II. Scope of the Report

An independent counsel is required by law to file "a final report . . . setting forth fully and completely a description of the work of the independent counsel, including the disposition of all cases brought."[43] This statutory language differed from the pre-1994 law, which contained a "declination clause" requiring:

> a description of the work of the independent counsel, including the disposition of all cases brought, and the reasons for not prosecuting any matter within the prosecutorial jurisdiction of such independent counsel.[44] [16]

The Independent Counsel Reauthorization Act of 1994 did not include a declination clause. Because of the intense public interest in this investigation and the historical significance of the conclusion of an investigation that led to the impeachment of a President, the statute obligates the Independent Counsel to report fully and completely on President Clinton's conduct insofar as necessary for the public to assess the Independent Counsel's decision not to pursue criminal prosecution of President Clinton.

The declination clause's omission did not reflect a congressional determination that an independent counsel is never permitted to articulate his reasons for declining prosecution. The declination clause's deletion resulted from a compromise adopted in the House and Senate Conference Committee. The Senate's view, that an independent counsel is never permitted to comment on a subject's potential criminal wrongdoing unless the person was indicted, was rejected by the Conference Committee on the final bill. The Conference Committee decided that an independent counsel should explain a declination decision where it is in the public's interest that he do so in order for the public to understand the conduct of the person investigated, and the independent counsel's basis for declining prosecution of the person for that conduct.[45] The Independent Counsel has given careful [17]

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[43] 28 U.S.C. § 594(h)(1)(B) (2000) (lapsed June 30, 1999 by operation of 28 U.S.C.A § 599 (West 2000)).

[44] 28 U.S.C. § 594(h)(1)(B) (1988) (lapsed Dec. 15, 1992 by operation of 28 U.S.C.A § 599 (West 1993)).

[45] The version of the reenacted legislation reported by the House Judiciary Committee for consideration by the House of Representatives (H.R. 811, 103d Cong.) retained the declination clause in section 594(h)(1)(B) unmodified. *See* H.R. Rep. No. 103–224 at 22, 29 (1993). The Senate, by contrast, made two substantive changes to the final report language, deleting "fully and completely" and the declination clause. The sponsor of that legislation, Senator Robert Dole, explained his intent: "If retained, this language would have been an open invitation to independent counsels to editorialize on cases that they, for whatever reason, chose not to bring, smearing hard-earned reputations in the process." 139 Cong. Rec. S15972 (daily ed. Nov. 18, 1993); *see also* 139 Cong. Rec. S15886 (daily ed. Nov. 17, 1993) ("[T]he amendment we are accepting relative to the final report is, indeed, to try to avoid having independent counsels state conclusory opinions that the subject of an investigation engaged in criminal wrongdoing in the absence of bringing an indictment against that person") (statement of Sen. Carl Levin).

Continued—

consideration to the legislative history on the omission of the "declination clause." The analysis and findings contained in this Report are consistent with Congress's intention as reflected by the statute's language and legislative history.

This Office's investigation has been and will continue to be of substantial public interest, and the decision of the Independent Counsel to decline prosecution is of historical significance. The Independent Counsel has determined the analysis of the basis for his decision given here is required to assure the public that the investigation of President Clinton was professional, thorough, and fair, and that the decision to decline prosecution was based on a review of the case's merits, the evidence, and the professional guidelines used by prosecutors to evaluate the appropriateness of a prosecution.

Even though this Report must be and is "full and complete," there is no need for this Report to be repetitive. The facts have already been recorded by this Office in its Impeachment Referral (and exhibits) to Congress that is in excess of [18] 8,000 pages, in a House report upon impeaching the President that is in excess of 400 pages, and in Senate documentation in excess of 15,000 pages.[46] That is the official record, and does not begin to encompass the vast public record on the subject. It is the Independent Counsel's intention in this Final Report to add further detail only as necessary to explain the basis for his resolution of the investigation, and no more.

The Conference Committee resolved these two views, expressly acknowledging that the "public interest" nevertheless justified an explanation of an independent counsel's decision not to indict based upon "a wide range of concerns which need to be carefully balanced," including: (1) an understanding of the basis for the independent counsel's decision not to indict; (2) an appreciation of the extent to which the individual was central or peripheral to the independent counsel's jurisdictional mandate; (3) that the information may exonerate the innocent; and (4) protecting individual rights to due process, privacy and fairness. *See* H.R. Conf. Rep. No. 103–511, at 19–21 (1994). In particular, the Conference Committee "consider[ed] to be crucial a discussion of the conduct of the person for whom the independent counsel was appointed to office." *Id.* at 19–20.

[46] *See* Impeachment Referral, *supra* note 10; House Comm. on the Judiciary, Impeachment of William Jefferson Clinton, President of the United States, H.R. Rep. No. 105–830 (1998); S. Doc. No. 106–3 (1999).