



COMMENT LETTERS

TO

FINAL REPORT

of

INDEPENDENT COUNSEL DAVID M. BARRETT

IN RE: HENRY G. CISNEROS

COMMENT LETTERS

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United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 30 2005

August 30, 2005

Special Division

Ms. Marilyn R. Sargent
Chief Deputy Clerk
United States Court of Appeals
for the District of Columbia
333 Constitution Avenue, N.W.
Room 5409
Washington, D.C. 20001

Re: Sylvia Arce-Garcia

Dear Ms. Sargent:

We represent Sylvia Arce-Garcia a subject of investigation and charges by the Office of Independent Counsel ("OIC"). We write briefly to address some of the statements and material contained in the final report of the OIC. While Ms. Arce-Garcia was charged by the OIC, that Office offered to and then did drop the charges against her pursuant to a deferred prosecution agreement.

To begin with, the inclusion of Ms. Arce-Garcia as a subject and as someone who was ultimately charged is substantial evidence of the flaws in the Independent Counsel procedures and law (that now has expired). Ms. Arce-Garcia was a long-standing assistant to former Henry Cisneros before he was nominated and served as HUD Secretary. She carried out administrative duties for him in all the time she worked as an assistant. She certainly was not a principal in the companies and endeavors of Mr. Cisneros and yet her carrying out administrative functions (e.g., making deposits, responding to questions as Mr. Cisneros requested) caused her to be named in the indictment brought by the OIC. With the normal constraints and procedures utilized by non-special prosecutors, such charges would not have been brought against someone like Ms. Arce-Garcia. While the charges were ultimately dropped, Ms. Arce-Garcia had to sustain the burdens and expenses associated with the investigation and case for some time.

The report does not emphasize Ms. Arce-Garcia's willingness to cooperate with the original background investigation of Mr. Cisneros or the various inquiries that led to charges being filed. She could have refused to participate in the process and saved herself the allegations that led to the charges, but she agreed to be interviewed and provide information all throughout the process.

Finally, the report suggests that Ms. Arce-Garcia participated in an alleged conspiracy to assist Mr. Cisneros with the hope or expectation that she would be rewarded with a federal

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Ms. Marilyn R. Sargent

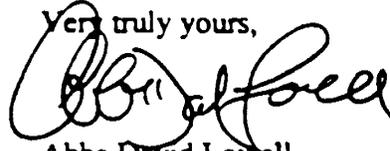
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August 30, 2005

job. That implication demeans her considerable skills and her long-standing employment with Mr. Cisneros. Mr. Cisneros relied on Ms. Arce-Garcia for assistance for years and years before he was named to President Clinton's cabinet. He has relied on her after his public service. It is wrong and unsupported for the OIG to insinuate that Ms. Arce-Garcia did anything with the expectation of being financially rewarded. The long record of her service is to the contrary.

This OIG investigation, the report of which is being filed nearly a decade after the inquiry began, provides a good example of why the independent counsel process was flawed. However, one benefit of the law is the provision that those involved, like Ms. Arce-Garcia, may respond to the report. She appreciates the opportunity to do so.

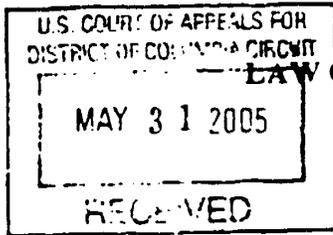
Very truly yours,

A handwritten signature in black ink, appearing to read "Abbe David Lowell". The signature is fluid and cursive, with the first name "Abbe" being particularly prominent.

Abbe David Lowell

cc: Ms. Sylvia Arce-Garcia

United States Court of Appeals
for the District of Columbia Circuit



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FILED MAY 31 2005

Special Division

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Mr. Mark J. Langer, Clerk
c/o Marilyn R. Sargent, Chief Deputy Clerk
United States Court of Appeals
District of Columbia Circuit
Washington, D.C. 20001-2866

Re: Division No. 95-1, *In Re: Henry G. Cisneros*

Dear Ms. Sargent.

Pursuant to the Court's Order in the above referenced cause and your letter of March 1, 2005, I traveled to Washington, D.C. to review those pages of the Independent Council Report having to do with myself. Having done so, I would ask that the Court include the following materials in the report that were not in any of the materials that I reviewed.

The witness Linda Medlar Jones disputed from aspects of the affidavit that she had signed for me which was attached to her Petition for Writ of Habeas Corpus attacking her conviction in federal court in Lubbock, Texas. While numerous references were made in the pages I reviewed to that Petition and to her Affidavit and her credibility, no mention was made of the fact that I was subpoenaed to appear in federal court by the Defendant because of allegations (which I did not witness first hand) by Ms. Jones that certain information contained in her affidavit was either inaccurate or was placed in there without her permission. At the pretrial hearing I approached Judge Stanley Sporkin, U.S. District Judge, and at that time was advised of the allegations by Ms. Jones. At that point, under the Rules of Professional Conduct, I was obliged to present to Judge Sporkin the handwritten statement by Ms. Jones which was copied word for word and attached as her Affidavit to the Writ of Habeas Corpus. The handwritten statement was edited for capitalization, punctuation and spelling errors only. A copy of that statement was marked as an Exhibit and placed in the court record by Judge Sporkin. Because there are references made to the typed Affidavit attached

Mr. Mark J. Langer, Clerk
May 27, 2005
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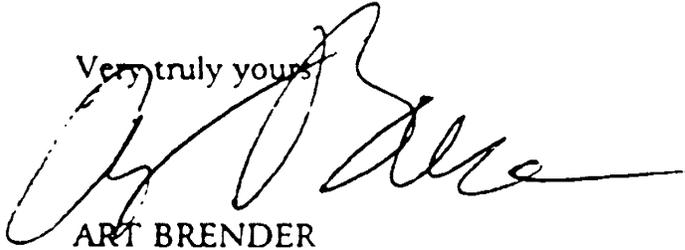
to the Petition for Writ of Habeas Corpus, I believe the handwritten statement by Ms. Jones should be included in the record of this cause as well as the sworn testimony by Ms. Jones in which she denied portions of the typed Affidavit.

I believe this is necessary so that those persons reading the Independent Council's report can accurately judge the credibility Ms. Jones.

The Independent Council's report should also have attached to it the sworn statement of the psychiatrist from the Federal Medical Facility in Fort Worth, Texas, who attested to the mental condition of Ms. Jones. Since this witness was a government employee, I believe that testimony is necessary in order to judge the credibility of Ms. Jones.

Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Art Brender', written over the typed name 'ART BRENDER'.

ART BRENDER

AB/sed

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November 8, 2005

United States Court of Appeals
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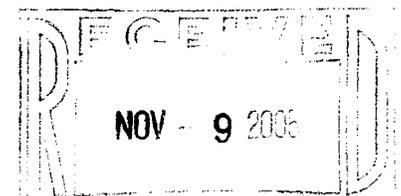
Special Division

BY HAND DELIVERY

Marilyn R. Sargent
Chief Deputy Clerk
United States Court of Appeals
District of Columbia Circuit
United States Courthouse
Room 5409
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866

Re: In Re: Henry Cisneros, Division No. 95-1

We are proud to have had the privilege of representing Henry G. Cisneros, the former Secretary of HUD, since the time he was indicted by the Office of Independent Counsel Barrett ("OIC") almost eight year ago. In September 1999, Mr. Cisneros pled guilty to a one-count misdemeanor of having intentionally made the false statement to the FBI that he had never paid Linda Medlar more than \$2500 at a time, when he had in fact done so. Mr. Cisneros was sentenced to a \$10,000 fine, no jail, no probation, and no other sanction, and the OIC dismissed the 18 felony charges that it had brought against him, and agreed to bring no other charges against Mr. Cisneros for any other conduct that he had allegedly engaged in. In entering his plea, Mr. Cisneros expressed his sincere regret for his conduct and for the pain that he had caused his family and friends. Having made the statements that he felt were necessary and appropriate in open court, Mr. Cisneros returned to his family and private life, and that should have been the end of the matter. Indeed, Mr. Cisneros did not make any further comments then, and he does not intend to make any further comments now, six years later.



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However, as lawyers identified in the OIC's report, we were advised by the Special Division that we had the right to make our own comments, and we feel constrained to make certain observations, because the OIC's report exemplifies some of the worst aspects of the now-discredited independent counsel statute.

First, the independent counsel statute facilitated an unfortunate trend of "criminalizing" the political process. Issues of lack of complete candor in the appointment process -- generally about personal, private episodes in a nominee's life -- have traditionally been dealt with outside of the legal process. The threat of possible criminal investigation and prosecution that the independent counsel statute added to the already intense scrutiny a nominee faces surely has deterred many highly qualified people from devoting their lives to public service.

Second, the independent counsel statute effectively created a separate branch of government, with volunteer prosecutors essentially unaccountable to anyone for their judgments. We doubt that any seasoned career prosecutor, faced with the typical range of potential criminal matters to pursue and the need to make reasonable judgments within normal budgetary constraints, would have pursued the matters in the way they were handled by this office, or brought the charges that this OIC did.

Third, there is the tendency for an independent counsel's office to take on a life of its own. The OIC began this investigation more than ten years ago. Mr. Cisneros entered his misdemeanor plea more than six years ago, covering all matters with which he could have been charged. Contrary to published newspaper accounts, we and Mr. Cisneros had absolutely nothing to do with the OIC's investigation from the time Judge Sporkin denied a motion for media access to the altered Medlar tapes in October 1999 until we were given access to the OIC report in March 2005. And although the OIC has been publicly quoted as saying that the final report was filed with the Special Division in August 2004, and implying that we were responsible for more than a year delay in its release, we have no knowledge as to what in fact occurred between August 2004 and March 2005. We do know that the few legal issues that we properly raised after being given access to portions of the report this past March were promptly and efficiently briefed and expeditiously decided by the Court.

Fourth, the entire concept of a "final report" by an independent counsel is fraught with problems. It results in allegations of criminal conduct that are not

Marilyn R. Sargent
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brought¹, as well as charges that could have been decided by the adversarial process, but which an OIC knows it cannot prove. It permits prosecutors who enlisted with a specific target and agenda to spend years drafting a one-sided, selective presentation of "evidence," knowing that no lawyer or client would have the time, resources, or inclination to respond in kind. The very nature of the process gives the OIC a license to take liberties with the "facts," knowing that it would be wasteful and impractical for the subject of the report to make a detailed factual response to the OIC's presentation. Thus, we do not undertake to do so. Instead, a few general factual responses to the OIC's report underscore its fundamental flaws.

Mr. Cisneros' relationship with Linda Medlar was widely covered in the news media in 1989. After it became clear to Mr. Cisneros that the relationship could not go forward, she advised him that she and her daughter needed financial help, that women are treated differently than men when a personal matter of that nature becomes media fodder. In fact, she told Mr. Cisneros that she had lost an employment position when she was recognized and when her presence in the workplace generated complaints. Because of those circumstances, and only because of those circumstances, Mr. Cisneros helped her financially over a number of years. The available evidence made it clear that the assistance was not "hush money"; it was assistance to help a person whose difficult circumstances Mr. Cisneros had helped to create. Mr. Cisneros voluntarily disclosed the fact of the assistance to the President-elect, to the Transition Team, and to the other significant players in the appointment process. Indeed, discovery materials provided to us during our defense of Mr. Cisneros made it abundantly clear that the FBI was fully aware from numerous interviews that the amounts and timing of the assistance were being described differently by different people, but that it was immaterial in light of the disclosures that had been made to the persons to whom the Constitution commits the appointment and confirmation process.

¹ For example, the OIC gratuitously suggests that Mr. Cisneros improperly used his influence at HUD for the benefit of Ms. Medlar, but that there was "insufficient evidence" to pursue the charge. In accepting the misdemeanor plea, Judge Sporkin stated that "[t]here is no evidence in this case that Mr. Cisneros in any respect compromised any of his public responsibilities. At all times, he has faithfully discharged the duties of his office." Final Report at page IV-216 (emphasis added).

Marilyn R. Sargent
Chief Deputy Clerk
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To any neutral observer of the process, the resolution of the matter six years ago was a total collapse of the OIC's overblown case. The fact is that an 18 felony count indictment was resolved with a misdemeanor plea. That disposition could have been obtained by the OIC on day one, without the needless expenditure of millions of dollars and thousands of hours of resources by the parties, the Courts, and the American taxpayers.

The materials that are now being publicly released are simply an effort to "try" the case that the OIC could not win in Court in an adversarial process. The effort to portray the assistance of Ms. Medlar as "hush money" is meritless. It relies on a highly selective and one-sided description of the countless interviews and grand jury sessions conducted by the OIC. More fundamentally, it relies on tape recordings that were altered and distorted by Ms. Medlar, some so badly that the trial court ruled that significant portions could not be used as evidence. And although the trial court held preliminarily that other altered tapes could be used as evidence, it was only because Ms. Medlar, who had altered them, would be subject to full cross-examination about her "reconstruction" of the numerous alterations and deletions. Mr. Cisneros and his counsel have never been provided that opportunity. Yet the OIC, despite a frank acknowledgement that Ms. Medlar "is known to have lied repeatedly to government agents and others, and to have lied under oath," and that the evidence derived from her "should be regarded cautiously," Final Report at page IV-3, nevertheless proceeds to lay out a chronology totally dependent on her self-interested "reconstruction" of tapes that purportedly deleted all of the "threats" she claims she was making against Mr. Cisneros. In fact, the location and timing of the tape alterations (many of which are not noted in the final report's quoted tape excerpts) make clear that that was not the thrust of the deletions; indeed, it was clear from some deletions (such as an erasure made in the middle of a key sentence of Mr. Cisneros essentially to eliminate the word "not") that the purpose of the deletions was to remove evidence that was in fact exculpatory of Mr. Cisneros.

While the OIC has spent years writing a report about events more than a decade old, we have moved on to the representation of other clients. We boxed up and stored our files six years ago, and there is no purpose to be served by a time-consuming and costly project writing a point by point refutation of the case the OIC could have – but chose not to – present to a jury years ago. Having represented targets of independent counsel investigations on both sides of the political aisle, we

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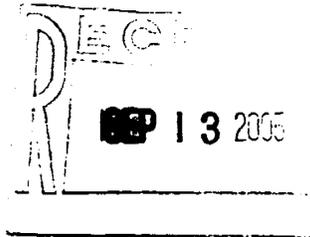
Marilyn R. Sargent
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November 8, 2005
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can say unequivocally that the only good thing about the current OIC report is that it is the final chapter written under an ill-conceived and dangerous statute.

Very truly yours,

A handwritten signature in cursive script that reads "Barry S. Simon".

Barry S. Simon



United States Court of Appeals
for the District of Columbia Circuit
U.S. Department of Justice

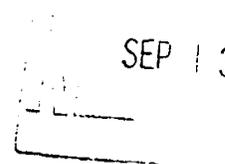
FILED JUN 29 2005

Special Division

Washington, D.C. 20530

June 28, 2005

Mark J. Langer
Clerk, United States Court of Appeals for the
District of Columbia Circuit
Washington, D.C. 20001-2866



Re: Division No. 95-1, In re Henry G. Cisneros
Statement of Jo Ann Farrington

Dear Mr. Langer:

I am writing to comment on the draft Final Report of Independent Counsel David Barrett.¹ The Special Division of the Court of Appeals has made available to me limited portions of the Final Report, and provided me with the opportunity to comment. I request that my comments be made a permanent part of the record of this matter, regardless of whether the Special Division determines that those portions of the Final Report in which I am mentioned should be released to the public.

The portions of the Report that were made available to me were heavily redacted and at times almost unintelligible. Furthermore, many portions of the Report were blocked out in the middle of sections discussing events involving me; why those portions of the Report should not have been disclosed to me is a mystery. Finally, the allegations in the Report involve events that began over a decade ago, and to which I have given little thought in many years. Obtaining and reviewing documents necessary to refresh my recollection about these matters has been difficult, and to a large extent impossible. Therefore, these comments necessarily reflect inadequate access to the contents of the Report itself, inadequate access to background documents, and a limited memory.

At the time of the events described in the Final Report, I was the Deputy Chief of the Public Integrity Section. My primary responsibility was the coordination, on behalf of the Attorney General, of preliminary investigations under the Independent Counsel Act. I am named in the Final Report, and apparently am viewed by Barrett as one of many attorneys in the Department of Justice who engaged in "questionable activity." These attorneys are alleged to

¹The views expressed in this letter are my personal views, and do not necessarily reflect the views of the Department of Justice. Specifically, I do not speak for the Department with respect to whether the release of its internal documents is appropriate, and assume that the views of the Department on that point have been sought by Special Division.

have “shied away from obtaining relevant evidence” concerning Mr. Cisneros, to have falsely claimed to the Attorney General that certain areas of investigation were conducted, and to have engaged in a “result-driven” analysis.

This response will address four areas. First, I comment on the Special Division’s responsibility to decide whether to publicly release this document, which maligns so many individuals. Second, I address the questionable legality of Barrett’s so-called “obstruction” investigation; it is my view that he was without jurisdiction to conduct his inquiry. Third, I provide some general observations about the contents of the Final Report, and finally, counter some specific factual statements in the Final Report.

Public Release

The question of whether and how much of this Final Report ought to be released publicly is entrusted to the sole discretion of this Court. As an individual whose conduct, motives and professional performance are criticized in the Report, I am in a poor position to object to release of the Report; any such objection inevitably would be viewed as self-serving. Furthermore, I recognize that there is considerable legitimate public interest in disclosure of how little was accomplished with the reported \$21 million of taxpayer dollars spent by this independent counsel. However, I urge the Court to consider carefully whether it is in the public interest to release the Report, at least in its entirety. Several factors militate against public release:

- The portions of the Final Report that I was permitted to review make damaging and wholly unsubstantiated allegations against numerous public servants and private citizens, in a document that carries the misleading veneer of being an official government report. Many “facts” are attributed to unnamed sources, and other “conclusions” are based on misunderstandings of the law and internal procedures of the Department of Justice and Internal Revenue Service. This document is neither well-enough reasoned nor well-enough supported to warrant publication with the approval of this Court.
- It is a fundamental perversion of the responsibility of a federal prosecutor to publicly air the results of a criminal investigation where no charges have been brought. The only setting in which a prosecutor may properly make such allegations public is open court, through the presentation of admissible evidence, in a setting entrenched with the traditional fundamental protections of our criminal justice system, including the right to confront and cross-examine witnesses. Both statutes and legal ethics rules restrict a prosecutor from public discussion of a case outside the setting of a trial. If the prosecutor brings no charges, his or her professional responsibility is to make no further public comment and certainly no public statement about the character or conduct of those investigated. In this case, neither the tax investigation of Mr. Cisneros nor the independent counsel’s lengthy but of course fruitless exploration of the internal decision-making processes of the Department of Justice and the IRS have been publicly acknowledged; this Court’s 1977 order granting the independent counsel limited tax jurisdiction remains under seal. Nevertheless, Barrett’s Final Report discusses both in detail.

During the 25 years of the history of the Independent Counsel Act, the Final Reports of the various independent counsels have varied widely, and a few have disclosed similar detail about investigations that led to no charges. However, the Court should consider the comments of the Watergate Special Prosecutor, the model for the Independent Counsel, on the appropriate contents of a Final Report:

This report contains no facts about alleged criminal activity not previously disclosed in a public forum. . . . [For the Special Prosecutor] to make public the evidence it gathered concerning the President and others who were not charged with criminal offenses would be to add another abuse of power to those that led to creation of a Special Prosecutor's office. The Federal Rules of Criminal Procedure prohibit the disclosure of information presented to a grand jury except as necessary in the course of criminal proceedings. The American Bar Association reinforces this stricture in its Code of Professional Responsibility and limits the circumstances under which attorneys involved in criminal investigations are free to make out-of-court statements about the details of their work.

Most important, in terms of the American constitutional system of government, is the notion of fundamental fairness for those who, after investigation, have not been charged with any criminal misconduct. This consideration is particularly important for a Special Prosecutor whose independence considerably reduces his accountability and who must be unusually sensitive to possible abuses of his power. It is a basic axiom of our system of justice that every man is innocent unless proven guilty after judicial proceedings designed to protect his rights and ensure a fair adjudication of the charges against him. Where no such charges are brought, it would be irresponsible and unethical for a prosecutor to issue a report suggesting criminal conduct on the part of an individual who has no effective means of challenging the allegations against him or of requiring the prosecutor to establish such charges beyond a reasonable doubt.

Watergate Special Prosecution Force, Report at 1-2 (1975)(footnote omitted, emphasis added).²

² When Congress reauthorized the Independent Counsel Act in 1994, it expressed similar concerns about the potential for abuse inherent in the Final Report requirement, and urged "restraint and responsibility" by an independent counsel in drafting the report:

Other federal prosecutors do not normally provide public explanations of decisions not to indict and, in deviating from this norm, independent counsels must exercise restraint. Power to damage

Many of the background documents relevant to this matter are the sort of sensitive documents that traditionally are afforded the strictest protection from public disclosure, and the prospect of their release is deeply troubling; however, it is impossible for an unbiased member of the public to assess the merits of the independent counsel's allegations without full access to the underlying records. To begin with, the draft Report contains extensive grand jury information, disclosure of which is ordinarily wholly foreclosed by Rule 6(e), Federal Rules of Criminal Procedure. While this Court has concluded in the past that some limited disclosure of grand jury information may be appropriate in the context of independent counsels' Final Reports, in this case, where no charges have been brought, the full force of the policy reasons for grand jury secrecy remain in play. Furthermore, the selective use the independent counsel has made of grand jury information is inherently misleading. The independent counsel should not be permitted to disclose bits and pieces of testimony, taken out of context, without full disclosure of the entire grand jury proceeding.

Nor is this concern limited to grand jury information protected by Rule 6(e). Many filings with this Court and this Court's resulting orders that are discussed extensively in the Report remain under seal, in part because they discuss sensitive issues affecting privacy concerns. Furthermore, it is not clear, based on the portions of the Report that were made available to me, whether the independent counsel is proposing to release the full record of the recommendations that were made to the Attorney General by the Assistant Attorney General for the Criminal Division, or the memoranda she received from the Deputy Assistant Attorney General for the Criminal Division and the Chief of the Public Integrity Section. These are extraordinarily sensitive internal documents, of a sort that are never publicly released. They reflect the internal advice given to the Attorney General by her advisors on matters entrusted to her discretion, include frank discussions of the credibility of witnesses and derogatory information about individuals, reveal the identity of confidential sources, openly discuss unsubstantiated allegations about both Mr. Cisneros and other citizens and include extensive privileged attorney work-product. The Department of Justice has strongly resisted efforts to make similar documents public in the past. I assume, of course, that each individual named in each of the background documents involved in this matter, as well as the Department of Justice, which has an institutional interest in release of its internal documents, has been contacted and permitted to comment.

reputations in the final report is significant, and the conferees want to make it clear that the final report requirement is not intended to authorize independent counsels to make public findings or conclusions that violate normal standards of due process, privacy or simple fairness.

With regard to an individual whose conduct was only tangential to that of the person for whom the independent counsel was appointed, an independent counsel should normally refrain from commenting on the reason for not indicting that person unless it is to affirm a lack of evidence of guilt.

H.R. Conf. Report No. 103-511, at 19-20 (1994) This independent counsel has wholly ignored this caution from the Congress concerning the discharge of his statutory responsibilities.

Nevertheless, while it appears plainly inappropriate to release these documents, the solution is not and cannot be simply to release the text of the Final Report without at the same time releasing the background documents. The Final Report refers extensively to these documents in misleading and inaccurate ways. Many if not most of the criticisms leveled by the independent counsel at the work of the Public Integrity Section are directly refuted or fully explained by the documents themselves, when read in full. It is my view that no reasonable reviewer could study the full record and agree with the independent counsel's preposterous conclusions – but it is also my belief as a career federal prosecutor that release of these documents would be a fundamental miscarriage of justice. I am fully aware of the seemingly irreconcilable tension between these concerns, and defer to this Court as to how it can best be resolved.

To summarize, this draft Report is an unfair and inappropriate assault on the legitimate interests of many individuals. While there are valid reasons for the independent counsel to be required to make some sort of public accounting for the extraordinary ride he has had at public expense, he has chosen to do so by slandering the public reputations of many honest and dedicated individuals, who have devoted their lives to public service. It is the responsibility of this Court to weigh these concerns and reach a decision that is “appropriate to protect the rights of any individual named in such report.” 28 U.S.C. § 594(h)(2). I depend upon this Court to do so.

The Jurisdiction of the Independent Counsel

It is left to this Court to determine whether the independent counsel's apparent disregard of the Court's explicit refusal to grant him jurisdiction over the so-called “obstruction” investigation in its Order of January 16, 2002, warrants further action. This entire investigation, insofar as it wandered beyond the matters assigned to him concerning Mr. Cisneros in 1995 and 1997, was ultra vires, inappropriate, and unlawful. The millions of taxpayer dollars that Barrett wasted in his meandering exploration of matters he had no authority to investigate can never be recovered.

Barrett spends a great deal of time in the Final Report pointing out that he had jurisdiction to investigate possible obstruction of his own investigation of Mr. Cisneros – but his investigation concerned no such allegations. Rather, he suggests that there was an effort to “obstruct” the Attorney General's preliminary investigations in 1994 and 1995, and then again in 1997. Of course, there was no such effort, but even if there had been, by definition it was not an obstruction of his investigation, which did not exist, but rather of the Attorney General's, a matter over which he did not and does not have jurisdiction.

As for the independent counsel's investigation of matters occurring in connection with his request for an expansion of jurisdiction in 1997, again he seems to be confusing his own investigation of Mr. Cisneros with the Attorney General's responsibilities under the Act. Until February 1997, he had no jurisdiction over any tax allegations concerning Mr. Cisneros, and therefore any “obstruction” that occurred before that date was certainly not of his investigation.

If Barrett believed there was wrongdoing by Departmental attorneys in their handling of the preliminary investigations it was his duty as a federal official to report that information to the Department of Justice – which has well-established procedures and an impressive record of investigating and, if appropriate, prosecuting criminal wrongdoing by its employees – for appropriate handling. It is important to emphasize this point; I am not suggesting that any perceived misconduct by me or others in this matter should not have been explored and resolved by the appropriate authorities. There are independent, well-trained investigators and prosecutors in the Office of Professional Responsibility whose job is to do just that – and who, I suggest, would have resolved this matter promptly and appropriately, at a fraction of the cost expended by the independent counsel. Rather, my point is that it was not Barrett’s prerogative to set off to do so on his own.

As a side note, the statute of limitations is five years, a matter which seems to have escaped the attention of the independent counsel, who continued his “investigation” for years after the running of the statute of limitations. These allegations did not come to the attention of the independent counsel at the very end of the five years; rather, he claims to have been “investigating” them from the beginning, yet somehow frittered years away without any meaningful progress. It is unprecedented, in my 25 years of experience, for a federal prosecutor to let the statute of limitations run under these circumstances without reaching a decision whether prosecution is warranted. For Barrett to assert that his investigation was “truncated” after a decade of investigation, or to blame his “limited resources” for his inability to promptly move forward and decide the issue defies reason; as Congress and the public are well aware, the budget of an independent counsel’s office was unlimited and largely unreviewable.

As Barrett acknowledges in his draft Report, the Department attempted to bring its concerns about Barrett’s apparent misunderstanding of his jurisdiction to his attention on several occasions, efforts which he ignored or chose to interpret as an attempt to frustrate his investigation. Unfortunately, because by definition the details of what the independent counsel was doing were unknown to the Department, because he refused to describe the matters he was investigating to responsible Departmental officials, and because of the Department’s natural reluctance to take steps that might interfere with whatever legitimate investigation the independent counsel might be undertaking, the Department found itself unable to resolve the issue. Finally, it appears that Barrett began to be concerned about the propriety of his actions, and engaged in a series of fruitless efforts to obtain a referral of his allegations both from the new Administration in the Department of Justice, which informed him that it saw “no actual evidence” to support his claims, and from this Court, which denied his request. Even that did not stop him, however, as apparently he then sent a subpoena to the Department of Justice for records, only to back down when it appeared the Department was not going to agree to his demands, and that its motion to quash the subpoena might result in a definitive ruling that his entire investigation was unlawful.³

³ I have no personal knowledge of these events; in its dealings with the OIG, the Department appropriately walled-off individuals who may have been potential subjects of Barrett’s investigation. I am relying on Barrett’s factual representations in the Final Report.

Barrett's abuse of his limited investigative authority may well interest those in the Inspector General's Office with the responsibility of pursuing fraud, waste and abuse by public officials. However, it is also a matter that should be kept in mind by any reader of this Final Report; this independent counsel has spent at least two years and more than \$2.7 million dollars (out of a reported more than \$21 million for the entire investigation) drafting a Final Report that is an attempt to cover up and justify his own unauthorized conduct. The Report should thus be reviewed with appropriate skepticism.

General Observations

I have never been asked about any of these events by the independent counsel. He has never requested an interview, submitted any questions to me, or subpoenaed me to testify before the grand jury. If he had done so, I would have said what I say today: There was no improper effort of any sort to block any investigation of Mr. Cisneros. I never heard, observed, felt, or communicated any pressure to tailor my recommendations on this matter in any way, either for or against the appointment of an independent counsel. There were vigorous and at times heated internal debates, but never was there anything beyond good faith, professional disagreements among us. My recommendations were based on my own personal assessment of the facts and the law, and were affected in no way by pressure from others in or out of the Department, concern about the possible consequences of the appointment of an independent counsel in this matter, or any interest in "protecting" Mr. Cisneros, whom I did not know and in whom I had no particular interest. Nor did I observe any conduct or hear any comments by any of the many lawyers who worked on this matter that would lead me to believe that any such inappropriate, much less corrupt, motive underlay their own recommendations on the matter.

Specifically, I would like to commend the ethics, impartiality, and legal acumen of Lee Radek, who was Chief of the Public Integrity Section, and whose conduct and motives are repeatedly maligned in this Final Report. It was an extraordinary privilege to serve under Mr. Radek, and it is outrageous that this Report suggests that this outstanding prosecutor who has dedicated his career to service in the Department of Justice engaged in any misconduct whatsoever. It is equally outrageous that Susan Park, a trial attorney in the Section who served under my supervision, and whose dedication to the work of the Department is beyond question, should be named as participating in any inappropriate or unprofessional conduct.

There was no fact that was knowingly misrepresented to the Attorney General by me or, to my knowledge, by any of the other individuals who worked on this matter. While there were disagreements among us as to some of the inferences that might legitimately be drawn from the facts, or the legal implications that attached, those disagreements were freely aired, fully discussed, and resolved by the Attorney General. If there was a conspiracy, it was shockingly inept, as we freely shared our recommendations with the FBI, seeking out and considering its comments, and then freely shared the documents which supposedly contained the evidence of our misdeeds with the independent counsel himself.

It was for many years my responsibility and my privilege to assist the Attorney General in the handling of independent counsel matters. I made dozens of recommendations on independent

counsel matters over the course of two decades. Sometimes I recommended in favor of appointment, sometimes I was opposed; sometimes the Attorney General, after hearing from all her advisors, agreed with my position and sometimes not. Never did I give any advice that was not, in my view, supported by the facts known to me and the law and the requirements of the Independent Counsel Act. This does not mean that I was always correct; good, competent lawyers can and often do disagree in their assessments, and sometimes are proven wrong in the course of events. Contrary to the independent counsel's assertion, this does not even suggest incompetence, much less corruption. I flatly deny each and every one of the accusations and innuendos in this Final Report suggesting that I or any of the other attorneys with whom I had the privilege to serve in this course of handling this matter engaged in any misconduct whatsoever.

The "conspiracy" that this Final Report suggests existed to protect Mr. Cisneros from investigation for tax offenses was truly a remarkable web. It spanned two Departments (Justice and Treasury), two Divisions within the Department of Justice, several Sections within those Divisions, and many, many lawyers, both career employees and political appointees. It stretched from career line attorneys through Section supervisors, Criminal Division officials, into the Tax Division, and apparently all the way up to the Attorney General herself.⁴ It required the complicity and silence of public servants whose dedication and honesty have never been questioned in any context before, through years of service in both Republican and Democratic Administrations. It was revived – indeed, became more focused – in 1997, long after Mr. Cisneros left office and political life altogether, long after Barrett was appointed and actively conducting his investigation, and it sucked in new coconspirators along the way. It even appears possible that Barrett believes that the conspiracy continued into the new Administration after 2001, which also refused to comply with Barrett's fishing expedition and resisted his subpoenas as based on an improper assertion of jurisdiction.

Yet Barrett never explains what he believes the point to this vast "obstruction" may have been. What were we attempting to accomplish and why? Did any of us even know Mr. Cisneros, other than as a name on the list of covered people under the Independent Counsel Act? Once Barrett was appointed to investigate Mr. Cisneros's false statements, why would we have engaged in criminal conduct two years later to try to keep him from investigating Mr. Cisneros's taxes as well? Were we all so fearful of displeasure from on high that we cowered before the prospect of recommending an independent counsel (in spite of the fact that we had done so without hesitation on other occasions, and would continue to do so in the years that followed)? If we were receiving such pressure, why would the Attorney General have gone ahead and sought appointment of an independent counsel anyway? And why would Barrett have been granted jurisdiction over one tax year (which effectively gave him the authority to examine, though not prosecute, Mr. Cisneros's taxes in surrounding years as well) when the Attorney General could have simply said no to any referral whatsoever? What was so special about this particular independent counsel matter that differentiated it from the others through the years in which we recommended appointments?

⁴ It is not clear whether Barrett believes the Attorney General was a victim or a coconspirator, though it is difficult to decipher how she could have been obstructing her own investigation. Indeed, it is not clear who among us he believes "put [our] personal, political, or institutional interests before the public interest," p. VI-1, or who the "high-ranking officials" are who were responsible for these misdeeds; he never bothers to be specific.

Surely, before a responsible public official would make such sweeping accusations against so many, he would have some actual evidence to support his suspicions, and perhaps even a theory as to what was going on and why. Nowhere in the portions of the Final Report that have been made available to me, however, does Barrett even suggest a motive that may have driven this "conspiracy," much less provide any facts in support.⁵ That is because none exist.

Finally, perhaps due to his inexperience as a federal prosecutor, the independent counsel has misread the record, assuming that a disagreement between FBI officials and DOJ attorneys must indicate that there was wrongdoing afoot. To the contrary, disputes and conflicts between investigators and prosecutors are common, and unfortunately they are sometimes bitter. Investigators and prosecutors alike care deeply about the work we do, we each play a decidedly different role in the criminal justice system, and though our ultimate goals in support of federal law enforcement are the same, our responsibilities at times diverge, leading to occasional misunderstanding and conflict. I fully understand the FBI's deep concern about an individual knowingly lying to it under any circumstances, and I understand its frustration at the Section's conclusion that such a lie, if it were not material, nevertheless would not be criminal. That concern and frustration, however, does not change the law, and does not make our conclusion an obstruction of justice. Indeed, I believe that the FBI agents who disagreed with us about this investigation understood that fact; it was Barrett who did not.

Specific factual comments

The inaccurate statements and unfair insinuations contained in this Final Report are too numerous to catalogue. Any reader of this Final Report should carefully review three additional documents, Public Integrity Section Chief Lee Radek's February 27, 1995, Memorandum recommending that appointment of an independent counsel to investigate Mr. Cisneros was not necessary, and the Attorney General's two filings, the first in 1995 and the second in 1997, seeking first appointment of an independent counsel and later expansion of his jurisdiction, and fully explaining her decisions. Taken together, these documents explain and refute most of Barrett's allegations concerning the work of the Public Integrity Section. I will but note a few glaring errors, focusing in particular on those statements directly concerning myself. Because of my personal involvement in the drafting of many of the documents criticized by the Attorney General, I will also discuss his allegations concerning those documents.

⁵ I do not take seriously as an explanation Barrett's dark reporting of his discovery of the fact that some Department of Justice lawyers, like many others who participated in the fierce debate over this statute over the course of its existence, did not believe that the Independent Counsel Act was good policy. As career prosecutors and public servants, we were and are used to the responsibility for enforcing statutes and policies with which we might not agree. That is our job, and certainly a philosophical disagreement with a statute would not tempt us to engage in a criminal conspiracy to block its proper implementation. In any event, as for myself, not long before these events, I assisted in the drafting of the congressional testimony of the Attorney General in support of reauthorization of the Act, and at the time was in full support of the statements therein. In spite of the outstanding public service provided by some independent counsels in the last decade, I concede that in the intervening years, I have come to believe I was grievously wrong to believe that entrusting such extraordinary powers to individuals without any effective means of oversight or supervision is the best way to handle such matters.

1. At page V-10, Barrett claims that he “did not know why the Attorney General had declined to recommend that [the OIC] be given jurisdiction over what appeared to be a prima facie case of multi-year tax fraud by a public official,” insinuating that he was kept in the dark about this. However, if he had any questions, all he needed to do was consult the Attorney General’s lengthy filing with this Court, which explains in detail the reasons why no referral was appropriate for tax years 1989, 1991 and 1993.
2. At page V-32, during the course of the initial inquiry, the draft Final Report describes a meeting at which “the FBI believed that there was a need to explore further what was on the Medlar tapes; Public Integrity indicated that the tapes did not warrant further inquiry and that the investigation should be stopped at that point.” This is nonsensical; Ms. Medlar’s allegations and the tapes that had been reviewed at that point on their face established sufficient specific and credible information to require a preliminary investigation, and the Section was already drafting a recommendation that such an investigation was necessary. Furthermore, although Barrett makes the puzzling statement that he “was never able to determine which DOJ officials recommended in favor of or against the initiation of a preliminary investigation,” he was provided a copy of this recommendation by the Public Integrity Section at the Section’s first meeting with him after his appointment.
3. In an interview in 2001, an anonymous source apparently claimed to the independent counsel’s office that seven years earlier, in October 1994, I had remarked to him that “We need to hurry up and shut the investigation down.” See page V-33. I have no independent memory of any such conversation, so am unable to offer more than speculation as to what this might have meant, assuming it was ever said. I can suggest that, in the context of the 30-day initial inquiry we were conducting, with the days ticking by, I may have remarked that it was necessary to “hurry up” and complete our inquiry. Why I would have said that we needed to “shut the investigation down” when at that very time I was drafting a recommendation to open the investigation is beyond me, and Barrett offers no hypothesis to explain the alleged remark; I suggest that Barrett’s “anonymous source” has a faulty memory.
4. At the initial inquiry stage, as described on page V-33, the FBI did want to engage in a wide-ranging investigation of Mr. Cisneros, and the Public Integrity Section did inform the FBI that our job at the time was to deal with the information we had pursuant to the procedures of the Act, which was the allegation from Ms. Medlar. Neither the Section nor the FBI had specific and credible information to suggest that Mr. Cisneros had engaged in any other misconduct, and under the Act, absent such information, we lacked the authority to investigate mere speculation.
5. It is true that the Public Integrity Section did not want the FBI to interview Ms. Medlar in the course of the 30-day initial inquiry; we did not have enough background information at the time for a full and complete interview, and we needed nothing from Ms. Medlar to inform the Attorney General’s initial decision whether the information in our possession was specific and credible. Both the Section and the FBI had a great deal to do in a very short period of time; unnecessary interviews at that point that could not inform the

decision the Attorney General had to make would be pointless and counterproductive. Ironically, when it came time later to interview Ms. Medlar after the preliminary investigation was underway, the FBI balked, claiming that it was unprepared to conduct an interview. Final Report at p. V-50.

6. The description of the Public Integrity Section's role in the conduct of initial inquiries and preliminary investigations at page V-2-3 is misleading and demonstrates Barrett's lack of understanding of the internal procedures of the Department. While the Section managed such inquiries on behalf of the Attorney General, it did not "determine the scope and course of the investigation." That was dictated by the facts received, and the specific issues the Attorney General was charged with resolving. Specific investigative steps, including which interviews were needed, were decided in close consultation with the FBI, with the Assistant Attorney General for the Criminal Division and the Attorney General herself, who was deeply involved on an ongoing basis in the progress of the investigation. Indeed, many of the interviews that were conducted in this investigation were done at the request of the Attorney General to resolve specific questions that she identified.
7. I cannot comment on the events within the IRS about which Barrett complains; I had no knowledge of the IRS proceedings other than that there was a tax inquiry underway, a fact that the Department learned when witnesses being interviewed by the FBI informed us that they had received IRS summonses. However, Barrett relies heavily on a internal IRS document which he dubs the "Improprieties Memorandum." The concerns of the CID outlined in the memorandum were presumably sent to the appropriate authorities within the IRS. The draft Final Report does not reflect any disciplinary action taken against IRS personnel, so the logical conclusion is that the allegations made by CID were determined to be unsubstantiated. Specifically, although I worked closely with the Tax Division to assist the Attorney General in her resolution of the 1997 tax referral request, to the best of my knowledge no improper disclosure was made to any DOJ attorney of the internal deliberations of the IRS.⁶ I certainly was not aware of any such communication.
8. At page V. 26, Barrett announces the "Results of the IC's Obstruction Investigation." He proclaims that two "inferences" can be drawn from his investigation concerning "certain [unnamed] DOJ officials." It might be anticipated that here, Barrett would finally lay out his theory as to why he believes that there was impropriety of such scope that it would warrant years of investigation, costing millions in taxpayer dollars.

First – Barrett proclaims that the Public Integrity Section recommended against appointment of an independent counsel. That, of course, is hardly an "inference;" our position was never a secret and was freely communicated to the Attorney General, the

⁶ It is true that after our analysis of the Roberts Declaration, when it was determined how unsubstantiated the tax allegations against Mr. Cisneros were, we may have strongly suspected there would be no referral from the IRS. Nor should it be surprising that two teams of attorneys, one within the IRS and one within the Tax Division, both trained and experienced in the review of criminal tax matters, reviewing the same information, would come to substantially the same conclusions, though Barrett and the drafter of the "Improprieties Memorandum" seem to find that suspicious. FR at p. V-12.

FBI and the independent counsel himself. It was also based on our legal conclusion, supported by analyses provided by other Sections within the Criminal Division, that Mr. Cisneros's misrepresentations to the FBI were not material and thus not prosecutable.

Second – Barrett announces that the Public Integrity Section recommended against appointment of an independent counsel to investigate tax offenses. Once again, no “inference” is required. The Section found no basis to conclude that Mr. Cisneros had committed potentially prosecutable tax offenses, and its reasons are reflected in the underlying documents in this matter.

This is it? This is the result of a multi-year investigation costing millions of dollars? And from this Barrett insinuates that there may have been impropriety – and even criminality – on our part?

9. At page V-41, the anonymous attorney within the Public Integrity Section is reported to have recalled in an interview in 2001 that in October 1994, I had remarked that it would be unfortunate if Mr. Cisneros were to resign. Again, I have no recollection of such a remark or its context; it was not and is not my practice to maintain notes or records of my conversations with my colleagues. However, recall that in October 1994, the initial allegations against Mr. Cisneros had just been received, and our inquiry was just beginning; it was unclear how serious the matter was or how far the issues extended, but the drumbeat of speculation about how long he would last in office had already begun. It was indeed a concern of mine – and many others – over the years that given the intensity of Washington politics, public servants caught up in scandals of various sorts were often forced to decide to leave office prematurely. Understanding the consequences of the work we do is part of our responsible stewardship of the public trust.
10. The same anonymous attorney purportedly came to the view that the Public Integrity Section's investigation was to be “limited” and focused on materiality as a “means of killing the investigation.” Page V-44. Of course our investigation was limited; by statute, we were to decide only whether the specific allegations we had received warranted further investigation. We were not charged with conducting a wide-ranging inquiry into all of Mr. Cisneros's past activities, and any such inquiry would have been unlawful under the Act. Furthermore, the Section quickly focused on materiality because it was the core issue that would determine the outcome of the investigation; if Mr. Cisneros's false statements were material, there would have to be an independent counsel, and if not, the legal basis for further investigation evaporated.
11. As for the materiality issue, the draft Final Report recognizes that the question is not whether Mr. Cisneros lied (everyone, including Mr. Cisneros, conceded that he did) but whether the decision-makers in the confirmation process would have been affected in their conduct or decisions had they been informed of the true facts. The issue, as has been made clear by the Supreme Court, is not whether knowledge that Mr. Cisneros lied would have affected their decision. Again, I refer the reader to Mr. Radek's memorandum to explain the results of the Section's inquiry into this issue and our reasoning. Bizarrely, after properly framing the issue, Barrett goes on to repeatedly

criticize the Section's recommendation by citing evidence that various individuals involved in the decision-making process stated that they would have been troubled had they known Mr. Cisneros had not been truthful. Of course they would have been, but that is not the issue under the federal criminal false statement law, and cannot form the basis for a false statement prosecution.

12. At page V-52, Barrett sets out the FBI's disagreements with the Section's recommendation, as outlined in a 1994 internal FBI memorandum, insinuating that they demonstrate the Section's wrongdoing. To briefly address them:
 - The FBI complained that the Section inaccurately suggested that the FBI did not consider Mr. Cisneros's false statement to be an issue during its background investigation of him. In fact, our interviews clearly established that the FBI did not consider Mr. Cisneros's false statement, of which it was aware, to be an issue. No amount of backtracking by the FBI later could change the evidence we gathered during the preliminary investigation, which demonstrated that if the FBI had known that Mr. Cisneros had paid Ms. Medlar \$4000 a month rather than \$2000 a month, that knowledge would not have affected its background investigation in any way whatsoever.
 - The memorandum suggested that the Section "falsely indicated that the Jaffe issue had been resolved," when the FBI had done little investigation. The Jaffe allegations were resolved as a matter of legal analysis; little investigation was needed to dispose of them. The evidence was that Mr. Jaffe did make the payments to Ms. Medlar as a favor to Mr. Cisneros, though we were not naive; "friendship" between powerful businessmen and politicians routinely involves the currying of relationships that might someday be helpful. Nevertheless, in the absence of a concrete link to some official act, such favors are not crimes.
 - The FBI complained that the Section had "selectively reported" the facts concerning Mr. Jaffe. There was no "selective reporting" of any facts that involved the allegations against Mr. Cisneros; we were not investigating Mr. Jaffe, and the Section's memorandum concerning Mr. Cisneros did not delve deeply into Mr. Jaffe's conduct or background. If the FBI believed there was evidence against Mr. Jaffe it was free to pursue that evidence.
 - Finally, the Section did not "falsely indicate" that the question whether Mr. Cisneros might have failed to report income based on checks he deposited directly into Ms. Medlar's account had been resolved. In fact, the issue was resolved; our investigation demonstrated that each of those checks was reported as income.
13. Barrett criticizes the Section's conclusion that Mr. Cisneros's statements were not material by claiming that a district court decision years later found that the alleged false statements were material. This is false. The court in that opinion was considering a pretrial motion to dismiss; there had not yet been a trial, and thus the court had none of the evidence concerning the materiality issue at its disposal. The court held that it was

unable at that stage of the case, given the state of the record, to determine as a matter of law whether or not the false statements were material, and that it was an issue that would be decided initially by the jury. "At this point in the proceedings, before the Government has had the opportunity to present its evidence at trial, the Court cannot determine whether or not the Government's case is sufficient to go to a jury. The proper time for Cisneros to raise this claim is at trial." United States v. Cisneros, 26 F. Supp. 24, 41 (D.D.C. 1998). Of course, the case was resolved before trial, and a jury never was asked to determine the question.

14. Barrett claims that in its recommendation to the Attorney General, the Section ignored other false statements by Mr. Cisneros. He seems to suggest that Mr. Cisneros was specifically asked in the course of his background investigation whether he was being honest and truthful, and lied by saying yes. However, the draft Final Report cites no such statements, and none came to the Section's attention in the course of the preliminary investigation.⁷ Barrett also mysteriously complains that we did not consider whether there were false statements in Mr. Cisneros's SF-86, the background form for security clearances; we had no allegation that there was anything false in the SF-86, and I am unaware of any such false statements. He equally mysteriously asserts that we did not consider whether the Department of Justice Security Office was a decision-maker; again, we had no allegations that any false statements had been made to the Security Office, and no information that it would have taken any steps different from those that it did take if it had been aware of the true sums Mr. Cisneros paid to Ms. Medlar.
15. Barrett claims that the Section should have known that Mr. Cisneros was under-reporting his income on his tax returns because he did not have sufficient funds to make the payments to Ms. Medlar based on his reported income. Barrett warps the available information to make this claim. In fact, Mr. Cisneros's tax returns over the period from 1989 to 1993 reflect that his gross income substantially exceeded \$1 million, while his payments to Ms. Medlar were approximately \$200,000. Even if it were the case that in one or more years, his expenditures may have exceeded his income (and we had no information to substantiate such a claim) this is hardly an uncommon occurrence and certainly does not provide grounds to launch a criminal investigation. Many individuals find themselves in that position in any year in which they have made a major purchase or incurred substantial expenses, such as moving to Washington from Texas. Barrett's simplistic analysis completely ignores the fact that individuals often rely on investments or borrow funds for substantial expenditures, refinance their home mortgages, rely on savings, and may receive inheritances or other untaxed sources of income. I am not suggesting that this was the case with Mr. Cisneros, but rather that those are the sorts of questions that the IRS, in the course of its administrative review of the matter, would explore and resolve; only after the facts are clear would it be appropriate to consider criminal prosecution. It is simply not true that if Mr. Cisneros was spending more money

⁷ It is not clear whether even such a statement would suffice to support a prosecution; after all, every witness in a trial takes an oath "to tell the truth," and every affiant affirms the truthfulness of the statements in the affidavit. Nevertheless, to sustain a prosecution, the specific untruthful statement must still be material, in that had the decision-maker known the true facts, those facts would have had the capacity to influence the decision-maker.

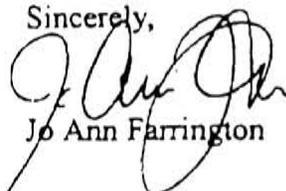
than his tax returns suggested he was earning – and we had no facts to establish that he was doing so – that fact in and of itself would justify launching a criminal investigation.

16. Barrett claims that in a brief meeting after his appointment, the Public Integrity Section gave him “directives” and improperly attempted to “direct the conduct and the outcome of his investigation,” resulting in “an infringement on his independence.” This paranoid claim is puzzling. As required by the Independent Counsel Act, soon after his appointment, the Section provided Barrett with the investigative results of the preliminary investigation and with Departmental documents analyzing the matter to provide background information and assist him in focusing his investigation. In the course of the meeting, we outlined our own conclusions to explain why some of the documents he was provided recommended against an independent counsel. The Section gave him no “directives,” and had no power or authority to direct his investigation in any way, as he was well aware.
17. I defer to others to respond to Barrett’s complaints about the Attorney General’s decision in 1997 to refer only tax year 1992 for further investigation. Although the Section worked closely with the Tax Division to ensure that the appropriate standards under the Independent Counsel Act were applied in our exploration of the matter, the Public Integrity Section relied on the Tax Division for its expertise in this matter. Contrary to Barrett’s allegation in his Conclusion on page V-207, the Attorney General was not “acting on Public Integrity’s recommendations” when she granted limited additional jurisdiction to the independent counsel. Rather, the Department’s exploration of this issue, conducted under extraordinary time pressure in just 30 days, was a team effort involving attorneys both from the Criminal Division and the Tax Division. However, with respect to the three tax years that the Attorney General declined to refer to Barrett, every attorney who reviewed the matter agreed that there was no factual basis to support a referral. The filing of the Attorney General fully sets out her findings and analysis with respect to the issues raised by the Independent Counsel’s request.

Thank you for the opportunity to provide these comments for the record. If the Court determines that this Report should be made public, I request that my comments be released as well, along with all the underlying background documents referenced herein.

Thus ends this country’s experiment with independent counsels. Good riddance.

Sincerely,



Jo Ann Farrington



U.S. Department of Justice

Washington, D.C. 20530

August 29, 2005

United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 31 2005

Special Division

Mark J. Langer
Clerk, United States Court of Appeals for the
District of Columbia Circuit
Washington, D.C. 20001-2866

Re: Division No. 95-1, In re Henry G. Cisneros
Additional Statement of Jo Ann Farrington



Dear Mr. Langer:

On July 12, 2005, the Special Division of the Court ordered that additional, previously redacted portions of Independent Counsel Barrett's draft Final Report be made available to me. I welcomed the Order because the earlier portions of the Report that I had been permitted to review were heavily redacted, with large chunks of fact and analysis missing, making a meaningful review difficult. I read the Court's Order to direct that all of Part V, in which Barrett suggests that I and a number of others may have participated in what he apparently believes was a conspiracy, would be disclosed to me. Unfortunately this was not the case; the new version I was provided, while some additional bits and pieces are disclosed, continues to be riddled with redactions, and it continues to be impossible to discern what Barrett's logic or theory might be. As a result, I have only a few additional comments.

One newly revealed paragraph purports to describe a meeting in January 1995 between the Public Integrity Section and FBI agents conducting the preliminary investigation of Mr. Cisneros. An FBI agent attributes a preposterous statement at that meeting to Public Integrity Section Chief Lee Radek, to the effect that there were "several" independent counsels ongoing, that a recommendation to appoint an independent counsel would pose problems for the Attorney General with the President, and that he did not want to put her in that position. The absurdity of this allegation – apparently made in grand jury testimony given by the agent nearly seven years later – is apparent on its face. First of all, there were not "several" independent counsels at the time; only two were underway. Second, the single-minded effort by the FBI to force appointment of an independent counsel in this case (which struck close to home, in that it involved alleged misstatements to the FBI itself), and its concomitant hostility to the Public Integrity Section's concerns over the legal and factual shortcomings of the matter, were crystal clear to all involved in the investigation by January of 1995; if there was indeed a plot by DOJ attorneys underway, the notion that it would be candidly disclosed to the FBI is bizarre. Furthermore, if the agent had heard any such remark, I am confident that it would have promptly been reported to the appropriate authorities; Barrett's Report discloses no such referral either

within the FBI or to the Justice Department's Office of Professional Responsibility. Finally, as anyone who worked with Attorney General Reno knows, she cared not a whit whether her decisions would jeopardize her job, so long as she was doing the right thing.

It is not clear to me whether Barrett believes I was at this purported meeting, though it would have been unusual for there to be a meeting on this matter that I did not attend. I certainly have no recollection of any meeting at which any such sentiment was expressed. Furthermore, I worked closely with Mr. Radek in the handling of Independent Counsel matters for many years and can state categorically that he never made any such remark in my presence – and since Barrett is claiming that Mr. Radek was freely expressing such inappropriate concerns to outsiders, if he held any such views, it seems likely he would have shared them with me as well.

Most of the rest of the newly revealed material from the Final Report deals with events internal to the IRS concerning its review of Mr. Cisneros's taxes. While I read this with interest, and saw nothing that suggested to me that there was any misconduct by any IRS or Tax Division employee, I have no personal knowledge of any of those events, and thus have no comments.

Again, I thank the Special Division for providing me with the opportunity to provide my comments on the draft Final Report, and if the Court should conclude that this Report should be made public, ask that my comments be included as part of the record.

Respectfully submitted,



Jo Ann Farrington

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May 31, 2005

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United States Court of Appeals
for the District of Columbia Circuit

Marilyn R. Sargent
Chief Deputy Clerk
United States Court of Appeals
District of Columbia Circuit
333 Constitution Ave, N.W.
Washington, D.C. 20001

FILED MAY 31 2005

Special Division

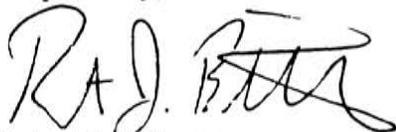
Re: Independent Counsel's Final Report in
Division No. 95-1, *In Re: Henry G. Cisneros*

Dear Ms. Sargent:

With reference to your letter of March 1, 2005, please find enclosed Barry Finkelstein's response to the Independent Counsel's Final Report in Division No. 95-1, *In Re: Henry G. Cisneros*. In your letter of March 1, you indicated that Mr. Finkelstein and I could examine portions of the Report in which Mr. Finkelstein is mentioned and submit to you "any comments or factual information for possible inclusion in an appendix to the Report." As you are aware, we have taken advantage of your invitation and have reviewed relevant portions of the Final Report.

On behalf of Mr. Finkelstein, and pursuant to 28 U.S.C. § 594(h)(2), I request that Mr. Finkelstein's enclosed response be included in the appendix to the Final Report.

Respectfully,



Robert J. Bittman

cc: Barry Finkelstein

IN RE: HENRY G. CISNEROS

**RESPONSE OF BARRY FINKELSTEIN
TO FINAL REPORT BY INDEPENDENT COUNSEL DAVID M. BARRETT**

Having been given the opportunity to review certain portions of the Independent Counsel's Final Report, I feel it is necessary to respond to what I believe are repeated inaccuracies and mischaracterizations of the work performed by the Internal Revenue Service's Office of Chief Counsel in connection with the Henry G. Cisneros matter.¹ The portion of the Report made available to me focuses on the process by which, in late 1996 and early 1997, the Office considered and decided against referring for criminal prosecution allegations that Mr. Cisneros evaded his individual income tax obligations in 1991, 1992, and 1993. It has been eight years since the Office considered Mr. Cisneros's case, and while I would concede that details may fade and memories might dull over such a lengthy period, no lapse in the memories of those involved can account for the Report's failure in both tone and factual precision to "report" on how and why the Office of Chief Counsel recommended against prosecuting Mr. Cisneros.

During the time period in question – and in the ten years that preceded it and in three of the eight years since – I served in the IRS's Office of Chief Counsel as Assistant Chief Counsel (Criminal Tax).² In that role, and as the individual with primary responsibility for the decision to decline recommending prosecution of Mr. Cisneros, I believe it is incumbent on me to respond to the Final Report and correct its most egregious mischaracterizations of my work and that of the Office of Chief Counsel. In short, I and those in the Office who examined the Cisneros matter uncovered critical deficiencies in and identified insurmountable obstacles to a potential criminal tax prosecution of Mr. Cisneros. Indeed, the fact that the Independent Counsel has submitted his Final Report without charging Mr. Cisneros for any tax violations reveals that the Independent Counsel has taken more than eight years to reach exactly the same conclusion that I and the Office of Chief Counsel reached in less than four months: that a criminal tax prosecution of Mr. Cisneros was neither warranted nor wise.

At the heart of my objection to the Final Report is its attempt to lay blame at the feet of the Office of Chief Counsel and others for the Independent Counsel's own failure to secure such an indictment. It is the height of prosecutorial irresponsibility for the Independent Counsel to state at the outset of the Report that it will examine "apparent efforts" of "certain high-ranking government officials" to insulate Mr. Cisneros from prosecution – language clearly impugning my reputation and that of the Office of Chief Counsel – but then fail to come to any real conclusion on the issue and admit that this part of the investigation is "incomplete" because of a lack of time and resources afforded to him. The reason the Independent Counsel uncovered no evidence of obstruction of justice over the last eight years is not because the Special Division, or

¹ While I regret the need to file a response to the Independent Counsel's Final Report, I am grateful to the Special Division for the opportunity to do so. I want to thank the Clerk's office, and particularly Marilyn Sargent and Lynda Flippin, for their assistance in allowing me to review designated portions of the Final Report.

² As a result of a reorganization of the IRS in 2000, I became Deputy Division Counsel/Deputy Associate Chief Counsel (Criminal Tax), another Senior Executive Service position. During the reorganization, some of the referral procedures described herein changed, as well, although none of those changes are relevant to the matter at issue here.

Congress, or the Department of Justice, or the Internal Revenue Service conspired against him, but because there was no obstruction of justice to unearth. The Office of Chief Counsel declined to recommend criminal prosecution of Mr. Cisneros for alleged tax violations for the same reason the Independent Counsel failed to indict him: because there was no justification for doing so.

I do not think it would be an effective use of this response to engage in a point-by-point review of each of the many misleading, incomplete, or simply erroneous factual assertions and legal conclusions (or quasi-conclusions) in the Final Report. Similarly, with respect to the question of exactly why I and the Office of Chief Counsel decided to decline to recommend criminal prosecution of Mr. Cisneros, I will leave it to the detailed "Declination Memorandum" cited in the Final Report and attached as an exhibit thereto, rather than recount the reasons yet again in this response. I think that it would be helpful, however, to use this opportunity first to explain how the Cisneros matter ended up before the Office of Chief Counsel, and second to address, briefly, the broad deficiencies in the Report's characterizations and conclusions.

The System of Criminal Tax Prosecution In The U.S., And How The Cisneros Matter Fit Therein

According to public data, the Internal Revenue Service receives more than 131 million individual returns per year. Although those returns yield over \$1.7 trillion, such revenue represents only 85% of the total amount due. Approximately 10 to 20 million Americans fail to properly file their tax returns each year. Annual non-compliance, also known as the "tax gap," is estimated currently at approximately \$350 billion. To address the tax gap, the IRS employs revenue agents (examiners), revenue officers (collectors), and special agents (criminal investigators).

In 2004, the fruits of special agents' efforts resulted in only 1,461 recommendations for criminal tax prosecutions. Thus, if you are among the 10 to 20 million Americans who are not complying with the tax laws, your chances of being criminally prosecuted are quite slim. This is not accidental. Erroneous returns can result from math errors, confusion about the law, poor advice, greed, fraud, or any of several other reasons. Recognizing the danger of applying criminal sanctions to the many relatively innocuous reasons that Americans file erroneous returns, Congressional and administrative tolerance is very low for the use of such sanctions for anything other than the most egregious tax case.

As a result, tax offenses are treated unlike any other criminal offenses, in that they receive a multi-level review that includes consideration by both the IRS's Office of Chief Counsel and the Department of Justice's Tax Division before they are referred to a U.S. Attorney's Office for prosecution. Without a formal referral of a tax case from the Office of Chief Counsel to the Tax Division, criminal tax files cannot be shared with any Justice official. And without Tax Division authorization, local United States Attorneys are precluded from commencing tax prosecutions.

At the outset of most criminal tax prosecutions, therefore, IRS special agents conduct the initial investigation. These special agents, who are part of the Criminal Investigation division of

the IRS, can conduct their investigation administratively using Internal Revenue Code provisions to gather evidence (e.g., using summonses), and then seek referral of the case at the conclusion of the investigation, or they can seek referral at an earlier stage to avail themselves of the grand jury process (e.g., to obtain a search warrant or initiate a grand jury investigation). Regardless of when referral is sought, Criminal Investigation must make a recommendation to the appropriate official of the Office of Chief Counsel seeking referral of the matter. The Office of Chief Counsel independently reviews the case, applying mandated review standards, and then, only if it concurs with Criminal Investigation's recommendation, refers that matter to the Department of Justice.³

For the reasons noted above, the Internal Revenue Service traditionally has been conservative in referring cases for criminal prosecution. It does this, in part, to ensure that conviction rates are high and so that a clear message can be sent to tax law violators by maximizing the impact of those criminal prosecutions. There is, therefore, a high threshold that must be met before the IRS will recommend a criminal tax prosecution. The standard for referring a case for prosecution is that the evidence must be sufficient to establish guilt beyond a reasonable doubt, and a reasonable probability of conviction must exist.

Consistent with this standard, a criminal case must also be based on evidence meeting strict criminal standards, including proof of each element of the offense. Moreover, every criminal tax offense includes a willfulness element, which is defined as an intentional violation of a known legal duty. Mere understatement of your tax obligation, therefore, is not sufficient to satisfy either the criminal standard or many of the lesser civil penalties contained in the Internal Revenue Code.

While the vast majority of cases are reviewed by local offices of the Office of Chief Counsel, grand jury and administrative cases involving politically sensitive targets have always, in practice, been reviewed by the head office of the Office of Chief Counsel in Washington, D.C. This practice was formalized in 1989 with respect to grand jury cases, and in July 1996 with respect to administrative cases. Politically sensitive matters include those involving possible criminal tax prosecution of currently serving elected federal officials (i.e., Members of Congress); current Article III judges (i.e., United States District Court Judges); current high-level Executive Branch officials (i.e., Cabinet level officials); currently serving elected statewide officials (i.e., Governor, Attorney General); current members of the highest state court; and currently serving mayors of municipalities having a population in excess of 250,000. Some of the politically sensitive cases that the head office in Washington has considered, in addition to the Cisneros matter, include investigations into allegations of tax violations by Congressman James Traficant, Commerce Secretary Ronald H. Brown, Agriculture Secretary Michael Espy, and Associate Attorney General Webster L. Hubbell. In each of these instances, the Office of Chief Counsel – and I as Assistant Chief Counsel (Criminal Tax) – referred the case for grand jury investigation and/or criminal prosecution. Put simply, whenever the facts have warranted

³ Tax cases can also be referred to the Department of Justice in response to a formal request under I.R.C. § 6103(h)(3)(B). In those situations, a high level Department of Justice official, or an Independent Counsel with tax jurisdiction, makes a formal request to the Internal Revenue Service headquarters (the Associate Chief Counsel) for referral of the case, which referral is made unless it is determined that referral would seriously impair a civil or criminal tax investigation. This procedure is invoked extremely infrequently.

referral, I and the Office have never failed to refer a case – regardless of the subject’s political affiliation.

Until 2000, the first level Office of Chief Counsel headquarters official was the Assistant Chief Counsel (Criminal Tax). At the conclusion of the Office of Chief Counsel review, if Criminal Investigation disagreed with the decision, a protest of that decision could be lodged. Protests of Assistant Chief Counsel decisions are considered by the Associate Chief Counsel. Protests of field non-centralized cases proceed up the chain of command and could ultimately reach the Associate level. Protests, in general, are rare.

In the instant case, special agents conducted an administrative investigation of Mr. Cisneros’s tax returns for the years 1991, 1992, and 1993. In December 1996 they completed their investigation, and Criminal Investigation recommended prosecution of Mr. Cisneros for evading his individual income tax for those three years. As the Final Report explains, the allegations related to Mr. Cisneros’s 1991 and 1992 tax returns were based primarily on his failure to include amounts of speaking engagement income. Allegations related to Cisneros’s 1993 return were based primarily on improperly claimed specific deductions. All three of Cisneros’s returns were prepared by the same certified public accountant.

In accordance with prior practice and consistent with written directives, review of the case was centralized in headquarters. In March 1997, the Office of Chief Counsel declined to refer the Cisneros case to the Department of Justice for prosecution. The decision to decline prosecution was documented in a “Declination Memorandum” to Criminal Investigation. The basis for declination was that although it was determined that Cisneros’s returns were not accurate, the case did not meet the required standard of proof beyond a reasonable doubt and did not present a reasonable probability of conviction. More specifically, as the Declination Memorandum more fully explains, virtually all of the omitted income was contained in the various records available to Cisneros’s retained certified public accountant, the certified public accountant signed an affidavit taking responsibility for providing faulty advice regarding the improper deductions, and, most importantly, unbeknownst to Mr. Cisneros, the certified public account had previously been an informant against Mr. Cisneros and had made “amateurish” mistakes on the instant returns that almost invited an audit.

Upon receiving the Declination Memorandum, Criminal Investigation initially advised that it was protesting the same and would seek review by the Associate Chief Counsel. Criminal Investigation later chose not to avail itself of the protest procedures.

Why The Final Report Is Misleading, Incomplete, And An Abuse Of Prosecutorial Discretion

In April 1997, the month after the Office of Chief Counsel declined to refer the Cisneros tax case for criminal prosecution, the Independent Counsel requested a referral pursuant to I.R.C. § 6103(h)(3)(B) of one of the three years that the Office of Chief Counsel considered: 1992. The referral was made and, as a consequence, all IRS files regarding Cisneros were delivered to the Independent Counsel. At the time of the referral, all civil and criminal statutes of limitations were still open. Over the next eight years, however, the Independent Counsel did not charge

Cisneros with any criminal tax violations. During that time, all criminal and civil statutes of limitations expired. Thus, even civil assessment and collection of the clear and undisputed underpayment of tax is now time barred absent fraud.

The Independent Counsel, in turn, argues in the Final Report that an almost unlimited budget over the course of nearly a decade was not sufficient to uncover the "truth" that he so steadfastly asserts must be out there. Instead, he accuses "certain high-ranking government officials" of insulating Mr. Cisneros from prosecution. The bottom line, however, is that no one "insulated" Mr. Cisneros, and that the system for multi-level review of cases such as this one worked as designed. A politically sensitive tax case was investigated at the local level by special agents and Criminal Investigation. It was recommended to the local Office of Chief Counsel for referral. Then, in accordance with prior practice and consistent with written directives, review of the case was centralized in the Office of Chief Counsel headquarters in Washington, D.C., and was declined for the reasons set forth in a detailed memorandum. Although Criminal Investigation initially considered protest of that decision, it later withdrew its protest. The Independent Counsel sought and obtained referral of the case, considered it, and ultimately declined to prosecute or obtain an indictment. End of case.

Contrary to the Independent Counsel's oblique, unfounded intimations of obstruction and political favoritism, there is no evidence of impropriety in the sequence noted above. Instead, the Independent Counsel places undue weight on the unfounded complaints of field special agents who, rather than appeal the Office of Chief Counsel's decision, as is their right, chose to voice unsubstantiated attacks on the Office's officials who disagreed with their recommendations. Special agents and Criminal Investigation play an indispensable role in investigating and developing facts and making an initial recommendation in matters such as the Cisneros case, but the ultimate decision to recommend criminal prosecution always lies elsewhere. Sometimes it lies in local Offices of Chief Counsel, and other times, such as in this case, it lies in Washington, D.C. For the Independent Counsel to base such a massive, lengthy, expensive investigation almost entirely on individuals who chose not to play by the rules or recognize the hierarchy and deliberate structure of the system in which they operated, shows a serious lack of prosecutorial discretion.

* * * * *

Putting aside what I believe to be the gaping substantive deficiencies in the Final Report, I am perhaps most troubled by the Independent Counsel's failure to respect the awesome power and independence granted to him through the unique, albeit now defunct, institution of the Independent Counsel. I was hauled into the grand jury on approximately 30 occasions, meaning that I eventually spent much more time explaining the Office's decision to decline prosecution than I spent actually considering the case. Furthermore, the Report impugns my reputation and the reputations of others in the Office of Chief Counsel despite an admittedly "incomplete" record (and a slight record at that), and does so in a way that is confusing, indirect, and ultimately unreliable. The Report includes numerous references to "Assistant Chief Counsel," for instance, but rarely clarifies whether it is referring to my personal involvement in a decision or an event, or whether it is attributing the same to another member of the Office. The Report also concludes that "persons . . . put their personal, political or institutional interests before the

public interest,” but neglects to identify what those personal, political, or institutional interests were. In this way, the Report avers that I, apparently among (or perhaps even in concert with) others, declined to recommend a criminal tax prosecution of Mr. Cisneros for political reasons.

Let me set the record straight. I am not political, and I resent the Independent Counsel for implying as much. I am a career civil servant and federal employee. I have held multiple positions in three different agencies and have received numerous accolades from senior career and political appointees across the political and ideological spectrums. I am a Vietnam War veteran with combat service, a former judge advocate with military judge experience, a former federal organized crime prosecutor, and for the last nineteen years have been a member of the Senior Executive Service. Since being with the Internal Revenue Service, I have held field, regional and headquarters positions.

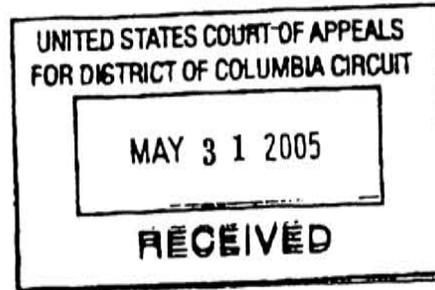
Since 1986, in my role as Assistant Chief Counsel (Criminal Tax), I have worked closely with several Independent Counsels, including those investigating Iran-Contra, Secretary Espy, Secretary Brown, and Associate Attorney General Hubbell, and have reviewed numerous centralized cases (most of which are not public). In each case I have fairly evaluated the evidence presented to me and the Office of Chief Counsel, I have applied the appropriate standard of review, and I have decided whether to refer cases for criminal prosecution based on one thing and one thing alone: the merits. I have relied on the facts as developed during the typically thorough and meticulous investigations conducted by special agents, and I have routinely relied on the advice and recommendations of local Offices of Chief Counsel and, more directly, on the opinions of those working with me in the Office of Chief Counsel here in Washington, D.C.

Yet in the end, and in most cases, I made the ultimate decision whether or not to refer politically sensitive tax cases for criminal prosecution, and I take responsibility for those decisions. Although all of my referral decisions were appealable to the Associate Chief Counsel, I always treated my responsibility to make such decisions with the utmost seriousness, fairness, professionalism, and attention to detail that I believe would have applied if I had been the final say on such referrals. I never shirked my responsibility or abused the powers that came with it. I believe that I and those who worked with me on the Cisneros matter in the Office of Chief Counsel deserve better than the unsupported accusations and innuendo that permeate the Independent Counsel’s multi-million dollar, decade-in-the-making Final Report.

If there is anything more clear than this, it is that the American taxpayer deserved better from the Independent Counsel, as well.

Barry Finkelstein

May 31, 2005



May 27, 2005

James H. Rodio
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VIA UPS OVERNIGHT

Honorable Mark J. Langer
Clerk of the Court
United States Court of Appeals
District of Columbia Circuit
United States Courthouse – Fifth Floor
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United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 31 2005

Special Division

In re: Henry G. Cisneros
(Div. No. 95-1)

Dear Mr. Langer:

Pursuant to 28 U.S.C. § 594 (h)(2) and the sealed Order of the Division for the Purpose of Appointing Independent Counsels, dated March 1, 2005, please accept this letter on behalf of my client, Martin Klotz, who is an individual mentioned in the Report (In re: Henry G. Cisneros (Div. No. 95-1)) prepared by the Office of the Independent Counsel ("OIC"). I respectfully request that this letter be included in the appendix to the Final Report.

I. Introduction

The OIC made available a number of pages that relate to Mr. Klotz, but did not provide access to the complete Report concerning the OIC investigation of Internal Revenue Service ("IRS") and Department of Justice ("DOJ") officials for potential obstruction of justice and false statement charges arising from the IRS tax investigation of Henry Cisneros. Instead of taking the honorable approach and admitting that it had insufficient evidence to pursue the obstruction and

Honorable Mark J. Langer
May 27, 2005
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false statement charge as most career prosecutors do when choosing not to move forward on a case, the OIC attempts to impugn the integrity and reputation of Mr. Klotz, a career IRS employee who spent approximately 32 years working for the United States government without a blemish on his record.¹

A fair reading of the pages made available to Mr. Klotz leads to the inescapable conclusion that IRS personnel in the field who conducted the investigation disagreed with the conclusions reached by individuals in the Assistant Chief Counsel's Office at IRS headquarters in Washington D.C. ("ACC Office") about the merits of the case. These were career civil servants who came to different conclusions on the same set of facts where "reasonable persons can differ." The Assistant Chief Counsel ("ACC") had the authority to review the Cisneros case and make the decision on whether to decline prosecution, or refer the case to the U.S. Department of Justice Tax Division for authorization to prosecute. The ACC declined prosecution for the reasons set forth in a Declination Memorandum he signed.

The agents and their supervisors complained – a result that happened when a case was declined,² but went further and authored a memorandum "Possible Improprieties by Assistant Chief Counsel (Criminal Tax)" expressing dissatisfaction with the declination and attacking the

¹ Mr. Klotz began working for the IRS as an attorney in 1972. From 1972 until 1987, he worked in field offices where his duties included reviewing Special Agent's Reports. From 1987 to 1991, he served as the Deputy to Assistant Chief Counsel Barry Finkelstein. He served as a Technical Assistant to the Assistant Chief Counsel from 1991 until his retirement.

² I spent eleven years as a Trial Attorney with the Northern Criminal Enforcement Section, Tax Division, U.S. Department of Justice. On the occasions that the Tax Division refused to authorize cases for prosecution, IRS personnel were generally not pleased and expressed their frustration. The fact that the case agents are frustrated is not surprising with such a high profile target like Mr. Cisneros. However, in this case, the case agents found a different avenue of appeal with the OIC, who then initiated a criminal investigation.

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ACC and his staff for disagreeing with the agents view of the case. As a result of this disagreement, the OIC decided to investigate possible obstruction and false statements³ charges relating to the decisions of certain DOJ and IRS officials not to authorize the investigation or prosecution of Cisneros for possible tax violations "specifically (3) the IRS's 1997 decision to decline to refer for prosecution or grand jury investigation allegations that Cisneros committed criminal tax violations, which impacted, DOJ's decision not to expand the Independent Counsel's jurisdiction." (Report, p. V-1)

At the time the Report was made available for review on March 1, 2005 after more than seven years of investigation, the OIC had insufficient evidence to charge a crime against the DOJ and IRS officials. In its Report, the OIC does not offer any evidence to establish any willfulness or intent on the part of the IRS individuals to violate the law; present any evidence that the individual received anything for their actions, or were pressured or compelled to stop the case from proceeding to the Tax Division; and more importantly, present any evidence that satisfies the elements of obstruction of justice or the making of false statements.

Given the length of time the OIC spent on this investigation, the OIC apparently could not simply state that it did not find sufficient evidence to support criminal conduct. The Report leaves the reader with nothing more than innuendo and inference of improper conduct and the belief that the OIC could find wrongdoing if it only had more time.⁴ In numerous places in the

³ The Report did not identify any false statements.

⁴ "The OIC did not complete its investigation of possible obstruction of justice . . . but yielded substantial credible evidence to draw certain inferences . . ." (Report, p. V-26) The OIC then lists the conclusions drawn from the evidence and inferences. Interestingly, the OIC concludes that "certain IRS officials, attempted to prevent an

Report, the OIC complains that the investigation was "truncated", "limited", "incomplete" or that he needed additional time. The two readily apparent questions are – to do what, and why had these things not been done? The OIC's conduct of the investigation was inappropriate and its conclusions as they relate to potential criminal conduct by the IRS officials unsupportable. The Report should be amended to clearly state that Mr. Klotz did not engage in any improper conduct. The Report appears mainly to be a vehicle for the OIC to justify an overly lengthy investigation that spent millions of dollars and produced no tangible results as it relates to the obstruction and false statements investigation.

II. Conduct of Investigation

A. Statute of Limitations

The OIC began its investigation in 1997 and initiated the grand jury investigation in early 1998. (Report, p. V-14) The OIC complains repeatedly that "it did not complete its investigation" (Report, p. V-26) and it "was unable to complete its obstruction investigation." (Report, p. V-207). The Report fails to state that the OIC had run out of time to investigate the charges. The obstruction of justice charges and the false statement charge in Title 18 do not provide a statute of limitations, therefore the provisions of 18 U.S.C. § 3282 provide a five year statute of limitations.

The statute of limitations may have started running as early as March 1997 when the ACC signed the Declination Memorandum thereby ending in March 2002. Or, assuming the

independent counsel from being appointed to investigate allegations that Cisneros committed tax offenses." (Report, p. V-26) The OIC had the opportunity to prosecute one of the tax years in question but failed to do so.

statute of limitations began running at approximately the same time as the OIC began its investigation in early 1998, the statute of limitations ran in early 2003. The statute of limitations had either run or was about to run at the time the Court ordered the OIC to write his final report. The OIC should not complain that it had insufficient time to conclude its investigation. The OIC's excuse about lack of time is not supported by the facts, the way it conducted the investigation and is irrelevant due to the statute of limitations.

B. Multiple Appearances by Mr. Klotz Before the Grand Jury

The OIC required Mr. Klotz to appear before the grand jury more than fifteen times.⁵ Mr. Klotz initially appeared after the OIC began the grand jury investigation in 1998. During the initial appearances in 1998, he provided information including his involvement in the review of the Cisneros tax case, his interactions with the other individuals at the ACC Office and the agents who investigated the case and the rationale behind the recommendation to decline prosecution of Cisneros. When the OIC required him to testify before the grand jury in December 2000, he began a series of approximately 15 appearances that lasted until May 2001. Some of the appearances lasted the entire day while others days were shorter. In close to twenty-five years of practice including eleven years as a federal prosecutor, I have never heard of a witness appearing more than several times before a grand jury. This conduct was abusive and not designed to obtain evidence relevant to the proposed changes.

⁵ Unfortunately, Mr. Klotz did not keep a complete record of the number of times he appeared before the grand jury. He appeared several times before I began representing him. I was present during 11 grand jury sessions on May 19, 1998; December 12, 14, 19, 21, 2000; January 9, 11, 2001; and February 1, 6, 8, 27, 2001. He also attended 4 additional grand jury sessions where I was available by phone on or about March 15, 28, 2001; April 24, 2001; and May 3, 2001.

Mr. Klotz's more than 15 appearances before the grand jury is telling. The OIC claims in the Report that the investigation was "incomplete" with a "limited record." (Report, p. VI-2) The fact that the OIC took more than five years to investigate the allegations and had the time to question Mr. Klotz more than fifteen times before the grand jury leads one to conclude that the OIC had no other witnesses and therefore could not prove its charge.

When Mr. Klotz appeared before the grand jury, the OIC asked many repetitive questions and the focus seemed to be on finding inconsistencies between the current day's testimony and the earlier testimony of Mr. Klotz. The OIC also attempted to find inconsistencies between the testimony of Mr. Klotz and the other ACC Office individuals about their recollection of events concerning the Cisneros matter. The relevance of these lines of questioning to a potential obstruction charge remains elusive and appears irrelevant.

III. OIC Claim of Predisposition

In a number of places in the Report, the OIC offers several points and states "they are at least suggestive of the facts that some officials of [deletion] the IRS acted with a predisposition not to allow an independent counsel investigation of possible Cisneros tax offenses to go forward." (Report, p. V-207) By phrasing the Report in this fashion, the OIC may make a reader believe that Mr. Klotz was such an official. This is unfair, unwarranted and an attempt by the OIC to tarnish Mr. Klotz. Mr. Klotz unequivocally denies he had any predisposition when he began his review of the Cisneros Special Agent's Report or that he put "his personal, political, or institutional interests before the public interest" as the OIC generally claims without naming

names in the Conclusion. (Report, p. VI, Conclusion) As previously stated, Mr. Klotz was a career civil servant who was just performing his duties.

Mr. Klotz made his recommendations to his supervisor and at one time suggested putting certain witnesses before the grand jury. (Report, p. V-201) Mr. Klotz also said it was a close case. (Report, p. V-201) Mr. Klotz and his supervisor, the ACC, also asked their superiors many times to look at the case. (Report, p. V-201) This conduct is not consistent with one who was predisposed or who was putting his own interests ahead of the public interests. This conduct was consistent with trying to make the correct decision.

IV. Referral of 1992 Tax Year to OIC

The OIC had the authority to investigate Cisneros for tax offenses for the 1992 year. (Report, p. VI -1-2) The OIC states in the Report:

[t]his Office maintained, and still is of the view, that Cisneros's tax filings for 1991, 1992 and 1993, merited a multi-year criminal investigation and, quite possibly, prosecution for willful tax evasion. There is no real question that he seriously underdeclared his income on his tax returns, and it is hard to escape the conclusion that these actions were willful, given, that his expenses (including his payments to Medlar) far exceeded the income he declared. Id.

The OIC chose not to press the single tax charge against Cisneros and blames its actions on the Department of Justice and Internal Revenue Service. This is disingenuous. While the more followed course of action is to prosecute a multi-year criminal tax case to establish willfulness, Department of Justice prosecutors have prosecuted one year tax cases. The OIC screams loud and hard about what it claims is the illegal conduct of Cisneros yet the OIC had the chance and

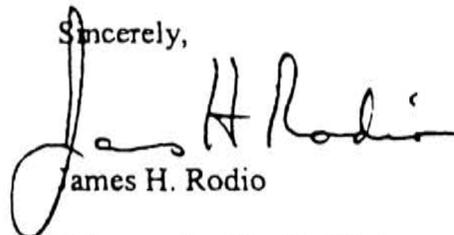
Honorable Mark J. Langer
May 27, 2005
Page 8

refused to prosecute. By failing to present an indictment, the OIC concedes that there are the same sorts of problems with the case that the ACC identified in the Declination Memorandum. For example, the Declination Memorandum focused on the problems with proving willfulness. The OIC stated that the conduct of Cisneros was egregious throughout the Report, yet the OIC required three years of evidence to prove willfulness. If the OIC believed the evidence was so strong, one would think the OIC would have prosecuted the 1992 year.

V. Conclusion

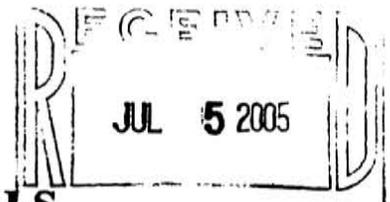
The Report is an attempt to justify the OIC's seven year investigation into potential obstruction and false statement charges. Having found insufficient evidence to move forward during an investigation that should have ended years ago, the OIC drafted a Report that casts an unfair shadow on Mr. Klotz by appearing to include him in the catch-all phrase, "IRS officials." The OIC then uses inference and innuendo to reach unsupportable conclusions of improper conduct that do not apply to Mr. Klotz. The Report should include an apology to Mr. Klotz and clearly state that the OIC found no evidence of wrong-doing or improper conduct on the part of Mr. Klotz

Sincerely,

A handwritten signature in black ink, appearing to read "James H. Rodio". The signature is written in a cursive style with a large initial "J".

James H. Rodio

Attorney for Martin Klotz



UNITED STATES COURT OF APPEALS

District of Columbia Circuit

**United States Court of Appeals
for the District of Columbia Circuit**

Division for the Purpose of
Appointing Independent Counsels
Ethics in Government Act of 1978, As Amended

FILED JUN 30 2005

Special Division

Division No. 95-1
In Re: Henry G. Cisneros

STATEMENT OF STANLEY F. KRYSA
(In Response to the Final Report)

In early March, I received a letter informing me that I had been named in Independent Counsel Barrett's draft final report, and that I had the right to read portions of the report and that I could comment on the report. Because of travel plans and other commitments, I was unable to arrange to read the report until mid-May. I was allotted a two-hour period on May 18th to read approximately 100 pages of the report, many of which had been substantially redacted. This response to events that occurred over eight years ago has been prepared without having had access to the official files and records that were created at the time of the events.

I retired from the Tax Division, Department of Justice, on January 3, 1999 after almost 42 years of service with the Tax Division. The last 21 years of my service was as a Senior Supervisor in the Criminal Tax function of the Division. Initially, I was Chief of the Criminal Section; then Director of Criminal Tax after the section was split into four sections; and Senior Division Counsel, Criminal, subsequent to 1995.

During my service on the criminal side, I became intimately familiar with the investigation, review, and prosecution of criminal tax violations, as well as with the policies and procedures of the Internal Revenue Service and Tax Division in administering the Criminal Tax Enforcement Program.

The Criminal Investigative Division (CID) of the IRS normally investigates potential criminal tax violations. When the Special Agent concludes that a case has been perfected, the Special Agent prepares a Special Agent's Report (SAR) laying out the facts and final recommendation. If the supervisor agrees, the case is forwarded to the local District Counsel, IRS, for review and action on the fore mentioned recommendation.

The review by District Counsel will result in one of the following actions:

1. the case is returned to CID for further investigation;
2. the case is referred to the Tax Division with a recommendation that a grand jury investigation be conducted;
3. the case is referred to the Tax Division for prosecution of certain tax violations;
4. or the case is declined for prosecution and returned to CID.

In sensitive cases, like the case involving Henry Cisneros, the case is forwarded to Washington and the review is undertaken by the Office of the Assistant Chief Counsel.

In recent years, a substantial number of cases have been referred to the Tax Division recommending grand jury investigation where little or no administrative investigation has been conducted by the CID.

If a case is referred to the Tax Division by District Counsel or Assistant Chief Counsel, the Tax Division reviews the case and renders a decision. That decision could be to conduct a grand jury investigation, prosecute tax charges or to decline to prosecute. Normally, each referred case is reviewed in the Tax Division by at least three experienced attorneys; i.e., a line attorney and two supervisors.

During my 21 years of criminal tax experience, I have reviewed and rendered a final decision in at least five thousand cases, scores of which were considered sensitive cases. These cases involved all statutory criminal tax violations, primarily failure to file, false filing and tax evasion violations as well as tax conspiracies.

In early 1997, the Tax Division's assistance and advice was requested by the Criminal Division relative to the request of Independent Counsel Barrett's to expand his jurisdiction to investigate potential tax violations by Henry Cisneros for the years 1989, 1991 through 1993. The request was received by Mark Matthews, then Deputy Assistant Attorney General. I was advised of the request by Mr. Matthews. At that time, CID personnel in San Antonio were concluding an administrative criminal tax investigation into potential tax violations by Henry Cisneros for the same years.

The Tax Division then assigned a senior supervisory attorney from the Western Criminal Section to work with and assist attorneys in the Public Integrity Section of the Criminal Division. This attorney had approximately 20 years of experience in the investigation, review and prosecution of tax violations. This attorney worked with two attorneys in the Public Integrity Section as well as with Lee Radek, then Chief of that Section.

This attorney performed his duties promptly, diligently and impartially, without any interference of supervision by Mark Matthews or myself. Any conclusions or recommendations made by him, were his own and not prompted by anyone in the Tax Division.

I attended some meetings with Criminal Division personnel, including Robert Litt, then Acting Assistant Attorney General on the Cisneros matter. I also attended one meeting where the Attorney General in her office with Criminal Division personnel and Mark Matthews also present.

The Criminal Division, through the Public Integrity Section, was primarily responsible for processing the Independent Counsel's request and final recommendation to the Attorney General. The Tax Division's role was that of consulting and advising the Criminal Division.

Attorney General Janet Reno made a decision in February of 1997 granting the Independent Council jurisdiction to investigate tax matters involving Cisneros for one year, 1992. Sometime after this decision, the Assistant Chief Counsel, IRS, after review of the Cisneros case forwarded to him by CID declined to recommend prosecution or grand jury investigation. As a result, the Cisneros case was not referred to the Tax Division.

In any meetings or discussions that I was involved in relative to the processing of Independent Counsel's request, the parties involved acted properly and impartially in attempting to determine the facts and in rendering a recommendation to the Attorney General. There was no conduct that could reasonably be construed as forcing a predetermined decision.

The decision made at Chief Counsel's office to decline to refer the Cisneros case to the Tax Division was within the authority of that office. During the last 12 years of my tenure with the Tax Division, I worked closely with the Assistant Chief Counsel. He is intelligent, diligent and very knowledgeable in criminal tax matters. He has an outstanding ability to analyze criminal tax cases and reach the correct decision. I always found him to be a strong and persuasive advocate for CID.

I totally disagree with the draft report's conclusions implying that named and unnamed persons in the IRS and Justice Department engaged in serious wrongdoing. These conclusions indicate, at best, a lack of understanding of procedures and policies utilized by the IRS and the Tax Division in criminal tax matters, or at worst, an attempt to lay blame unjustifiably after an ill-advised, lengthy, unsuccessful, and costly investigation.

Respectfully submitted,


Stanley F. Krysa

JUL 5 2005
UNDER SEAL

Robert S. Litt
555 Twelfth Street, N.W.
Washington, D.C. 20004

United States Court of Appeals
for the District of Columbia Circuit

May 31, 2005 **FILED** JUN 3 0 2005

Special Division

Mark J. Langer
Clerk, United States Court of Appeals
District of Columbia Circuit
Washington, D.C. 20001-2866

Re: Division No. 95-1, In re Henry G. Cisneros

Dear Mr. Langer:

I am writing to comment on the report of Independent Counsel David Barrett in the matter of Henry G. Cisneros. Because I am named in the report, the Special Division of the Court of Appeals ordered that "relevant portions" of the report be made available to me so that I would have an opportunity to comment. However, the Independent Counsel permitted me to review only a heavily edited document. Isolated passages floated in a sea of blank space, devoid of context; individual words were apparently snipped out of the middle of sentences; large portions were excised even from sections in which I am named.

I do not understand why the Independent Counsel declined to permit me to review in full the sections in which I am discussed. Since he apparently intends that the entire report be released to the public, his concern cannot be confidentiality. Nevertheless, the Independent Counsel's decision means that my comments may be incomplete or ignore certain aspects of his report that I was not allowed to review.

Even the expurgated version of the report that I was allowed to read, however, is a fitting conclusion to one of the most embarrassingly incompetent and wasteful episodes in the history of American law enforcement. This independent counsel spent ten years – ten years! – and tens of millions of dollars on his investigation. His Herculean labor produced a no-jail misdemeanor plea from his target – a plea that Mr. Cisneros would undoubtedly have been willing to enter on the day of Mr. Barrett's appointment. He continued his investigation for almost six years after that guilty plea, chasing gossamer theories of obstruction of justice even after the statute of limitations expired. He took years to write a report that could have been written in months. A major theme of that report – that officials in the Department of Justice somehow corruptly conspired to obstruct the

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Independent Counsel's investigation when they opposed the expansion of his jurisdiction – is a scurrilous falsehood.

The Independent Counsel's report – to the extent that he permitted me to review it – does not specify which officials he believes were culpable, nor set forth actual evidence of obstruction. In the place of fact and evidence, the report gives nothing more than a tendentious history of his investigation, embellished by dark insinuations and suspicions. At bottom, the Independent Counsel's accusation of criminal behavior by Department of Justice officials rests on his inability to understand why neither the Department of Justice nor the Internal Revenue Service agreed with his opinion that a multi-year criminal tax investigation was warranted.

I was one of the lawyers at the Department of Justice who reviewed the Independent Counsel's 1997 request that his jurisdiction be expanded to cover four years of potential tax violations. As others did, I carefully reviewed every page of the Independent Counsel's submission, met with the OIC (on several occasions) and Cisneros' counsel, and reviewed documents and interview memoranda. After full consideration I concluded that the Independent Counsel's submissions were (barely) sufficient to justify expansion of his jurisdiction with respect to one of those years and insufficient for three others.¹

Each and every Department lawyer who reviewed the Independent Counsel's request, from line attorneys in both the Criminal and Tax Divisions of the Department of Justice to the Attorney General, came to the same conclusion. Each and every one of them agreed that there was no basis to grant the tax jurisdiction sought by the Independent Counsel. To the extent there was any doubt whatsoever, it was resolved in the Independent Counsel's favor by granting him jurisdiction over one year. There was no political pressure, no thought of "protecting" anyone, no obstruction of justice – nothing other than a good faith application of settled legal standards and procedures.

I. The Merits of the Attorney General's Decision

As if to suggest that the Attorney General's decision was made in secret and never explained, the Independent Counsel's report makes the puzzling

¹ I was not reluctant to recommend appointment of an independent counsel when I believed it was warranted, even when high government officials were involved and even when others in the Department disagreed. It has been publicly reported, for example, that I favored the appointment of an independent counsel to investigate alleged false statements by Vice President Gore.

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statement that “[t]he OIC did not know why the Attorney General had declined to recommend that it be given jurisdiction over what appeared to be a prima facie case of multi-year tax fraud by a public official.”² Nothing could be further from the truth. The Independent Counsel may not have agreed with the Attorney General’s conclusions. But her application to the Special Division of February 28, 1997, clearly explained why she found that, applying the standard of the Ethics in Government Act, there were “no reasonable grounds to believe that further investigation was warranted” as to three of the four years for which the Independent Counsel requested jurisdiction. The reason for the Attorney General’s decision was clear. The information provided by the Independent Counsel to the Attorney General in support of his request for expanded jurisdiction often proved to be inaccurate, incomplete or unsupported. Although the OIC was provided ample opportunity to answer the Department’s concerns and to rebut evidence presented by Cisneros’ counsel or obtained by the Department from witness interviews or documents, the OIC was completely unable to do so.

Let me summarize the Attorney General’s conclusions:

1989. The Independent Counsel claimed that Cisneros willfully failed to report on his tax return \$16,000 of an \$80,000 consulting fee he received in 1989. However, the Department interviewed Cisneros’ accountant and reviewed the accountant’s work papers. As the Attorney General noted, this evidence “clearly establish[ed]” that the accountant knew the full amount of the consulting fee, and indeed that Cisneros forwarded him a 1099 form for the full amount. Everyone interviewed agreed that Cisneros relied upon his accountant and others to take care of his financial affairs. Thus, while Cisneros’ tax return for 1989 was concededly inaccurate, there was no evidence that Cisneros was responsible for that inaccuracy, rather than his fully informed tax preparer.

1991. The Independent Counsel claimed that Cisneros failed to report approximately \$126,000 – or perhaps \$114,000, the Independent Counsel did not appear sure – of speaking fees received during 1991. However, despite repeated requests from the Department, the Independent Counsel was unable to provide any support whatsoever for his claim that income was unreported in that year. I vividly recall Department lawyers comparing one of the Independent Counsel’s submissions to the accountant’s work papers and repeatedly finding that fees which the Independent Counsel claimed had been omitted from Cisneros’ tax returns were in fact reported as income. An FBI agent’s opinion that someone has

² I was not permitted to copy the Independent Counsel’s report but only to take notes. Accordingly, some of my quotations from the report may be inaccurate in detail, but I am confident that they are correct in substance.

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failed to report income, without any evidence to support that opinion, does not provide any basis for further investigation.

1992. As the Attorney General noted, there was substantial evidence that, for this year as well, Cisneros' accountant had complete information about Cisneros' income and that he, rather than Cisneros, was responsible for any errors in the tax return. However, the Attorney General determined that she could not conclude that "no further investigation" was warranted of the allegations relating to this year, and applied to the Special Division to grant the expansion requested by the Independent Counsel.

This action is significant in two respects. First, it refutes the Independent Counsel's suspicions of a conspiracy to deny him tax jurisdiction in defiance of the law. If such a conspiracy existed, why did the conspirators not deny him jurisdiction over all of the tax years – particularly since, as I discuss below, we knew that the Attorney General's grant of jurisdiction to investigate one year effectively opened the door for the Independent Counsel to investigate all of the years? Second, the fact that the Independent Counsel never brought tax charges against Cisneros relating to 1992 suggests that the Attorney General's judgment about the evidence was considerably better than his.

1993. The Independent Counsel claimed that Cisneros failed to report approximately \$33,500 that he received in distributions from retirement accounts in 1993. However, as was the case for the 1989 tax year, there was no evidence that Cisneros was responsible for the omission: no evidence that he was aware that this income was omitted from his return, no evidence that he ever received the 1099 forms that were mailed to him (and considerable evidence suggesting that he did not), and no evidence that he took any steps to prevent this income from being reported.

These conclusions were not mine alone. They were the conclusions of non-political career lawyers in both the Tax Division and the Criminal Division of the Justice Department. And they were apparently the conclusions of non-political career lawyers in the Internal Revenue Service who were charged by law with reviewing the IRS's administrative investigation. Most importantly, they were the conclusions of the Attorney General, an intelligent, thorough and experienced prosecutor, who was fully informed about and conversant with the relevant facts. She reviewed the Independent Counsel's request repeatedly and in detail, as she did all matters under the Ethics in Government Act. The Independent Counsel himself met with her to present his case. All the questions that she asked were answered. No information was withheld from her. The application to the Special Division resulted from her decision – not anyone else's.

II. My Personal Involvement in the Preliminary Investigation

The peculiar nature of the Independent Counsel's report leaves me to guess whether he thinks I am one of those Justice Department officials who "acted improperly" or one of those who "worked hard to make certain that Cisneros received no special treatment." The portions I was permitted to read do not identify who falls in which category. I was a Deputy Assistant Attorney General in the Criminal Division from 1994 through 1997. At the time that the Independent Counsel requested that his jurisdiction be expanded to cover tax matters, Jo Ann Harris, who had been Assistant Attorney General, had resigned, and John Keeney, who was Acting Assistant Attorney General, was ill. It therefore fell to me to supervise the Criminal Division's preliminary investigation.

The report contains a number of errors, omissions and misrepresentations of which I have personal knowledge:

First, the Independent Counsel asserts that on February 6, 1997, I told representatives of his office that it would be an "act of lawlessness" for the Department to decline to grant the tax jurisdiction he requested. The Independent Counsel reports this statement out of any context and in a manner that inaccurately suggests that I had formed a judgment on the merits of his application. As of February 6 the Department had barely begun its review of the OIC's presentation. I was in no position to express a view on the facts, and my views remained those that the Independent Counsel attributes to me on February 3: "[T]he OIC's expansion request would be granted if there were no problems with the underlying factual basis and if the tax division had no legal objections."

While I do not recall using the word "lawlessness," I clearly recall the context in which I would have. It had nothing to do with the facts of the case. The Independent Counsel wanted to apply directly to the Special Division for jurisdiction over tax offenses, bypassing the Department of Justice. The Department took the position that he had no authority to do so. I had several conversations with the staff of the OIC to reassure them that they had nothing to fear from review of their request by the Department. In that context, I undoubtedly told them that the Attorney General would not decline to expand the Independent Counsel's jurisdiction if the facts supported his request; in other words, that the Attorney General would act lawfully, not lawlessly.³ That is exactly what she did.

³ A February 7, 1997 letter from the Independent Counsel to the Attorney General references these discussions and confirms that he had agreed to hold his direct application to the Special Division in abeyance.

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Second, the Independent Counsel's report claims that, on February 18, 1997, I made the absurd statement that the Department routinely contacted potential targets before commencing investigations. Of course, that is not correct and I never said it. What is correct, and what I undoubtedly told the OIC, was that in conducting preliminary investigations pursuant to the Ethics in Government Act the Department routinely afforded potential targets the opportunity to be heard before the Attorney General decided whether or not to seek appointment of an independent counsel. This was the Department's policy throughout the history of the independent counsel statute and it was Department policy at the time of the Cisneros matter.

The Independent Counsel also suggests that I said that Cisneros was being treated differently because this was a tax case. Again, this comment simply reflects Department of Justice policy in all criminal tax cases. Unlike other criminal cases, criminal tax prosecutions are reviewed by the Tax Division to ensure uniformity in the enforcement of the federal tax laws.

Third, the Independent Counsel quotes me as saying that "although the correct standard would be applied, Public Integrity looked at cases 'differently than the rest of us.'" That is both an accurate statement and an irrelevant one. The career lawyers in the Public Integrity Section – not political appointees or independent counsels – were the repository of institutional knowledge about the Ethics in Government Act. They were in the best position to ensure that the law was applied consistently, so as to carry out its purpose of ensuring fair and non-partisan treatment of accusations against high government officials. They did so in every case during my tenure at the Department – cases in which they recommended the appointment of independent counsels as well as those in which they did not. They did look at cases differently than the rest of us; that was their job.

Fourth, as if it were somehow an admission, the Independent Counsel notes that I said that the Attorney General's decision was "difficult and close." Indeed it was; but what was difficult and close was the decision to grant jurisdiction over one year in the face of strong evidence that Cisneros did not knowingly fail to report income. Similarly, the Independent Counsel's complaint that the Attorney General granted "very narrow tax jurisdiction, effectively preventing any prosecution for tax offenses" misses a critical point. As I personally pointed out to representatives of the OIC at the time, evidence relating to other years could be relevant to their investigation of a single tax year under Rule 404(b) of the Federal Rules of Evidence, and if their investigation produced actual evidence of tax offenses in other years, the Department of Justice would be prepared to reconsider a request to expand jurisdiction. It does not appear that the Independent Counsel took advantage of this commonly used prosecutive strategy.

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Finally, the OIC repeatedly charges that the Department of Justice's consideration of his request was influenced by allegedly improper disclosures by the IRS to the Tax Division. I do not know enough about IRS procedures to know whether such communications would have been improper – although I find it noteworthy that the portions of the Independent Counsel's report that were provided to me do not cite any authority that IRS and the Department are prohibited from consulting on a criminal tax matter.

I do know, however, that I based my recommendation to the Attorney General entirely upon the facts and the law. I did not know what the IRS would do and I did not care. The role of the Department of Justice was simply to determine whether, under the applicable legal standards, the information presented by the Independent Counsel and the results of the Department's preliminary investigation justified further investigation of tax violations by Cisneros. With the exception of one year, they did not.

III. The Conduct of the Independent Counsel's Investigation

Finally, I would like to comment on several aspects of the Independent Counsel's investigation, which deviated in numerous respects from the standards normally adhered to by federal prosecutors. In the introduction to his report, the Independent Counsel invokes the "need to guarantee both the appearance and the reality that everyone, regardless of their [sic] status, is treated the same by their government when it comes to matters of criminal conduct." The suggestion is that the Department's review of the Independent Counsel's application deviated from these standards. In fact, the reverse is true. It was the Independent Counsel, not the Department of Justice, who was attempting to subvert normal investigative standards and practice.

First, the Independent Counsel attempted to take advantage of his special status to attempt to bypass the normal IRS process for review of tax cases – a process that was already proceeding normally with respect to Cisneros. Criminal tax investigations are normally handled by the Internal Revenue Service, administratively or together with the Department of Justice and a grand jury. An IRS administrative investigation of Cisneros had been going on for several years. It is apparent from the Independent Counsel's report that he feared that the IRS, through its normal review process, was going to decline to recommend prosecution of Cisneros.

Second, the Independent Counsel's report makes clear that he sought to block the Attorney General from following normal procedures for Department consideration of Independent Counsel jurisdiction. Congress specifically authorized the Attorney General to conduct a preliminary investigation before appointing an independent counsel. The Attorney General was prohibited from using grand juries, subpoenas, plea bargains or immunity grants in a preliminary

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investigation, but all other techniques were permitted. 28 U.S.C. § 592(a)(2). In the two decades that the independent counsel act was in effect, the Department of Justice routinely interviewed witnesses, requested and reviewed documents, and sought presentations from potential targets in the course of preliminary investigations.

Third, the Independent Counsel criticizes the Department of Justice for failing to obtain materials from the Internal Revenue Service pursuant to 26 U.S.C. § 6103(h)(3)(B). However, as noted in the Attorney General's application to the Special Division, such a request would have terminated the normal IRS administrative review – perhaps what the Independent Counsel wanted. While I am not an expert in tax procedures, it is my understanding that such a request is highly unusual, indeed almost unprecedented.

Ironically, it appears that there was nothing in the IRS file that would have changed the Attorney General's conclusions, since the IRS itself declined to refer the case for prosecution. There is no doubt that, if the Attorney General had demanded the IRS file (thus shutting down the administrative investigation) and had then declined to seek expansion of the Independent Counsel's jurisdiction, she would have been severely criticized (perhaps by this same Independent Counsel) for interfering with IRS processes.

Fourth, in disregard of normal prosecutive practice, the Independent Counsel appears to have pursued his investigation of alleged obstruction of justice from the summer of 1997 to March 2003. Since the Attorney General's application to the Special Division was made in February 1997, it appears that the Independent Counsel continued to investigate the matter for over a year after the five-year statute of limitations expired.

One wonders what the Independent Counsel did in those six years. There were not many potential witnesses in this matter: no more than a dozen people at the Department of Justice and presumably a similar number at IRS. The universe of relevant documents was also relatively small – at least when compared to corporate fraud investigations which Department prosecutors somehow manage to complete within the statute of limitations.

Nevertheless, to my knowledge, in six years the Independent Counsel never interviewed or subpoenaed *any* of the Department of Justice lawyers who were involved in the preliminary investigation. Certainly I never received a subpoena, a request for an interview, a letter, a telephone call, or any communication from the OIC. Before accusing government lawyers of having acted corruptly a responsible prosecutor might have asked for their version of the facts. And apart from fairness, any reasonably competent prosecutor always wants to learn what his putative targets have to say. But it does not appear that the OIC found the time to do that.

UNDER SEAL

Perhaps the OIC asked the Department of Justice for permission to interview its employees and the Department resisted the request. Fragmentary hints in the portions of the report provided to me suggest that in other portions withheld from me the Independent Counsel may claim that his investigation was "truncated" as a result of actions taken by the Department of Justice. Taking at face value the somewhat absurd claim that a six-year investigation was "truncated," one wonders why – if the Independent Counsel was truly interested in obtaining the testimony of witnesses – he did not subpoena them and litigate the question of whether the Department could refuse to permit its employees to testify in an independent counsel's investigation. See, e.g., *In re Lindsey*, 158 F.3d 1263 (D.C. Cir.), *cert. denied*, 525 U.S. 996 (1998).

I am reasonably certain, at least, that the Independent Counsel never approached the Department of Justice seeking witness testimony during the Clinton Administration. This raises two significant points. First, if the Department did object to its employees testifying in the Independent Counsel's inquiry, it was under a Republican Administration, not a Democratic one. Second, why did the Independent Counsel wait so long to make such a request (if one was even made)? Surely he could have anticipated at the outset of his investigation that testimony from Department of Justice employees would be important; surely he could have anticipated the possibility that the Department might resist. What could possibly have been occupying the time of his staff for the almost four years between the initiation of his obstruction investigation and the end of the Clinton Administration?

The portions of the report I was permitted to read provide some indication of the OIC's activity. One unfortunate IRS lawyer appears to have been required to appear before the grand jury on thirty separate occasions – a staggering and probably unprecedented number even in a complex case, which this most assuredly was not. The testimony of this IRS witness is quoted in the Independent Counsel's report in single sentences or phrases that are strung together in an obvious effort to create the impression of nefarious doings even though the quotations themselves contain no actual evidence of illegal conduct. I challenge the Independent Counsel to release the transcript of each of the thirty grand jury appearances of this witness, so that the public can determine whether he has fairly characterized the witness' testimony.⁴

⁴ Grand jury secrecy can surely be no objection. The Independent Counsel has quoted grand jury testimony throughout his report.

IV. Conclusion

It should be obvious that I am deeply angered by the Independent Counsel's report. I am not angry only for myself. I was a political appointee in the Department of Justice and a degree of politically motivated criticism is to be expected in such circumstances. But the career lawyers in the Public Integrity Section and the Tax Division whom the Independent Counsel attacks deserve better. In particular, I was privileged to work closely with the Public Integrity Section on several matters during my tenure at the Department. They are among the finest representatives of the legal profession I have known. They have forsworn the vastly greater incomes they could have earned in the private sector for the privilege of serving the public. Their work was invariably careful, thorough, and fair. I did not always agree with their conclusions but I never had any reason to doubt their complete good faith. To subject them to this sort of calumny simply because they did not supinely accede to the Independent Counsel's request is shameful.

In the final analysis, the Independent Counsel is apparently so certain that he was right that he can only conclude that those who disagreed with him did so in bad faith. Perhaps his conclusion reflects the overheated political climate of the last decade. The historian Stephen Ambrose, interviewed some years ago, said that the "greatest single thing he learned" from writing his biography of Dwight Eisenhower was "never to question a man's motives. [Eisenhower] would frequently question someone's wisdom, but he taught me that you never really know what someone's motives are." Ambrose went on to note that this lesson is "rarely learned in Washington . . . where questioning motives often appears the national pastime."⁵

I remain firmly convinced that the Department's analysis of the proposed tax case against Cisneros was correct and that the Independent Counsel was wrong. I do not question the good faith of his belief that a tax prosecution was warranted. But I do question his judgment and stewardship of public resources in the pursuit of his hallucinatory obstruction investigation. Sometimes people can disagree in good faith. It is unfortunate that the Independent Counsel did not recognize that that is what happened here.

I respectfully request that, if the Independent Counsel modifies his report or provides any response to comments, I be provided an opportunity to review those responses or changes and comment on them, as provided in 28 U.S.C. § 592(h)(2). I further request, as also provided in that section, that if the relevant

⁵ K. Ringle, "Historian on the March," The Washington Post, Dec. 20, 1997, p. F01.

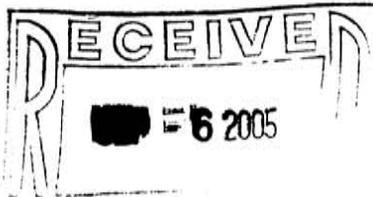
UNDER SEAL

portions of the Independent Counsel's report are made public, this letter be made public as well.

Respectfully submitted,

A handwritten signature in cursive script that reads "Robert S. Litt/mff". The signature is written in black ink and is positioned above the printed name.

Robert S. Litt



UNDER SEAL

United States Court of Appeals
for the District of Columbia Circuit

Robert S. Litt
555 Twelfth Street, N.W.
Washington, D.C. 20004

FILED AUG 15 2005

Special Division

August 15, 2005

Mark J. Langer
Clerk, United States Court of Appeals
District of Columbia Circuit
Washington, D.C. 20001-2866

Re: Division No. 95-1, In re Henry G. Cisneros

Dear Mr. Langer:

I am writing to supplement my letter filed with the Special Division on June 30, 2005, commenting on the report of Independent Counsel David Barrett in the matter of Henry G. Cisneros. On July 12, 2005, after I filed my letter, the Special Division ordered that the Clerk make available to me "the relevant unredacted portions of Part V of the Final Report," and permitted me an opportunity to provide additional comments.

The Independent Counsel apparently interpreted the Special Division's order as requiring disclosure to me of the entirety of each page from which he had previously redacted material, and nothing additional. As a result I have still been able to review only a portion of the report's discussion of the alleged conspiracy to obstruct justice. Moreover, because I received individual non-continuous pages, I am still confronted with sentences that are truncated midstream, incomplete lists, or interrupted thoughts. I continue to be baffled by the Independent Counsel's reluctance to permit me to review the entire obstruction section, unless he intends to oppose public release of that section.

Nothing in the new portions I was permitted to review, however, affects my prior comments in any substantive way. I would offer only two additional observations.

First, one of the incomplete paragraphs in the newly provided sections reveals that the Independent Counsel did, in fact, serve some kind of a subpoena on the Department of Justice. It appears, however, that this subpoena was not served until late in the Independent Counsel's investigation, and that it was the present Administration, not the Clinton Justice Department, that opposed it. The

UNDER SEAL

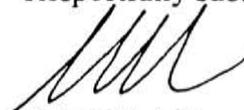
Mark J. Langer
August 15, 2005
Page 2

Independent Counsel's report states that he withdrew the subpoena on February 28, 2003 – six years to the day after the Attorney General's decision on his request to expand his jurisdiction, and hence a year after the statute of limitations had expired on any obstruction of justice charges.

Second, another of the newly released partial paragraphs suggests that, but for an Order to Show Cause issued by the Special Division on September 3, 2002 (and not further described in the portions provided to me), the Independent Counsel might still be continuing his investigation. Even after the Special Division, on March 17, 2003, ordered the Independent Counsel to wrap up his investigation, it took over two years simply to prepare his final report. Some independent counsels managed to conduct their entire investigation, start to finish, and prepare a final report, in that period.

I respectfully request that, if the Independent Counsel modifies his report or provides any response to comments, I be provided an opportunity to review those responses or changes and comment on them, as provided in 28 U.S.C. § 592(h)(2). I further request, as also provided in that section, that if the relevant portions of the Independent Counsel's report are made public, this letter be made public as well.

Respectfully submitted,



Robert S. Litt

UNITED STATES COURT OF APPEALS

District of Columbia Circuit

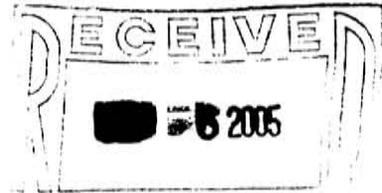
United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 31 2005

Division for the Purpose of
Appointing Independent Counsels
Ethics in Government Act of 1978, As Amended

Special Division

Division No. 95-1
In Re: Henry G. Cisneros



STATEMENT OF MARK E. MATTHEWS

(In Response to the Final Report)

This statement is submitted pursuant to the March 1, 2005 Order of the Special Division authorizing the undersigned to review selected portions of the Office of Independent Counsel ("OIC") Final Report in the Henry G. Cisneros matter and to submit comments and factual information in response. I welcome the opportunity to refute the Report's erroneous allegations about "improper" and "questionable" activity by undesignated Department of Justice ("DOJ") and Internal Revenue Service ("IRS") officials.

Introduction

At the time period relevant to my statement (February 1997), I was the Deputy Assistant Attorney General ("DAAG") for criminal matters within the DOJ's Tax Division. I supervised approximately 90 federal prosecutors who reviewed virtually all criminal tax matters and prosecuted in the field U.S. Attorneys' offices a significant portion of all criminal tax cases nationwide. Although I make this statement exclusively in my capacity as a former DAAG from 1994-1998, I have substantial additional relevant experience, including: (a) five years as an Assistant United States Attorney in the Southern District of New York from 1988-1993 (including two years as a Deputy Chief of the Criminal Division); (b) almost three years as the Chief of the IRS Criminal Investigation Division from 1999-2002; and (c) currently (since October 2003) as the IRS Deputy Commissioner, Services and Enforcement. With almost two decades of experience in federal criminal investigations and prosecutions (mostly tax), I have ample familiarity with the criminal tax system's processes and procedures – including the

relationships between investigating special agents and prosecutors and between the field and headquarters operations, both in DOJ and IRS.¹

The Final Report mentions my name numerous times. It also recounts and often mischaracterizes events in which I was one of a few direct participants. Yet in the eight years since these events in February 1997, the OIC has never -- not once -- contacted me for any purpose, much less to advise me that events in which I participated were under investigation, or would be a subject of the OIC's Final Report.

The Final Report's Allegations

The portions of the Final Report made available to me in a heavily redacted form² essentially allege that a group of undesignated "high-ranking" DOJ and IRS government lawyers acted "questionably" and "improperly" to "undermine the exercise of the Attorney General's discretion" in deciding whether to seek extended jurisdiction for OIC Barrett to investigate Cisneros for possible tax offenses for four tax years (1989, 1991-93). The gravamen of the OIC's complaint is that Washington D.C.-based government attorneys in the headquarters of DOJ and IRS acted improperly to prevent the OIC from investigating Cisneros for alleged tax crimes.

According to the Final Report, these government lawyers from two different agencies acted "in conjunction" with each other. There appear to be two fundamental features of this alleged misconduct: (a) the lawyers' conclusions were biased or "predisposed" against the OIC position in light of what the OIC claims was a "strong criminal tax case," and (b) the DOJ and IRS lawyers improperly signaled to each other their respective positions in a manner designed to give each group comfort that the other would not agree with the OIC and thereby prevent a tax investigation of Cisneros.

¹ Based on what I learned from media leaks surrounding this investigation, I advised all prospective employers after 1997 of the apparent pendency of this investigation.

² I was offered the opportunity to review and take notes from over 150 segments of the Final Report that the OIC deemed "relevant" to me, some as small as a single sentence on an otherwise blank page. In view of the fact that the DOJ and IRS officials were alleged to have operated "in conjunction" with each other, I requested the opportunity to review additional portions of the Final Report. For example, I asked to review materials regarding potential DOJ resistance to the OIC investigation unknown to me, any motive evidence and references to particular policies deemed to have been violated. Given that the DOJ officials have not been provided with any opportunity to respond for eight years, fundamental fairness would seem to require that we be shown the full bill of particulars when finally given a chance. The OIC refused to make the materials available notwithstanding the fact that he planned to make the full Final Report public in short order. I requested access to these materials in a motion to the Special Division, but the OIC only provided unredacted versions of pages previously provided in response to the Court's Order. Therefore, I still have reviewed only limited portions of the Final Report and my statement may not address all relevant matters in the Report. Lastly, my quotations from the Report are based on my notes and may not be precise, but they do capture the essence of any quoted line. I also note that this statement, like the Final Report, contains voluminous grand jury and tax information, not previously released to the public.

Summary Response

There are numerous flaws in the OIC's hypothesis, almost none of which are addressed in his Report. This may be because none of the DOJ lawyers named were ever contacted by the OIC during his eight years of investigation and report writing on this matter.

The DOJ lawyers, including the Attorney General, assessed the proposed tax investigation of Cisneros believing that the best approach was to ensure the same handling and evaluation of the Cisneros matter as would apply to any other taxpayer. We suggested that the OIC allow the completed IRS administrative investigation then being reviewed by non-political, career IRS employees to proceed to its natural conclusion. If that administrative investigation resulted in a referral to DOJ for criminal investigation and/or prosecution, we assured the OIC that it would be referred to his office. The OIC admits in his Report that he distrusted the IRS career employees and overtly alleges that they could be compromised. He likewise admits in his report that he objected to the fact that the normal IRS standard for referral of criminal matters would be applied to Cisneros, because the Independent Counsel statute provided him with a lower standard.³ He asked DOJ to act to terminate the normal IRS process and send him the case.

When the Attorney General sought to expand the OIC jurisdiction to tax year 1992, but concluded that the evidence presented in the three other tax years did not meet the statutory threshold to commence an investigation, the OIC developed the theory that her discretion had been undermined by this large group of mostly career government lawyers from two different agencies. This is entirely untrue.

(a) The Attorney General was fully, even exhaustively, presented with the legal theories and factual allegations that the OIC asserted in support of his jurisdiction. Not only did the OIC personally have the opportunity to make a direct presentation to the Attorney General, he submitted to her a lengthy written presentation (22 pages) which outlined the IC's case in his own words. Moreover, the Attorney General was present at a discussion in which her staff laid out in detail the strengths and weaknesses of each tax year at issue. I am confident the Attorney General does not believe that her discretion was compromised.

(b) When this matter arrived at DOJ, it was assigned to three career lawyers to evaluate the case and prepare a recommendation to the Attorney General. Those

³ Although the details of the Independent Counsel statute were new to me at the time, it was clear that the standard there for an expansion of jurisdiction was lower than the traditional IRS standard for referral. The OIC had a right to insist on that standard, and it was that lower standard that caused the Attorney General to refer the 1992 year to the OIC in my opinion. I do think that the IRS standard has some relevance to this matter, however, because under the Independent Counsel statute, he was obliged to comply with "written or other established policies of the [DOJ] respecting enforcement of criminal laws." Section 594(f). Therefore, it seems particularly odd that when the OIC actively sought to exploit a lower investigative standard than would apply to all other taxpayers, that it is the DOJ lawyers who are accused of not treating everyone "the same by their government when it comes to matters of criminal conduct."

three career lawyers have asserted that no senior DOJ officials, including any political appointees, directed or otherwise signaled in any way a desired outcome of their analysis. They concluded that tax years 1989, 1991 and 1993 did not meet the standard under the Ethics in Government Act for referral to an independent counsel. That recommendation was passed to the Attorney General, unaltered by any high-level DOJ official.

(c) No less than 10 DOJ and IRS government lawyers, eight of whom were career employees, disagreed unanimously with the OIC's position with respect to three of the tax years for which he sought jurisdiction to investigate.⁴ Their analysis concluded that there was no evidence that Cisneros had willfully signed false tax returns. In fact, the evidence overwhelmingly demonstrated that any errors were the result of the poor performance of his bookkeepers and accountants. The portions of the Final Report made available to me provide no evidence of any improper motive for so many lawyers to come to the same conclusion. More to the point, I know from my direct participation in these events – and would have explained to the OIC if asked – that these reviewers acted on their own independent professional judgment.

(d) If DOJ and IRS officials were conspiring to protect Cisneros from investigation for these three tax years, the OIC has not explained why they came to contrary conclusions with respect to the 1992 tax year. Moreover, DOJ officials explicitly advised the OIC staff after the decision to refer the 1992 tax year that as the OIC investigated 1992, the nature of a tax investigation would clearly and properly require that the OIC seek evidence and documents from contiguous tax years. The staff was explicitly invited to resubmit their request if additional evidence developed concerning tax years 1989, 1991 and 1993. To my knowledge, as so far as revealed in the portions of the Final Report disclosed to me, the OIC never developed such evidence and never renewed its request.

(e) As for the alleged inappropriate signaling between IRS and DOJ, all contacts were proper as will be described below. Moreover, one is struck by the fact that notwithstanding the limited contacts that did occur, the IRS career lawyers persisted in their view that no year merited investigation under traditional IRS standards, while the DOJ lawyers persisted in their view that given the strictures of the independent counsel statute, the Attorney General should seek referral for tax year 1992. Why did they come to different determinations if they were acting in concert? According to the OIC theory, the DOJ lawyers had assured themselves that no referral would be forthcoming from the IRS. If so, then why would the DOJ attorneys seek expansion of the OIC's jurisdiction to allow investigation of one year, knowing that the OIC was essentially free to continue to obtain evidence with respect to the other three years?

⁴ Although I do not know with certainty that the two other staff IRS lawyers agreed with IRS Assistant Chief Counsel Finkelstein, the clear tenor of the portions of the OIC report available to me is that they did. It also seems apparent that any dissent would have been noted in the Final Report.

(f) With respect to the fourth year at issue (1992), the Attorney General did in fact seek expanded jurisdiction for the OIC because she determined that given the short time available to resolve outstanding factual issues, she was obligated to refer that year. The Attorney General explicitly noted in her application to the Special Division, that if the IRS did decide to refer the matter to DOJ (under the standards applicable to all other taxpayers), she would reevaluate the remaining three years.

The Federal Criminal Tax System

Outside the context of this independent counsel investigation, the normal review and approval process for the indictment of a criminal tax case includes by far the most elaborate safeguards in the entire federal criminal justice system. The scrutiny applied to criminal tax prosecutions far exceeds the review in other sensitive areas such as RICO, money laundering and environmental crimes, for example. Each potential tax case is evaluated by three sets of lawyers in different agencies before it may be presented to a grand jury. Prior to any referral of the case to DOJ, IRS Chief Counsel attorneys review the case. If it is referred to DOJ, at the Tax Division, it is evaluated by from two to five lawyers, depending on the features and complexity of the case. Only if approved there is the case sent to a local U.S. Attorney's office for prosecution, and even then, an Assistant U.S. Attorney may decline to prosecute the case. Many potential criminal tax cases are terminated at each level of this elaborate review process for a wide variety of reasons.

The reason for this multi-layered and frequently very lengthy process stems from the nature of tax prosecutions. Far more Americans are required to encounter and comply with the tax system each year, potentially facing civil and criminal penalties, than any other area of federal law. It is exceedingly important that the public have confidence in the fairness of this system. Those of us who have worked in this system for years believe that it is very important that we reserve criminal investigation and prosecution for those individuals who unambiguously, willfully and knowingly violate their known legal duty to file accurate tax returns and pay any taxes due and that every case brought contribute to a strong deterrent message. Whatever an efficiency expert might think of the complicated process above, it has helped maintain every year a conviction rate at trial in tax cases of over 95% of cases, higher even than in drug cases.

I have participated in this process from all perspectives (field and headquarters; investigator and prosecutor) – as an AUSA in the Southern District of New York, as the DAAG for Criminal Tax and as the Chief of the IRS Criminal Investigation Division. There is one constant source of tension in this program. The investigative agents and line prosecutors in the field invariably believe more strongly and sometimes much more strongly in their cases than those more detached individuals reviewing the case in Washington, D.C. And of course you would expect and hope that field investigators believe in their case. But the system for decades has relied on the balancing evaluations of individuals not involved in the actual investigation. And for many decades, the lawyers in IRS Chief Counsel's Office and at the Tax Division in Washington, D.C. have

been charged with making that more objective evaluation of the case. They must consider, for example, “is this taxpayer being charged with something that a similarly situated taxpayer would be charged with?” And is the evidence strong enough to convict? To put it mildly, this reviewing role has never been popular with the field investigators or prosecutors.

A prosecutor unschooled in the nature of tax cases often leaps to the conclusion that any cash not clearly apparent on a tax return represents a crime. In fact, the “art” of a criminal tax investigation is not in finding money not obviously on a tax return; the key issues are in determining whether the money is taxable income and understanding the potential defenses available to the taxpayer at trial. Is that money really income in the year at issue (with all the myriad technical tax defenses that an able defense attorney will exploit)? And can that tax issue be proved beyond a reasonable doubt? Can the prosecution prove that the defendant knew both that it was taxable income and not on his or her return beyond a reasonable doubt? Even if you determine that the return is erroneous, was it accidental or negligent? Does the taxpayer have a defense of reliance on a professional advisor, bookkeeper, tax preparer or attorney? These are the kinds of issues that IRS and DOJ tax reviewers confront each day. Some independent counsels in the past, when they realized they had potential tax issues, augmented their staffs with seasoned tax prosecutors to assist in the investigation and prosecution of these matters. Mr. Barrett did not.⁵

The OIC approach

From the moment it sought jurisdiction to commence a tax prosecution, the Barrett OIC sought to subvert the checks and balances built into the regular processes for review of potential tax prosecutions. The OIC admits fully and completely that they distrusted the career lawyers in the IRS Chief Counsel’s office. His Report states, “The OIC told Matthews that the OIC was particularly concerned about any IRS input because the IRS could be compromised and politicized.”⁶ The OIC therefore explicitly sought to avoid an opinion from a group of career IRS lawyers. He believed that that opinion might reject an investigation of Cisneros. The OIC states in his Final Report that his goal was to terminate the normal operations of an IRS administratively investigated case. He proposed that DOJ seize the case from IRS, without waiting for the usual referral and

⁵ The Final Report is replete with examples of an inexperienced tax prosecution team. These range from the trivial (but telling) to the startling and significant. It is revealing that after eight years of work, the OIC staff could not differentiate between the two fundamental types of tax investigations. The portions of the report available to me reveal that the OIC staff appears to have thought they were investigating a case involving “indirect methods” of proof. In fact, the Cisneros case presents a clear “specific items” method of proof. This error appears to have contributed substantially to the OIC’s belief that without a referral of multiple tax years, they could not complete their investigation, because they cited, in error, the indirect methods portion of the tax manual. The OIC’s fundamental misunderstanding of the methods of tax prosecution discredits its criticism of the judgments reached by DOJ and IRS in this case.

⁶ It perhaps goes without saying that based on many years of dealing with Chief Counsel attorneys, I had no such similar reservations. In my experience, I had seen those attorneys make decisions on the merits every time. We may not have agreed in every instance, but I never doubted their personal integrity.

recommendation, by invoking an extremely unusual mechanism in Title 26 – Section 6103(h)(3)(B). This provision, used only one time in history to my knowledge, would allow the Attorney General to seize jurisdiction of a tax matter and information without a referral from the IRS.⁷

The DOJ disagreed with this approach, and urged that the usual administrative process, near imminent conclusion, be allowed to run its course. As the Attorney General stated in her February 28, 1997 Application to the Special Division:

The [DOJ] has considerable respect for and takes great care to avoid interfering with the administrative processes of the IRS...[L]etting the administrative process proceed to its natural conclusion is the best course at this time.

The OIC rejected this approach and invoked the IC statute and timeframes in his attempt to override it. The Public Integrity (“PI”) Section came to the DOJ Tax Division and sought assistance from one of our seasoned prosecutors in reviewing the OIC’s request for expanded jurisdiction. The Tax Division made available one of its Assistant Section Chiefs, an experienced, career prosecutor. He joined with two career Public Integrity attorneys and began an evaluation of the materials presented by the OIC. He also joined with the Public Integrity attorneys in conducting the interviews they scheduled with relevant witnesses. These three career prosecutors worked tirelessly to develop a recommendation for the Attorney General. Although these prosecutors discussed their findings and evaluations with PI Section and Tax Division supervisors during the month of February, they all state that they received absolutely no pressure or suggestion about the results of their analysis. They jointly came to a recommendation that three tax years (’89, ’91 and ’93) did not meet the standards under the Ethics in Government Act for an expansion of the OIC’s jurisdiction. All DOJ supervisors – PI section, Tax Division, and the Attorney General – concurred with that recommendation.

The Tax Years

My recollection of the evaluation completed by the three prosecutors was that although Cisneros’s tax returns had errors, there was no evidence that Cisneros was aware of or responsible for those errors.⁸ In fact, it appeared that his accountants and

⁷ It must be noted that OIC lawyer Mark Jackowski had never heard of this provision of the tax code nor of the notion of prereferral advice (discussed below) until I mentioned it to him in an early conversation. He had asked for a description of every mechanism for a transfer of tax information and cases between the IRS and DOJ. In an effort to give a comprehensive listing of every possible avenue, I advised him of the existence of 6103(h)(3)(B) (which is used so seldom that perhaps only a handful of professionals are even aware of it) and the notion of prereferral advice. He seized on this option as a mechanism to terminate the IRS investigation. In reading the OIC Final Report, I note that merely days after being advised of these fairly arcane tax provisions, Mr. Jackowski had determined that we had misadvised him and were failing to use them appropriately.

⁸ For my preparation of this statement, I was only allowed to review the Attorney General’s submission to the Special Division on the four tax years. The Tax Division declined (citing the tax privacy

bookkeepers were aware of almost every dollar of missing income, except for Forms 1099 not sent or received. The OIC allegations concerning the 1989 tax year involved the cashing of a portion of a single check, when Cisneros took \$16,000 of an \$80,000 check in cash. The fact that the full amount of this check was a fee and the fact of the split deposit was referenced in the accountant work papers. There was simply no evidence that Cisneros knew his return was incorrect. The OIC allegations concerning tax year 1993 involved three missing Forms 1099 from an IRA annuity to my recollection. The evidence unearthed by the DOJ attorneys disclosed that the 1099s were unambiguously sent to old mailing addresses for Cisneros because he had by this time moved to Washington, D.C. Moreover, there was significant annuity and IRA income reported on his return. Again, there was simply no evidence Cisneros knew the return was incorrect. The OIC allegations concerning tax year 1991 were based largely on allegedly missing speaking fee income. Here, I am seriously hampered by my lack of access to the previous evaluations, but my recollection was that the evaluation by the DOJ attorneys demonstrated significant issues such as (a) much of the income actually appeared on the Cisneros tax return, (b) some organizations failed to send 1099s, and (c) virtually all of the remaining income was known to Cisneros' bookkeepers and/or accountants. As indicated above, mostly because of the compressed time available to the DOJ attorneys to complete the evaluation of tax year 1992, the Attorney General elected to seek expanded OIC jurisdiction for that year.⁹

The recommendation to the Attorney General for these four tax years was reviewed by high-level officials in the Department – Lee Radek and Robert Litt in the Criminal Division and Stanley Krysa and me in the Tax Division. (Mr. Krysa, Senior Division Counsel for the Tax Division had over 40 years of experience in tax matters at this time.) We all concurred with that recommendation and passed it unaltered to the Attorney General. In addition, she received submissions and materials from the OIC and heard him out in person. All of the DOJ attorneys, including the three attorneys who conducted the initial review, had a direct, in-person briefing of the Attorney General in which she participated in a full discussion of each tax year proposed for investigation. It is difficult under these circumstances to understand on what possible basis the OIC believes that “high-level” officials within DOJ and IRS “undermined the exercise of the Attorney General’s discretion.” She was in full possession of all the known facts as well as the differing interpretations of those facts. I do not think the Attorney General believes that her discretion was in any way undermined by her subordinates at DOJ or anyone at the IRS.

provisions of Section 6103) to provide me a copy of the far more detailed analysis made contemporaneously in 1997 by the Tax Division attorney, working with the Public Integrity attorneys. I relied in large part on that document prior to making a recommendation to the Attorney General in 1997.

⁹ It is startling to learn for the first time from the Final Report that while the OIC’s request for expanded jurisdiction was under review at DOJ, the OIC learned – but never disclosed to DOJ (to my knowledge) that Cisneros’s accountant, a key witness in the proposed tax case, had previously approached IRS CID in the 1980s to volunteer as an informant against Cisneros. Neither the OIC nor the local IRS CID agents disclosed this fact to the IRS District Counsel attorneys or to DOJ attorneys who were called upon to assess the strength of the tax case that would depend on this witness’ credibility, in the face of the demonstrably sloppy bookkeeping. To this day, the OIC apparently does not understand that the purported “strong criminal tax case” was discredited by this one fact alone.

Alleged Improper Communications

The Final Report points to what it terms improper signaling between the IRS lawyers who were conducting the review of the administrative case and the DOJ lawyers who were considering a possible expansion of the OIC's jurisdiction. Apparently the theory is that we were able to give each other private assurances that the case would not be investigated. In fact, all contacts and communications between the IRS Chief Counsel's office and the DOJ were totally appropriate.

The IRS Assistant Chief Counsel (Finkelstein) was the classic referral authority during this time period, meaning he had the power to refer the case to the DOJ. In addition, an individual within the IRS who has referral authority may also make disclosures to the DOJ for the purpose of soliciting "advice and assistance." This is "prereferral advice." See Internal Revenue Manual 11.3.22.12.2. Similarly, the Public Integrity Section may undertake a preliminary investigation to determine whether to seek expansion of an OIC's jurisdiction. See 28 U.S.C. Section 593(c)(2)(A). There are no limitations placed on that authority (although there is no subpoena power), and therefore the line attorneys sought numerous documents and conducted several interviews during the course of preparing their recommendation to the Attorney General. They also engaged in discussions with defense counsel. I understand that Public Integrity lawyers, in other instances, did contact the relevant investigating agency for their views and/or assistance, when appropriate. So whether or not each agency decided to communicate or seek assistance, both were clearly authorized to do so, and nothing in the Independent Counsel statute prohibited that communication.

Thus, it was entirely proper for the Public Integrity Section lawyers, who felt obligated for due diligence purposes, to speak directly with the Assistant Chief Counsel IRS and ask whether he would or could assist DOJ in its evaluation of the tax case. The fact that Mr. Finkelstein decided to decline to provide that assistance or otherwise seek prereferral advice from the DOJ does not mean that the request was inappropriate. If DOJ had failed to seek expansion for any tax year without seeking IRS assistance and then received a referral from the IRS the next day, we would be alleged to have made a biased decision without seeking all relevant information. On the other hand, if DOJ terminated the IRS administrative case (as the OIC requested) and then decided not to seek expansion, the OIC would have clearly claimed that we were protecting Cisneros by terminating a valid IRS investigation.

In a completely different context, DOJ learned facts about the IRS administrative case indirectly from defense counsel for Cisneros. At the meeting with counsel for Cisneros, his attorney stated strongly that his presentation before the IRS had "killed the case" there. That suggestion seemed more than plausible after he made his presentation to DOJ of the countervailing facts in the four tax years.

The portions of the Final Report available to me do not clearly state whether there was a direct communication between the two agencies of the final views on the respective

decisions facing them. I can say with certainty, however, that prior to the Attorney General's decision, I did not convey any expected final decision of the Attorney General to the IRS. The simple reason was that this whole procedure (independent counsel jurisdictional expansion) was entirely new to me, and I had no experience with the Attorney General's decision making in these matters. I simply did not and would not have speculated to Mr. Finkelstein about the view that the Attorney General might take about an expansion for any of the tax years. From the contacts that were made, however, and the request for assistance, Mr. Finkelstein could certainly have deduced that the DOJ lawyers had some difficulties with the case. Moreover, he also clearly understood shortly thereafter that the DOJ must not have referred all years, because the OIC was unable to claim jurisdiction for those years.

The OIC finds support for his theory of improper coordinated action in the notion that the IRS declination memorandum had similar positions to those contained in the Attorney General's submission. This overlooks the fact that IRS Chief Counsel and the Tax Division have been exchanging views on tax matters on a daily basis for decades. If one were to evaluate the tens of thousands of IRS referral memoranda and Tax Division authorization memoranda, you would see a correlation of issues identified in well over 90% of the cases. It may not be that we agree on the outcome of every case in every instance, but it is simply not surprising that experienced professionals would identify the same sort of obvious proof issues described above.

Finkelstein's Testimony

The OIC places great weight on several reported statements from Mr. Finkelstein's grand jury testimony that he might be being used as a "cover" for the DOJ decision. Any reader of that portion of the Final Report needs to know that Mr. Finkelstein spent thirty-one (31) days in the grand jury – most of them full-day sessions. This is simply an unprecedented use of the grand jury. I strongly doubt that the selected quotations fairly characterize the bulk of Mr. Finkelstein's testimony nor do I believe that Mr. Finkelstein believes that any of the IRS or DOJ lawyers mentioned in the Final Report committed any misconduct.

Normal Procedures

Another theory of misconduct advanced by the OIC is the notion that Finkelstein improperly "intervened" in this case and disrupted normal procedures by making the referral decision in Washington, rather than leaving the decision for local IRS District Counsel. The OIC apparently relied on a memorandum from an angry CID chief John Filan in Austin who wrote that "in an unprecedented deviation from the normal review process, the case was taken from District Counsel because of its 'sensitive nature' and given to Assistant Chief Counsel attorneys who did not review criminal tax cases on a regular basis and to whom Finkelstein had apparently given directions to kill the case." In fact, since 1989, the IRS Chief Counsel had issued a series of Decision Memoranda

(Part 31) covering the appropriate approval level for cases involving “politically sensitive individuals,” the definition including “current high-level Executive Branch officials, (i.e., cabinet-level officials).” That memorandum requires any such case to be referred to IRS headquarters in Washington and the Assistant Chief Counsel (Criminal Tax) [or Mr. Finkelstein] for approval. The portions of the Final Report made available to me contain no reference to this provision, and the Report leaves the erroneous impression that Mr. Finkelstein violated procedures. In fact, it would have been a violation of procedures NOT to refer the case to Finkelstein.¹⁰ Chief Filan was also in error regarding the experience of the Assistant Chief Counsel attorneys in Washington, who very frequently are involved in the review of criminal tax cases.

The OIC Investigation

Upon receiving the Attorney General’s decision, the IC apparently spent very little effort on his tax case and instead turned his ire, the next 8 years and over \$10 million¹¹ of his efforts against the largely career staff of lawyers at the IRS and DOJ. He spent almost as much money and more years investigating this second phase of his work than in obtaining the misdemeanor conviction of Cisneros. The Independent Counsel converted a routine difference of prosecutive judgment into an abusive, six-year grand jury investigation. I understand that he called a single IRS attorney into the grand jury for thirty-one (31) appearances, yet never once contacted several DOJ attorneys with greater knowledge of the facts, but finally insinuates that all of them engaged in misconduct. The unfairness of this should be apparent, if beside the point for present purposes, because none of this ever had any basis in fact.

Conclusion

I personally witnessed the Attorney General make this decision on the merits based on a full understanding of the facts and law. In my involvement with this matter, I saw utterly no evidence of any improper motives or actions by any DOJ or IRS official. In fact, there was never any evidence that any government official engaged in any improper or questionable acts in this matter, and none is reported in the portions of the Final Report made available to me. Yet this Independent Counsel has pursued his theory for eight years at a cost of over \$10 million, even though 10 government lawyers, eight of them career and many of them very seasoned criminal tax professionals, disagreed unanimously with the OIC’s assessment of the case.

The political appointees in the government understand that unsubstantiated claims of political misconduct will be leveled at them with some frequency; it comes with the territory. But the career lawyers at the IRS and DOJ were the real victims of this

¹⁰ I sought access to any redacted provisions of the Final Report that discussed this memorandum, but the OIC declined to make any such sections available or to advise me of whether any such references even existed.

¹¹ Even if you credit all funds expended before Cisneros’ plea in 1999 to the Cisneros part of the investigation, the OIC expended more than \$10 million for the last six years, including over \$3.6 million in the two years taken to write the Final Report.

investigation. The IRS lawyers, in particular, were put through the wringer for year after year for simply doing their job. The OIC investigation sent a terrible message through the system – that a career lawyer exercising his or her best judgment could become the subject of a criminal investigation without any evidence of an improper act, motive or bias; a difference of opinion was enough. The damage to the system will not be easily repaired.

Date: August 31, 2005

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mark E. Matthews". The signature is fluid and cursive, with a long horizontal stroke at the end.

Mark E. Matthews



U.S. Department of Justice

Criminal Division

JUL 5 2005

Washington, D.C. 20530

June 30, 2005

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 30 2005

Mark J. Langer
Clerk, United States Court of Appeals
District of Columbia Circuit
Washington, D.C. 20001-2866

Special Division

Dear Mr. Langer:

I am writing this letter in response to the Order of the Independent Counsel Division of the United States Court of Appeals for the District of Columbia Circuit (the "Special Division") dated March 1, 2005. That Order provided me with the opportunity to review certain redacted portions of the final report of the independent counsel investigation conducted by David Barrett, and to provide written comments to the Special Division. The portions of the report that I was allowed to review were replete with redactions, making it exceedingly difficult to understand. Nevertheless, this is my response to investigative conclusions about my conduct and my character which were compiled over ten years at a cost of more than twenty million dollars.¹

I have been a trial attorney with the Public Integrity Section for over seventeen years. I believe firmly in the value and virtue of government legal service. Integrity and fairness are the most important qualities in any prosecutor, and they appear sorely lacking in Mr. Barrett and his staff. The final report cavalierly, and without any supporting evidence, concludes that I and several of my supervisors within the Section and the Criminal Division, as well as individuals in other components of the Department and the Internal Revenue Service, joined in a preemptive effort to obstruct the Independent Counsel's investigation. This is a reprehensible falsehood.

From the start of my tenure in the Public Integrity Section through the expiration of the Independent Counsel Act (the "Act"), I worked on dozens of matters that the Public Integrity Section handled pursuant to the provisions of the Act. On most of these, I worked with the same people whom Mr. Barrett now accuses of misconduct. All of these matters involved "covered persons" under the Act, including a significant number of cabinet secretaries in both Democratic and Republican administrations. Not once did I ever encounter at any level within the Section,

¹ The views expressed in this letter are my personal views, and do not necessarily reflect the views of the Department of Justice. I respectfully request that these comments be made a part of the permanent record and made public if any portion of Mr. Barrett's report is publicly released.

the Division or the Department the slightest hint or suggestion that a decision should be made on any basis other than the merits of the factual and legal issues involved. Neither was I ever asked to "tailor" an investigation to realize a preordained result. And yet, Mr. Barrett and his staff have managed to convert legitimate disagreements among Department lawyers and investigators into substance for his argument that government lawyers sought to obstruct his investigation. This misguided approach is at the heart of much of Mr. Barrett's misunderstanding of the preliminary investigations conducted by the Public Integrity Section.

As an initial matter, Mr. Barrett did not have jurisdiction to conduct this obstruction investigation. The substance of the Independent Counsel's original and supplemental jurisdiction, as provided by the Special Division, was to investigate and prosecute crimes concerning (i) Mr. Cisneros's false statements to the FBI during his background investigation, (ii) criminal tax violations for tax year 1992, and (iii) potential obstruction of justice of matters "which arose out of" his substantive investigation of Mr. Cisneros's false statements to the FBI, or his alleged tax violations. Nothing in the orders of the Special Division ever authorized Mr. Barrett to investigate an alleged obstruction of either of the preliminary investigations undertaken by the Department of Justice, or the Attorney General's unreviewable exercise of discretion in deciding whether to appoint an independent counsel.

It is equally clear that Mr. Barrett knew that his jurisdiction did not extend to the matters on which he has wasted so much time and so much money. Years after he began his review he returned both to the Department of Justice and the Special Division to seek the expanded authority which he now claims he possessed all along. The Department of Justice, then under a Republican Administration and without the contribution of any member of the team which participated in the earlier preliminary investigations, denied his request, finding "no actual evidence" to support Mr. Barrett's claims. The Special Division also denied his request, and appears, ultimately, to have prompted Mr. Barrett to terminate his investigation.

The 1994-1995 Preliminary Investigation

In his final report, Mr. Barrett states that the first part of his "obstruction" investigation explored whether crimes were committed in connection with recommendations made by the Public Integrity Section regarding whether an independent counsel should be appointed to investigate Mr. Cisneros. Mr. Barrett suggests that the Public Integrity Section must have engaged in obstructionist conduct by virtue of the fact that the Section recommended against the appointment of an independent counsel at the end of an extended preliminary investigation. As support for this premise, he offers examples of instances when Section attorneys and the FBI disagreed over tactical investigative steps as "proof" that Section attorneys were trying to limit or kill the investigation. I was intimately involved in the preliminary investigation, and I can state unequivocally that the report contains many misrepresentations about my role as well as the role of the Section, the most blatant of which are the following:

- Mr. Barrett states that from the inception of the Public Integrity Section's review of the allegations, Section attorneys supervising the matter were taking steps to shut the investigation down. This defies reason. At the conclusion of the Department's initial inquiry, Attorney General Reno commenced a preliminary investigation into the matter. Mr. Barrett states in his report that "The OIC was never able to determine which Department of Justice officials recommended in favor or against the initiation of a preliminary investigation." However, in August 1995, when Mr. Barrett visited the Public Integrity Section, he was provided with a 17-page memorandum dated October 11, 1994, from Lee Radek, Chief of the Public Integrity Section, to Jo Ann Harris, the Assistant Attorney General of the Criminal Division, captioned "Recommendation that Preliminary Investigation be Conducted of Allegations Against HUD Secretary Henry Cisneros." This memorandum was forwarded to Attorney General Reno by Assistant Attorney General Harris, who concurred in the Section's recommendation. The memorandum was also listed on the very first page of an eight page index of documents provided to Mr. Barrett on that same day. The detailed memorandum in support of the recommendation rebuts any suggestion that the Section was trying to shut the investigation down during the initial inquiry.

- Mr. Barrett suggests that the decision of attorneys in the Public Integrity Section not to pursue additional lines of investigation offers further "proof" that the Section was trying to curtail the investigation. This line of argument shows a complete lack of understanding of the Attorney General's role under the Independent Counsel Act. Section 592 of the Act tasked the Attorney General with determining whether further investigation was warranted of a potential violation of federal criminal law. As fully explained in the Section's recommendation against the appointment of an independent counsel, which is part of the Appendix to Mr. Barrett's report, the allegations which the Section did not pursue, even if they were true, would not have constituted violations of federal criminal law or would have fallen outside the applicable statute of limitations, and therefore were beyond the Attorney General's purview.

- Mr. Barrett claims that I was trying to prevent the FBI from interviewing Ms. Medlar or obtaining tape recordings she had made of telephone conversations with Mr. Cisneros. The report describes me as "frantic" on not one but two occasions. This term arises in a somewhat comical characterization of my tone in conversations with FBI supervisors on September 28, 1994. During those conversations, I attempted with some admitted urgency to find out why the FBI was proceeding to meet with and interview Ms. Medlar; without telling the Department they were doing so, without inviting Department attorneys to attend, without vetting appropriate questions for Ms. Medlar, and without assuring that the tape recordings we all wanted were going to be properly authenticated before copies were obtained. If there was concern in my voice, it was because of these failures, and the fact that for the only time in my entire tenure in the Department, I was told not once, but twice by FBI supervisors that FBI agents could not be reached by pager or cell phone. Ironically, later during the extended preliminary investigation period, the FBI opposed conducting a follow-up interview of Ms. Medlar at the Public Integrity Section's request because the FBI believed it was "premature."

- Mr. Barrett insinuates that certain statements attributed to Public Integrity Section attorneys betray our intention to scuttle the investigation. On October 19, 1994, and later in October, meetings were held between Public Integrity Section attorneys, including myself, and FBI agents involved in the investigation. While there was indeed disagreement about the investigative steps that needed to be taken (the FBI wanted to pursue investigative steps which had no bearing on the matters that either needed resolution, or could be resolved under the Act), I am completely perplexed by what certain agents have indicated they heard from Mr. Radek, Ms. Farrington or myself. No one within our Section who worked on these or any other cases would ever have said that the Section's function was to find ways to decline Independent Counsel Act cases. I certainly never did. Nor would I ever have said that lying to the FBI was "irrelevant." In fact, what seems to have energized these accusations has more to do with the FBI's irritation over our legal conclusion that the specific untrue statements by Mr. Cisneros to the FBI were not material to his background investigation, a subject which came up repeatedly during our meetings.

- Mr. Barrett claims that over the course of the preliminary investigation I made several comments about the IRS audit of Mr. Cisneros's finances which somehow confirm his baseless conclusions of impropriety. However, my alleged statements simply reveal that we were aware that the IRS was actively looking at Mr. Cisneros's finances. I vaguely recall that at some point the FBI asked the Public Integrity Section to suggest that the IRS put its investigation "on hold" during the pendency of the Department's preliminary investigation, so that the investigators from the two agencies would not trip over each other. I have no personal knowledge of whether or not the IRS suspended its investigation for the duration of the Department's preliminary investigation.

- Mr. Barrett's report conveniently ignores documents that he had in his possession, provided by the Public Integrity Section and discussed in the Section's recommendation memorandum, which reflect that the Section sought the guidance of the Criminal Division's Appellate Section. The Appellate Section independently concluded that Mr. Cisneros's false statements to the FBI were not material. This conclusion was communicated to Attorney General Reno as she was considering whether to seek the appointment of an independent counsel.

- Mr. Barrett claims that in 1995, the Section received evidence that Mr. Cisneros did not report sufficient income to make payments to Ms. Medlar and support his family. In 1995, and again in 1997, Department attorneys reviewed Mr. Cisneros's tax returns and determined that this claim was simply false. The flaws in Mr. Barrett's reasoning are discussed below in greater detail in the section addressing the denial of Mr. Barrett's expansion request.

- Mr. Barrett implies that our contacts with counsel for Mr. Cisneros during the course of both preliminary investigations were inappropriate and evidence of our desire to terminate the investigation. It was routine during every preliminary investigation conducted under the Act to contact defense counsel and seek their cooperation and offer them the

opportunity to present information they deemed relevant to our review. Lacking subpoena power, voluntary cooperation was a vital tool in our investigations.

- Mr. Barrett argues that Public Integrity Section attorneys tried to direct his investigation. In August of 1995, Section attorneys met with Mr. Barrett and members of his staff, a practice that was followed routinely when an independent counsel was appointed. We met to provide Mr. Barrett with documents and other materials, and to offer him our candid assessment of the matter and to suggest investigative steps he or she could pursue. Mr. Barrett's conversion of our candid assessment of the case into some sort of Department directive concerning a predetermined outcome is senseless.

- Finally, Mr. Barrett suggests that the Public Integrity Section "misled" the Attorney General during her decision-making process. This is specious. In addition to the memoranda provided by the Public Integrity Section and the Appellate Section, Ms. Reno had meetings and received memoranda from a number of Department and FBI officials, including, as Mr. Barrett points out in his report, the Assistant Attorney General and Deputy Assistant Attorney General of the Criminal Division, the FBI's Legal Counsel, and FBI Director Freeh. The Attorney General was fully briefed before she made a decision about the case, and the ultimate, informed decision was hers. Debate over difficult cases is a common practice in prosecutors' offices when close cases are being considered – a practice that ensures fairness and consistent application of the law.

The 1997 Preliminary Investigation

Mr. Barrett states that his obstruction investigation also examined the decision of Attorney General Reno in 1997 regarding whether to expand Mr. Barrett's probe at his request to encompass potential tax violations by Mr. Cisneros in four tax years – 1989, 1991, 1992 and 1993. Following a preliminary investigation by the Public Integrity Section and the Department's Tax Division, the Attorney General, who met personally with Mr. Barrett in connection with his application, sought an expansion of jurisdiction for only tax year 1992. Every Department attorney involved in this review concurred that there was no basis to expand Mr. Barrett's jurisdiction to include the other three years, because each concluded that there was no evidence that Mr. Cisneros willfully violated the tax laws. The deficiencies in Mr. Barrett's presentation and arguments were then and remain now overwhelming.

In support of his request for expanded jurisdiction, Mr. Barrett submitted to the Department of Justice in 1997 an affidavit of FBI Special Agent T.J. Roberts. In the affidavit, Agent Roberts identified a number of checks made payable to Mr. Cisneros for speaking engagements during the relevant tax years, which were deposited directly into Ms. Medlar's bank account. Agent Roberts concluded that Mr. Cisneros failed to report these checks as income on his tax returns. During the preliminary investigation, a senior attorney with the Department's Tax Division reviewed Mr. Cisneros's tax returns and his accountant's records, and found repeated instances where checks that Agent Roberts identified as unreported income clearly had

been reported on Mr. Cisneros's returns. In the few isolated cases where income was not reported, the Attorney General concluded that there was clear and convincing evidence that Mr. Cisneros had not intended to deceive the IRS, because all relevant information had been provided to his tax preparer.²

Mr. Barrett's analysis fails in another area. Mr. Barrett forcefully champions the misplaced belief that Mr. Cisneros did not have enough income to make payments to Ms. Medlar and support his family. Therefore, he argues that Mr. Cisneros must have been diverting some of his income directly to Ms. Medlar without declaring that money on his tax returns. Mr. Barrett claims that the Department of Justice had this information in 1995 and 1997, and therefore should have recommended that he be granted authority to look into all four tax years. Ergo, we conspired to obstruct his investigation. Unfortunately, notwithstanding the extraordinary costs borne by the taxpayer to fund Mr. Barrett's ten year frolic, he could not hire a competent accountant.

The lynchpin of Mr. Barrett's argument is played out on several pages of his final report. Specifically, Mr. Barrett presents what seems to be an irrefutable argument that for tax years 1991 and 1992, Mr. Cisneros's payments to Ms. Medlar and the costs associated with supporting his family far exceeded his disposable income. It is unfortunate that among other errors, Mr. Barrett and his staff looked at the wrong line of Mr. Cisneros's tax return. While I am not an accountant, I know that the way you roughly determine an individual's disposable or usable income is to begin with *gross* income. Mr. Barrett's use of Mr. Cisneros's *taxable* income figure on his tax returns results in double counting and is simply wrong.³

Millions of dollars, additional years of investigation and a final report that blithely smears the reputations of hard-working career attorneys at the Department of Justice and the IRS; all are based in significant part on the fact that Mr. Barrett and his staff could not accurately review basic financial records, or incorporate the correct line on Mr. Cisneros's tax returns into their analysis.

² Despite the claim in Mr. Barrett's report that he did not know why the Attorney General did not seek expansion for the three other tax years, the Attorney General filed a notification with the Special Division explaining her reasoning. This notification was provided to Mr. Barrett, and is included in the Appendix to his report. The Attorney General also told Mr. Barrett that she would reconsider her decision if the IRS referred the matter to the Department. Other officials in the Department invited Mr. Barrett and his staff to present any new evidence that he might develop.

³ Mr. Cisneros's tax returns, which were provided to Mr. Barrett by the Public Integrity Section in 1995, clearly show that Mr. Cisneros had more than sufficient income to permit him to make the payments to Ms. Medlar. The tax returns show that during the relevant time period, 1989 through 1993, Mr. Cisneros's gross income exceeded \$1.1 million dollars. This figure does not even include other savings and resources that Mr. Cisneros may well have had available based on his substantial income stream before his appointment as Secretary of HUD.

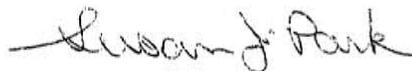
Conclusion

Noticeably absent from the portions of the final report I was permitted to review was any discussion of my motive, or the motive of others, for Mr. Barrett's speculation that we were trying to protect Mr. Cisneros from an independent counsel investigation. Although Mr. Barrett makes a vague suggestion that warding off appointments of independent counsels would "protect" the Attorney General from raising the ire of President Clinton, he fails to explain why the Public Integrity Section recommended, and the Attorney General sought, appointment of independent counsels to investigate other members of the President's cabinet following the Cisneros matter, whenever the facts and legal analysis supported such an appointment. In my experience, Attorney General Reno reviewed each independent counsel matter thoroughly, never shied away from asking probing questions or requesting additional investigative steps, and listened to the recommendations of numerous individuals within the Department and the FBI. The procedure she followed in this case was no different.

Mr. Barrett claims in his final report that he determined that "a reasonable and thorough investigation would require the Grand Jury to consider the testimony of DOJ officials and to review DOJ documents." To my knowledge, Mr. Barrett never sought the opportunity to speak with any Department of Justice lawyer, either informally or before the Grand Jury. Further, his alleged efforts to obtain relevant documents were informal and fitful. My understanding is that only in late 2001 did Mr. Barrett make a formal letter request for a broad universe of documents, followed by a grand jury subpoena for the documents on February 5, 2002. Every prosecutor knows that preserving relevant documents is typically one of the initial steps in any criminal investigation. Yet Mr. Barrett waited almost five years to subpoena these documents, the time at which it appears the statute of limitations for any potential prosecution was about to expire.

At the time of his initial appointment in 1995, the Special Division gave Mr. Barrett focused jurisdiction to determine whether Mr. Cisneros had made prosecutable false statements to the FBI during his background investigation. In 1997, acting on the Attorney General's recommendation, the Special Division expanded Mr. Barrett's jurisdiction to include possible tax offenses in calendar year 1992. Both of these matters were wrapped up by Mr. Cisneros's misdemeanor plea in 1999. Yet, it appears that Mr. Barrett was determined to stay in business as long as he possibly could. Since he was never given jurisdiction, by either the Attorney General or the Special Division, to investigate any other substantive matter, Mr. Barrett conjured up a far-fetched theory of a wide-reaching government conspiracy to justify prolonging his tenure for six additional years. He has nothing to show for his efforts. If Mr. Barrett is serious about exploring the issue of integrity, he should examine his own.

Respectfully submitted,



Susan J. Park
Trial Attorney
Public Integrity Section



U.S. Department of Justice

Criminal Division

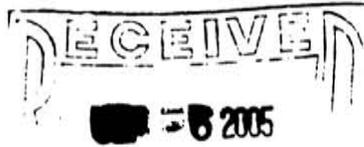
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August 31, 2005

United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 31 2005

Mark J. Langer
Clerk, United States Court of Appeals for the
District of Columbia Circuit
Washington, D.C. 20001-2866



Special Division

Dear Mr. Langer:

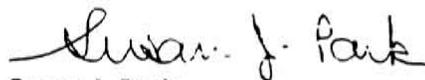
I am writing this letter in response to the Order of the Independent Counsel Division of the United States Court of Appeals for the District of Columbia Circuit (the "Special Division") dated July 12, 2005. That Order directed that additional portions of Part V of Independent Counsel Barrett's draft final report be made available for my review. However, the only new materials I was allowed to review were redactions that had been made on the same pages I had been allowed to review pursuant to the Special Division's initial order of March 1, 2005.¹ Because the new materials still do not include significant portions of Part V, or for that matter other critical portions of the final report, my previous comments concerning the inadequacy of the Independent Counsel's disclosure remain on point. Much of the new material describes activities that occurred at the Internal Revenue Service in 1994 and 1995, of which I have no personal knowledge. After reviewing the new material, I am in no better position to determine how or why Mr. Barrett believes individuals throughout the Department of Justice and Internal Revenue Service conspired to obstruct his investigation.

My only additional comment arising from the new disclosures is to take issue with the purported Grand Jury testimony of FBI Special Agent Yount. Yount alleges that Lee Radek told him during the course of this investigation that it was his job to prevent cases from getting referred to an independent counsel. In my seventeen years in the Section, and during my substantial work on numerous Independent Counsel matters, I never heard such a statement from Mr. Radek or anyone else in the Criminal Division. In fact, in the years after the Cisneros matter, Mr. Radek did not hesitate to recommend the appointment of an independent counsel when a matter justified such a recommendation.

¹ It is either particularly disingenuous or extremely sloppy that the limited additional disclosures provided by Independent Counsel Barrett's Office were coupled with new redactions of material in the Appendix that had previously been made available. The clear purpose of the Court's Order was to provide more, not less material, for review.

I appreciate the opportunity to provide additional comments on Independent Counsel Barrett's draft final report, and once again request that my comments be made a part of the permanent record and made public if any portion of Mr. Barrett's final report is publicly released.

Respectfully submitted,

A handwritten signature in cursive script that reads "Susan J. Park".

Susan J. Park
Trail Attorney
Public Integrity Section



U.S. Department of Justice

Criminal Division

JUL 5 2005

Washington, D.C. 20530

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United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 30 2005

Special Division

Mark J. Langer
Clerk, United States Court of Appeals for the
District of Columbia Circuit
Washington, D.C. 20001-2866

Re: Division No. 95-1, In re Henry G. Cisneros

Dear Mr. Langer:

This is in response to the invitation of the Court to comment upon heavily redacted portions of the report of Independent Counsel David Barrett in the matter of Henry Cisneros. Those portions mention me in my former role as Chief of the Public Integrity Section, and explicitly and implicitly accuse me of misconduct.

Unfortunately, the passage of time - a passage that has given me new respect for the five-year statute of limitations in criminal cases and its effect upon the ability of witnesses to recall facts - has dimmed my memory of many of the details of these ten-year-old events. The severe redactions in the report made available to me may also cause some facts to be omitted from this response.

I begin by noting that the completion of this report will, at long last, mark the end of the ill-fated experiment in government that was the Independent Counsel Act. This statute, however well intentioned, proved to be more akin to a national nightmare. No one makes that point more eloquently than David Barrett himself, supported by the confused analysis and factual muddle that constitutes the portion of his final report made available to me. I believe that the portions not made available to me are of the same remarkably low quality.

The Statute

The Independent Counsel Act brought into existence the very creature that the founding fathers sought so hard to prevent - an individual holding powerful office unrestrained by any other body or the citizenry. The Act relied upon the good faith and judgment of men, or rather a

man, instead of the checks and balances that exist for all of our other public officers. Nothing, not the explicit declarations of the Department of Justice, the findings of a Court, criticism by press and public officials, or just plain embarrassment over the obvious incompetence displayed in his actions, was able to deter Mr. Barrett from a 10 year, 21 million dollar misappropriation of the tax dollars of the citizens of the United States. He spent major portions of that time and money investigating matters over which he clearly had no jurisdiction, over which he knew he had no jurisdiction, and which were, to any disinterested observer, clearly without merit.

And now, in a transparent attempt to justify this waste, he submits a document that posits that there was a vast conspiracy to thwart the bringing to justice of Henry Cisneros - a cabinet level official who lied to the FBI during his pre-appointment background investigation about the amount of financial support that he was paying his former mistress, Linda Medlar Jones.

There was, of course, no such conspiracy. The actions of myself and others accused by Mr. Barrett were, in each and every instance, taken for the most proper of motives and in full compliance with the law, regulations, and ethical requirements.

In 1994 and 1995, the Public Integrity Section was charged with conducting an initial inquiry, and then a preliminary investigation of the allegations against Mr. Cisneros. Under the Independent Counsel Act, an initial inquiry was to determine if the allegation was specific and credible. In this case, this was a no-brainer. Medlar's allegations plainly satisfied the statutory standard. Following that inquiry, a preliminary investigation was begun. The Act required that the Attorney General had 90 days in which to determine whether or not further investigation was warranted. No use of grand jury subpoenas or other tools for the obtaining of evidence, other than voluntary cooperation, was authorized. This process was perhaps the second most serious flaw in the Independent Counsel Act. It placed an unreasonable burden on the Department of Justice, it took away traditional tools used to investigate such matters, and it redefined the term investigation. This warping of the normal process of a criminal investigation often led to friction and misunderstandings between prosecutors and investigators involved in these matters.

The Public Integrity Section enjoyed excellent relations with the FBI as an institution and with its agents and supervisors individually. We prosecuted cases investigated by the Bureau all over the country with enormous success. I hold the agency and its employees in the highest regard. But, preliminary investigations under the Independent Counsel Statute required both the Departmental attorneys and the FBI agents involved to change the way that they did business, and, as a result, numerous misunderstandings occurred.

When the Department received an allegation against a covered person, we were not allowed to investigate that person and the allegations as we would have done in a normal investigation; instead, we were governed by the statutory procedures of the Act. The statute directed that if information was not specific and from a credible source, "the Attorney General shall close the matter." As a result, where covered persons were involved, we were without jurisdiction to explore suspicions or hunches unless they directly related to the original

allegations. This is a concept foreign to law enforcement and completely foreign to the way the FBI - and any other investigative agency - does business normally.

As a result, attempts by myself and prosecutors to change the agents' normal broad approach to investigating individuals who were suspected of wrongdoing into an inquiry centered on the specific allegation we had received were often misinterpreted as attempts to limit the investigation in order to predetermine its outcome. Such was never the case.

I was often required to explain the difference in approach to FBI agents who were invariably inexperienced in Independent Counsel matters at the beginning of each new inquiry. More than once, I heard my explanations interpreted to mean that I saw Public Integrity's job as finding a way to decline such matters. This was a misinterpretation of my frequent explanation to agents that the Act required a full preliminary investigation within 90 days so that at the end, we could say that the case should either be declined or turned over to an independent counsel. It was a plea to finish the job, not leave it incomplete so that an expensive statutory creature would need to be appointed simply because of our failure to complete our work. This misinterpretation has occurred in other settings, and I can only assume that it is what is referred to in Mr. Barrett's report.

I am also quoted in the report as having said to an FBI agent that I was reluctant to recommend an independent counsel in this matter because I was concerned that it would damage the relationship between Attorney General Reno and President Clinton. I was not given access to the transcript of the agent's testimony to that effect, but if the report is accurate, the agent is just plain wrong. Due to the passage of time I can recall no conversations with an agent by that name, nor even the agent himself, although I have no reason to doubt that he worked on the matter. However, I am absolutely certain that I never said such a thing.

First, I was in no way concerned with the relationship between the Attorney General and the President. Janet Reno never expressed such a concern, so why would it bother me? Moreover, I have no doubt that if Attorney General Reno ever learned that I was basing my recommendation upon such a consideration, she would have fired me on the spot. Such an improper motive could only have done me harm, not gained me favor.

Second, it was clear from the beginning of the Cisneros initial inquiry that the FBI as an institution and the agents working on the matter favored the appointment of an Independent Counsel, an understandable bias since it was to the FBI that Mr. Cisneros told his lies. Why would I then tell an FBI agent that I had improper motives for making my recommendation against such an appointment?

Here, the Independent Counsel Act caused a further strain between the Departmental lawyers and the FBI because of the limited alternatives imposed by the Act -- appointment of an Independent Counsel or closing of the matter without prosecution. In the eyes of the FBI, if the matter were closed without prosecution after only a 90-day inquiry, it would amount to an

endorsement of Mr. Cisneros' behavior, and send a message to others that it was not a crime to lie to the FBI. This may be an understandable reaction, but it is one which, unfortunately, raised emotions to a level that proved to be counterproductive.

The effect of the Independent Counsel Act upon the relationship between myself, other Public Integrity personnel and the FBI was of constant concern to me. I had worked closely with that organization and its members for years. I was the senior non-FBI member of their Criminal Undercover Review Committee, I considered two Deputy Directors who served during this time as personal friends. But the requirements of the Independent Counsel Act damaged those relationships severely.

As stated earlier, the Independent Counsel Act called for appointment of an individual with little or no supervision whenever "further investigation was warranted," a low, and vague standard. It is this standard that Attorney General Reno relied upon, in a decision with which I disagreed, in requesting the Court to appoint an Independent Counsel to investigate Mr. Cisneros. The existence of this standard caused numerous disagreements due to the differing interpretations by individuals and to the differences in experience of those advisors and decision makers. While it might always be possible to point to some further investigation that could be conducted in any matter, whether or not it was reasonable to conduct such an investigation varied between individuals based upon their experience and their interpretation of the statute. While these differences would cause friction between advisors, ultimately it was the Attorney General's responsibility to resolve those differences and come to her own decision. This she did in this case and with all others in which I was involved.

The Independent Counsel

I became aware that the Special Division of the Court was having some difficulty finding an Independent Counsel in this matter when I noticed the length of time it took for Mr. Barrett to be named, and when I learned that several lawyers had turned down the appointment. I attributed this to the weakness of the case against Mr. Cisneros. I first became concerned with Mr. Barrett's ability when, at our first meeting, and on several other occasions, he made what seemed to be a prepared speech about how he considered himself to be counsel for Mr. Cisneros, not against him. Whatever he meant, it was not a speech that would make a prosecutor comfortable.

But the true test of a prosecutor is his track record. Mr. Barrett's is dismal. For actions Mr. Cisneros took in 1992 and early 1993, which came to light in 1994, Mr. Barrett negotiated a plea in late 1999 to an obscure misdemeanor calling for no jail and no probation. Such a resolution of the Cisneros matter could have been negotiated in 5 days rather than 5 years.

In the meantime, Mr. Barrett indicted the source of the allegations, Linda Medlar Jones, and her sister and brother-in-law, for fraud, false statements and money laundering in a no-loss inaccurate mortgage application case. Ms. Jones pled guilty, and was sentenced to 42 months' imprisonment. While I recognize that no good deed goes unpunished, the harm that such a

prosecution did to law enforcement is incalculable. One can only speculate as to how many potential witnesses to corruption or other crimes were deterred from coming forward by learning of Ms. Jones' fate.

Mr. Barrett has spent more than 5 years since the Cisneros plea investigating non-existent obstructions of his investigation over which he had no jurisdiction had they existed. To this end, he engaged in what would have been described as Grand Jury abuse had it been engaged in by Department of Justice personnel. I have been informed that he dragged one IRS official before a Grand Jury approximately 30 times, while conducting an investigation over which he had no jurisdiction or predication.

Be it his inexperience or just some misguided sense of the facts, for some reason Mr. Barrett spent the majority of his time investigating not that which he was appointed to investigate, but instead, the facts surrounding his appointment and the partial granting of his request for expansion of his jurisdiction.

The Allegations

The Appointment of Mr. Barrett

In weaving his web of speculation into an accusation of a vast conspiracy, Mr. Barrett makes much of the fact that I recommended against the appointment of an Independent Counsel in the Cisneros matter. First, Mr. Barrett had no jurisdiction to investigate the proceedings that led up to his appointment. Until recent legislation, it has been axiomatic that one cannot obstruct a proceeding that was not yet underway. Mr. Barrett spent years and millions investigating a non-existent obstruction of a non-existent investigation. Had he found some corrupt scheme, it never could have been prosecuted, even had he acted within the five year limitations period.

Second, the facts in no way supported an inference that there was an obstruction. My recommendation was based upon my assessment of the facts and the law. This assessment is well documented in my memo making the recommendation, which was provided to Mr. Barrett at our first meeting. There was never an attempt to conceal my recommendation or the reasons for it. It was based upon my conclusion that the false statements made by Mr. Cisneros had no potential to influence any decision-maker in his appointment to the cabinet.

Attorney General Reno disagreed with that decision. I offer no criticism of that decision. It was a close call and it was hers to make. But the very fact that she disagreed with my recommendation and sought the appointment of an Independent Counsel surely belies the fact that there was some conspiracy to protect Mr. Cisneros.

Nevertheless, Mr. Barrett points to misunderstandings between attorneys and investigators, attributes to me words that I did not speak, and concludes that officials, presumably including myself, acted improperly.

Let me state unequivocally that at no time did I or to my knowledge anyone in the Department of Justice base any action, recommendation or decision upon anything but our good faith interpretation of the law and the facts in the Cisneros matter. I was never pressured or influenced by anyone in any inappropriate way, and I did not exert any such pressure or influence upon anyone. Mr. Barrett's unsupported conclusions to the contrary, the men and women of the Public Integrity section were truly non-political in every sense during my tenure as Chief.

The request to expand jurisdiction

With respect to the partial granting of his request for increased jurisdiction in 1997, Mr. Barrett alleges that there was an even broader conspiracy to obstruct his efforts. He alleges that a conspiracy between the Department of Justice and the Internal Revenue Service (a near physical impossibility in my experience) resulted in his being given too little jurisdiction to succeed in bringing a tax case against Mr. Cisneros.

Two events spring from memory with respect to this allegation. The first is Mr. Barrett's lack of any reaction when, in a meeting with various Department of Justice officials, he was informed that a sworn affidavit of an FBI agent that he had submitted was provably false in part.

The second is a meeting between Tax Division and Criminal Division attorneys and the IRS Chief Counsel, in which we sought to learn IRS procedures for referring a criminal tax matter, in order to determine whether there were legally proper ways for the Department of Justice to ascertain the facts relating to the IRS ongoing administrative review of Mr. Cisneros' taxes. What is memorable about this meeting was the absolute refusal of the Chief Counsel to discuss in any way the facts or circumstances of any matter relating to Mr. Cisneros. Every question and every answer involved only the use of hypothetical examples, and there was absolutely no sharing of taxpayer information.

In the end, as explained in the Attorney General's filing with the Court, Mr. Barrett was given jurisdiction to investigate one tax year. He was informed that if he found other tax years to be relevant to that year, he should renew his request; and he was assured that if, in the normal course, the IRS were to refer a criminal tax case, that he would be given jurisdiction over it. Neither event occurred.

Despite his going to such lengths as immunizing IRS employees and summoning Chief Counsel to a grand jury for an inexcusable number of times, Mr. Barrett could not prove a tax offense by Mr. Cisneros and could not prove an obstruction of his investigation by anyone. Instead of doing his speaking in Court as professional prosecutors do, he chose to smear me, along with dedicated career public servants at a time long after the statute of limitations on any crime had run, when the statute that brought him into existence had long since gone to an appropriate grave, and when there was no longer any reason for his office to exist except to issue this scandalous report, after which he may spend years litigating attorneys fees for the subjects.

Conclusion

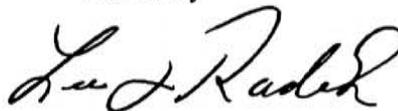
It is clear from the section of the report that I was provided that I was a subject of Mr. Barrett's ill conceived obstruction investigation. I was never informed of this and was never given an opportunity to explain my analyses or actions. I learned after the fact that Mr. Barrett had engaged in an unsuccessful attempt to subpoena records from the Department of Justice, and that the Department, under the current administration, had concluded that Mr. Barret was conducting an investigation outside of his jurisdiction.

Although I am not in a position to object to the publication of Mr. Barrett's report, it occurs to me that Mr. Barrett should be the one most embarrassed by its having been released. I am also aware that the citizens and taxpayers are due an explanation from Mr. Barrett as to how he has spent his time and their money. Nevertheless, because of the nature of the unsupported allegations against a broad range of dedicated public officials contained in the sections of the report made available to me, I urge the court to consider carefully whether release of that portion of the report is in the public interest.

In the end, those of us who have spent a lifetime prosecuting crime can only be grateful that the Congress chose to call statutory creatures such as this one Independent Counsels, not prosecutors.

I request that this response be included in the record and made public only if the portion of the report to which it refers is made public.

Sincerely

A handwritten signature in black ink, appearing to read "Lee J. Radek". The signature is fluid and cursive, with a large initial "L" and "R".

Lee J. Radek

THERABENGROUP

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 31 2005

May 31, 2005

Special Division

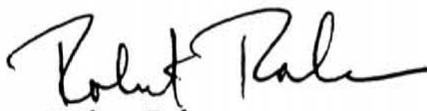
Mr. Mark Langer
Clerk
United States Court of Appeals
District of Columbia Circuit
333 Constitution Ave, NW
Room 5409
Washington, DC 20001

Mr. Langer,

Please accept the enclosed as the submission of former United States Attorney General Janet Reno in response to the sealed Report of the Independent Counsel in re: Henry G. Cisneros.

If you have any questions about this submission, please do not hesitate to contact me.

Respectfully submitted,


Robert Raben



FILED APR 28 2005

DONALD W. RIEGLE, JR.

Special Division

April 21, 2005

Marilyn R. Sargent
Chief Deputy Clerk
333 Constitution Avenue, N.W.
Room 5409
Washington, DC 20001

Dear Ms. Sargent:

In reviewing today, March 31, 2005, the Final Report: *In Re: Henry G Cisneros* - No 95-1, I feel it's necessary to make the following comments.

These comments are based only upon reading the limited portion of the Final Report which I have been permitted to review, and where my name is mentioned. I have no way of knowing the degree to which the concerns I wish to express may be addressed in the remainder of the Final Report, which I have not seen.

Specifically, on page 1V-122, there is a section labeled *h*. The Senate Committee Evaluation. In the 1st paragraph, the report reads as follows:

"The Transition Team provided the FBI Report, but not the attached FBI interview reports, to the Chairman of the Senate Banking Committee for holding Cisneros's confirmation, without disclosing any additional or inconsistent information the Transition Team had received from Cisneros,⁵⁷⁷"

"The FBI Report related Hernandez's observation that Cisneros was diverting as much as \$60,000 a year from his lecture income, possibly to Medlar, but did not otherwise discuss the amounts of the payments. Aley then arranged for Cisneros to make personal courtesy calls to other Senators on the Banking Committee,⁵⁷⁸ none of whom were provided with the FBI report or informed of the inconsistencies in Cisneros's story.⁵⁷⁹"

The plain reading of the above paragraph makes it clear that the FBI, and the Transition Team, had in its possession contradictory information regarding Mr. Cisneros, which it did not disclose to me; as Chairman of the Senate Banking Committee.

I consider this unusual, and improper, and I would strongly urge the court to establish why this contradictory information that had been gathered was not brought to my attention – or to the attention of other committee members.

Having reviewed many FBI summary reports on nominees during my six years as Banking Chairman, I am aware of no other instance where contradictory information of this kind, in an FBI investigative file, was not fully disclosed – so that it could be considered for its bearing on a nominee's suitability to be confirmed by the Senate.

In the after-the-fact construction, this breach of failing to fully disclosure contradictory information has been reformulated into a tangential question of whether the underlying issue itself – support payments to an ex-girlfriend, and their exact amounts – would have been an issue that, by itself, would have determined whether a senator would vote for or against a prospective nominee.

Respectfully, that is not the critical question. The critical question is the candor and honesty of a nominee in providing accurate information during a formal FBI investigation of a prospective cabinet nomination – and then fully sharing that information with the relevant Senate Committee.

If, for example, a summary FBI report to a Senate Committee Chairman on a prospective nominee were to indicate serious inaccuracies in a nominees responses to normal FBI investigative questions, that fact, by itself, would warrant serious review, discussion, and further evaluation.

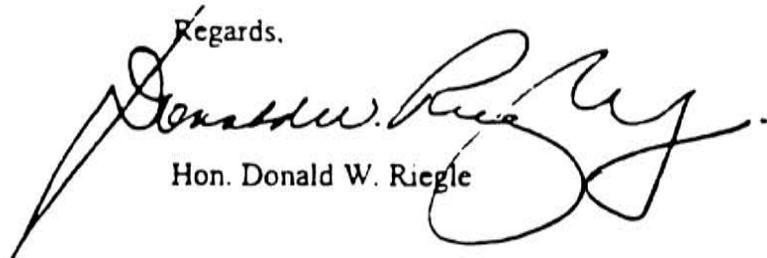
Material misrepresentation of facts in an FBI interview process raises serious questions of character and integrity, regardless of the underlying subject matter.

As these case facts have since been reconstructed by further Special Counsel investigations, it is clear to me that the "inconsistencies" discovered by the FBI field investigation, prior to Mr Cisneros confirmation by the Senate, should have been fully disclosed to the Committee, and to me as Chairman of the Committee.

It is my hope that in other sections of the Final Report, we are given a complete explanation as to why these "inconsistencies" were withheld by the FBI, or others managing the confirmation process at that time.

I consider that lapse in the situation to be a serious breach of proper protocol which should not be permitted to occur in the future.

Regards,

A handwritten signature in black ink, appearing to read "Donald W. Riegle". The signature is fluid and cursive, with a large loop at the end.

Hon. Donald W. Riegle



U.S. Department of Justice
Justice Management Division
Office of the General Counsel
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20530
(202) 514-3452

APR 4 2005

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 07 2005

UNDER SEAL

Special Division

Marilyn R Sargent
Chief Deputy Clerk
United States Court of Appeals
District of Columbia Circuit
Washington, D C 20001-2866

Dear Ms Sargent

I am writing on behalf of D Jerry Rubino, Charles Alliman, and Carol Snyder, former Department of Justice employees in response to your letters of March 1, 2005, allowing each of them the opportunity to review and comment on portions of pages 25-26, 118-121 and 135-136 of Part IV of the report of Independent Counsel David M Barrett with respect to *Re. Henry G. Cisneros*. They have asked that I advise the court of a substantive comment concerning one sentence, a technical correction and a fact that they are not able to verify

The report says

According to Snyder, the FBI report was "very important" because the DOJ-PSO had to make a security determination **solely** on the basis of the information provided to the FBI

(Part IV at 120) (emphasis added.) The bolded word is incorrect. The determination is made **primarily** on the basis of information provided to (or by) the FBI. However, the individuals making security determinations have other sources as well, such as information provided (with consent of the subject) by the Internal Revenue Service and from credit reporting agencies

The report refers to the "DOJ Personnel Security Office (DOJ-PSO)". The Department of Justice has no separate Personnel Security Office. The Department has a Security and Emergency Planning Staff, whose director is the Department Security Officer ("DSO"). Personnel security is a responsibility of the DOJ-DSO.

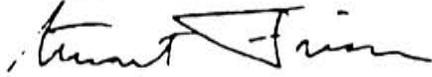
Finally, the report states that Mr Cisneros received his clearance on January 20, 1993. Messrs Rubino and Alliman and Ms Snyder cannot verify the exact date as they no longer have access to the relevant records.

Marilyn R. Sargent

Page 2

Thank you for the opportunity to review the selected portions of the report.

Sincerely,

A handwritten signature in black ink, appearing to read "Stuart Frisch". The signature is fluid and cursive, with a large, stylized initial "S" and "F".

Stuart Frisch
General Counsel
Justice Management Division

Attorney for Messrs Rubino, Alliman and Ms Snyder

cc. D Jerry Rubino
Charles Alliman
Carol Snyder