. THOMPSON: Well, certainly could commence an investigation in an appropriate situation, and I do know that that has happened with respect to at least two independent counsel investigations.

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43. *See* 28 U.S.C. § 596(a) (1994) (discussing grounds and process for removal of independent counsel and procedure for review of removal decision).

JUDGE ELLIS: Well, Mr. Stein, we have the Attorney General able to remove for cause. And are there other checks or supervisory powers that you think exist here?

MR. JACOB A. STEIN (Stein, Mitchell & Mezines, Washington, D.C.): My experience is that I had unlimited authority as an independent counsel. These ideas expressed by others concerning limitations were not the way I saw it. I had no limits. I was astonished at the authority I had, and I felt it was a personal test of my own sanity in the exercise of that authority. I don't know whether others thought that I passed the test. But I had more authority than anybody should have. I was reviewing myself.

I think all of us who have had any experience with the statute believe the number of persons who come within the statute should be limited to the highest people in the government. The nature of the inquiry should be limited to things done in office, misuse of the office. The independent counsel should be limited so that he or she can't go into things that have nothing to do with the function of the office.

Now, I was hoping at some time I would get an opportunity to read something about investigations, and I am going to take that opportunity to do so right now.

Excuse me for doing this.

JUDGE ELLIS: I now know why our chief judge assigned me this panel. I think he said it would be something like throwing the rugby ball into the scrum: one must get out of the way, and that's essentially what I will do.

All right, Mr. Stein.

MR. STEIN: "[T]he least thing is seen as the center of a network of relationships that the [investigator] cannot restrain himself from following, multiplying the details, so that his descriptions and digressions become infinite. Whatever the starting point, the matter in hand spreads out and out, encompassing ever vaster horizons, and if it were permitted to go further and further in every direction, it would end by embracing the entire universe."[44]

One other quote. This is from John Adams, a man of respectable authority.

"[G]uilt and crimes are so frequent in the world, that all of them cannot be punished; and many times they happen in such a manner, that it is not of much consequence to the public, whether they are punished or not."[45]

I tried to keep those two things in mind because it seemed to me that the longer I was at large, the greater the danger that I, myself, would be investigated.

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44. ITALO CALVINO, SIX MEMOS FOR THE NEXT MILLENNIUM 107 (Patrick Creagh trans., 1988).

45. John Adams, Argument for the Defense, *in* 3 LEGAL PAPERS OF JOHN ADAMS 242, 242 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

I want to tell you about a personal experience I had in my investigation.

I was visited by someone from the FBI once a week – a very high person in the FBI – and it was appropriate that he would visit me because he had lent me four FBI agents to help me and the FBI agents reported to me only. He would give me everything that the FBI collected over the week concerning Edwin Meese, all sorts of material. He would hand this to me; and when I would look at it, I would know that if any of this leaked, I would be under investigation. So I didn't want it; I'd hand it back to him and say to him, "If it ever became appropriate for me to have an article like this, you can be assured I will call you." And he would say to me, "Well, you know, we can put a safe in your office and you could put it in the safe," and I had had a little experience with things like that, and I said, "No, you've got better safes than I've got; you keep it in your office."

JUDGE ELLIS: I'm glad we didn't wait.

Mr. Fiske, you began this. Let me give you an opportunity to end it.

What kind of supervisory checks should exist?

And let me ask you also – I think omitted in the conversation that we've had so far – is there any role for Congress? Does the statute specifically contemplate such a role?

MR. FISKE: I don't think, once you have appointed an independent counsel, you can have any checks beyond what I consider the extremely limited checks that are currently in place.

Judge Walsh referred to the power of the Attorney General to remove an independent counsel for cause.

It is not surprising that that has not happened to date. It is hard to imagine politically how that could ever happen except in the absolutely most extreme circumstances. I don't think that is a realistic check against what some of the alleged abuses of conduct of independent counsel have been.

So I don't see a practical way to limit the authority of the independent counsel and still say that the independent counsel is independent.

I would agree with others who have suggested that the statute should be amended, and I would limit it to the very top people, as Jamie Gorelick said. I think I would disagree a little bit with her view as to the limits on the scope of the power of the independent counsel to pursue related matters.

When we get to that on the program, I will have more to say.

JUDGE ELLIS: Should there be time limits, Mr. Thompson, on an investigation? In other words, when an independent counsel is appointed, should she or he be given a time limit?

MR. THOMPSON: No, I think that is unrealistic.

If you look at your handout, many of these cases – and whether or not it should be an independent counsel case or whether it should have been handled by the Department of Justice is really irrelevant once you get the case as a professional prosecutor – and many of these cases did involve, and do involve, criminal investigations.

What you have in criminal investigations are cover-ups; you have many times active obstruction of justice issues.

It is very unrealistic to say that you need to complete an investigation within a certain time.

I agree with Bob. I think we need to be very careful about placing limits on investigating related matters because, in a criminal investigation, you need to take the investigation where someone who might have information might be with respect to the subject or target of the investigation.

So I think you need to be careful about placing artificial limits upon a criminal investigation.

JUDGE ELLIS: I think all of you, however, would agree that the longer that an independent prosecutor remains an independent prosecutor, the more likely it is that he or she becomes politicized in one way or another; and, therefore, while it may not be a good idea to have limits, Mr. Stein, I am sure, would agree that self-imposed limits make sense.

MR. STEIN: I think so.

I think it was Oliver Wendell Holmes who said that the rule of relevance is required as "a concession to the shortness of life."[46] And when the investigation goes on so long that it is divorced from public interest, there is a real problem.

I would like to know what the other panelists think about dealing with the press.

Should you never deal with the press? Should you deal with the press?

When I was appointed, Judge Robb said to me, "Do you want some advice?"

I said, "I certainly do."

He said, "I don't want to see you on the Today Show."

I would like to get the feeling of others about that.

JUDGE ELLIS: That is a critical point, but let me give Judge Walsh one last opportunity on the limits and resources.

Do you think, Judge Walsh, that there ought to be any limitations in terms of time or in terms of funds or personnel imposed on an independent counsel?

JUDGE WALSH: I agree with Jacob Stein that self-imposed limits are always desirable, certainly as a goal, because the longer you stay there, not only

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46. Reeve v. Dennett, 11 N.E. 938, 944 (Mass. 1887).

do you lose public support, but you also invite public attack or political attack. So it is an inevitable thing and any independent counsel is going to be aware of that. But as to trying to impose arbitrary limits, that is the way in which the Iran-Contra congressional committee got into their basic trouble – and John Nields will be here and maybe he can give you a different explanation – but they imposed a six-month or seven-month limit on their investigation. It made them sitting ducks for the administration, which was withholding information.

We were dealing not just with – first of all, there were no stumblebums in this business and we were dealing with the most expert groups in our national security community. We were dealing with our CIA, which is darn good and which is composed, in some elements, of people well-trained in deceit because that is their business – they do that for our country – and they also can turn those skills loose on Congress and an investigating counsel, such things as giving you a hundred thousand documents by holding out the ten that explain the other ninety-nine thousand. It is beautifully done, and I could talk with you at some length about that.

JUDGE ELLIS: Sounds like some of the people I litigated with for twenty years.

JUDGE WALSH: That is the basic problem with trying to put time limits on an independent counsel or on a congressional committee. You just put yourself in the hands of defense counsel who can make motion after motion and use up your time and you can't get –

MR. STEIN: Judge, could I ask you this.

On reflecting on the techniques that were used against you and the resourcefulness of the people who were using them, as you look back on it, is there anything that you would have done differently?

JUDGE WALSH: Yes, there is, Jake, because the limitation that Congress put on its own investigation hit back at me. Because they had to finish in six months and because they needed a storyteller like Ollie North to explain what happened, I was confronted with the inevitability of their giving him immunity; and in an effort to preserve the case against him, I had to get all of the evidence against him in the files before he testified so that we could say that we had it without listening to him. That didn't help in the end anyhow, as Judge Sentelle may tell you. But that's what we did at the time.

Now, in an effort to get as much as I could as quickly as I could, I relied on document requests.

The Attorney General before me, Attorney General Meese, had filed the original document request, addressed to all the agencies, and I followed it along. I expanded them to deal with my needs, but I took a chance on being able to use them as the basis for getting the documents. I figured that if we subpoenaed

them, we're going to get the same kind of a runaround anyhow, but in that case, we would have had a court to go to to enforce the subpoena. That, in turn, would have invited litigation which would have prolonged my work.

So I still think, though, to reply to Jake's question, I would have been better to proceed by subpoena, fight it out at the beginning, than to rely on document requests and then find out four or five years later that the Secretary of Defense had notes that explained the whole business or a lot of these things and hadn't produced them and had lied about them and we hadn't found it out.

JUDGE ELLIS: All right. Let's turn now to the interesting issue that Mr. Stein raised about contacts with the press.

Mr. Thompson, did you have many contacts with the press?

I don't recall seeing you on "Good Morning, America."

MR. THOMPSON: No, and there is that opportunity to get on TV and talk about the independent counsel statute and investigations in general or to talk about your specific investigation, and I think it is improper as a prosecutor, whether you are in an independent counsel's office or with the Department of Justice, to talk about your case or investigation in the media. I just think that that is something that you shouldn't do.

The only issue there is that many of these cases do involve highly politicized, high-profile matters, and sometimes you do need to make a fair response to defense counsel who is trying to improperly manipulate the media. So there is a balance there. But I do not think that the prosecutor should initiate those kinds of contacts.

JUDGE ELLIS: Mr. Fiske.

MR. FISKE: I tried to follow the same policy as independent counsel that I had followed when I was United States Attorney, which was making no comment to the press except when you announced an indictment or when there was some court proceeding that resulted, as some of ours did, in guilty pleas. Then, of course, it is perfectly appropriate to announce those. And, of course, you do appear in court and respond to motions, and so forth, and all of that is in the public arena and that is all duly reported. But I personally always believed that a prosecutor should not be appearing in the press other than to announce official actions of his or her office.

JUDGE ELLIS: Judge Walsh, what about contacts with the media? Did you have many?

JUDGE WALSH: I did. I dealt with them on a fairly regular basis, for two reasons.

One, I was under political attack from a very early stage and at times it was necessary to respond to that and at other times, as my investigation dragged

out over two years, three years, four years, five years, it was difficult, even for good reporters, to keep everything with some degree of continuity. So in the end, I would meet regularly.

There were a group of twenty, twenty-five reporters following us with some degree of regularity. They would have the option of coming to see me two or three times a year. I would tell them how much money we spent. That was in the public press at all times. We released our six-month figures to them as they occurred.

"Why are you spending so much money?"

You try to explain in a general way, without dealing with the specifics of any case.

Then, for example, after we had convicted North and Poindexter, the question was: "Why are you still going? Why don't you go home?"

So then there would be a series of meetings in which we would explain the framework of the investigation, again without identifying individuals or talking about a case against individuals, and always bearing in mind, of course, Rule 6(e), which forbids the disclosure of grand jury testimony.[47] We gave them no specifics, but gave them a generalized framework so that they would understand an event of the moment.

And if you think, by not talking, you were going to minimize their attention to what was going on, that's unrealistic because they were monitoring the grand jury.

The D.C. Court changed it finally in the end, but all the reporters had to do was stand at the elevators on the second floor and watch who went down a particular corridor to the grand jury room and they would know who the witnesses were today, and they were wise enough to understand the relationship of those witnesses to a particular department or a particular line of inquiry.

But I thought that the regular meeting with them – and they were an extremely decent, competent group – was helpful because it enabled them to keep their stories accurate and to give the public some idea of the continuity of the investigation.

JUDGE ELLIS: Mr. Stein, I take it that that varies a little from what you did during your investigation.

MR. STEIN: I felt it was unwise to talk to the press for the reasons given by two of the panelists.

JUDGE ELLIS: But when the investigation goes on some five to six years, does that change it?

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47. FED. R. CRIM. P. 6(e).

And what about speeches to bar associations or speeches to other kinds of groups? Did you do any of those?

MR. STEIN: Never.

JUDGE ELLIS: Judge Walsh.

JUDGE WALSH: I did it on two occasions: One, after the immunity was granted to North, after North testified, not only – John Nields can explain all this – but when North was called as a witness, his attorney, a very able attorney, Brendan Sullivan, insisted that he only testify once, either in private or in public. So it meant he had to be put on the stand publicly, with no preparation, without knowing what he was going to say. And all of you who have ever questioned a witness without knowing what he is going to say know what is very likely to happen; and he ran away and a poll taken, at the conclusion of his testimony, of the ten most popular people in the world had North as number five; President Reagan was number four –

MR. STEIN: Moving up to one.

JUDGE WALSH: – President Reagan was number four and the Pope was number six. So at that point I thought I had to explain why I was going to prosecute him anyhow, and I did do that to the American Bar Association at its meeting a month later. And another time, when the statute was under attack, I spoke to the American Bar Association in defense of the concept of independent counsel and the statute.

JUDGE ELLIS: All right. Mr. Fiske, did you want to end this round where it began?

MR. FISKE: I think I started.

JUDGE ELLIS: All right. Let's turn now to the matter of the final report,[48] which is a matter of great interest to everyone. Let me ask whether there ought to be, as there is, a requirement for a final report, for, after all, there is no such requirement for a United States Attorney. When a United States Attorney declines a prosecution, she or he doesn't get up in front of the press or publish anything that says, "Well, I didn't prosecute, but I didn't prosecute because of this, that, and the other thing, and it's one of those cases where it probably should be prosecuted, but I don't have the resources."

What about the requirement for a report, Mr. Stein?

MR. STEIN: I think there are two elements.

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48. *See* 28 U.S.C. § 594(h)(1)(B) (requiring that independent counsel submit final report after completion of duties).

The public is entitled to know how its money is spent, and perhaps a report should be written to give some information about that.

On the other hand, it can do a lot of damage to a lot of people. In addition, writing the report requires a lot of time.

I was requested by two senators to put in my report that Mr. Meese should be absolutely exonerated and from another senator that I should declare that he is unfit for the job of Attorney General.

Well, I had nothing to do with those issues. My issue was whether there was evidence to bring an indictment. If you explore other issues, you yourself become a political figure. That was not my assignment.

Anyway, if a report should be written – and there are many reasons why there shouldn't be a report–perhaps it should be confined to who you employed, what their backgrounds were to show that you had quality people, and some indication why the investigation took the time it did.

I also give advice to anybody who is going to be appointed an independent counsel. Start writing your report as soon as you are assigned. If you wait to the very end, you are going to have a tremendous problem.

JUDGE ELLIS: Mr. Thompson.

MR. THOMPSON: I agree. I owe a report to Judge Sentelle. It is a really daunting task. I think it is a very wasteful requirement; there is a tremendous potential for abuse.

When I was a prosecutor in the Department of Justice, when I ended a case, I simply shut the door and turned the lights out. Now I have to spend millions of your money doing this report. Right now what I have to give to Judge Sentelle is a full and complete report.

The statute says that I need to write a report setting forth fully and completely a description of the work of the independent counsel, including a description of all cases brought.[49]

JUDGE ELLIS: Does that include, for example, having to tell Judge Sentelle and the other members of the court that while you thought there was evidence of some wrongdoing, you didn't think you could persuade a jury, or something of that sort?

In other words, what I heard you read and what I recall from the statute clearly doesn't require that you, as you're turning out the lights, throw rocks.

MR. THOMPSON: Absolutely, and hopefully we will not do that, but you will need to describe, as I understand the statute at this point, a basic degree of the work of the office and the investigative work and some description of the investigative details because I think now, as the statute is constructed, the

49. *Id.* § 594(h)(1)(B).

court needs that, the special panel needs that, to determine the attorneys' fees issue, especially who was the subject and the target of the investigation and did not get prosecuted.

JUDGE ELLIS: All right. Judge Walsh.

JUDGE WALSH: I think the report is an important requirement of the statute.

Where a person has the unsupervised power that we have all discussed and in a matter of this kind of sensitivity, dealing with the highest officers in government, he should be required to report on what he does.

The original idea of the statute was to create an independent investigator whose credibility would be accepted in deciding not to go ahead against someone.

The classic report that I always point to was the one by Leon Silverman, who was later President of the American College of Trial Lawyers, who wrote a thousand-page report on why Secretary of Labor Donovan should not be prosecuted, and he pointed out the lack of credibility of the witnesses.

Now, I think it was both important to Secretary Donovan and to the public who had supported the investigation to know why, after the Attorney General asked for an investigation, he concluded nothing should be done.

I think there are two questions.

One, should there be a report?

Second, should it be made public?

And again, this is a democracy where the public is entitled to know what is going on and if somebody spends, like I did, $35,000,000, there is bound to be some question and it ought to be answered by someone other than by political opponents or people with an ax to grind, attacking either the statute or me.

There is another question also: whether that report should contain grand jury evidence.

And I thought Judge Sentelle did a beautiful job of meeting that question.

First, the classified information was put in a separate report that nobody saw except the court.

Second, he decided to leave the grand jury references in because they were necessary to the complete story.

But before that report was released, he issued an opinion. President Reagan had asked to suppress the report, and so had several others. He ruled on those motions with an opinion which pointed out that all the report was was a report by an individual. The conclusions expressed in it as to what the facts were and why someone wasn't prosecuted were those of an individual. So his opinion acted as a preface for the report to diminish it as a public accusation of any sort.

And then finally the statute provides that every person mentioned in the report is to have an opportunity to supply his comments, his explanations, his denials, which are to be published at the same time as the report.

My report is three volumes. The third volume, which has the comments by those mentioned in my report, is, by far, the longest. It is over a thousand pages, in dealing with the 400- or 500-page report.

So I think it is a dilemma.

Is it right to have a prosecutor saying things that may be unfavorable to an individual without having a grand jury indictment and a prosecution?

You know, we just shudder at that. But where you have to explain what happened and why you didn't do something as the statute requires – and I think it probably should require – why, it seems to me this is the best answer to it – give everybody an immediate opportunity to answer – so the press gets both the report and the answers at the same time and then have someone like Judge Sentelle set the stage by diminishing the report as a public accusation.

JUDGE ELLIS: Mr. Thompson.

MR. THOMPSON: Judge Walsh, I understand your points there, but we would not want that kind of report coming out of the United States Attorney's Office or the Department of Justice. For example, if Jamie Gorelick undertook an investigation of, say, a mayor of a large city and decided not to prosecute him or her, we would think that the prosecution would be closed, and there would be professional and ethical limitations upon her ability to write a report as to what happened with respect to that investigation. And the question I have is: I think that perhaps the filing of this report and the writing of the report actually serve to not only make the investigation go longer, but perhaps serve to overly politicize the investigation.

JUDGE ELLIS: Judge Walsh.

JUDGE WALSH: I could certainly say that it's a pain in the neck.

I worked for a year – the report took, I think, five or six months after we were through.

Nobody likes the idea.

But just to meet Larry's point, the Attorney General has to file an annual report. The structure there is in place. It is not something novel, like an individual independent counsel going off by himself.

Also, there is congressional oversight of the Department of Justice that is regular. Although there is congressional oversight of the independent counsel, it is very difficult to make that effective, and I think that to make congressional oversight effective, they need a report. And if the report is going to go to Congress, it certainly ought to go to the court, and I think Judge Sentelle was right in releasing it to the public.

JUDGE ELLIS: Mr. Fiske.

MR. FISKE: Larry contrasted this situation with that of the U.S. Attorney or the career prosecutors in the Justice Department, and it really does make the point very well, and it is sort of a one hundred and eighty-degree difference.

The traditional U.S. Attorney investigation is one where they investigate something. Hopefully the public, if it is done right, never even knows there is an investigation at all; and if the decision, at the and, is not to prosecute, then there is no prosecution, there is no announcement, and hopefully nobody ever knew the person was under investigation.

The very situation that creates the need for an independent counsel is that the allegation, which may be confidential or secret in the traditional investigation, is a public allegation. So the whole country knows about the allegation. And, secondly, it is deemed that the Department of Justice is unable to investigate that and, therefore, a person is picked from the outside to come in as an independent counsel to investigate this highly publicized investigation.

It's easy if the person brings an indictment. Then we go through the traditional system: The jury votes up or down and he gets judged on the result.

The problem comes – or the theoretical problem comes – when the independent counsel, who has been selected theoretically because of his or her independence and credibility, decides not to prosecute; and then, even in a nonpolitical politicized situation and certainly in the highly politicized situations that have been common recently, everybody wants to know why not, and that is what creates the demand for this report which is so otherwise antithetical to our whole system.

It is interesting that originally the statute required the report to say why the individual under investigation was not indicted. The most recent amendment, in fact, in 1994 makes that now discretionary so that that can be done or not in the discretion of the independent counsel.[50]

I think it is a very tough call –

JUDGE ELLIS: And how would you come out on that issue?

MR. FISKE: Well, I think you can't answer that yes or no. I think –

JUDGE ELLIS: It depends on – it's fact-specific –

MR. FISKE: I think you have to depend on the facts.

I think there has to be some explanation to the public why an indictment wasn't brought. The problem comes when people say, "Well, we didn't indict,"

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50. *See* Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, 108 Stat. 732, 734 (codified in 28 U.S.C. § 594(h)(1)(B) (1994)) (eliminating requirement that report contain reasons for not prosecuting matters within independent counsel's prosecutorial jurisdiction).

and then someone takes sort of a gratuitous shot like the kind that someone tried to get Jake Stein to take and say, "Well, we're not going to indict him, but I think he's unfit for office" or "there are some ethical violations here," things that go beyond the scope of the independent counsel's responsibility. That shouldn't happen.

The last point I want to make – and I think this is an important point – there is an interrelationship, I believe, between a report requirement and the complaints from so many parts of the media and the public about the length and expense of the investigation.

We all have situations, when we're regular prosecutors, a case comes in and an allegation comes in, you look at it, it doesn't seem to be going anywhere, and you say, "Let's move on to something else; we've got other things we want to spend our resources on."

The independent counsel has one case – one case. He is going to be judged – he or she – on that one case, not on their overall track record. And then when the results have to be laid out before the American people in a report, it is understandable that a prosecutor is going to bend over backwards to run down every last conceivable lead, dot every last "i," cross every "t," to make that report as bulletproof as possible from the criticism that is inevitably going to come out if there wasn't an indictment.

And so I think those two things are inextricably interrelated. As long as you have that report requirement, you are going to have these long and expensive investigations, because it all makes sense from the point of view of the person that is doing it.

JUDGE ELLIS: I think those comments adequately deal with the report issue.

Let me turn now to another very important, indeed sometimes incendiary, issue and ask: What kinds of questions arise, as is often the case, when there is a parallel congressional investigation? How should the issues be resolved?

Let's begin with Mr. Stein.

There was no congressional investigation in your case.

MR. STEIN: There was none, and I had none of the problems that Judge Walsh was confronted with. There were no questions of immunity, and things like that. So perhaps someone who was involved in the parallel should speak.

JUDGE ELLIS: Mr. Thompson, you had the same experience.

MR. THOMPSON: Yes. That was not an issue in my investigation.

JUDGE ELLIS: Judge Walsh, the spotlight seems to focus on you here.

JUDGE WALSH: Well, it does on this question because, from the very beginning, we were confronted with the problem of parallel investigations.

Those of you who have prosecuted know a parallel investigation is difficult on both sides – if you're getting a criminal case ready and have somebody else working on a civil case, questioning the same witnesses, leading to possible confusion of your witnesses who are all reluctant to testify.

There was no one who wanted to come in and blow the whistle in our case. Every witness, from the beginning to the end, was essentially hostile and sensitive and uneasy in what they were doing, and to have two groups working with the same witnesses is bad, at best.

MR. STEIN: Judge Walsh, let me ask you this.

JUDGE WALSH: Yes.

MR. STEIN: You said, in reflecting on how you may have done it differently, you would have used the grand jury.

Quickly?

JUDGE WALSH: No. We had the grand jury fast enough.

MR. STEIN: But you would have brought the key figures before the grand jury?

JUDGE WALSH: No, no, no, no.

MR. STEIN: How would you –

JUDGE WALSH: I would have used the grand jury to subpoena documents, but I wouldn't –

MR. STEIN: Okay.

JUDGE WALSH: I think that any of you who have prosecuted know you have to be very careful, with a hostile witness, before you perpetuate his testimony. He usually is reluctant at the beginning and he gives more and more as he gains confidence in you.

So you can't solve the problem that way. But we did have overlap. John Nields actually had sent out requests to each of the agencies we were investigating, asking for duplicates of all the documents they gave me. So whatever I requested, he was asking for duplicates – so that we were being followed from the back as we went ahead, but –

JUDGE ELLIS: Did you ask Congress to refrain?

JUDGE WALSH: No. I think we asked John not to, and I can't remember whether he agreed to or not. He'll tell you when he gets up here.

But I must say that we worked weekly with counsel for the two committees – John Nields and Arthur Lyman – and they were just as cooperative

as they could be. We had different objectives; we had different time constraints; and they did their best to accommodate it, but it was difficult.

One of the key elements of proof in the case were Swiss records.

Under the treaty, Switzerland would produce those records, but only to a law enforcement agency, not to Congress, which they regarded as a political agency. So Congress couldn't get the Swiss records which had all of the details of the diversion of the funds from the Iranian arms sales to support the Contras, and so they had to give immunity to one of the persons that I intended to prosecute, Albert Hakim, who was the treasurer of the Contra supply enterprise.

Now, then the ultimate problem came with giving immunity to North and Poindexter, who were very important to us, first, as defendants and targets and then as a possible source of information.

JUDGE ELLIS: I take it, though, you would say that the problem of immunity is one of the principal problems.

Mr. Fiske.

JUDGE WALSH: Well, let me just say one more thing.

Under the law, Congress has the ultimate word, and it should be that way. Congress should make the decision as to whether it should grant immunity or not, and they are really the supreme governing agency in our government. And if they conclude that for political reasons – high-level political reasons – it is important to tell the public, the prosecutor should be subordinated.

JUDGE ELLIS: Mr. Fiske.

MR. FISKE: Yes. I did also have some experience with congressional investigations during my tenure.

I agree completely with what Judge Walsh says about Congress having the ultimate authority.

Within a month after I had started, Congress announced that it was intending to have hearings into the very issues I was investigating both in Arkansas and Washington, and I went to the leadership of the two committees and asked them to hold up their hearings because I felt it would interfere with our investigation, and they said, "We're not going to give anybody immunity; you don't have to worry about that." But I had the same concern about them calling people in, putting them under oath, and having them tell a story that would lock them in that would make them basically useless as witnesses later if it turned out that story prematurely told was false.

The Democrats controlled Congress at the time and they were receptive to my request to hold up hearings and the Republicans wanted to go forward, and we finally negotiated sort of an unhappy compromise, which was – I was working on some aspects of this in Washington – I said, "When I finish that, then I would have no objection to your going forward on those issues, but I don't

want to have hearings going on into what's going on in Arkansas." And that's the way it worked out, but there were some very unhappy voices.

A congressman from Wisconsin – this was right about the time of the O.J. Simpson arrest – said, "This is like saying to us, 'You can't ask him about the knife'; you can't ask him about the bloody glove; all you can say is, 'Say, O.J., how was the trip to Chicago?'"

But I think the reaction to Congress to holding up an investigation that may interfere with a prosecutor's investigation probably depends in large part on political considerations.

JUDGE ELLIS: Now, I promised this unruly bunch that before we ended this panel, each would have an unfettered opportunity to express his views about whether the independent statute should be changed or indeed scrapped.

We are going to be very brief – two minutes each – and we will begin now with Judge Walsh.

JUDGE WALSH: Briefly, the purpose of the statute, it grew out of the Saturday Massacre in which Archie Cox was fired because he subpoenaed the President's records and the Solicitor General carried out the President's direction to fire him.

The idea was to get someone who couldn't be dealt with that way.

The purpose also was, where there is a real possible conflict of interest of the Attorney General, to give him or her a double insulation. Not only can she or he appoint an independent counsel themselves, they can also ask a court to do it so the Attorney General is out of the appointive process.

Now, the statute is overbroad.

In the debate within the American Bar Association which developed the original concept, there was a question of whether the request for appointment of an independent counsel should be discretionary or mandatory. I happened to favor the discretionary against the mandatory, but the mandatory prevailed.

If there is to be a mandatory appointment, I think many of us agree that this requirement should be limited to the President, the Attorney General and – actually, we have language here that Jake Stein and Archie Cox worked with me on – or, actually, they're the draftsmen – it should be limited to a criminal abuse of power by the President or the Attorney General in the performance of the official duties of their office.

In other words, it shouldn't be a question of whether Hamilton Jordan smoked pot in a nightclub for which an independent counsel was once appointed or whether somebody had a mistress, and it should not relate to matters that occurred before a person took office. It should be limited to emphasize that it should be an important matter. In Iran-Contra there was a constitutional confrontation. In Watergate there was sordid activity by the President himself.

There may be room for language which would narrow it even further by emphasizing the need for something important and not trivial.

Now, that is my feeling.

JUDGE ELLIS: All right. Now, Mr. Thompson has the distinction of being the only one of our independent prosecutors who is not a *former* independent prosecutor. He is a *current* independent prosecutor, with pending matters, and that may –

Do you wish to have your two minutes or –

MR. THOMPSON: I will defer. I do have some post-conviction litigation going on, and I think it would be appropriate for me to just pass on that question.

JUDGE ELLIS: All right. Mr. Stein.

MR. STEIN: I think someone with the power the office confers should have a tolerance for the idea that you cannot rectify all the wrongs in the world; you can't pursue all the leads that come to you; and you've got to have the courage to close the investigation in spite of the fact that just when you're ready to close it, you get a letter from somebody who says that he has the goods on your man – he's got the goods and he will produce a woman in your office 10:30 tomorrow morning to blow this investigation wide open.

That's after you've been in office for, let's say, three months.

And suppose he's got the goods.

Well, he's got you, but you've got to have the courage to say, "We're through, we're closing down."

Thank you.

JUDGE ELLIS: All right. Mr. Fiske.

MR. FISKE: Well, I already said I think the statute should be limited to top officials in the Executive Branch – the President, the Vice President, the Attorney General, basically the same limitations that Jamie Gorelick listed.

There is one aspect that I would like to deal with, which goes back to what Bill Barr and Jamie Gorelick were talking about: the constraints on the Attorney General in the investigation that the Attorney General herself or himself conducts to decide whether to appoint an independent counsel in the first place.

I see absolutely no reason, it makes no sense, why the Attorney General is not allowed to use the grand jury, not allowed to use the same prosecutorial resources that he or she would ordinarily use in any other case in order to make this crucially important decision.

And the last point I would make is that I do think that it is very important that the independent counsel have the authority to pursue related matters when those related matters involve the use of a key witness that the independent counsel may not want to turn over to someone else and, secondly, when those

related matters, in his or her judgment, are reasonably designed to produce, in one way or another, evidence against the subject of the investigation.

JUDGE ELLIS: Ladies and gentlemen, please join me in thanking the panel.

(Applause.)

Panel Four – Congressional Investigations

CHIEF JUDGE WILKINSON: Our fourth phase of the independent counsel program will deal with the question of congressional investigations, and this time we will hear about the whole question of congressional investigations from the point of view of those who worked on such investigations in Congress. And so I will ask Chief Judge Haden of the Southern District of West Virginia to introduce the next panel.

JUDGE CHARLES H. HADEN II (Chief Judge, Southern District of West Virginia): Good morning, ladies and gentlemen.

Up to this point, the primary focus of the discussion has been on the independent counsel operation and how selected, et cetera. Our focus for this panel is on the counterpoint of recent years – the congressional investigation.

At the outset, I would remind you that the independent counsel statute has had a very brief life in the history of the country. It was enacted first in 1978, sunsetted in 1992 and, as previously remarked, was reinvigorated and reinstated in 1994, and it has a limited life through the end of 1999.[51]

On the other hand, before and after the advent of the independent counsel statute, Congress has freely exercised its authority to conduct investigations within the scope of its constitutional powers.

A congressional investigation, for our purposes, is a focused aspect of legislative oversight which shares the common goals of (1) informing Congress as to the best means of accomplishing its task in developing legislation; (2) monitoring the implementation of public policy; and finally, (3) disclosing to the public how its government is performing. This inquisitorial process also sustains and vindicates Congress's role in the constitutional scheme of separated powers and checks and balances.

When push comes to shove in the constitutional and policy arena, it is, as one of our previous speakers has conceded, thought generally that the congressional investigation, so long as it stays within the sphere of its authority, is paramount over independent counsel or other executive or quasi-executive authorized investigations that might conflict with or parallel a congressional purpose.

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51. 28 U.S.C. §§ 591-599.

Conflicts have arisen between Congress and the executive over congressional investigations since the Union was formed.

For you who have an interest in the history of it, the first clash occurred when Congress investigated the failed Sinclair Expedition in 1792, where former revolutionary soldiers, who had defeated the British, were soundly vanquished by native Americans in the Northwest Territory.

Beyond the memory of most of us, but not some who are present here today, there was also the Teapot Dome Scandal investigation during the Harding administration; and the ones we are all aware of include Watergate, Iran-Contra, Whitewater and, most recently, the seminal investigation of campaign contributions from foreign supporters to candidates for important offices. And like other speakers, I too would not put a name on that investigation. I don't think the media has yet informed us what the appropriate final name is.

Our focus today compares and contrasts areas of direct conflict that can occur when Congress and the independent counsel are charged with investigating the same event and the same people. In any such parallel investigation, there is always that tension created by Congress's need to oversee the activities of government and to inform the public about overriding issues of public policy, that is, again, how the public's government is being conducted, with that of the independent counsel on the other hand, whose interest generally is to investigate criminal activity of events and persons in high offices and with the power that has never yet been exercised by an independent counsel to refer certain officeholders to Congress for impeachment.

Preeminent among Congress's various powers to investigate, but perhaps most dangerous to the success of an independent counsel prosecution, as previous speakers have noted, is the prospect of a grant of broad immunity to witnesses who may appear before Congress pursuant to the immunity statute of 1970 – 18 United States Code, Section 6000, and the following subsections.[52]

Our panelists will no doubt discuss the implications of either the granting or withholding of immunity to prospective congressional witnesses.

There are also other essential tools that many of us from outside the Beltway are less acquainted with, and those are – and they have to do with legislative oversight – the power of subpoena, staff interviews, staff depositions, and the contempt power, the employment of which, either singly or together, may overshadow the success or failure of a concurrent investigation conducted by an independent counsel.

Our two panelists today bring a wealth of opinions and also years of experience to the conduct of or reaction to congressional investigations, vis-a-vis a concurrent independent counsel investigation.

I will introduce both briefly.

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52. 18 U.S.C. §§ 6001-6005 (1994).

Mr. Richard Leon, to my left, and Mr. John Nields are fully covered in the biographical information on page 13 of the program, but for our purposes today, suffice it to say that Mr. Leon has served as deputy or chief counsel to the United States House Republican members on three different congressional investigations: Whitewater, October Surprise, and Iran-Contra.

Dick Leon also is an adjunct Professor at Georgetown University Law Center, where he teaches a course that is the very subject of this panel – congressional investigations. He teaches that with another person we had hoped to have present here today, John Podesta, who is Deputy Counsel to the President and who, no doubt, views this whole affair with a somewhat different perspective, but Professor Podesta was unavailable.

Mr. Nields has also functioned as Special Counsel for the United States Department of Justice to prosecute top officials of the FBI in the case of *United States v. Gray.*[53] But more relevant to this point here today, Mr. Nields served as Chief Counsel for congressional Democratic members, the relevant congressional committees investigating Koreagate and Iran-Contra. And also Mr. Nields, I hope, in his explanation, will distinguish for us, if it has not been done already, the difference between a special counsel and an independent counsel.

I also note for you that the program is in error in describing Mr. Nields as independent counsel for Iran-Contra. I think Judge Walsh should take full credit for that.

In any event, I suggest that both of our panelists have extensive experience in protecting the integrity of valid congressional investigations while working at all times to avoid jeopardy to the success of a concurrent independent counsel investigation, and they come to us with a wealth of talent. I think both of them are pretty good speakers on the subject.

I will commence with the first question, and that is:

If criminal investigations, John Nields, primarily are the responsibility of the independent counsel, what role or purpose should congressional investigations play? And how does what is being investigated play a role in defining the scope of the congressional investigation?

MR. JOHN W. NIELDS, JR. (Howrey & Simon, Washington, D.C.): This isn't an evasion, but I need to start off by saying that I bumped into Judge Walsh last night and told him that I had read the first chapter of his book[54] and how much I liked it. Apparently I didn't read far enough.

JUDGE WALSH: It gets better.

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53. United States v. Gray, 502 F. Supp. 150 (D.D.C.1980).

54. LAWRENCE E. WALSH, FIREWALL: THE IRAN-CONTRA CONSPIRACY AND COVER-UP (1997).

MR. NIELDS: I'll do a little more reading tonight.

I did not expect, at the beginning of my career, that I would end up speaking on behalf of Congress at an event like this. I began as an Assistant U.S. Attorney, doing criminal prosecutions, and we thought that Congress was hopelessly political and no place where any professional could do his job, but I have now done two congressional investigations for Congress and here I am, and I'll do the best I can.

Congress's functions in the kind of area we are talking about here are very important, and they are very different from those of an independent counsel, and they are different in ways that you could be confused about if you get your understanding of independent counsels from reading the press.

Congress performs a kind of watchdog function over the Executive Branch of our government. Congress holds hearings to explore issues of public policy about how we govern ourselves. Congress uncovers and exposes and publicizes misuse of government power, abuse of government power. Congress frequently targets particular individuals in the Executive Branch to expose misfeasance, with the result that those individuals resign or are, in some manner, run out of office; and very occasionally – and we hope this is very occasionally – Congress actually has an impeachment function.

This work of Congress is very political. It is sometimes partisan. It is often not pretty to look at, but it is very important. We live in a democracy in which the government is supposed to be accountable to the voters, and the voters can't perform their function unless they know what their government has done.

Congress also obviously has the responsibility for passing laws and I, for one, hope that at the end of the unnamed campaign finance investigation, Congress will actually address the issue of appropriate remedial legislation. But for the purposes of this discussion, it is really its watchdog function, I think, that comes into play; and, as I say, it is a political function, and it is very different from the function of an independent counsel, which is, or at least should be, not political at all.

The independent counsel is not a good way of finding out whether the government is performing its job correctly or whether there are, in general, people in government who are engaged in some manner of misfeasance. It is not a good way of doing that, first of all, because an independent counsel functions in secret under grand jury secrecy as independent counsel, as all prosecutors should. They frequently take a very long time to get the answer to the question, and their scope is much narrower than Congress's. They are to answer the question of whether someone should be prosecuted for crimes. Most of the misconduct in government does not result in violation of criminal laws or at least violations that ought to be prosecuted. And finally and most important, the independent counsel and any prosecutor's office ought not to

be attempting to serve a political role. They should be serving a role of ferreting out and prosecuting crime. It is a role of justice, not politics.

So Congress has a very important role in the kind of arena we are talking about, and it is different from – and we will get into this deeper as we go forward – from the function of the independent counsel.

JUDGE HADEN: Mr. Leon, do you want to try your hand at that?

MR. RICHARD J. LEON (Baker & Hostetler, Washington, D.C.): Well, it is a broad topic but a worthy one.

I think, as a general proposition, it has been very interesting to see the reversal that has occurred over the ten years since I first worked as a counsel to a congressional investigation as a colleague of John on the Iran-Contra investigation. Since the three occasions I've worked on congressional investigations, we have seen both the Congress and the administration change hands, and with it we have seen a new phenomenon that is rather interesting. When the Republicans controlled the White House and the Democrats controlled the Congress, the Republicans were always bitching and moaning that there were too many Democratic congressional investigations of the White House. Well, since it has turned around a hundred and eighty degrees, the Democrats are complaining that there's too much investigating of the Executive Branch by the Republican-controlled Congress.

I think the bottom line is that Congress has its institutional responsibilities, and it has to exercise them in a responsible way.

Of the investigations that I've been involved in, two of the three had public hearings, Iran-Contra and Whitewater I – Whitewater I being the initial Congressional investigation into contacts between White House and treasury officials that occurred in 1994 when Bob Fiske was serving as the Special Counsel. There was no question, there was no issue, that it was appropriate and necessary for public hearings to occur in both of these investigations. In both instances the Democrats controlled the Congress of the United States. And even within the Congress, there was no real serious issue as to whether there should be public hearings.

I think Congress, for the most part, especially through the leadership that has been exerted by the chairmen and ranking members who ran these committees, has exercised this power in a responsible way, as has the counsel that they have retained. Where Congress has gotten into trouble is when they have stopped focusing on legislating and educating the American people, which are their constitutional responsibilities, and started using the congressional investigative process for either political pontificating or to gain some form of leverage over the opposite party. The classic example of that was the one investigation I was involved in, during which an independent counsel was not appointed. That investigation, where I served as chief counsel for the Republi-

cans, was called the "October Surprise" investigation, and it was an investigation into the then sitting President George Bush during the election year 1992. The House Democrats in that case decided that it was appropriate to do a $1.35 million investigation into twelve-year-old allegations about alleged conduct by President Bush and others to conspire with Iranians to hold back the release of the American hostages from Iran. That was the decision of the leadership in Congress. And as a result of that decision – and I might add we were fortunate to have Lee Hamilton, who had served as chairman of the Iran-Contra committee, as the chairman of that investigation and Henry Hyde as the ranking member – we conducted an investigation in a bipartisan manner and we issued a bipartisan report which completely cleared President Bush and President Reagan of the allegations that had been brought during that campaign year.

So Congress sometimes can be its own worst enemy – there's no question about it – but if you think about the various independent counsel investigations that have been going on recently, you haven't seen Congress overreacting.

Indeed, there are, or have been, independent counsel investigations during this administration with regard to Secretary Cisneros, Secretary Brown, and Secretary Espy, but you haven't had major congressional investigations with regard to any of those.

With regard to Whitewater, we have reached a point now where Whitewater is used as kind of a catch-all phrase. I think it is very dangerous to do that because "Whitewater" had some very distinct components to it. As Bob Fiske was faced with the responsibility of sorting those components out, so too, I think, we, in our discussion of the interrelationship between congressional and independent counsel investigations, must also sort those components out.

The component of the Whitewater affair that related to questionable contacts between senior Treasury Department officials and senior White House officials, and which was the subject of the three weeks of congressional investigations we held in the summer of '94, when Bob Fiske was special counsel and I was serving as Jim Leach's special counsel, were never questioned by anyone. Indeed, that investigation unmasked improper conduct at the very senior levels of the administration that resulted in the resignation of the Deputy Secretary of the Treasury, the General Counsel of the Treasury Department, and senior White House officials.

Travelgate and Filegate, which are other components under the "Whitewater" umbrella, have not been critically questioned as inappropriate topics for Congress to be investigating, even though technically they have been appended to Judge Starr's agenda.

So I think, when we use the term "Whitewater," we have to be careful to parse the various components of it. And I think, for the most part, despite the pontificating that goes on by certain congressional gadflies and the press,

Congress has exercised its constitutional responsibilities with gravity and with great concern.

JUDGE HADEN: The next question has to do with timing and the success of either a congressional or an independent counsel investigation or the success or failure of both.

As a matter of policy, I would put to Mr. Leon first, should congressional investigations precede or follow an independent counsel investigation? And if, or more appropriately when, a conflict develops between the two concurrent investigations, what tools can you use to minimize that conflict?

And that latter part, I might say, I'm certain I'd be interested in hearing about use of the subpoena power, the various methods of legislative oversight.

MR. LEON: Well, it is a tough question to answer, Your Honor, because it proceeds on an assumption that you could have an ideal world and, of course, you don't.

I think experience has shown, since Iran-Contra, certainly, and in the various situations where there have been congressional investigations that have had great public credibility, that Congress is wise to exercise self-restraint as to when it conducts these kinds of investigations, and how it goes about conducting them.

I think, in the case of Iran-Contra, even though John and I were working for members on opposite sides of the aisle, we were pretty much in agreement that it was a situation that necessitated an airing of the problem. A cloud had descended, so to speak, over the administration, and it had to be looked into. Neither President Reagan nor his administration would have been able to function effectively for the remaining two-year period of his administration without some attempt to look into what was going on.

I think the hearings that took place at that time obviously had to occur, even though Judge Walsh was going to take awhile to finish up his job.

So I think with respect to timing in the real world – it's hard to say which should go first or which should go second. I think, if Congress restricts itself, for the most part, to conducting its investigations and televising its hearings to those situations where there is a grave concern, not only within the Congress but within the country, whether or not the government, at its highest levels, is either not functioning or functioning improperly, then in that type of situation – of which Iran-Contra was clearly an example – it is appropriate for Congress to go first.

I think, as a general proposition, Congress should try to refrain, as it has in the Cisneros, Brown, and Espy investigations, from conducting investigations into criminal behavior that an independent counsel is pursuing. And I think Congress for the most part has done that.

JUDGE HADEN: John.

MR. NIELDS: Yes, I think it is hard to generalize. There are a number of issues, immunity being the most important one or the most difficult one, the one where the conflict is clearest.

There was a time when it was thought that a congressional hearing created the kind of publicity that would make a criminal prosecution impossible or require the delay of a criminal prosecution. Courts have pretty much come to the view that the publicity issues can be dealt with with interrogation of jurors and sequestration of the jury, and so on. But obviously, if Congress does not have an important interest in having a public investigation, it is creating problems for the criminal justice process by holding one at the wrong time and should refrain.

There is also the issue that Bob Fiske mentioned earlier that everybody is tromping over the same witnesses; and in an ideal world, you would have one investigation dealing with one set of witnesses, not two or three or four investigations. But if you have a situation, which I think we are all assuming here, where there is a role for an independent counsel – a criminal investigation – and also a role for Congress, those two issues you simply have to work out; and I would say I've done this twice for Congress, once when there was a Justice Department investigation parallel to me and once when there was an independent counsel investigation parallel to me, and actually I had an easier time dealing with the independent counsel in Iran-Contra than the Justice Department in Koreagate.

But the critical issue obviously is the immunity issue. Congress does have the final authority to decide whether it is going to grant immunity,[55] and if Congress does, it's a pretty sure bet that it's going to mess up the criminal prosecution.

MR. LEON: I would add one point in that regard, John.

I think the Congress, in its wisdom, has provided in the immunity statute that the congressional vote to grant immunity must be a two-thirds majority, not just a simple majority. By creating that requirement in the statute, Congress has acknowledged that a decision to grant immunity is a very serious decision that should not be taken lightly and a decision that should be bipartisan by nature.

Getting a two-thirds vote is no small task. We obviously succeeded in that regard in Iran-Contra, and there have been other instances, too. But in Iran-Contra we had a vote of a bipartisan majority – a clear majority – of the committee.

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55. 18 U.S.C. § 6005.

So I think it is important to stress what Mr. Fiske and Judge Walsh said earlier this morning that it is Congress that ultimately has the authority – the ultimate authority in this area. I think Congress has been pretty careful in choosing their opportunities to do that.

MR. NIELDS: In the Iran-Contra situation, it is, I think, fair to say that everyone knew going in that Congress was going to do a thorough investigation and wasn't going to stop short of immunizing the witnesses that it needed to get there. I don't recall what the actual vote was when we eventually hit the issue, but I know that there was overwhelming support on both Republican and Democratic sides in both the House and the Senate to compel the testimony under immunity of both North and Poindexter. There was a view expressed by one or two members of Congress that the way to handle that investigation, a la Watergate, was to hold off, let Judge Walsh prosecute and convict North and Poindexter, and then he would have maximum leverage to turn them against the President. That view was expressed, and I think people understood that that was a way that would increase the likelihood that at the end of it, the President would be gotten; but the overwhelming view was that that was not our job and that we had a job that was very important, and I think you've got to look at each one of these investigations on its own facts.

One issue that is going to matter is: Is the issue at hand one that is primarily and at its core a criminal law problem or is it, at its core, something else? We thought, for example, that Watergate was, at its core, a criminal law problem. It blossomed into many other things, but at its core was a break-in – I don't know if it was a third-rate burglary, but it was a burglary – and that it was a cover-up of the burglary and who participated in the burglary.

The Iran-Contra affair is closer to what Judge Walsh said a little bit earlier. It was a real constitutional confrontation. Something very wrong had happened about the way we govern ourselves and about the way Congress and the executive branch dealt with each other, and it was understood by all to go very probably to the top official in the Executive Branch, the President, and it was an open question, when we began our investigation whether the result of it would be the toppling of the government or of the President himself.

People can differ about how likely that was, regardless of how the facts turned out, but that was an issue that was in our minds and in the public's minds, and it was viewed as paramount that we, in a reasonably expeditious fashion, answer that question so that the public would know whether this was an issue that ought to result in a change of government of some kind or not, and you couldn't do that, we thought – and I think everybody believed that – without compelling testimony from North and Poindexter.

Now, again, each one of these things is going to look different.

The campaign finance investigation may be one in which the public policy issues outweigh the criminal law issues.

Whitewater – at least the original Whitewater – seems obviously to be one that has a criminal law question in it and almost no public policy question in it, and each investigation is going to look a little different.

MR. LEON: I take issue with you, John, though, as to several of the component parts of Whitewater. I think there are at least three component parts under the umbrella of Whitewater that clearly have the public policy allure you mentioned. One was the one that we focused our hearings on in the summer of '94 involving the questionable contacts between senior Treasury Department officials and senior White House officials.

I think Filegate and the Travelgate components of Whitewater are two others where there are very clear public policy and good government issues. Educating the American people as to what was going on as to them – how it could be that these FBI files on these officials were all of a sudden showing up where they were – is appropriately the subject of congressional inquiry.

So I think those components of Whitewater, at a minimum, have to be segregated out from under the umbrella of "Whitewater" as being topics that merit that kind of attention.

MR. NIELDS: Yes, I agree with that. I think that I was referring to the land –

MR. LEON: Arkansas deal –

MR. NIELDS: The land deal.

One question, I guess, which is sort of out there is whether the history of the North-Poindexter immunities and reversals of their convictions has changed the map and the analysis.

JUDGE HADEN: That is what I wanted to follow up with John in that regard.

Knowing that some of these investigations are hybrid and the question needs yet to be resolved, after investigation or after some portion of the investigation, whether it is a public policy issue or a criminal issue, or both, what are some of the fallback mechanisms, less than a broad grant of immunity, that can be used to protect both investigations?

MR. NIELDS: Well, again, I think you have to look at that one case at a time. It is certainly hypothetically possible that you end up in a congressional investigation where there is a parallel independent counsel and the independent counsel has an interest in one or two people and one very small area and Congress can simply agree to stay out of that area. But most of the time I think it is going to be the way it was in Iran-Contra, and I think we probably would

be kidding ourselves if we thought that we could have some sort of limited area of taking testimony or some sort of plan for keeping the congressional immunized testimony secret for a long period of time so that the prosecution could move forward. I suspect that most of the time it is going to come at Congress the way it did in Iran-Contra, which is, if you do it, you've got to do it knowing that there is a very high probability that you're going to mess up the criminal prosecution.

And I think that what has happened is that because of what occurred in fact, which was the reversal of the convictions, the public and the press is now putting more pressure on Congress to stay out of immunity in a parallel investigation, and I think Congress will in fact stay out in most cases. Whether they would stay out if the Iran-Contra affair issues presented themselves anew in the same form next year, I doubt, but I think that is open to question.

MR. LEON: I think, from an institutional point of view, there certainly has been a lot of discussion and a lot of statements made by various congressional chairmen, ranking members, and leadership members to suggest that they are bending over backwards, in the aftermath of North and Poindexter, to be deferential to the independent counsel investigation and not step on the toes of the independent counsel.

I think we certainly heard that kind of talk from Chairman Gonzalez and ranking member Leach in Whitewater I and in the Senate from Chairman Riegle, ranking Republican and later chairman D'Amato, and of course, ranking Democratic Senator Sarbanes. Congress also has been responsible in selecting as its chief counsels in almost every instance that I can think of people such as John and I, who were former federal prosecutors and who are very sensitive to, and appreciative of, the difficulty of the position of an Independent Counsel and the collateral consequences of their decisions.

JUDGE HADEN: Dick, let me ask you: On the question of politics, do you believe that the independent counsel process, where there is a concurrent congressional investigation, has become irretrievably politicized where we are now, in operating with these two types of investigations?

MR. LEON: Well, that is a hard question to answer.

I think there's definitely been heightened and more concerted criticism and attack on our independent counsels, particularly Independent Counsel Starr. I think this is very disturbing and, in some ways, a matter of great concern. We have never seen before, to the extent we have seen to date, I don't think, the kind of concerted attack against an independent counsel that we have seen in Mr. Starr's case. There have been press reports – and I'm not in a position to validate them – that these attacks are being coordinated by political operatives

at the senior levels of a national party, and I think that it is most regrettable and I think that it should be avoided at all costs.

You know, looking at the chart that was handed out among the materials here and comparing the number of independent counsels that have been appointed and the number of congressional investigations that have occurred contemporaneous with them, I think Congress obviously has gotten in the act in criticizing and attacking independent counsels.

I think it is distressing when you have attacks on the appointment process of independent counsel. I think that is also a new phenomenon. I think Judge Sentelle and his panel were put through some unprecedented attacks on their appointment process, and that is not healthy for the process.

So there has been increased sniping, but the bottom line is that the press and the media love conflict. That is how they make their money; that is what they're there to report. And there has just been an increased interest, and increased industry within the media, to seek conflict wherever it is and to report on it.

JUDGE HADEN: John.

MR. NIELDS: Well, I think that sort of a short answer to your question is yes, but it is not just the independent counsel statute.

The thing that sort of resonates in my head is reading *The Washington Post*—I think it was the day after Newt Gingrich was made Speaker—and there was an article that essentially said, "Okay. Now he's Speaker, what are we going to investigate him for?" And the House Ethics Committee then, you know, answered the call, and that was a committee that I once represented.

We started off with a really, really important and good, American idea, which was that everybody, including the highest official in our government, is under the law and should not be treated any differently because of his station than an ordinary citizen. It is a rule of neutrality and equality in our criminal justice system. It is a really important idea, and the independent counsel statute was designed to preserve it. But what we have moved to, it seems to me, is a very different idea and a very bad idea, which is that we are going to use our criminal justice system against our high officials in a way that is much worse and harsher than the way we use it against ordinary citizens.

It is very important that our high officials be subjected to a special kind of scrutiny because of what they do. They have power and it is very important that we watch them carefully, but that is a political function and that should be done through the political process. It should not be done through our criminal justice system.

MR. LEON: I can't resist responding to one thing John said.

I think the pendulum has swung as far as it is going to go within Congress, and it is now swinging back in the other direction. For example, the members of Congress have grown so concerned about the use of the ethics process within the House as a political weapon of choice that they just recently convened a task force to come up with bipartisan reform of the ethics process in the hope that they can make it less partisan.

So I think Congress recognizes that this whole investigative process may have gone too far. I think Congress is attempting, perhaps not perfectly, to get itself more in the other direction. Ultimately, when you have people like Lee Hamilton and Henry Hyde and Dick Cheney running investigations, you get a high-quality product.

MR. NIELDS: I would just like to say it is not enough, in my view, that the ultimate decision whether to prosecute or not is made in a professional way. As far as I can tell, independent counsels have all done that. I can't think of a single example of an exception to that. We have had objective and fair decisions. But the decision of who you investigate is also important and, for the reasons I think Jake Stein mentioned and many others, that the question of who you use your criminal investigative powers against is just as important as whether you make a good decision at the end of the investigation.

JUDGE HADEN: As kind of a final question for this panel, I think several of the speakers, including the two here, have alluded to the enormous power the media brings to bear on the concurrent investigations of this type, and I suppose my question to you would be: Has the media played, in your estimation, since Watergate and considering all the investigations since, a constructive or a negative role in this process, on balance?

MR. LEON: John, do you want to go first?

MR. NIELDS: I am going to sort of repeat myself.

The media plays an absolutely essential role in watchdogging the government. They probably do a more important job of that than the Congress does, and it is very important that that be done. We can't function as a democracy unless it is done. But the problem is they don't understand how wrong it is to try to crank up the criminal justice system as part of that effort, and I used to hear people suggest this – and it only made me mad but now it's true – the criminal justice process is being used as a weapon in political warfare, and the press doesn't understand that that's wrong and they help make it happen, and it is very, very destructive.

MR. LEON: I think, if the press reflects a little bit more upon it, the press should realize that being party to concerted attempts to undermine and attack the appointment process of independent counsels, and the conduct of inde-

pendent counsels, is ultimately not in the best interests of the system. It is also not in the best interests of fair play, and it is not in the best interests of the institutions that they are covering.

JUDGE HADEN: Gentlemen, do either of you, or both, have closing remarks?

MR. NIELDS: I think I made mine.

MR. LEON: That's mine.

JUDGE HADEN: Well, the audience will join me in thanking a very knowledgeable and entertaining panel. Thank you.

(Applause.)

Panel Five - The Future of the Independent Counsel Process

CHIEF JUDGE WILKINSON: We are ready now for the final panel this morning, and that will take a look at the overall independent counsel process and what does the future hold for the independent counsel statute.

With that in mind, I will ask Judge Davis to assemble his panel.

JUDGE ANDRE M. DAVIS (U.S. District Judge, District of Maryland): Good morning again, ladies and gentlemen.

I say, with great confidence, that those of you with the endurance and stamina to stick around will be rewarded. We have a spectacular panel, as you can see. I commend to your review the biographical sketches contained in your programs, but I will briefly introduce the four panelists for this, the fifth and final panel this morning.

To my far left, your far right, we are pleased to have the Honorable Henry J. Hyde, congressman from Illinois, who has represented the Sixth District of Illinois for more than twenty years in the Congress.

We are particularly pleased to have Congressman Hyde as a guest here at the Fourth Circuit, for he is a friend of the federal judiciary and we appreciate his work.

Next to Congressman Hyde is Mr. Theodore B. Olson, who has, for more than thirty years, conducted a national law practice, with stints in the Justice Department, and, like all of the panelists, has been intimately involved in many ways with the independent counsel process, as he will address, I'm sure.

To my right, we have Terry Eastland, a Fellow at the Ethics and Public Policy Center in Washington, D.C. Terry, unlike all the other panelists this morning, brings his wisdom and insight into this process unburdened by a formal legal education. So I think we can look with anticipation at what he has to say.

Finally, of course, we have Professor Emeritus Archibald Cox.

I am convinced that many of you in here will remember Professor Cox from the classroom, but certainly we all remember Professor Cox as the first special prosecutor in the modern era and whose circumstances in connection with his role as special prosecutor in 1973 and the manner and means by which that role came to an end obviously created the ground swell of support for the independent counsel statute, and certainly Professor Cox has very clear and firm ideas about what the process holds.

Our charge has been to focus on the fundamental question of: Should we permit the sun to set on this thing in 1999? And if not, what might we provide to Chairman Hyde this morning to take back to the Congress in the way of ideas as to how the statute might be improved upon?

We are going to do that first by taking a retrospective look at some of the specific investigations.

I have encouraged the panelists to provide a critique in response to the following question, specifically: Are there particular independent counsel investigations that you believe are models of what such an investigation should be? And to tell us why.

And they have assured me that they are willing and happy to do that.

We will go on from there to talk a little bit more about how the statute, if it is to remain in effect, might be changed properly.

Let me start with Professor Cox.

Professor Cox, can you point to any models of investigations that you would hold up for future consideration by future independent counsels?

PROFESSOR ARCHIBALD COX (Harvard Law School, Cambridge, Massachusetts): I think the first investigation of Edwin Meese by Jacob Stein was probably a case for which something like the independent counsel procedure is needed, and that the investigation was pressed forward quickly and efficiently.

That is the only case that I would say was an example of the way it should go in terms of what the statute ought to be.

MR. STEIN: I want to thank you for that from the floor.

PROFESSOR COX: The Iran-Contra affair seems to me to be an example of a situation where such a statute is needed, but the investigation was, to some extent, made less useful than it might have been by forces outside of Judge Walsh's control.

If I may, I would say that Watergate again illustrates the kind of situation where such a procedure is needed, and I would say that Leon Jaworski's conduct of the investigation was first rate.

The others, I think, shouldn't be covered by such a statute. So I would list them all on your bad category.

JUDGE DAVIS: What would you point to, Professor Cox, with respect to the Meese investigation that made it especially appropriate?

PROFESSOR COX: His high rank in the White House.

JUDGE DAVIS: Is there any aspect as to the conduct of the investigation that you wish to cover?

PROFESSOR COX: No, I wouldn't, except that it was done quickly, –

JUDGE DAVIS: So speed and –

PROFESSOR COX: – effectively.

JUDGE DAVIS: Speed and efficiency is virtue.

PROFESSOR COX: Provided they also are fair and thorough, and I believe it was.

JUDGE DAVIS: Congressman Hyde, are there any past investigations that you would hold up as a model of either an excellent job or less than desirable job?

CONGRESSMAN HENRY J. HYDE (Chairman, House Judiciary Committee, House of Representatives, Washington, D.C.): Well, I think the Ray Donovan investigation finally gave him some measure of clearance, which is important in the interest of justice. It is hard to be critical of any of them without having an intimate knowledge of the problems they encountered.

Judge Walsh catches a lot of criticism because of the length of the investigation, but his problem was complicated by our investigation. I remember Judge Walsh coming up and pleading with us to defer this and defer that, but we were hell-bent – and I say "we" – the Democrats wanted to move into the public arena because they were going to nail Ronald Reagan and this was an opportunity too good to be missed. But it did complicate and get in the way of what Judge Walsh was doing, particularly on the immunity. They were willing to give immunity to anybody if it would lead to the top gun. It didn't, which of course breaks my heart, but Judge Walsh had lots of problems. But I really wouldn't like to rate the various investigations.

I think, in listening to Mr. Stein, he clearly didn't want to nail Ed Meese, and I don't think an independent counsel should want to nail anybody. They should go where the evidence leads them. So I don't really have a report card on all of them.

JUDGE DAVIS: Mr. Olson.

MR. THEODORE B. OLSON (Gibson, Dunn & Crutcher, Washington, D.C.): Well, I think I agree with the sentiments of Professor Cox in the sense that I

think almost everyone who has studied this subject has been asked this kind of question about, if you can stand this statute at all if we have to have it, how should it be done.

Jake Stein conducted the best model of an investigation; and I say that because it was quick, it was relatively short in duration, and it was as quiet as Jake could make it.

Everybody knew what was happening because it involved the nominee to be Attorney General of the United States. But Jake is a very discreet guy and was not talking to the press and conducted it in a very, very discreet way. It was very specific and narrowly focused. He didn't branch out, as discussed this morning, into every allegation that might have come to his attention. He was decisive at the end. He made it clear what he decided and what he was not going to comment on. And in that respect, he was very prosecutorial in the sense that he made a prosecutorial judgment; and when invited to by all kinds of other people, including the press and members of Congress, to comment on whether Edwin Meese was a suitable candidate for Attorney General or was he too sloppy in the keeping of his records, or anything, Jake said, "It's not my business." And members of Congress, as I recall, pressed him to answer these questions and he said, "I'm not going to answer those questions," and that's why I think it was a good investigation.

Unfortunately, with respect to the other ones, the institution of the independent counsel statute causes things to happen that shouldn't happen and people seem to think that all of a sudden this process has gotten bad and it's gotten politicized and it's gotten out of control.

Well, this was inevitable from the very beginning because of the nature of the statute. Some of them have gone on too long, and it may not have been Judge Walsh's fault that he served in office, as I like to say, longer than World War II – he served in office longer than President Reagan served as President of the United States.

The Supreme Court upheld the independent counsel statute in part because it was a temporary office. Yet Judge Walsh held the office longer than any Attorney General in the history of the United States, with the exception of one.

There are other things – and I won't spend too much time on this – but Ed Meese had the good fortune of being investigated by three different independent counsels, which is, I guess, the hat trick of the independent counsel world. The second investigation of Ed Meese resulted in a report that said he was not going to be prosecuted. But the independent counsel issued an opinion stating that Meese had violated the law and he could have proved it, if he wanted to, and I thought that was a very inappropriate thing to do.

I've got other criticisms of each of the other ones, but don't want to take up all that time.

JUDGE DAVIS: Mr. Eastland.

MR. TERRY H. EASTLAND (Ethics & Public Policy Center, Washington, D.C.): I think it would be important to say at the outset that I wouldn't want to buy into the notion that if only we had good independent counsels, we should retain the statute. I would agree with what Ted Olson said – that so much of what people today – especially today – find problematical with the statute is built into it in its origins, but if we are going to enumerate those who were good and bad in answering this question, let me say, with respect to Jake Stein – I will go ahead and praise Jake Stein again – I want to supply some dates.

He began on April 2, 1984, I believe it was, and issued his report on the 20th of September. That was a quick investigation and it was thorough, and it was regarded as such.

The important aspect of his investigation was the fact that in his report he did not go beyond what I think is the proper mandate of any prosecutor. He did not opine on the ethics, if you will, of Mr. Meese, instead speaking directly to the issues that were before him.

So that is what made that a good and, I think, probably the best model, if you will, of any investigation we have had.

I think the earliest two, the first two – these were appointees during the Carter administration – Hamilton Jordan and Tim Kraft were both accused of using cocaine, and both of the independent counsels investigating them had the good sense to decline to prosecute. These were not ordinarily the kinds of cases the Justice Department would have brought. So I think, at least in that respect, those early investigations could be credited; perhaps also the investigation by Arlin Adams recently that Larry Thompson has now had to take over, a very long-running one, but as far as I can tell, there have been a few complaints but not of the kind that would lead me to think that that has been, on balance, a badly conducted investigation.

On the other side of the question, I would say that Ed Meese's second investigation by Mr. McKay was flawed in terms of the final report. In the report, he said that Mr. Meese had probably – probably – violated federal tax laws. And again, I don't think it is appropriate for a prosecutor of any kind to say that someone has probably violated a federal criminal law. You should do that, I think, in a court of law. You should prove your case, and I think it is inappropriate to say what was said in that report.

That, by the way, was the first ever use of a report to say something such as that about an individual under investigation. It had not been done prior to the McKay report on Ed Meese.

I would also say, with respect to the investigation of Michael Deaver, there was a problem with that investigation by that independent counsel in that there was an attempt to subpoena – twice there were attempts to subpoena – the

Canadian Ambassador. These were resisted by Canada. These were also objected to by the State Department, and ultimately this effort was undone in the district courts. But I think, again, an ordinary prosecutor would not have tried such a thing.

I save the best for last.

I have criticized Judge Walsh publicly. What I have said about him is already in the record, but I will simply repeat some of those things here.

I think that the conspiracy charge that was brought initially in the Iran-Contra matter, a very broad-ranging effort dealing with the notion of defrauding the federal government, that is not the kind of case that I think the Justice Department would have brought, and certainly even a Watergate-style appointee out of the Justice Department would not have seen that kind of case being developed. And, of course, it did not make it, it did not develop as such.

I would say secondly that – and this is not something that Judge Walsh did alone – there were others in the 1980s – and, again, I would say that these – what I am speaking of here are – the kind of developments that I would criticize are really inherent in the nature of the statute, but there were a number of cases in which the charges concerned representations made by individuals, including Casper Weinberger, to the Congress, and the point here was that these individuals had committed crimes, whether it be perjury or whether they be false statements made to the Congress, and there were no other charges, other than those dealing with the representations made to Congress, in the indictments. I think a serious question should be raised here as to whether an independent counsel should be making those kinds of cases.

Finally, I do think it was inappropriate for Judge Walsh to say, when President Bush did pardon Casper Weinberger and five others, the Christmas Day Pardon of 1992 – I think it was highly inappropriate to say, as he did, that Casper Weinberger lies as well to the press as he does to Congress.

Again, I think, if you are going to say that someone is guilty of a crime, that that should be done formally and not, if you will, to the press.

JUDGE DAVIS: Perhaps we should go straight to the question, then, Congressman Hyde.

What is the mood in Congress about the statute? And is it likely to survive the sunset?

CONGRESSMAN HYDE: Well, Congress is in a very political frame of mind, as you might imagine. It depends whose ox is being gored. When the Reagan Administration and the Bush Administration were in the White House, why, there was great Democratic support for independent counsels. Now that the shoe is on the other foot, the Republicans are looking more kindly at this institution.

I think, for myself, I don't like the notion of creating a legal Frankenstein who is accountable to nobody, with an unlimited bank account, with a charter that is as comprehensive as many independent counsels have treated it – it just lacks accountability. On the other hand, you have situations of conflict of interest where the public's trust in the system is at risk.

So as Churchill once said, "Democracy is a terrible form of government except for all the others," and an independent counsel is not a very nice way to prosecute people, but there may be circumstances where it is necessary.

JUDGE DAVIS: So the statute is a necessary evil?

CONGRESSMAN HYDE: That is my conclusion at this point. I want to say today's testimony from your panelists has been extraordinarily useful. I'm hoping to get a transcript of it when you're through because we will have to look at this for reauthorization purposes, and what has happened here today is going to be helpful.

But I support it reluctantly because the conflicts of interest are too patent. They seem to be very patent in this administration, and I think we need the institution, but it needs some correction. It needs accountability. It needs some more regular budget authority. It needs a narrower charter so it can't roam all over the ball park. The targets have to have some rights so that maybe they come in and appear before the court and say, "Can't we close this long-playing Eastland down?" So there are changes we need to make, and I would look to all of you for help in that.

JUDGE DAVIS: Ted, I take it your first choice would be to scuttle the statute.

MR. OLSON: Yes. I guess I'm on record almost as much as Terry Eastland is on the subject.

We got along in this country for almost 200 years without an independent counsel statute, and I want to make the point, which I think others probably have as well, that there is nothing wrong with the idea of going outside the Department of Justice to pick someone special to pursue an investigation if public confidence requires it. Bill Barr, when he was Attorney General, did that three times, as I heard him describe this morning, and dealt with delicate matters about which public credibility suggested to him that he ought to get someone that was not a direct subordinate of the Attorney General or the President to conduct an investigation. Indeed, as we all know, because of public pressure on the administration, the Watergate investigation was conducted by individuals who performed that function without an independent counsel statute.

I think that the thing that is bad about the independent counsel statute is that it is mandatory in so many respects. It has so many opportunities for use for political purposes. If you don't mind, I will read just one paragraph from

Justice Scalia's dissenting opinion in *Morrison v. Olson*[56] which I think, if you were to read anything about this subject that is worth reading again and again, it is Justice Scalia's dissenting opinion saying that the statute was unconstitutional. It is just a couple of sentences. He says:

> 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. And 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. How admirable the constitutional system that provides the means to avoid such a distortion. And how unfortunate the judicial decision that has permitted it.[57]

And I, of course, agree completely with Justice Scalia.

CONGRESSMAN HYDE: Judge Davis, may I intervene, because you are going to ask Mr. Cox and Mr. Eastland, and I would like to read, as a predicate to what they might say, something Janet Reno said when we reauthorized the statute in 1994, and I am quoting from her testimony 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, "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." . . .
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> 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 . . . .
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> It is absolutely essential for the public to have confidence in the system and you cannot do that when there is conflict or an appearance of conflict in the person who is, in effect, the chief prosecutor. There is an inherent conflict here, and I think that that is why this Act is so important.
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56. Morrison v. Olson, 487 U.S. 654 (1988).

57. *Id.* at 732 (Scalia, J., dissenting).

> 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.[58]

I might point out parenthetically that she has distanced herself, it seems, from this sentiment in our current controversy, but I think she said it well, and I would like to throw that in the mix.

JUDGE DAVIS: Professor Cox, what, if any, evolution have your views enjoyed in the twenty years since you're quoted there?

PROFESSOR COX: Perhaps it depends a little on how you would interpret the views as they were expressed before.

I think the present statute contains more evils than benefits – the present statute. I think it has been widely politicized, with the result that it has lost the confidence of the public. I think, by losing the confidence of the public, it has destroyed the real value of such a statute if applied to a very limited number of cases, such as Judge Walsh suggested earlier. It's been expensive; it's been expensive to defend it.

I do agree with my earlier statements and with Attorney General Reno to this extent: I think, in the case of a far narrower number of high officials in the executive branch – the President, the Vice President, the Attorney General, perhaps some, but not all, other Cabinet officers, and the very top – very top – echelon of a few White House officials, that the appointment of an independent counsel is the only way to assure public confidence.

I think, as she said – I guess I said it before – that the conflict of personal loyalty that the Attorney General would face if it were the President seriously charged with a crime is something that no man should be forced to deal with. No matter how conscientious he was, he would be wrestling with himself, "Am I leaning over backwards? Am I going too far in his favor?"

And then I think that the department does have some institutional conflicts. I think the Department of Justice, in Watergate, for example, might well have taken the position that the President was not subject to any judicial process and was not subject to the subpoena for the tapes, and there was a lot of law that would support them.

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58. *The Independent Counsel Reauthorization Act of 1993: Hearings on S.24 Before the Senate Comm. on Governmental Affairs*, 103d Cong. 11-12 (1993) (testimony of Janet Reno, Attorney General).

Equally, their normal position is one for defending and expanding executive privilege.

We were challenging executive privilege.

So there are some real conflicts. So I do think that it is needed, but I would greatly narrow the statute.

And I've got – I'm not sure whether you want them now, but I've got a list of changes that I –

JUDGE DAVIS: I will let you go ahead, Professor Cox.

PROFESSOR COX: Well, I would first limit it, as I say, to a few senior high officials beyond the President.

Second, I would, as Judge Walsh said earlier, limit the crimes to abuse of official power, including criminal attempts to improperly influence executive, legislative, and administrative decisions.

Assuming that those two are done, then certain other changes follow along with them.

I think that the test that further investigation is warranted is a little too easy, that some more stringent strainer is needed, something less than probable cause. I haven't got just the phrase, but that was suggested.

I was also shaken by what Judge Walsh said.

I would, in such a statute, limit it to a year, unless the judicial panel extended the time for cause shown, shown in camera, of course.

I have no answer, but I would try to come up with advice as to how far the investigation might extend to related crimes and crimes related to related crimes, and so forth.

And I would make it a mandatory full-time job for the independent counsel. I think that is symbolic in various ways, that it probably would speed things up.

JUDGE DAVIS: How do you respond to the suggestion from an earlier panel that to narrow the class of potential candidates to those willing to work full time would, in Judge Sentelle's illustration –

PROFESSOR COX: Well, I think that difficulty is much less likely to arise if you narrow the scope of the statute, by my hypothesis, to cases which, very close to my definition, involve a national crisis. I can't believe that there aren't qualified people who aren't willing to put aside their normal lives in order to serve in a position of this responsibility under those circumstances.

JUDGE DAVIS: Ted, as one who would scuttle the statute entirely, what do you think of Professor Cox's amendments?

MR. OLSON: Well, I agree with many of them.

My feeling about the independent counsel statute is to starve it from any oxygen at all, but if you are going to give it some, then make it as little as possible.

I agree with the notion that the independent counsel should be a full-time job, particularly. I know that might narrow the scope of people available for the assignment and make Judge Sentelle and his colleagues' job more difficult, but we go through a process of finding people to serve in the Justice Department who agree to a full-time job all the time; we hire U.S. Attorneys. And it may be, for a short period of time, someone is just going to have to give up what they do in order to do this sort of thing because if it is not a full-time job, that means that the independent counsel's priorities are separated; maybe they've got private clients that are calling upon them. The subject of the independent counsel investigation wants this dumb thing to be moved ahead and be over with as quickly as possible and feels that as long as the independent counsel has divided loyalties with respect to his or her time, that it is a very difficult situation and that someone should do that full time.

The other changes, if you have invited me to do that, –

JUDGE DAVIS: Go ahead.

MR. OLSON: – is that the idea of these reports is very destructive, it seems to me, and that if there has to be a report, it should be an extremely narrow report. The reports as to how money is spent should not be used as a means by which the independent counsel can indict, through language, the conduct or character of the persons that were investigated or subject to the investigation.

One independent counsel came out at the end of his investigation and said, "Well, these people shouldn't have been indicted, they didn't commit any crimes, I shouldn't have even conducted this investigation, but they were stupid and political in their behavior."

Well, we don't need to appoint a public official to make those types of pronouncements. There's plenty of people in the press that can do that sort of thing.

The report that Judge Walsh prepared is full of grand jury material – selective grand jury material. It may be fair, it may not be fair – and Judge Walsh, I'm sure, believes that it is fair – but the person responding to this report has no way of knowing whether something has been taken out of context from several thousand pages of grand jury testimony and used to characterize the conduct of that individual. There is no way the individual has an opportunity to respond to that.

That is one of the changes.

I would also – Judge Walsh probably won't like this – make the independent counsel sign a promise, like we do with people in the intelligence community, that they are not going to write any books about the independent counsel

experience, and if they do, the profits go back to the government, because I think that also provides an opportunity for doing damage to the people who were the subjects of the investigation and it is not a necessary thing to do.

I've got some other changes, but other people –

JUDGE DAVIS: Well, we will get to Terry in a moment. Have you got a couple more, –

MR. OLSON: Well, there was some discussion about –

JUDGE DAVIS: – other than printing it in disappearing ink?

MR. OLSON: There was a discussion of the question of attorneys' fees.

Right now, the statute provides that the subject of an independent counsel investigation can only recover attorneys' fees if they are not indicted, but if they are indicted, even if they are acquitted, they cannot recover any attorneys' fees.[59]

I think that that should be changed because a prosecutor can get an indictment very easily. It is not difficult to get an indictment when you have been conducting one of these investigations; and in one instance that I know of, the threat of an indictment was used to cause the subject of the investigation to waive the statute of limitations. The subject, knowing that if the indictment was returned that he could never recover his attorneys' fees, waived the statute of limitations and allowed the investigation to go on longer because of that threat.

You can also not recover attorneys' fees if you are simply a witness.

Many people have to get dragged before these proceedings, spend a tremendous amount of time involved in the process, and they can't recover their attorneys' fees.

You can't recover attorneys' fees for the period before you were identified as a subject or for the period after you are no longer identified as a subject.

That seems unfair.

The court, for reasons which I'm sure make sense to the court, cuts back on the recovery of attorneys' fees in a lot of different aspects of the investigation. One of the court's rules with respect to this is that to the extent the attorney has to deal with the press to defend the subject with respect to the allegations which are being made by the independent counsel, possibly through the press or in other contexts – to the extent that the lawyer for the subject of the independent counsel investigation has to deal with the media – and Judge Walsh agrees that you have to deal with the media at least in some respects when you

59. *See* 28 U.S.C. § 593(f)(1) (1994) (allowing subject of independent counsel investigation to recover attorneys' fees if independent counsel does not bring indictment against subject).

are representing someone in this capacity and only the attorney can do it—you can't recover attorneys' fees for that.

Now, if you are a subject of one of these investigations, your life is on the line. You ought to be able to find a good lawyer and pay that lawyer according to what the normal rates are. Otherwise, it is a tremendous disincentive for lawyers to represent people in these circumstances. As it is, you can't recover attorneys' fees until the investigation is over, and then it takes a certain period of time to file the report and recover the fees. So you have suffered a discount already because of the passage of time.

And I think I have taken too much time.

There are lots of other ways in which the statute could be changed, but those are the ones that are on my list right now.

JUDGE DAVIS: Terry.

MR. EASTLAND: Well, I guess we could discuss all the many ways in which the statute could be changed. There are two vehicles that have been proposed already. Representative Conyers has one reform vehicle, as does Congressman Dickey from Arkansas. Both parties have therefore representatives willing to offer ways in which the statute should be reformed. I think, however, that we would be best to do without the statute entirely; I would not have it. And I would say that the only reason the statute now is in such bad odor, the reason that we are having this session here this morning, is because Democrats, frankly, have experienced it for four years now. There is a certain mutual assured destruction quality. And so I think that the revisionism that has gone on in the press and with many Democrats, I would have to say, about the worthiness of the statute is explained entirely by where people sit now, notwithstanding that I would say there are plenty of Republicans that are Democrats with respect to the statute now. They seem far more in love with it than they did when Ronald Reagan and George Bush were in the White House.

Let me say this: This is an ancient problem we are dealing with. The problem is this: What do you do with executive malfeasance? And that is the essential problem.

It was not unknown to the framers who met in Philadelphia. They pondered this question. They provided certain means with which to get at executive malfeasance. These included, of course, the impeachment mechanism; implicitly, I would say, congressional investigations as well, which precede, of course, actual impeachment efforts.

But as well, the President has the take-care authority, does he not, in Article II?[60]

60. U.S. CONST. art. II § 3.

Now, it is interesting, with respect to the take-care authority, that the Constitution does not also try to eliminate the built-in conflict of interest there, does it?

The President, yes, has the authority to enforce laws even against himself.

And so for a hundred and – whatever it was – seventy-five years we went without an independent counsel statute. We did not have such a means of trying to deal with this problem of executive malfeasance. We dealt with it through other means and, yes, there were special prosecutors or outside counsels named before Professor Cox was named.

President Grant was the first President ever to name an outside counsel. He also was the first President to fire an outside counsel, not with the same ill effects, I might say, in 1875. But there have been other examples of outside counsels being named by Presidents or by Attorneys General. That happened in the Truman years as well. It happened at the turn of the century in the first Roosevelt administration.

But all that history be as it may, once we get to Watergate, what, to me, is interesting about Watergate is that we have the firing of the man to my right and it is that firing which galvanizes, which energizes, those on Capitol Hill to find a new means of dealing with this old problem, and all of those early proposals thought that the problem could be dealt with so long as you could change the manner in which an outside counsel was to be appointed and so long as you could change the ability of the President to control, through the removal power, that outside counsel.

In fact, the early proposals were – Judge Sentelle, you would be interested in this – to have the judges remove an independent counsel, which I think, if that case had gone to the Court in *Morrison*, the Court would have had to have held that statute unconstitutional.

So there was this search for this mechanism, for this new device, which many in Congress described as an auxiliary precaution, quoting Federalist 51,[61] and they thought that this new device would lead us to a new period in which all would be well with the country.

Well, if we ever heard of the law of unintended consequences, you know, so it has been, and so we are having this session here today.

I would just say this: that the Watergate Special Prosecution Force – bear this in mind – did not endorse the notion of a statutory independent counsel. It said, "Look, do it the old-fashioned way: either have Presidents or Attorneys General name an outside counsel in that particular case to investigate."

Other instrumentalities would be the ones that Bill Barr mentioned this morning.

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61. THE FEDERALIST No. 51 (James Madison).

There are other ways in which one can, in extraordinary cases, try to overcome that conflict of interest, whether real or apparent, but, in any event, the Attorney General would be responsible, and ultimately the President would be responsible, consistent, in my judgment, with what the Constitution provides.

One other way in which the problem might be approached, other than by retaining the current statute and revising it in the many, many ways we could describe – and I would be happy to go into all of those arcane details, but it seems to me there are more fundamental issues to be brought forward – but the Office of Special Counsel idea is one that Howard Baker suggested in 1974, and it is one that Andy Frye and others in Washington have also recommended, and by this mechanism there would be an office permanently created that would be located within the Justice Department and it would be headed by someone nominated by the President, and confirmed by the Senate, perhaps to a ten-year term, such as the FBI Director.

This might be one way of trying to deal with this particular issue. I think it, on balance, would probably be a better means than the one we have now with the statute because at least you would have an institution in place where prosecutors could have the ability to compare and contrast cases. In other words, they wouldn't be focused just simply on the case at hand.

There are also problems with this suggestion as well. Ultimately my view is that we ought to go back to what we did in Watergate.

JUDGE DAVIS: A number of states have gone that route.

I would be interested in hearing from the panel members whether they think any of this is of real concern to the American people. To what extent are the American people interested or concerned about these issues as we have discussed them today?

Congressman Hyde.

CONGRESSMAN HYDE: Well, I think it depends on the press treatment.

Conflict is mother's milk for the media, and if you can develop a conflict, they can demonize people. They shredded the Nixon Administration, and it is one of the fascinating aspects of human nature. With all of the negative press President Clinton has received, his acceptability figures are very, very high.

But I think you're always going to have conflicts of interest; you're always going to have perceptions of unfairness and injustice. And I think we have to have a way to deal with them.

JUDGE DAVIS: Ted, is this a matter of interest to the man on the street, woman on the street?

MR. OLSON: Well, I think the answer to that is somewhat like Congressman Hyde said. Most of the people on the street think that the idea of the independent

counsel is a good idea because the President can't be trusted to prosecute himself, but it ought to be of a deeper importance to the American people.

If you look through the list that was passed out here of the amount of money and time that has been spent with respect to these various different prosecutions, and so forth, and now everybody is saying, "Well, we ought to narrow it down to a narrower group of people and to a narrower list of crimes," and that sort of thing, most of these people on the list would fall out.

I suspect that ultimately the amount of damage that has been done by this statute to individuals who have been brought through the process in one way or another vastly exceeds the benefit; and when we decide that our Constitution needs to be altered in this way where we are taking the executive power away from the President and putting it in the hands of someone who is really uncontrolled through that process and when we are amending the Constitution, in a sense, through this statute in a way which does not bring about improvements in the system, the American people ought to care about it.

We do have the impeachment process, we do have a free press, and as Justice Scalia said in his dissenting opinion, the idea that every single violation of every single law should be prosecuted sounds like a good idea, but it isn't the great overriding value that it is perceived to be.[62]

If we have a mechanism that deals with misconduct by the President or an Attorney General, which we do in the Constitution, with our free press, congressional oversight, the office that Terry is talking about creating in the Department of Justice already exists – it is called the Office of Public Integrity – there is a permanent part of the Department of Justice that investigates officials, and they do a pretty darn good job, plus the impeachment process, and so forth. We have plenty of ways of dealing with official misconduct and we don't need to keep adding to it.

At some point we are going to have an independent counsel – I think Jake was worried about this – appointed to investigate the independent counsel. I mean, there was a risk there because some classified documents were lost in the course of the Walsh investigation and there may have been an investigation of that. I guess it didn't turn out to be one.

But we could keep adding different officials to investigate the officials who we've created to investigate the officials, and so forth, but we had a pretty good system created in 1787. That is what the people ought to care about. I think it is ultimately, whether they know it or not, very important to the American people.

JUDGE DAVIS: Professor Cox.

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62. Morrison v. Olson, 487 U.S. 654, 732-33 (1988) (Scalia, J., dissenting).

PROFESSOR COX: Well, I am inclined to think that the American people see the present statute and system as being used as a political weapon back and forth, a political football. They get a certain amount of pleasure out of following this – at least some of them do – but fundamentally, they have come to distrust – the proceedings and to think that it doesn't serve the purpose which I think, in a fundamental sense, they feel is needed, going farther back to Watergate.

JUDGE DAVIS: Terry.

MR. EASTLAND: Well, as a writer of books, what I don't like is, the public does not buy political or governmental or public policy books anymore.

I mean, why do Americans hate politics in government? I have a self-interest in this. I think the independent counsel statute is but one of the many reasons. What does the public think about the independent counsel statute?

Yes, I would agree with what Professor Cox said. I think they see it as something that is used to gain perhaps partisan advantage in Washington. I think it is important, though, to understand something.

We made a fundamental decision, after Watergate, in the run up to the enactment of the statute in '78, and the decision was this: that the pursuit of executive branch criminality should have a much higher priority in our politics than it has had before – that is a fundamental assumption – and, therefore, we needed an independent place in a government that theretofore consisted of three separated powers – we needed an independent place in which to be able to investigate, to pursue, executive branch criminality, and we have been pursuing that to a fare-thee-well now over many investigations over the years. This absorbs ever more time, not just the lawyers who can bill, not just the defense attorneys and the others who are engaged in partisan roles on the outside, but it takes an enormous amount of time.

We have twenty-four hours in a day still, do we not?

And so there is less time to devote to ordinary politics, and this is a point that cuts across parties, whether it be Republicans or Democrats, whoever might be in the White House.

Bill Clinton has complained about the investigations of independent counsels, and so on and so forth; it is not allowing him to perhaps spend as much time as he might governing. He is making a fair point, I think.

This, of course, is the consequence of the independent counsel statute.

I would also add this. I think the statute may work a disproportionate effect upon a Democrat in the White House than it does upon a Republican if the Democrat is trying to govern in the progressive tradition of expanding the central government because it only tends to weaken presidencies; whereas a Republican president who, perhaps, is not as interested in expanding the central government – it may not have as much of an adverse impact. So there is a certain irony in the way the statute works in terms of how it can enervate an executive.

Finally, I would just add this, speaking of Bill Clinton, and we ought to mention Bob Woodward at some point, I suppose. Bob Woodward's paperback edition just came out recently – *The Choice* – and he has an afterword.[63] That book was written during the election season, as you know. He writes very fast. And the afterword – and I suppose there was some deep-throat in the room which gave him this information – but he paints a scene, over a couple of pages, where Bob Dole and Bill Clinton have this post-election meeting. To paraphrase the conversation, Bill Clinton says to Bob Dole, "Bob, you know, you were right and I was wrong. You were right about the independent counsel law that you had opposed for so many years and I was wrong."[64] The wisdom of four years later.

Now, in 1992, when Bill Clinton and Al Gore were running, there was, of course, from Al Gore the demand that Bill Barr, whom we've heard from earlier, seek the appointment of an independent counsel in the Iraqgate matter.

That was then; this is now.

I think the political coordinates have sufficiently changed that it is quite possible that in 1999 – this would be my advice to Henry down there – my advice to you would be, don't pass the statute. The statute cannot be enacted by the President of the United States alone. We still have to go through two houses of Congress, do we not? And I think that President Clinton might be agreeable to not having the statute in the future.

JUDGE DAVIS: I will treat that as Terry's final statement.

Professor Cox, I extend to you ninety seconds to make a final statement and give final advice to Congressman Hyde.

PROFESSOR COX: I will just make one remark first, if I may, about what Terry was last saying, –

JUDGE DAVIS: Yes, sir.

PROFESSOR COX: – and that is, I think what faults he finds, this public response that he describes, the amount of time given to charges and defense of the executive wrongdoing, is a result of the present statute and its breadth, and that those saying if it were narrowed as drastically as I suggest, that it would be something there for the rare crisis and not something that was used all the time.

The last point I would add – I do say this very general – I do think it important that everything possible be done – you can't just legislate it – to wipe out the picture which has been growing that the job of independent counsel, as it's created by this statute – and I am not directing this to independent counsel

63. BOB WOODWARD, THE CHOICE (1996).

64. *See id.* at 444.

so much as others – has come to be seen as a hunt and it's a failure unless the hunt gets the game.

Surely, the right position, particularly if the statute is narrowed as I said, is that it is really an impartial inquiry.

President Nixon would never believe that I saw it that way. I think I saw it that way, truly, and that there would have been more advantages in finding that there was no criminal wrongdoing by our President rather than finding that there was. And I think the job should be seen as a success whether independent counsel, in this narrow range of cases, finds that there is ground for seeking an indictment or whether he concludes that an indictment should not be sought. And therefore, so far as the administration of criminal justice is concerned, the President or the one or two other high officials are entitled to, just like any other individual in this country, the presumption of innocence of any criminal wrongdoing and that is the end, or should be the end, of counsel's responsibility. And while I think he needs to report on that much, he shouldn't be reporting a lot of other comments that don't lie in the area of criminal law.

JUDGE DAVIS: Ted, final say.

MR. OLSON: The only thing that I would add is that Justice Scalia again foresaw a lot of this,[65] and one of the things that he said was – and I'm reminded by what Terry said about President Clinton now agreeing that this independent counsel statute is a bad idea – when Attorney General William French Smith took office in 1981, when the Reagan administration began, former Attorney General Griffin Bell came to him and said, "The one thing that you are really going to hate is that independent counsel statute." He said, "It's the worst thing that we did. We shouldn't have done it," referring to the Carter administration.

So this pendulum swings back and forth and people are now coming around to recognizing these things. But Justice Scalia foresaw the political difficulty with it, the same political difficulty that the Clinton administration had when they allowed the statute to come back after Bill Barr and the Bush administration had allowed it to die.

Justice Scalia said:

> [I]t is difficult to vote not to enact, and even more difficult to vote to repeal, a statute called . . . the Ethics in Government Act. If Congress is controlled by the party other than the one to which the President belongs, it has little incentive to repeal it; if it is controlled by the same party, it dare not. By its shortsighted action today, I fear the Court has permanently encumbered the Republic with an institution that will do it great harm.[66]

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65. *Morrison*, 487 U.S. at 732 (Scalia, J., dissenting).

66. *Id.* at 733 (Scalia, J., dissenting).

JUDGE DAVIS: Congressman Hyde, you are going to get the last word. I have been prevailed upon by Terry to give him a few more seconds.

MR. EASTLAND: I just want to make a final comment, which is this, Ted. The statute does grandfather in existing independent counsel. So those already at work right now would continue after June 30, 1999.

Now, the Republicans might think that is the best of all possible worlds – keep those current counsels going and not take the gamble that perhaps they can recover the White House in 2000.

The political circumstances, I think, have changed. This will be the first ever circumstance in which the Republicans, if they are reelected and they can control Congress in '98, would have that option.

But the final comment I wanted to make was simply this. There is an important paradox at the heart of the independent counsel statute. The statute presumes the prosecution of a sitting President of the United States.

Now, I ask you this – this is a roomful of judges – is that constitutional?

That's an interesting question.

And it is not a question the Supreme Court has rendered an opinion on, as we know. It was, by the way, rolled into the Nixon privilege case. The Court took cert. on that question and then decided not to render an opinion on it. But it is a very interesting question, of course, in constitutional law, and I would say the policy at the Justice Department is that a sitting President may not be prosecuted.

That is what Robert Bork wrote in 1973. In litigation in 1973 regarding Spiro Agnew, he had occasion to treat that question.

And the government's amicus in the Paula Jones case, the Solicitor General's brief in that case,[67] has a footnote in which it alludes to the learning at the Justice Department on this question.

And so I think that the position of the United States still today remains that. So here is an interesting question: Can an independent counsel, charged with investigating a President, violate the Department of Justice policy by indicting a sitting President?

JUDGE DAVIS: Congressman Hyde.

CONGRESSMAN HYDE: I can't predict what is going to happen in the coming year, but my guess would be that we will reauthorize an independent counsel statute. I think we will learn a lot from the experience we have had in the past years and from the information provided by you gentlemen and ladies.

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67. Brief for the United States as Amicus Curiae in Support of Petitioner at 15 n.8, Clinton v. Jones, 117 S.Ct. 1636 (1996) (No. 95-1853).

It should be of some limited duration, with permission to extend it for good cause shown, a narrower charter, accountability in terms of funding, but not cross the line to where we use that as a device to impair the independence.

The fact is, human nature is human nature.

I wouldn't have trusted Ed Meese to prosecute Ronald Reagan and I don't trust Janet Reno to prosecute Bill Clinton.

Now, I am not saying they should be prosecuted. I am simply illustrating the inherent conflict of interest with a prosecutor who is a political appointee trying to prosecute or investigate her patron or his patron. It's not going to happen. So you need this institution. You need to have public confidence that people are being treated justly and fairly, but we ought to try to make it as workable an institution as we can.

This meeting has been a great contribution, and I am going to talk to Ted again and again. I know how he feels and his ideas are good. So are yours, Terry, and Mr. Cox – just fine – and this has been very useful.

Thank you.

JUDGE DAVIS: Please thank each panelist.

(Applause.)

NOTES