

WEARING A BULL'S EYE: OBSERVATIONS ON THE DIFFERENCES BETWEEN PROSECUTING FOR A UNITED STATES ATTORNEY'S OFFICE AND AN OFFICE OF INDEPENDENT COUNSEL*

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The servants of the nation are to render their services without any taking of presents. . . . The disobedient shall, if convicted, die without ceremony.

Plato¹

I. INTRODUCTION

Public servants respond to a higher calling. In deciding to enter public service, individuals agree to forsake personal rewards, to ignore the personal pleas of friends, acquaintances, and special interests, and to work for the common good of the community. Federal public servants work for the good of the entire nation, not for the individual interests of a person or a narrow constituency.

When a public servant ignores an oath to uphold and abide by

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1. This quote is a translation of Plato's Law 955d, which was posted on the back of Independent Counsel Donald Smaltz's office door. See David Grann, *Prosecutorial Indiscretion* (visited May 26, 1999) <<http://www.pbs.org/wgbh/pages/frontline/shows/counsel/readings/indiscretion.html>>.

the law, he or she invites scrutiny by those supposedly being served: the public. Plato's suggestion of death without ceremony is not tolerated in this country as the punishment for such transgressions, but a thorough investigation and public trial provide the public with confidence that our government is one of laws and not of individual men and women with their own personal agendas. Some punishment for those convicted should follow. "A government of the people, by the people, [and] for the people"² should not stand as some empty mantra to days long past.

The Independent Counsel Law³ (the Law) provided for the appointment of an independent prosecutor when these transgressions were committed by a public official close to the President. The independent counsels appointed to handle these investigations frequently called on attorneys from the Department of Justice, particularly Assistant United States Attorneys (AUSAs), to handle the investigations and trials that might result. These federal prosecutors were used because of their experience in federal investigations and their ability to provide a typical federal investigatory approach to the independent counsel's office. However, service with an office of independent counsel brought a degree of scrutiny, criticism, and volatility to which many federal prosecutors have not been exposed, and thus, was not "typical." It was as if you suddenly wore a "bull's eye" as you conducted the investigation.

In my seven years as an AUSA, first in the District of Columbia and later in the Eastern District of Virginia, I was trained to handle sophisticated and complex criminal investigations and trials. Usually the job was one that I could pursue with relative anonymity. Although these cases often made the news and were discussed within the community, the nature of the work and repetition of the offenses kept any single case out of the news cycle after an arrest was made, or indictment returned, until there was another press release on the matter by the office.

When I began in 1991 as an Associate Independent Counsel with the Honorable Arlin M. Adams's office investigating former

2. Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), in LAURENCE BERNIS ET AL., ABRAHAM LINCOLN THE GETTYSBURG ADDRESS AND AMERICAN CONSTITUTIONALISM 14 (Leo Paul S. de Alvarez ed., 1976) (pronouncing "that this nation, under God, shall have a new birth of freedom — and that government of the people, by the people, for the people, shall not perish from the earth").

3. 28 U.S.C. §§ 591–599 (1994).

Secretary of Housing and Urban Development, Samuel R. Pierce, Jr.,⁴ I was struck by the amount of mail that came from the public protesting the investigation. Two pieces of mail in particular made an impression on me. Both came to my attention because I was the prosecutor handling the trial of an African-American real estate developer in Fort Worth, Texas, to which the pieces of mail were referring. The first came from a former member of the House of Representatives who decried the handling of the investigation and the apparent racial bias of the prosecutor in the investigation. The second came from a well-known civil rights organization suggesting that the prosecution was racist and all allegations against the developer were unfounded. These charges were ironic because I am an African-American and a supporter of the civil rights organization that sent the second letter.

In 1997, when I took a leave of absence from my teaching position at the University of Kansas School of Law to work in Independent Counsel Donald C. Smaltz's office, I noticed the same sort of public protest to the investigation into former Secretary of Agriculture A. Michael Espy's allegedly taking gifts and favors from agriculture businessmen.⁵ However, this protest came in a different sort of venue. During a weekend visit home to Kansas from the Independent Counsel offices in Alexandria, Virginia, I approached two of my neighbors in a local doughnut shop to say hello. When they asked what I was doing, my subsequent explanation was met with dismay from one of my neighbors' dining companions. In a loud, confrontational voice, she voiced her displeasure with the Independent Counsel's work, told me that the investigation was "ridiculous," and asked how could I justify spending millions of dollars investigating whether someone took football tickets. I was taken aback by her comments, not so much by the fact that her reaction was negative, but more by the fact that this individual had knowledge of the investigation. My response, I believe, addressed her concerns, but it struck me that it was an experience that I had never had while I practiced with the Department of Justice. This unfamiliarity also was true for the mail I received while with the Independent Counsel's Office investigating Secretary Pierce.

Although I was frequently confronted while in the U.S.

4. See *infra* notes 65–68 and accompanying text.

5. See *infra* notes 76–78 and accompanying text.

Attorney's Office in both the District of Columbia and the Eastern District of Virginia, the confrontations were usually initiated by individuals who were directly connected to the investigation and trial. I believe most AUSAs receive some mail concerning investigations they are conducting. However, my experience, again, was that this mail was from individuals either connected to the investigation, or from the immediately affected community.

In this article, I will explore some of the reasons for the differences in treatment and public reaction between the Department of Justice (especially the U.S. Attorneys' Offices) and the Offices of Independent Counsel. This article represents my observations and discussions that I have had with former colleagues.

Part II of this article discusses the appointment of Special Prosecutors before the enactment of the Independent Counsel Law and after its passage. Part II also describes how the Law was designed to function. Part III discusses the availability of prosecutorial discretion in independent counsel investigations, and the differences between independent counsel grand juries and grand juries who work with AUSAs. Part IV discusses investigating individuals whose government positions make them celebrities, while Part V explores the effect of media scrutiny on federal investigations by both independent counsels' and U.S. Attorneys' Offices. Finally, Part VI sets forth the reasons for the high costs of independent counsel investigations.

II. THE PAST APPOINTMENTS OF SPECIAL PROSECUTORS/INDEPENDENT COUNSEL AND THE PROCESS INVOLVED WITH THE LAW

Presidential administrations provide opportunities for individuals to be cloaked with enormous political power and influence. Individuals are provided opportunities to direct government policy in a variety of areas, and to direct the spending of billions of taxpayer dollars for the good of the people according to the agenda of the administration.

However, the money involved also invites opportunities for abuse. Investigations into these allegations of abuse are necessary for the public to have confidence in how tax dollars are used. The need for the investigation to come from an outside party is evident.

Whenever a high government official is subject to a criminal investigation by the Administration of which he is a part, a potential in-

stitutional conflict of interest *always* exists. Such conflict can *only* be remedied by the appointment of an independent counsel in a manner that does not present such institutional conflict of interest.⁶

History tells us there has always been a need for an independent prosecutor when executive office abuse is alleged. Not surprisingly, independent or special prosecutors were used long before the 1978 passage of independent counsel enabling legislation. As is apparent from the discussion, the legislation increased the use of independent prosecutors, but the need for them is not new to this country.

A. Special Prosecutors Appointed Before the Independent Counsel Act

1. *The Early Special Prosecutors*

Outside special prosecutors have been employed by presidents since the last century. John B. Henderson was the first special prosecutor, appointed in 1875 by President Ulysses S. Grant to investigate the St. Louis Whiskey Ring and General John McDonald, the Supervisor of Revenue for the Missouri District.⁷ McDonald was accused of implementing a scheme involving whiskey distilleries that gave kickbacks for their taxes being underassessed.⁸ Although Henderson obtained numerous convictions, Grant subsequently fired and replaced him after the investigation turned to Grant's close friend and personal secretary.⁹ The replacement, James Broadhead, proved ineffective, partially because of the President's criticisms of Henderson.¹⁰

President James A. Garfield appointed William A. Cook in 1881 to investigate "The Star Route Frauds" involving alleged bribery of

6. H.R. REP. NO. 103-224, at 10 (1993) (quoting the statement of the Honorable George E. MacKinnon, before the Subcommittee on Administrative Law and Governmental Relations, Mar. 3, 1993; Judge MacKinnon is the former Chief of the Special Division of the United States Court of Appeals for the District of Columbia Circuit).

7. See Donald C. Smaltz, *The Independent Counsel: A View from Inside*, 86 GEO. L.J. 2307, 2311-12 (1998); see also TERRY EASTLAND, *ETHICS, POLITICS AND THE INDEPENDENT COUNSEL: EXECUTIVE POWER, EXECUTIVE VICE 1789-1989*, at 8 (1989); Hanly A. Ingram, *United States v. Tucker: Should Independent Counsels Investigate and Prosecute Ordinary Citizens?*, 86 KY. L.J. 741, 743 (1997-1998).

8. See Smaltz, *supra* note 7, at 2311.

9. See *id.* at 2311-12.

10. See *id.* at 2313.

postal officials by Garfield's 1880 campaign manager to obtain certain postal routes in the Western United States.¹¹ President Theodore Roosevelt appointed special prosecutors on two occasions after the turn of the century.¹² First, he appointed Holmes Conrad, a Democrat, and Charles J. Bonaparte, a Republican, in 1903 to investigate postal officials accused of taking bribes and kickbacks in return for the promotion of postal employees.¹³ Two years later, he appointed Francis J. Heney to investigate a land fraud scandal involving the former Commissioner of the United States General Land Office.¹⁴

The Warren Harding administration was marked with scandal.¹⁵ Shortly after Harding's death in 1923, after three years as President, valuable oil reserves were discovered in an area called Tea Pot Dome and in other areas that had been transferred from the United States Navy to the Department of the Interior at Harding's direction.¹⁶ Albert Fall, the Secretary of the Interior, had leased the land to two private oil exploration companies.¹⁷ When Calvin Coolidge assumed office after Harding's death, Congress enacted legislation allowing Coolidge to appoint two special prosecutors, one from each major political party, with the advice and consent of the Senate.¹⁸ Coolidge, with Senate confirmation, appointed Atlee Pomerene, a Democrat, and Owen J. Roberts, a Republican, as special prosecutors.¹⁹ This remains the only appointment of a special prosecutor with the confirmation of the Senate.²⁰

The investigation revealed that Fall had taken bribes for his actions, and he was sent to prison.²¹ Fall's incarceration was the

11. *See id.*; *see also* EASTLAND *supra* note 7, at 8.

12. *See* Smaltz, *supra* note 7, at 2313.

13. *See id.* at 2314.

14. *See id.*

15. *See* Katy J. Harriger, *The History of the Independent Counsel Provisions: How the Past Informs the Current Debate*, 49 MERCER L. REV. 489, 491 (1998).

16. *See* Smaltz, *supra* note 7, at 2315; *see also* Constance O'Keefe & Peter Safirstein, Note, *Fallen Angels, Separation of Powers, and the Saturday Night Massacre: An Examination of the Practical, Constitutional, and Political Tensions in the Special Prosecutor Provisions of the Ethics in Government Act*, 49 BROOK. L. REV. 113, 147 n.16 (1982).

17. *See* Smaltz, *supra* note 7, at 2315.

18. *See id.* at 2315-16; EASTLAND, *supra* note 7, at 8.

19. *See* Smaltz, *supra* note 7, at 2316.

20. *See id.*; EASTLAND, *supra* note 7, at 8.

21. *See* EASTLAND, *supra* note 7, at 12. "Fall served nine months and nineteen days

first incident of a cabinet member serving time for a crime committed while in office.²² Coolidge then fired Attorney General Harry Daugherty,²³ who was later indicted and tried by the U.S. Attorney's Office in New York for conspiracy to defraud the government, but not convicted.²⁴ Harding's death while in office may have saved him from possible impeachment because of the scandal.²⁵

President Harry S. Truman appointed Newbold Morris as special prosecutor in 1952 to investigate allegations of bribery and tax fixing within the Internal Revenue Service and the Tax Division of the Department of Justice.²⁶ As part of his investigation, Morris requested that members of the Department of Justice answer a lengthy questionnaire and that he be given access to Attorney General Howard McGrath's files.²⁷ McGrath refused access, and when Truman concluded that Morris had exceeded his authority, McGrath fired Morris after just sixty-three days, the shortest tenure of any special prosecutor.²⁸ A retired judge who was appointed Attorney General upon the subsequent firing of McGrath, finished the investigation.²⁹

2. Watergate

In 1972, after a break-in at Democratic National Headquarters in the Watergate Apartment complex in Washington, D.C., Attorney General Elliott Richardson, at the urging of Congress and under Department of Justice guidelines, appointed Archibald Cox as the special prosecutor to investigate allegations that White House officials were involved.³⁰ When Cox learned of White House tape re-

of a one-year sentence." *Id.*

22. *See id.*

23. *See* Smaltz, *supra* note 7, at 2316. Congress did not trust Daugherty, and this mistrust led to the legislation allowing the appointment of Pomerene and Roberts. *See id.* at 2315. Congress believed Daugherty obstructed efforts to investigate the case. *See* Harriger, *supra* note 15, at 492. Later, the Senate set up a special committee to investigate him, and he eventually left office under these suspicions. *See id.*

24. *See* Smaltz, *supra* note 7, at 2316; EASTLAND, *supra* note 7, at 12.

25. *See* O'Keefe & Safirstein, *supra* note 16, at 147 n.16.

26. *See* Smaltz, *supra* note 7, at 2316-17; EASTLAND, *supra* note 7, at 8.

27. *See* Smaltz, *supra* note 7, at 2317.

28. *See id.*

29. *See id.*

30. *See* S. REP. NO. 103-101, at 5 (1993), reprinted in 1994 U.S.C.C.A.N. 748, 749 (reciting the history of the independent counsel statute).

cordings that might reveal relevant discussions and pressed for the evidence through subpoenas, President Nixon ordered Richardson to fire Cox.³¹ Richardson and his deputy, William Ruckelshaus, resigned, refusing to carry out the directive.³² Solicitor General Robert Bork, however, complied.³³

The resignations in the face of the President's order, described in the media as "The Saturday Night Massacre,"³⁴ shattered public confidence in a system that put no criminal checks on government officials who abused their power.³⁵ The event led to the appointment of Leon Jaworski as the new special prosecutor.³⁶ Jaworski's investigation revealed the involvement of President Nixon and his White House staff, and led to the subsequent impeachment proceeding against the President, who eventually resigned.³⁷ These events also led to the passage of the Ethics in Government Act in 1978, which included the Independent Counsel Law.³⁸

3. *The Special Prosecutor During the Carter Administration*

Only two special prosecutors have been appointed outside of the Independent Counsel Law since its original passage.³⁹ The first undertook his investigatory responsibilities while the Carter administration occupied the White House.⁴⁰ In 1979, President Jimmy Carter's Attorney General, Griffin Bell, appointed Paul J. Curran to investigate allegations that the National Bank of Georgia, then controlled by Carter friend and Office of Management and Budget Director Bert Lance, had directed illegal campaign contributions to the Carter presidential campaign with "loans" to Carter's peanut warehouse.⁴¹ Since the alleged activity occurred during the 1976 campaign, prior to the enactment of the 1978 Independent Counsel Law,

31. *See id.*, reprinted in 1994 U.S.C.C.A.N. at 750.

32. *See id.* at 5–6, reprinted in 1994 U.S.C.C.A.N. at 750.

33. *See id.* at 6, reprinted in 1994 U.S.C.C.A.N. at 750.

34. *See id.*, reprinted in 1994 U.S.C.C.A.N. at 750.

35. *See id.*, reprinted in 1994 U.S.C.C.A.N. at 750.

36. *See* S. REP. NO. 103-101, at 6 (1993), reprinted in 1994 U.S.C.C.A.N. at 750.

37. *See id.*, reprinted in 1994 U.S.C.C.A.N. at 750.

38. *See id.*, reprinted in 1994 U.S.C.C.A.N. at 750.

39. *See* Smaltz, *supra* note 7, at 2320.

40. *See id.* The second was Robert Fiske in 1994. *See infra* notes 72–73 and accompanying text.

41. *See* Nicholas M. Horrock, *Bell Names Former U.S. Attorney to Investigate Carter Peanut Loans*, N.Y. TIMES, Mar. 22, 1979, at A1.

Bell decided to make the appointment without use of the Law.⁴² Curran eventually closed the matter without any prosecutions.⁴³

B. Independent Counsels Appointed Under the Law

1. *The Carter Administration*

Arthur Hill Christy was the first Independent Counsel appointed under the Law.⁴⁴ His appointment came in 1978 to investigate allegations of cocaine use by the White House Chief of Staff, Hamilton Jordan.⁴⁵ Christy found no basis for criminal prosecution in the matter.⁴⁶ Independent Counsel Gerald J. Gallinghouse was appointed in 1980 to investigate allegations of cocaine use by the President's National Campaign Manager, Tim Kraft.⁴⁷ There was insufficient evidence found for any criminal proceeding.⁴⁸

2. *The Reagan Administration*

In 1981, Leon Silverman became the first Independent Counsel appointed under President Ronald Reagan's administration.⁴⁹ Silverman's task was to investigate allegations that Labor Secretary Raymond J. Donovan was involved in a 1976 kickback scheme and had ties to organized crime.⁵⁰ Due to the lack of evidence, no indictments were issued in either inquiry.⁵¹

After the Law was reauthorized for the first time in 1982, Jacob Stein was appointed Independent Counsel in 1984 to investigate allegations that Reagan's Attorney General, Edwin Meese, accepted

42. See Smaltz, *supra* note 7, at 2320; see also Frank Lynn, *Curran Is Confident He Has Power to Investigate Carter Loans Fully*, N.Y. TIMES, Mar. 22, 1979, at A1.

43. See Smaltz, *supra* note 7, at 2320; see also Wendell Rawls, Jr., *Lance Cleared on 9 Fraud Counts; Jury Deadlocks on 3 Other Charges*, N.Y. TIMES, May 1, 1980, at A1.

44. See Arthur Christy, *Trials and Tribulations of the First Special Prosecutor Under the Ethics in Government Act of 1978*, 86 GEO. L.J. 2287 (1998); see also S. REP. NO. 103-101, at 13, reprinted in 1994 U.S.C.A.N. at 757.

45. See Christy, *supra* note 44, at 2288.

46. See *id.* at 2288-89.

47. See Sharon LaFraniere, *Independent Counsel Law Increasingly Beset*, WASH. POST, June 22, 1992, at A4.

48. See *id.*; O'Keefe & Safirstein, *supra* note 16, at 125.

49. See Smaltz, *supra* note 7, at 2323.

50. See LaFraniere, *supra* note 47.

51. See *id.*

financial favors from friends appointed to federal jobs.⁵² No indictments followed from that investigation.⁵³ Appointed in 1986, Independent Counsel Alexia Morrison investigated obstruction of justice allegations against Assistant Attorney General Theodore Olson of the Office of Legal Counsel.⁵⁴ This investigation resulted in the Supreme Court holding that the Office of Independent Counsel was constitutional.⁵⁵ Again, no indictments resulted from the investigation due to insufficient evidence.⁵⁶ Also in 1986, Whitney North Seymour, Jr. was appointed Independent Counsel to investigate allegations that White House aide Michael Deaver had engaged in improper lobbying after leaving his federal office.⁵⁷ Deaver was convicted of perjury, although his three-year sentence was suspended.⁵⁸

Lawrence Walsh, yet another Independent Counsel appointed in 1986, investigated allegations that profits from weapons sales to Iran were diverted by White House officials to aid the contras in Nicaragua in violation of federal law.⁵⁹ The Iran-Contra investigation resulted in seven guilty pleas; four convictions after jury trials, two of which were overturned for use of immunized testimony; one dismissal based on the unavailability of classified documents; and two withdrawn indictments following presidential pardons.⁶⁰

Allegations that Attorney General Edwin Meese and Reagan's political advisor Lyn Nofziger engaged in improper lobbying, and Meese's questionable dealings with Wedtech Corporation, led to the appointment of James C. McKay in 1987.⁶¹ This investigation resulted in one conviction, that of Nofziger, which was subsequently overturned on appeal because of an inadequate indictment, and one acquittal because insufficient evidence was found to prosecute Meese.⁶²

52. *See id.*; *see also* S. REP. NO. 103-101, at 13, *reprinted in* 1994 U.S.C.C.A.N. at 758.

53. *See* S. REP. NO. 103-101, at 13, *reprinted in* 1994 U.S.C.C.A.N. at 758.

54. *See* LaFraniere, *supra* note 47.

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

56. *See* S. REP. NO. 103-101, at 13, *reprinted in* 1994 U.S.C.C.A.N. at 758; LaFraniere, *supra* note 47.

57. *See* LaFraniere, *supra* note 47.

58. *See id.*

59. *See id.*

60. *See* S. REP. NO. 103-101, at 13, *reprinted in* 1994 U.S.C.C.A.N. at 758.

61. *See id.*, *reprinted in* 1994 U.S.C.C.A.N. at 758; LaFraniere, *supra* note 47.

62. *See* S. REP. NO. 103-101, at 13, *reprinted in* 1994 U.S.C.C.A.N. at 758.

James Harper was appointed in 1987 to investigate Lawrence Wallace, an Assistant Attorney General, for alleged income tax evasion.⁶³ This investigation resulted in no indictments.⁶⁴

3. *The Bush Administration*

In 1990, retired Third Circuit United States Court of Appeals Judge Arlin M. Adams became the Independent Counsel to investigate allegations against Samuel Pierce, the Secretary of the Department of Housing and Urban Development (HUD).⁶⁵ Secretary Pierce and other HUD officials were suspected of misusing government funds by steering HUD-related projects to friends, family, and business associates.⁶⁶ In July, 1995, Larry Thompson succeeded Judge Adams as Independent Counsel.⁶⁷ The HUD investigation resulted in the convictions of sixteen individuals, with one conviction overturned on appeal on statute of limitations grounds; the acquittal of one individual; and the conviction of one corporation.⁶⁸

4. *The Clinton Administration Independent Counsel Before Reauthorization of the Law*

Joseph diGenova, appointed in 1992, investigated allegations of a politically motivated search into presidential candidate William Clinton's passport file at the State Department.⁶⁹ Pursuant to the investigation diGenova brought no prosecutions.⁷⁰

5. *The Special Prosecutor and Independent Counsel for the Whitewater Investigation During the Clinton Administration*

The Independent Counsel Law was not reauthorized in 1992 because of opposition in the 102nd Congress, so it expired in December of that year.⁷¹ Thereafter, President William Clinton's At

63. See LaFraniere, *supra* note 47.

64. See *id.*

65. See Smaltz, *supra* note 7, at 2323.

66. See 1 ARLIN M. ADAMS & LARRY D. THOMPSON, FINAL REPORT OF THE INDEPENDENT COUNSEL, IN RE: SAMUEL R. PIERCE, JR. xv (1998).

67. See *id.* at 52.

68. See *id.* at xv.

69. See Smaltz, *supra* note 7, at 2323.

70. See *id.*

71. See S. REP. NO. 103-101, at 8, reprinted in 1994 U.S.C.A.A.N. at 752. The law

torney General, Janet Reno, appointed Robert Fiske on January 20, 1994, to investigate the President and First Lady's involvement in the Whitewater Development Corporation.⁷² Fiske then became the second special prosecutor, along with Curran during the Carter administration, to be appointed after the enactment of the Law.⁷³

Subsequently, after the Law was reauthorized on June 30, 1994, Fiske was removed on August 5th and replaced by Kenneth Starr as Independent Counsel under the Law.⁷⁴ Starr's investigation later expanded to include, among other things, allegations involving the President's testimony in a civil suit filed against him by a former Arkansas state employee, and the President's subsequent testimony regarding his relationship with a White House intern. The investigation resulted in the United States House of Representatives passing four articles of impeachment and the Senate trial on those articles, which trial ended in an acquittal.⁷⁵

6. Clinton Administration Independent Counsel after Reauthorization of the Law

In September 1994, Donald C. Smaltz was appointed to investigate allegations that Secretary of Agriculture Alphonso Michael Espy took improper gifts while in office and lied to federal investigators.⁷⁶ Smaltz's investigation led to the convictions of numerous individuals and corporations, including two corporations who provided Espy with illegal gratuities; a civil settlement with one corporation; and substantial criminal and civil fines.⁷⁷ Espy, however, was

remained on the books, however, until three independent counsels completed matters then under investigation. *See id.*

72. See Michael Kranish, *Whitewater Counsel Sets Broad Probe; Fiske Named, Will Look into White House Aide's Suicide*, BOSTON GLOBE, Jan. 21, 1994, at 1.

73. The first was Paul J. Curran. *See supra* notes 39-40 and accompanying text.

74. See Susan Schmidt, *Judges Replace Fiske as Whitewater Counsel; Ex-Solicitor General Starr to Take over Probe*, WASH. POST, Aug. 6, 1994, at A1.

75. See Connie Cass, *Shadow of Scandal Has Hovered over Nation for Twelve Months; Lewinsky Case Broke onto Scene One Year Ago*, KAN. CITY STAR, Jan. 17, 1999, at A12.

76. See Smaltz, *supra* note 7, at 2323.

77. See John Godrey, *Tyson Foods Fined \$6 Million; Firm Admits Gifts to Espy*, WASH. TIMES, Dec. 30, 1997, at A1; George Lardner, Jr. & Bill Miller, *Judge Voids Convictions of One in Espy Gifts Case*, WASH. POST, Sept. 23, 1998, at A2; Bill Miller, *Espy Acquitted in Gifts Case; Jury Clears Ex-USDA Chief on 30 Counts Brought by Independent Counsel*, WASH. POST, Dec. 3, 1998, at A1; *Poultry Officials Guilty in Espy Case; Gifts to Agriculture Boss by Tyson at Issue*, CHI. TRIB., June 27, 1998, at 4; Jerry Seper,

acquitted following a jury trial.⁷⁸

Independent Counsel David Barrett, appointed in 1995, investigated allegations that Henry Cisneros, the Secretary of HUD, lied to federal investigators during his F.B.I. background check about the amount of payments made to a mistress.⁷⁹ Three convictions resulted from the investigation.⁸⁰

President Clinton appointed Daniel Pearson in 1995 to investigate the financial dealings of Commerce Secretary Ron Brown; the investigation ended after Brown's death in August 1996.⁸¹ Independent Counsel Curtis von Kann was appointed in 1996 to investigate conflict of interest allegations against former White House official Eli Segal.⁸² Segal was cleared of any wrongdoing.⁸³

In 1998, Carol Elder Bruce was appointed to investigate Interior Secretary Bruce Babbitt for allegedly lying to Congress about his role in rejecting a proposal from a tribe of Wisconsin Indians for a casino.⁸⁴ Meanwhile, Ralph Lancaster was appointed and investigated allegations that Labor Secretary Alexis Herman engaged in influence peddling and solicited illegal campaign contributions.⁸⁵ There were also two Independent Counsels named in 1989 and 1991

Espy Indicted on 39 Counts; Illegal Gifts, Cover-Up Charged, WASH. TIMES, Aug. 28, 1997, at A1.

On April 27, 1999, the Supreme court affirmed the D.C. Circuit's reversal and remand of the Independent Counsel's conviction of Sun-Diamond Growers of California for providing Espy with illegal gratuities in violation of 18 U.S.C. § 201(c)(1)(A). *See United States v. Sun-Diamond Growers*, 119 S. Ct. 1402 (1999). The Court ruled that in order to show a violation of the statute, the government must show some link between the thing of value conferred on the public official and a specific "official act" for or because of which it was given. *See id.* at 1410. Smaltz has not retried that count of Sun-Diamond's conviction. Sun-Diamond was also found guilty of two counts of committing wire fraud in violation of 18 U.S.C. §§ 1343 and 1346, and five counts of violating the Federal Election Campaign Act, 2 U.S.C. §§ 441b(a) and 441f. Those convictions flowed from a scheme of a Sun-Diamond employee and lobbyist to help repay the debts of the failed congressional campaign of Espy's brother, and were upheld by the courts. *See id.*; *United States v. Sun-Diamond Growers*, 138 F.3d 961, 977 (D.C. Cir. 1998).

78. *See Miller*, *supra* note 77.

79. *See Tony Locy, Ex-Secretary Cisneros Is Indicted; Former Mistress, Aides at HUD Also Charged*, WASH. POST, Dec. 12, 1997 at A1.

80. *See Cisneros' Ex-Lover Sentenced*, TIMES UNION (Albany), Mar. 26, 1998, at A11.

81. *See Independent Counsels*, COM. APPEAL (Memphis), Dec. 1, 1998, at A2.

82. *See Clinton Probe Cost Exceeds \$40 Million*, DES MOINES REG., Oct. 1, 1998, at 4.

83. *See id.*

84. *See Independent Counsels*, *supra* note 81. This investigation is still ongoing.

85. *See id.* This investigation also has yet to be closed.

whose names and jurisdiction have not been made public.⁸⁶

C. The Purpose of the Independent Counsel Law

The Independent Counsel Law's reauthorization in 1994 was met with great promise and hope. Upon signing the law, President Clinton said:

I am pleased to sign into law S.24, the reauthorization of the Independent Counsel Act. This law, originally passed in 1978, is a foundation stone for the trust between the Government and our citizens. It ensures that no matter what party controls the Congress or the executive branch, an independent, nonpartisan process will be in place to guarantee the integrity of public officials and ensure that no one is above the law.

Regrettably, this statute was permitted to lapse when its reauthorization became mired in a partisan dispute in the Congress. Opponents called it a tool of partisan attack against Republican Presidents and a waste of taxpayer funds. It was neither. In fact, the independent counsel statute has been in the past and is today a force for Government integrity and public confidence.

This new statute enables the great work of Government to go forward . . . with the trust of its citizens assured.

It is my hope that both political parties would stand behind those great objectives. This is a good bill that I sign into law today — good for the American people and good for their confidence in our democracy.⁸⁷

The Independent Counsel Law expired on June 30, 1999.⁸⁸ The statute's hope and promise has been washed away in the criticism of its employment in recent investigations.⁸⁹ The Law was born in a time of crisis and was designed to provide the public with confidence that high-ranking government officials would be held accountable for their actions. Prosecuting under the Law was different from traditional federal prosecutions, and the nature of this “beast” created circumstances that fostered attacks.

86. See Smaltz, *supra* note 7, at 2323; *infra* note 110 and accompanying text.

87. William J. Clinton, *Statement on Signing the Independent Counsel Reauthorization Act of 1994*, 30 WEEKLY COMP. PRES. DOCS. 1351, 1383 (June 30, 1994).

88. See 28 U.S.C. § 599 (1994).

89. See, e.g., David E. Rosenbaum, *The President Under Fire: The Legal Power; Some Experts Are Faulting Counsel Law*, N.Y. TIMES, Jan. 26, 1998, at A14.

1. Background of the Statute

The Ethics in Government Act, including the Independent Counsel Law, was first enacted in 1978 and was reauthorized for five years in 1982, 1987, and again in 1994. The primary purpose of the Law was “to preserve and promote public confidence in the integrity of the federal government.”⁹⁰ The Law designed a system for appointing Independent Counsel “to investigate and prosecute allegations of criminal wrongdoing by top government officials who are close to the President.”⁹¹

The Law was a direct result of the “Saturday Night Massacre”⁹² surrounding the firing of Archibald Cox during the Watergate scandal of President Richard Nixon.⁹³ Since that fateful series of events, our elected officials have demonstrated the need to maintain legislation that ensures the availability of an independent prosecutor to investigate and pursue abuses of power in our government.

2. The Operation of the Independent Counsel Law

The Independent Counsel Law was triggered whenever the Attorney General received information sufficient to constitute grounds to investigate criminal conduct by any high-ranking government official,⁹⁴ or when Congress submitted a written request to seek an independent counsel appointment.⁹⁵ The Law covered top officials at the White House, including the President and Vice-President, top officials at the Department of Justice and other federal agencies, senior campaign officials,⁹⁶ and members of Con

90. S. REP. NO. 103-101, at 5, reprinted in 1994 U.S.C.C.A.N. at 749.

91. *Id.*

92. See *supra* notes 34–38 and accompanying text.

93. See H.R. REP. 103-224, at 5.

94. See 28 U.S.C. § 591(a), (b).

95. See *id.* § 592(g)(1).

96. The Independent Counsel statute applied to the President, Vice President, Secretary of State, Secretary of Treasury, Secretary of Defense, the Attorney General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health and Human Services, Secretary of Housing and Urban Development, Secretary of Transportation, United States Trade Representative, Secretary of Energy, Secretary of Education, Secretary of Veterans Affairs, Director of the Office of Management and Budget, Director of National Drug Control Policy, any person in the Executive Office of the President compensated at or above the pay level in 5 U.S.C. § 5313 (Level II of the Executive Schedule), any Assistant Attorney General or person in the Depart-

gress.⁹⁷

Once the Attorney General received the information, she or he had thirty days to make a determination on whether “grounds to investigate” existed based on whether the information was “specific and from a credible source.”⁹⁸ If the Attorney General determined there was no specific information, or that the source was not credible, the matter was closed.⁹⁹ However, if the Attorney General was unable to make such a determination within thirty days, or did find grounds, the Attorney General had to initiate a “preliminary investigation.”¹⁰⁰ When Congress made a written request, the Attorney General had thirty days to report to the requesting congressional committee on any action taken.¹⁰¹

The preliminary investigation had to be completed within ninety days,¹⁰² with an allowance for one extension of no longer than sixty days.¹⁰³ If the Attorney General concluded¹⁰⁴ “that there are no reasonable grounds to believe that further investigation is warranted,” the Special Division of the U.S. Court of Appeals for the District of Columbia (a three-judge panel that appointed the independent counsels)¹⁰⁵ had to be so notified; moreover, the Special Division could not override that decision and appoint an independent counsel regarding the matter.¹⁰⁶ On the other hand, if the Attorney General determined that reasonable grounds warranted further investigation, or if the Attorney General had not made a determina-

ment of Justice compensated at or above the pay level in 5 U.S.C. § 5314 (Level III of the Executive Schedule), the Director or Deputy Director of the Central Intelligence Agency, the Commissioner of the Internal Revenue Service, the chairman and treasurer of the principal national campaign committee seeking election or reelection of the President, and any officer of that committee exercising authority at the national level during the incumbency of the President. *See* 28 U.S.C. § 591(b)(1)–(6) (1994). Certain former officials in the positions named above, except the campaign committee positions, also were covered by the statute. *See id.* § 591(b)(7).

97. *See* 28 U.S.C. § 591(c)(2).

98. *Id.* § 591(d)(2).

99. *See id.*

100. *See id.*

101. *See id.* § 592(g)(2).

102. *See id.* § 592(a)(1).

103. *See* 28 U.S.C. § 592(a)(3).

104. The Attorney General had to recuse him or herself if he or she had a personal or financial conflict of interest. The decisions under the Law were then made by the next most senior person in the Department of Justice. *See id.* § 591(e)(1)(B).

105. *See id.* § 49(a).

106. *See id.* § 592(b)(1).

tion by the time the statutorily provided ninety days for the preliminary investigation had lapsed, the Attorney General had to then apply to the Special Division for the appointment of an independent counsel.¹⁰⁷ The Attorney General's decision to seek or decline to seek the appointment of an independent counsel was not reviewable by the courts.¹⁰⁸

The appointed independent counsel stepped into the shoes of the Attorney General on all matters relating to his or her appointment, and assumed the power to convene grand juries, grant immunity, plea bargain, issue indictments, engage in civil as well as criminal proceedings, handle appeals, contest assertions of privilege, and generally operate as a federal prosecutor.¹⁰⁹ An independent counsel's identity and jurisdiction were not to be made public except when requested by the Attorney General or on the determination of the Special Division that disclosure would be in the best interest of the public.¹¹⁰ The Special Division provided the independent counsel with a "mandate" that described his or her jurisdiction and assured the independent counsel adequate authority to fully investigate and prosecute the subject matter.¹¹¹ The Attorney General and Department of Justice lost all authority over matters within the independent counsel's mandate and had to suspend all investigations and proceedings with regard to the matters, unless given written permission by the independent counsel.¹¹²

Independent counsels were required to cooperate with Congress' oversight function¹¹³ and file with the Special Division an accounting of all expenditures every six months,¹¹⁴ as well as a Final Report detailing the description of the work conducted by the office.¹¹⁵ An independent counsel could be removed from office only by "personal action" of the Attorney General and "only for good cause, physical or

107. *See id.* § 592(c)(1)(A), (B).

108. *See id.* § 592(f).

109. *See* 28 U.S.C. § 594(a)(1)–(10).

110. *See id.* § 593(b)(4). This section mandated disclosure of the independent counsel when an indictment was returned or criminal information was filed relating to the investigation. *See id.*

111. *See id.* § 593(b)(3).

112. *See id.* § 597(a).

113. *See id.* § 595(a)(1), (2). This cooperation included submitting to Congress an annual report on the counsel's activities. *See id.*

114. *See id.* § 594(h)(1)(A).

115. *See* 28 U.S.C. § 594(h)(1)(B).

mental disability (if not prohibited by law . . .), or any other condition that substantially impairs the performance of [his or her] duties."¹¹⁶ An independent counsel could appeal the Attorney General's removal decision to the U.S. District Court for the District of Columbia in a civil action seeking either reinstatement or other appropriate relief.¹¹⁷

Independent counsels had to provide a statement of expenditures on or before June 30th of each year for the six-month period immediately preceding the filing.¹¹⁸ On or before each December 31st, he or she also had to provide a statement of expenditures for the fiscal year that ended on September 30th.¹¹⁹ The Comptroller General audited each statement and filed a report with Congress.¹²⁰ An independent counsel whose office was terminated had to prepare a statement of expenditures within ninety days after the office's termination.¹²¹

The independent counsel's duties ended when he or she reported to the Attorney General that the matters within the mandate had been completed, or substantially completed with the Department of Justice assuming responsibility for matters remaining,¹²² and then filed the Final Report.¹²³ The Special Division also could terminate the independent counsel on a determination that the investigation was completed or so substantially completed that it would be appropriate for the Department of Justice to finish the remaining matters.¹²⁴ If the Attorney General had not made a request to the Special Division to terminate the independent counsel within two years of the independent counsel's appointment, the Special Division then made a determination on its own motion and again at the end of the succeeding two-year period.¹²⁵ The Special Division would then reconsider the appointment annually.¹²⁶

116. *Id.* § 596(a)(1). An independent counsel could also have been removed by impeachment and conviction. *See id.*

117. *See id.* § 596(a)(3).

118. *See id.* § 596(c)(1).

119. *See id.*

120. *See id.* § 596(c)(2)(A), (B).

121. *See* 28 U.S.C. § 596(c)(1).

122. *See id.* § 596(b)(1)(A).

123. *See id.* § 596(b)(1)(B).

124. *See id.* § 596(b)(2).

125. *See id.*

126. *See id.*

The birth and death of an independent counsel's investigation was unlike the investigation conducted by AUSAs for a U.S. Attorney's Office. The nature of the target, the oversight measures, and the limited jurisdiction created obstacles and injected factors that do not hinder AUSAs. Again, it was like wearing a bull's eye. Once one joined the investigation, everyone seemed to be aiming at him or her. Pursuing the mandate through a complete investigation was necessary for the proper functioning of our government. Those charged with that duty often found that the time required, the great expense, and the intense criticism accompanying the work were factors that were out of their control.

However, investigating those in the government who abuse their position is essential to our system and should be done by someone outside the political and governmental pressures of the system. As former Attorney General Archibald Cox noted in 1975 after being fired as the Watergate special prosecutor: "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."¹²⁷

The pressure found as an associate independent counsel is much different than that found as an AUSA. An independent counsel encountered a number of factors that are not part of the experience of a typical federal prosecutor. However, to discuss some of these factors, one must remember that an independent counsel began his investigation in the shoes of the Attorney General.

III. CONDUCTING THE INVESTIGATIONS

When an independent counsel was appointed to conduct an investigation, he or she was invested with all of the same rights, powers, and privileges as the Attorney General.¹²⁸ While an independent counsel's discretion in exercising those powers could be challenged, questioned, or criticized, it was his or her discretion, and his or hers alone, to exercise. That was the nature of these investigations, and how it has historically been interpreted. The targeted offi-

127. H.R. REP. NO. 103-224, at 11 (Statement of Attorney General Janet Reno before the Committee on Government Affairs, U.S. Senate, May 14, 1993).

128. *See supra* note 109 and accompanying text.

cial, however, were provided substantial protection from an overreaching investigation. One of those protections worked as well or even better in an independent counsel investigation than one conducted by a U.S. Attorney's Office: the protection of the grand jury.

A. Prosecutorial Discretion

Whether or not to pursue certain crimes is at the heart of the prosecutor's decisionmaking process. The allegation that independent counsels pursued cases that a U.S. Attorney might not simply ignore the fact that all those vested with prosecutorial functions have the option of executing those functions in the manner they see fit and on cases they choose to pursue. Prosecutorial discretion is one fundamental operating principle of our criminal justice system.

The flaws in providing such discretion to prosecutors have long been recognized, particularly by minorities. In 1990, the General Accounting Office, in a study of the death penalty in this country, found "a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the *Furman* decision."¹²⁹ The study found the victim's race was the greatest influence on charging decisions in those states with the death penalty.¹³⁰ In other words, one was more likely to be charged with the death penalty if he killed a white person than if he killed an African-American.¹³¹ The decision to charge the death penalty is one that is solely the prosecutor's, and here, with the death penalty, the pernicious element of racism has played an undeniable role.

The Supreme Court had a chance to redress this vicious exercise of prosecutorial discretion in *McClesky v. Kemp*.¹³² McClesky, an African-American, was charged with armed robbery and the murder of

129. 137 CONG. REC. 8263-01 (1990) (U.S. General Accounting Office Report, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities*). The *Furman* decision refers to *Furman v. Georgia*, 408 U.S. 238 (1972), which held that the death penalty violated the Eighth Amendment's prohibition against "cruel and unusual punishment" when the trial judge or the petit jury have unfettered discretion to determine whether to impose the death penalty. *See id.* at 239-40. For a discussion of the background of the death penalty laws see Roscoe C. Howard, Jr., *The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863, 866-77 (1996).

130. *See* 137 CONG. REC. 8263-01 (1990).

131. *See id.*

132. 481 U.S. 279 (1987).

a white police officer in Georgia.¹³³ McClesky presented the Court with a statistical study of the racial makeup of death penalty cases in Georgia.¹³⁴ His study demonstrated that of all the racial combinations between African-Americans and whites as defendants and/or victims, African-American defendants who killed white victims were overwhelmingly the likeliest to be charged with the death penalty in Georgia.¹³⁵

The *McClesky* Court held:

[The] argument that the Constitution condemns the discretion allowed decisionmakers in the Georgia capital sentencing system is antithetical to the fundamental role of discretion in our criminal justice system. Discretion in the criminal justice system offers substantial benefits to the criminal defendant. . . . [T]he capacity of prosecutorial discretion to provide individualized justice is “firmly entrenched in American law.” As we have noted, a prosecutor can decline to charge, offer a plea bargain, or decline to seek a death penalty in any particular case. Of course, “the power to be lenient [also] is the power to discriminate,” but a capital punishment system that did not allow for discretionary acts of leniency “would be totally alien to our notions of criminal justice.”¹³⁶

In other words, the Court told this country's minority citizens that state prosecutors' racist application of the death penalty was something they would have to “live with.”¹³⁷

It is a paradox to hear independent counsels criticized for exercising their discretion to pursue allegations of impropriety in the most powerful government on earth, when protests against prosecutorial discretion from the minority community in a far more troubling area have gone unheeded. In the independent counsel situation, individuals who are accused of crimes involving their offices and who also are known to the media and the public and looked upon as role models, are crying “foul.” In the death penalty situation, the targets are not as well-known, but the issue is the same. The power of the prosecutor to exercise his or her discretion is only

133. *See id.* at 283.

134. *See id.* at 286.

135. *See id.*

136. *Id.* at 311–12 (citations omitted).

137. Pun, but no disrespect, intended.

addressed by removal of the prosecutor from office.

Indeed, targets of independent counsel investigations were provided protection from an arbitrary and capricious independent counsel, which is not provided to those in the community at large who face arbitrary, capricious, and biased prosecutors. First, the Attorney General initially determined whether an independent counsel was needed.¹³⁸ Then, after the appointment, the independent counsel had to seek permission, through the Attorney General, from the three-judge Special Division of the U.S. Court of Appeals for the District of Columbia to investigate any matters not covered in the original mandate.¹³⁹ Further, the Attorney General had the power to remove an independent counsel for a number of reasons.¹⁴⁰ One final protection that the Constitution provides all individuals is the necessary indictment, based on probable cause and voted on by a grand jury.¹⁴¹ The independent counsel grand juries performed this function exceptionally well.

B. The Grand Jury

The work of the grand jury provides a different perspective between investigations in a U.S. Attorney's Office and an Independent Counsel's Office. I have often heard former prosecutors boast, and defense counsel allege, that prosecutors could indict the proverbial "ham sandwich."¹⁴² The argument that follows this boast is that the grand jury serves only as a pawn for the prosecutor's wishes and provides no real assurances of serving the historical role of buffer

138. See *supra* notes 95–108 and accompanying text.

139. See 28 U.S.C. § 593(c) (1994).

140. See *supra* note 116 and accompanying text.

141. See U.S. CONST. amend. V.

142. See *In re Grand Jury Subpoena of Stewart*, 545 N.Y.S.2d 974, 977 n.1 (Sup. Ct. 1989) ("[M]any lawyers and judges have expressed skepticism concerning the power of the Grand Jury. This skepticism was best summarized by the Chief Judge of this state in 1985 when he publicly stated that a Grand Jury would indict a 'ham sandwich.'"); see also *People v. Dukes*, 592 N.Y.S.2d 220, 223 (Sup. Ct. 1992) ("[I]n this case, the prosecutor served the grand jury the proverbial 'ham sandwich' and told them, in effect, to take it or leave it."); SOL WACHTLER, *AFTER THE MADNESS: A JUDGE'S OWN PRISON MEMOIR* 292 (1997) ("I felt the historical purpose of the grand jury had been so contorted as to render it meaningless. That it no longer provided protection for the presumed innocent, but instead worked as a handmaiden to the prosecutor. To illustrate the point I noted that 'any prosecutor who wanted to, could indict a ham sandwich.' The quote made the headline of the *Daily News* and found its way into publications and novels, some without attribution . . .").

between the community and the prosecutor.

My experience with grand juries has been very different. Initially, I should point out that as an AUSA, grand juries before which I appeared never refused to return an indictment that I presented to them. However, each case I presented had been thoroughly investigated. Also, witnesses had been identified, debriefed, and allowed to testify, while relevant documents had been reviewed, analyzed, and presented to the grand jury. I am simply unfamiliar with any case in which a prosecutor brought a matter to the grand jury without supporting evidence and obtained an indictment.

Those cases that did not merit prosecution because of lack of evidence, lack of a federal interest, or lack of violation of the law simply were not presented to the grand jury.¹⁴³ Prosecutors exercised their constitutionally recognized discretion and simply declined to present the matters to the grand jury. It does not surprise me that the vast majority of cases presented to grand juries result in indictments. It has little to do with any perceived lack of will by the grand jury and everything to do with the professionalism of the prosecutors.

I found things no different as an Associate Independent Counsel. However, I did find that the grand juries appeared more serious about their duties and more willing to challenge the prosecutors and the witnesses, and to request that certain avenues of investigation be pursued. The federal grand juries hearing AUSA cases do involve themselves in matters of interest, but rarely do they have witnesses who regularly walk the government's halls of power, nor are they connected with those who do.

In my experience, independent counsel grand juries were often shocked at the levels of abuse that were placed before them in the form of testimony and documents. As a result, the grand juries took an active role in questioning the witnesses and determining the direction of the prosecution.

In one instance, a witness, who was a principal in a private firm, was "scolded" by an independent counsel grand jury for allowing his firm to be used in a scheme that victimized an elderly woman. When the witness was later recalled to the grand jury, before answering questions on the actual investigation, he reported to the

143. U.S. DEPT OF JUSTICE, U.S. ATTORNEY'S MANUAL §§ 9-27.200, .220, .230 (1997).

grand jurors that changes had been made at the firm in accordance with their comments. In another instance, one high-level government official, called as a witness by an independent counsel, was told directly by a grand juror that her non-credible answers were disappointing in light of her government position.

Independent counsel grand jurors have pointedly directed me to seek certain documents and report to them my findings. And, by no means did grand jurors simply accept the representations of associate independent counsel and vote as they suggested.¹⁴⁴ Indeed, the fact that grand jurors vigorously pursued their duties and challenged theories and evidence presented to them gave me confidence in the indictments I returned while serving as an Associate Independent Counsel.

Independent counsel grand jurors demonstrated the decorum and respect that was expected of them during the exercise of their duties, but they also asserted themselves as active and aggressive participants in the process. They were cognizant of the historical nature of their duties, the importance of the witnesses, and the gravity of the allegations before them. Moreover, they reminded the associate independent counsels of their awareness. I have found investigations in which the independent counsel's theory of liability was challenged by one or more members of the grand jury, or questions raised as to why certain witnesses were not made subjects or targets of the investigation. As an Associate Independent Counsel, I always heeded their advice.

I also have found that the federal grand juries used by AUSAs, while professional and competent, do find a certain "routine" to the cases that the AUSAs bring to them. Independent counsel grand juries were very vigorous in executing their duties, and by no means served as the independent counsels' pawns.

IV. PROSECUTING CELEBRITIES

144. See *United States v. McKenzie*, 678 F.2d 629, 632 (5th Cir. 1982); see also *United States v. Cederquist*, 641 F.2d 1347, 1353 (9th Cir. 1981) (allowing prosecutors to comment on the evidence and witness credibility before the grand jury).

The nature of independent counsels' targets made the investigation more difficult than a normal federal investigation. The problems associated with conducting investigations of individuals who, because of their positions, are virtual celebrities took a toll on an independent counsel investigation.

A. AUSAs Are at Home in Their Districts

The Offices of the U.S. Attorneys confine their work to their judicial districts. In practice, AUSAs are individuals who often hail from the districts in which they practice or have lived in their districts for a substantial time.¹⁴⁵ This provides the assistants in U.S. Attorneys' Offices the opportunity to establish an expertise in the nature of the practice in their jurisdictions. AUSAs become familiar with the methods of the federal courts in which they try cases and understand what the community appreciates in a prosecution. Conducting and observing trial after trial in the courtrooms of a particular district provides the AUSA the background for what is expected by the judges and the community and what is not.

B. Associate Independent Counsel Were Frequently from Other Federal Districts

In contrast, the associates who worked for an independent counsel often come from jurisdictions other than the venue for the investigation.¹⁴⁶ While in Judge Adams's office, I was involved in an indictment in Brooklyn, New York, and an investigation that took me to Miami, Florida, and Fort Worth, Texas. The office's investigation also involved a trial in North Dakota, which trial was handled by a former AUSA from the District of Columbia and the Eastern District of Virginia. Mr. Smaltz's office conducted a trial in San Francisco, California, which was handled by an AUSA from Tampa, Florida. Independent counsel prosecutors did not always have the advantage

145. For example, I was appointed an AUSA with the U.S. Attorney's Office in the District of Columbia in 1984. I had practiced in the District of Columbia since 1978. In 1987, I transferred to the U.S. States Attorney's Office for the Eastern District of Virginia, where I had maintained a residence since 1978.

146. This was done, in part, due to the fact that the independent counsel could request that employees of the Department of Justice be detailed to their offices. *See* 28 U.S.C. § 594(d)(1) (1994). This was not the case prior to the reauthorization of the Law in 1994.

of practicing in the jurisdictions where the trials were brought, and often had to become familiar with a new federal district while simultaneously coping with the scrutiny attached to their investigations. An AUSA conducting an investigation usually does not encounter such problems.

C. Defendants in Typical Federal Prosecutions Are Usually Unfamiliar to Federal Investigators and the Community

Generally, AUSAs become familiar with the community and understand the types of crimes prevalent in their districts and the law enforcement concerns on which they should focus. Even when armed with this information, the defendants are individuals not usually known to federal investigators or prosecutors outside the criminal arena. Defendants may be residents of the judicial district, who make themselves known through their criminal activity. However, it is not unusual for criminal defendants to be from outside the community. Often, criminal defendants are individuals who have come to the jurisdiction from elsewhere to involve themselves in criminal enterprises and activities in the district.

As a result, the community is usually unfamiliar with most of these individuals before they are charged with a crime. Often, the first time most juries hear of a criminal defendant is at trial during *voir dire*.¹⁴⁷ Usually, criminal defendants in federal court are anonymous individuals whose lives and backgrounds are outlined and described by their counsel and trial witnesses, while their criminal activities and background are the subject of the prosecutor's case-in-chief.

Juries rarely come to the courtroom with a predetermined notion of who the defendants are, or what to expect from them. Indeed, in many criminal trials, the defendants are never directly introduced to the jury at all. Exercising their Fifth Amendment privilege,¹⁴⁸ defendants in many criminal trials never take the

147. This is a French term which means "to speak the truth." BLACK'S LAW DICTIONARY 1575 (6th ed. 1990). "This phrase denotes the preliminary examination which the court and attorneys make of prospective jurors to determine their qualification and suitability to serve as jurors. [In many federal trial courts, only the judge conducts the *voir dire*.] Peremptory challenges or challenges for cause may result from such examination." *Id.*

148. See U.S. CONST. amend. V ("No person shall be . . . compelled in any criminal case to be a witness against himself . . .").

stand, address the jury, or make themselves known except through others' representations. Some criminal defendants waive that right and are witnesses on their own behalf. Often, that testimony is the first time that jurors, and sometimes the prosecutors, get to evaluate the criminal defendant directly.

D. There Are Occasions of Celebrity Defendants in Federal Cases

Occasionally, of course, defendants and witnesses in prosecutions handled by U.S. Attorneys' Offices are well known in their jurisdictions, and sometimes throughout the nation. For example, in 1988, the U.S. Attorney for the Eastern District of Virginia investigated, tried, and convicted perennial presidential candidate Lyndon LaRouche and some of his political followers of conspiracy, mail fraud, and tax fraud.¹⁴⁹ Mr. LaRouche was a nationally known political extremist who resided in the Eastern District of Virginia. In 1991, the U.S. Attorney's office also investigated the taping of a cellular phone conversation of a former Virginia Governor.¹⁵⁰ The investigation required a U.S. Senator to appear as a witness before a grand jury in the Eastern District of Virginia.¹⁵¹ The Senator's grand jury appearance caused quite a stir in the Commonwealth of Virginia and the nation.¹⁵²

Similarly, in the District of Columbia, the mayor of the city, Marion Barry, was investigated, tried, and convicted of narcotics use in 1990 by the U.S. Attorney's Office.¹⁵³ The former President of the University of the District of Columbia was also tried by the D.C. office and acquitted of eight counts of theft, fraud, and perjury in 1988.¹⁵⁴ In addition, two prominent District of Columbia businessmen were tried and acquitted of fraud charges in trials in 1990 and 1991 by the same office.¹⁵⁵ All these defendants were promi

149. See Caryle Murphy, *LaRouche's Conviction May Change Organization*, WASH. POST, Dec. 18, 1988, at B3.

150. See Donald P. Baker, *Sen. Robb Testifies About Tape: Grand Jury Session Lasts Three Hours*, WASH. POST, Aug. 8, 1991, at A1.

151. See *id.*

152. See *id.*

153. See Steve Twomey & DeNeen L. Brown, *Barry Guilty on One Count, Cleared on One*, WASH. POST, Aug. 11, 1990, at A1.

154. See *Former University President Is Acquitted in Federal Court*, N.Y. TIMES, Feb. 11, 1988, at A16.

155. See Tracy Thompson, *Acquitted D.C. Defendants Staying out of Limelight*,

ment citizens of the District of Columbia, while Mayor Barry was also known throughout the country.

E. Celebrity Investigations Take a Toll

Prosecuting cases involving well-known and prominent individuals takes its toll on those handling the investigation. Because of the prominence of witnesses or targets, the prosecutor realizes that the media coverage will be more intense. The media and the public will closely scrutinize each step of the investigation. Those going in and out of a grand jury are reported on, watched, and analyzed.

As a result, allowances often are made for prominent witnesses that may not be made for others. Such allowances include having interviews conducted in the offices of the witnesses, conferences or grand jury appearances rescheduled to accommodate schedule conflicts, and office personnel designated to handle media inquiries. Many of these changes are minor. However, many prosecutors understand that in this type of case, the scrutiny will be more keen.

Not just the prosecutors recognize the differences with prominent individuals. Juries are usually familiar with well-known individuals within their jurisdictions and may come to conclusions about individuals based on the reputations of the individuals in their respective communities. If the jury is unaware of a well-known defendant's reputation before the trial, they quickly become aware of it. Although the trial itself informs jurors about whom they are sitting in judgment, often the courtroom gallery, with the media and prominent citizens attending, will clue in even the most uninformed to the notoriety of the trial taking place. The defendant's reputation sometimes is not reflected in the evidence at trial, but is something that most jurors are aware of and carry with them into deliberations.

The celebrity of individuals and the resulting crush of attention may have effects for which an AUSA is not prepared. For example, in the Eastern District of Virginia, an AUSA was removed from the investigation of illegal campaign contributions to the campaign of a former U.S. Senator because the AUSA had met earlier with members of another Senator's staff regarding an unrelated investigation.¹⁵⁶ It was reported that the AUSA had asked questions about

WASH. POST, Feb. 24, 1992, at D5.

156. See Robert F. Howe, *Prosecutor Reportedly Taken off Political Case in Va.*,

the Senator's alleged personal indiscretions.¹⁵⁷ Although there were no allegations that the AUSA committed ethical or procedural violations, the scrutiny given to an investigation involving a former U.S. Senator was enough to change the course of the investigation.¹⁵⁸ Moreover, one former U.S. Attorney for the Eastern District of Virginia was not reappointed for a second term, reportedly because of the investigations he had ordered involving elected officials in his district.¹⁵⁹ His investigations of a prominent public figure may have been enough to alter the course of his career.

The toll takes place in the courtroom also. In the District of Columbia, the U.S. Attorney's Office suffered setbacks in each of its prosecutions of prominent citizens tried in federal court. For example, Mayor Barry was convicted of only a misdemeanor charge despite videotape evidence capturing his use of narcotics.¹⁶⁰ The President of the University of the District of Columbia and the two prominent District of Columbia businessmen were all acquitted.¹⁶¹ Most prosecutors will realize that the defendant's celebrity status will have an effect on a jury.¹⁶² In the trial of O.J. Simpson in Los

WASH. POST, Nov. 2, 1991, at C5.

157. *See id.*

158. *See id.*

159. *See* Robert F. Howe, *Henry Hudson: No Breaks, No Regrets; Prosecutor's Tough Record on Crime May Form Basis of His Political Future*, WASH. POST, May 27, 1991, at B1.

160. *See* Twomey & Brown, *supra* note 153.

161. *See Former University President Is Acquitted in Federal Court, supra* note 154; Thompson, *supra* note 153. I do not underestimate the possibility that the jury simply rejected the evidence in each of these cases. However, in Barry's case, in an unusual pronouncement from a member of the bench, the trial judge, The Honorable Thomas Penfield Jackson, stated in a law school forum that he felt that the jury simply failed to do its job, and some jury members had their "own agendas," while the judge had "never seen a stronger government case." Christopher B. Daly, *Barry Judge Castigates Four Jurors; Evidence of Guilt Was 'Overwhelming,'* WASH. POST, Oct. 31, 1990, at A1.

162. The exploitation of celebrity status to affect the jury is a much-employed defense tool. Sometimes the exploitation comes in the form of fellow celebrities who are brought in to view the trial. For example, in the Barry trial, Nation of Islam leader Louis Farrakhan and Bishop George Augustus Stallings, Jr. were part of the spectator gallery. *See* Sandra Torry, *Judge Reverses Ban on Attendance: Stallings Joins Spectators*, WASH. POST, July 7, 1990, at A1. United States District Court Judge Thomas Penfield Jackson originally excluded both men from the trial, describing them as "potentially disruptive." *Id.* He later reversed himself after the Court of Appeals for the District of Columbia ruled that he could not exclude anyone from the trial on the basis of their religious or personal beliefs. *See id.*; *see also* United States v. Barry, Nos. 90-3150, 90-3149, 90-3151, 1990 WL 104925 (D.C. Cir. July 5, 1990). Meanwhile, political gadfly Reverend Al Sharpton appeared outside the courthouse to protest the prosecution of

Angeles, the jury's acquitting the defendant, despite evidence of guilt, may have been based on Simpson's celebrity.¹⁶³

F. Independent Counsel Investigations Always Involved "Celebrities"

In a U.S. Attorney's Office, the case of the celebrity defendant is infrequent. Federal cases may receive significant attention because, as federal cases, they are not brought as frequently as state and local criminal trials. These cases also receive attention because they involve fairly significant investigations. However, the attention to U.S. Attorney's Office criminal cases is not constant, and decisions on how cases are handled and who will staff them are rarely affected by who is being investigated. In a U.S. Attorney's Office, the occasional celebrity is a rarity among the many cases with individuals awaiting their fifteen minutes of fame.

In contrast, independent counsel offices, by their very nature, always dealt with prominent public officials. The Law called for the investigation and, if necessary, trial of those in the President's Cabinet, other high-ranking federal officials, and those with whom they dealt.¹⁶⁴ Unlike a U.S. Attorney's Office, an office of independent counsel rarely handled cases of individuals who were not fairly prominent in their own right or connected to someone prominent.

Handling such cases resulted in rigorous public scrutiny for each independent counsel investigation and prosecution. Associates of the appointed independent counsel understood the scrutiny involved in each of their decisions and the criticism that might follow. Those whom they investigated were usually prominent public servants, well-known to the public, who had reached their positions due to substantial achievements in their professional lives. Investigations of these individuals are often looked upon as attempted and uncalled-for "assassinations" of individuals' character.

G. Jury Nullification

Mayor Barry. See Torry, *supra*.

163. See Linda Deutsch, *LA Jury Acquits Simpson; Spellbound Nation Watches 372-Day Murder Trial End*, FORT WORTH STAR-TELEGRAM, Oct. 4, 1995, at 1.

164. See 28 U.S.C. § 591(b); *supra* note 96.

Defense counsel try to get this assassination message to the jury, and in some cases, to the jury pool, i.e., those members of the public who will be called for jury duty. Defense counsel carry the message to the media in hopes that it is read or heard and taken to heart by those who may be sitting in judgment of their client. Prosecutors in the offices of independent counsel understand that losing a case, not on the facts, but on the force of the defendant's personality and reputation is a very real problem.

Jury nullification is a well-known phenomenon to prosecutors.¹⁶⁵ Jurors sometimes take into account factors unrelated to guilt or innocence in their deliberations.¹⁶⁶ As a minor example, one defendant, who I indicted and tried as an AUSA, was a paraplegic confined to a wheelchair. The defendant and his business partner allegedly attempted to rig secret bids with their lone area competitor for Veterans Administration (V.A.) contracts to convert vans for handicap usage.¹⁶⁷ After the defendant and his business partner approached their competitor about sharing their bid information, the competitor made a report to the F.B.I.¹⁶⁸ The government stepped in after the bids were made, but before the V.A. made any awards. Although his business partner pleaded guilty prior to trial, the defendant maintained that he was merely trying to determine his

165. On the eve of the trial of Mayor Marion Barry in the District of Columbia, it was reported that Barry's defense counsel, the late R. Kenneth Mundy, was "openly counting on the hope that a D.C. jury will nullify, or refuse to convict, no matter how strong the government's evidence." Barton Gellman, "Nullification" Looms as Barry Case Takes Shape; Both Sides Look to Possibility That Jury Will Reject Conviction Regardless of Evidence, WASH. POST, Feb. 17, 1990, at A1. It was further reported that "[a]nxiety is growing in the U.S. Attorney's Office . . . that Mundy may be right." *Id.* Jury nullification has been highly debated. See, e.g., Jack B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law to Do Justice*, 30 AM. CRIM. L. REV. 239 (1993); R. Alex Morgan, Comment, *Jury Nullification Should Be Made Part of the Criminal Justice System, But It Won't Be*, 29 ARIZ. ST. L.J. 1127 (1997); Steven M. Warshawsky, Note, *Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy*, 85 GEO. L.J. 191 (1996); Chaya Weinberg-Brodt, Note, *Jury Nullification and Jury Control Procedures*, 65 N.Y.U. L. REV. 825 (1990).

166. For example, Associate Professor Paul Butler of the National Law Center at George Washington University argues that the criminal justice system in this country is biased in its treatment of blacks. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995). Therefore, black juries should exercise their power to nullify certain charges brought by prosecutors against black defendants. See *id.* at 678.

167. See Frank Green, *Jury Acquits Businessman Accused of Rigging Bids*, RICHMOND TIMES-DISPATCH, Nov. 18, 1990, at B1.

168. See *id.*

competitor's intentions and was planning to report the results of his investigation to the F.B.I.¹⁶⁹ Before trial, a neighbor of mine predicted that no jury would convict a paraplegic for attempted fraud against the government. I, of course, believed in the strength of my case. As predicted by my neighbor, but to the shock of both the defense counsel and myself, the jury acquitted the defendant.¹⁷⁰

H. The Independent Counsel Investigation Assured the Public That Investigative Decisions Were Not Based on Protecting a Celebrity

Often, it is very difficult to gauge when sympathy will come into play to nullify a verdict, as I suspect happened in my trial of the wheelchair-bound defendant. Nevertheless, the facts, and the prosecutor's confidence in them, should be the prosecutor's basis for deciding whether to go forward. Defense counsel, of course, will attempt to carry another message forward, and the media may be the tool of choice in accomplishing this. As a prosecutor, you are unable, and should not be attempting, to counter that message in the media.¹⁷¹

Although my V.A. fraud trial ended in an acquittal, no members of the public or the press talked in terms of eliminating the Office of the United States Attorney or investigating the circumstances of the investigation. It was never expected that they would. However, after the acquittal of former Secretary of Agriculture Michael Espy, cries for the end of the Independent Counsel Law could be heard far and wide.¹⁷²

169. *See id.*

170. *See id.*

171. *See* Roscoe C. Howard, Jr., *The Media, Attorneys, and Fair Criminal Trials*, 4 KAN. J.L. & PUB. POL'Y 61, 68 (1995) (emphasizing that federal prosecutors should not use the media as a litigation tool).

172. *See generally* Neil A. Lewis, *Espy Is Acquitted on Gifts Received While in Cabinet*, N.Y. TIMES, Dec. 3, 1998, at A1. One of the more troubling aspects of the Espy case was the statement from the jurors that they were trying to "sen[d] a message to these independent counsels [that] [w]e, the American people, don't want any more of these trivial, petty cases." Bill Miller, *Espy Jury Criticizes Attorney*, LAWRENCE J.-WORLD (Kan.), Dec. 6, 1998, at A1. It is rare for an AUSA to hear that a jury attempted to "send you a message" about the nature of an investigation. Here, the jurors' open criticism of the Independent Counsel was an aspect of the investigation that I found to be extraordinary. I criticize it as troubling because of the jurors' concern over the nature of the institution and the type of investigations, along with their criticism of the facts and

Although the Independent Counsel Law came under criticism for Starr's investigation and those of other Independent Counsels,¹⁷³ their investigations assured the public that federal officials had not received special treatment and that alleged wrongdoing had not been covered up by supportive cabinet colleagues or political cronies. Criticism of Attorney General Janet Reno's decision to not seek independent counsels for the campaign finance scandal and the fund raising testimony of a former White House staff member,¹⁷⁴ as well as her refusal to expand the probe of Interior Secretary Bruce Babbitt's denial of casino licenses to Indian tribes,¹⁷⁵ included allegations of cover-ups.¹⁷⁶

the law. Jurors are expected to put aside their biases and sympathies, and look at the facts in light of the law. With jurors in independent counsel prosecutions, that may not be the norm.

173. See John Mintz & Toni Locy, *Starr's Probe Expansion Draws Support, Criticism*, WASH. POST, Jan. 23, 1998, at A20.

174. See *Gore Won't Face Counsel; Reno Says No Further Inquiry Needed on Funds*, KAN. CITY STAR, Nov. 25, 1998, at A1 (reporting that Republicans led by Rep. Dan Burton, R.-Ind. said, "Janet Reno has gone through extraordinary contortions not to appoint an independent counsel for the entire campaign finance investigation."); *Reno Vetoes Fund-Raising Inquiry of Clinton's Ex-Staffer*, KAN. CITY STAR, Jan. 30, 1999, at A3 (quoting Rep. Dan Burton, R.-Ind.: "The attorney general is once again protecting the president and his friends. [The attorney general] has defied the spirit and the letter of the independent counsel statute. Her investigation has become a sham."); *Reno Won't Name Gore Independent Counsel*, LAWRENCE J.-WORLD (Kan.), Nov. 25, 1998, at A2 (quoting Rep. Dan Burton, R.-Ind.: "Once again, the Attorney General has failed to follow the law. For the past two years, the attorney general has made it clear she is committed to protecting the president."); Jerry Seper, *Reno Won't Seek Gore Investigation, '96 Fund Raising Still Being Probed*, WASH. TIMES, Nov. 25, 1998, at A1 (quoting Sen. Orrin G. Hatch, R.-Utah, chairman of the Senate Judiciary Committee, as saying that he and others were deciding how to "take these matters out of the hands of the attorney general. What is at stake is whether the public's confidence . . . will be further eroded by this administration, and whether there will be a full accounting for the reckless fund-raising practices of President Clinton and other administration officials.").

175. See Jerry Seper, *Reno Refuses to Expand Casino Probe to Clinton; Also Denies GOP Request for Independent Counsel*, WASH. TIMES, Dec. 16, 1997, at A4.

Miss Reno — in refusing to seek outside counsel or to expand the inquiry — "continues down a perilous path. How much longer the letter and spirit of the independent counsel law can be ignored by the nation's chief law enforcement officer is an increasingly critical question. I remain convinced that the attorney general has a classic conflict of interest here, one which justifies the appointment of an independent counsel."

Id. (quoting Rep. Henry Hyde, R-Ill.).

176. See Katy J. Harriger, *Damned If She Does and Damned If She Doesn't: The Attorney General and the Independent Counsel Statute*, 86 GEO. L.J. 2097, 2097 (1998) ("Attorney General Janet Reno's controversial decision not to seek appointment of an independent counsel to investigate the campaign finance scandal highlights the enduring

When the Attorney General makes decisions about prosecutions involving those directly above her in the chain-of-command, those decisions will always be subject to criticism. Rightly or wrongly, she will be seen as protecting those with whom she works if she decides to forgo an investigation involving her cabinet colleagues. These criticisms erode public confidence in the Attorney General's performance. I do not express an opinion one way or the other on the Attorney General's decisions. However, critics do not ignore the ties that political activism and loyalty bring to these individuals. Whether or not the campaign finance, fund-raising testimony, or casino investigations should be pursued will always be subject to debate, and charges that cabinet members received protection because of political and professional relationships with the investigator will persist when the investigation is handled by a non-independent prosecutor.

The offices of independent counsel reassured the public that decisions, even those that ultimately exonerate officials of alleged wrongdoing, were made in the absence of politics or cronyism. This provided the public with the sense that their government is still one of laws and not men. Although many criticized an independent counsel, one of those criticisms was not fear of a "cover-up" in an investigation. Thus, the statute served to provide the public with confidence in its government.

V. MEDIA SCRUTINY

The scrutiny that an independent counsel office constantly received took a substantial toll on the prosecutors and the prosecutions themselves. That scrutiny was usually delivered by the media. AUSAs are often able to use public scrutiny to their advantage during their investigations by providing information to the media hoping a citizen will come forward with an investigative lead. AUSAs often count on this type of break in their investigation. It is thought of as good old-fashioned luck.

The independent counsel scrutiny is much different. The scrutiny is usually criticism in the media, with defense counsel readily

tension between politics and the law, and particularly, the impact of that tension on the Attorney General and the Department of Justice."); William Safire, *His Lawyers Made Him Do It; President Can Do No Wrong Under Janet Reno*, KAN. CITY STAR, Dec. 9, 1998, at B7.

providing the information necessary for the criticism. Independent counsel prosecutors often retreat to their “bunkers” in reaction to how their investigations are portrayed, and rarely experience the sort of investigative luck that AUSAs look for.

A. Investigative “Luck”

One of the advantages of working as an assistant in a U.S. Attorney's Office is the relative anonymity. It is not unusual for AUSAs to live in their jurisdictions without anyone ever recognizing them or realizing what they do for a living, but media coverage can make a prosecutor easily recognizable. Those in prosecutors' offices recognize that fact.

The effect of media exposure is not lost on most of those appointed to be U.S. Attorneys (the heads of the offices, not the Assistants). The U.S. Attorneys often are politically ambitious and well connected to the governing political party.¹⁷⁷ In pursuing their ambitions and keeping the public informed, these individuals use the press conference and the press release as normal tools of the office.

The ability of the media to communicate a message to the community is formidable.¹⁷⁸ As an example, while prosecuting in Richmond in 1989, I indicted a group of drug dealers in rural Caroline County, Virginia, as a result of an F.B.I./Virginia State Police operation dubbed “Corner Girl.” During the press conference held by the U.S. Attorney to announce the arrest of the cocaine distribution gang, the United States Attorney stated that federal efforts would be increased and more arrests would follow.¹⁷⁹ Not long after that pronouncement, a seemingly unassuming accountant approached local law enforcement about receiving immunity to help with the investigation.¹⁸⁰ After substantial negotiations, the accountant began to cooperate with federal law enforcement authorities.

The information that the accountant provided led to the indict-

177. See generally Tom Rickhoff, *The U.S. Attorney: Fateful Powers Limited*, 28 ST. MARY'S L.J. 499, 512–20 (1997).

178. See Howard, *supra* note 171, at 64.

179. See John F. Harris, *Open-Air Drug Market in Rural Va. Closed; 17 Persons Indicted in Caroline County*, WASH. POST, June 10, 1989, at B5.

180. I have not used this witness's name because of the witness's attempts to regain a normal life, and because of the fugitive status of at least one of the individuals who was convicted during the investigation, as well as the always present danger of retaliation that exists with drug gangs.

ment and conviction of the source of the “Corner Girl” cocaine supply. The accountant helped with handling the books for the source and showed law enforcement how the books were used to keep track of laundered drug proceeds. The accountant later told law enforcement that he came forward after hearing the U.S. Attorney's press conference announcing the arrest of the “Corner Girl” gang. He felt that it was only a matter of time before federal authorities discovered him and that turning himself in would help with negotiating a deal.

The “Corner Girl” episode demonstrates what I consider to be one of the prime operating principles of federal prosecutions: “Sometimes it is better to be lucky than good.” In this case, the press conference created the “luck.” Federal prosecutors and law enforcement agents count on citizens with knowledge about crimes to come forward and provide information to help identify and convict criminal violators. The media helps take that message to the public and creates an image of an efficient and trustworthy law enforcement enterprise worth helping. Information from informants, tipsters, or any knowledgeable persons is the lifeblood of federal investigations. Without them, the flow of intelligence about criminal activities would not be sufficient to properly initiate and investigate federal crimes. One reason that they come forward is their faith in the government to do things that are right. On the other hand, if the media's message is a negative one, this source of information will dry up. Individuals will not have the faith in the system to come forward.

With a constant stream of information criticizing the effectiveness of independent counsels and the decisionmaking of the prosecutors in those offices, citizens become reluctant to get involved in their prosecutions. AUSAs do not encounter such a run of bad publicity. For an associate independent counsel, however, it is just another day at the office.

B. Ready Sources of Bad Publicity

Contrast my “Corner Girl” experience with what I found in 1991 while serving in Judge Adams's Office of Independent Counsel. I was immersed in investigating a Fort Worth, Texas developer, a former HUD official who became a PaineWebber vice-president, and a tax attorney from Omaha, Nebraska. A *Legal Times* headline

blared:

“Big Bucks, Little Bang: HUD Investigation Seems Mired in the Muck”¹⁸¹

The article alleged that after twenty months of investigating with a cost of \$4 million, the office had little to show publicly for its probe.¹⁸² Judge Adams's office did not act as a source for the article, and the article did not mention the office's inability to discuss ongoing grand jury investigations.¹⁸³ Defense counsel for various targets and defendants in the investigation were cited as sources for most of the conclusions drawn by the article.¹⁸⁴

Indeed, one matter the *Legal Times* article pointed to as demonstrating the inability of the office to move along its investigation was a grand jury matter before the then Chief Judge of the U.S. District Court for the District of Columbia.¹⁸⁵ Although the descriptions were not attributed to a source, because of the nature of the matters discussed, those hearings were closed and should not have been discussed by anyone.¹⁸⁶ The article was very critical of the prosecutor's handling of the hearing.¹⁸⁷

I was unfamiliar with this tactic from my practice as an AUSA. The *Legal Times* article cited several defense counsel as willing to speak on the record about the problems they perceived with Judge Adams's office.¹⁸⁸ Further, my relationship with defense counsel in

181. Linda Himelstein, *Big Bucks, Little Bang: HUD Investigation Seems Mired in the Muck*, LEGAL TIMES, Dec. 16, 1991, at 1.

182. *See id.*

183. *See generally* FED. R. CRIM. P. 6(e)(2) (“[A]n attorney for the government . . . shall not disclose matters occurring before the grand jury . . .”). There are exceptions that allow disclosure, but they are all law enforcement related. *See, e.g., id.* 6(e)(3) (exempting disclosure that allows a government attorney to enforce federal criminal law).

184. *See* Himelstein, *supra* note 181, at 1.

185. *See id.* at 10.

186. *See* FED. R. CRIM. P. 6(e)(5) (“Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury.”); *see also id.* 6(e)(6) (“Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.”). The effect of sealing a hearing is to prevent any party to the hearing from discussing it outside the hearing, except to the extent needed for related litigation.

187. *See* Himelstein, *supra* note 181, at 10.

188. *See id.* at 1, 10.

this prosecution quickly became uncivil after the article was published.¹⁸⁹

Defense counsel understood that their relationships with prosecutors in offices of independent counsel would not become institutional. Defense counsel often met the associate independent counsels for the first time in their professional careers during the course of the independent counsel's investigation. In the Department of Justice, defense counsel understand there is always the possibility that they could return to represent a different client with an AUSA with whom they have previously dealt. These possible future encounters are unlike dealing with an independent counsel, which is viewed as a one-time affair. An office of independent counsel, as an institution, ceased to exist at the end of its investigation. The prosecutors, as a unit, would no longer be present to provide any institutional histories of difficulties they may have encountered with defense counsel.

I cannot say that my dealings with defense counsel in the HUD investigation were indicative of how defense counsel, in general, decided to handle their professional relationships with associate independent counsel. Indeed, I opposed former colleagues from the U.S. Attorney's Office and saw many others who have become defense counsel that took on clients involved in independent counsel investigations. However, defense counsel hardly hesitated to provide the media with information critical of the independent counsel, and they had little fear that inaccurate or misleading information would hurt their relationships with associate independent counsel.

I do not propose that anything is *per se* wrong with media con-

189. During the course of the trial, defense counsel accused my co-counsel and me of intimidating witnesses and telling them they could be indicted. See Linda Himelstein, *Shaky Witness Trips up HUD Prosecution; Scenes from the Forgotten Trial*, LEGAL TIMES, Nov. 16, 1992, at 1, 19. The article described the trial "atmosphere" as having "degenerated," with the judge growing "visibly and increasingly irritated by the defense lawyers' aggressiveness," while the prosecution has told the court it would not engage in the "name-calling" taken on by the defense. *Id.* The trial court held defendant Leonard Briscoe's lead counsel in criminal contempt for counsel's conduct during trial. See Rule 42(a) Order of Contempt, *United States v. Briscoe* (D.C. Cir. 1992) (Nos. 91-0399, 92-0086) (stating that Briscoe's "audibly cursing an Associate Independent Counsel" was attributed, in part to the overall conduct of his lead counsel at trial); *In re Levine*, 27 F.3d 594 (D.C. Cir. 1994) (per curiam); Maria Recio, *Lawyer Gets Own Cell Time*, FORT WORTH STAR-TELEGRAM, Nov. 20, 1992, at A25. Much of the conduct for which he was held in contempt was aimed at the government prosecutors' key witness. See *id.* Moreover, in addition to Briscoe's attorney, a co-defendant's lead counsel and Briscoe himself were also found in contempt. See 2 ADAMS & THOMPSON, *supra* note 66, at 106 n.8.

tact by defense counsel. I also acknowledge that independent counsels received some favorable press. However, for an AUSA, it is rare that the press criticizes the U.S. Attorney's office as an institution or denounces an investigation the AUSA is undertaking.¹⁹⁰ Defense counsel provided a ready stream of sources for negative media coverage in an independent counsel investigation.¹⁹¹ The result was national criticism of an ongoing investigation. The luck that prosecutors rely on did not readily develop in the face of such persistent criticism. As potential witnesses read the information, they became reluctant to come forward. Their faith in the independent counsel was undermined.¹⁹²

An added effect was that the constant criticism and scrutiny of the investigation drew the staff of an independent counsel's office closer together. The atmosphere in the office took on the nature of a "bunker" bracing for the attacks.

C. The Bunker

Alleged wrongdoing by a public figure is usually the source of headlines and sensational news stories.¹⁹³ Newspapers do have to sell papers to remain in business, and articles that outline the fall of a prominent public figure are covered extensively.¹⁹⁴ One rea

190. Nonetheless, the Department of Justice does absorb a certain amount of criticism. See, e.g., Brigid McMenamin & Janet Novack, *The White-Collar Gestapo*, FORBES, Dec. 1, 1997, at 82 (criticizing the expansiveness of the federal criminal laws); *Report Questions Tactics of Federal Prosecutors*, KAN. CITY STAR, Nov. 22, 1998, at A8.

191. See Samuel Dash, *Independent Counsel: No More, No Less a Federal Prosecutor*, 86 GEO. L.J. 2077, 2095 (1998) ("[T]hese attacks are usually fueled by defense strategy to vilify the prosecutor for the purpose of weakening her investigation. Journalists, acting as conduits, and not the filters their ethics require them to be, routinely report these attacks, lending credibility to them and thus shaping the opinions and perceptions of the public.").

192. Leaks are not always confined to defense counsel. Independent counsels have also leaked information to the media to combat the waves of criticism they have received. See, e.g., *Starr Argues That News Leaks Did Not Violate Grand Jury Rules*, CHI. TRIB., Jan. 7, 1999, at 12.

193. See Donald A. Daugherty, *The Separation of Powers and Abuses in Prosecutorial Discretion: Morrison v. Olson*, 79 J. CRIM. L. & CRIMINOLOGY 953, 987 (1988) ("[B]ecause of the political implications of a possible discovery of unethical behavior in the executive branch, great publicity inevitably accompanies the appointment of an independent counsel.").

194. See Cass R. Sunstein, *Bad Incentives and Bad Institutions*, 86 GEO. L.J. 2267, 2269, 2277 (1998). "Emphasis on scandals can also be in the economic self-interest of the media, especially when a basic concern is inevitably to attract viewers, readers, and

son these stories run prominently in the news is their impact on the community, but another is the story's ability to sell papers.¹⁹⁵

The appointment of an independent counsel signaled the beginning of such a story. The coverage was constant and widespread. The independent counsel was usually investigating someone in public life who needed the support of the public to continue in their line of work. Defense counsel for the public official generally responded with statements to the media. Usually their statements took the form of attacks on the independent counsel.

Runaway prosecutors abusing their power is the typical type of story that independent counsels were used to seeing. An independent counsel's options to counter this type of information were limited. The independent counsel, following Department of Justice guidelines,¹⁹⁶ could provide only minimal information concerning the ongoing investigation.¹⁹⁷ The inability to respond to the criticism or to defend the nature of the ongoing investigation often provided the office with a "bunker" mentality.¹⁹⁸

The ongoing public criticism in print and television media created an atmosphere within an office of independent counsel that those handling the investigation were the only ones who understood the gravity of the allegations being investigated.¹⁹⁹ Often there was

sponsors. . . . A large part of the job of newspapers is to sell newspapers and advertisers. In many quarters, corruption sells." *Id.* at 2269, 2277.

195. *See id.* at 2277-79 (indicating that the media focuses on independent counsel investigations to the detriment of important national policy issues in part to sell papers).

196. *See* 28 U.S.C. § 594(f)(1).

197. *See generally* FED. R. CRIM. P. 6(e); 28 C.F.R. § 50.2 (1999).

198. My practice as a prosecutor was to not respond to media inquiries of this type. For example, the Office of Independent Counsel declined comment on the representations in the November 16, 1992 *Legal Times* article discussed in *supra* note 189. Interestingly, when the reporter approached me during the trial for a comment and a photograph, I inquired about the nature of the article. The reporter declined to reveal the topic. I had noticed that she was not part of the normal corps of reporters who had been following the trial. Although I declined to comment or be photographed, I did offer to provide copies of any public document made available to the press during the trial to lend to the accuracy of her story. The reporter declined that offer. There is a growing concern that the print and broadcast media are more concerned with developing stories that will sell, rather than reporting facts. *See Mistakes Hurt Credibility of Newspapers, Study Finds*, KAN. CITY STAR, Dec. 16, 1998, at A8. The practice of each office of independent counsel should have been to offer the public only information necessary to provide basic facts about an investigation. *See* Howard, *supra* note 171, at 67-68.

199. *See generally* Daniel Klaidman & Evan Thomas, *A Falling Starr*, NEWSWEEK, Oct. 5, 1998, at 35 (mentioning Starr's shock at the public reaction to the Clinton investigation).

a sense that there was no support for the investigation. Indeed, the Department of Justice commonly provided legal advice and representation to executive branch personnel who were approached by the independent counsel's office during its investigation.²⁰⁰

Unfortunately, this “bunker” mentality had its price. Often, the office of independent counsel felt that the lack of support from both the public and the Department of Justice made it difficult or impossible to carry out the investigation. Independent counsels criticized pointedly and publicly the Department of Justice's efforts to block expansion of their mandates into new areas uncovered through their investigations.²⁰¹ Such public rebukes did not foster investigatory cooperation with the Department of Justice. There can be little doubt that the Department weighed such comments when considering future requests from independent counsel.

The defense tried mightily to reinforce the “bunker” mentality with sharp attacks on the independent counsel office, and constant referrals to alleged bullying tactics by the prosecutors.²⁰² For example, in a trial I handled for Judge Adams's office, defense counsel stated, “We have talked to witnesses who said that [the independent counsel prosecutors] have intimidated them and told them they could be indicted.”²⁰³ This theme continued during my employment

200. See John Q. Barrett, *All or Nothing, or Maybe Cooperation: Attorney General Power, Conduct, and Judgment in Relation to the Work of an Independent Counsel*, 49 MERCER L. REV. 519, 532–35 (1998).

201. See, e.g., Charles R. Babcock, *Espy Prober Says Reno Blocked Path of Inquiry; Political Pressure from Tyson Alleged*, WASH. POST, May 20, 1998, at A14. One of the matters, the investigation of Ronald Blackley, Espy's Chief of Staff, was finally referred after an appeal to the U.S. Court of Appeals. See *In re Espy*, 80 F.3d 501 (D.C. Cir. 1996). A jury later convicted Blackley of failing to disclose outside income on financial disclosure forms and making false statements. See Bill Miller, *Espy's Former Chief of Staff Sentenced to 27 Months*, WASH. POST, Mar. 19, 1998, at A5.

202. See generally Smaltz, *supra* note 7, at 2363. (“The politicalization and demonization of the independent counsel and the investigation pose two dangers. First, it frustrates the attempt to ensure an unbiased investigation into public corruption charges. Second, and in many ways more sinister, it makes an already cynical public even more disgusted with the democratic system.”); William Glaberson, *Investigating Clinton: The Prosecution*, N.Y. TIMES, Feb. 2, 1998, at A1; Amy Keller, *Lantos Prompts Ire with “Nazi” Charge*, ROLL CALL, Dec. 15, 1997, at 1 (describing how, during a hearing of the House Government Reform and Oversight Committee where Mr. Smaltz was testifying, Democratic Representative Thomas Lantos referred to Independent Counsel Donald C. Smaltz's response to an inquiry about his political party affiliation as similar to that of former Secretary-General Kurt Waldheim's efforts to hide his affiliation with the Nazi party).

203. Himelstein, *supra* note 189, at 19.

with Mr. Smaltz's office where once, in an attempt to quash a grand jury subpoena, counsel told the court that the tactics of the office in intimidating and threatening witnesses should cast suspicions on any office efforts to enforce the subpoena.²⁰⁴

Professor Samuel Dash, former Chief Counsel of the Senate Watergate Committee and former Ethics Counsel to the Starr investigation, summed it up eloquently:

If the present public dissatisfaction with the independent counsel statute, widely expressed by lay persons and legal experts alike, is based on the crediting of the frequent vitriolic attacks on individual independent counsel reported by the news media, it is misplaced and misinformed. Such attacks are basically unreliable because they cannot be rooted in knowledge of the actual conduct of a particular independent counsel and her staff, who are under the restrictions of grand jury secrecy and professional responsibility. Instead, these attacks are usually fueled by defense strategy to vilify the prosecutor for the purpose of weakening her investigation. Journalists, acting as conduits, and not the filters their ethics require them to be, routinely report these attacks, lending credibility to them and thus shaping the opinions and perceptions of the public. As a result, the public perception is based on a myth, which, unfortunately, may contaminate the reality in the office of the independent counsel through the chilling impact on professional prosecutors by constant, and from their point of view, unearned public condemnation.²⁰⁵

Independent counsels were unable and unwilling to respond to this type of attack,²⁰⁶ other than to deny it happened if asked by the court. As long as defendants faced rigorous investigations with mounting evidence, defense counsel employed the strategy of attack-

204. Neither counsel filed formal complaints in any forum against me, any other prosecutor, or either office based on these allegations. At no time did defense counsel identify to the court any witnesses who were the subjects of these tactics at trial or during cross-examination. Moreover, no witness complained to the court, the Independent Counsels, any government agency, or any bar association about any such tactics by the Independent Counsels' Offices. These complaints by defense counsel were false and unsubstantiated and were meant to generate criticism.

205. Dash, *supra* note 191, at 2094-95.

206. The government informed the court during Judge Adams's investigation that "[i]f name-calling is allowed in the courtroom, then we're at a great disadvantage because we're not going to engage in name-calling." Himelstein, *supra* note 189.

ing the prosecutor.²⁰⁷ These continued attacks undoubtedly undermined investigations and the public's confidence in the system.²⁰⁸

Despite the attacks on independent counsels' investigative tactics and techniques, these investigative practices are taught, learned, and employed at the Department of Justice.²⁰⁹ Many associate independent counsels were trained as AUSAs, and many brought their methods with them when they came to the independent counsel investigations.²¹⁰ The attacks are not leveled because the tactics and techniques were different, but simply because they were employed by independent counsels.

Again, as witnesses and juries became aware of the attacks, no matter how baseless, they adopted postures that made investigations difficult to carry out. This strategy is rarely part of the arsenal found with defense attorneys dealing with AUSAs. AUSA investigations generally do not have the national appeal, the "celebrity" status, or the lack of familiarity that came with independent counsel investigations. AUSAs rarely experience the "bunker."

VI. THE COST

No discussion of the Independent Counsel Law is complete without discussing the investigation costs. The money spent looms over all issues confronted by the Law. The investigations had significant costs. The independent counsel expenditures became the flashpoint for criticism of the investigations.²¹¹ Some of the ex

207. See, e.g., Don Van Natta, *Clinton Benefiting from Starr Strategy*, PATRIOT LEDGER (Quincy, Mass.), Mar. 2, 1998, at 1 ("[T]he White House determined that President Clinton's best survival strategy in the scandal [uncovered by the independent counsel investigation] was to mount an all out attack on Kenneth Starr, the independent counsel.").

208. See Dash, *supra* note 191, at 2085 ("The strategy of attacking independent counsel and the statute authorizing them originated as a response to the Iran-Contra investigation by independent counsel Lawrence Walsh. . . . This criticism weakened Walsh's investigation and tainted his reputation . . .").

209. See *id.* at 2082.

210. See generally 28 U.S.C. § 594(d)(1) (allowing independent counsels to request personnel assistance from the Department of Justice).

211. See, e.g., Daugherty, *supra* note 193, at 989-90.

This freedom from budgetary constraints has permitted many [independent] counsel to adopt a "scorched earth" approach, in which no evidence is too remote or too trivial to merit inquiry. Furthermore, as the cost of an investigation mounts, an independent counsel may be caught in a "vicious circle" in which further investigation is pursued primarily in response to pressure to

penditures were unavoidable, some were inevitable, and some were the results of defense tactics employed in these investigations.

A. The Price of Good Government

The one constant criticism of independent counsel investigations was cost.²¹² Rarely did a news article or report detail an independent counsel investigation without reporting the cost, as well it should. When taxpayer dollars are being spent, the public has a right to know how their money is being used.

Of course, the money expended by U.S. Attorneys' Offices in pursuing criminal investigations also comes from the taxpayers. However, often the public is not reminded of the investigation expense or budget of their U.S. Attorneys' Offices. A considerable amount of money is spent in U.S. Attorney investigations, but the public preoccupation with the cost of investigations is absent.

What is the effect on prosecutions? Probably one of perception. A U.S. Attorney investigation is usually dealt with on the strength of the issues of the investigation itself. An AUSA is able to focus on the actual allegations of criminal conduct or representations of misconduct by investigating authorities. On the other hand, associate independent counsels often had to justify expenditures in regard to the investigation. I previously mentioned the citizen who confronted me about the money spent investigating tickets to sporting events that were given to Secretary of Agriculture Mike Espy. This sort of criticism was not new to me as an Associate Independent Counsel. Often defense counsel cited the seemingly limitless budget available to the independent counsel as a reason to have criminal defense costs carried by the government²¹³ or to have the prosecution dis-

justify the undertaking of the probe in the first place. With normal budgetary concerns and policy priorities, a typical federal prosecutor might have declined to commit resources to . . . cases which fail[] to produce indictments.

Id. (footnotes omitted).

212. See, e.g., *The Future of the Special Prosecutor Law*, RES IPSA, Fall 1998, at 8 ("Four years and \$40 Million! The time and money Special Prosecutor Ken Starr has spent to investigate President Bill Clinton has become a rallying cry for those who want to rewrite or abolish the special prosecutor law."); Bill Thompson, *Independent Counsel Probes Just Aren't Worth It*, LAWRENCE J.-WORLD (Kan.), Dec. 8, 1998, at B6.

213. During a grand jury investigation in which I was involved with one independent counsel, the government subpoenaed voluminous records of a "target." The target, through counsel, requested that the government make copies of the records and leave the originals with the target. The subpoena called for original documents and the gov-

missed as the product of a flawed system that provided no financial check on the prosecutor.²¹⁴

At the invocation of such arguments, I often asked myself what is the proper cost of good government? Is it that we want to spend no money on these investigations or just a certain amount? One former aide in President Lyndon B. Johnson's administration summed up the temptations encountered by those who find themselves cloaked with the power of doing service in the name of the President:

You sit next to the Sun King, and you bask in his rays, and you have those three magic words, "the President wants." . . . [Y]ou

ernment offered to allow the target to make copies for business records before the originals were presented to the grand jury. In a motion to the United States District Court requesting that copies of the records be supplied to the target, defense counsel requested that the Office of Independent Counsel bear the expense of copies because of its limitless budget which put it in far better shape to carry the expense than his client. The court directed the government to make the copies.

214. This argument is exemplified by the argument of Joseph diGenova, the former U.S. Attorney for the District of Columbia and a former Independent Counsel, who argued:

A U.S. Attorney has hundreds of thousands of cases to look at and a need to make cost judgments about what is worth pursuing The truth is, because of the way the independent counsel statute works, things a U.S. Attorney would never investigate get investigated under this statute because the independent counsel has one and one case only.

Susan Page, *Are Independent Counsels out of Control? Investigations Now Taking Longer and Costing More*, USA TODAY, Nov. 14, 1997, at A1.

Also, Dee Dee Myers, former press secretary to President Clinton, was once quoted as saying, "This law gives unlimited resources, time and staff to a person whose job is to try to find a crime and investigate it. Is proving that this particular crime is true going to be worth the cost, either materially or to society?" *The Future of the Special Prosecutor Law*, *supra* note 212. Justice Scalia made this argument in his dissent in *Morrison v. Olson*. Justice Scalia argued that the independent counsel is not susceptible to considerations of typical prosecutors. *See Morrison*, 487 U.S. at 708 (Scalia, J., dissenting). He added, "What would normally be regarded as a technical violation . . . may in [the] small world [of the independent counsel] assume the proportions of an indictable offense." *Id.* at 732. Further, Justice Scalia stated:

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.

Id. *See generally* James P. Fleissner, *The Future of the Independent Counsel Statute: Confronting the Dilemma of Allocating the Power of Prosecutorial Discretion*, 49 MERCER L. REV. 427, 436 (1998) (commenting that critics of the independent counsel statute believe more institutional checks are needed).

have power unimagined by you before you sat in that job. And if you don't watch out, you begin to believe that it is your splendid intellect, your charm and your insights into the human condition that give you all this power.

And even people who would like to discipline themselves are sometimes caught off guard. The arrogance sinks deeper into their veins than they think possible. . . . You are lionized in Washington. There are stories in *Newsweek* and *Time* about how important you are. I'm telling you, this is like mainlining heroin. And while you are exercising it, it is so blinding and dazzling that you forget, literally forget, that it is borrowed and transitory power.²¹⁵

What is the cost of keeping this illusion in check?

The threat of invoking the Independent Counsel Law kept those who serve the President and public in the job of serving the President and the public. The Law was invoked when public servants swayed from that path and became intoxicated with the power or perks that come with being cabinet-level officials. The deterrence effect is not present when a political friend and cabinet-level colleague controls the investigation into abuse of power.

One must remember that:

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.²¹⁶

President Theodore Roosevelt similarly reminded us that “[n]o man is above the law and no man is below it; nor do we ask any man's permission when we require him to obey it. Obedience to the law is demanded as a right; not asked as a favor.”²¹⁷ This is a country of

215. *Why the President's Men Stumble*, N.Y. TIMES, July 18, 1982, § 6 (Magazine), at 14 (quoting Jack Valenti).

216. *United States v. Lee*, 106 U.S. 196, 220 (1882) (deciding a controversy involving property ownership between the government and private citizens).

217. Theodore Roosevelt, Third Annual Message (Dec. 7, 1903), in JOHN BARTLETT,

enormous freedoms and liberties. However, it is also a country of laws and not of men.²¹⁸ The power derived from high level government positions is one that must be given out with great thought and care as to who will exercise and execute the power. The frailties of man make it necessary to police its exercise. James Madison recognized this early on:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.²¹⁹

I am uncertain at what point the country believes that policing those non-angels who are obliged to govern us becomes too expensive. To expect a direct cost analysis of an investigation, i.e., requiring a certain number of felony convictions be obtained by the office for a certain amount of money, is too simplistic. The costs of an investigation, such as the salaries spent, the rent paid, and the travel reimbursed, are direct and observable. However, the benefits that the independent counsels brought went beyond the actual cases brought, the convictions obtained, and the fines collected. The benefits came from deterring the potential power abusers who are placed in office. The benefit of the Independent Counsel Law was that high-ranking government officials feared an investigation that neither they nor anyone they knew could control. The availability of independent counsels, armed with the powers of the Attorney General, provided the public with a benefit beyond the convictions and ac-

FAMILIAR QUOTATIONS 576 (Justin Kaplan ed., 16th ed. 1992).

218. The phrase "a government of laws and not of men" is generally attributed to John Adams, *Novanglus Papers* No. 7. See RESPECTFULLY QUOTED 189 (Suzy Platt ed., 1989) (citing 4 THE WORKS OF JOHN ADAMS 106 (Charles Francis Adams ed., 1851)). In Paper No. 7, "[Adams] credited James Harrington with . . . [describing] government as 'the empire of laws and not of men' in his 1656 work, *The Commonwealth of Oceana*, p.35 (1771). The phrase gained wider currency when Adams used it in the Massachusetts Constitution, Bill of Rights, article 30." *Id.*

219. THE FEDERALIST NO. 51, at 337 (James Madison) (1788).

quittals reported in the press.

Because these suspect officials are invested with a public trust, and because they are high-ranking with enormous power, their transgressions are simply more important. An alleged breach of that trust by individuals in the cabinet or close to the President must be investigated. The public must know that their government is fulfilling its obligations. The only way to ensure public in the investigations is to assign the case to those without loyalty to those in power — independent counsels.

B. AUSA and Independent Counsel Spending Decisions

When one argues that independent counsels pursued cases that might not be brought by a U.S. Attorney,²²⁰ one should remember that U.S. Attorneys' Offices also have spent a disproportionate amount of time and money on cases involving “celebrities” or notorious conduct. When cases are not “routine,” they are handled in a non-routine manner. Independent counsels rarely had the luxury of handling “routine” cases. Nevertheless, all federal prosecutors are obliged to the public to make sure that public officials are dealt with fairly and thoroughly.

While the U.S. Attorneys enforce the laws as they apply to all citizens, the independent counsel mandate was precise and narrow. Moreover, at the heart of each mandate was an alleged fundamental abuse of power. The obligation to pursue such allegations seems fundamental when it involves high level public servants unable to properly control themselves. These cases are different than a typical U.S. Attorney's Office investigation. Cases involving high-ranking officials allegedly abusing power will dictate differences in how the cases are handled, how they proceed, and what they cost.

The public should have some confidence that we remain a country where everyone is subject to the law and no one is taking advantage of power for a purpose other than to serve the public. In my view, neither the Department of Justice nor independent counsels can set a price on that.

C. The Amounts Involved

220. See Page, *supra* note 214 (quoting Joseph diGenova).

The amounts that Independent Counsel Offices have spent are eye-catching. In a six-month period ending on March 31, 1998, the seven Independent Counsel Offices in existence spent approximately \$7,679,804.²²¹ These expenditures included the Arlin M. Adams/Larry D. Thompson Independent Counsel Office, which spent \$524,860;²²² the David M. Barrett Independent Counsel Office, which spent \$1,476,088;²²³ the Carol Elder Bruce Independent Counsel Office, which spent \$4,020;²²⁴ the Smaltz Independent Counsel Office, which spent \$2,325,505;²²⁵ the Starr Independent Counsel Office, which spent \$3,212,441;²²⁶ and the von Kann Independent Counsel Office, which had costs of \$136,890.²²⁷

Each office's expenditures appear exorbitant when totaled over the lives of the investigations. For example, the total cost of the Starr investigation from 1994 through 1998²²⁸ has been placed at \$39.6 million.²²⁹ The Smaltz investigation from 1994 through 1998 has been estimated at costing \$17.5 million,²³⁰ the Barrett investigation's costs from 1995 through 1998 was placed at \$7.3 million,²³¹ while the investigation of the late Secretary of Commerce, Ron Brown conducted in 1995 and 1996, cost \$ 3.3 million.²³² The Starr, Smaltz, and Barrett Independent Counsel Offices have not concluded their work.

Independent Counsel Offices that have concluded their work demonstrate that these investigations, even over a modest time, could be expensive. For instance, the November 1979 to May 1980

221. See ACCOUNTING & INFO. MANAGEMENT DIV., U.S. GEN. ACCOUNTING OFFICE, PUB. NO. 98-285, FINANCIAL AUDIT: INDEPENDENT COUNSEL EXPENDITURES FOR THE SIX MONTHS ENDED MARCH 31, 1998 (1998) [hereinafter FINANCIAL AUDIT]. The report provided no expenditures for Ralph Lancaster's office.

222. See *id.* at 10.

223. See *id.* at 13.

224. See *id.* at 16.

225. See *id.* at 18.

226. See *id.* at 21.

227. See FINANCIAL AUDIT, *supra* note 221, at 24.

228. Kenneth Starr was appointed with the passage of the Independent Counsel Law. His predecessor was Robert Fiske, whose investigative expenses are included in the total.

229. See Viveca Novak, *Was This a Bad Idea? A Verdict Clearing Espy Is the Latest Sign That the Independent Counsel Statute Is Likely to Perish*, TIME, Dec. 14, 1998, at 36.

230. See *id.*

231. See *id.*

232. See *id.*

Arthur Christy investigation of Hamilton Jordan had a cost of \$182,000.²³³ Gerald Gallinghouse's investigation, which ran from December 1980 through March 1981, had expenses of \$3300.²³⁴ Leon Silverman spent \$326,000 investigating former Labor Secretary Raymond Donovan from December 1981 to September 1982, and from June 1985 to October 1987.²³⁵ The April through September 1984 investigation of Ed Meese by Jacob Stein cost \$312,000, while the Theodore Olson investigation conducted by Alexia Morrison from May 1986 to March 1989 had expenses of \$1.5 million.²³⁶ Whitney North Seymour's May 1986 to June 1989 investigation of Michael Deaver cost \$1.5 million, and the December 1986 to August 1993 Iran-Contra investigation cost \$35 million.²³⁷ James McKay's investigation from February 1987 to January 1990 of Wedtech had expenses of \$2.6 million, and further, two confidential Independent Counsels ran costs of \$17,000 and \$46,000, without either returning an indictment.²³⁸

The money spent on these investigations is substantial, but misleading. Some of the expenditures would be made regardless of the establishment of independent counsel offices. For instance, the Law allowed independent counsels to use Department of Justice personnel in carrying out their functions.²³⁹ Specifically, in the Independent Counsel Office of Donald Smaltz, agents from the F.B.I. served as investigators, while AUSAs from the Southern District of New York, the Northern District of California, the District of Massachusetts, the Central District of Florida, and other various districts served as prosecutors. These individuals reassigned from the Department of Justice had their salaries credited to the payroll of Independent Counsel Smaltz. However, assuming the decision to appoint

233. See S. REP. NO. 103-101, at 13, *reprinted in* 1994 U.S.C.C.A.N. at 757; Sunstein, *supra* note 195, at 2283.

234. See S. REP. NO. 103-101, at 13, *reprinted in* 1994 U.S.C.C.A.N. at 757; Sunstein, *supra* note 195, at 2283.

235. See S. REP. NO. 103-101, at 13, *reprinted in* 1994 U.S.C.C.A.N. at 757; Sunstein, *supra* note 194, at 2283.

236. See S. REP. NO. 103-101, at 13, *reprinted in* 1994 U.S.C.C.A.N. at 758.

237. See *id.*, *reprinted in* 1994 U.S.C.C.A.N. at 758. *But see* Toni Locy, *\$44 Million for Probes of Clinton Era; Starr Leads in Latest Special Counsel Costs*, WASH. POST, Oct. 1, 1997, at A23 (estimating the cost of the Walsh probe at \$47.4 million).

238. See S. REP. NO. 103-101, at 13, *reprinted in* 1994 U.S.C.C.A.N. at 758.

239. See 28 U.S.C. § 594(d)(1). The 1989 Independent Counsel Law did not allow the Department of Justice to detail its attorneys to offices of independent counsel.

an independent counsel was accompanied by sufficient evidence to begin a criminal investigation,²⁴⁰ personnel from the Department of Justice would have investigated the allegations in the absence of the independent counsel. The personnel were on detail from the Department of Justice,²⁴¹ and no new hires were made to take their places. When their work was done at an independent counsel's office, they returned to their prior duties at the Department of Justice or other government agency. The government is not expending money that it would not ordinarily expend for these personnel to investigate the allegations.

D. The Length of the Investigations

The expense involved in independent counsel cases is misleading in that the major reason for the expense is simply the investigation's length. In addition to large startup costs not associated with a typical federal investigation, factors contribute to the cost of the investigation that are simply beyond the control of the independent counsel.

1. *Starting with Nothing*

Independent Counsel Smaltz has described the starting of an independent counsel office as being at "ground zero."²⁴² As an independent counsel was sworn in to carry out the oath of investigating the matters in his or her mandate, there were no staff members, no investigators, no office, no phone — nothing.²⁴³ Getting your administrative bearings is time-consuming.²⁴⁴

No permanent staff was available to independent counsels, which would have allowed them to immediately come up to speed on travel and expense guidelines. There was no cadre of paralegals familiar with the court system or government regulations. Indeed, there was no place to even hang a coat. Everything and everyone had to be found, identified, and engaged; and the independent coun-

240. See *supra* notes 94–103 and accompanying text.

241. See *supra* note 239.

242. Smaltz, *supra* note 7, at 2337–38.

243. See 1 ADAMS & THOMPSON, *supra* note 66, at 5.

244. See generally Christy, *supra* note 44, at 2289–92 (describing efforts to set up his independent counsel's office to investigate Hamilton Jordan).

sel was required to conduct all of his or her activities with “due regard to expense,”²⁴⁵ making only “reasonable and lawful expenditures.”²⁴⁶ The independent counsel offices had to be within government space, unless commercial space was cheaper,²⁴⁷ and the first order of business was to engage someone to certify the reasonableness of the expenditures.²⁴⁸ However, despite these controls, the office start-up costs were significant and unavoidable.

Start-up costs occurred when prosecutors came on board, and they had to take time to become acquainted with the investigation. I recall starting in Judge Adams's office and having to become familiar with reams of documents including congressional testimony taken before the office was established, as well as the personnel and divisions at HUD that were involved in the investigation. In Mr. Smaltz's office, I also had to become familiar with the testimony and exhibits of trials that had been conducted before I went to the office. Further, I had to familiarize myself with Department of Agriculture operating rules and regulations.

2. *Changing Personnel*

It takes time to get offices functioning. As time passes, money is expended. To add to the expenses as investigations were prolonged, various staff had to leave and return to prior jobs, and be replaced by new staff. For example, I left Judge Adams's office in 1994, and other attorneys had to be hired to finish ongoing investigations in which I was involved. Also, I was in Mr. Smaltz's office from 1997 to the spring of 1998 primarily to handle the trial of Espy along with two other prosecutors. Unfortunately, we were unable to get a trial date set within that year, and I had to return to my teaching position at the University of Kansas. One of my trial partners then was appointed to the Los Angeles Superior Court, and he too left the office. The Espy trial team had to be reconstituted with members of the Independent Counsel Office and an outside hire from Detroit, along with some new investigators to replace those who left through normal attrition. Constant personnel change is a factor in running any temporary office, and the independent counsel's office was no

245. 28 U.S.C. § 594(l)(1)(A)(i).

246. *Id.* § 594(l)(1)(A)(ii).

247. *See id.* § 594(l)(3).

248. *See id.* § 594(l)(1)(A)(iii).

exception. These changes clearly drove up the cost of an investigation.

When a new trial team had to be assembled, it not only added to the taxpayer's bill for the office, but also left the government at a disadvantage. The new team had to become familiar with the indictment, the evidence, the witnesses, the existing court orders and motions, and had to review a great deal of material to know and understand the original trial team's theory of prosecution. Defense counsel understand this and often push for delays to disrupt the prosecution in this manner. A new prosecution team will not be as effective because it is coming to the matter late. This is clearly an advantage for the defense.

3. Defense Counsel Became Involved at an Early Stage

Another factor that contributed to the length of an investigation was the fact that many witnesses had been fully debriefed by investigators before the independent counsel was appointed.²⁴⁹ The Attorney General conducted a preliminary investigation prior to the appointment of the independent counsel,²⁵⁰ which provided targets, subjects, and witnesses to the investigation with a preview of the nature of the investigation and their role in it. When the independent counsel was appointed, witnesses and subjects often retained lawyers to assist them. Rarely in U.S. Attorney investigations are as many untargeted individuals represented by counsel. However, under the independent counsel statute, subjects of the investigation could be reimbursed for attorneys fees if they were not indicted by the independent counsel.²⁵¹ Reimbursement encouraged the engagement of counsel.

Such "lawyering up" added to the length of the investigations because one had to negotiate through counsel in many situations. Moreover, investigations often revealed that defense counsel for several individuals agreed to provide a "joint defense" to the inves-

249. *Cf.* Daugherty, *supra* note 193, at 987 ("[T]he separation of the Independent Counsel from the Executive Branch necessarily casts aside one of the most decent traditions of our criminal law system — the tradition that allegations of wrongdoing are not made public until a grand jury has found probable cause to believe them true.").

250. *See* 28 U.S.C. § 592(a)(1), (b)(1).

251. *See id.* § 593(f)(1).

tigation.²⁵² This agreement ordinarily involved information sharing among defense counsel.²⁵³ In light of these agreements, prosecutors had to be careful to determine what information a witness knew firsthand, and what the witness learned from counsel through sharing information, or from the preliminary investigation conducted by the Attorney General. This made the process of debriefing witnesses very involved, extended the investigation, and drove up costs.

4. *The Complexity of the Investigation*

Independent counsel cases often involved extremely complex issues, which is yet another factor that contributed to the length of the investigation.²⁵⁴ The office attempted to unwind very sophisticated criminal schemes that involved large government bureaucracies, substantial sums of money, and extensive efforts by the targets to remain undetected. The targets were popular figures, making witnesses reluctant or unwilling to testify against them. Independent counsels had to work with witnesses to gain their cooperation. This work was often slow and methodical, but without this cooperation, unraveling these complex criminal schemes was nearly impossible.

Investigating sophisticated schemes to obtain money, with recalcitrant witnesses protecting the targets, has many similarities to investigating organized crime. The time it takes to unravel the facts and determine whether there are criminal violations extends the length of the investigation.²⁵⁵ Professor Samuel Dash noted that:

One criticism that has been leveled at the independent counsel statute involves the seemingly excessive length and cost of certain investigations. It is both inaccurate and unfair to use one or two investigations as a paradigm for all investigations under the independent counsel statute. The length and expense of any criminal investigation are direct functions of the complexity of the case or

252. See generally Deborah Stavile Bartel, *Reconceptualizing the Joint Defense Doctrine*, 65 *FORDHAM L. REV.* 871, 880 (1996) (recognizing the necessity of joint defense groups in criminal cases).

253. See *id.*

254. See H.R. REP. NO. 103-224, at 13-14.

255. See *Independent Counsel Reauthorization Act: Hearings on H.R. 811 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 103d Cong. 44 (1993) [hereinafter *Hearings*] (statement of Samuel Dash, Professor, Georgetown University Law Center).

series of cases. It is impossible to generalize as to an optimum length of time or a cost ceiling for criminal investigations, be they federal or state, because such investigations are by nature fact-specific. Some cases can be handled expeditiously; others cannot. These principles apply whether the criminal investigations are conducted by an independent counsel or by the Department of Justice.²⁵⁶

Moreover, the legal representation opposing an independent counsel was usually sophisticated and sometimes was the Department of Justice itself.²⁵⁷ This opposition added to the complexity of the case and affected who was engaged by the independent counsel to assist in the investigation. Further adding to the complexity and cost, the legal issues involved and the forums for the litigation dictated hiring experts conversant in the issues.

Many of these factors are also encountered by AUSAs in white collar investigations.²⁵⁸ The Department of Justice spends equivalent amounts of time and money in their probes.²⁵⁹ The complexity extends an investigation for any prosecutor, not just independent counsels. As a result, the investigations are lengthy, and the expenses incurred during the investigations become very significant.²⁶⁰

5. *Jurisdictional Challenges*

An independent counsel was given a mandate on what he or she could investigate.²⁶¹ Jurisdiction was complete within that mandate, but matters not within or related to the mandate remained under

256. *Id.*

257. *See* Barrett, *supra* note 200, at 532–35.

258. *See* Dash, *supra* note 191, at 2084.

259. *See id.*

260. One of the criticisms leveled at offices of independent counsel was that their cost per defendant was significantly higher than that of a U.S. Attorney's Office. *See Hearings, supra* note 255, at 67 (statement of Terrance O'Donnell, Esq., Williams & Connolly) ("The average cost per criminal defendant in the U.S. Attorneys' Offices is about \$10,000 — the Walsh [independent counsel] team was averaging about \$2.5 million per defendant!"). These criticisms ignore some of the facts outlined in this Article and also the fact that many U.S. Attorney prosecutions are more routine, with few if any complex issues, and many prosecutions are misdemeanors. In some matters, the prosecutions are handled by attorneys temporarily assigned to the U.S. Attorney's Office as "specials" to gain trial experience, and thus do not count against the office's budget. An independent counsel was not afforded such luxuries.

261. *See supra* note 111 and accompanying text.

the jurisdiction of the Attorney General.²⁶² As a result, defense counsel frequently challenged the issuance of grand jury subpoenas or grand jury questioning on the grounds that it was beyond the independent counsel's jurisdiction.

During the course of any criminal investigation, it is not unusual for prosecutors to come across criminal activities that were not anticipated. Therefore, the grand jury is given broad latitude in conducting its investigations.²⁶³ Similarly, this broad power of the grand jury was not denied to the independent counsel.²⁶⁴ An independent counsel used this broad investigatory power to determine the scope and depth of the criminal activity surrounding those acts covered by his or her mandate. As witnesses testified and documents were reviewed, criminal activity that was not apparent when the mandate was drafted sometimes became evident.²⁶⁵

The basic reason for the discovery of new information during the course of an independent counsel investigation was the Attorney General's limited power during the initial probe. During the course of this preliminary investigation, the Attorney General lacked subpoena power, the power to plea bargain, the power to convene a grand jury, and the power to grant immunity to compel witnesses to testify or provide documents.²⁶⁶ Many criminal acts do not come to light until the investigatory power of the grand jury and other techniques are implemented.²⁶⁷ The information provided to the Attorney General had to come from voluntary cooperation or publicly available information. The result was that the independent counsel was appointed without the benefit of a thorough federal investigation. Therefore, independent counsel investigations began with incomplete information.

As an independent counsel discovered new criminal activity, defense counsel often sought to curb the inquiry by challenging the prosecutor's jurisdiction to investigate the matter. Notwithstanding the fact that an independent counsel could seek to have additional

262. See 28 U.S.C. §§ 593(c)(1), (2), 594(a), (e).

263. See *Blair v. United States*, 250 U.S. 273, 282 (1919).

264. See 28 U.S.C. § 594(a)(1).

265. The independent counsel could then ask for expansion of the mandate's jurisdiction. See *id.* § 593(c)(2).

266. See *id.* § 592(a)(2).

267. See, e.g., 18 U.S.C. § 6002 (1994) (providing the grand jury power to compel testimony).

matters referred to his or her office for investigation,²⁶⁸ defense counsel challenged the independent counsel's ability to investigate certain areas at all. Clearly, this was a very effective avenue for the defense. If the matter is never investigated, obviously, the criminal client is never placed in jeopardy. This obstacle, however, rarely confronts an AUSA. The limited mandate of an independent counsel encouraged frequent jurisdictional challenges by defense counsel.²⁶⁹

These challenges meant that an independent counsel had to defend his or her investigation before the judge with supervisory power over the grand jury. This contributed to the length of the investigation, and thus the expense of the office.²⁷⁰

6. *The Independent Counsel as a Part-Time Prosecutor*

Every U.S. Attorney and AUSA I have encountered has worked as a full-time prosecutor. The positions are demanding and put the prosecutor on call all day, every day. It is not unusual for federal prosecutors to be called during vacations and holidays to answer investigators' questions or handle criminal procedural matters.

The advantages of full-time prosecutors are obvious: efficiency and justice. When things are handled quickly, the investigation moves along, and those caught up in the investigation do not languish while a prosecutor is found. However, when the prosecutor is involved in a private matter, especially one that takes him or her from the jurisdiction or makes him inaccessible, the criminal investigation languishes until the private matter is completed. An independent counsel's position not being full-time²⁷¹ may have unnecessarily lengthened the investigations and increased the cost.

For example, when an independent counsel practiced law in addition to prosecuting, he or she was often absent from the office for long stretches of time. During these absences, the office operated on instructions left behind or communicated while the independent counsel was away. Deputies and associates moved the investigation

268. See 28 U.S.C. § 594(e).

269. See, e.g., *In re Espy*, 145 F.3d 1365, 1367 (D.C. Cir. 1998); *In re Espy*, 80 F.3d 501, 504 (D.C. Cir. 1996).

270. See Smaltz, *supra* note 7, at 2339–46 (describing what occurs as a result of jurisdictional challenges).

271. See 28 U.S.C. § 594(b)(1) (compensating the independent counsel at a per diem rate, rather than as a full-time employee).

along and pursued avenues of inquiry, while the independent counsel pursued private practice. Upon returning to the office, the independent counsel might have directed that things be done differently. Accordingly, the investigation took more time and cost more. This experience is not universal and did not appear to pose a problem in either office in which I worked. Nevertheless, it is a concern that I have heard other associate independent counsels voice.

The appointment of part-time independent counsels has been criticized on many levels. One veteran attorney has pointed out that an independent counsel who practiced law on the side failed "to appreciate the importance of appearances in serving as the independent counsel."²⁷² The appearance of failing to provide full attention to matters as high profile as an independent counsel investigation could have serious ramifications.²⁷³

Another concern was that investigative decisions were not being made by the individual selected to conduct the investigation. The appearance that someone other than an independent counsel was making the decisions may have created the impression of an "investigation without adult supervision."²⁷⁴ This appearance may have had the effect of undermining public confidence in the investigation.

As pointed out above, when prosecuting individuals who were well-known to a potential jury pool, an independent counsel's actions might have sent a message to the public. When the message was that the investigation may not be the primary focus of the prosecutor, it may have had an adverse effect on potential jurors familiar with the investigation.

These are not concerns for an AUSA working with a U.S. Attorney and his or her deputies, who are always available for direction in investigations and approval of investigative avenues and techniques. However, one argument supporting the appointment of a part-time independent counsel was that allowing independent counsels to practice law while prosecuting was necessary in order to attract individuals capable of handling an investigation of such mag-

272. *Starr's Private Practice Draws Critics*, LAWRENCE J.-WORLD (Kan.), Feb. 14, 1998, at A1 (quoting Irvin Nathan, Esq., of Washington, D.C.).

273. *See id.* ("In a really high-profile matter involving [an independent counsel investigation of] the president, this is a full-time job, or should be.").

274. Daniel Klaidman, *No Adult Supervision; Should Starr Be Moonlighting and Making Money While Probing the President?*, NEWSWEEK, Mar. 23, 1998, at 34.

nitude as those carried out by an independent counsel.²⁷⁵

In rebuttal, my experience has been that attorneys are attracted to this work for the level of practice, the historical significance, and the public duty. To argue that attorneys would not leave practice to take on this opportunity may be underestimating the caliber of the bar in this country. I have known many career prosecutors who have bypassed opportunities to go into private practice because of their attraction to the work and their satisfaction with their jobs.

A commitment as an independent counsel undoubtedly had a strong effect on a professional career.²⁷⁶ However, it is my estimation that attorneys capable of conducting thorough and professional investigations on a full-time basis are available. Former long-time prosecutorial colleagues of mine, who are now in private practice, have evidenced a desire to be involved in these investigations on a full-time basis, and many presently in the Justice Department or working as local prosecutors have the background and desire to effectively handle such a major undertaking. Having someone committed to an investigation full-time would have made it more efficient, thereby giving the public the confidence enjoyed by investigations conducted by U.S. Attorneys' Offices.

7. *The Final Report*

275. See *How Independent Counsels Are Chosen: The Inside View*, WASH. POST, Aug. 11, 1997, at A15. The article quotes Judge David B. Sentelle from the U.S. Court of Appeals for the D.C. Circuit and Presiding Judge of the Special Division:

Judge Butzner [U.S. Court of Appeals for the Fourth Circuit and member of the Special Division] and I . . . have discussed [the] 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 [matter] 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 anywhere.

Id.

276. For example, when Donald Smaltz was appointed the Independent Counsel to investigate former secretary of Agriculture Mike Espy in September, 1994, he hired his law partner, the Honorable William F. Fahey, now a judge of the Superior Court in Los Angeles as Counselor to the Independent Counsel. While conducting the investigation, their highly successful Los Angeles law firm of Smaltz, Anderson & Fahey dissolved.

As an AUSA, cases are either investigated and prosecuted or declined, and then your attention turns to the next case. In contrast, independent counsels had a statutory obligation to provide a Final Report.²⁷⁷ The Report had to set forth a description of the office's work, including dispositions of all cases brought.²⁷⁸ The Final Report presented the independent counsel an opportunity to demonstrate to the public what he or she could not during the investigation: the investigation was thorough, complete, professional, and impartial.

While this public accounting was a welcome obligation, this last step, again, added to the overall costs. Simply putting together the materials and information at the conclusion of the investigation extended the matter beyond the time required for a normal federal investigation.²⁷⁹ Composing, editing, and printing the Final Report would substantially drive up the costs of the investigation. However, composing, in particular, extended the life of the office, because the independent counsel wanted to make sure that the public understood what had been done. Since the statute required the report to describe the work "fully and completely,"²⁸⁰ the independent counsel composed a report that told the entire story of the investigation.²⁸¹ Preparing the Final Report not only added to the expense of the investigation, but also extended an investigation in a way not encountered by the U.S. Attorney's Office.²⁸²

VII. CONCLUSION

Our government's legitimacy is based largely on its accountability to the American people. . . . [W]hen there are allegations of misconduct within the branch which has the responsibility for prosecuting such activities, this accountability has the potential to break down, and, in doing so, threatens the very integrity and legitimacy of the United States government. The independent counsel law plays a critical role in maintaining this integrity and accountability.²⁸³

277. See 28 U.S.C. § 594(h)(1)(B).

278. See *id.*

279. See Smaltz, *supra* note 7, at 2349–50 (describing what is entailed in compiling a final report).

280. 28 U.S.C. § 594(h)(1)(B).

281. See Smaltz, *supra* note 7, at 2349.

282. See *id.* ("The final report process adds another eight months to two years to independent counsel matters . . .").

283. *Hearings, supra* note 255, at 51 (statement of Samuel Dash).

The work of the independent counsels provided the public with a sense that government officials would not cover up the misdeeds of one of their own. High-ranking officials would be investigated and tried for crimes they committed while in public service. When handled by an independent counsel, the investigation and trial became a very different and expensive proposition. However, I believe it is a necessary proposition. We should not forget our lessons from history: some of those presented with power will abuse it. They should not be investigated by their own.