
The Wisdom of the Founding Fathers: Separation of Powers and the Independent Counsel Experience

Kenneth W. Starr

Kenneth Starr was appointed in 1994 to investigate the Whitewater matter. He held the office of independent counsel until he resigned in late 1999.

A native of Texas, Judge Starr holds a bachelor's degree from George Washington University and a master's degree from Brown University; he is a graduate of Duke Law School. He was a law clerk to U.S. Supreme Court Chief Justice Warren Burger, practiced law in Los Angeles and Washington, D.C., served as counselor to U.S. Attorney General William French Smith, and in 1983 was appointed to the U.S. Court of Appeals for the District of Columbia Circuit. As solicitor general of the United States from 1989 to 1993, he argued twenty-five cases before the Supreme Court.

Judge Starr was keynote speaker at Center of the American Experiment's Fall Briefing in November 1999.

I would like to reflect briefly on my experiences as independent counsel. In particular, as befits an organization that proudly marches under the noble banner of the American experiment, I would like to focus on some lessons to

be learned from the twenty-one-year experiment with the independent counsel mechanism.

My thesis is straightforward: structural innovations and reforms are no substitute for basic honesty in govern-

ment. To the contrary, as we experiment with the structure of government so wisely given to us at the founding of the American Republic, we do a great disservice to the genius of the founding generation. It was their noble dream to create a balanced government at the national level that would preserve, rather than imperil, basic human liberty. The independent counsel statute, so long opposed by the Justice Department and by many thoughtful observers of our constitutional order, disserved those enduring goals.

Let me be clear at the outset that I am in no wise suggesting that independent investigations are either structurally unsound or inconsistent with the Framers' intent in fashioning our Constitution. We have a long tradition of independent investigations in this country, going back to the administration of President Ulysses S. Grant. But the pivotal fact of all those investigations, up to and including the Watergate investigation, is that the outside, independent investigators or prosecutors were appointed by the attorney general in the exercise of the attorney general's own discretion. Congress, through the political process, could (and did) appropriately seek to influence and guide that decision, but the decision itself—whether to appoint an outside investigator—remained totally within the attorney general's discretion.

The independent counsel statute, passed in the fervor of the reform movement that swept the nation in the wake of Watergate, turned the world upside down. Congress stepped in and

exercised raw power to regulate and control the attorney general's conduct of a basic, fundamental executive branch task—the investigation and possible prosecution of federal crimes. Congress did a remarkably poor and ill thought out job in doing so back in 1978.

The Role of the Attorney General

Two points bear mention. First, the independent counsel statute created only the illusion, not the reality, of legally enforceable controls over the attorney general's decision making. The attorney general was entirely at liberty to thumb his or her nose at the statute's requirement to seek appointment of an independent counsel. Let me briefly illustrate the point. Controversy has raged, and continues to this day, over Attorney General Janet Reno's refusal to appoint an independent counsel in the campaign finance matters. She has steadfastly declined to do so, even in the face of strong recommendations from FBI director Louis Freeh and by her own appointed head of the campaign finance task force, Chuck LaBella. But this is not new.

This same issue arose years ago in the Reagan administration, when a citizen requested a federal court in Washington, D.C., to direct the attorney general to seek appointment of an independent counsel to investigate alleged offenses in connection with the 1980 presidential election. The citizen dug a dry hole. The reviewing courts said there is no role for the judiciary in

this kind of matter. The attorney general can do as he or she pleases, and the courts are powerless to intervene.

This mocks our usual system, basic to the rule of law, that an executive agency's actions are subject to judicial review to determine their legality and indeed their constitutionality. This is fundamental to our elaborate system of checks and balances. And yet, the courts were quite right to stand aside in this particular respect, because to give the judiciary power to order the attorney general in this arena would strike at the very heart of our separation of powers system. Thus, only the illusion, not the reality, of control over the attorney general was created by this would-be "reform."

Second, and by far more important, the statute did strip the attorney general—once the decision was made to seek appointment of an independent counsel—of the actual power to appoint. Instead, the statute vested the appointment power in three already-sitting federal judges across the country, called the Special Division. This was ill-conceived at every turn. It embroiled the federal judiciary, powerless to defend itself against political attack, in the swirling controversy that necessarily attends the investigation of a sitting president. But the statute did more: it also created perverse incentives on the part of the attorney general. Instead of supporting an independent counsel, the attorney general was given obvious incentives to impede or even actively undermine an independent counsel's investigation. The independent counsel, after all, was

the appointee of others—three federal judges over whom the attorney general had no control. In short, for something this fundamental, the attorney general had no say whatever in who the independent counsel would be. This is utterly unique in our system, dreamed up in the spirit of post-Watergate reform without sufficient reflection or rigorous analysis.

It brings to mind the old saw attributed to a phlegmatic member of Parliament of yesteryear. Confronted with the latest proposal to build a Better World, the old curmudgeon exclaimed: "Reform. Reform. Don't speak to me of reform. Things are bad enough as they are."

Compare this unfortunate system with the old tried-and-true method of relying on the attorney general's own discretion. Not perfect, to be sure, but at least the American people knew the lines of accountability. And so did the attorney general.

Recently, Attorney General Reno named former Missouri senator Jack Danforth to head up the Waco investigation. This was Ms. Reno's choice. Quite naturally, the attorney general expressed strong confidence in and support for her own appointee. How could she do otherwise?

If, unlikely though it may be, Senator Danforth eventually finds himself under attack, his primary defender will be the attorney general. She will rally around him, and urge in the strongest terms that he be allowed to go about his work unimpeded. This is not so with respect to independent counsels appointed not by the attorney general but by the Special Division.

As I was laying aside my burden in October, the *Washington Post*—which has not been an unabashed admirer of the investigation—wrote a benedictory farewell editorial about my tenure. One telltale aspect of that editorial merits mentioning. It stated that, among the obstacles that my investigation faced, it had been the subject of, in the *Post*'s words, a “dishonorable smear campaign.”

I strongly agree with that sentiment. It was dishonorable. Indeed, at one juncture at the height of the Lewinsky phase of our multifaceted investigation, men and women assigned to our office by the Justice Department as career civil servants came under malicious attack, virtually all of it based on false information. Yet the leadership of the Justice Department stood by—silent. It allowed the assaults to go on at the cost of eroding public confidence in a duly authorized federal investigation. One phone call, one press conference, one threatened resignation, and the waters would have been much calmer.

This has been a very unfortunate chapter in the history of a great office of the executive branch, all brought about by the unwisdom of the reform-minded, post-Watergate Congress.

The Secret Service

The statute's perverse incentives also found expression in the hotly contested litigation over the Secret Service's refusal to provide relevant information to the grand jury investigation. The Justice Department rallied vigorously to the Secret Service's side, notwithstanding the department's pro-

found underlying conflict of interest. The ensuing litigation extended considerably the length of the investigation, as well as its cost. The public lost patience as we litigated the matter throughout the federal courts all the way up to the Supreme Court. This not only took valuable time, it absorbed much of our office's energy.

It fell to me personally to litigate these matters before Chief Judge Norma Holloway Johnson in Washington, D.C. Chief Judge Johnson ruled decisively against the Justice Department, as did the United States Court of Appeals, which likewise roundly rejected the novel submission of the Justice Department's lawyers. But the toll was more than in time, resources, and energy. Our litigation position, which was winning in court before dispassionate, fair-minded judges, was being used as a political weapon to attack the appropriateness and legitimacy of the investigation itself.

Let me be clear. The Secret Service is a proud and great institution. We are deep in the debt of the brave men and women who daily put their lives on the line to protect our nation's leaders. They are American heroes. At a personal level, it was my honor during the Bush administration to represent the Secret Service, as the government's lawyer in litigation as it found its way to the Supreme Court.

But there is another proud tradition of the Secret Service. It is a law enforcement agency. Time and again, the Secret Service has provided information, including testimony, relevant to criminal investigations or prosecu-

tions. This was never contested. Never had the Secret Service sought to exempt itself from the basic obligations of all federal law enforcement personnel to provide relevant information to criminal investigations. Indeed, to cite just one example, during the Reagan administration, the Secret Service cooperated fully in the process of determining whether Lieutenant Colonel Oliver North had, as had been alleged at the time, access to President Reagan in the Oval Office. This was a key issue during the Iran-Contra investigation. At that time, not so long ago, the Secret Service did its duty, and did it willingly. Secret Service agents readily provided relevant and highly useful information demonstrating that there was no such access on the part of Colonel North, and that there was no such close relationship. No one dreamed that the Secret Service was somehow ignoring or brushing aside a legal privilege.

The Justice Department voluntarily stepped into this unfortunate and unnecessary controversy. Knowing full well that it was destined to lose, the department fought, and fought vigorously, all the way to the Supreme Court in a fruitless but time-consuming effort to shield Secret Service agents from doing their duty, however unhappy that duty was for them and for us. The department argued boldly and broadly for a brand-new, never-before-argued protective function privilege. Legal privileges, even though they are obstacles to the process of seeking truth, nonetheless serve valuable policy goals. We see this in the spousal privilege,

and the patient-physician privilege, and the attorney-client privilege. But not every relationship of closeness enjoys a privilege in our law. The horror of Columbine High School and the unsolved mystery of JonBenet Ramsey both remind us that there is no parent-child privilege to prevent parents from being required to testify, should the occasion arise, about their children. Privileges are to be grounded not simply in policy, but in law.

But this asserted privilege was entirely made up out of whole cloth. Not one case, not one statute, not even a legislative proposal ever advanced anywhere had suggested the existence of such a privilege. It bears noting that this was not an asserted privilege drawn narrowly solely to protect the president. To the contrary, the proposal was an entirely new, open-ended, functional privilege that would protect any and every protectee-protector relationship, such as the bodyguards of Governor Ventura or even the private security force protecting Donald Trump or Bill Gates. This made-up doctrine, conjured up at taxpayer expense, was also riddled with proposed exceptions, conveniently framed to protect the agents from testifying in this particular investigation, which, ironically, was authorized by the attorney general herself.

This is a predictive judgment on my part, to be sure, but in this I am confident: if the attorney general's own appointee as independent counsel, such as Senator Danforth, had sought this information, the attorney general would not have stood in the way. At a minimum, she would have directed the

Secret Service to look elsewhere for lawyers, just as she did to the White House with respect to its various claims of executive privilege.

The resulting irony was remarkable: the attorney general had authorized an investigation into whether, among others, the president himself had committed serious federal offenses in connection with the sexual harassment litigation then pending before Chief Judge Susan Webber Wright in Little Rock. But having authorized the investigation, and gone forward to the Special Division for an expansion of our already broad investigation, the attorney general then went to court to try to prevent our investigation from obtaining highly relevant evidence, and to do so based not on existing law but on an argument that entirely new law be created. This was a first, and I hope the last.

Plain Speaking

These perverse incentives spawned by the statute made the law enforcement process, which is inherently challenging and difficult, nigh unto impossible. I am thus all the more indebted to the good men and women of the Office of Independent Counsel, many of whom are career public servants carrying on their responsibilities at considerable personal and financial sacrifice.

They embody honest government. They make me proud. Yes, we all make mistakes, and I am certainly high up in the category of folks whose feet are made of clay. But for all their inevitable imperfections, don't we expect basic honesty from our public

officials? Don't we demand it? And isn't part of basic honesty coming forward with facts, not hiding the facts? And isn't that part of basic trust between those vested with authority and we the people?

We can all disagree about the right approach to Social Security, the use of budget surpluses, tax cuts, health care issues, HMO patients' bills of rights, the conflict in Kosovo, weapons systems for the military, and so on. But surely we can all agree that we must have, as an irreducible minimum, honest government. We expect honesty from our children, we demand honesty from our employees and coworkers, and we should demand no less from our public officials.

And honesty means disclosure. It means telling the truth. It means, in the spirit of Harry Truman, plain speaking. No dissembling or postmodernist games with language or an easy sense that all is relative, nothing is absolute.

That is not America. That is not what this country stands for. America is founded on the principle that truth is absolute. It says so right in the beginning of our founding document, the Declaration of Independence. We learn it as schoolchildren, if not at our parents' knees. We hold certain truths to be so obvious, so manifest, that they are self-evident. That means that those principles are beyond dispute. They exist. We can count on them. That's America, and American values. That's the very foundation of the American experiment. Truth. Self-evident truths. And the Constitution, including the

Bill of Rights, is the mechanism of genius that gives life and breath to those principles that bind us together as a free people under God.

Waco has temporarily disappeared from the newspapers, but it is sure to return as Senator Danforth carries on his investigation. In the meantime, as the news cycle had moved on to other issues, there came an intriguing revelation in the press reports that seemed to disappear almost immediately from public view (at least for now). The revelation came from a retired FBI agent, Bob Ricks, who was the bureau's spokesman during the siege of the Branch Davidian compound. Mr. Ricks, who now heads the Oklahoma Highway Patrol, stated that he had informed Attorney General Reno back in 1994 that Justice Department rules requiring FBI agents to remain silent about the standoff in Waco were causing credibility problems for the bureau. Mr. Ricks went on, according to the press account, to this effect: "[I told the attorney general that] you probably don't realize it, but in the Midwest, Waco is still an extremely big deal out here, and it's the subject of much conversation." He said the attorney general was dismissive. Waco was already old news.

But Waco was festering. It was a colossal disaster waiting to happen. For exactly two years after the deadly conflagration at the Branch Davidian compound, a bomb killed 168 people at the Alfred Murrah federal building in Oklahoma City. The motive: according to federal prosecutors, the convicted bombers, Timothy McVeigh and Terry Nichols, attacked the build-

ing in retribution for the government's action at Waco.

And an integral, critical part of the underlying problem, according to Mr. Ricks, the retired FBI agent, was the closing down of avenues of discussion. It was the determination to button down, remain silent, and wait for the winds of public discontent to blow over.

This, of course, is one person's perspective. But it is a grim reminder that honesty is fundamental. I am delighted that a person of complete integrity, Senator Danforth, will be guiding the Waco inquiry. Let me also say, based on my own extended experience of over five years, that I have the utmost confidence in the honesty and decency of the very able director of the FBI, Judge Louis Freeh. He is a genuine American hero.

Keeping the Republic

The American experiment in government is 210 years old. On September 17 we celebrated, without fanfare, Constitution Day, the day the basic instrument of our government as a free people was fashioned. And isn't the lesson of those two centuries and one decade that our governmental structures serve us well? They are faithful and true, if we will be faithful to them. They were admirably designed, based on the careful, rigorous analysis by great patriots like James Madison and then the subject of thorough and vigorous debate on the floor of the Constitutional Convention in Philadelphia in the summer of 1787.

As he was emerging from the convention, the wise, already long a legend Benjamin Franklin—octogena-

rian, suffering from gout, urging that prayers be offered for the delegates in their deliberations—was met by one of Philadelphia’s matrons. She inquired of this remarkable genius of a wise man, “What kind of government have you given us, Dr. Franklin?” “Madam,” Dr. Franklin replied, “a republic . . . if you can keep it.”

Note the shift in responsibility. The convention had worked its will, brilliantly. The ratification debates lay ahead, the crafting of the Federalist Papers to urge the document’s adoption, the great agreement that a Bill of Rights would be fashioned immediately in the First Congress: but the responsibility had shifted, morally, to the American people. The Constitution, in its opening majestic language, summons up this mysterious sovereign: “We the People.” The People—we—have the moral responsibility to keep the republic.

At the very foundation is basic virtue. Not perfection, but, yes, virtue. Alexander Hamilton wrote, wisely, that “if men were angels, government would not be necessary.”

Government, for its part, is not angelic. Nor are those who serve angels. But we should not compromise. Above all—above all ideology, above all parochial loyalties, above all visions of the public good and of the best public policy—must be, continually, the vision that animated the founding generation. They believed in the American experiment because they believed that, with all their imperfections, the American people were and would remain civically virtuous.

This does not mean, let me note in closing, that the voice of the people is the voice of God. That is not the American experiment. Remember Dr. Franklin’s response to the Philadelphia matron: This is a republic. Ours is a representative democracy. It is not government by plebiscite, it is not government by national town hall, and it was manifestly not to have been government enslaved to polls. Polls cannot make wrong into right. Polls cannot transform evil into good. Ours is not to be a consumer-driven government whose officers are weather vanes, shifting with the winds of public opinion.

Great leaders listen to the people, and they respect their views. But they know that their solemn duty is to lead. That is the powerful example of the founding generation. The signers of the Declaration of Independence took no polls. They did what they thought was right, and risked all to do it. They led. Washington took no polls at Valley Forge. He led. The examples in our glorious history abound. Lincoln did not take polls. He did what he prayerfully believed to be the right thing, the proper thing to preserve the American experiment.

And so, too, in our century, in the mother country, Winston Churchill took no polls. In Britain’s darkest hour, when its very survival was hanging in the balance, a majority in the newly formed War Cabinet wanted to open negotiations with the Third Reich. Churchill would have none of it. He stirred the hearts of a great nation in that darkest hour and transformed it into their finest hour.

Doesn't the American experiment, at its best, demand leaders who have genuinely absorbed the lessons of our great and remarkable history as a free people? Whether they are attorneys general, or directors of the FBI, or indeed presidents, these men and women, above all, should remain faithful to what is right in our system of ordered liberty. Public opinion will wax and wane. Today's enthusiasm is tomorrow's forgotten idea. But leadership endures. This is the land of Washington, Adams, Jefferson, Madison, Monroe, Jackson, Lincoln, and on the list goes.

The American people are a great people. They continue, at the close of a century and the dawn of the next millennium, on a great experiment. May it be God's will that our leaders will reflect the goodness—and the greatness—of a great people.

Following his speech, Judge Starr responded to questions posed by American Experiment's Mitch Pearlstein and to written questions from the audience.

Mitch Pearlstein: Let me draw you out a bit on this question of truth. You spoke about public opinion polling. If we go back to the Kennedy administration, there was talk about managing the news. But spinning and managing, or attempting to manage, is one thing; lying flat out is something else. Being bullies out of the White House is something else. What are the implications of this? I'm asking you to go beyond the

data and speculate. What does it mean to this democracy? What does it mean to young folks?

Judge Starr: Cheerful optimist that I am, I do have concerns about the future if we do not depoliticize the law. I'm very pleased that the attorney general came to the view that the independent counsel's structure, for reasons that we only began to explore this evening, has contributed to politicization of the law. I think it is vitally important and, indeed, incumbent on law officers and friends of a law-ordered society—whether they have had their minds sharpened by being narrowed by a legal education, as is sometimes said, or whether it is simply the result of thoughtful reflection—that in an increasingly chaotic world the law have integrity, that the facts have integrity, and that we raise our voices in severe condemnation when individuals would, for whatever reason, begin politicizing the process of law. I think we've seen that under way now for some time. And, frankly, I don't think there is enough of a sense of revulsion to that continual effort to politicize law and to view law as politics by other means.

I am proud to be part of a tradition of viewing the law as having honor and meaning and being worthy of our respect. If it needs to be changed, let's bring about change, but let's respect the law and abide by it. And let us not create easy and convenient exceptions for when we choose to obey and choose to disobey.

Mitch Pearlstein: You said you didn't want to tell war stories, but let me ask you about just one. What was your full-day marathon before the House Judiciary Committee like? Did you have a good time?

Judge Starr: Emphatically not. I regretted the fact that it was thought necessary—or at least appropriate—for the independent counsel to be the witness. Our office had collaborated very closely to produce a referral to Congress that embodied our collective judgment, and thus it seemed to me that it was then in Congress's hands. But it was the judgment that it was a good thing for me to be there. In retrospect, not only was it long and arduous and unfortunate, it also gave further life to the perception that this was simply an issue that one person, the individual who held the office of the independent counsel, had brought to the country. I lament that. Throughout that process, I was hoping that there would be more of a focus on the facts as opposed to the presumed motivations of the men and women of the office or, more specifically, the independent counsel himself. So, I was willing to do it, it was a long day, and they served very good sandwiches at the House Judiciary Committee.

Mitch Pearlstein: Would you talk about the power of the media to form and manipulate public opinion?

Judge Starr: I think the media serve as an echo chamber, and material that goes into the echo chamber is constantly being recycled and echoed for our edification. One of the unfortu-

nate things about the media coverage—and I think this is indicative of a larger phenomenon—was the focus on immediacy, the here and now, what this individual witness may or may not be doing, and a focus on the human drama. The opposite would be simply saying, "There's a grand jury investigation under way. Much of it we will not know, may never know, so we're going to move on and cover the next story until there really is something to report." At times the media became, I believe, the unwitting instrument by which deliberately false information was making its way into the stream of public discourse and deliberation. I regret that, but it's one of the reasons that I think we need honest people in government who, when they emerge from the grand jury, if they choose to make a statement at all, will tell the truth instead of lying about what happened in the grand jury.

Mitch Pearlstein: What impact do you think the dismantling of the independent counsel statute will have on future presidencies?

Judge Starr: I think it will be a good thing. We've seen with Senator Danforth, even though that doesn't involve presidential activity and involvement, a good sign of a healthy way of going about the inherently unhappy process of examining whether there is truth to allegations that the president or people close to the president may be involved in wrongdoing.

Dismantling the statute is simply the restoration of the status quo that reigned for 120 years, eventuating in

Watergate. Remember that Archibald Cox and Leon Jaworski were choices of the attorney general of the United States. Those were very good, distinguished choices at the time. And there's no reason to believe that that will not, in fact, continue to happen. We hope that in the future we will elect to the presidency honorable people who don't need a watchman looking over them. But in the unfortunate event that we elect someone who has to be watched or investigated, then I think it will be a good thing that the president knows that an attorney general will do the appointing and will stand by that special prosecutor. I think it could have a very useful, practical effect.

Mitch Pearlstein: Here's a modest little question: Are the American people still morally capable of preserving the republic?

Judge Starr: I believe so. Again, I'm the cheerful optimist and believe that the American people continue to be a sensible and reasonable people, capable of exercising civic virtue. I do worry about the growth, not in skepticism, which is almost always a good thing, but the growth in cynicism, which I think is also abounding among our younger people, about those who serve in government.

There has been a tremendous rallying around first principles of freedom and liberty. We need now to have in government good and honest people who will conduct themselves in a way that promotes and serves public confidence and gives us a government we can respect.

Mitch Pearlstein: Once the House delivered articles of impeachment, did you ever consider pursuing, as a basis for removal, a criminal conviction of President Clinton under Article III, instead of the Article II impeachment trial by the Senate?

Judge Starr: I will not, even as a former officer, comment on facts that are still part of an ongoing investigation, now very ably headed by a career civil servant prosecutor, Bob Ray, in whom I have great confidence and trust. But the position of the Justice Department, since the time of Judge Bork's distinguished service as solicitor general of the United States, has been that—leaving issues of fact aside—a sitting president cannot suffer a criminal indictment, as a part of our constitutional order. That is existing policy and that was a policy that an independent counsel was obliged, under the statute, to respect.

Mitch Pearlstein: Why, in your view, has an independent counsel not been assigned to investigate campaign finance?

Judge Starr: I am not privy to the facts, and thus it is impossible for me to come to a reasoned and fair judgment, in fairness to the officers involved. I will simply say this: I know Judge Freeh, I respect Judge Freeh as a lawyer, as a judge, and as an honest director of the FBI. His recommendation speaks for itself, and he was privy to the facts.

Mitch Pearlstein: Do you have an opinion on why so many persons would intentionally obstruct justice? What

could possibly motivate them to compromise their integrity? Fear? Greed? What did they gain?

Judge Starr: It would be inappropriate for me to embrace the assumption that informs the question. It would suggest certain conclusions on my part that I don't think that I should, even for purposes of this very pleasant discussion, embrace. I do think it's appropriate to say that in the time of Watergate and looking back now through current experiences at that very unhappy part of our history, a number of the individuals who participated at the time attributed it to misplaced values. Faith was placed in an individual as opposed to principles. It is important that the men and women who serve in government feel strongly about principles and not simply loyalty to an individual or to a party.

Mitch Pearlstein: What would you have done differently?

Judge Starr: In retrospect, I regret not having made the American people more aware, on a continuing basis, of my job description. There was a profound misunderstanding, and my silence certainly contributed to the continuation of the misunderstanding, or at least did not alleviate it.

When I arrived in Little Rock, Arkansas, in August 1994 to take over the Whitewater investigation, I discovered that the very distinguished lawyer Bob Fiske had already determined that he was going to investigate several matters that, on their face at least, seemed not to bear a direct relationship to Whitewater or to the Whitewa-

ter Development Corporation's relationship to Madison Guaranty Savings and Loan. But Bob Fiske was acting like a prosecutor. He was, after all, an appointee of the attorney general, who was given a mandate to examine this set of facts and to behave like a federal prosecutor behaves, to go where the evidence led him.

Beginning at that time, I should have made it clear that this investigation is much broader than simply the Whitewater land deal. And it's broader because of the decision by Bob Fiske, very ably guided and informed by his staff, to go into additional matters such as the Jim Guy Tucker cable business and a potential multi-million-dollar loss to the United States Treasury. He was gathering information that he felt had to be examined. I should have made that clear. But above all, even with that—and I must say that the investigation and my duties would completely have concluded had we simply had the Arkansas phase of the investigation—I think that my failure became, in retrospect, much more significant, if, indeed, not profound.

When I first of all took on additional assignments for the Travel Office, the FBI files matter, and then eventually the Lewinsky investigation, I should have been saying at every turn—especially with the echo chamber filled with suggestions to the contrary—that each of those branches of our jurisdiction was given to us by the attorney general in her determination as to what was an efficient and effective way of investigating matters that could not be investigated by the Justice Depart-

ment, because of the conflict of interest. In essence, the office where I served became five independent counsels rolled into one.

Much of the public came to believe that it was simply a personal vendetta, which it was not. It never was, and is not now. But that became an issue. I regretted that very much, but at the end of the day, I would also have to say that whether or not I had done more in the way of public information and education, the fault lies not with my not having gone on Meet the Press with boring regularity; it lies rather in the independent counsel structure and its ultimate infidelity to the wisdom of the founding generation. It was an anti-constitutional, structurally flawed statute doomed to fail, and ultimately we have reaped the unfortunate harvest of the seeds that were sowed in that post-Watergate Congress in 1978.

Mitch Pearlstein: You've been very generous in your comments about Mr. Freeh and the FBI and some of the other career prosecutors in your office. What about other players, perhaps particularly in the Congress, who you thought acted with great bravery and great honor?

Judge Starr: A number of the men and women of the Congress were working hard, under very difficult and unpopular circumstances, to do what they thought was the right thing. We owe a great debt of gratitude to those, whatever their view came to be, who genuinely wrestled with this and came to a view that was based on principle, whether one agrees with the principle

or not. During the hearings themselves, a number of members asked very thoughtful, probing questions.

With respect to the process that has been under way to determine the future of the independent counsel statute, it was my privilege to testify by request, by invitation—I wasn't seeking it out—before Senator Fred Thompson's committee on government operations. And I was deeply impressed by the quality and thoughtfulness of the questions coming from members, including but not limited to Senator Thompson, Senator Joe Lieberman, Senator Susan Collins, and Senator Judd Gregg.

Mitch Pearlstein: At the risk of being unfair, let me follow up, particularly where Senator Lieberman and some others are concerned. I have great respect for Senator Lieberman, a Democrat from Connecticut. It seems to me that—without getting partisan about it—any number of folks on the Democratic side of the aisle were appropriately critical but, at some point, they didn't take what I would view as the essential next step. Why, do you think?

Judge Starr: Senator Daniel Patrick Moynihan expressed it quite succinctly in late 1998 when he said in an interview that he was concerned about the stability of the republic and that the bar to removal of a duly elected president should be high. What we have seen is, in effect, our representatives and senators coming to a judgment that the activity merited serious disapprobation, as embodied in Sena-

tor Dianne Feinstein's motion of censure, which enjoyed the support of a goodly number of members, including Senator Moynihan. But I think there was a sense that that conduct, which would justify the ready removal of a sitting federal judge, should not, no matter how unfortunate and unwise, warrant the removal of a duly elected president, because of concerns about issues of political stability.

Now, one can agree or disagree with that sentiment. To me, a principled person like a Senator Lieberman could well be heard articulating that position and coming to that judgment about tailoring the remedy in terms of the offense. The way it was articulated during the debates was frequently "Is there an abuse against the state?" Several representatives were very interested in that question. Can one say it was an offense against the state or an offense that imperils the liberties of the people? Those of us steeped in the law, and certainly judges (and even former judges), would say that the offenses that we're talking about may very well sound in the nature of serious offenses against the state. But, in essence, we

engaged in a definitional exercise that led us to the view, as a free people, that we want to err on the side of caution with respect to the removal of a president, lest we become more like a parliamentary system and less a presidential system.

Mitch Pearlstein: What's next for you? Will you be writing a book to tell your side of the story?

Judge Starr: I do want to do a book, but it's the one on the Supreme Court that I set aside seven years ago. When I was a kid in school many years ago—in the days when we were required to memorize things—one of the definitions of poetry that some well-meaning English teacher was trying to drum into us was powerful feelings recollected in tranquility. Given what we have been through as a people, and certainly those who participated, there are inevitably powerful feelings. In my judgment, it is better that those feelings be recollected, God willing, in tranquility. If that time comes, it will be some considerable time in the future. n