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A ROUNDTABLE DISCUSSION
ON THE
INDEPENDENT COUNSEL
STATUTE

Douglass Theatre
Macon, Georgia
October 27, 1997

PARTICIPANTS:

JUDGE GRIFFIN B. BELL
PROFESSOR ARCHIBALD COX
MR. LLOYD N. CUTLER
JUDGE LAWRENCE E. WALSH

MODERATOR:

PROFESSOR JAMES P. FLEISSNER

A ROUNDTABLE DISCUSSION

ON THE

INDEPENDENT COUNSEL STATUTE

Biographical Information of Participants

GRIFFIN B. BELL - Senior Partner in the Atlanta firm of King & Spalding ... attended Georgia Southwestern College ... graduate of Mercer University School of Law (1948) ... received LL.D. from Mercer in 1967 ... practiced law in Savannah and Atlanta (1953-61) ... partner with King & Spalding (1953-61) ... served as judge on the United States Court of Appeals for the Fifth Circuit (1961-76) ... Attorney General of the United States (1977-79) ... Fellow, American College of Trial Lawyers (President, 1985-86) ... Member, American Law Institute ... Trustee, Mercer University (Chair, 1992-95).

ARCHIBALD COX - Carl M. Loeb University Professor Emeritus, Harvard University ... Visiting Professor of Law at Boston University ... graduate of Harvard University (1934) and Harvard Law School (1937) ... recipient of thirteen honorary degrees ... law clerk to Judge Learned Hand, United States Court of Appeals for the Second Circuit ... practiced law in Boston (1938-41) ... assistant in the Office of the Solicitor General, United States Department of Justice (1941-43) ... Associate Solicitor, United States Department of Labor (1943-45) ... faculty member at Harvard Law School (Visiting Lecturer 1945-46, Professor 1946-58, Royall Professor 1958-61) ... Chairman, President's Wage Stabilization Board (1952) ... Solicitor General of the United States (1961-65) ... Williston Professor, Harvard Law School (1965-76) ... Watergate Special Prosecutor (1973) ... Carl M. Loeb University Professor, Harvard University (1976-84) ... Member: American Bar Foundation, American Law Institute, American Academy of Arts and Sciences, Common Cause (past Chairman),

Health Effects Institute (Chairman) ... author of numerous publications on Labor Law and Constitutional Law.

LLOYD N. CUTLER - Senior Counsel to the Washington, D.C. firm of Wilmer, Cutler & Pickering since 1990 ... graduate of Yale University (1936) and Yale Law School (1939) ... received honorary degrees from Yale University and Princeton University ... law clerk to Judge Charles Clark, United States Court of Appeals for the Second Circuit ... practiced law in Washington, D.C. (1946-present) ... Counsel to the President of the United States (Carter Administration 1979-81, Clinton Administration 1994) ... Member: American Law Institute (Member of Council); Council on Foreign Relations (Board of Directors 1977-79); United States Group, Permanent Court of Arbitration (1984-93); American Academy of Arts and Sciences ... Honorary Bencher, Middle Temple, London.

LAWRENCE E. WALSH - Of Counsel to the Oklahoma City firm of Crowe & Dunlevy since 1981 ... graduate of Columbia University (1932) and Columbia Law School (1935) ... Special Assistant Attorney General, New York (1936-38) ... Deputy Assistant District Attorney, New York County (1938-41) ... practiced law in New York (1941-43) ... Counsel to the Governor of New York (1943-51) ... Counsel to the Public Service Commission (1950-51) ... General Counsel and Executive Director, Waterfront Commission of New York Harbor (1953-54) ... Judge, United States District Court, Southern District of New York (1954-57) ... Deputy Attorney General of the United States (1957-60) ... partner in the New York firm of Davis, Polk & Wardwell (1961-81) ... ambassador and deputy head of U.S. delegation to Paris meetings on Vietnam in 1969 ... Independent Counsel for the Iran-Contra Investigation (1986-93) ... Fellow, American College of Trial Lawyers ... President, American Bar Association (1975-76) ... Member, American Bar Foundation and the American Law Institute (Member of Council).

A Roundtable Discussion on the Independent Counsel Statute

DEAN DESSEM: Good afternoon. I am Larry Dessem, Dean of the Mercer Law School. On behalf of the Law School, it is my distinct pleasure to welcome all of you here this afternoon for the continuation of a truly outstanding Mercer Law Review Symposium.

This morning we heard from three leading experts: Professors John Barrett, Kathleen Clark, and Katy Harriger. They challenged us and stimulated us with their presentations. We thank them for their participation.

At the luncheon prior to this afternoon session, many thank yous were in order for the many people who worked very hard to bring off this Symposium. They include people like Yonna Shaw, Whitney McMath, Brian Max, Professor Steve Johnson, and Professor Jim Fleissner. Professor Fleissner, in particular, deserves our thanks today for organizing this Symposium. Many of us have seen him in recent weeks on *The Newshour with Jim Lehrer*, and it will be our pleasure to have him as our moderator here today at the Douglass Theatre.

Professor Fleissner will introduce our panelists this afternoon. These four lawyers epitomize the very best that the legal profession has to offer. Throughout their long careers they were called on many times by the nation to render service, and they answered those calls and rendered service within the highest traditions of our profession. We welcome them to Mercer, men who make all of us proud to call ourselves lawyers. At this point I would like to welcome and introduce Professor Jim Fleissner, our afternoon's moderator and organizer of today's panel.

PROFESSOR FLEISSNER: Thank you, Dean Dessem. Ladies and gentlemen, the topic of this Symposium is the Independent Counsel Statute. This session is convened for a roundtable discussion featuring our four distinguished guests to whom I will extend some words of welcome shortly.

I would like to begin the proceedings in an unconventional manner by asking you, the audience, a question; and the question is this: Do you remember Saturday, October 20th, 1973? Certainly, there is one among us who has vivid recollections of that day.

It is worth pausing briefly to consider that Saturday because the events of that day have a lot to do with the topic of this Symposium. Watergate Special Prosecutor Archibald Cox had served President Richard M. Nixon with a subpoena calling for the production of tape recordings of certain White House conversations. The President had refused to comply with the subpoena. United States District Court Judge John Sirica ordered the President to produce the tapes. The Court of Appeals affirmed. Rather than taking the case to the Supreme Court, the President attempted to impose what he termed a "compromise": the Special Prosecutor would get summaries, not tapes, and would be forbidden from seeking additional materials.

On Saturday, October 20th, 1973, Special Prosecutor Cox gave a press conference defending his view that the President should comply with the law. That evening the President ordered that Archibald Cox be fired. Rather than carry out the order, the Attorney General and the Deputy Attorney General resigned. The task fell to the Solicitor General, who carried out the President's will. The White House announced the dismissal, the abolition of the Watergate Special Prosecution Force, and its intention to return the investigation to the control of a political appointee in the Justice Department.

After his dismissal, Archibald Cox issued a press release containing a single sentence. It read: "Whether ours shall continue to be a government of laws and not men is now for Congress and ultimately the American people." Of course, Congress and the American people took a stand: a new Special Prosecutor was appointed, tapes were produced, additional prosecutions ensued, and President Nixon ultimately resigned. But before the drama of Watergate ran its course, Congress began considering whether there was a way to ensure that ours shall be a government of laws and not men. Within days of the dismissal of Professor Cox, there were calls for Congress to pass legislation to create an institutional mechanism to guarantee the independence of those responsible for investigating and prosecuting high ranking officials of the executive branch. The hope was to ensure thorough investigations and

impartial prosecutorial decision making, free from real and perceived conflicts of interest.

Today's Independent Counsel Statute first was enacted in 1978 as part of the Ethics in Government Act. The statute has played a preeminent role in national affairs: the Iran-Contra and Whitewater investigations, the recent indictment of the former Secretary of Agriculture, and the Attorney General's consideration of an independent counsel to investigate campaign fund raising all remind us that the Independent Counsel Statute is at center stage. This Symposium addresses this crucial topic at a critical point in time. The Independent Counsel Statute has a sunset provision and will expire in 1999 if it is not reenacted. Therefore, the Congress confronts the issue of whether to extend the life of the statute, and if so, whether to amend the law. Of course, inherent in the democratic process is the reality that members of Congress and the administration may allow short term political considerations to obscure their view of the long term national interest. The Mercer Law Review has invited four very wise and able men to provide counsel to the nation as to the future of the Independent Counsel Statute. Today we will ask them: On the merits, what is in the best long term interest of the Nation?

I would like to extend some words of welcome to our four distinguished guests. Judge Bell, of course, our greeting to you is "welcome home." In the years since Judge Bell graduated from Mercer Law School, he has been a big part of the life of the law school and the university. To any first-year law student who is interested in finding out about Judge Bell's life in the law and his contributions to the law school, I would say, "Just look around the law school." In the Dean's office, the student would find a portrait of Judge Bell during his service on the United States Court of Appeals. Near the building's main entrance is a portrait done during his tenure as Attorney General of the United States. Near the student lounge, which is named in his honor, a plaque details the highlights of his career in public service and private practice. Another plaque commemorates Judge Bell's role in the dedication of the law building itself. The student would find that one of our distinguished faculty members, Jack Sammons, holds the Griffin Bell Chair in Law. And the student might also see a reminder posted of one of Judge Bell's many visits to the school.

Ladies and gentlemen, we are very happy that Judge Bell has made one of those visits today because he brings special insight to the issue before us. Judge Bell has had great involvement in independent counsel issues. He worked to restore the Department of Justice in the wake of Watergate and gave the Department a tremendous vote of confidence by declaring that, in his view, an Independent Counsel Statute was not

needed. His prominent role in the debate over the statute continued after his tenure as Attorney General. When the Supreme Court considered the constitutionality of the statute in *Morrison v. Olson*,¹ he joined former Attorneys General Edward Levi and William French Smith in filing an amicus brief urging the Court to strike down the law. Later, during the Iran-Contra investigation, he had the experience of being counsel to a person whose conduct was being questioned by an independent counsel. Judge Bell's client? President George Bush. Judge Bell, welcome.

We also are fortunate to be joined by Professor Archibald Cox. Professor Cox continues to build on a remarkable career in academia and public service. As a teacher and scholar at Harvard Law School, Professor Cox is recognized as a leading expert on Labor Law and Constitutional Law. Among many honors, Professor Cox has received an honorary degree from Harvard University, a distinction he shares with the man for whom he served as a law clerk, Judge Learned Hand. In 1976 Professor Cox was named by Harvard as Carl M. Loeb University Professor, one of only nine faculty members to receive the university's highest recognition for scholars.

Professor Cox's record of public service is equally impressive. He served as Solicitor General of the United States and argued many landmark cases before the Supreme Court. Of course, his public service includes his historic role as Watergate Special Prosecutor. In his forward to Ken Gormley's recently published biography of Professor Cox, former Attorney General Elliott Richardson said this:

In the end, Nixon's most damaging misjudgment was his underestimation of Cox's ability to communicate the strength of his integrity. Nixon himself, like everyone else who watched Cox's press conference on the afternoon of October 20, 1973, must have felt that force. Indeed, in all the annals of public service there have been few finer examples of grace under pressure.²

Since his Watergate service, Professor Cox has been very involved in the debate over the Independent Counsel Statute. He first testified before Congress on the subject days after he left his post as Watergate Special Prosecutor. When *Morrison v. Olson* was before the Supreme Court, Professor Cox filed an amicus brief supporting the statute on behalf of Common Cause. Professor Cox, we are thrilled and honored that you are with us today.

1. 487 U.S. 654 (1988).

2. KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION xii (1997).

Mr. Lloyd Cutler has been a prominent and influential member of the legal community for many years. He is currently Senior Counsel to the firm of Wilmer, Cutler & Pickering in Washington, D.C. A pillar of the legal scene in our nation's capital, the breadth of Mr. Cutler's practice and the roster of his clients are most impressive. On two occasions, he has had the distinction of serving in the White House as Counsel to the President of the United States. Mr. Cutler first served as White House Counsel to President Carter from 1979 to 1981. More recently, President Clinton turned to Lloyd Cutler in 1994. Mr. Cutler returned to the White House Counsel's Office with the agreement that he would serve for a six-month period.

Mr. Cutler has played a key role in the independent counsel debate from the start. Professor Katy Harriger, one of our guests today and author of perhaps the leading book on the Independent Counsel Statute, wrote that Lloyd Cutler was one of the two most influential private individuals in the legislative history of the statute—the other being Professor Samuel Dash, the former Counsel to the Senate Watergate Committee.³ Concerned about the number of lawyers involved in Watergate, Lloyd Cutler testified before Congress on behalf of the idea of a continuing public prosecutor and worked on drafting of legislative proposals. In the years since the law first went into effect, Mr. Cutler has continued to be influential as the statute has undergone amendment.

Mr. Cutler also observed the operation of the Independent Counsel Statute from the vantage point of the White House Counsel's Office, including the two earliest investigations, which were into allegations against two members of President Carter's staff, as well as some of the most recent investigations involving officials of the Clinton Administration. Mr. Cutler has observed the statute from yet another perspective, that of counsel to a person under investigation. During the Iran-Contra investigation, Mr. Cutler represented Secretary of State George Schultz. I am sure you will agree that Lloyd Cutler brings a unique perspective to this Symposium. Sir, we are grateful that you are with us.

The final participant of our roundtable discussion is Judge Lawrence Walsh. Judge Walsh is currently Of Counsel to the firm of Crowe & Dunlevy in Oklahoma City. As you know, Judge Walsh was appointed under the Independent Counsel Statute to investigate what has been known as the Iran-Contra affair. He served in that capacity beginning in 1986 and issued his final report in 1993. When the Supreme Court was considering *Morrison v. Olson* during his tenure as independent

3. KATY J. HARRIGER, *INDEPENDENT JUSTICE: THE FEDERAL SPECIAL PROSECUTOR IN AMERICAN POLITICS* 65 (1992).

counsel, an amicus brief in support of the statute was filed on Judge Walsh's behalf. Judge Walsh's book concerning the investigation, entitled *Firewall*, was recently published.⁴

Judge Walsh's service as independent counsel is only part of the experience he brings to bear on the subject of the Symposium. Judge Walsh began his career as a Special Assistant Attorney General in New York during a time when the image of corruption fighting, racket busting prosecutors took on a new lustre. Judge Walsh went on to serve under Thomas E. Dewey as Deputy District Attorney in Manhattan. After a stint in private practice, he returned to public service after Thomas E. Dewey was elected Governor of the State of New York. During Thomas E. Dewey's first two terms as governor, Judge Walsh served as counsel to the governor and was among Governor Dewey's inner circle of advisors during a period when he twice secured the Republican presidential nomination.

Later, Judge Walsh served as a judge on the United States District Court in the Southern District of New York. He left the bench to become Deputy Attorney General of the United States, serving under Attorney General William P. Rogers. Having previously worked for the great John W. Davis, Judge Walsh went on to become managing partner of the New York firm of Davis, Polk & Wardwell, where he practiced law for twenty years. While in private practice, Judge Walsh has been a leader in the legal profession, including serving as President of the American Bar Association. In 1969 Judge Walsh engaged in further public service as an ambassador to the Paris Peace Talks during the Vietnam War. From that experience, I am sure it has not escaped Judge Walsh's notice that the participants in this roundtable discussion are seated at a rectangular table. Judge Walsh, welcome to Mercer Law School.

Gentlemen, I would like to begin by raising what is really the overarching issue to get your opening comments. How should the nation address the issue of ensuring the independence and impartiality of investigations of high-ranking officials? Should the Independent Counsel Statute be retained? If not, how should the problem of conflicts of interest in such cases be addressed? If the statute should be retained in your view, should it become permanent or should there be another sunset provision?

Let me call on Mr. Cutler to speak first.

MR. CUTLER: Well, as Professor Fleissner said, I did testify in favor of the independent counsel law when it was first enacted in 1978, and

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

I have testified in favor of each subsequent five-year renewal. While I certainly have had some second thoughts out of my experience in the Clinton Administration, I would still support its further renewal but with some important modifications.

Much of the argument against further renewal is based on the contention that the cure is worse than the disease. Some see defects in the basic idea that anyone other than the Attorney General should have prosecutorial discretion over officials in the executive branch. Some think that there are defects in the particular terms of the law. And some think that there are defects in the character or judgment of particular individuals who have been selected to serve as independent counsel. For these reasons, they would abandon the statutory independent counsel experiment and leave it up to the Attorney General, who you all know is named by and serves at the pleasure of the President, to decide when, if ever, an independent counsel would be appropriate and, if so, who it should be.

My response basically would be to invoke what James Madison had to say about men and angels, which you have undoubtedly heard many times.

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.⁵

Even when the Attorney General is Nicholas Katzenbach or Edward Levi or Elliott Richardson or Griffin Bell, about as close to angels as we can hope for, an independent counsel law would still be necessary. This was the unforgettable lesson of Watergate and the Saturday Night Massacre as you have been told. Although Elliott Richardson's two predecessors as Attorney General had both fallen into disgrace because of their own Watergate involvement, Congress and the public were prepared to trust Richardson's independence as Attorney General, especially when he selected Professor Cox as the nonstatutory special prosecutor to carry on the Watergate investigation.

But when Archie was closing in on his targets, President Nixon, certainly more man than angel, directed Richardson to fire Cox, fired Richardson for refusing to do so, and then found another Justice official who would, and did, fire Cox. These events proved the need for a statutory independent counsel law, in my judgment, beyond any

5. Federalist No. 51 (James Madison).

reasonable doubt. Now, we may never have another President who would use his power this nakedly to cover up his own administration's alleged criminal misconduct. But the memory of President Nixon's action has convinced a large segment, an overwhelming segment I think, of public opinion that most Attorneys General—Griffin, I note you as one to whom this would not apply—would be unable to resist more subtle pressure to go easy on their own President and the top officials of the incumbent administration. The Attorney General's appearance of impartiality and independence is simply gone for our generation. And it is most unlikely that even an Attorney General of the Katzenbach, Levi, Richardson, Bell, or Reno caliber would restore it in our time.

Now, that does not mean that the present law is perfect. I have a number of changes I would make in the present law, but I gather that you want to save those for questions later.

PROFESSOR FLEISSNER: Yes, sir. Thank you. Judge Bell, I have posed the over-arching question, which is whether the statute should be retained and, if not, what should be in its stead. Would you like to address that?

JUDGE BELL: Well, I am not in favor of the statute. I have been on these programs before, so everyone in the group knows my position. I was the Attorney General when this law was passed. President Carter was the President, and he had promised the American Bar Association in a speech that he would support their law that they were sponsoring. This Independent Counsel Statute, formerly known as the Special Prosecutor's Statute, was a project of the American Bar Association. Of course, it came out of Watergate.

I had the idea, and I think maybe there was some bias on my part when I say this, that the Department could prosecute anyone, and we did not need a special prosecutor. And I had the unusual experience of proving that twice. In the Bert Lance prosecution, everyone in the top level of the Department recused themselves, just as it would be if you were serving as a judge, and it fell down to the professional prosecutors to handle that case. Now, you may think that is unusual, but at that time there were only seventy people in the whole Department of Justice that were political appointees; and the others were career people, most of whom had been recruited starting with Bobby Kennedy from law schools as honor students. They had an honors program. A lot of those people stayed. A lot of them are still there. And they can handle any kind of a prosecution.

The second thing that made me think it was not necessary was that after the statute was passed, it was not retroactive, but we had many

stories about the Carter peanut warehouse and the charges that somehow the Bank of Georgia was funneling money through the Carter peanut warehouse to the presidential campaign in a form of laundering. So, I appointed a lawyer who had been a U.S. Attorney in New York, Paul Curran, to investigate that charge. And I gave him all the power that the Attorney General had. He could use the FBI and some of the prosecutors in the Department. He never had a press conference, he never had a leak, and he finished in six months. At that time he announced that he had accounted for every peanut and every nickel and that there was nothing wrong and filed a written report. That is the way I think it ought to be done. You do not need these long investigations. I think you just cause the people to distrust the Department of Justice. The more special counsels we have, the less people think of the Department. It is a disparagement of the Department of Justice. Therefore, I have always taken the position, more strongly now than ever because I have some proof now to go on, that we ought to just let this statute expire. It would be a merciful end for an experiment that we did not need in this country.

We need to trust our institutions and hold our institutions accountable. If we will do that, we have plenty of institutions. We just need to make sure that they work well. I think that this would put more pressure on the Department to do a better job. Therefore, I do not favor this law. I think it will expire again in 1999, and I sure hope that will be the way to end this millennium and start the next one.

PROFESSOR FLEISSNER: Judge Walsh, I cannot resist calling on you next.

JUDGE WALSH: I have the utmost respect for Attorney General Bell and he knows that. We have talked over the years. I am sure that we all are impressed with Lloyd's analysis.

On the weekend which you spoke of when Archie received the news, Chesterfield Smith had just become President of the American Bar Association. He called up to say, "How do we react?" And I said, "With vigor." And so he did, as you may remember. The American Bar Association was one of the first. Sometimes it moves very slowly, but this time it moved with speed and came in behind Archie and denounced President Nixon's actions. Then, Chesterfield Smith appointed a special committee to see what should be done to prevent such occurrences in the future. Bill Spann, of Atlanta, was the chairman of that committee. That is the committee that drafted the original independent counsel law. It was changed somewhat in passage, but that is where it came from. And the big question before the House of Delegates was: should it be

mandatory or discretionary? Should you force the Attorney General to accept an appointment from the court or should you leave it to his discretion? This was debated. I happened to be in favor of making it discretionary, but Bill Spann won and made it mandatory. The House voted for it to be mandatory, and that is what Congress did. I always figured that Bill got back at me and that is why I ended up being appointed independent counsel. Because when Bill was up at the Pearly Gates, he never forgot that I had not supported his more extreme view, which Congress supported.

Now, the great value of the act is that it gives a double layer of insulation to the Attorney General. The Attorney General has always had the power, as Griffin Bell said, to appoint his own independent counsel or his own special counsel or special prosecutor. But here he may not only disqualify himself from acting in the situation, but he disqualifies himself, or herself, from appointing the person who is going to act, which is, I think, an added reassurance to the public.

Going back to Iran-Contra for just a minute, there we had an Attorney General who had many responsibilities. He was more than just a person who enforces the law, or more than the person who enforces the criminal law. He had advisory relationships with all of the departments of government and particularly with the President. In the last analysis, the legality of what the government does, or any of the offices does, was subject to his review. So there was an intimate relationship there as counselor as well as the person who is the distant prosecutor and the distant enforcer of the law.

We had an Attorney General who had formerly been counsel to the President, his personal counsel, and actually had the rank of Counselor to the President. When the Iran-Contra problems surfaced, it was really a triple interlocking conspiracy there. First, there was a conspiracy to continue to support the Contras in Nicaragua after Congress had cut off appropriations and had flatly forbidden such action. The second was a conspiracy to sell arms to Iran during the Iran-Iraq War when we were supposed to be neutral, in the hope that the sale of arms would filter back to the hostage takers who had taken eight Americans hostage and release them. And that violated the Arms Export Control Law, a flat violation, with the President being told he was violating the law. Then, the third conspiracy was a conspiracy to cover up the first two, and that was where the Attorney General came in. He was the key man who was selected by the President and his Chief of Staff to develop a "coherent" position for the administration when the Secretary of State was saying one thing, the CIA was saying another, and the National Security Advisor was saying another.

Now, under those circumstances, and one of the things that happened was that as he explained his situation to the senior policy advisors to the President, he told them that one particular transaction was embarrassing where the CIA had actually been drawn in to deliver the weapons to Iran. He said that the President had known about it and had told the Secretary of State that he had known about it. Two days later, the Attorney General, with a group of senior policy advisors before him, the Secretary of State, the Secretary of Defense, President, Vice President, Director of the CIA, and the National Security Advisor, told them that the President did not know what everyone in that room knew the President did know, and two of them had notes describing the conversation in which the President was informed. Now, how could that Attorney General turn around and investigate the crimes committed in connection with Iran-Contra? When he and three of his senior advisors had been the ones who were putting together the defense, giving North time to destroy records, I would say he could not come back and enforce the law here. He, himself, recognized his position. He did not act under the mandatory provision under the statute. He acted because there was an appearance of conflict of interest, and indeed, there was. So under those circumstances, if he appointed his substitute, how much credibility would he have? But he had the advantage of this statute, which permitted him to go to an impartial court, and ask to have the court select the person that was going to come in and pick up the problems that had been left.

So it seems to me that the basic pattern of the act is useful. And, like Lloyd, I see areas where it perhaps hits too widely. For example, if we look at the Watergate investigation as it originally started, forgetting any possibility of what might have happened during President Clinton's presidency, but looking back and using this very expensive instrumentality to look into something that happened years before a person took office —

MR. CUTLER: I think you meant Whitewater.

JUDGE WALSH: Excuse me. I meant Whitewater. I get carried away with my own eloquence every now and then. But on Whitewater we are going back into something that happened years ago. Whether that should be a mandatory aspect of the act or not, I do not know.

But I am getting off into the area that you want to save for later as to possible changes. So I think you would say that the basic concept is a desirable concept to preserve. I support the five-year renewal until all of the wrinkles get worked out because it is a radical act that takes the power away, that shares the power of the executive branch with the

judiciary in making this appointment. I think continuing the five-year sunset provision until it gets worked out might be a good idea. But if I could just let it go at that and then come back to the specific changes that might be made later.

PROFESSOR FLEISSNER: Thank you, Judge Walsh. Professor?

PROFESSOR COX: I think the present act has been so far politicized that it is far more costly to the public interest than the good it does. I am in favor of radical changes.

I agree with what has been said by Judge Walsh and Lloyd Cutler to this extent. There is a need for independent investigation by independent counsel of great fairness and stature in cases like Watergate where there is serious criminal misconduct, where there is serious concern about allegations of criminal misconduct, I would say, in office by the President and perhaps the four or five other high officials. I think that is, as Judge Walsh said, the only way to assure the public of a truly impartial, fair-minded investigation and finding. That is partly because any Attorney General is very likely to suffer from some degree of conflict of interest, conflict of concerns. And certainly the public would suspect that he faces one even in the rare case where he does not. That does not mean that he cannot be fair. He may lean over backwards to avoid giving way to the conflict but still be affected by something that ought to be wholly irrelevant.

Second, the Department of Justice in a sense has a conflict. Judge Walsh gave you some illustration. I think of others that come to my mind in connection with the Watergate affair. There were two questions of law of key importance in the effort to obtain the tapes. One, whether the President is subject to judicial process at all. Two, whether he was entitled to refuse to turn them over under the claim of executive privilege. In both cases, the long run position of the Department was very likely to be to protect the President against such demands. But query whether that was the time and place for that bias, not in any bad sense, but bias to be part. Furthermore, only a truly independent person separate from the Department of Justice can have the public credibility to give genuine clearance to the President or one of the few others that the statute should cover if he finds that there is no basis for prosecution. And I think for that reason the basic scheme, greatly changed in ways we will talk about in a few minutes, should be retained.

Your other question was: do I think the statute should be put in permanent form or so that it will lapse unless renewed. I think that I would provide for another ten-year period. The present act has been so politicized. The role of independent counsel in the public eye, in the eye

of anyone who reads the press and sees it as presented by Congress as a hunt. That is not what it should be. It really should be an investigation and finding. I think, and President Nixon would have never believed it I am sure, but I think that was my state of mind genuinely during the Watergate investigation. And I would have, if I had had my druthers; it would have been better for the country to be able honestly to say, "No, no evidence reaches the President," than to say the reverse. At least that was my approach, my underlying thought. And I think something like that is appropriate for the independent counsel.

PROFESSOR FLEISSNER: Thank you. Let me raise what is, I think, a much misunderstood aspect of the statute. I refer to the provisions governing the Attorney General's decision whether to request an independent counsel, the so-called triggering mechanism, which has been much reported in the press. Once the Attorney General has information in a specific form from a credible source, there then begins a preliminary investigation, of up to five months in length, where the issue is whether there are sufficient and reasonable grounds to believe that further investigation is warranted as to a particular criminal violation by one of the persons covered by the statute. Let me ask Mr. Cutler first: Would you like to see some changes in the triggering mechanism?

MR. CUTLER: Yes. I would like to see at least two changes in the triggering mechanism. The first is that the Attorney General specifically under this statute, while she is conducting this ninety-day investigation to see whether further investigation is warranted, cannot subpoena anyone, cannot convene a grand jury, and cannot grant immunity to any witness. That means that she is limited to what people will say to her and her staff voluntarily. And, yet, the conclusion she is asked to reach is whether further investigation is warranted. Unless you have an absolutely cold case one way or the other out of the oral interviews, which is rare, it is almost impossible to conclude that no further investigation is warranted, particularly when you have not put anybody under oath, you have not issued subpoenas, and you have not used the immunity power or the power of the grand jury.

The second problem is this threshold. Whatever powers we give the Attorney General to do investigations, that is to subpoena witnesses, I think she should have that. Even in the case of a civil antitrust case, the Antitrust Division of the Department of Justice has the power to issue a so-called civil investigative demand for documents and testimony of witnesses. She ought to have that power at the very least even if she cannot grant immunity and cannot have a grand jury. Second, I would

change this threshold, which is about one micro millimeter high, that no further investigation is warranted so that it is changed into reasonable grounds for believing that a significant federal crime may have been committed, something more than a misdemeanor, for example. So, I would make both of those changes.

PROFESSOR FLEISSNER: Mr. Cutler, if I could ask you a follow-up question. What is your understanding of the purpose of the provisions you describe that essentially handcuff the Attorney General by refusing to allow immunity and use of subpoenas during the preliminary investigation?

MR. CUTLER: Well, I believe it was on the theory that investigation should be left to the independent counsel. If you could not find anything out except by using the investigatory powers of a prosecutor, you had to go to an independent prosecutor in order to do that on the theory that the Attorney General would muck it up and sabotage or do whatever. But that is how it got in there.

PROFESSOR FLEISSNER: Do any of the rest of you have comments on the triggering issue?

JUDGE WALSH: I agree with Lloyd's suggestion except that you get into a sort of a conflict here. He has suggested the conflict between the Attorney General trying to learn what the problem is and what you should do and the problem of spoiling the investigation of the independent counsel that he is going to be appointing. If you are going to investigate and prosecute someone, you do not want somebody else getting in there first and getting the documents and giving everybody time to think up what their defense is going to be and tell other people what it is going to be so they can accommodate it.

MR. CUTLER: Why is that unfair?

JUDGE WALSH: Well, I just said that is what you want. Now, whether you can always have what you want is something else again. But I was about to say I have trouble because I understand that in the present situation there is difficulty and the Justice Department staff that is responsible for an ongoing investigation dealing with those persons covered by the statute, wherein they have a question as to whether they are, in a sense, prohibited from carrying the investigation into that area.

Now, whether that is an over-extended caution I do not know. But it is something that just occurred to me. I have not figured out the solution to that, how you can have a relatively thorough investigation by the Attorney General in deciding what to do without the dangers that I have suggested of spoiling the investigation.

Now, those are the broad outlines. How you adjust the particulars to deal with them is something that I think we all have to think about. I certainly would question giving the power to anybody to grant immunity and destroy a prosecution before the independent counsel has been appointed, if you are going to appoint one. You have to almost decide you are not going to appoint one before you get into giving persons immunity that he may need to prosecute in order to complete his work, in order to develop evidence against that person and others.

So I think it is a difficult area, and I do not know actually whether we know all the answers to it or not. I think that Lloyd is right in his concern, in that certainly a request to subpoena as he suggested that is used in the Antitrust Division is certainly something that should be possible. I would even go so far as to use subpoenas, if necessary, because, drifting off for a moment into the current situation, which I probably should maybe not be discussing, but you have a question here where it is not like in Watergate or Iran-Contra where the criminal law was pretty clear and the question was what are the facts. Here you have a question of what the law means. And is it enforceable by criminal prosecution or is it so vague or so ambiguous that to preserve the constitutionality of the law as a vehicle for prosecution all of the ambiguities would have to be interpreted in favor of the defendant? In other words, is it a vehicle that can be used, and should an independent counsel be appointed for it to try to deal with a relatively useless vehicle? Now, that is something that it seems to me the Attorney General has to decide in the first instance: whether she wants to make the commitment to go through and investigate this. But in order to decide that, she has to have information, which comes back to what Lloyd has been talking about, that somehow she has to be informed that the facts and the difficulties of the issues presented by the law to decide whether it is a law which is worthy of trying to enforce by independent counsel.

PROFESSOR FLEISSNER: Professor?

PROFESSOR COX: I disagree quite sharply with Lloyd Cutler's proposal because it seems to me, particularly in its use of probable cause as the test, to suggest that the role of independent counsel is simply to prosecute. My fundamental conception, as I tried to say before, is that

in the first instance it is quite different from that. It is a far more impartial, evenly balanced role with the job being just as well done concluding that there is no basis, no serious basis, for these charges against the President or Vice President. After all, if your test is probable cause, it is just about time to submit the case to the grand jury. There is not much of anything left to do. Then if the grand jury indicts, to press the case. That is why I basically disagree.

I would try to find a formula for, I guess tightening up is the right expression, the test. I think "further investigation is warranted" is not a sufficiently tight strainer. I would try and find something between probable cause and the present formula of "further investigation is warranted." I confess I have not come up with it, but if we could sit down and talk about it for a couple of hours I could come up with a formula.

Another change I would make: I think the Attorney General should not be required to appoint, and indeed should not appoint, independent counsel in a case where the allegations are of an offense which even if the facts are as alleged in the case of anyone else it would be contrary to the settled policy of the Department of Justice to prosecute. There is a case of that kind pending now, the case against Mr. Cisneros. As I understand it, the settled policy is not to prosecute for a false statement under oath where the only falsity is in the size of the payment that is acknowledged by the possible defendant. And I see no reason to single out that sort of case with the government official when all the rest of the world would go unprosecuted under the circumstances. So I think that should be worked into the statute.

PROFESSOR FLEISSNER: Judge Bell?

JUDGE BELL: I agree with Mr. Cutler a hundred percent. This provision in the law is passed out of a distrust of the Attorney General. It puts blinders on the Attorney General, and it is almost a joke to think that the Attorney General could make all these findings without being able to subpoena a witness, without being able to grant immunity or even call someone before a grand jury.

Of course, we ought to pay more attention to what has happened in the past. The most disgraceful use of this statute, I think, of all was the Hamilton Jordan investigation, where some lawyers representing people in a drug case said that they would give information about Hamilton Jordan using drugs if they would let their clients go. They tried to leverage turning in somebody that was covered by the act to get their clients out of the trouble they were in. Now, here was the Attorney General sitting there and could not even put these lawyers before a

grand jury. I think that is a disgrace in this, a free country. I think this ought to be left out of the law altogether. No duty ought to be on the Attorney General to do the appointing or the recommendation to appoint a special counsel, or the Attorney General ought to have some power to do the job and do it right. So I agree with Mr. Cutler.

PROFESSOR FLEISSNER: There had been proposals, some of which were reflected in remarks earlier today, to limit the number of executive branch officials covered by the statute.

JUDGE BELL: There is no limit on the people who are covered under the Section B. If there is a conflict—personal, financial, or political—then you drag in all these other people. As I understand, there is nobody in the Whitewater investigation who is covered by the act except under that provision. One of the district court decisions in Little Rock says that, that Mr. Starr was appointed to cover people who were in this Section B. None of this long list of people that are covered by the act were involved at all. So there is no end to what the breadth of this statute is. These people are in Arkansas who knew the President, he had dealings with them, so they are all in under the act now and they have got a special counsel for them.

PROFESSOR FLEISSNER: Well, what about limiting the types of allegations or limiting the time period for which the independent counsel would be authorized? What about those other limits?

JUDGE BELL: Well, there is a time period in the statute now.

PROFESSOR FLEISSNER: In terms of the length of an investigation?

JUDGE BELL: Yes, in the amended statute, there is a time period, there is a limit.

MR. CUTLER: There is a limit of one year after leaving the position for some of the covered persons, not for all.

PROFESSOR FLEISSNER: Professor?

PROFESSOR COX: I would limit it essentially to the President, the Vice President, maybe the three most important Cabinet officers, the most important person in the White House. Second, I would limit it to crimes involving the abuse of power in office or in getting office. That

would be the immediate office that he or she occupies. That would both limit the type of crime and, of course, how far back you went.

JUDGE WALSH: I agree with Archie.

PROFESSOR FLEISSNER: The most frequently heard complaint about independent counsels relates to a perceived lack of accountability once they get into operation and a concern about accountability in part because the norm is for an independent counsel to have an identified subject for investigation. There is a perception that once they have a focus for investigation that they may try, as Justice Jackson once said, to pin an offense of some kind on that individual. Is there a way to make independent counsels more accountable or would that be a mistake?

PROFESSOR COX: Well, I think at the present time, of course, independent counsels can be dismissed by the Attorney General for gross misconduct or something very like that.

JUDGE WALSH: I think it is just for cause.

PROFESSOR COX: Well, I do not. No, I think you are wrong.

MR. CUTLER: The Attorney General has the power to remove the independent counsel for cause or in the event he has a heart attack or becomes disabled or whatever. Then he has a right to judicial review. Now, the special division of the court is out of it, but the deposed independent counsel can go to the district court and seek a review.

JUDGE BELL: If you made this office more accountable, we would never finish one of these investigations.

PROFESSOR COX: I would deal with the framing of the thing by fixing a year as the limit, subject to extending the time if cause is shown. There are two things, although it is not everything that could be said. First, all the Watergate indictments were returned, some under me, but mostly under my successor, within a year. Second, of course, if an indictment is returned and the independent counsel has got to prosecute it, it is going to take more than a year. But I think the extension should be for cause shown. It could be shown in camera, if necessary.

JUDGE WALSH: Let me present the argument against that. First, let me describe the isolation of the independent counsel. If you are invited to Washington, you think you are going to step into the Attorney General's shoes and that all of the power of government is going to be behind you. All of a sudden you find it is all against you, that the old alliances have not changed a bit. You are there with a very small staff trying to find out where to buy yellow pads and pencils, and the administration has pulled together and knows your vulnerability, which is your exposure to the public: why you are not doing something right away? All it has to do is hold back documents, delay testimony, let the time run out, and talk about the expense of your office. That is the way to undercut an independent counsel.

So once you add an arbitrary time limit of one year, or even two years, in a complex series of investigations, you are defeating the value of the appointment. Then when you take a situation in which there is not only a prosecutorial interest, but also a Congressional interest, and Congress wants to investigate and find out what is going on at the same time and perhaps grant immunity to facilitate its investigation, even though the independent counsel does not want them to. Once you force the independent counsel to act within a year and Congress is free to act at such time as it thinks the political conditions will permit it to extend its investigation, you are putting him in a triple disadvantage. It just seems to me that arbitrary limits really are not needed. No independent counsel, or not very many of us, want to stay around any longer than we can see some probability of producing something.

MR. CUTLER: I am prepared to stipulate that you needed six years to complete your investigation and that you could have persuaded the —

JUDGE WALSH: Would you put something down in writing now?

MR. CUTLER: And that you could have persuaded the Attorney General, and the court if necessary, that you needed the six years. But what is wrong with having an annual check of that? What is wrong with having to show at the end of a year that you need more time?

Let us take these very simple factual cases of Secretary Cisneros, who paid some money to his mistress who then taped a conversation, or the Espy case, even though I certainly can see recommending that Secretary Espy should resign because he was continuing as a cabinet officer as if he were still a Congressman. But both of those have now gone on for more than three years although they are very simple factual matrixes to deal with. Should there not have been a need to get on with it earlier

or at least to have to explain to the Attorney General and the court why it was taking so long?

JUDGE WALSH: You can either have a really independent counsel or you could have a quasi-independent counsel who then shares his responsibility with the court and/or with someone else.

MR. CUTLER: He is independent. He has got a year appointment subject to extension.

JUDGE WALSH: I think that we need to realize that every six months the independent counsel has to report on every penny he spends to the court and also to the oversight committees of Congress, so he is not off there without anybody watching him. And he has following him the best newspaper reporters probably in the world. The Washington press corps is just outstanding. They know what is going on. They watch who is going in and out of the grand jury. They have a pretty good idea of progress or lack of progress. It is not as though he is off in a quiet corner with nobody knowing what is going on. He is not. And, as I indicated earlier, in order to protect his public position, he will voluntarily file interim reports explaining his situation.

But it just seems when you ask, you get a judge who knows nothing about the investigation, and the judge who appoints the independent counsel then reviews his expenses but really has no participation whatever in the merits of the investigation; he does not want it. It is not part of his job. And to draw him into approving the continuation of an investigation draws a federal judge into the merits of the investigation that is being conducted. I think that outlines the two sides to it.

PROFESSOR FLEISSNER: Judge Bell?

JUDGE BELL: I would say that this whole matter could be mooted if we would simply provide that the independent counsel work full time. Then, we would not be having this discussion I do not think.

PROFESSOR COX: I would do that too.

JUDGE WALSH: I think we would all agree on that. Maybe not.

MR. CUTLER: I concede that you did work full time.

JUDGE BELL: Having said that, I am going to add a personal note. I have a law partner who is a special counsel, and he does not work full

time. Nevertheless, I say if you are going to do it, work substantially full time. If it is important enough to have this procedure, then I think you ought to work at it full time.

PROFESSOR FLEISSNER: Once an Attorney General requests an independent counsel, there is a special division of the United States Court of Appeals that appoints the individual to be independent counsel. Now, that was upheld as constitutional in *Morrison v. Olson*, and my question to the panel is whether any of you would like to see a change in the manner of the selection of an individual independent counsel? Mr. Cutler?

MR. CUTLER: I would change that because of the events of the last few years. The whole idea of having an Independent Counsel Statute is to persuade the public that the person in charge of the investigation, the independent counsel, will be selected in an impartial nonpolitical manner, and that he will, indeed, behave impartially and nonpolitically. Because of the fact that Judge Sentelle, who is one of the members of this special panel that selects the independent counsel, did have a relationship with Senator Faircloth—who is totally anti-Clinton on everything and taking an active part in the Senate Banking Committee hearings and because Judge Sentelle's wife was employed in Senator Faircloth's office, there was an appearance that the decision to take out Bob Fiske—who had been appointed as an Attorney General's Special Counsel during the hiatus of the applicability of the independent counsel law that the Republicans had simply refused to extend—there was an appearance that the appointment itself was political. And Ken Starr, for whom I have a great deal of respect, did make, in my judgment, some errors in judgment which fed that appearance of politicization. I think that method has shown to be a failure as we do not have the confidence either in the panel that does the appointing or in the actual appointments now that we used to have at the very beginning of this statute when people of quite high stature were selected and they finished their jobs very promptly.

What I would favor, and there are two ways of going, one would be to provide that the President nominates, by and with the consent of the Senate, some five or ten potential independent counsels who are selected because they are nonpartisan in the political sense, and experienced federal prosecutors at some point in their career, which Ken Starr incidentally was not. When a need for an independent counsel comes and the Attorney General requests an appointment, the special panel selects from that panel of ten who have been previously confirmed and

who meet the tests of nonpartisanship and independence and in whom the public presumably has confidence, and one of those is selected.

Another way of doing the same thing is doing what goes on in Britain and Northern Ireland, where there is an office of Public Prosecutor separate from the Attorney General, who is in charge of all prosecutions involving what we might call ethical crimes by public officials. And you would have a continuing office that would deal with such cases in the category of very high government officials of the incumbent administration. But in either of those ways, I think you could restore public confidence in the method of appointment and the caliber of the individual who is selected.

PROFESSOR FLEISSNER: Judge Bell?

JUDGE BELL: I would agree with Mr. Cutler's suggestion, particularly the one about a standing panel. The public has no way of knowing how these people are selected. We know that this panel of judges picks them, but do they come from some list or just how does one end up being a special counsel, or being asked to do that? I think the public is entitled to know that. So I also think if we speak of accountability, if you agree to have your name submitted and you have been confirmed by the Senate to be on the standing panel, then you are subject to the same accountability as any other person would be who has been selected for public service. I think that would be a good step, a good move forward. I am saying this even though I oppose the statute. I want to do away with it. But in the event I lose, I would like to make it better.

PROFESSOR FLEISSNER: Professor?

PROFESSOR COX: I disagree with Lloyd Cutler for the same reasons I have disagreed with him on several other things. I think he really envisages a statute that has much the breadth of the present statute. He really envisages prosecution as the main job. That is at odds with my fundamental conception of what is needed.

What is needed is someone of stature, not willing to go simply on a panel to be called on from time to time, to be a special prosecutor, but someone who will accept the post only because it involves the President of the United States or someone of almost equal importance. And I, while judges may make mistakes of appearance or worse, I think on the whole a panel of judges is the least likely to make mistakes and lend a political atmosphere to such a step as appointment of this independent counsel.

PROFESSOR FLEISSNER: One way that an independent counsel functions differently from a normal prosecutor is there is a requirement at the end of the investigation that a report be written. They are often made public. The law has changed recently so that the prosecutor is no longer under an obligation to explain prosecutions that he or she did not bring, where they decline prosecution, but they still have to file a report. Would any of you like to see changes in the reporting requirements of the Independent Counsel Statute?

JUDGE BELL: I would not. I think the report is a good thing. And I think it would be of great use if the special counsel occasionally would decide, and the Attorney General decide, not to prosecute someone and to say that, to explain why you did not do it. Just let the public have the facts. I think that would be a very useful tool, rather than telling how hard you worked and all that sort of thing.

PROFESSOR FLEISSNER: Professor Cox?

PROFESSOR COX: I think the report is a good thing, but I think what it covers and its tone is very important. I think a report that says I have decided there is no sufficient basis for prosecution, but there is a lot of evidence that suggests that "X" may well have done thus and so but we cannot just prove it. And as to "Y," I think he has revealed that he has no sense of ethical standards but he has not been guilty of any criminal misconduct. So on and so forth. I think he should report in rather general terms, and if he reports that prosecution is not warranted, he should clear the man and not say a lot of things implicating or throwing doubt on that man. Or, if it is vice versa, if he goes ahead, of course he needs to seek a grand jury indictment.

PROFESSOR FLEISSNER: Judge Walsh, on the issue of the report, when you wrote your report, the statute still required a discussion of —

JUDGE WALSH: Why we did not indict.

PROFESSOR FLEISSNER: That is correct.

JUDGE WALSH: In other words, it is unlike the usual U.S. Attorney situation where frequently, in the hundreds of cases going through his office, it is not known that somebody was investigated by a grand jury and it is just forgotten and he is not in any way exposed to unfavorable publicity and it goes away. But in the independent counsel's case, there has already been publicity when the matter has been referred to the

independent counsel, so there is nothing secret about it. And then you get into the question of why, if the Attorney General asks the court to appoint someone to investigate and possibly prosecute, why did you not prosecute?

And I think the classic example of the value of a final report was that of Leon Silverman in the case of Secretary Donovan, who was investigated for possible improper relationships with union officials. Leon wrote a thousand page report as to why the witnesses were not credible and why there was no indictment. Now, it seems to me that was a report that was valuable to Secretary Donovan, valuable to the public so they knew what happened, and it was a useful thing.

Now, it is a matter of judgment if a reporting independent counsel goes too far or is unfair. But even there, there is a safeguard because at the same time his report is published, every person mentioned in that report is invited to comment and have his comments already in the hands of the court for simultaneous release. So, if the independent counsel says I did not prosecute Mr. So-and-so because of X, Y, and Z, there will be a simultaneous comment being released by Mr. So-and-so that X, Y, and Z never existed and that the independent counsel's suggestion that it did exist is clearly wrong. So the public gets both sides at the same time in its explanation as to why no action was taken.

MR. CUTLER: I agree the reports are useful, but I would like to see something in the statute, or at the very least continued statements, reiterations by the press, by law school faculties, and by the Bar that there is, even in the case of an indictment, a presumption of innocence. We have gotten to the stage now where not only has that presumption of innocence disappeared when a public official is indicted for this kind of a crime, but we have gotten to the point where if an independent counsel is requested, that convinces most of the public that some crime must have been committed, and we need to do something about that. It is a lost part of our tradition, this presumption of innocence.

PROFESSOR FLEISSNER: Judge Bell?

JUDGE BELL: Now you are coming around to my side. That is one of the worst things about this law: how unfair it is in operation. By simply announcing that somebody has had a special counsel appointed to look into their affairs, you treat people differently from the ordinary defendant in the federal system. When a grand jury is investigating someone, it is not known. It has to be kept secret. So why did we single out public officials for this mistreatment? That is a very good point. I am glad Lloyd and I are on the same side.

PROFESSOR FLEISSNER: Let me raise the issue of parallel congressional investigations, and I know Judge Walsh and Professor Cox dealt with that issue in investigations they presided over. Is there anything that could be done as part of the independent counsel law to restrain the Congress or take steps to protect the integrity of the independent counsel's investigation against congressional hearings, congressional grants of immunity, and the like?

PROFESSOR COX: How could you?

JUDGE BELL: That would be a violation of the separation of powers. The Executive cannot tell the Congress what they can do and cannot do. That is one of the problems about it. Judge Walsh alluded to that, that it caused him a lot of problems. It is going on now, for example. While the Attorney General is making a study, the Senate and the House are having hearings on the same subject matter. But I do not know that there is anything you can do about that under our system.

MR. CUTLER: Well, there is something the independent counsel can do about it if the independent counsel recommends against the grant of immunity and Congress goes ahead. The independent counsel has the power to resign. He can say with full justification, "This is your law and you wanted an independent counsel to conduct an investigation, and now you are preventing me from doing what I think is correct in the conduct of the investigation, so go find a new independent counsel."

JUDGE WALSH: In Iran-Contra there was a parallel investigation by a joint committee—two committees—of Congress. Under the law, there is no question they have the power to grant immunity whether the independent counsel or any prosecutor or Attorney General likes it or not. The ultimate decision is with the Congress. They are first among equals in political powers, and I think that is the way it should be. I think the congressional committees in Iran-Contra were misguided into thinking that they could grant immunity and the prosecutions could still survive. I warned them that I did not think that was true, but their counsel had a different view.

Now, after they had granted immunity, at a time when there was no holding that that was fatal, we went ahead and successfully prosecuted North and Poindexter anyhow. But then both of those were reversed. And since the reversal of those cases, with the opinions that were written—which suggested that the mere public exposure of a witness's testimony made it necessary to prove that no witness, no matter how many there were, had the slightest impact from it—that had to make it

clear to Congress they cannot grant immunity and expect prosecution, too. And since then I think they have been very decent. I think that they, in the investigation in the Housing area, have not granted immunity. I think in Whitewater they withheld immunity at Bob Fiske's request. And I think it is working out very decently.

PROFESSOR FLEISSNER: Professor Cox?

PROFESSOR COX: It was a very little problem in the Watergate affair, largely because both Senator Ervin and Senator Baker, the Republican leader, were very responsible in their conduct. I did differ with them about whether they should put on television a lot of testimony of John Dean and others—not because they would affect the prosecution—John Dean had already told his stories and they were not offering him immunity—but because as the decisions of the Supreme Court stood at that point, they seemed to me rather to suggest that the publicity would make any criminal prosecution impossible, certainly any trial in the District of Columbia. But Senator Ervin would not listen to that, and I think maybe our pressing forward in an effort to get the Court to enjoin them was a mistake. I do not know if there have been any hearings that interfered since then. I do think that a general change of attitude in Congress is necessary to make any statute, even revised the way we have suggested, work because it is clearly treated by at least one party, or many of the members of it, as a political weapon. Appointing independent counsel is treated as advancing the hunt and giving, as I hope my talk before has made clear, an altogether wrong impression of what is being done.

PROFESSOR FLEISSNER: Do you think that an independent counsel should be appointed on the campaign fund-raising allegations?

JUDGE BELL: I would not want to comment on that.

MR. CUTLER: As for me, I have full confidence in the independence and the integrity of Janet Reno, and she will make the decision the way she reads the law.

JUDGE WALSH: It seems to me that the Attorney General first has to decide whether the laws that are for possible consideration are useable as a vehicle for prosecution. I am not departing from Archie Cox's view that you should not start out feeling you have got to prosecute no matter what. It is a matter to be decided with care. But if a law is riddled with ambiguities, at least to those of us from the

outside, to decide whether an ad is a candidate's ad or an issue ad, that kind of thing, or whether solicitation takes place from where the phone call is made or where it is received, I think she would perform a service in deciding whether or not it is within the policy of the Department of Justice to try to investigate that kind of a matter under a threat of criminal prosecution or whether it should be left to some civil disposition.

PROFESSOR FLEISSNER: Professor?

PROFESSOR COX: I think Judge Walsh calls attention to a question that has not been resolved. Where the meaning of the statute is uncertain, ambiguous, on one interpretation there have clearly been violations, and on another interpretation there have not. Is it the Attorney General's job to interpret it in the first instance or is it something he leaves to the independent counsel to go and get a judicial determination?

JUDGE WALSH: I would say that when we are talking about our basic election law, the way in which we elect the most important candidates in our government, that it should not be left to a transient, no matter how great a guy he may be. That is the Attorney General's responsibility in the first instance, and she is going to be in communication with Congress. If Congress wants an independent counsel, she is in the position, should she see fit, to say, "Give me a law which is comprehensible and we will follow through." But to talk about criminal prosecutions of a law which is riddled with ambiguity invites, first, constitutional review and in the end an interpretation that is going to be probably defeating prosecution.

PROFESSOR COX: You may be right. But this same thing, it seems to me, has never been fleshed out for debate clearly.

JUDGE WALSH: Let me make this point. The same thing came up in connection with classified information. We were deprived of classified information that we thought was critically important. We thought we were deprived for no reason. Now that is a decision that was withheld by the Attorney General and never transferred to independent counsel. And it seemed to me that that is the way it should be. I never asked Congress to consider giving it to an independent counsel because I did not think a transient should be making decisions about national security where he has no deep background in that area. And it seems to me that there are areas where the interpretation of the law should be in the

hands of those who are permanently stewards of it, rather than in a transient.

PROFESSOR FLEISSNER: Judge Bell?

JUDGE BELL: I was going to say that the question is in the nature of a poll, and I think it is very unfortunate that we run polls almost every day to tell the Attorney General what she ought to do. She is a federal officer sworn to uphold the Constitution, and she will make this decision whenever the time comes to make it. And I do not believe that polling helps a lot in such a situation.

PROFESSOR FLEISSNER: Let me pose a final question, drawing on your long careers of public service. Could you recount for us an instance from your career in public service where you were faced with a crisis that required difficult decisions to be made and indicate how it is that people who may be in similar situations in the future should confront those kind of difficult issues? Does anybody want to lead off?

PROFESSOR COX: I am not sure I have an answer as to how anyone should approach a difficult decision. It is hard for me to think of any more difficult decision in my life than the one that was presented during the week before President Nixon dismissed me, or at least caused my dismissal.

The decision of the court of appeals came down at the end of the preceding week and gave him roughly a week in which to stay the mandate in which he might seek Supreme Court review. Being in touch with Elliott Richardson, the Attorney General, and therefore indirectly with the White House, it became fairly clear that he was not going to seek Supreme Court review and that he was going to disobey the court order, or the subpoena. It became fairly clear, oh, five days before the final Saturday, and the question of what I should do was anguishing.

Today it looks as if it all played out the way it was bound to play out, but at the time it was far from clear to me that if President Nixon followed that course and if I persisted in seeking enforcement of the court order, presenting a confrontation, how the law could prevail. Clearly the rule of law ought to prevail. Clearly if I were to back off, it would not do the job I had agreed to do and it would also greatly weaken the rule of law.

But suppose I persisted and he disobeyed, what then? There is no way a court can enforce an order against the President of the United States. What happens? Well, the answer has to be that the public has to rise up morally and politically itself and through its very avenues of

expression, including the Congress and other representatives, and morally and politically overwhelm the disobedient President. But would that happen? Or would you be like the little boy in the famous story of the Eastern potentate who had the marvelous raiment, and all the crowd would bow down worshipping him, his power and his marvelous clothes until the day a little child blurted out, "Why, the Emperor hasn't got any clothes!" Would I not be doing that to the rule of law?

After all, if you look in history, there were Presidents who did disobey the courts. There was Franklin Roosevelt who prepared a fireside chat explaining what he expected would be his disobedience of an adverse court decision. But then the Court did decide in his favor. Nixon had been overwhelmingly re-elected less than a year before. How could you be sure what the result would be? Of course, the only way out of the dilemma was to find a compromise, a real compromise, that provided the tapes as evidence but protected any other interests the President had in any other part of the case. And I struggled to work that out for three days.

There were also, I suspect, personal things that come into these moments of anguish. I kept going back, "Who was I to be forcing a confrontation with the President of the United States?" I think I thought that way, anyway. My memory kept jumping back to a conversation with my father when I was about twelve. A friend of his had given up a trip that the friend and his wife had very much wanted to make when President Coolidge had asked him to do something. And I had gone to father and said, "Father, why did Mr. So-and-so give up that trip?" And the words were very clear: "When the President of the United States asks you to do something, you do it." I kept remembering this. So I do not know; you muddle along the best you can with this and hope that in the end you will do the right thing.

PROFESSOR FLEISSNER: Judge Walsh?

JUDGE WALSH: The question is a critical decision?

PROFESSOR FLEISSNER: Yes.

JUDGE WALSH: Well, probably in Iran-Contra there were two: Whether to go ahead after North received immunity and whether to indict him on a fragmentary case before he received immunity and take the wind out of Congress's sails. And it was my conclusion that that might be the smart thing to do, but I did not think it would be the correct thing to try to beat Congress to the punch. That way they had the upper hand. They had the responsibility for making the decision

whether immunity should be given, but once they had made that decision, it was not up to me to try to frustrate it by indicting him in the hope that he would not testify anyhow. And then after they granted him immunity, the decision that we should go ahead was somewhat easier because the cases were not clear cut enough that I could say, "You have destroyed my case," with utter conviction.

PROFESSOR FLEISSNER: Mr. Cutler?

MR. CUTLER: Well, from the standpoint of being the White House Counsel, the most difficult decisions are the extent to which you can counsel a President who is the subject of an independent counsel investigation. And there are two aspects of it. One is whether there is or is not an attorney-client privilege between a White House lawyer and his boss, the President, and the other people who are on the President's staff at the White House. And the second is whether or not to assert—even if there is some attorney-client privilege—whether it is appropriate to assert that privilege or executive privilege, when the effect of turning over all the documents and the testimony is going to be to breach whatever confidentiality there is still left in communications between a President and his advisors on what he ought to do on matters of real policy, not just personal conduct, but foreign policy, affirmative action policy, all sorts of other things.

From an institutional point of view, it is extremely important to preserve executive privilege although when you get to a contest with the grand jury, of course, it can be left to the court to decide document by document or witness by witness whether the testimony is really essential to the grand jury, which is essentially what the Nixon tapes court did. But for any President who thinks of the long term importance of executive privilege, which is almost gone now, the short term adverse political effects of pleading executive privilege or lawyer-client privilege are overwhelming. If you plead it, if you assert it, then the President is covering something up. There must be something really wrong here. And in an endeavor to show you are not covering up, you virtually give away executive privilege. It was given away in the Iran-Contra congressional hearings almost entirely and also before the independent counsel. It is a very difficult problem, and I think we have decided it on political grounds up to now—short term political grounds—rather than long term interests of the Presidency as an institution. And even the Republicans, who are the ones who are going to say cover-up today, are seeming to forget that some day they will occupy the White House again themselves.

PROFESSOR FLEISSNER: Judge Bell?

JUDGE BELL: Well, I have been on the bench and been the Attorney General, too, and there are a lot of decisions to be made. I have always thought that people in the private sector have hard decisions to make. We all have decisions to make in life. I do not have a lot of patience with people that agonize over decisions. If you have a job to do, you ought to be like Harry Truman—if you cannot stand the heat, you ought not to be in the kitchen. So you have got to make decisions. But the first thing that I have always done as a public person is to see what the law required. If the law requires you to do something, then do it. If you have any discretion, then do what you think is right. That is just a matter of conscience. Whatever you think is right in your heart. When I was a young judge, we had a judge from Texas named Joseph C. Hutcheson, and I learned a lot from him. He said the art of judging was to listen to the case, read the briefs, listen to the lawyers, and then decide what the right of the case was. Once you decided what the right of the case was, he said, then support it as best you can. And I suppose that is what making a decision is. Decide what the right of the matter is, make the decision, and do your best to support it. Thank you.

PROFESSOR FLEISSNER: There are two items of business left. The first one is I would like you to join me in thanking these four distinguished gentlemen. [Applause] Second, I would like to introduce Bryan Scott, the Editor in Chief of our Law Review, who would like to make a presentation.

MR. SCOTT: Thank you, Professor Fleissner. On behalf of the Mercer Law Review, we would like to thank you for coming and joining us today. We appreciate your coming to Macon and sharing your wisdom with us on the Independent Counsel Statute.

As a token of our appreciation, the Law Review wanted to get you something that would remind you of your visit here in Macon and that had a Georgia flavor to it. We decided on something that is a little out of the ordinary. It is a book by Sidney Lanier, who was, as many people in this theater know, a Macon native who wrote several nationally recognized poems, such as "The Song of the Chattahoochee" and "The Marshes of Glynn." On the inside cover of the book we have a plaque which says, "Presented by the Mercer Law Review in grateful appreciation for your participation in the Independent Counsel Statute: A Symposium. Mercer University School of Law, Macon, Georgia, October 27, 1997."

We do appreciate everything that you have done, and if you would, give our participants a round of applause again as I pass out these books.

Before we close, I would like to extend a special thank you to Brian Max, who is our Leads Edition Editor. We appreciate all that he did. As far as the Law Review is concerned, Brian was the primary participant who put this together. I would also like to thank Whitney McMath and Yonna Shaw for the work that they did putting this Symposium together. I want to especially thank Professor Jim Fleissner, who made the contacts to these individuals and did much of the work and planning for this Symposium. Without him this could not have been possible. And, as you saw, he coordinated the roundtable discussion today. We appreciate everything you have done, Professor Fleissner.

I want to thank all of you for coming. We are grateful for the support of the law students and alumni and the Mercer community, and we thank you for being here. We are dismissed.