Approved: [handwritten signature] 9/5
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Senator Wint Winter, Jr. at

10:05 a.m. on March 6, 1992 in room 514-S of the Capitol.

All members were present except:
Senator Feleciano

Committee staff present:
Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Gordon Self, Office of Revisor of Statutes
Judy Crapser, Secretary to the Committee

Conferees appearing before the committee:

Chairman Winter brought the meeting to order by bringing SB 739 to the Committee's attention.
SB 739 - legislative commission on State-Indian affairs.

The question was debated whether the legislature should have final agreement presented in bill form for consideration by the body.

Senator Gaines moved to amend SB 739 to require any compact agreed to by the Commission be submitted to the next Legislature for consideration and action. The amendment is to apply the usual legislative process to compacts. Senator Rock seconded the motion. The motion to amend carried.

Senator Winter offered a balloon amendment to SB 739 to establish an advisory committee on Native American Affairs. (ATTACHMENT 1) Discussion followed as to the advisability of creating a new and additional committee at this time. Senator Oleen noted the Senate Committee on Governmental Organization had not approved any additional committees and will recommend the current listing be taken under advisement as to the necessity of each of them. She would oppose the amendment on those grounds.

Senator Morris moved to recommend SB 739 favorable for passage as amended. Senator Oleen seconded the motion. The motion carried.

Chairman Winter recognized Senator Rock for the purpose of presenting reports of the Subcommittee on Civil Procedure. (ATTACHMENT 2)

SB 477 - death of a child; review by health and environment; spiritual treatment exception.

Senator Rock moved to adopt the Subcommittee report to recommend favorable a Substitute Bill for SB 477 based on a draft offered by Representative Wagnon incorporating additional amendments. Senator Martin seconded the motion. The motion carried.

SB 745 - clean-up amendments to the Kansas consumer protection act.

Senator Rock moved to adopt the Subcommittee report to recommend SB 745 favorable for passage. Senator Parrish seconded the motion. The motion carried.

SB 698 - code of civil procedure to use same criteria as open records act regarding discovery of criminal investigation reports.

Senator Rock moved to adopt the Subcommittee report to recommend SB 698 favorable for passage. Senator Bond seconded the motion. The motion carried.

SB 615 - tort claims act, definition of community service work.

Senator Rock moved to adopt the Subcommittee report to recommend SB 615 favorable for passage. Senator Gaines seconded the motion. The motion carried.

SB 744 - moneys payable to accused or convicted persons for story of crime.

Senator Rock moved to adopt the Subcommittee report to recommend SB 744 favorable for passage. Senator Gaines seconded the motion. The motion carried.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 514-S, Statehouse, at 10:05 a.m. on March 6, 1992.

SB 732 - enforcement of support, relating to immediate income withholding. RE Proposal No. 19.

Senator Rock moved to adopt the Subcommittee report to amend SB 732 to give court authority to withhold on maintenance decrees and to recommend favorable as amended. Senator Martin seconded the motion. The motion carried.

SB 711 - farm animal and research facilities protection act amendments.

Senator Rock moved to adopt the Subcommittee report to amend SB 711 to include research and work products as part of property and to reduce the penalty of picture-taking from a felony to a misdemeanor, and to recommend SB 711 favorable for passage as amended. Senator Gaines seconded the motion. The motion carried.

SB 756 - creating the crime of abuse, neglect or exploitation of an adult.

Senator Rock moved to adopt the Subcommittee report to amend SB 756 with a Substitute Bill and recommend the Substitute Bill favorable for passage. Senator Bond seconded the motion. The motion carried. (ATTACHMENT 3)

SB 588 - child support orders; procedures, supplementing codes for care of children and juvenile offenders. SRS Task Force, RE Proposal No. 19.

Senator Rock moved to adopt the Subcommittee report to amend SB 588 as proposed and to recommend favorable for passage as amended. Senator Parrish seconded the motion. The motion carried. (ATTACHMENT 4)

SB 689 - child abuse and neglect amendments.

Senator Rock moved to adopt the Subcommittee report to send SB 689 through the Senate Committee on Ways and Means and that the subject be recommended for an interim study. Senator Parrish seconded the motion. The motion carried.

SB 685 - notification of refund provisions required before telemarketing fraud provisions of consumer protection act inapplicable.

Senator Rock reported the Subcommittee had not received a compromise report from the interested parties to SB 685. He stated those parties were continuing their efforts to achieve that compromise; therefore, the bill remains tabled in the Subcommittee.

SB 536 - notice to SRS before placing child in need of care in secretary's custody. SRS Task Force, RE Proposal No. 19.

Senator Rock reported the Subcommittee had no recommendation to make on SB 536. He suggested the bill be added to the list of recommendations for interim study.

Chairman Winter recognized Senator Moran for the purpose of reporting from the Subcommittee on Criminal Law.

SB 670 - providing for independent counsel.

Senator Moran reported the Subcommittee recommended amending SB 670 on page 2, lines 25-32, as suggested by Common Cause to mirror the federal independent counsel statute and to include members of the legislature. He requested that the material provided by Common Cause become part of the Committee's record. (ATTACHMENT 5)

Discussion followed exploring the questions of whether a time limit should be defined for an independent prosecutor to complete investigations and whether the Attorney General should be allowed, for good cause, to terminate an independent counsel. It was noted that provision is made for the legislature to control the independent counsel's duration by controlling the appropriations, and that provision is made for the court to terminate the duties of the independent counsel.

Action was delayed on SB 670 to allow Senator Yost to be present.

The meeting was adjourned at 11:07 a.m.

1 (c) At the conclusion of its negotiations hereunder, the commis-
2 sion shall adopt a final draft of a compact and shall present the same
3 to the governor for the governor's approval or rejection. If the gov-
4 ernor rejects the compact, the governor shall within 10 calendar days
5 (excluding the day presented) return the compact to the commission
6 together with a written statement of the governor's objections
7 thereto.
8 (2) The commission may modify the draft of the compact and
9 again present the same to the governor. All compacts negotiated in
10 accordance with the provisions of this section shall be signed by the
11 governor.
12 (3) If the commission determines that an impasse exists, it shall
13 be the duty of the commission to request that the governor call a
14 special session of the legislature or to initiate a petition for the calling
15 of a special session of the legislature in accordance with K.S.A. 46-
16 1401 *et seq.* and amendments thereto, for the purpose of considering
17 such matter.
18 Sec. 4. /This act shall take effect and be in force from and after
19 its publication in the Kansas register.

Sec. 4 Establishment; advisory to secretary of human resources. There is hereby created the advisory committee on Native American affairs hereinafter referred to as the "advisory committee." The advisory committee shall be advisory to the secretary of human resources.

Sec. 5 Same; composition; qualifications; appointment; terms; vacancies. The advisory committee shall consist of seven (7) members no more than four of whom shall be members of the same political party. Each of the four Indian Tribes in the state shall have one representative, there shall be one representative of Haskell Indian Junior College and two other at-large representatives. Advisory committee members shall be appointed by the governor with the advice and consent of the senate. Of the initial appointees, two (2) shall be appointed to one-year terms, two (2) to two-year terms, and three (3) to three-year terms. Appointees to any vacancy which may occur shall be appointed only for the unexpired term of the member such appointee replaces. After the initial appointees have served their initial terms, all appointees shall be appointed for a three-year term.

Sec. 6 Same; chairman and secretary. The advisory committee shall elect one of its members as chairman and one as secretary to serve a one-year term.

Sec. 7 Same; functions, powers and duties. The advisory committee shall have the following functions, powers and duties:

(a) Gather and disseminate information and conduct hearings, conferences and special studies on problems and programs concerning Native Americans;

(b) Coordinate, assist and cooperate with the efforts of state and federal departments and agencies to serve the needs of the Native American especially in the area of economic development, culture, education, employment, health, housing, welfare and recreation;

(c) Develop, coordinate and assist other public and private organizations with understanding the problems of Native Americans;

(d) Develop, coordinate and assist other public and and private organizations to provide services to Native Americans;

(e) Propose new programs concerning Native Americans;

(f) Evaluate existing programs and proposed legislation concerning Native Americans;

(g) Stimulate public awareness of the problems of Native Americans by conducting a program of public education;

(h) Conduct training programs for community leadership and service project staff;

(i) Accept contributions from any person to assist in the effectuation of this section and to seek and enlist the cooperation of private, charitable, religious, labor, civic and benevolent organizations for the purposes of this section;

(j) Solicit, receive and expend federal funds to effectuate the purposes of this act and enter into contracts and agreements with any federal agency for such purposes;

(k) Establish advisory committees on special subjects; and

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(1) Cooperate with the state board of education in advising and assisting school districts, upon request, in conducting inservice training programs for Native American education needs.

Sec. 8 Same; meetings; quorum. The advisory committee shall meet on call of the chairperson. A majority of members shall constitute a quorum.

Subcommittee on Civil Procedure

SB 615 - tort claims act, definition of community service work
recommend favorable with suggestion for an interim study of the tort claims act and provisions for immunity.

SB 685 - notification of refund provisions required before telemarketing fraud provisions of consumer protection act inapplicable.
remains on the table

SB 477 - death of a child; review by health and environment; spiritual treatment exception.
recommend passage of bill as amended by adoption of substitute bill as proposed by Representative Wagnon with change in section 2(a) from "anticipate" to "unexplained" and to require an internal cranial autopsy

SB 536 - notice to SRS before placing child in need of care in secretary's custody. SRS Task Force, Re Proposal No 19.
Kay Farley / A.G.-- want to apply to emergency provisions
KSA 38-1542 -- provides for EX PARTE orders - can put with parent, non-parent, youth residential facility or Secretary, SRS.
Subcommittee took no action to make a recommendation

SB 588 - child support orders; procedures, supplementing codes for care of children and juvenile offenders. SRS Task Force Re Proposal No. 19
recommend favorable with adoption of amendments suggested by Kay Farley

SB 689 - child abuse and neglect amendments
SRS proposes 2 amendments -- Carolyn Hill testimony -- (line 14, page 3) (line 43, page 3)
recommend bill be sent to Ways and Means and to request an interim study of the changes

SB 698 - code of civil procedure to use some criteria as open records act regarding discovery of criminal investigation reports.
recommend favorable

SB 711 - farm animal and research facilities protection act amendments. (Burke?)
recommend favorable if amended to include research and work product as part of property and return picture taking from a felony to a misdemeanor.

SB 732 - enforcement of support, relating to immediate income withholding. Re Proposal No. 19.
recommend favorable with amendment to give court authority to withhold on maintenance decrees

SB 744 - moneys payable to accused or convicted persons for story of crime. (A.G.)
recommend favorable

SB 745 - clean-up amendments to the Kansas consumer protection act. (A.G.)
recommend favorable

SB 756 - creating the crime of abuse, neglect or exploitation of an adult. (A.G.)
recommend a ~~substitute~~ bill patterned after child abuse statute with definition of "dependent" from A.G. and inclusion of the Christian Scientist amendment

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Senate Bill 756 Revised March 5, 1992

(Suggested redraft)

An act concerning crimes and punishment; creating the crime of mistreatment of a dependent adult and prescribing a penalty therefor.

Be it enacted by the Legislature of the State of Kansas:

Section 1. (a) Mistreatment of a dependent adult is knowingly and intentionally committing one or more of the following acts:

(1) Infliction of physical injury, unreasonable confinement, ~~intimidation~~, or cruel punishment upon a dependent adult, or — D felony

(2) taking unfair advantage of a dependent adult's physical or financial resources for another individual's personal or financial advantage by the use of undue influence, coercion, harassment, duress, deception, false representation or false pretense by a caretaker or another person; or

(3) omitting or depriving treatment, goods or services by a caretaker or another person which are necessary to maintain physical or mental health of a dependent adult; — A misd

(b) For purposes of this section:

(1) "Dependent adult" means an individual 18 years of age or older who is unable to protect their own interest. Such term shall include:

(A) Any resident of an adult care home including but not limited to those facilities defined by K.S.A. 39-923 and amendments thereto;

(B) any adult cared for in a private residence;

(C) any individual kept, cared for, treated, boarded or otherwise accommodated in a medical care facility;

(D) any individual with mental retardation or a developmental disability receiving services through a community mental retardation facility or residential facility licensed under K.S.A. 75-3307b and amendments thereto; or

(E) any individual kept, cared for, treated, boarded or otherwise accommodated in a state psychiatric hospital or state institution for the mentally retarded;

(c) Mistreatment of a dependent adult as defined in subsection (a) (1) and (a) (2) is a class D felony.

Mistreatment of a dependent adult as defined in subsection (a) (3) is a class A misdemeanor.

Section 2. This act shall take effect and be in force from and after its publication in the statute book.

→ Christian Science exception

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district attorney.

(b) *Form of summons*. The summons shall be issued by the cle dated the day it is issued, contain the name of the court and caption of the case and be in substantially the following form:

(Name of Court)

In the Interest of ____________ Case No. ________

(Name[s])

Date of birth ________

Each a child under 18 years of age

SUMMONS

TO:

(Names)	(Relationship)	(Addresses)

A petition has been filed in this court, a copy of which is attached.

On ________, 19___, at ______ o'clock ___m. the above parent(and any other person having legal custody are required to appear before this cou at ________, or prior to that time file your written response to the petiti with the clerk of this court.

Failure to respond or to appear before the court at the above time will not preve the court from entering judgment that each child is a child in need of care if it fin judgment should be granted and removing the child from the custody of paren parents or any other present legal custodian until the further order of the court. *Th court may order one or both parents to pay child support*, so at this hearing parents must be prepared to establish the amount of annual income they receive. If, after a child has bee adjudged to be a child in need of care, the court finds a parent or parents to b unfit, the court may make an order permanently terminating the parent's or parent parental rights.

________, an attorney, has been appointed as guardian *ad litem* for th child or children. Each parent or legal custodian has the right to appear and b heard personally either with or without an attorney. The court will appoint an attorne for any parent who is financially unable to hire one.

Date ________, 19___ Clerk of the District Court

by ________________

(Seal)

Sec. 7. K.S.A. 1991 Supp. 38-1543 is hereby amended to reac as follows: 38-1543. (a) Upon notice and hearing, the court may issue an order directing who shall have temporary custody and may modify the order during the pendency of the proceedings as will best serve the child's welfare.

A hearing hereunder shall be held within 48 hours, excluding ays, Sundays and legal holidays, following a child having been

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1 [illegible]ı into protective custody.
2 (c) Whenever it is determined that a temporary custody hearing
3 is required, the court shall immediately set the time and place for
4 the hearing. Notice of a temporary custody hearing shall be in sub-
5 stantially the following form:
6 (Name of Court)
7 (Caption of Case)
8 NOTICE OF TEMPORARY CUSTODY HEARING
9 TO:
10 (Names) (Relationship) (Addresses)
11 ____________ ____________ ____________
12 ____________ ____________ ____________
13 ____________ ____________ ____________
14 ____________ ____________ ____________
15 On ________, ________, 19___, at ________ o'clock ___m. the court
16 (day) (date)
17 will conduct a hearing at ____________ to determine if the above named child
18 or children should be in the temporary custody of some person or agency other than
19 the parent or other person having legal custody prior to the hearing on the petition
20 filed in the above-captioned case. *The court may order one or both parents to pay*
21 *child support* so at this hearing parents must be prepared to establish the amount of annual income they receive.
22 ____________, an attorney, has been appointed as guardian *ad litem* for the
23 child or children. Each parent or other legal custodian has the right to appear and
24 be heard personally, either with or without an attorney. An attorney will be appointed
25 for a parent who can show that the parent is not financially able to hire one.
26 Date ________, 19___ Clerk of the District Court
27 by ____________
28 (Seal)
29 REPORT OF SERVICE
30 I certify that I have delivered a true copy of the above notice to the persons above
31 named in the manner and at the times indicated below:
32 Name | Location of Service | Manner of Service | Date | Time
33 (other than above)
34 ________ ________ ________ ________ ________
35 ________ ________ ________ ________ ________
36 ________ ________ ________ ________ ________
37 Date Returned ________, 19___ ____________
38 (Signature)
39 ____________
40 (Title)
41 (d) Notice of the temporary custody hearing shall be given at
[illegible] east 24 hours prior to the hearing. The court may continue the
[illegible] hearing to afford the 24 hours prior notice or, with the consent of

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1 ...ie party, proceed with the hearing at the designated time. If an
2 order of temporary custody is entered and the parent or other person
3 having custody of the child has not been notified of the hearing, did
4 not appear or waive appearance and requests a rehearing, the court
5 shall rehear the matter without unnecessary delay.
6 (e) Oral notice may be used for giving notice of a temporary
7 custody hearing where there is insufficient time to give written
8 notice. Oral notice is completed upon filing a certificate of oral notice
9 in substantially the following form:
10 (Name of Court)
11 (Caption of Case)
12 CERTIFICATE OF ORAL NOTICE OF TEMPORARY CUSTODY HEARING
13 I gave oral notice that the court will conduct a hearing at ________ o'clock
14 ____m. on ______________, 19____, to the persons listed, in the manner and
15 at the times indicated below:

Name	Relationship	Date	Time	Method of Communication (in person or telephone)

21 I advised each of the above persons that:
22 (1) The hearing is to determine if the above child or children should be in the
23 temporary custody of a person or agency other than a parent;
24 (2) the court will appoint an attorney to serve as guardian *ad litem* for the child
25 or children named above;
26 (3) each parent or legal custodian has the right to appear and be heard personally
27 either with or without an attorney; ~~and~~
28 (4) an attorney will be appointed for a parent who can show that the parent is
29 not financially able to hire an attorney~~.~~; *and*
30 (5) *the court may order one or both parents to pay child support* so at this hearing parents must be prepared to establish the amount of annual income they receive.

____
(Signature)

____
(Name Printed)

____
(Title)

37 (f) The court may enter an order of temporary custody after
38 determining that: (1) The child is dangerous to self or to others; (2)
39 the child is not likely to be available within the jurisdiction of the
40 court for future proceedings; or (3) the health or welfare of the child
41 may be endangered without further care.
42 (g) Whenever the court determines the necessity for an order of
43 ...mporary custody the court may place the child in the temporary

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S 588, p. 11

19 New Sec. 10. (a) In determining the amount of a child support
20 order under the Kansas code for care of children, the court shall
21 apply the Kansas child support guidelines adopted pursuant to K.S.A.
22 20-165 and amendments thereto. ~~Except as provided in subsection~~
23 ~~(b), the court shall presume in initially applying the guidelines that:~~
24 (1) Both parents have only gross earned income equal to 40 hours
25 per week at the federal minimum wage then in effect;
26 (2) neither parent's income is subject to adjustment for any
27 reason;
28 (3) the number of children is as alleged in the petition;
29 (4) the age of each child is as alleged in the petition or, if un-
30 known, is between seven and 15 years;
31 (5) no adjustment for child care, health or dental insurance or
32 income tax exemption is appropriate; ~~and~~
33 (6) neither parent is entitled to any other credit or adjustment.
34 ~~(b) A presumption in subsection (a)(1), (a)(2), (a)(5) or (a)(6) may~~
35 be overcome by stipulation of the parties or by a preponderance of
36 evidence showing that use of the presumption in applying the guide-
37 lines would result in economic hardship and that the party cannot
38 be adequately protected by section 12 and amendments thereto. A
39 presumption in subsection (a)(3) or (a)(4) may be overcome by stip-
40 ulation of the parties or by a preponderance of evidence.

(b) If the appropriate amount of support under the Kansas child support guidelines cannot be determined because any necessary fact is not proven by evidence or by stipulation of the appropriate parties, the court shall apply one or more of the following presumptions:

or

delete

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S 588, p. 12

10 New Sec. 12. (a) A party entitled to receive child support under
11 an order issued pursuant to the Kansas code for care of children
12 may file with the clerk of the district court in the county in which
13 the judgment was rendered the original child support order and the
14 original income withholding order, if any. If the original child support
15 or income withholding order is unavailable for any reason, a certified
16 or authenticated copy of the order may be substituted. The clerk of
17 the district court shall number the child support order as a case
18 filed under chapter 60 of the Kansas Statutes Annotated and enter
19 the numbering of the case on the appearance docket of the case.
20 Registration of a child support order under this section shall be
21 without cost or docket fee.
22 (b) If the number assigned to a case under the Kansas code for
23 care of children appears in the caption of a document filed pursuant
24 to this section, the clerk of the district court may obliterate that
25 number and replace it with the new case number assigned pursuant
26 to this section.
27 (c) The filing of the child support order shall constitute regis-
28 tration under this section. Upon registration of the child support
29 order, all matters related to that order, including but not limited to
30 modification of the order, shall proceed under the new case number.
31 Registration of a child support order under this section does not
32 confer jurisdiction in the registration case for custody or visitation
33 issues.
34 (d) The party registering a child support order shall serve a copy
35 of the registered child support order and income withholding order,
36 if any, upon the interested parties by first-class mail. The party
37 registering the child support order shall file, in the privileged official
38 file for each child affected, either a copy of the registered order
39 showing the new case number or a statement that includes the
40 caption, new case number and date of registration of the child sup-
41 port order.
42 (e) If the secretary of social and rehabilitation services is entitled
43 to receive payment under an order which may be registered under

1 this section, the county or district attorney shall take the actions
2 permitted or required in subsections (a) and (d) on behalf of the
3 secretary, unless otherwise requested by the secretary.
4 (f) A child support order registered pursuant to this section shall
5 have the same force and effect as an original child support order
6 entered under chapter 60 of the Kansas Statutes Annotated including,
7 but not limited to:
8 (1) The registered order shall become a lien on the real estate
9 of the judgment debtor in the county from the date of registration;
10 (2) execution or other action to enforce the registered order may
11 be had from the date of registration;
12 (3) the registered order may itself be registered pursuant to any
13 law, including but not limited to the revised uniform reciprocal
14 enforcement of support act (1968);
15 (4) if any installment of support due under the registered order
16 becomes a dormant judgment, it may be revived pursuant to K.S.A.
17 60-2404 and amendments thereto; and
18 (5) the court shall have continuing jurisdiction over the parties
19 and subject matter and, except as otherwise provided in subsection
20 (g), may modify any prior support order when a material change in
21 circumstances is shown irrespective of the present domicile of the
22 child or parents. The court may make a modification of child support
23 retroactive to a date at least one month after the date that the motion
24 to modify was filed with the court.
25 (g) If a motion to modify the child support order is filed within
26 three months after the date of registration pursuant to this section
27 ~~and~~ if no motion to modify the order has previously been heard,
28 the court shall apply the Kansas child support guidelines adopted
29 pursuant to K.S.A. 20-165 and amendments thereto without re-
30 quiring any party to show that a material change of circumstances
31 has occurred, without regard to any previous presumption or stip-
32 ulation used to determine the amount of the child support order,
33 and irrespective of the present domicile of the child or parents.
34 Nothing in this subsection shall prevent or limit enforcement of the
35 support order during the three months after the date of registration.

;

and if the moving party shows that the support order was based upon one or more of the presumptions of section 10,

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1 *Form*. The summons shall be issued by the clerk, dated the
2 day it is issued, contain the name of the court and the caption of
3 the case and be in substantially the following form:

4 (Name of Court)

5 In the Matter of
6 ______, Respondent Case No. ______
7 Date of birth ______
8 A ____ male ____ female under the age of 18 years.

9 SUMMONS

10 TO:
11 ______ ______
12 (Juvenile)
13 ______ ______
14 (Father)
15 ______ ______
16 (Mother)
17 ______ ______
18 (Other having custody- (Address)
19 relationship)

20 A complaint has been filed in this court, a copy of which is attached.
21 On ______, 19____, at ______ o'clock ____m. the above-named
22 juvenile and a parent and any other person having legal custody are required to
23 appear before this court at ______. Failure to appear may cause the
24 juvenile to be taken into custody and brought before the court.
25 The juvenile will be required to admit or deny the statements in the complaint.
26 You have the right to hire an attorney to represent the above juvenile. If you do
27 not hire an attorney, the court will appoint an attorney for the juvenile. The juvenile,
28 parent or other person having legal custody of the juvenile may be required to repay
29 the court for the expense of the appointed attorney. *The court may order one or*
30 *both parents to pay child support*, so at this hearing parents must be prepared to establish the amount of annual income they receive.
31 Date ______, 19____ Clerk of the District Court
32 by ______
33 (Seal)

34 Sec. 18. K.S.A. 38-1632 is hereby amended to read as follows:
35 38-1632. (a) *Length of detention*. Whenever an alleged juvenile of-
36 fender is taken into custody and is thereafter taken before the court
37 or to a juvenile detention facility or youth residential facility des-
38 ignated by the court, the juvenile shall not remain detained for more
39 than 48 hours, excluding Saturdays, Sundays and legal holidays, from
40 the time the initial detention was imposed, unless the court deter-
41 mines after hearing, within the forty-eight-hour period, that further
42 detention is necessary.
43 (b) *Waiver of detention hearing*. The right of a juvenile to a

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ention hearing may be waived if the juvenile and the attorney for the juvenile consent in writing to waive the right to a detention hearing and the judge approves the waiver. Whenever the right to a detention hearing has been waived, the juvenile, the attorney for the juvenile or the juvenile's parents may reassert the right at any time not less than 48 hours prior to the time scheduled for adjudication by submitting a written request to the judge. Upon request, the judge shall immediately set the time and place for the hearing, which shall be held not more than 48 hours after the receipt of the request excluding Saturdays, Sundays and legal holidays.

(c) *Notice of hearing.* Whenever it is determined that a detention hearing is required the court shall immediately set the time and place for the hearing. Notice of the detention hearing shall be given at least 24 hours prior to the hearing, unless waived, and shall be in substantially the following form:

(Name of Court)

(Caption of Case)

NOTICE OF DETENTION HEARING

TO: ________________ ________________

(Juvenile)

________________ ________________

(Father)

________________ ________________

(Mother)

________________ ________________

(Other having custody-relationship) (Address)

On ________ (day), ________ (date), 19____, at __ o'clock ____m. there will be a hearing for the court to determine if there is a need for further detention of the above named juvenile. Each parent or other person having legal custody of the juvenile should be present at the hearing which will be held at ________.

You have the right to hire an attorney to represent the above juvenile. Upon failure to hire an attorney the court will appoint an attorney for the juvenile and the juvenile, parent or other person having legal custody of the juvenile may be required to repay the court for the expense of the appointed attorney. *The court may order one or both parents to pay child support* so at this hearing parents must be prepared to establish the amount of annual income they receive.

Date: ________, 19____

Clerk of the District Court

by ________________

(Seal)

REPORT OF SERVICE

[C]ertify that I have delivered a true copy of the above notice on the persons [abov]e named in the manner and at the times indicated below:

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Location of Service (other than above)	Manner of Service	Date	Time

Date Returned: ______, 19____ ______________

(Signature)

____

(Title)

(d) *Oral notice.* When there is insufficient time to give written notice, oral notice may be given and is completed upon filing a certificate of oral notice with the clerk in substantially the following form:

(Name of Court)

(Caption of Case)

CERTIFICATE OF ORAL NOTICE OF DETENTION HEARING

I gave oral notice that the court will hold a hearing at ______ o'clock ____m. on ______________, 19____, to the persons listed, in the manner and at the times indicated below:

Name	Relationship	Date	Time	Method of Communication (in person or telephone)

I advised each of the above named persons that:

(1) The hearing is to determine if the above named juvenile shall be detained;

(2) each parent or person having legal custody should be present at the hearing;

(3) they have the right to hire an attorney of their own choice for the juvenile;

(4) if an attorney is not hired, the court will appoint an attorney for the juvenile; and

(5) the juvenile, parent or other person having custody of the juvenile may be required to repay the court for the expense of the appointed attorney.; *and*

(6) the court may order one or both parents to pay child support, so at this hearing parents must be prepared to establish the amount of annual income they receive.

____

(Signature)

____

(Name Printed)

____

(Title)

(e) *Hearing, finding, bond.* At the time set for the detention hearing if no retained attorney is present to represent the juvenile, the court shall appoint an attorney for the juvenile, and may recess the hearing for 24 hours to obtain attendance of the attorney ap-p[illegible]l. At the detention hearing, if the court finds the juvenile is [illegible]ous to self or others, the juvenile may be detained in a juvenile

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detention hearing has been waived, the juvenile, the attorney for the juvenile or the juvenile's parents may reassert the right at any time not less than 48 hours prior to the time scheduled for adjudication by submitting a written request to the judge. Upon request, the judge shall immediately set the time and place for the hearing, which shall be held not more than 48 hours after the receipt of the request excluding Saturdays, Sundays and legal holidays.

(c) *Notice of hearing*. Whenever it is determined that a detention hearing is required the court shall immediately set the time and place for the hearing. Except as otherwise provided by subsection (b)(1) of ~~section 7~~ *K.S.A. 1991 Supp. 38-1691 and amendments thereto*, notice of the detention hearing shall be given at least 24 hours prior to the hearing, unless waived, and shall be in substantially the following form:

(Name of Court)

(Caption of Case)

NOTICE OF DETENTION HEARING

TO: ______________ ______________

(Juvenile)

______________ ______________

(Father)

______________ ______________

(Mother)

______________ ______________

(Other having custody-relationship) (Address)

On ________, ________, 19___, at ________ o'clock ___m.

(day) (date)

there will be a hearing for the court to determine if there is a need for further detention of the above named juvenile. Each parent or other person having legal custody of the juvenile should be present at the hearing which will be held at ____________.

You have the right to hire an attorney to represent the above juvenile. Upon failure to hire an attorney the court will appoint an attorney for the juvenile and the juvenile, parent or other person having legal custody of the juvenile may be required to repay the court for the expense of the appointed attorney. *The court may order one or both parents to pay child support*, so at this hearing parents must be prepared to establish the amount of annual income they receive.

Date: ________, 19____

Clerk of the District Court

by ______________

(Seal)

REPORT OF SERVICE

I certify that I have delivered a true copy of the above notice on the persons named in the manner and at the times indicated below:

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Name	Location of Service (other than above)	Manner of Service	Date	Time
______	______	______	______	______
______	______	______	______	______

Date Returned: ________, 19____ ________________

(Signature)

____

(Title)

(d) *Oral notice.* When there is insufficient time to give written notice, oral notice may be given and is completed upon filing a certificate of oral notice with the clerk in substantially the following form:

(Name of Court)

(Caption of Case)

CERTIFICATE OF ORAL NOTICE OF DETENTION HEARING

I gave oral notice that the court will hold a hearing at ______ o'clock ____m. on ______________, 19____, to the persons listed, in the manner and at the times indicated below:

Name	Relationship	Date	Time	Method of Communication (in person or telephone)
______	______	______	______	______
______	______	______	______	______

I advised each of the above named persons that:

(1) The hearing is to determine if the above named juvenile shall be detained;
(2) each parent or person having legal custody should be present at the hearing;
(3) they have the right to hire an attorney of their own choice for the juvenile;
(4) if an attorney is not hired, the court will appoint an attorney for the juvenile; and
(5) the juvenile, parent or other person having custody of the juvenile may be required to repay the court for the expense of the appointed attorney~~.~~; *and*
(6) the court may order one or both parents to pay child support, so parents must be prepared to establish the amount of incom[e] they receive at this hearing.

____

(Signature)

____

(Name Printed)

____

(Title)

(e) *Hearing, finding, bond.* At the time set for the detention hearing if no retained attorney is present to represent the juvenile, the court shall appoint an attorney for the juvenile, and may recess the hearing for 24 hours to obtain attendance of the attorney appointed unless the juvenile is detained in jail pursuant to subsection (b)(1) of ~~section 7~~ *K.S.A. 1991 Supp. 38-1691 and amendments*

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S 588, p 31

New Sec. 25. (a) In determining the amount of a child support
24 order under the Kansas juvenile offenders code, the court shall apply
25 the Kansas child support guidelines adopted pursuant to K.S.A. 20-
26 165 and amendments thereto. ~~Except as provided in subsection (b),~~
27 ~~the court shall presume in initially applying the guidelines that:~~

(b) If the appropriate amount of support under the Kansas child support guidelines cannot be determined because any necessary fact is not proven by evidence or by stipulation of the appropriate parties, the court shall apply one or more of the following presumptions:

28 (1) Both parents have only gross earned income equal to 40 hours
29 per week at the federal minimum wage then in effect;
30 (2) neither parent's income is subject to adjustment for any
31 reason;
32 (3) the number of children is as alleged in the complaint;
33 (4) the age of each child is as alleged in the complaint or, if
34 unknown, is between seven and 15 years;
35 (5) no adjustment for child care, health or dental insurance or
36 income tax exemption is appropriate; ~~and~~ or
37 (6) neither parent is entitled to any other credit or adjustment.
38 ~~(b) A presumption in subsection (a)(1), (a)(2), (a)(5) or (a)(6) may~~
39 ~~be overcome by stipulation of the parties or by a preponderance of~~
40 ~~evidence showing that use of the presumption in applying the guide-~~
41 ~~lines would result in economic hardship and that the party cannot~~
42 ~~be adequately protected by section 27 and amendments thereto. A~~
43 ~~presumption in subsection (a)(3) or (a)(4) may be overcome by stip-~~ — delete

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1 ~~ulation of the parties or by a preponderance of evidence.~~ — delete

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S 588, p. 32

14 New Sec. 27. (a) A party entitled to receive child support under
15 an order issued pursuant to the Kansas juvenile offenders code may
16 file with the clerk of the district court in the county in which the
17 judgment was rendered the original child support order and the
18 original income withholding order, if any. If the original child support
19 or income withholding order is unavailable for any reason, a certified
20 or authenticated copy of the order may be substituted. The clerk of
21 the district court shall number the child support order as a case
22 filed under chapter 60 of the Kansas Statutes Annotated and enter
23 the numbering of the case on the appearance docket of the case.
24 Registration of a child support order under this section shall be
25 without cost or docket fee.
26 (b) If the number assigned to a case under the Kansas juvenile
27 offenders code appears in the caption of a document filed pursuant
28 to this section, the clerk of the district court may obliterate that
29 number and replace it with the new case number assigned pursuant
30 to this section.
31 (c) The filing of the child support order shall constitute regis-
32 tration under this section. Upon registration of the child support
33 order, all matters related to that order, including but not limited to
34 modification of the order, shall proceed under the new case number.
35 Registration of a child support order under this section does not
36 confer jurisdiction in the registration case for custody or visitation
37 issues.
38 (d) The party registering a child support order shall serve a copy
39 of the registered child support order and income withholding order,
40 if any, upon the interested parties by first-class mail. The party
41 registering the child support order shall file, in the official file for
42 each child affected, either a copy of the registered order showing
43 the new case number or a statement that includes the caption, new

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1 case number and date of registration of the child support order.
2 (e) If the secretary of social and rehabilitation services is entitled
3 to receive payment under an order which may be registered under
4 this section, the county or district attorney shall take the actions
5 permitted or required in subsections (a) and (d) on behalf of the
6 secretary, unless otherwise requested by the secretary.
7 (f) A child support order registered pursuant to this section shall
8 have the same force and effect as an original child support order
9 entered under chapter 60 of the Kansas Statutes Annotated including,
10 but not limited to:
11 (1) The registered order shall become a lien on the real estate
12 of the judgment debtor in the county from the date of registration;
13 (2) execution or other action to enforce the registered order may
14 be had from the date of registration;
15 (3) the registered order may itself be registered pursuant to any
16 law, including but not limited to the revised uniform reciprocal
17 enforcement of support act (1968);
18 (4) if any installment of support due under the registered order
19 becomes a dormant judgment, it may be revived pursuant to K.S.A.
20 60-2404 and amendments thereto; and
21 (5) the court shall have continuing jurisdiction over the parties
22 and subject matter and, except as otherwise provided in subsection
23 (g), may modify any prior support order when a material change in
24 circumstances is shown irrespective of the present domicile of the
25 child or parents. The court may make a modification of child support
26 retroactive to a date at least one month after the date that the motion
27 to modify was filed with the court.
28 (g) If a motion to modify the child support order is filed within
29 three months after the date of registration pursuant to this section ;
30 ~~and~~ if no motion to modify the order has previously been heard, and if the moving party shows that the support order was based upon one or more of the presumptions of section 25,
31 the court shall apply the Kansas child support guidelines adopted
32 pursuant to K.S.A. 20-165 and amendments thereto without re-
33 quiring any party to show that a material change of circumstances
34 has occurred, without regard to any previous presumption or stip-
35 ulation used to determine the amount of the child support order,
36 and irrespective of the present domicile of the child or parents.
37 Nothing in this subsection shall prevent or limit enforcement of the
38 support order during the three months after the date of registration.

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20-302b. District magistrate judges; jurisdiction, powers and duties; appeals. (a) A district magistrate judge shall have the jurisdiction, power and duty, in any case in which a violation of the laws of the state is charged, to conduct the trial of traffic infractions or misdemeanor charges and the preliminary examination of felony charges. In civil cases, a district magistrate judge shall have concurrent jurisdiction, powers and duties with a district judge, except that, unless otherwise specifically provided in subsection (b), a district magistrate judge shall not have jurisdiction or cognizance over the following actions:

(1) Any action, other than an action seeking judgment for an unsecured debt not sounding in tort and arising out of a contract for the provision of goods, services or money, in which the amount in controversy, exclusive of interests and costs, exceeds $10,000, except that in actions of replevin, the affidavit in replevin or the verified petition fixing the value of the property shall govern the jurisdiction; nothing in this paragraph shall be construed as limiting the power of a district magistrate judge to hear any action pursuant to the Kansas probate code or to issue support orders as provided by paragraph (6) of subsection (a);

(2) actions against any officers of the state, or any subdivisions thereof, for misconduct in office;

(3) actions for specific performance of contracts for real estate;

(4) actions in which title to real estate is sought to be recovered or in which an interest in real estate, either legal or equitable, is sought to be established, except that nothing in this paragraph shall be construed as limiting the right to bring an action for forcible detainer as provided in the acts contained in article 23 of chapter 61 of the Kansas Statutes Annotated, and any acts amendatory thereof or supplemental thereto; and nothing in this paragraph shall be construed as limiting the power of a district magistrate judge to hear any action pursuant to the Kansas probate code;

— Insert as Section 31, renumbering following sections (amending existing section 31 [repeals]).

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(5) actions to foreclose real estate mortgages or to establish and foreclose liens on real estate as provided in the acts contained in article 11 of chapter 60 of the Kansas Statutes Annotated, and any acts amendatory thereof or supplemental thereto;

(6) actions for divorce, separate maintenance or custody of minor children, except that nothing in this paragraph shall be construed as limiting the power of a district magistrate judge to (A) hear any action pursuant to the Kansas code for care of children or the Kansas juvenile offenders code; (B) establish, modify or enforce orders of support pursuant to the Kansas parentage act, K.S.A. 23-451 *et seq.*, 39-718a, 39-718b, 39-755 or 60-1610 or K.S.A. 23-4,105 through 23-4,118, 23-4,125 through 23-4,137, 38-1542, 38-1543 or 38-1563, and amendments thereto; or (C) enforce orders granting a parent visitation rights to the parent's child;

including, but not limited to, orders of support

(7) habeas corpus;

(8) receiverships;

(9) change of name;

(10) declaratory judgments;

(11) mandamus and quo warranto;

(12) injunctions;

(13) class actions;

(14) rights of majority; and

(15) actions pursuant to the protection from abuse act.

(b) Notwithstanding the provisions of subsection (a), in the absence, disability or disqualification of a district judge, a district magistrate judge may:

(1) Grant a restraining order, as provided in K.S.A. 60-902 and amendments thereto;

(2) appoint a receiver, as provided in K.S.A. 60-1301 and amendments thereto;

(3) make any order authorized by K.S.A. 60-1607 and amendments thereto; and

(4) grant any order authorized by the protection from abuse act.

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(c) In accordance with the limitations and procedures prescribed by law, and subject to any rules of the supreme court relating thereto, any appeal permitted to be taken from an order or final decision of a district magistrate judge shall be tried and determined *de novo* by a district judge, except that in civil cases where a record was made of the action or proceeding before the district magistrate judge, the appeal shall be tried and determined on the record by a district judge.

(d) Upon motion of a party, the administrative judge may reassign an action from a district magistrate judge to a district judge.

History: L. 1976, ch. 146, § 13; L. 1977, ch. 112, § 2; L. 1979, ch. 92, § 12; L. 1979, ch. 80, § 2; L. 1983, ch. 140, § 3; L. 1984, ch. 39, § 31; L. 1985, ch. 115, § 30; L. 1986, ch. 115, § 32; L. 1986, ch. 137, § 1; L. 1986, ch. 137, § 2; L. 1990, ch. 212, § 1; July 1.

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TESTIMONY OF

ARCHIBALD COX

CHAIRMAN OF COMMON CAUSE

on

THE INDEPENDENT COUNSEL PROVISIONS

OF THE ETHICS IN GOVERNMENT ACT

before the

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT

SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS

March 19, 1987

Senate Judiciary Committee
March 6, 1992
Attachment 5

STATEMENT OF ARCHIBALD COX
BEFORE THE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT OF THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS

Mr. Chairman, Mr. Ranking Member, and Members of the Committee:

I appreciate this opportunity to appear on behalf of Common Cause before the Subcommittee on Oversight of Government Management of the Senate Committee on Governmental Affairs to present our views on Title VI, the Independent Counsel provisions, of the Ethics in Government Act ("the Act"), 28 U.S.C. 591-98. I am Chairman of Common Cause, a citizens' organization of 275,000 members. I am also Carl M. Loeb University Professor Emeritus at Harvard University and a Visiting Professor of Law at Boston University. I have served in the U.S. Department of Justice as a young lawyer, as Special Watergate Prosecutor, and as Solicitor General of the United States.

Common Cause strongly supports the reenactment of Title VI. The Ethics in Government Act of 1978 is the result of a comprehensive congressional effort to safeguard the integrity of the governmental process. The Independent Counsel provisions are essential to preserving public confidence in the fair and ethical behavior of public officials.

The Ethics Act, and particularly its Independent Counsel provisions, flowed directly from the Watergate scandals, which generated an extraordinary crisis of public confidence in the integrity of our government. The Senate Watergate investigation that began in the fall of 1972 and culminated in President Nixon's resignation nearly two years later exposed not only gross

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misconduct by high government officials, but also impropriety and favoritism in the Justice Department's investigation of that misconduct.

A number of committees in both the House and the Senate held hearings to consider a variety of proposals designed to alleviate abuses of prosecutorial power revealed by Watergate. Congress recognized at the time the law was enacted (see, e.g. H.Rep. 95-1037, 95th Cong., 2d Sess. 2 (1978) and then reenacted, see, e.g. S.Rep. 97-496, 97th Cong., 2d Sess. 4 (1982)) that the problems revealed by the Watergate scandal were neither unique to nor confined to that scandal or that Administration. As the House Judiciary Committee noted in its report recommending the law's enactment:

> "The Attorney General is at the same time the chief Federal law enforcement official and a Presidential appointee who is a key member of the President's cabinet. Cases involving possible wrongdoing by high-level executive branch officials, therefore, present a fundamental conflict of interest." H. Rep. 95-1307, supra at 2.

Because of this conflict of interest there can be no assurance of both fairness and the appearance of fairness if the Attorney General and his subordinates are left to deal with allegations of wrongdoing on the part of high executive officials. In order to solve this problem Congress provided the present mechanism for the appointment of temporary Independent Counsel with the powers of a prosecutor but without supervision by the President or the Attorney General. 28 U.S.C. 591-598. The mechanism ensures that prosecutorial decisions involving the President, the Vice-President, and senior presidential aides are made on the merits and not out of favoritism toward a powerful

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figure. By assuring the public that a thorough, impartial investigation will occur, the mechanism also benefits the innocent official by legitimizing a decision to refrain from prosecution.

The Independent Counsel provisions of the Act are scheduled to expire if not reenacted by January 1988. Common Cause strongly urges reenactment with strengthening amendments.

In Part I, below, we explain why the Independent Counsel provisions are, and their reenactment would be, entirely constitutional.

In Part II we elaborate our reasons for urging reenactment.

Part III discusses two instances in which the available information gives strong reason to believe that the Attorney General has failed to apply Title VI, particularly Section 592, in accordance with the manifest intent of Congress. The risk of continued misapplication can be reduced, we submit, by a Subcommittee Report pointing out the errors and calling upon the Attorney General to avoid repetition.

Part IV recommends that the provision of Title VI relating to expansion of the jurisdiction of an existing Independent Counsel should be clarified by granting the division of the court explicit power to extend the jurisdiction of Independent Counsel upon his request and without the concurrence of the Attorney General.

Part V suggests that the powers and duties of an Independent Counsel be expanded by an amendment directing Independent Counsel to call to the attention of the Office of Government Ethics and the appropriate officials in any department or agency any information developed in the course of his investigation that gives reason to believe that an individual may have committed a

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violation of ethical standards prescribed for government employees not deserving criminal prosecution.

Part VI urges the oversight powers of appropriate Congressional committees be further implemented by an amendment requiring the Attorney General to make closed files on cases handled under Title VI available to an appropriate Congressional committee on the same terms as such files are available in other criminal investigations or prosecutions.

Part VII suggests that the Committee Report call the attention of the court to the need to make public the pendency of questions of law requiring its determination, together with sufficient disclosable information to enable interested parties to file briefs *amici curiae*.

I. TITLE VI OF THE ETHICS IN GOVERNMENT ACT, 28 U.S.C. 591-8, IS CONSTITUTIONAL

It is my considered opinion that Title VI of the Ethics in Government Act is constitutional. Congress had ample constitutional authority to enact Title VI, and has ample power to renew it.

1. The power of Congress to create the office and provide for the appointment of Independent Counsel by a court of the United States is beyond reasonable dispute. Virtually all government departments, offices, and agencies are created by act of Congress. Equally plainly the post of Independent Counsel is an "inferior office" in the constitutional sense. Article II, section 2, cl. 2 explicitly provides that --

> Congress may by Law vest the Appointment of such inferior officers, as they think proper, . . . in the Courts of Law . . . .

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The Constitution puts no restriction upon this express grant. The Supreme Court has indicated that there is no implied restriction, possibly excepting instances in which court appointment of certain officers is incongruous with judicial duties. Ex Parte Siebold, 100 U.S. 371 (1879). There is no incongruity in calling upon a court to appoint prosecutors, who, unlike a military officer or diplomat, are officers of the court, counsel to the grand jury and subject to the disciplinary power of the court. See U.S v. Solomon, 216 F.Supp 835 (SDNY, 1963) (upholding 28 U.S.C. Sec. 546, empowering courts to fill vacancies in the office of U.S. Attorney). Courts often appoint counsel to prosecute criminal contempts.

2. Congress also has power to make Independent Counsel entrusted with the investigation and possible prosecution of high-level Presidential aides truly independent of the day-to-day supervision of the President or his appointee, the Attorney General. In Kendall v. U.S., 37 U.S. (12 Pet.) 524 (1837), the Supreme Court described as "alarming" the idea that the Congress "cannot impose upon any Executive Officer any duty they may think proper . . . ; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the discretion of the President." In Myers v. U.S., 272 U.S. 52 (1926), the Court implied that Congress may so specifically commit duties to the discretion of a particular officer as to limit the power of the President to revise the officer's interpretation of his duties in the first instance. In Humphrey's Executor v. U.S., 295 U.S. 602 (1935) and Wiener v. U.S., 357 U.S. 349 (1958), the Court indicated that Congress may ensure independence from the

day-to-day supervision of the President when the tasks of the officer require "freedom from Executive interference," when the office "must, from the very nature of its duties, act with entire impartiality" and "not be open to the suspicion of partisan direction."

The necessity of absolute freedom from "suspicion of partisan direction" exists in every case in which the statute authorizes the appointment of Independent Counsel. Independent Counsel may be appointed only when the officers or other individuals against whom criminal charges have been made are or have been so close to the President and/or the Attorney General as to give rise to the appearance, if not the sharp actuality, of a conflict of interest. Because day-to-day supervision by the President or Attorney General would reintroduce that conflict of interest, the Independent Counsel who conducts an investigation and prosecution must be independent of such control in order that he may "act with entire impartiality" and "not be open to the suspicion of partisan direction."

The cases sometimes cited to support the argument that the statutory independence of Independent Counsel trespasses upon the executive powers of the President under Article II are readily distinguishable. Myers v. U.S., 272 U.S. 52 (1926) (removal subject to approval by Senate); Buckley v. Valeo, 424 U.S 1 (1976) (appointment by Congressional officials); INS v. Chadha, 462 U.S. 919 (1983) (one House veto); and Bowsher v. Synar, 106 S.Ct. 3181 (1986) (delegation to official controlled by Congress) all involved measures by which Congress attempted to enlarge its power by intermingling its operations with those constitutionally

assigned to the Executive branch. Title VI does not inject Congress, a congressional instrument, or an officer subject to removal by Congress into Executive functions. Title VI does not enlarge congressional authority. The sole effect of the limited independence given to Independent Counsel is to bar the President and Attorney General from day-to-day control over an officer charged with investigating the President's closest aides.

3. Congress also has ample power to forbid Executive removal of Independent Counsel without good cause. Humphrey's Executor v. U.S., 295 U.S. 602 (1935), and Weiner v. U.S., 357 U.S. 349 (1958), squarely upholds the power of Congress to forbid discretionary removal of officers whose functions call for a significant measure of independence from Presidential control. The functions of Independent Counsel require that measure of independence, as shown above, in order to assure the public of the full and fair investigation and prosecution, if necessary, of alleged wrongdoing high in the Executive Branch.

There is no merit in the argument that Title VI unconstitutionally seeks to vest in a court the incongruous power to control prosecutorial decisions. The scope of the office to which Independent Counsel will be appointed is adequately defined by Section 591; it is the office of investigating whether an identified individual falling into one of the categories specifically defined by Section 591(b) has committted a violation of one or more federal criminal laws other than a petty offense. The initial definition of jurisdiction need do little more than refer to the specific individual and relevant group of crimes. The court is required only to apply the general concept of the

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statute to particular fact -- a familar judicial role. The appointment of an attorney to prosecute an alleged criminal is essentially similar.

It has also been argued against our view that expansion of the jurisdiction of Independent Counsel upon his request would vest non-judicial powers in the court. But such action would involve only the removal of limitations in the original jurisdiction that events have shown to be artificial. The court would still be applying the definitions and policy of Section 591. The expansion would extend only to persons and events discovered to have been acting in association with or related to the initially identified individual and events.

There is likewise no merit to the rhetorical question asking, if the power to appoint counsel carries with it power to expand an Independent Counsel's jurisdiction, why may not the same be said of virtually any other prosecutorial decision that independent counsel may make? The same may not be said because Title VI does not give the power and because reading it into the statute would run contrary to ancient and familiar precepts of our law. Controlling traditional prosecutorial decision is utterly different from detailing in practical operating terms the scope of an office already defined in principle by the Congress (Section 591).

The points just outlined are elaborated in the brief amicus curiae filed by Common Cause in response to the constitutional challenges raised by Lt. Col. Oliver North and Michael Deaver. The brief is signed by Paul A. Freund, probably the leading constitutional scholar now living, Philip B. Heymann, a former

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Assistant Attorney General in charge of the Criminal Division, Lawrence H. Tribe, author of a leading constitutional law treatise, Donald J. Simon, Cass Sunstein, and myself. I ask that it be made part of the record before the Subcommittee as a more complete exposition of our submission that Title VI is constitutional.

II. TITLE VI OF THE ETHICS IN GOVERNMENT ACT SHOULD BE REENACTED WITHOUT LIMITATION OF TIME

Effective government in a free society depends upon public confidence that all officials are governed by law and, upon violation, are subject to the same pains and penalties as other citizens. That confidence can be preserved in the face of credible charges of wrongdoing high in the Executive Branch only by providing for a vigorous, impartial, and fair-minded investigation by a prosecutor not linked to the President or his principal aides by personal, political, or official association. A special mechanism is required in such cases because the normal law enforcement officials, the Attorney General and his subordinates in the Department of Justice, are inescapably so closely linked to the President and his administration by political and often personal ties as to create a severe conflict of interest, even the appearance of which would erode public confidence in the integrity of a Department of Justice investigation. The Teapot Dome and Watergate scandals amply demonstrated the need. Since 1978 Title VI has provided the necessary machinery, but it will expire in January 1988.

Title VI should be reenacted as permanent legislation because events demonstrate the need for such machinery. The need for

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detached, impartial investigation of the sale of arms to Iran and provision of unauthorized aid to the Contras would be sufficient illustration. In fact, it has been necessary to appoint special prosecutors or independent counsel at least six times during the past six years to investigate charges of criminal misconduct against high officials.

The procedure established by Title VI is preferable to "a system in which the Department of Justice hires individuals to conduct investigations and prosecutions of high level officials"[1] for four reasons:

First, the conflict of interest that inevitably casts doubt upon investigation and prosecution by the Attorney General also precludes leaving the decision to appoint a special prosecutor to his discretion.

Second, there is too much danger that public misgivings resulting from the same conflict of interest would lessen confidence in the detachment and impartiality of a special prosecutor selected by the Attorney General. Judicial selection builds such confidence.

Third, it is difficult to secure complete independence for a special prosecutor appointed by the Attorney General. He can always be removed.

Fourth, it is desirable to have a court determine whether and when to release to the public reports and other relevant papers.

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[1]Question 1, Letter from Subcommittee Chairman and Ranking Member, February 27, 1987.

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III. THE SUBCOMMITTEE SHOULD REQUIRE THE ATTORNEY GENERAL TO CEASE MISAPPYING THE STATUTORY STANDARDS RELATING TO PRELIMINARY INVESTIGATION AND APPOINTMENT OF INDEPENDENT COUNSEL

The Subcommittee and the Congress faced a difficult problem in drafting the provisions of Title VI governing the disposition of charges against a high-level official prior to appointment of Independent Counsel. On the one hand, it was plain that the mere receipt of any charge of wrongdoing should not trigger the appointment of Independent Counsel. On the other hand, the inherent actual or apparent conflict of interest required exclusion of the Attorney General and his subordinates from any decisions that might be or even plausibly seem to be subject to influence by personal or political interest. Section 592 attempts to solve the problem in two stages.

First, when the Attorney General receives information suggesting that a person covered by Title VI has engaged in covered misconduct, the Attorney General is required to determine whether "grounds to investigate exist."

Second, if the Attorney General proceeds to a preliminary investigation, at its conclusion he is to determine whether further investigation and prosecution is warranted. If the Attorney General so determines, he must apply to the court for appointment of an Independent Counsel. If he determines that further investigation is not warranted, he must notify the court and furnish a summary of the results of the preliminary investigation and the reasons for not proceeding further.

Although complete information is not available, the notifications filed by the Attorney General regarding Faith Ryan Whittlesey, Edward Schmults and Carol Dinkins strongly indicate

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that both the first and second standard have been seriously misapplied.

A. The Attorney General has misapplied the statutory standard for initiating a preliminary investigation.

When the Attorney General receives information suggesting that a person covered by Title VI has engaged in covered misconduct, the Attorney General is then required by Section 592(a)(1) to determine "whether grounds to investigate exist." Both the words of Section 592(a) and the legislative history make plain that at this stage the Attorney General is to consider only two factors:

-- the degree of specificity of the evidence he received, and

-- the credibility of the source of the information.

Moreover, the Senate Committee Report clearly states that the allegation need not include every element of the crime: "the accuser would not be required to expressly allege that the act was a bribe or show that all legal elements of a crime exist." (pp. 12-13)

If the information received from a credible source is sufficiently specific, then the Attorney General "shall conduct a "preliminary investigation." The mandatory obligation to move to a preliminary investigation is highly important to the success of Title VI because every preliminary investigation must end either in an application for judicial appointment of Independent Counsel (Section 592(c)) or in the filing in court of a notification summarizing the information received and the results of the preliminary investigation (Section 592(b)). If the Attorney General ignores the requirement for a preliminary investigation, conducts some other form of inquiry, and then decides on the basis

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of other factors not to apply for the appointment of Independent Counsel, no notification is filed under Section 592(b) and the only sure opportunity for oversight is lost.

The notification filed by the Attorney General in the case of Faith Ryan Whittlesey reveals that on an earlier occasion the Attorney General failed to follow the statutory mandate. In the fall of 1986 the Attorney General received information that Ambassador Whittlesey may have received money in violation of the gratuity statute and may have used the Ambassador's gift fund for unauthorized purposes. An inquiry into the allegations was conducted by the Department of Justice in conjunction with the State Department Inspector General's Office. The inquiry produced specific and credible evidence that money donated to the gift fund of the Ambassador had been used for unauthorized purposes (pp. 3-7 of the Notification), that the Ambassador appointed an official to her staff whose family shortly thereafter made a $5,000 contribution to the Ambassador's gift fund (pp. 15-17), and that donors to the Ambassador's gift fund had requested that the Ambassador take official action on their behalf, and that she had taken such action (pp. 8-12). Not only was the information credible, it was unchallenged. Despite the time and detail involved in what he himself termed a "thorough inquiry," the Attorney General determined to close the inquiry without notifying the court of his decision not to request appointment of Independent Counsel, and thus without explaining the reasons for his decision.

That plan for closing was in clear conflict with the statutory mandate comtemplating a preliminary investigation

followed by notification whenever specific information has been received from a credible source. The Attorney General had the specific facts indicating a possible criminal offense from a credible source, but he was not content to follow the statute. He went on to find that there was no evidence of intent to violate the gratuity (18 U.S.C. 201(g)) and State Department gift statutes (22 U.S.C. 2697). Not only are decisions involving inferences of intent those from which the Attorney General should stand back, for reasons indicated below, but the Senate Committee Report on the 1982 amendments explicitly states that the specific information required to trigger a preliminary investigation does not include information on every element of a crime.

Receipt of additional information caused the Attorney General to conduct a preliminary investigation into a related matter. The notification in that instance revealed the prior "thorough inquiry" and thus the facts did become known. Nevertheless, it is important that the Subcommittee call attention to the Attorney General's misapplication of the preliminary investigation standard in order to prevent undermining one of the few sure mechanisms for accountablity at this stage that the Act provides.

B. The Attorney General has misapplied the statutory standard for whether to request the court to appoint Independent Counsel.

When the Attorney General conducts a preliminary investigation, he must determine upon its completion whether further investigation and prosecution is warranted. In making that determination he is to comply with the written or other

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established policies of the Department of Justice with respect to the enforcement of criminal laws.

Both the statutory language and the legislative history show that the Attorney General is to perform no more than a screening process. The present standard, quoted above, was adopted in 1982 in order to make it plain that Independent Counsel need not be appointed when a clear-cut, well-established policy would preclude prosecution if the individual subject of a preliminary investigation were not an official high in the Executive Branch. But it was never the intent to authorize the Attorney General to make discretionary judgments about the weight of the evidence or the degree of culpability in the particular case. The Senate Report states:

> In his report to the court, the Attorney General must substantiate this practice with case law, opinions of the U.S. Attorney for the district in which the violation was alleged to have occurred, written prosecutorial guidelines, or other evidence that no prosecution would be brought.
>
> This Committee strongly stresses that the Attorney General must make this determination only in those clear cases in which there is an established, demonstrable policy not to prosecute. Any case in which there is no clear policy against prosecution or any arguably exceptional circumstances are present should be sent to a special prosecutor. (p. 15, emphasis added.)

The Hamilton Jordan case discussed in the 1981 hearings and subsequent reports is a good example of the kind of preliminary investigation in which a "clear policy against prosecution" would make further investigation or prosecution unwarranted. Similarly, if it is indeed a long-established practice of the Department of Justice to refrain from investigating and prosecuting violations of the Neutrality Act, then the Attorney General applied the statutory standard correctly in the instance cited in Question 5

in the Subcommittee's letter to Archibald Cox dated February 27, 1987.

The purpose and policy of Title VI, backed by the legislative history, make it equally plain that the Attorney General should not exercise in the name of Department policy that kind of final prosecutorial judgment invoked in appraising the weight of the evidence or likelihood of a conviction. Similarly, the Attorney General misapplies the statutory standard if he weighs the relative credibility of the official under suspicion as opposed to other potential witnesses, draws or refuses to draw inferences about the official's "intent," or attempts to determine the individual official's moral culpability.

This distinction was explicitly drawn by the report of the Subcommittee which introduced the "reasonable grounds" standard:

> The "reasonable grounds" language would, in the Subcommittee's judgment, strike an appropriate balance between the need to permit the Attorney General to exercise limited discretion in evaluating the results of the preliminary investigation and the need to establish a standard that is not so high that the Attorney General would be making decisions best left to the special prosecutor.
>
> The Subcommittee's proposed standard should not be interpreted as allowing the Attorney General to definitely establish whether or not prosecution is warranted. (p. 49)

The distinction is also implicit in the purposes and policy of Title VI. Title VI rests upon the premise that an Attorney General, whose personal and political interest are involved whenever other individuals high in the same administration are suspected of crime, should be disqualified from making prosecutorial judgments that may be or may seem to be influenced by his personal feelings or political interests. Decisions concerning credibility, motive or intent, the weight of the

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evidence, and the likelihood of persuading a jury are peculiarly susceptible to that kind of influence even when made in attempted good faith. The policy of Title VI requires that in such cases the Attorney General leave the final judgment to Independent Counsel and himself stand aside.

The administration of Title VI in accordance with the statutory standard requires the Attorney General to be alert and sensitive to the danger that a prosecutorial decision may be or appear to be influenced by personal relationships or political concerns. The "reasonable grounds" standard, correctly applied, requires him to ask the court to appoint Independent Counsel unless the question whether to proceed with an investigation or prosecution is so plain that a decision not to proceed further could not be or appear to be affected by personal or political interests.

As we read the notifications in the Whittlesey, Schmults, and Dinkins cases, the Attorney General failed to apply the standard intended by Congress. Our reasons for reaching this conclusion are set out below. We doubt whether any more precise statutory language can be developed, but we suggest that the Subcommittee could clarify the standard and reduce the risk of future misapplication by pointing out the errors.

In the case of Ambassador Whittlesey the Attorney General conducted a preliminary investigation into the charges made by the Deputy Chief of Mission under the Ambassador that the Ambassador had attempted to obstruct the federal investigation just completed into the allegations that she had violated the gratuity (18 U.S.C. 201(g)) and State Department gift statutes (22 U.S.C. 2697). The

Notification to the court on the Attorney General's preliminary investigation sets forth the conflicting versions of the facts given by the Ambassador and her Deputy Chief of Mission concerning the conduct that was the basis for the allegations and states that "the Department for present purposes resolved the disputed facts in the light least favorable to Ambassador Whittlesey." (p. 27) The Attorney General then determined that reasonable grounds for further investigation did not exist because "a reasonable prosecutor would not seek an indictment on the basis of the results of [his] preliminary investigation." (p. 28) He explained that it would be "unjust" to seek the appointment of an Independent Counsel because "[n]o harm resulted from Ambassador Whittlesey's conduct, which occured at a time of great personal stress for the Ambassador and concern over perceived efforts to discredit her." (p. 28)

This is a misapplication of the statutory standard for appointment of Independent Counsel. The Attorney General is not authorized to decide whether there should be an indictment based on his findings, but on whether there are reasonable grounds to believe that futher investigation would yield findings that could lead to an indictment.

Moreover, the Attorney General's decision appears to be based partly on the sympathy that he believed the Ambassador should be accorded. Reliance on grounds of compassion is precisely the sort of consideration inappropriate for one involved in a conflict of interest. The Attorney General had worked together with the Ambassador in the White House and had been entertained by her in Switzerland. Could anyone in his position, sensitive to conflict

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of interest, be sure that his judgment that compassion was due was wholly uninfluenced by personal, official or political association?

The Attorney General also failed to apply the statutory standard in the Schmults and Dinkins cases. In the Schmults case he determined that although former Deputy Attorney General Edward Schmults had not disclosed withholding documents from the House Judiciary Committee, reasonable grounds for further investigation did not exist because there was "insufficient evidence of criminal intent" (p. 24). In the case of former Assistant Attorney General Carol Dinkins, involving charges that she withheld undisclosed documents from the Judiciary Committee during its investigation and submitted a false or misleading declaration to the court, the Attorney General also found no reasonable grounds for further investigation because evidence was lacking concerning her state of mind (p. 45).

But issues of intent are precisely the kinds of issues on which Title VI contemplates deference to an impartial investigator. No one sensitive to the dangers of acting with a conflict of interest could have full confidence that his decisions on these issues were not affected by the fact that he was making critical prosecutorial judgments on former high-level officials in his own Department. In many cases, moreover, the investigative tools expressly denied the Attorney General -- subpoena power, the power to obtain testimony under oath -- might well provide additional useful evidence on such issues if he allowed an Independent Counsel to proceed.

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IV. THE COURT SHOULD BE GIVEN EXPRESS POWER TO ENLARGE THE EXISTING JURISDICTION OF AN INDEPENDENT COUNSEL UPON HIS REQUEST

The provisions of the Act relating to extension of the jurisdiction of an Independent Counsel should be clarified and strengthened.

Reflection upon the course of criminal investigations makes plain that situations will arise from time to time in which Independent Counsel finds either that the individual under investigation for specified crimes may have committed other related offenses not within his existing jurisdiction or that other individuals not within his jurisdiction may have engaged in criminal misconduct in combination or association with the named individual. In such situations full understanding of the evidence and economy of resources may both require centering further investigation and prosecution under a single head. Consolidation may also be necessary to give a grand jury or trial jury a full understanding of events. Although the facts have not been fully disclosed, such a situation is said to have developed in Independent Counsel's investigation of Theodore Olson, a former Assistant Attorney General.

Title VI in its present form leaves doubt concerning the allocation of power to deal with such situations. Section 592(e) provides:

> The Attorney General may ask an independent counsel to accept referral of a matter that relates to a matter within that independent counsel's prosecutorial jurisdiction.

Section 594(e) provides that:

> An independent counsel may ask the Attorney General or the division of the court to refer matters related to

> the independent counsel's prosecutorial jurisdiction. . . .

Section 593(c) provides:

> The division of the court, upon request of the Attorney General which may be incorporated in an application under this chapter, may expand the prosecutorial jurisdiction of an existing independent counsel, and such expansion may be in lieu of the appointment of an additional independent counsel.

The relation between these provisions is unclear, particularly in respect to the difference between an expansion of jurisdiction and reference of a new matter related to Independent Counsel's existing jurisdiction. The important question is whether the Attorney General can block any addition that might be described as an expansion of jurisdiction.

Possibly, the term "expansion" is used to describe expansion into unrelated matters and the power to refer covers any related matter even though it is an area into which counsel was not previously authorized to inquire. Possibly the phrase "upon request of the Attorney General," being set off by commas, is not restrictive. Possibly Section 593(c) does not limit the powers of the division of the court. But the words can be read to allow an expansion of jurisdiction only upon request of the Attorney General. So important a question should not be left in doubt.

As pointed out above, situations are bound to arise in which evidence discovered by Independent Counsel makes plain that the original definition of his jurisdiction was narrower than common sense and equal justice have come to require. The Attorney General ought not to hold a veto over the expansion of jurisdiction needed to meet unforeseen developments. The very same personal and political relationships and the ties to the

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President that make it inappropriate for the Attorney General to control the conduct of the investigation and prosecution make it equally inappropriate for the Attorney General finally to control the investigation's scope. The court should therefore be given authority to grant an extension of jurisdiction upon request of Independent Counsel. The court would still have ample authority to determine whether the additional matters really are related to the initial subject and whether justice requires that the request be granted or denied.

This change can most easily be accomplished by amending Section 593(c) to read:

> The division of the court upon request of the Attorney General which may be incorporated in an application or upon request of the independent counsel may expand the jurisdiction of an existing independent counsel to include any additional persons or offenses related to matters within such original jurisdiction, and such expansion may be in lieu of the appointment of an additional independent counsel.

V. THE POWERS AND DUTIES OF INDEPENDENT COUNSEL SHOULD BE INCREASED BY REQUIRING HIM TO REPORT TO THE APPROPRIATE AUTHORITIES ANY EVIDENCE GIVING REASON TO INVESTIGATE THAT AN INDIVIDUAL HAS VIOLATED ETHICS STANDARDS FOR GOVERNMENT OFFICIALS

The authority of Independent Counsel under Title VI is presently limited to the investigation and prosecution of criminal offenses. Title VI does not provide a mechanism for impartially exploring, resolving, and punishing non-criminal offenses, such as violations of civil law, administrative regulations or Standards of Conduct set forth in Executive Orders, even when these issues arise in the course of an Independent Counsel's investigation.

The limitations were recognized by Independent Counsel, Jacob Stein, Esq., in his report of an investigation into charges that Edwin Meese III had engaged in improprieties as Counsellor to the

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President. Mr. Stein found "no basis" for prosecution. Mr. Stein also explicitly refused to say ". . . that the evidence does not substantiate the loose charges of moral turpitude against Mr. Meese" (Independent Counsel Report, p. 2). He explained that such questions were not within his jurisdiction (Report, pp. 3-4). He did not specify the non-criminal charges or refer them to any other government office. Instead he expressed "an expectation that they will not remain unexplored by those who will strive to do so free from all bias and prejudice" (Report, p. 4).

Mr. Stein's disposition of non-criminal charges was entirely appropriate under the present statute. It seems equally apparent that Independent Counsel should not be charged with extending an investigation beyond violations of federal criminal laws. But when an investigation by counsel limited to criminal misconduct incidentally produces evidence that gives reason to believe that an individual covered by Title VI, Section 591, may have violated ethical standards promulgated by statute or regulation, the matter should not be allowed to drop. Independent Counsel should be empowered and instructed to bring the evidence to the attention of the Office of Government Ethics, the appropriate Inspector General, or other proper federal authority.

Prescribing that course of action would have two beneficient consequences:

First, the effect of an independent authority calling attention to possible non-criminal violations would strengthen public appreciation for the importance of non-criminal standards of conduct for government employees. Freedom from criminality or at least indictability would not as easily be seen as sufficient

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exculpation to authorize continuance in high government office. The Independent Counsel's decision -- when he finds insufficient basis for indictment -- could not as easily be misrepresented as a complete "vindication" or "exoneration" of the offical in question. Reinforcing respect for standards of conduct would also encourage review of alleged non-criminal wrongdoing.

Second, a reference by an "independent" -- impartial and apolitical -- officer would create strong pressure for the appropriate authority to investigate allegations against those who, as in the case of criminal allegations, are otherwise the most likely to be immune, because of their power and status, from thorough Executive Branch inquiries into violation of relevant ethical standards. Public confidence in the integrity of government depends on the investigation and resolution of allegations concerning non-criminal, as well as criminal, offenses by those high-level officials who are subject to the Act's impartial criminal investigatory processes.

This suggestion can readily be implemented by adding a new Subsection to Section 594, reading:

> (h) When investigation of violation of federal criminal laws incidentally develops evidence giving reason to investigate whether an individual covered by Section 591(a) has violated ethical standards established by federal law or regulation, but no criminal prosecution is warranted, Independent Counsel shall report such evidence to the Office of Government Ethics and any other federal agency or officer having jurisdiction over such non-criminal violations.

VI. TITLE VI SHOULD BE AMENDED TO GIVE THE JUDICIARY COMMITTEES APPROPRIATE ACCESS TO CLOSED FILES

Title VI in its present form is open to the implication that the files in cases handled under Section 591 *et seq*. are to be kept confidential except as provided in Title VI

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or ordered by the court. We suggest that access should be available to the Judiciary Committees upon the same conditions and to the same extent as other closed criminal files.

The point can readily be clarified by adding the following new subsection to Section 595:

> (f) Members of the Committee on the Judiciary of either House of the Congress shall have access to closed files in cases handled under Section 592 to the same extent and under the same conditions as other closed files of the Department of Justice.

VII. THE SUBCOMMITTEE REPORT SHOULD CALL THE ATTENTION OF THE COURT TO THE NEED TO MAKE PUBLIC THE PENDENCY OF QUESTIONS OF LAW REQUIRING ITS DETERMINATION, TOGETHER WITH SUFFICIENT DISCLOSABLE INFORMATION TO ENABLE INTERESTED PARTIES TO FILE BRIEFS AMICI CURIAE

From time to time the division of the court authorized to appoint Independent Counsel will be called upon to decide important questions of law significantly affecting the public interest. We think it important that such issues not be decided in secret without affording interested members of the public knowledge of the questions and an opportunity to discuss them and seek leave to file briefs amici curiae.

The problem appears to have arisen in a pending case in which Independent Counsel has requested the Independent Counsel Division of the Court to expand her jurisdiction to cover additional individuals. According to The New York Times of March 9, 1987, Independent Counsel Alexia Morrison, who has been investigating Theodore B. Olson, a former Assistant Attorney General, has asked the court for a broader mandate, to include two other former high-ranking Justice Department officials. She made the request after a similar request had been denied by Attorney General Meese. The

issue before the division of the court is highly significant. According to The New York Times, Judge George MacKinnon, who heads the three-judge panel in charge of administering the law, said the issue is whether the court has power to expand the jurisdiction of an Independent Counsel's inquiry once the Attorney General has decided on a narrower scope of inquiry. Despite the public importance of the issue, according to The New York Times, "[n]one of the filings have been made public."

We recognize -- and indeed stress -- the need to protect the reputations and privacy of individuals whose names are drawn into criminal investigations in which no indictment is warranted. But even though respect for reputations and privacy may sometimes preclude release of complete information, it should always be possible to make public sufficient information to inform the public of the questions of law that the court will decide.

Issues of law with continuing public importance should not be left to the individual parties involved in the litigation. They deserve a full and public airing. Sufficient information normally should be disclosed to enable interested parties to file helpful briefs amici curiae. In the case mentioned above, for example, the issue is the interpretation of a key provision in the current statute, with far-reaching implications for the scope of other ongoing and future investigations by Independent Counsel. The issues may also involve the constitutionality of a broad reading of the court's powers, thus potentially affecting Congressional deliberations upon reauthorization.

In our opinion the Independent Counsel Division has power to deal with the problem and release appropriate information as Title

VI is now drawn. We think that it would be helpful, however, if the Subcommittee agrees, for its report to confirm this reading of the statute and then suggest the advisability of releasing such information about pending legal issues of public importance as can be disclosed without injury to individuals involved.

Common Cause very much appreciates the thorough work this Subcommittee has done in reviewing experience with the Independent Counsel provisions of the Ethics in Government Act. We believe the Independent Counsel mechanism has played a unique and valuable role in preserving the integrity of the government process. We strongly urge the Congress to reauthorize the Act. We further hope that Congress will take this opportunity to establish a strong record of the standards it intends to be applied in implementing the Act and make clear its opposition to any usurpation of the role of the Independent Counsel.

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