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May 31, 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 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

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

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[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.

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.

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.

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[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.

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.

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

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.

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]

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[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

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

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

Respectfully submitted,

Robert S. Litt/mff

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