Office of the Attorney General
Washington, D. C. 20530

August 31, 1987

Honorable George Bush
President of the Senate
Washington, D.C. 20515

Dear Mr. President:

I am writing to advise you of the pendency of three sealed and consolidated appeals in the United States Court of Appeals for the District of Columbia Circuit, in which appellants challenge the constitutionality of the independent counsel provisions of the Ethics in Government Act. The Court of Appeals issued an order on August 24 and directed that the Attorney General "shall file any brief simultaneously with the party whom he supports." Appellants' opening brief is due August 31, appellees' brief is due September 8, and appellants' reply brief is due September 11. Given the tight deadlines with which we are confronted, I have considered the matter and am reporting to you, as expeditiously as has been possible, our course of action.

Pursuant to the Court of Appeals's order of August 24 and as authorized by 28 U.S.C. § 597(b) and Rule 29 of the Federal Rules of Appellate Procedure, the Department of Justice has decided that it must support appellants' challenge to the constitutionality of the Act. I am writing to notify you of this position, pursuant to the provisions of section 21 of Public Law No. 96-132, 93 Stat. 1049-1050, as continued by various subsequent acts, which direct the Attorney General to "transmit a report to each House of the Congress" in any case in which the Attorney General determines that the Department of Justice "will refrain from defending * * * any provision of law enacted by the Congress in any administrative or other proceeding, because of the position of the Department of Justice that such provision of law is not constitutional."

As you know, the issue of the constitutionality of the independent counsel provisions of the Ethics Act has a long history. In the fourteen years since the Act was first proposed, the Justice Department has consistently emphasized the serious constitutional questions at stake. On several occasions, the Department has detailed our concerns for the Congress. In 1981, for instance, then-Attorney General Smith informed the Senate Legal Counsel of our "serious reservations" regarding the constitutionality of the statute and noted that "[i]f the Department's position is sought in future litigation, we would espouse views consistent with" those concerns. At the same time,

however, the Department has also repeatedly supported statutory revisions that would ensure the Act's constitutionality.

Despite our constitutional concerns, the Justice Department has implemented the Act faithfully while it has been in effect. When individuals raised questions regarding the constitutionality of the Act in litigation, the United States discouraged the courts from prematurely reaching the validity of the law. When this was no longer possible, the Justice Department successfully offered a "saving interpretation" that preserved particular statutory provisions from a specific constitutional challenge presented. In re Olson, Div. No. 86-1 (D.C. Cir. Apr. 2, 1987).

Finally, the Justice Department has consistently attempted to administer the law in a fashion that avoids its constitutional infirmities. The Attorney General has promulgated special regulations and offered all independent counsel appointed under the Ethics Act parallel appointments of equal scope as Executive Branch officials. 28 C.F.R. Part 600; 52 Fed. Reg. 7270 (1987). Such appointments have been accepted by several independent counsel, and their validity has been upheld by the Court of Appeals for the District of Columbia. In that opinion, the Court of Appeals confirmed that parallel appointments can obviate the need to address the difficult and complex constitutional questions inherent in the Ethics Act. In re Sealed Case, No. 87-5247 (D.C. Cir. Aug. 20, 1987).

In the sealed cases now before the court, however, the independent counsel has unfortunately declined the Department's offer of a parallel appointment. The Justice Department specifically renewed its offer to the independent counsel involved on August 28, 1987, and it was again refused. Additionally, the appellants' challenge goes to the statutory scheme in its entirety. Thus, the constitutional issue is unavoidable. On the underlying question, I wish to be very clear: the Department of Justice is firmly committed to having a responsible mechanism in place to ensure integrity and public confidence in the vigorous enforcement of the law against any and all government officials that dishonor themselves, their President and their country by committing illegal acts. Our actions in granting parallel appointments, in working with Congress on legislative improvements, and in advancing narrow positions in court all demonstrate the depth of our dedication to this principle. With the issue squarely presented and in light of the court's order, however, the Department is now compelled to protect the separation of powers that is so fundamental to our constitutional structure.

As the Department of Justice has stated repeatedly over the last decade, the independent counsel provisions of the Ethics Act are unconstitutional for a variety of reasons. First, the Ethics

Act violates the Appointments Clause as it assigns duties to an officer of the United States -- the independent counsel -- who is effectively subordinate to no one and who was not appointed by the President. Second, the Ethics Act violates Article III by assigning to federal judges the non-judicial functions of determining the scope of an independent counsel's authority, and of deciding when the office of an independent counsel should be terminated because its assigned task is thought to have been completed. Third, the Ethics Act violates Article II by eliminating or strictly limiting the power of the Executive Branch to appoint, control, and remove an officer of the United States charged with the quintessential executive duty of criminal law enforcement. Therefore, in our brief, the Department will advise the District of Columbia Circuit to hold the independent counsel provisions of the Ethics Act unconstitutional.

Allow me to reiterate that I strongly support efforts to investigate and punish wrongdoing by high level government officials. I have always sought to advance those efforts within the constraints of the Constitution. As this independent counsel has declined the parallel appointment that others have accepted and the court has upheld, we are now compelled, by virtue of the posture of these cases, to vindicate the critical constitutional principles involved. Nevertheless, we are firmly convinced that the goal of punishing criminal activity by government officials can properly be achieved within the existing constitutional framework. Accordingly, I am personally dedicated to ensuring that a judicial decision striking down the independent counsel provisions of the Ethics Act will not frustrate the results Congress hoped those provisions would achieve.

Sincerely,

ARNOLD I. BURNS
Acting Attorney General