

Dated: October 3, 2003

Signed: \_\_\_\_\_  
Joseph I. Lieberman, U.S.S

STATEMENT OF SENATOR JOSEPH LIEBERMAN ON THE “INDEPENDENT  
COUNSEL REFORM ACT OF 2003”

MR. LIEBERMAN. Mr. President, I am very pleased to be joining today with Senator Levin in introducing the Independent Counsel Reform Act of 2003. With this bill, we hope to convince our colleagues that an improved Independent Counsel statute can serve an essential purpose. We want to convince our colleagues that our legislation will preserve the ideals that motivated the enactment of this statute in the years after Watergate, that no person is above the law, and that our highest government officials must be subject to our laws in the same way as any other person. If they are guilty, they must be held accountable. If they are not, they must be cleared. In these cases the American people are more likely to trust the findings of an Independent Counsel’s investigation and conclusions. Officials who are wrongly accused will receive vindication that is far more credible to the public than when it comes from the Department of Justice. As a result, the public’s confidence in its government is enhanced by the Independent Counsel statute.

In 1999, as the Independent Counsel law was expiring, I joined with Senators Levin, Specter, and Collins in introducing the “Independent Counsel Reform Act of 1999.” That year, we drafted new provisions to curb the excesses we had seen in some of the investigations conducted under the prior incarnation of the law. The revisions ensure that there will be fewer Independent Counsel appointed, and that their actions will in many respects be constrained by the same sorts of guidelines and practical restraints that govern regular federal prosecutors. The bill we are introducing today retains these suggested reforms. In fact, it is virtually identical to the Independent Counsel Reform Act of 1999, with a single exception I will describe in a moment.

We made those substantial changes after the Committee on Governmental Affairs had held five hearings on the Independent Counsel statute. During the hearings we heard from numerous witnesses who had served as Independent Counsel, and as Attorney General, from former prosecutors and from defense attorneys. Many witnesses supported the statute, even defense attorneys who had represented targets in Independent Counsel investigations. Both

witnesses who opposed the statute outright, and those who advocated keeping it in some form, suggested a number of improvements to the statute. We carefully considered those recommendations before we sat down to draft a bill that retained the essential features of the old law while reducing its scope, limiting the powers of the Independent Counsel, and bringing greater transparency into the process.

For example, the threshold for seeking the appointment of an Independent Counsel will be raised, so that a greater amount of evidence to back up allegations of criminal conduct will be required. The Attorney General will also be entitled for the first time to issue subpoenas for evidence and convene grand juries during the preliminary investigation, and would be given more time to conduct preliminary investigations. This change responds to concerns that, in the past, the Attorney General's hands have been tied during the preliminary investigation stage. With our bill, the Department of Justice will be able to conduct a more substantial preliminary investigation.

In another change that will reduce the number of Independent Counsel appointed, officials covered by the statute will be limited to the President, the Vice President, the President's Chief of Staff, and Cabinet members. This is a major reduction compared to the number of officials covered by the Independent Counsel statute when it expired. The Attorney General will retain the discretionary authority to appoint an Independent Counsel to investigate non-covered individuals when the Attorney General determines that investigation or prosecution by the Department of Justice would result in a personal, financial or political conflict of interest. This discretionary authority was part of the Independent Counsel law from 1983 through 1999; although the provision was not included in the bill we introduced that year, it has been included in this bill because of the promulgation, after our bill was introduced, of new regulations by the Department of Justice.

In many Administrations, high level political advisers can have enormous influence, much more even than some Cabinet members. When we first introduced the Independent Counsel Reform Act of 1999, I hoped that criminal allegations against officials not covered by the statute could be handled either by the Department of Justice, or, in cases involving high-level officials or other conflicts of interest, through the appointment by the Attorney General of a Special Counsel. After our bill was introduced, however, then Attorney General Reno issued revised regulations for the appointment of Special Counsel, which provide that the Attorney General may block any investigative or prosecutorial action being pursued by the Special Counsel. The regulations also allow the Attorney General to shut down the investigation entirely, or starve it of funds. These revisions, and others, constituted a major reduction in a Special Counsel's autonomy. As Robert Fiske had testified during our committee hearings in 1999, he accepted his 1994 appointment to be the Whitewater Special Counsel only after satisfying himself that the regulations then in effect granted him the same

powers as would have been available to an Independent Counsel. Now, with the variety of control mechanisms in place under the Department's 1999 regulations, it is far too easy for an Attorney General to stifle an investigation in ways less dramatic and less public than actually removing the Special Counsel.

Under the legislation we are introducing today, each Independent Counsel will have to devote his full time to the position for the duration of his tenure. This will prevent the appearance of conflicts that may arise when an Independent Counsel continues with his private legal practice, and it will expedite investigations as well. The Independent Counsel will also be expected to conform his conduct to the written guidelines and established policies of the Department of Justice. The prior version of that requirement contained a loophole, which has been eliminated.

There have been many complaints about runaway prosecutors, who continued their investigations longer than was necessary or appropriate. Our bill will impose a time limit of two years on investigations by Independent Counsel. The Special Division of the Court of Appeals will be able to grant extensions of time, however, for good cause and to compensate for dilatory tactics by opposing counsel. Imposing a time limit with flexibility allows Independent Counsel the time they genuinely need to complete their investigations, and deters defense counsel from using the time limit strategically to escape justice. But the time limit will also encourage future Independent Counsel to bring their investigations to an expeditious conclusion, and not chase down every imaginable lead.

Our bill makes another important change that will prevent expansion of investigations into unrelated areas. Until now the statute has allowed the Attorney General to request an expansion of an Independent Counsel's prosecutorial jurisdiction into unrelated areas. This happened several times with Judge Starr's investigation, and I believe those expansions contributed to a perception that the prosecutor was pursuing the person and not the crime. An Independent Counsel must not exist to pursue every possible lead against his target until he finds some taint of criminality. His function, our bill makes clear, is to investigate that subject matter given him in his original grant of prosecutorial jurisdiction.

We are bringing greater budgetary transparency to the process by directing the Independent Counsel to produce an estimated budget for each year, and by allowing the General Accounting Office to comment on that budget. This greater transparency will provide more incentive for Counsel to budget responsibly.

Another correction we are making is to eliminate entirely the requirement that an Independent Counsel refer evidence of impeachable offenses to the House of Representatives. The impeachment power is one of Congress's essential Constitutional

functions, and no part of that role should be delegated by statute to a prosecutor.

Our bill was unsuccessful in the 106<sup>th</sup> Congress. Perhaps one of the reasons was that we were still too close to one or two controversial investigations that turned some against the statute; perhaps the wounds were still too raw. Now with a fresh perspective gained through the passage of time, Congress should reconsider what it has given up by allowing the Independent Counsel law to lapse for the past four years. Hopefully, occasions will be few and far between when serious and credible criminal allegations emerge against high-level officials. When this happens, however, the public will question how we can be certain that the incident is being appropriately investigated. Indeed, in the absence of an Independent Counsel law, some may even question whether allegations are as likely to surface in the first place. If people with knowledge of criminal wrongdoing suspect that their information may be covered up rather than acted upon, they would be less likely to take the risk of coming forward.

The controversy that has enveloped the White House in the past week illustrates the need for an Independent Counsel law. According to news reports, two high-level Administration figures, which some reports have placed in the White House, willfully disclosed the name of a covert CIA operative. If true, this disclosure would be a serious criminal law violation, one that may well have endangered not just the covert operative, but the people abroad who worked with her in service to the United States. The disclosures were reportedly made to punish the agent's husband, Ambassador Joseph Wilson, for questioning the accuracy of comments made by the President about Iraq's nuclear weapons program. The Department of Justice recently initiated an investigation, but according to a recent poll the public overwhelmingly prefers that the investigation not be handled by the Department. Although we do not yet know which individuals may be implicated as a result of a thorough investigation, many Americans question whether Attorney General Ashcroft can preside impartially over a probe that could prove very damaging his close associates in the White House, and to the President. An Independent Counsel statute is absolutely essential so that we have an institutionalized means for addressing allegations such as these. We should not, as we are now, forced into an ad hoc and situationally driven discussion of whether the Department of Justice can investigate a particular case.

I have always believed that the Independent Counsel statute embodies certain principles fundamental to our democracy. The alternative to an Independent Counsel statute is a system in which the Attorney General must decide how to handle substantive allegations against colleagues in the Cabinet, or against the President. Often the President and the Attorney General are long-time friends and political allies. The Attorney General will not be trusted by some to ensure that an unbiased investigation will be conducted. In other cases, many will question the thoroughness of an investigation directed from inside the Department. In a time

of great public cynicism about government, the Independent Counsel statute guarantees that even the President and his highest officials will have to answer for their criminal malfeasance. In that sense, this statute upholds the rule of law and will help stem the distrust toward government. The Independent Counsel statute embodies the bedrock American principle that no person is above the law.

I ask unanimous consent that the text of the Independent Counsel Reform Act of 2003 appear in the Congressional Record following my remarks.