**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**Division for the Purpose of**
**Appointing Independent Counsels**

**Ethics in Government Act of 1978, As Amended**

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| ***In Re:*** | ***Madison Guaranty Savings & Loan Association*** | **Division No. 94-1** |
| | | **UNDER SEAL** |

**MOTIONS OF PATRICK KNOWLTON:**
**(1) FOR LEAVE TO AMEND COMMENTS AND FACTUAL INFORMATION INCLUDED IN THE APPENDIX TO THE OIC'S INTERIM REPORT ON THE DEATH OF VINCENT FOSTER;**
**(2) UNSEAL COMMENTS AND FACTUAL INFORMATION PROPOSED TO BE AN APPENDIX TO THE OIC'S REPORT;**
**(3) COMPEL THE OIC TO PRODUCE GRAND JURY MINUTES;**
**(4) TO PRESENT EVIDENCE TO THE GRAND JURY:**
**1. COMMENTS AND FACTUAL INFORMATION PROPOSED TO BE AN APPENDIX TO THE OIC'S INTERIM REPORT, AND**
**2. GRAND JURY MINUTES**

Patrick Knowlton respectfully prays that the Court grant him leave to amend the Comments and Factual Information, attached as an appendix to the OIC's interim Report by Order entered September 26, 1997, and to substitute the enclosed Comments and Factual Information in its place.

Because of the impending expiration of the Ethics in Government Act, and movant's right to promptly disseminate the information in the filing, movant respectfully requests

that the Court consider his motion to unseal it on an expedited basis.

He also respectfully asks this Court to compel the OIC to produce certain grand jury minutes, and to present to the grand jurors (i) those minutes and (ii) his proposed comments and facts.

Movant's four motions are separate and independent of one another. The objects of all these motions are the same as the objects of the Act -- to ensure that:

(1) Justice is done;

(2) Justice appears to have been done;

(3) Those named in a Report are afforded a measure of fairness;

(4) Reports are full and complete; and

(5) The Independent Counsel is accountable.

## SUMMARY OF CONTENTS



**Summary:** Mr. Knowlton asks the Court for leave to amend his Comments and Factual Information included in the Appendix to the OIC's interim Report, released in October of 1997, and to substitute the enclosed submission for the one included by this Court's Order of September 26, 1997. The OIC's reliance on § 594 in filing its interim, as opposed to a "final," Report, was in error. The OIC's interim Report is unknown to the Act and this Court therefore need adjudicate movant's rights under the Act. The relief sought is in keeping with all purposes of the Act.



**Summary:** Mr. Knowlton respectfully moves the Court to unseal his proposed comments and factual information. Movant should be afforded the right to publicly disclose the facts in the filing, as well as his having sought redress in this Court (except for those matters regarding the grand jury). The common law, the First Amendment to the Constitution, and the traditional practice of this Court supports the relief requested. Personal privacy interest in non-disclosure, if any, is outweighed by the public interest in the administration of justice. The Act specifically authorizes this Court to "allow the disclosure of any... document" and to "disclose sufficient information about the issues to permit the filing of timely amicus curie briefs." Unsealing is in keeping with the statutory purpose of the Act of ensuring that justice is done.

The impending expiration of our Ethics in Government Act is important to the public. Movant has right to promptly disseminate the facts in the filing, as well the fact of his having sought redress in this Court. He therefore respectfully requests that the Court consider this motion on an expedited basis.

**(III) MOTION TO COMPEL THE OIC TO PRODUCE GRAND JURY MINUTES.....50**

**Summary:** Because of this Court's extensive involvement in and attention to the Independent Counsel's investigation from its inception until the present time, and because of its familiarity with all the supporting documents, this Court is in the best position to determine the continuing need for grand jury secrecy and therefore has jurisdiction to order the disclosure of grand jury testimony.

A grand jury witness has a general right to the transcript of his own grand jury testimony when sought in connection with a judicial proceeding. Movant seeks his own minutes for his use in the prosecution of his civil suit, and in connection with judicial proceedings before this Court, as set forth in his motion to present evidence to the grand jury.

Given the Court's precedent in holding that it has jurisdiction to order OICs to produce a witness's own grand jury testimony, this Court has the power to order the production of the grand jury testimony of others. Movant seeks the minutes of the testimony of others for his use in the prosecution of his civil suit, and in connection with judicial proceedings before this Court, as set forth in his motion to present evidence to the grand jury.

**(IV) MOTION TO PRESENT EVIDENCE TO THE GRAND JURY:**
**1. COMMENTS AND FACTUAL INFORMATION PROPOSED TO BE AN APPENDIX TO THE OIC'S INTERIM REPORT, AND**
**2. GRAND JURY MINUTES.....60**

**Summary:** This Court is the proper forum in which to litigate the proposed grand jury action. The Act's borders on the scope, duration, and exclusivity OF of the OIC's prosecutorial jurisdiction evidence congressional intent to treat the OIC's jurisdiction as a single mandate, ongoing until the OIC files its single, final, report. These provisions of the Act are in sui generis and work in tandem. The OIC's Foster death probe is not, under the Act, closed.

Mr. Knowlton is a grand jury target of the OIC's ongoing, special, limited jurisdiction. Movant's proposed appendix proves the existence of an overall conspiracy to obstruct justice in the matter, proves the OIC's participation in that conspiracy, and proves its subsidiary conspiracy to tamper with movant in connection with his grand jury appearance. He prays that the Court order the OIC to present to the grand jury his proposed appendix, together with its exhibits.

He also asks that the Court order the OIC to present to the grand jury the minutes of his own grand jury testimony, as well as the testimony of the park witnesses who viewed the body at Fort Marcy Park. Movant's proposed appendix proves that the body site was tampered with, and by whom. So does the 1994 to early 1995 grand jury testimony of body site witnesses, upon information and belief.

Movant respectfully proffers authority for the proposition that this Court has the power to order this relief, and respectfully suggests that the Court consider reviewing the grand jury minutes in camera, and consider

appointing counsel to advise the grand jury of its obligations and rights in this matter.

**Conclusion:** Mr. Knowlton asks that the grand jury see the grand jury minutes whether or not the Court grants him the opportunity to see them. All the proposed remedies are independent of one another.

The objects all the relief sought are the same as the objects of the Act -- to ensure that:

(1) Justice is done;
(2) Justice appears to have been done;
(3) Those named in a Report are afforded a measure of fairness;
(4) Reports are full and complete; and
(5) The Independent Counsel is accountable.

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## Facts

Patrick Knowlton ("movant") was in Fort Marcy Park on July 20, 1993.[1] Exactly six months later, January 20,

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[1] See September 23, 1997 Appendix to Report on the Death of Vincent Foster, Jr., pp. 1-2:

> **Facts.** While heading home in heavy traffic on the George Washington Memorial Parkway, and facing over a two hour commute, Patrick Knowlton pulled into Fort Marcy Park at 4:30 p.m. on July 20th, 1993, to relieve himself. Patrick parked close to the main footpath entrance into the park, between the only two cars in the small parking lot, which were parked just four spaces apart.
>
> To Patrick's left was parked an unoccupied mid-1980s rust-brown four-door Honda sedan with Arkansas tags (closest to the footpath entrance), and on his right was a late model metallic blue-gray sedan, backed into its parking space. A man was seated in the driver's seat of the blue-gray sedan. Immediately after Patrick parked, the man lowered the passenger side electric window and stared at him, menacingly. This unnerved Patrick as he exited his car.
>
> As he started from his car toward the footpath, Patrick heard the blue-gray sedan's door open. Apprehensive, Patrick walked to the sign bordering the footpath entrance to the park and feigned to read its historical information while nonchalantly glancing to his right to see if the man was approaching. He saw the man leaning on the roof of the driver's side of his blue-gray sedan, watching him intently. Patrick then cautiously proceeded 75 feet down the footpath's left fork to the first large tree, in the opposite direction from which Mr. Foster's body was later recovered.
>
> As he relieved himself, Patrick heard the man close his car door. Because the foliage was dense, he couldn't see the parking lot and hoped the man wasn't approaching. As Patrick walked back to the parking lot with a heightened sense of awareness, he scanned the lot but did not see the man. Patrick surmised that the man had either gotten back in his car or perhaps could even be crouching between the brown Honda and Patrick's car preparing to attack him.
>
> In order to maintain his distance from the space between the two cars until he learned the man's whereabouts, Patrick walked directly toward the driver's side door of

1994, Attorney General Reno appointed Robert B. Fiske, Jr., to serve as regulatory Independent Counsel to investigate "Whitewater."[2]

In April and May of 1994, nine months after his visit to Fort Marcy park and three months into the Fiske probe,

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the brown Honda, and then around the back of it. As Patrick reached the driver's side door of the brown Honda, he looked through the window. He also looked into the back seat as he walked the length of the car. He saw a dark colored suit jacket draped over the driver's seat, a briefcase on the front passenger's seat, and two bottles of wine cooler on the back seat. As he reached the back of the Honda, Patrick was relieved to see that the man had returned to his own vehicle. The man was still staring fixedly at him.

Of the five things Patrick witnessed at the park ((1) the man and his car, (2) the suit jacket, (3) the briefcase, (4) the wine cooler, and (5) the mid-1980s Arkansas brown Honda), the Honda itself is the most relevant. It was not Mr. Foster's car. When Mr. Foster's body was discovered approximately 70 minutes after Patrick had left the park, Mr. Foster had been dead for well over 70 minutes. Mr. Foster therefore could not have driven to the park in his Honda, as claimed in the government Reports on the death.

[2] 28 CFR § 603.1 (1993): Whether there were violations of criminal law relating to the Clintons' "relationship with: (1) Madison Guaranty Savings and Loan Association; (2) Whitewater Development Corporation; or (3) Capital Management Services."

FBI Agent Lawrence Monroe interviewed movant.[3]

On August 5, 1994, shortly after the reenactment of the Ethics in Government Act[4] ("Act"), this Court appointed Mr. Starr to serve as statutory Independent Counsel and set his initial jurisdiction to investigate "Whitewater."[5] Expansions of the OIC's jurisdiction include what is known

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[3] See Id. p. 3:
Monroe subsequently wrote in his reports of those interviews that Patrick "identified this particular vehicle [Honda] as a 1988-1990...," and that Patrick "reiterated his description of this Honda as a 1988-1990." This information was false and known to be false.[fn2]

And see id. p. 3 fn. 2:
Monroe tried for hours to get Patrick to admit that the Foster's 1989 silver-gray Honda "could have been" the car Patrick saw. Patrick steadfastly responded, "No," repeating the description he had provided to the Park Police by telephone. Monroe falsified his interview report, writing that Patrick had "identified" the Honda as a "1988-1990," despite the fact that during his second FBI interview, Patrick had picked out the same color he had seen on the mid-1980s Honda from the "browns" section of the car color panels in the FBI laboratory, and that color corresponded to one available only on 1983 and 1984 Hondas.

[4] Ethics in Government Act of 1978, As Amended, 28 U.S.C. §§ 591-599 (1994).

[5] This Court's Order entered August 5, 1994:

> "...[W]hether any individuals or entities have committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.

as "Travelgate"[6] and "Filegate."[7]

Fourteen months into the OIC's probe, on Tuesday, October 22, 1995, the London Sunday Telegraph appeared on U.S. Newsstands. Ambrose Evans-Pritchard's article, *"Death in the Park: Is this the killer?"* subtitled, *"Foster mystery: a key witness ignored by the FBI reveals the face,"* quoted movant as having said that agent Monroe's reports of his interviews with movant contained an "outright lie." It reported that "Starr's investigators have never talked to Knowlton. The federal grand jury has

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[6] The Court's Order entered March 22, 1996:

> ...[T]he investigative and prosecutorial jurisdiction of Independent Counsel Kenneth W. Starr be expanded to investigate whether any violations of federal criminal law were committed by William David Watkins, former Assistant to the President for Management and Administration, in connection with his December 1993 interview with the General Accounting Office concerning the firing of the White House Travel Office employees and to determine whether prosecution is warranted...

[7] The Court's Order entered June 21, 1996:

> ...[T]he investigative and prosecutorial jurisdiction of Independent Counsel Kenneth W. Starr be expanded to investigate whether any violations of federal criminal law... committed by Anthony Marceca... relating to requests made by the White House between December 1993 and February 1994 to the Federal Bureau of Investigation for background investigation reports and materials...

never summoned him to give sworn testimony..."[8]

Two days later, October 24, 1995, the London Sunday Telegraph appeared on US newsstands. That same day, the OIC prepared a subpoena for movant's grand jury appearance.

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[8] Ambrose Evans-Pritchard, *Death in the Park: Is this the killer?"* Subtitle: *Foster mystery: a key witness ignored by the FBI reveals the face."* London Sunday Telegraph, October 22, 1995:

> When the *Sunday Telegraph* showed him police judicial summaries of his testimony - which he had not seen - he was stunned, saying his statements have been falsified...
>
> The other [car in the parking lot of Fort Marcy Park] was a blue sedan, possibly a Japanese make. There was a man in his twenties sitting inside it with a manicured appearance. He lowered his window and gave Knowlton a threatening look...
>
> His FBI statement says that Knowlton "could not further identify this individual and stated that he would be unable to recognize him in the future." "That's an outright lie," he said, angrily. "I want it on the record that I never said that. I told them I could pick him out of a line-up." The *Sunday Telegraph* asked if he would be willing to help with an artist's sketch of the suspect. He agreed... The sketch above was drawn by an experienced police artist...
>
> Knowlton's statement says that the blue sedan had Virginia license plates. "That's not true," he said.
>
> They showed him a photograph of... a Honda with Foster's Arkansas number plates. It was a newer model Honda, with a gloss paint, fancy wheels, and a dent in the back -- a totally different car. "They went over it about 20 times, telling me that this was Foster's car," said Knowlton. "But I was quite adamant about it. I saw what I saw, and I wasn't going to change my story."
>
> Starr's investigators have never talked to Knowlton. The federal grand jury has never summoned him to give sworn testimony...

Two days after that, Thursday, October 26, 1995, Russell Bransford, an FBI agent who had been detailed to the Fiske probe, served the subpoena. That day, 13 men harassed movant. It continued into the following day, so that at least 25 men harassed movant.[9]

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[9] See September 23, 1997 Appendix to the OIC's Report on the Death of Vincent Foster, Jr., p. 3-4:

> Beginning that same day he was subpoenaed, and continuing into the following day, Patrick was harassed by at least 25 men. The intimidation began at around 7:20 p.m., when Patrick and his girlfriend, Kathy, walked from his home in the Foggy Bottom neighborhood to the Dupont Circle neighborhood, and back. During that time, eleven or more men walked towards him, or came at him from behind. Each man directed a constant threatening glare into Patrick's eyes.
>
> Most of these incidents happened in a rapid and coordinated fashion, so that before one man departed, another was approaching. It is difficult to convey the cumulative effect on the target of this technique of intimidation. Kathy, a Ph.D. consultant and educator, stated in her affidavit that at one point she had to "struggle to keep from crying"[fn4] and that she "had never witnessed anything like this before or since. It was intentional, coordinated, intimidating, and extremely unnerving."
>
> Experts tell us that the technique is known to federal intelligence and investigative agencies, and that its objects were twofold: (i) to intimidate and warn Patrick in connection with his grand jury testimony; and failing that, (ii) to destabilize him and discredit his testimony before the grand jury.
>
> Id. p. 4 fn. 4: Kathy struggled to maintain her composure when she and Patrick began to cross Connecticut Avenue to escape from the sixth, seventh and eighth men, whereupon they noticed the ninth man standing on the corner of R Street and Connecticut Avenue, awaiting their approach while staring directly at Patrick.

On Monday, October 30, four days after the harassment began and three days after the OIC and FBI received actual notice of it, Agent Russell Bransford agreed to visit Plaintiff. The facts of Bransford's visit that day give rise to the reasonable inference of his participation in the conspiracy, as alleged in movant's civil suit.[10]

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[10] Patrick Knowlton v. Robert Edwards et. al., USDC DC, CA 96-2467:

> 155. On Monday, October 30, 1995 at around noon, four days after the harassment began, and three days after the OIC and FBI received actual notice of it, BRANSFORD finally telephoned Plaintiff and agreed to visit Plaintiff later that day. Plaintiff asked that BRANSFORD call Plaintiff in advance of his visit so Plaintiff's lawyer could be present... BRANSFORD reluctantly agreed...
>
> 156. That afternoon, BRANSFORD called from his car telephone while parked in front of Plaintiff's building... BRANSFORD again tried to talk Plaintiff out of having counsel [again]...
>
> 158. In violation of his agreement to wait fifteen minutes for the arrival of Plaintiff's counsel, BRANSFORD arrived at Plaintiff's door two or three minutes later.
>
> 159. ...BRANSFORD unbuttoned his suit jacket to display his weapon, and, during their conversation, BRANSFORD grinned at Plaintiff as if he knew exactly what had happened to Plaintiff. BRANSFORD... explained that he had been detailed to the Fiske probe, that he had been "kept on" by Mr. Starr's office...***
>
> 161. BRANSFORD's efforts in twice trying to talk Plaintiff out of having counsel be present, and BRANSFORD'S twice disregarding his agreement to let Plaintiff contact counsel in advance of his arrival to interview Plaintiff, were intended to give Defendant BRANSFORD the opportunity to further intimidate and cause Plaintiff emotional distress unhindered by the presence of counsel.

On November 1, 1995, movant testified before the grand jury. His experience there is also recounted in his civil suit[11] (and Affidavits attached hereto).

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[11] Patrick Knowlton v. Robert Edwards et. al., USDC DC, CA 96-2467:

> 162. On Wednesday, November 1, 1995, Plaintiff testified before the District of Columbia federal Whitewater grand jury investigating the death of deputy White House counsel Vincent Foster...
>
> 163. When Plaintiff testified on November 1, 1995, deputy Independent Counsel failed to introduced himself, sat behind Plaintiff and passed notes to the associate Independent Counsel, who questioned him while resting his head on his hand, as if Plaintiff's testimony was little more than an annoyance.
>
> 164. During two and a-half-hours of testimony, Counsel asked Plaintiff about what occurred at Fort Marcy Park and his prior statements to MONROE for about an hour. During this time, Counsel referred to MONROE's false statements in his reports of interviews with Plaintiff as "alleged misquotes," and referred to the overwhelming campaign of intimidation that Plaintiff had just suffered as the "alleged harassment."
>
> 165. During the balance of the time, associate Independent Counsel insinuated that Plaintiff was a liar, a homosexual, and a publicity hound...
>
> 166. When Plaintiff demanded to know who had sent agent BRANSFORD to his home on October 30, 1995, deputy Independent Counsel, seated behind Plaintiff, spoke for the first and only time, "We sent BRANSFORD."
>
> 167. Towards the end of his appearance before the grand jury, associate Independent Counsel asked Plaintiff to step out of the room so that Counsel could ask the grand jurors whether they had any questions for Plaintiff. When Plaintiff returned, associate Independent Counsel asked Plaintiff, among other things, whether the suspicious acting man in the park talked to Plaintiff, passed him a note, confronted Plaintiff in any way or pointed a gun at

On July 15, 1997, five days before the fourth anniversary of Mr. Foster's death, the OIC filed with the Court its interim Report on the Death of Vincent W. Foster, Jr. (conducted under "other allegations" clause of the Court's Order[12] or the Act's definition of the scope of OICs' jurisdiction[13]). On July 29, 1997, movant filed a

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> Plaintiff. Counsel then asked Plaintiff a question that was coarse, insulting, injurious, hurtful, offensive, and outrageous. Plaintiff was appalled. Counsel then followed up by asking Plaintiff why he called the police and did not wait for the police to call him, and sarcastically if he came forward because he is a "good citizen" and a "Good Samaritan."

[12] Id.:

> The Independent Counsel shall have jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law, other than Class B or C misdemeanor or infraction, by any person developed during the Independent Counsel's investigation referred to above and connected with or arising out of that investigation.
> (emphasis supplied)

[13] See 28. U.S.C. § 593 (b)(3): *Scope of prosecutorial jurisdiction:*

> In defining the independent counsel's prosecutorial jurisdiction, the division of the court shall assure that the independent counsel has adequate authority to fully investigate the subject matter with respect to which the Attorney General has requested the appointment of the independent counsel, and all matters related to that subject matter. Such jurisdiction shall also include the authority to investigate and prosecute federal crimes, other than those classified as Class B or C misdemeanors or infractions, that may arise out of the investigation or prosecution of the matter with respect to which the Attorney General's request was made, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.
> (emphasis supplied)

Motion for the Division of the Court to furnish him relevant portions of the OIC's Foster death Report, and to include Comments and Factual Information in its Appendix, with an appendix.[14] The Court and the parties responded to movant's request.[15]

Eighty-six days after its having been filed, on October 10, 1997, this Court ordered that the OIC's Foster death Report be released to the public, inclusive of its appendix.

On November 24, 1997, six weeks after the release of the OIC's Foster death Report inclusive of its appendix designed to protect movant's reputation, a book review entitled *The Secret Life of Ambrose Evans-Pritchard,*

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[14] Two Volume Appendix, including, inter alia, 113 exhibits supporting Second Amended Complaint (Knowlton v. Edwards et. al., CA 96-2467 (42 U.S.C. § 1985(2)) (Conspiracy to interfere with Civil Rights)): A. Proof of Facts Alleged... C. Proof of Plaintiff's Mental Stability; D. Proof of the Conspiracy alleged: (a) The initial FBI investigation; (b) The U.S. Park Police investigation; (c) Civilian vehicles in the Fort Marcy lot when authorities arrived; (d) The gun; (e) Other forensic evidence; (f) Depression; (g) Other evidence of an FBI cover-up.

[15] (1) August 7, 1997, Order "that the Independent Counsel respond to the motion within 5 business days;" (2) August 14, 1997, OIC response with passages referring to movant and apprising Court of no objection to review of passages; (3) August 20, 1997, Ordered that relevant passages available; (4) September 23, 1997, 20-page Comments and Factual Information; (5) September 26, Order that OIC include submission in Appendix; (6) September 29, OIC Motion for the Court to Reconsider; and (7) September 30, Order denying motion to reconsider.

written by Michael Isikoff, appeared in the Weekly Standard Magazine. In it, Isikoff referred to movant as a "borderline psychotic."[16]

Another book review, *Conspiracy Central*, appeared the next day, November 25, 1997, in the National Review Magazine.[17] By Jacob Cohen, it too slandered movant:

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[16] Michael Isikoff, *The Secret Life of Ambrose Evans-Pritchard,* Weekly Standard Magazine, Nov. 24, 1997:

> Evans-Pritchards' work, such as it is, consists of little more than wild flights of conspiratorial fancy coupled with outrageous and wholly uncorroborated allegations offered up by his "sources" - largely a collection of oddballs... and borderline psychotics.
>
> * * *
>
> Patrick Knowlton, a construction worker who stopped to urinate at Fort Marcy Park on the afternoon of Vince Foster's death and -- here's the key part -- recalls seeing a mysterious "Hispanic-looking" man lingering around the parking lot. No sooner has Evans-Pritchard popped this bombshell in the *Telegraph* than, Knowlton reports, menacing-looking men in business suits begin following him and staring really hard at him...
>
> * * *
>
> But for the moment I prefer my own conspiracy theory: Evans-Pritchard doesn't believe a word he has written... designed to discredit critics of the Clinton White House by making them look like a bunch of blithering idiots.

[17] J. Cohen, *Conspiracy Central*, National Review Magazine, November 25, 1997:

> ...Patrick Knowlton, who claims that he came to the park at 4:30 on the afternoon of July 20 to relieve himself, and at that time saw in the parking lot a brown Honda with Arkansas plates...
>
> * * *
>
> He insists that a very sinister-looking man was hovering around the parking lot and may have monitored his peeing... Knowlton seems to have a penchant for seeing the sinister in the glances of those he meets... Mysterious cars follow him, he says.

> Mysterious cars follow him, he says... Carefully organized teams of men constantly pass him and his girlfriend on the streets, giving them very menacing stares... during every walk Knowlton takes, so that any experimental stroll will reveal them.

## (I) MOTION FOR LEAVE TO AMEND COMMENTS AND FACTUAL INFORMATION INCLUDED IN THE APPENDIX TO THE OIC'S INTERIM REPORT ON THE DEATH OF VINCENT FOSTER

**Summary:** Mr. Knowlton asks the Court for leave to amend his Comments and Factual Information included in the Appendix to the OIC's interim Report, released in October of 1997, and to substitute the enclosed submission for the one included by this Court's Order of September 26, 1997. The OIC's reliance on § 594 in filing its interim, as opposed to a "final," Report, was in error. The OIC's interim Report is unknown to the Act and this Court therefore need adjudicate movant's rights under the Act. The relief sought is in keeping with all purposes of the Act.

**1. This Court may grant movant leave to amend his September 23, 1997 Comments and Factual Information.** This Court's order that movant's factual information and comments be appended to the OIC's interim Foster death Report was in keeping the purpose of the Act of the protection of those named in the Report. The comment proceeding "stems from the hazard to the reputation..." In re Sealed Motion, 880 F.2d 1367, 1378 (D.C. Cir. 1989).

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> Carefully organized teams of men constantly pass him and his girlfriend on the streets, giving them very menacing stares... Apparently, they are present during every walk Knowlton takes, so that any experimental stroll will reveal them. One wonders, is there a school that teaches federal agents this methodology of intimidation?

The inclusion of movant's submission in the OIC's appendix did not, however, adequately protect his reputation in accordance with the Act, as is evident from print appearing after the release of the OIC's Foster death report. Given the facts of the intimidation movant reports to have suffered, there are only two conclusions to be drawn. Either he is a liar or mentally unbalanced or there exists a conspiracy to cover up the facts of Mr. Foster's death. Movant's filing proves the cover-up and he should presently be afforded redress under the Act.

**2. The OIC's interim Report is unknown to the Act.** The OIC claims to have filed its July 15, 1997 report in accordance with 28 U.S.C. § 594(h),[18] however, 28 U.S.C. § 594(h) recognizes only a "final" report, not an "interim" report or its equivalent. § 594(h)(1)(B) provides that "before the termination of the independent counsel's office under section 596(b), [the Independent Counsel shall] file

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[18] See Report on the Death of Vincent Foster, Jr., p. 1:

> In accordance with 28 U.S.C. § 594(h), the Office pf Independent Counsel In re: Madison Guaranty Savings & Loan Association (the OIC) files this summary report on the 1993 death of Deputy White House Counsel Vincent W. Foster, Jr.

a final report with the division of the court..."[19] See also the discussion of § 594(h)(2) "final" report comment proceeding in In re Sealed Motion,[20] 880 F.2d 1367, D.C. Cir. 1989. The OIC must file one "final" report describing

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[19] **§ 594(h) Reports by independent counsel --**

**(1) Required reports** -An independent counsel shall***

**(B)** before the termination of the independent counsel's office under section 596(b), file a final report with the division of the court, setting forth fully and completely a description of the work of the independent counsel, including the disposition of all cases brought. (emphasis supplied)

**(2) Disclosure of information in reports -** The division of the court may release to the Congress, the public, or any appropriate person, such portions of a report made under this subsection as the division of the court considers appropriate. The division of the court may make any portion of the final report filed under paragraph (1)(B) available to any individual named in such report for the purposes of receiving within a time limit set by the division of the court any comments or factual information that such individual may submit. Such comments and factual information, in whole or in part, may, in the discretion of the division of the court, be included as an appendix to such final report. (emphasis supplied)

[20] In re Sealed Motion, 880 F.2d 1367, 1368 (D.C. Cir. 1989): The Independent Counsel Reauthorization Act... specifically empowered this division of the court... to ensure that individuals 'named' in a final report..."; [T]he court may, in its discretion, find to be appropriate for inclusion in an appendix to a final report upon its release." Id. at 1369; "Congress created the comment proceeding in an effort to ensure fairness and accuracy in the final report... This authority vested in the special court provides a highly desirable check on what would otherwise allow an independent counsel to file an unbridled final report." Id. at 1370; "[E]xclusive jurisdiction over grand jury minutes where the division of the court finds it appropriate to protect the rights of any individual named in a final report." Id. at 1374.

its work "fully and completely" under § 594(h)(1), "before termination" under § 596(b)(1).[21]

The OIC is bound by the Act as written. It is not free to interpret the Act's reference to a final report as meaning an interim report, even under the present

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[21] **28 U.S.C. § 596. Removal of independent counsel; termination of office**

**§ 596(b) Termination of office --**

**(1) Termination by action of independent counsel.** An office of independent counsel shall terminate when --

**(A)** the independent counsel notifies the Attorney General that the investigation of all matters within the prosecutorial jurisdiction of such independent counsel or accepted by such independent counsel under section 594(e), and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions; and

**(B)** the independent counsel files a final report in compliance with section 594(h)(1)(B) (emphasis supplied)

And see, **§ 594 (h) Reports by independent counsel --**

**(1) Required reports** -- An independent counsel shall--

**(A)** file with the division of the court, with respect to the 6-month period beginning on the date of his or her appointment, and with respect to each 6-month period thereafter until the office of that independent counsel terminates, a report which explains major expenses, and summarizes all other expenses, incurred by that office during the 6-month period with respect to which the report is filed, and the estimates future expenses of that office; (emphasis supplied)

circumstance -- where the OIC and the Court has treated the interim report as having given those named in it rights under 28 U.S.C. § 594(h)(2).

The Supreme Court recognizes "the cannon of construction that instructs that 'a legislature is presumed to have used no superfluous words.'" Bailey v. United States, 116 S. Ct. 501, 507 (1995) (quoting Platt v. Union Pacific R.R. Co., 99 U.S. 48, 58 (1879). The Supreme Court has "'stated time and time again that courts must presume that a legislature says in a statute what it means and means what it says.'" Department of Defense v. FLRA, 114 S. Ct. 1006, 1014 (1994), quoting Connecticut Nat'l Bank v. Germain, 503 U.S. ___ 112 S. Ct. 1146, 1149 (1992).[22] "'The ultimate question is one of congressional intent, not one of whether this Court thinks it can improve upon the statutory scheme that Congress enacted into law.'" United States v. Mezzanatto, 115 S. Ct. 797, 808 (1995) (Souter,

[22] See also Director, OWCP v. Greenwich Collaries, 114 S. Ct. 2251, 2255 (1994) (Where a statutory term is undefined, the Court's "task is to construe it in accord with its ordinary or natural meaning"); FDIC v. Meyer, 114 S. Ct. 996, 1000 (1994) ("In the absence of... a definition, we construe a statutory term in accordance with its ordinary or natural meaning"); Bailey v. United States, 116 S. Ct. 501, 506 (1995) (A word in a statute "must be given its 'ordinary or natural meaning..."); Staples v. United States, S. Ct. 1793, 1797 (1994) (The language of the statute [is] the starting place in our inquiry...").

J. dissenting) (quoting Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979).[23]

Congress omitted the term "final" in section 594(h)(1), which requires the independent counsel to file with the Court every six months "a report which identifies and explains major expenses." "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Rusello v. United States, 464 U.S. 16, 23 (1983), quoted in Field v. Mans, 116 S. Ct. 437, 442 (1995).

Congress reenacted the Act in 1994, subsequent to this Court's decisions in In re Sealed Motion, 880 F.2d 1367 (D.C. Cir. 1989) and In re North, 10 F. 3rd 831, 835 (D.C. Cir. 1993), interpreting parties' rights under § 594(h)(2) upon the filing of a final Report. Congress reenacted § 594(h)(2) without amendment. "When Congress reenacts language that has been given a consistent judicial construction, we often adhere to that construction in interpreting the reenacted statutory language." Central

[23] See also Fogerty v. Fantasy, Inc., 114 S. Ct. 1023, 1033 (1994) (Thomas, J. dissenting), quoting Pavlic & Le Flore v. Marvel Entertainment Group, 493 U.S. 120, 126 (1989) ("Our task is to apply the text, not to improve upon it.").

Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 114 S. Ct. 1439, 1452 (1994).[24]

**3. Because the subject report unknown under the Act, movant's rights herein cannot determined by reference to any specific provision of the Act**. The provisions of analogous federal court rules is instructive, such as Federal Rule of Civil Procedure 15(a): "[L]eave [to amend] shall be freely given when justice so requires."[25] Justice requires that the public have the opportunity to review movant's filing. If movant's amended filing is substituted for the one submitted on September 23, 1997, it would forever be accessible to any American from any government

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[24] See also Holder v. Hall, 114 S. Ct. 2581, 2606 (1994) (Thomas, J. concurring), quoting Pierce v. Underwood, 487 U.S. 552, 567 (1988) ("[W]e generally will assume that reenactment of specific statutory language is intended to include a 'settled judicial interpretation' of that language."); id. at 2627 (separate opinion of Stevens, J.), quoting United States v. Sheffield Bd. of Comm'rs, 435 U.S. 110, 134 (1978) ("'When a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and this Court is bound thereby.'").

[25] See, e.g., Lowry v. Texas A & M University System, 117 F.3d 242 (5th Cir. 1997) (FRCP 15(a) creates "strong presumption" in favor of permitting amendment).

printing office. Like parties in a civil suit, the OIC would not be unfairly prejudiced thereby.[26]

**4. The handling of the report and the opportunity for rebuttal are within the control and discretion of the Court.** "Congress 'directed' the court to take 'appropriate steps to protect the rights of any individual named in the report.' S. Rep. No. 95-170, at 70-71. 'Thus, the handling of the report, its release and the opportunity for rebuttal are within the control and discretion of the court.'" In re Sealed Motion, 880 F.2d 1367, 1375 (D.C. Cir. 1989).

**5. Movant has standing to seek redress and the motion is ripe.** Because on September 26, 1997 this Court ordered the OIC to include movant's September 23 submission in its Appendix to its interim Report, under the doctrine of "law of the case," movant has standing to seek redress under 28 U.S.C. § 594(h)(2). Movant seeks redress under the Act presently because the injury to his reputation has accrued. Cf. North v. Walsh, 656 F. Supp. 414 (D.D.C.

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[26] See Van Le v. Five Fathoms, Inc., 792 F.Supp 372 (D.N.J. 992) (opponent of proposed FRCP 15(a) amendment carries burden of clearly establishing futility); United States v. Banks, 115 F.3d 916, 918 (11th Cir. 1997) (unfair prejudice can be lack of notice to opposing party or some other denial of a fair opportunity to defend); Quarantino v. Tiffany & Co., 71 F3d 58, 66 (2d Cir. 1995) ("Leave is normally granted, especially when the opposing party is not prejudiced.").

1987), holding insufficient hardship to warrant anticipatory judicial relief.

**6. Movant has no remedy at law.** Movant has no remedy at law for injury to his reputation causally related to the subject investigation. (See Schiavone v. Montuoro, 487 F. Supp. 66 (S.D.N.Y. 1984), dismissing defamation action against United States attorneys for the publication of a letter requesting that the Attorney General investigate under the Act.)

**7. The remedy sought is in keeping with the Act's legislative intent of protecting movant's rights and affording him a measure of fairness.** This Court in In re North, 10 F. 3rd 831, 835 (D.C. Cir. 1993) noted that one of the purposes of the section was to "to afford a measure of fairness to persons mentioned in the report... [who] may submit 'comments and factual information' that the court may include as an appendix to the report. 28 U.S.C. § 594(h)(2)."

"Congress created the comment proceeding in an effort to ensure fairness and accuracy in the final report of a 'truly independent special prosecutor.' To this end, the Act also vests jurisdiction in this division of the court 'to make such orders as are appropriate to protect the rights of any individual named in such [Independent

Counsel] report...' Section 594(h)(2)." In re Sealed Motion, 880 F.2d 1367, 1370 (D.C. Cir. 1989). Movant seeks an appropriate order to protect his rights.

The Act requires that the Court "exercise its judicial discretion, to ensure that individuals 'named' in a final report... are treated fairly and justly... [and] 'directs' the court to protect the rights" of any such individual. In re Sealed Motion at 1368-1369:

> Congress provided special procedures... to ensure fairness to the targets of such investigations and to those touched by investigations... The legislative history of the Act demonstrates that Congress appreciated the unique nature of the Independent Counsel office it created and the dangers the law posed to all touched by an investigation.[27]

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[27] See also In re Sealed Motion at 1368-1369:

> The Independent Counsel Reauthorization Act of 1987, 28 U.S.C. § 591 et. seq., and its predecessors have specifically empowered this division of the court, in the exercise of its judicial discretion, to ensure that individuals "named" in a final report of an independent counsel's investigation of high government officials are treated fairly and justly... Specifically, the Act specially "directs" the court to protect the rights of any "individual named" in the report. To this end, 28 U.S.C. § 594 (h)(2) provides: "The division of the court shall make such orders as are appropriate to protect the rights of any individual named in such [final] reports." The legislative history of the Ethics in Government Act, supra, emphasize this duty.

And see Id. at 1374:

> In addition to the specific provision of the Act, the entire legislative history of the Ethics in Government Act indicates, as above stated, that Congress was very cognizant of the necessity of protecting the rights of individuals named in an independent counsel report.

**8. Inclusion of the filing in the OIC's appendix would further legislative intent by assuring that the Report is full and complete.** This Court in In re North, 10 F. 3rd 831, 835 (D.C. Cir. 1993) also noted that one of the purposes of the section was to "[t]o assure that the report is full and complete..." "Congress viewed the report as a 'very important' means to insure the accountability of a special prosecutor." In re Sealed Motion at 1370.

The statutory "comment proceeding" is also designed to assure the public of the accuracy of the Independent Counsel's final report. "The court finds it important as to the witness... the government and the public that he be given every reasonable opportunity to ensure the accuracy of the Independent Counsel's Report as to him and his conduct." Id. at 1369.

This Court observed the that the purpose of the Independent Counsel's final report is to ensure his accountability, five years after its In re Sealed Motion decision. In re North at 1241:

> [T]he purpose of the Final Report is to "ensure the accountability" of the Independent Counsel to the government and the public. S. Rep. No. 170, 95th Cong. 2d Sess. 70-71. The American public is particularly entitled to this accountability where the subject of the investigation and the investigation itself have been widely publicized of long duration and expense... it is in the national interest that the public, its representatives in the political branches,

> and its surrogates in the media have as full an access to the fruits of the investigation as possible...

**9. The redress sought would further the object of the Act of ensuring that justice is done.** The Act is designed to ensure that justice is done. Significant evidence of a cover-up is in the public domain and more will be released.[28] Here, the FBI failed to initially assume primary jurisdiction in the case[29] and the OIC's probe is the third FBI investigation into the case. Congress cautioned against such an appearance of conflict of interest.

> Because independent counsels are appointed to handle politically sensitive investigations for the primary purpose of avoiding any appearance of partiality or bias, it is particularly important that they and their investigations be above any suspicion or allegation regarding conflict of interest.[30]

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[28] See 28 U.S.C. §§ 594(k) and 595(a)(2); 5 U.S.C. § 552; 28 C.F.R. § 16. Freedom of Information lawsuits in this matter now pending include: Accuracy in Media, Incorporated v. National Park Service, US District Court for the District of Columbia, Civil Action No. 97-021098; Accuracy in Media, Incorporated v. Federal Bureau of Investigation, US District Court for the District of Columbia, Civil Action No. 97-02107; and Alan J. Favish v. Office of Independent Counsel, USCA, 9th Cir., No. 98-55594 (claiming exemption based on ongoing investigation). And Patrick Knowlton v. Robert Edwards et. al., US District Court for the District of Columbia, Civil Action No. 96-2467 (42 U.S.C. § 1985(2)).

[29] See investigations mandated by 18 U.S.C. § 1751, *Presidential and Presidential staff assassinations*

[30] Act of Dec. 15th 1987, Pub. L. No. 100-191, 1987 U.S.C.C.A.N. (101 Stat. 1293) p. 2172.

## Conclusion

Movant did the right thing by calling the US Park Police in July of 1993 -– consistent with his understanding of his duties as a good citizen. He was later harassed and intimidated to set him up to look delusional, during which time the OIC and FBI ignored his pleas for help, until FBI Agent Bransford visited his home and further intimidated him. Because he continued to tell the truth, including the truth of the bizarre harassment he suffered, he was discredited.

Because the OIC's interim Report is unknown to the Act, movant's rights cannot be determined by reference to any specific provision of the Act. Analogous federal court rules are instructive. Like parties in a civil suit, the OIC would not be unfairly prejudiced should movant be afforded leave to amend his filing. The redress sought is in keeping with the Act's legislative intent of protecting movant's rights by affording him a measure of fairness and in assuring that the Report is full and complete. Justice, the overall object of the Act, would be served thereby. The filing proves the cover-up. The Act permits redress.

**WHEREFORE**, Patrick Knowlton respectfully moves the Court for leave to amend his previous submission included as an appendix to the OIC's interim Report, and to

substitute the enclosed comments and factual information for the one attached by order of September 26, 1997, and to Order the OIC to notify the US Government Printing Office of the substitution.

## (II) MOTION TO UNSEAL COMMENTS AND FACTUAL INFORMATION PROPOSED TO BE AN APPENDIX TO THE OIC'S REPORT

**Summary:** Mr. Knowlton respectfully moves the Court to unseal his proposed comments and factual information. Movant should be afforded the right to publicly disclose the facts in the filing, as well as his having sought redress in this Court (except for those matters regarding the grand jury). The common law, the First Amendment to the Constitution, and the traditional practice of this Court supports the relief requested. Personal privacy interest in non-disclosure, if any, is outweighed by the public interest in the administration of justice. The Act specifically authorizes this Court to "allow the disclosure of any... document" and to "disclose sufficient information about the issues to permit the filing of timely amicus curie briefs." Unsealing is in keeping with the statutory purpose of the Act of ensuring that justice is done. The impending expiration of our Ethics in Government Act is important to the public. Movant has right to promptly disseminate the facts in the filing, as well the fact of his having sought redress in this Court. Movant therefore respectfully requests that the Court consider this motion on an expedited basis.

### 1. A denial of the relief sought would constitute a prior restraint -- the First Amendment requires disclosure of the filing

The First Amendment to the Constitution mandates public disclosure of movant's filing. The First Amendment "guarantees the press and the public a general right of

access to court proceedings and court documents unless there are compelling reasons demonstrating why it cannot be observed." The Washington Post v. Robinson, 935 F.2d 282, 287 (D.C. Cir. 1991).[31]

The Supreme Court has recognized that, "[t]o work effectively, it is important that society's criminal process 'satisfy the appearance of justice,' and the appearance of justice can best be provided by allowing people to observe it." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571-72 (1980) (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)). Indeed, affording public access to criminal proceedings "plays a particularly significant role in the functioning of... the government as a whole," serving as an indispensable "check" on the judicial process. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982). Where the government "attempts to deny the right of access in order to prohibit disclosure of sensitive information, it must be shown that the denial

[31] See also, Oregonian Publishing Co. v. United States District Court, 920 F.2d. 1462, 1465 (9th Cir. 1990) ("Under the first amendment, the press and the public have presumed right of access to court proceedings and documents"), *cert. denied*, 501 U.S. 1210 (1991); In re Washington Post Co., 807 F.2d 383, 389-90 (4th Cir. 1986) (holding that First Amendment right of access applies to documents submitted in connection with criminal proceedings).

is necessitated by a compelling governmental interest." Id.

There is a strong historical tradition in this country of providing public access to pleadings and court documents, and that weighs heavily in favor of disclosure. The First Amendment establishes a "presumption of openness" of judicial proceedings that can only be overcome by demonstration of "an overriding interest based on findings that closure is essential to preserve higher values." Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984).[32]

This Court's unsealing of the OIC's Report on Mr. Foster's death, inclusive of its appendix, was in keeping with the Court's tradition of making Independent Counsels' reports publicly available.[33]

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[32] See also, Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 10-11 (1986) ("Press Enterprise II") (traditional public access to certain pre-indictment proceedings is question relevant to First Amendment issue).

[33] See, e.g., *Report of Independent Counsel in In re Edwin Meese III* (1988) (Div. No. 87-1); *Final Report of the Independent Counsel for Iran/Contra Matters* (1993) (Div. No. 86-6). In its December 3, 1993 Memorandum concerning the release of the Iran/Contra Independent Counsel's report, for example, this Court observed that "the Iran/contra Investigation has been the occasion of massive media coverage and public debate. The Court not only 'considers [it] appropriate,' but in the public interest that as full a disclosure as possible be made of the Final Report..." Mem. At 3 (D.C. Cir. Dec. 3, 1993.).

In sum, records of judicial proceedings and documents filed with courts are presumptively open to the public, and only a strong, affirmative showing would permit the Court to close off the public from access to its judiciary.

**a. The damage of the prior restraint bears on news and commentary on the administration of justice and public and congressional interest in the reenactment of the Ethics in Government Act**

"A prior restraint... by definition, has an immediate and irreversible sanction. If it can be said that a threat of a criminal or civil sanctions after publication 'chills' speech, a prior restraint 'freezes' it at least for a time." Nebraska Press Ass'n, 427 U.S. at 559. And, "[t]he damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events." Id.

The Ethics in Government Act of 1978, As Amended, has a five-year "sunset." The current provisions, reauthorized and amended by the Independent Counsel Reauthorization Act of 1994, P.L. 103-270, June 30, 1994, will expire on June 30, 1999, unless reauthorized.[34]

> The issue has a way of going away for five years at a time. What happens at reauthorization will depend on the experience of the five years in between. What

[34] 28 U.S.C. § 599.

happens in the last year before reauthorization is the key to it all.[35]

If unsealed, the public will have the opportunity to review it prior to the expiration of the Act.

**b. The party opposing disclosure carries a heavy burden of showing justification for the imposition of such a prior restraint**

The denial of movant his request to publish specific, truthful facts lawfully in his possession would constitute a "prior restraint."[36] Such a prior restraint, prohibiting movant from revealing to the public his having sought redress in this Court, violates the Constitution. The Supreme Court has made clear that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." Nebraska Press Ass'n, 427 U.S. at 559. Indeed, "a prior restraint on publication [is]... one of the most

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[35] Remarks of Mary Gerwin, counsel to the Senate Subcommittee for Oversight of Government Management. K. Harringer, Independent Justice, 1992, p. 90.

[36] See Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 556 (1976); Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 248 (7th Cir. 1975); Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376, 390 (1973) (The "special vice of a prior restraint is that communication will be suppressed... before an adequate determination that it is unprotected by the First Amendment.").

extraordinary remedies known to our jurisprudence." Id. at 562.

The Supreme Court has therefore repeatedly invalidated prior restraints in a variety of contexts.[37] The Government "thus carries a heavy burden of showing justification for the imposition of such a restraint." Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). The "heavy burden" of rebutting the "heavy presumption" against the constitutionality of the prior restraint against movant cannot be satisfied in this case. This Court's rule of all submissions being filed under seal does not present the

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[37] See, e.g., New York Times Co. v. United States, 403 U.S. 713, 714, quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) (A prior restraint bears "a heavy presumption against its constitutional validity," (invalidating prior restraint of publication of massive amounts of classified national security information,); Nebraska Press Ass'n, 427 U.S. at 569-70 (invalidating prior restraint of pretrial publicity in a criminal case); CBS, Inc. v. Davis, 114 S. Ct. 912, 914-15 (1994) (invalidating a prior restraint of a news broadcast where the subject of the broadcast claimed that the videotape was "obtained through calculated misdeeds):

> Nor is the prior restraint doctrine inapplicable because the videotape was obtained through "calculated misdeeds" of CBS. In New York Times Co., the Court refused suppression publication of papers stolen from the Pentagon by a third party. Subsequent civil or criminal proceedings, rather than prior restraints, ordinarily are the appropriate sanctions for calculated defamation or other misdeeds in the First Amendment context.

sort of "exceptional case" that arguably might justify a prior restraint in extreme circumstances.[38]

**2. The common-law rule presumptively allowing public access to Court documents requires disclosure of movant's filing**

**a. There is a strong presumption in favor of public access to judicial records**

As the Supreme Court recognized in Nixon v. Warner Communications, Inc., 435 U.S. 589, 597, 602 (1978) it "is clear that the courts of this country recognize a general right to inspect public records and documents including judicial records and documents," and that there is a "presumption... in favor of access to judicial records."

Indeed, the D.C. Circuit has found "the existence of the common law right to inspect and copy judicial records [to be] indisputable." In re Application of National

[38] See, e.g., Near v. Minnesota, 283 U.S. 697, 717 (1931), observing that prior restraints are permissible "only in exceptional cases," and giving us as an example a restraint to limit publication of battle plans during wartime.

Broadcasting Co., 653 F.2d 609, 612 (D.C. Cir. 1981).[39]

This "precious" and "fundamental common law right," "'serves the important function of ensuring the integrity of judicial proceedings in particular and of the law enforcement process more generally.'" Id. at 612, 613 (citation omitted).

**b. The common-law requires a balancing of the public interest against arguments advanced by the party opposing disclosure**

The common-law access rule requires the courts to engage in a balancing test, "weighing the interests advanced by the parties in light of the public interest and the duty of the courts." Nixon v. Warner Communications, Inc., 435 U.S. at 602. In applying this test, the courts must take into account the "presumption... in favor of access to judicial records," the "incremental gain in public understanding" that would result from disclosure,

[39] See also Johnson v. Greater Southeast Community Hospital Corp., 951 F.2d 1268, 1277-78 (D.C. Cir. 1997) (recognizing that the common-law creates a "strong presumption in favor of public access to judicial proceedings" and that the party seeking to seal records is obligated "to come forward with specific reasons why the record, or any part thereof, should remain under seal.") And see Valley Broadcasting Co. v. United States District Court, 798 F.2d 1289, 1293 (recognizing that the press "enjoys a common-law right to copy and inspect judicial records"); Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988) (recognizing that common-law presumption of access can be rebutted only "if countervailing interests heavily outweigh the public interests in access").

and any countervailing arguments advanced by the party opposing disclosure. Id.

Application of the common-law balancing test here demonstrates that movant's filing should be unsealed. The subject matter of the filing concerns highly publicized, pressing issues of major public importance – allegations concerning the suspicious death of a deputy White House counsel. Moreover, it is especially important to release the filing to protect the integrity of the Independent Counsel process.

**(1) The Justice Department's policy of favoring openness of judicial proceedings is binding on the OIC**

Furthermore, as a matter of policy, Justice Department regulations provide: "Because of the vital public interest in open judicial proceedings, the Government has a general overriding affirmative duty to oppose closure. There is... a strong presumption against closing proceedings or portions thereof, and the Department of Justice foresees very few cases in which closure would be warranted." 28 C.F.R. § 50.9. This Justice Department policy favoring openness of judicial proceedings is binding on the OIC. "An Independent Counsel shall, except where not possible, comply with the written or other established policies of

the Department of Justice respecting enforcement of the criminal laws." 28 U.S.C. § 594(f).

**(2) The vast majority of reports cited are already in the public domain, and Mr. Foster's death has been the subject media coverage**

Almost all of the exhibits cited in the subject filing are to testimony and reports drawn from thousands of pages of the underlying government investigative record which already been released to the public. These records include reports of various kinds, testimony, depositions, FBI and Park Police witness interview reports, photographs, laboratory reports, investigators' memos, and handwritten notes.

By any measure, the volume of news reports, analysis, and commentary about Mr. Foster's death undermines any argument that the filing must remain secret. Like the Iran/contra affair, there has been "massive media coverage and public debate." In re North, 16 F. 3d 1234 (D.C. Cir. 1994).

> [T]he court should weigh factors such as [1] whether the subjects of the investigations have already been disclosed to the public; [2] whether the subjects do not object to the filings being released to the public; [3] whether the filings contain information which is already publicly known; and [4] whether the court filings consist of legal or factual rulings in a case which should be publicly available to understand the court's rules and precedents or to follow developments in a particular matter. Sen. Rep. No.

123, 100th Cong. 1st Sess. 21 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2150, 2170.

Id. at 1237.

"Third - whether the filings contain information which is already publicly known - this is a factor which weighs most strongly in favor of release. Not only is the information widely known, it is widely known incorrectly." Id. at 1240. So too here.

**(3) Those named in the filing would not be unduly prejudiced by its public dissemination**

The subject filing contains no grand jury information subject to secrecy restrictions of Federal Rule of Criminal Procedure 6(e). It also does not include any reference to the existence of motions regarding grand jury matters, other than the motion seeking the production of movant's own grand jury minutes.

Although it does set forth facts from which the reader may infer criminal activity from unindicted persons, that circumstance does not justify withholding the fact that it has been filed with this Court. This Court ordered the public release of the final report of Iran/Contra Independent Counsel Lawrence E. Walsh even though that report was filled with grand jury material and "rife with accusations of guilt of criminal conduct against persons

never indicted or convicted." In re North, 16 F.3d at 1238.

This Court in North held that the Iran/Contra final Report should be released in its entirety in part because the material had already received public dissemination through interim reports to Congress that were made public and "media accounts," and therefore had "lost its protected character." Id. at 1244-45.

Because movant is not an official, his filing cannot give the impression that the views expressed therein are the same as the views of this Court. Cf. In re North, 16 F.3d at 1239: "In short, the [final] Report will not bear the imprimatur of the Court, nor is it issued under this Court's aegis."

**3. Personal privacy interest in non-disclosure, if any, is outweighed by the public interest in the administration of justice**

In Outlaw v. U.S. Department of the Army, 815 F. Supp. 505 (D.D.C. 1993), a FOIA suit where plaintiff sought release of five death scene photographs, the army declined release "on the grounds that release of such photographs, depicting the deceased... could constitute an unwarranted invasion of the personal privacy of the victim's family members." (at 506).

Judge Oberdorfer disagreed:

> Indeed, if the prosecution had wished to put the photographs into evidence at the 1967 trial, it is most unlikely that the prosecution would have considered, or had any duty to consider, the privacy interest of the decedent's then surviving family... On the other hand, there is an obvious public interest in the disclosure as a check on the administration of justice by the United States Army. As our Court of Appeals has stated, this court must:
>
> > first determine whether their disclosure would compromise a substantial, as opposed to a de minimus, privacy interest. If no significant privacy interest is implicated..., FOIA demands disclosure.... If, on the other hand, a substantial privacy interest is at stake, then [the court] must weigh that privacy interest in non-disclosure against the public interest in the release of the records in order to determine whether, on balance, disclosure would work a clearly unwarranted invasion of personal privacy.

The Court concluded that "even if it were" a substantial privacy interest, "that privacy interest is outweighed by the public interest in the contribution to the administration of justice... that disclosure could effect." Id.

In Stern v. FBI, 737 F.2d 84, 92 (D.C. Cir. 1984), a FOIA suit where plaintiff sought the release of the identities of three FBI employees investigated in connection with possible cover-up of illegal FBI surveillance activities, this circuit upheld the district court's order that the FBI employee who had knowingly participated in the cover-up be identified. The court

noted that "[t]he activity under investigation constituted potential violations of federal criminal laws prohibiting the obstruction of justice," (id. at 90) and observed that "the public may have an interest in knowing that a government investigating itself is comprehensive, that the report of an investigation released publicly is accurate, and that any disciplinary measures imposed are adequate, and that those who are accountable are dealt with in an appropriate manner." (emphasis supplied) (Id. at 92).

Moreover, the OIC has no right to assert the privacy interests of others. "[B]oth the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person." Dept. of Justice v. Reporters Comm., 489 U.S. 749, 789, 103 L.Ed. 744 (1989).

Additionally, because the OIC's Report on the Death of Vincent W. Foster, Jr. was released to the public on October 10, 1997, the release of the filing will not interfere with the OIC's investigation.

**4. This Court has the power to unseal**

**a. Unsealing falls within this Court's supervisory power over its own records and files**

This Court needs no affirmative grant of authority from the Executive or Legislative Branches to allow public

access to judicial records and files. "'It has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution, powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.'" Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991). One such "implied power" is the inherent authority of courts over their own files. "Every court has supervisory power over its own records and files..." Nixon, 435 U.S. at 598.

In denying a motion to file a fee application under seal under the Ethics in Government Act, this Court in In re Pierce (Olivas Fee Application), 102 F.3d 1264 (D.C. Cir. 1996), observed the public's need to understand the reasons for the court's actions.

> The court's practice has been to make fee applications publicly available so that the public may understand the reasons for the court's disbursement of (often large amounts of) public funds to someone who was investigated by an independent counsel . Cf. Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8, 106 S.Ct. 2735, 2740, 92 L.Ed. 2d 1 (1986) (noting that in deciding whether there is a right of public access to criminal proceedings, courts consider whether the place and process have historically been open to the public and whether public access plays a significant role in the functioning of the proceeding); Washington Post v. Robinson, 935 F.2d 282, 288 (D.C. Cir. 1991) (same).

**b. Any supervisory power by the OIC over the Court's records and files raises a serious separation-of-power issue**

Neither of the other two Branches may exercise power over this Court's determinations regarding access to the Court's files. Unlike the act of appointing independent counsels, which involves the exercise of this Court's power under the Appointments Clause of Article II of the Constitution, see generally Morrison v. Olson, 487 U.S. 654, 673-79 (1988), this Court's resolution of a motion seeking public disclosure of documents that have been filed with it is a case or controversy that requires the exercise of the Court's Article III "judicial power" -- this Court's decision whether to release final report of Independent Counsel is "a genuine case or controversy between the movants and the Independent Counsel," and therefore "constitute[s] a judicial proceeding." In re North, 16 F.3d 1234, 1244 (D.C. Cir. 1994).

No Branch is permitted "'to possess directly or indirectly, an overruling influence over the others in the administration of their respective powers." Mistretta v. United States, 488 U.S. 361, 409 (1989) (quoting *The Federalist* No. 48, at 332 (J. Cook ed. 1961) (Madison)). Thus, it would raise serious separation-of-powers questions for this Court to cede its inherent judicial power to

unseal its own files to the Executive Branch. "Allowing revision and control" by the Executive Branch of the judgments of Article III courts would be "radically inconsistent with the independence of that judicial power which is vested in the courts." Hayburn's Case, 2 U.S. (2 Dall.) 408, 411, (1792). This Court possesses ample authority to grant the public immediate access to the entire filing.

**c. The relief sought is incidental to the Court's power to receive comments and factual information under § 594(h)(2)**

Just as the power to define,[40] expand,[41] and clarify[42] the independent counsel's jurisdiction is incidental to the Court's power to appoint under § 593(b)(1), unsealing is incidental to the court's power to receive final reports under § 594(h)(1)(B).

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[40] In response to the argument "that the Division's Appointments Clause powers do not encompass the power to define the independent counsel's jurisdiction," the court in Morrison v. Olson, 487 U.S. 654, held that because this duty is "related to the factual circumstances that gave rise to the... request for the appointment of the independent counsel," it is incidental to its power to appoint. (Id. at 679).

[41] That reasoning also applied to the Court's "authority to expand the jurisdiction of the counsel upon request of the Attorney General under § 593(c)(2)" (Id., note 17).

[42] Additionally, the court held that this Court's "power to 'reinterpret' or clarify the original grant may be seen as incidental to the court's referral power." (Id. at 685, note 22).

### 5. The Court must unseal the filing or articulate specific, compelling reasons for denying the public access to it

The American people are entitled to know whether the Independent Counsel has complied with his mandate. It is impossible to square keeping the existence of the subject filing secret with the fundamental notions of a free and open society. Press-Enterprise II, 464 U.S. at 510.

"Where... the State attempts to deny the right of access in order to prohibit disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07 (1982). "In no event may mere conclusions be sufficient: for if the Executive Branch seeks judicial aid in preventing publication, it must inevitably submit the basis upon which that aid is sought to scrutiny by the judiciary." New York Times Co. v. United States, 403 U.S. 713, 727 (1971).

The D.C. Circuit has adopted similar requirements. Courts must "articulate the precise reasons why" sealing of record is appropriate and ensure that "sealing order is... no broader than is necessary to protect those specific interests identified as in need of protection." Johnson v.

Greater Southeast Community Hospital Corp., 951 F.2d 1268, 1277-78 (D.C. Cir. 1997).[43]

Even if the Court determines not to unseal the complete filing, the common-law and First Amendment rights of access to judicial records require the Court at least to issue specific and detailed findings explaining why any portion of it must remain secret.

**6. The Act specifically authorizes this Court to "allow the disclosure of any... document," and to "disclose sufficient information about the issues to permit the tiling of timely amicus curie briefs"**

The facts set forth in movant's filing is of extraordinary public importance. The administration of justice, particularly on the eve the expiration of our Ethics in Government Act, works in favor of disclosure. The Act specifically provides that this Court may allow disclosure of any document filed with it. 28 U.S.C. § 593(g):

> *Disclosure of information*. -- The division of the court may, subject to section 594(h)(2), allow the disclosure of any notification, application, or any other document, material, or memorandum supplied to the division of this chapter.

[43] See also Press-Enterprise Co. 464 U.S. 501, 510 (1984), holding that the "presumption of openness" of judicial proceeding can be overcome only by an overriding interest and requiring that interest to be articulated with findings specific enough for a reviewing court to determine whether the closure order was properly entered.

Movant's filings present significant legal issues. Other parties may want to submit their views to the Court on the relief he seeks, but will be unable to do so without timely unsealing. The Act provides for this circumstance and specifically empowers the Court to disclose to facilitate the filing of timely amicus curie briefs.

28 U.S.C. § 593(h):

> *Amicus curie briefs*. -- When presented with significant legal issues, the division of the court may disclose sufficient information about the issues to permit the filing of timely amicus curie briefs.

**7. Unsealing is in keeping with the statutory purposes of the final Report of ensuring the accountability of Independent Counsel, protecting movant's rights and ensuring that justice is done**

"Congress created the comment proceeding in an effort to ensure fairness and accuracy in the final report of a 'truly independent special prosecutor.' To this end, the Act also vests jurisdiction in this division to the court 'to make such orders as are appropriate to protect the rights of any individual named in such [Independent Counsel] report...' Section 594(h)(2)." In re Sealed Motion, 880 F.2d 1367, 1370 (D.C. Cir. 1989).

**a. The purpose of the final Report procedure is to ensure its accuracy and the accountability of the Independent Counsel**

"Congress viewed the report as a 'very important' means to insure the accountability of a special

prosecutor." Id. The statutory reporting procedure is designed to, inter alia, assure the public of the accuracy of the Independent Counsel's final report. "The court finds it important as to the witness... the government and the public that he be given every reasonable opportunity to ensure the accuracy of the Independent Counsel's Report as to him and his conduct." Id. at 1369.

This Court again observed the that the purpose of the Independent Counsel's final Report is to ensure his accountability, five years after its In re Sealed Motion decision. In re North at 1241:

> [T]he purpose of the Final Report is to "ensure the accountability" of the Independent Counsel to the government and the public. S. Rep. No. 170, 95th Cong. 2d Sess. 70-71. The American public is particularly entitled to this accountability where the subject of the investigation and the investigation itself have been widely publicized of long duration and expense... it is in the national interest that the public, its representatives in the political branches, and its surrogates in the media have as full an access to the fruits of the investigation as possible...

**b. Unsealing the filing would ensure movant a measure of fairness**

"The Independent Counsel Act contains a special provision which empowers the court to 'make such orders as are appropriate to protect the rights of any individual named in such (the Independent Counsel's) report...' 28 U.S.C. § 594(h)(2)." In re Sealed Motion at 1374. The Act

requires that the Court "exercise of its judicial discretion, to ensure that individuals 'named' in a final report... are treated fairly and justly... [and] 'directs' the court to protect the rights" of any such individual. Id. at 1368-1369:

> Congress provided special procedures... to ensure fairness to the targets of such investigations and to those touched by investigations... The legislative history of the Act demonstrates that Congress appreciated the unique nature of the Independent Counsel office it created and the dangers the law posed to all touched by an investigation. (Id. at 1369-1370)

**c. Justice cannot appear to have been done unless it has been done**

The Independent Counsel Act is designed to ensure that justice is done. On public questions, there should be "uninhibited, robust, and wide-open" debate. New York Times Co. v. Sullivan, 376 U.S. 254, 269-270. As the Supreme Court noted in John Hancock Mut. Ins. Co. v. Harris Trust & Sav. Bank, 114 S. Ct, 517, 523 (1993), "we examine first the language of the governing statute, guided not by a single sentence or member of a sentence, but looking to the provisions of the whole law, and to its object and policy."

**Conclusion.** The First Amendment requires disclosure of the filing. A denial of the relief sought would constitute a prior restraint and the OIC carries a heavy

burden of showing justification for its imposition. The damage of the prior restraint is evident here in light of the expiration of the Ethics in Government Act. The American people should not be deprived of the information in movant's filing at this time. The issues involved and the time-sensitive right to disseminate the information is important.

The common law rule presumptively allowing public access to Court documents requires disclosure of the filing. Moreover, all of the exhibits cited are already in the public domain, and the death has been the subject of media coverage and public debate. Those named in the filing would not be unfairly prejudiced by its public dissemination, and any personal privacy interest in non-disclosure is outweighed by the public interest in the administration of justice. Additionally, the Justice Department's policy of favoring openness of judicial proceedings is binding on the OIC.

The requested relief falls within this Court's supervisory power over its own records and files and it is incidental to the Court's power to receive reports. Moreover, the Act specifically authorizes this Court to allow the disclosure of any document and to disclose

sufficient information about the issues to permit the filing of timely amicus curie briefs.

Unsealing is in keeping with the statutory purposes of the final Report of ensuring the accountability of Independent Counsel; to ensure the accuracy of the final Report, and in protecting movant's rights. Most importantly, under the circumstances of the case, public dissemination of movant's having sought redress under the Act is in keeping with the fundamental purpose of ensuring that justice is done.

**WHEREFORE**, Patrick Knowlton respectfully requests that the Court unseal his proposed Comments and Factual Information, filed herewith, and respectfully requests that the Court consider this motion on an expedited basis.

**(III) MOTION TO COMPEL THE OIC TO PRODUCE GRAND JURY MINUTES**

> **Summary:** Because of this Court's extensive involvement in and attention to the Independent Counsel's investigation from its inception until the present time, and because of its familiarity with all the supporting documents, this Court is in the best position to determine the continuing need for grand jury secrecy and therefore has jurisdiction to order the disclosure of grand jury testimony.
>
> A grand jury witness has a general right to the transcript of his own grand jury testimony when sought in connection with a judicial proceeding. Movant seeks his own minutes for his use in the prosecution of his civil suit, and in connection with judicial proceedings before this Court, as

set forth in his motion to present evidence to the grand jury.

Given the Court's precedent in holding that it has jurisdiction to order OICs to produce a witness's own grand jury testimony, this Court has the power to order the production of the grand jury testimony of others. Movant seeks the minutes of the testimony of others for his use in the prosecution of his civil suit, and in connection with judicial proceedings before this Court, as set forth in his motion to present evidence to the grand jury.

**1. This Court has jurisdiction to issue an order for disclosure of grand jury testimony**

**a. The Court in the best position to determine the continuing need for grand jury secrecy**

The seminal case on the issue is In re Sealed Motion, 880 F.2d 1367 (D.C. Cir. 1989). In rejecting the Independent Counsel's argument that the court which empanelled the grand jury had exclusive jurisdiction to determine whether to release grand jury testimony, this Court noted that "the theory underlying the practice was that the empanelling court was ordinarily 'in the best position to determine the continuing need for grand jury secrecy.'" (citation omitted) Id. at 1375. The Court then reasoned that because of its "extensive involvement in and attention to the Independent Counsel's investigation from its inception until the present time and its familiarity with all the supporting documents" (id. at 1376), it had "acquired extensive and unique knowledge

concerning the needs for grand jury secrecy and the rights of those seeking release of the grand jury minutes." Id.

**b. This Court has jurisdiction to order the release of the grand jury minutes**

In light of this "extensive and unique knowledge," and because the "Act specially 'directs' the court to protect the rights of any 'individual named' in the report" (Id. at 1368), as well as to "provide some protection for targets, witnesses and affected parties in independent counsel investigations" (Id. at 1370), the Court decided it had authority "to issue an order that calls for the disclosure of a witness' grand jury testimony..." Id. at 1375.

> In the present circumstances we believe that this special statute supercedes the alleged general rule granting the empanelling court exclusive jurisdiction over grand jury minutes where the division of the court finds it appropriate to protect the rights of any individual named in a final report. (Id.)

In sum, "with all respect to the district court" (id. at 1376), this Court is in the best position to decide "the proper balance between the prerogatives of the Independent Counsel and the rights of one of those swept up in the investigation." Id. at 1369-1379.

**2. Movant's right to grand jury minutes**

**a. Transcript of his own testimony**

Movant is entitled to the transcript for his use in the prosecution of his civil suit. "'[J]udical proceedings

are not restricted to trials, but include[] every proceeding of a judicial nature before a court or official clothed with judicial or quasi judicial power...'" (citation omitted) Id. at 1380.

Movant's civil cause centers on the defendants' attempts to discredit him. Movant must prove damages[44] in his civil rights action[45] and movant's appearance before the grand jury is relevant on that issue, as pled:

> 167. Towards the end of his appearance before the grand jury, associate Independent Counsel asked Plaintiff to step out of the room so that Counsel could ask the grand jurors whether they had any questions for Plaintiff. When Plaintiff returned, associate Independent Counsel asked Plaintiff, among other things, whether the suspicious acting man in the park

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[44] See McCord v. Bailey, 636 F.2d 606 (D.C. Cir. 1980) (approved Kush v. Rutledge, 460 U.S. 719 (1983)), stating elements of 42 U.S.C. § 1985(2) claim:

> (1) A conspiracy of two or more persons and accompanying overt acts;
> (2) The object of the conspiracy is to deter a party or witness from attending court or *from testifying there freely, fully, and truthfully*;
> (3) The court is federal, i.e. article 3, court;
> (4) Force, *intimidation or threat*; and
> (5) Injury.

[45] 42 U.S.C. § 1985(2): "*Conspiracy to interfere with civil rights,*" part (2), *"Obstructing justice; intimidating party, witness, or juror",* states in part:

> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully... (emphasis supplied)

> talked to Plaintiff, passed him a note, confronted Plaintiff in any way or pointed a gun at Plaintiff. Counsel then asked Plaintiff a question that was coarse, insulting, injurious, hurtful, offensive, and outrageous. Plaintiff was appalled. Counsel then followed up by asking Plaintiff why he called the police and did not wait for the police to call him, and sarcastically if he came forward because he is a "good citizen" and a "Good Samaritan."
>
> 168. Prosecutors' ill-treatment of Plaintiff during his appearance before the grand jury, in response to Plaintiff's attempts to tell the truth and to be a responsible citizen, was excessive, improper, malicious and outrageous, and was a patent abuse and perversion of the grand jury process. Plaintiff's experience in being treated so contemptuously and disrespectfully by associate and deputy Independent Counsels, who are recognized authority figures, in front of the grand jurors, on the heels of having suffered the effects of the overwhelming campaign of intimidation, caused Plaintiff further grief. Plaintiff's distress associated with prosecutors' mistreatment of him before the grand jury was a direct and proximate result of the overall conspiracy and its subsidiary conspiracy to intimidate him.[46]

The question referred to above in ¶ 167 of movant's complaint regarding the suspicious acting man in Fort Marcy Park is: "Did he touch your genitals?" The Independent

[46] Patrick Knowlton v. Robert Edwards et. al., USDC DC, CA 96-2467.

Counsel has denied that this question was asked.[47] Movant says it was and he is entitled to prove it to clear his name. (See Affidavits of movant and undersigned, attached hereto.) The comment proceeding "stems from the hazard to the reputation..." In re Sealed Motion at 1378.

**b. Grand jury minutes of other witnesses**

"The entire Act, and the procedures it authorizes, demonstrate a legislative intent for the division to require strong protection for officials and others who are caught up in an investigation and are named in a report..." (emphasis supplied). Id. at 1375. Movant seeks grand jury minutes of other witnesses upon the same grounds as he seeks the transcript of his own testimony, to assist him in clearing his name in the prosecution of his civil suit. Specifically, inasmuch as the Act "is sui generis" (id. at 1369), "with all due respect to the district court" (id. at 1376), movant seeks an order from this Court requiring the

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[47] See Motion of the Independent Counsel for Reconsideration of the Court's Order of September 26, 1997, and in Response to the Motion of the Patrick Knowlton for Inclusion of Comments in an Appendix, p. 7:

> For example, a commentator informed the OIC of a sensational accusation made by Knowlton regarding his grand jury appearance. The OIC informed Knowlton by letter dated November 22, 1995, that a careful review of the transcript of the grand jury appearance conclusively demonstrated the falsity of his accusation.

OIC to produce all the transcripts of witnesses who viewed the body at the park, and who testified before the OIC's grand jury from the date of its inception, August of 1994, through February of 1995.

> See proposed Appendix to the Report on the Death of Vincent Foster, Jr., June 23, 1999, p. 78:
>
> > Proof of whom was with the body, and when, is an important aspect of the case. The body site is in a secluded area of the park and cannot be seen from the direction of the parking lot. When the timetable is compared to witness accounts of the state of the body, it proves that the body was tampered with, and by whom. These issues are analyzed later in this paper. In the balance of this paper, in discussing those issues which relate to the state of the body at the park, the witness accounts are presented in the following order:
> >
> > Park Police Officer Kevin Fornshill
> > Firefighter Todd Hall
> > Paramedic George Gonzalez
> > Paramedic Richard Arthur
> > Firefighter Ralph Pisani
> > Firefighter Lieutenant James Iacone
> > Firefighter Jennifer Wacha
> > Park Police Officer Franz Ferstl
> > Park Police Investigator Christine Hodakievic
> > Park Police Lieutenant Patrick Gavin
> > Park Police Investigator John Rolla
> > Park Police Investigator Cheryl Braun
> > Park Police Investigator Renee Abt
> > Park Police Evidence Tech Peter Simonello
> > Dr. Donald Haut
> > Firefighter Corey Ashford
> > Firefighter Roger Harrison
>
> > There will be no review of the records of the accounts of Sergeant Robert Edwards, Officer William Watson, or the unidentified Intern with him, because there are no public reports of interviews with them.

Movant's proposed appendix proves that the body site was tampered with, and by whom. So does the testimony of

body site witnesses, taken before the OIC's grand jury in 1994 through March 20, 1995, upon information and belief.[48]

This Court in In re Sealed Motion, id. at 1372 n. 8, cited United States v. Rose, 215 F. 2d 617 (3rd Cir. 1954) as having authoritatively listed the reasons for grand jury secrecy:

> The Rose court outlined the traditional reasons for grand jury secrecy which centered on encouraging grand jury witnesses to testify and pointed out that the interests behind grand jury secrecy were not compromised by release of a witness' own grand jury testimony. Significantly, the Supreme Court, in United States v. Proctor & Gamble, 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958), cited Rose as correctly outlining the principles underlying grand jury secrecy and set forth the reasons at length:

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[48] See e.g., The Secret Life of Bill Clinton, p. 125: [Firefighter Todd Hall's] second FBI statement reads: "Upon discovering there was a road in the area, Hall believes that it is possible that he saw vehicular traffic on route 123." Well, what was it, he was asked under cross-examination at the Whitewater grand jury in early 1995, was it people running away or was it the flash of cars? It was people, he answered. It could have been cars, he said, but what he saw was people. ([The note to passage states:] "Author interview with a confidential grand jury source, January 1996.")

Id., p. 143: Four of these rescue workers testified in secret before the Whitewater grand jury in the spring of 1995 that they saw trauma to the side of Foster's head or neck. Two of them, including Arthur, described it as a gunshot wound. ([The note to passage states:] "Author interview with a confidential source at OIC.")

Id., p. 149: "One Park Police officer ultimately broke ranks under cross-examination and testified that the crime scene had been tampered with after he arrived."

And see attached Affidavit of Ambrose Evans-Pritchard.

> In United States v. Rose, supra at 628-629, those reasons [for grand jury secrecy] were summarized as follows: "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subordination of perjury or tampering with the witnesses who may testify before a grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of those crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."
>
> Proctor & Gamble, 356 U.S. at 681-682 n. 6, 78 S.Ct. at 985-86 n. 6. More recently, in Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 99 S. Ct. 1667, 60 L.Ed. 2d 156 (1979), the Court has reaffirmed its agreement with the Rose view of the reasons for grand jury secrecy. Douglas Oil, 441 U.S. at 219 n. 10, 99 S.Ct. 1673 n. 10.

None of these reasons are present here.[49]

Because movant seeks his grand jury testimony in connection with the comment proceeding under the Act, as well as for the prosecution of his civil suit, a "strong

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[49] E.g., (1) There are no indictments contemplated; (2) Production of the minutes would have no effect on the freedom of the grand jury in its deliberations or importuning the grand jurors; (3) Because there are no indictments contemplated, subordination of perjury or tampering with witnesses who may later appear at the trial of those indicted by the grand jury is not possible; (4) The production of the minutes would encourage, rather not discourage, disclosures by persons who have information with respect to commission of crimes; and (5) The production of the minutes would not result in the trial of innocent.

showing of particularized need for a transcript of the named witness' grand jury testimony exists in this cause." In re Sealed Motion at 1376.

Given this Court's power to order the OIC to provide movant the minutes of his own grand jury testimony, it has the power to order the production of the grand jury testimony of others.

A "grand jury witness has a general right to a transcript of such testimony absent the government demonstrating countervailing interests which outweigh the right to release of the transcript. The Independent Counsel has made no such showing her and the record in this cause demonstrates that such grounds do not exist." Id. at 1376. So too here.

**Conclusion**

"[T]he right to secrecy in grand jury proceedings belongs to the grand jury witness [and] a grand jury witness named in an independent counsel's report is entitled to a transcript of his own testimony absent a clear showing by the government that other interests outweigh the witness' right to such transcript." Id. at 1370-1371.

Movant also seeks the grand jury minutes of other witnesses on the same grounds as give him entitlement to

the minutes of his own grand jury testimony. Movant was illegally targeted in connection with the OIC's probe into Mr. Foster's death. This Court should "ensure fairness to the targets of such investigations and to those touched by investigations." (Id. at 1369-1370).

**WHEREFORE**, Patrick Knowlton respectfully moves this Court to order the Office of Independent Counsel to produce the grand jury minutes of his own November 1, 1995, testimony, as well that of the following grand jury witnesses taken from August of 1994 through March, 1995:

Park Police Officer Kevin Fornshill
Firefighter Todd Hall
Paramedic George Gonzalez
Paramedic Richard Arthur
Firefighter Ralph Pisani
Firefighter Lieutenant James Iacone
Firefighter Jennifer Wacha
Park Police Officer Franz Ferstl
Park Police Sergeant Robert Edwards
Park Police Investigator Christine Hodakievic
Park Police Lieutenant Patrick Gavin
Park Police Investigator John Rolla
Park Police Investigator Cheryl Braun
Park Police Investigator Renee Abt
Park Police Evidence Technician Peter Simonello
Dr. Donald Haut
Firefighter Corey Ashford
Firefighter Roger Harrison

**(IV) MOTION TO PRESENT EVIDENCE TO THE GRAND JURY:**

**1. COMMENTS AND FACTUAL INFORMATION PROPOSED TO BE AN APPENDIX TO THE OIC'S INTERIM REPORT, AND**

**2. GRAND JURY MINUTES**

**Summary:** This Court is the proper forum in which to litigate the proposed grand jury action. The Act's borders on the scope, duration, and exclusivity OF of the OIC's prosecutorial jurisdiction evidence congressional intent to treat the OIC's jurisdiction as a single mandate, ongoing until the OIC files its single, final, report. These provisions of the Act are in sui generis and work in tandem. The OIC's Foster death probe is not, under the Act, closed.

Mr. Knowlton is a grand jury target of the OIC's ongoing, special, limited jurisdiction. Movant's proposed appendix proves the existence of an overall conspiracy to obstruct justice in the matter, proves the OIC's participation in that conspiracy, and proves its subsidiary conspiracy to tamper with movant in connection with his grand jury appearance. He prays that the Court order the OIC to present to the grand jury his proposed appendix, together with its exhibits.

He also asks that the Court order the OIC to present to the grand jury the minutes of his own grand jury testimony, as well as the testimony of the park witnesses who viewed the body at Fort Marcy Park. Movant's proposed appendix proves that the body site was tampered with, and by whom. So does the 1994 to early 1995 grand jury testimony of body site witnesses, upon information and belief.

Movant respectfully proffers authority for the proposition that this Court has the power to order this relief, and respectfully suggests that the Court to consider reviewing the grand jury minutes in camera, and consider appointing counsel to advise the grand jury of its obligations and rights in this matter.

**1. This Court is the proper forum in which to litigate the proposed grand jury action and the Act is sui generis.**

Based on this "extensive and unique knowledge" (see infra) and in furtherance of the objects of "the entire Act, and the procedures it authorizes, demonstrat[ing] a legislative intent for the division to require strong protection for officials and others who are caught up in an investigation..." (id. at 1375), this Court ruled it had authority to rule on the production of grand jury minutes.

> In the present circumstances we believe that this special statute supercedes the alleged general rule granting the empanelling court exclusive jurisdiction over grand jury minutes...
> (Id. at 1375)

Inasmuch as the Act "is sui generis" (id. at 1369), "[w]ith all respect to the district court" (id. at 1376), movant suggests that this Court is in the best position to rule on the grand jury action herein proposed.

**2. The OIC's jurisdiction is limited**

**a. Limited scope of the OIC's jurisdiction**

The scope of OIC's investigative and prosecutorial jurisdiction is limited to this Court's orders[50] and to those matters that may arise out of its jurisdiction.[51]

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[50] **28 U.S.C. § 594. Authority and duties of independent counsel -- (e) Referral of other matters to an independent counsel --**

> **(e)** An independent counsel may ask the Attorney General or the division of the court to refer to the independent counsel matters related to the independent counsel's prosecutorial jurisdiction, and the Attorney General of the division of the court, as the case may be, may refer such matters. If the Attorney General refers a matter to an independent counsel on the Attorney General's own initiative, the independent counsel may accept such referral if the matter relates to the independent counsel's prosecutorial jurisdiction. It the Attorney General refers any matter to the independent counsel pursuant to the independent counsel's request, or if the independent counsel accepts a referral made by the Attorney General on the Attorney General's own initiative, the independent counsel shall so notify the division of the court.

[51] **28. U.S.C. § 593 (b)(3):**
**Scope of prosecutorial jurisdiction** -- In defining the independent counsel's prosecutorial jurisdiction, the division of the court shall assure that the independent counsel has adequate authority to fully investigate the subject matter with respect to which the Attorney General has requested the appointment of the independent counsel, and all matters related to that subject matter. Such jurisdiction shall also include the authority to investigate and prosecute Federal crimes, other than those classified as Class B or C misdemeanors or infractions, that may arise out of the investigation or prosecution of the matter with respect to which the Attorney General's request was made, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses. (emphasis supplied)

### b. Limited duration of investigative jurisdiction

Congress also provided that the tenure of this limited jurisdiction terminates under § 596(b)[52] upon the OIC's filing of its final report under § 594(h)[53]

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[52] **28 U.S.C. § 596. Removal of independent counsel; termination of office**

**§ 596(b) Termination of office --**

**(1) Termination by action of independent counsel.** An office of independent counsel shall terminate when --

**(A)** the independent counsel notifies the Attorney General that the investigation of all matters within the prosecutorial jurisdiction of such independent counsel or accepted by such independent counsel under section 594(e), and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions; and

**(B)** the independent counsel files a final report in compliance with section 594(h)(1)(B) (emphasis supplied)

[53] **§ 594(h) Reports by independent counsel --**

**(1) Required reports** -- An independent counsel shall

**(A)** file with the division of the court, with respect to the 6-month period beginning on the date of his or her appointment, and with respect to each 6-month period thereafter until the office of that independent counsel terminates, a report which explains major expenses...; and

**(B)** before the termination of the independent counsel's office under section 596(b), file a final report with the division of the court, setting forth fully and completely a description of the work of the independent counsel, including the disposition of all cases brought. (emphasis supplied)

**c. Exclusivity**

The OIC's grand jury's Foster death probe is also almost exclusive in that the Act precludes the DOJ from investigating matters under OIC jurisdiction.[54]

**3. The OIC's Foster death probe is open**

The Act demonstrates congressional intent to treat the OIC's prosecutorial jurisdiction as a single jurisdiction -- limited in scope and terminating upon the filing of its single, final, report. This limited jurisdiction continues to the present day. Because the OIC's grand jury probe is conducted pursuant to one single continuing prosecutorial jurisdiction, this matter is and will continue to be before the grand jury until the OIC's tenure ends upon its filing of its final report.

Under the Act, the OIC "terminate[s] when... the investigation [singular] of all matters within the

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[54] **28 U.S.C. § 597: Relationship with Department of Justice--**
**(a) Suspension of other investigations and proceedings --** Whenever a matter is in the prosecutorial jurisdiction of an independent counsel under section 594(e), the Department of Justice, the Attorney General, and all other officers and employees of the Department of Justice shall suspend all investigations and proceedings regarding such matter, except to the extent required by section 594(d)(1), and except insofar as such independent counsel agrees in writing that such investigation or proceedings may be continued by the Department of Justice. (emphasis supplied)

prosecutorial jurisdiction... have been completed..." and it "files a final report." Only at the time of termination does the OIC's prosecutorial jurisdiction cease. The grand jury probe into Mr. Foster's death is one of these "all matters." It remains open today.

**4. Movant is a grand jury target of a prosecutorial jurisdiction that is ongoing**

**a. Movant suffered witness tampering in connection with his grand jury appearance**

Movant suffered witness tampering.[55] See infra, "Facts," page 8, note 9. See also June 23, 1999 proposed Appendix to Report on the Death of Vincent Foster, Jr., pp. 289-336.

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[55] **18 U.S.C. § 1512:**

**(c)** Whoever intentionally harasses another person and hinders, delays, prevents, or dissuades any person from-

* * *

(4) causing a criminal prosecution... to be sought or instituted, or assisting in such prosecution or proceeding; or attempts to do so shall be fined under this title or imprisoned...

**b. Movant is a grand jury target**

*"Death in the Park: Is this the killer?"* London Sunday Telegraph October 22, 1995 (see infra, "Facts," page 7, note 8):

> His FBI statement says... "That's an outright lie," he said, angrily. *** "That's not true," he said. *** "They went over it about 20 times, telling me that this was Foster's car," said Knowlton. "But I was quite adamant about it. I saw what I saw, and I wasn't going to change my story." *** Starr's investigators have never talked to Knowlton. The federal grand jury has never summoned him to give sworn testimony...

Two days later, Thursday, October 26, 1995, an FBI agent who had been detailed to the Fiske probe served the subpoena. See, e.g., June 23, 1999 proposed Appendix to Report on the Death of Vincent Foster, Jr., pp. 380, 450:

> Twenty-seven months later [after the death], Patrick was illegally targeted to neutralize his account, and testimony, regarding the car. Only the federal government uses the *modus operandi*, or mode of operation, employed to harass Patrick. It began when he was secretly subpoenaed by the federal government.
>
> Although it did not seek to indict him, Starr's grand jury probe targeted Patrick Knowlton. He was targeted illegally, not legally.

(See also discussion infra, "Facts," page 8.)

On November 1, 1995, movant testified before the grand jury. His experience there is recounted in his civil suit. (See infra "Facts," page 10, note 11.)

In the present case, all evidence points to the fact that movant was targeted by illegal conduct in connection with his grand jury appearance.[56]

**5. The Court has the power to order that the OIC provide evidence of witness tampering and obstruction of justice to the grand jury**

Mr. Knowlton is a grand jury target of the OIC's ongoing, special, limited jurisdiction. Movant's proposed appendix proves the existence of an overall conspiracy to obstruct justice in the matter, proves the OIC's participation in that conspiracy, and proves its subsidiary conspiracy to tamper with movant in connection with his grand jury appearance. He prays that the Court charge the jury and order the OIC to present to the panel his proposed appendix, together with its exhibits. He also asks that the Court order the OIC to present to the grand jury the grand jury minutes of the testimony of the park witnesses who viewed the body at Fort Marcy Park, as well as the minutes of his

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[56] See In re North, 48 F.3d 1267: To qualify as subject under Act for purposes of petitioning for attorney fees incurred as a result of independent counsel's activity, individual must show that his conduct was within the scope of grand jury investigation, in sense that grand jury was examining conduct of his in way that would lead reasonably counseled person at time of incurring fees believe there was realistic possibility that he would become a defendant.

own grand jury testimony. Movant's proposed appendix proves that the body site was tampered with, and by whom. So does the 1994 to early 1995 grand jury testimony of body site witnesses, upon information and belief (see infra, p. 57, note 48).

Transplanted from England, and frequently referred to as the People's Panel, the grand jury was valued as a kind of people's watchdog. It undertook to protect the individual from oppression, as when in 1743 it twice refused to indict newspaper publisher John Peter Zenger for criminal libel for criticizing New York's colonial governor. When relations between the American colonies and Great Britain grew increasingly tense, grand juries became a means of protesting abuses by the crown's emissaries. The Founders saw the grand jury as a bulwark for the individual against arbitrary or malevolent prosecutors.

It developed into and remains today more of a prosecutor's panel, largely directed and controlled by government lawyers. But the grand jury process still provides a vehicle for citizen participation in government. The District Court's "charge" to the grand jury likely apprised it of its broad authority and of its duties to its fellow citizens.

Formally and technically, the grand jury is an arm and creature of the Court. This is most apparent when its powers are tested or resisted. Then, before the force of the government may be duly exerted, it is necessary to go to a judge for a ruling.

In the routine business of the prosecutor's investigatory machine, the Court is somewhat like an absentee landlord. The OIC has two such landlords. As discussed above, with all respect to the District Court, this Court has jurisdiction over this matter.

In this case, the proposed appendix proves by clear and convincing evidence:

(1) The existence of an illegal conspiracy to cover up the facts of Mr. Foster's death;

(2) The OIC's participation in that conspiracy; and

(3) A subsidiary conspiracy directed against Mr. Knowlton in connection with his appearance before the OIC's grand jury.

The OIC's abuse of its grand jury's powers in this instance includes the withholding from the panel evidence of its own wrongdoing, gathered by a previous panel, thus precluding the grand jury from performing its duties and providing effective citizen participation in government. Movant asks the Court to act to remedy this circumstance.

In one celebrated case, the court instructed the panel that it was free to ignore the orders of President Hayes to the prosecutor that the grand jury limit its probe: "The moment the Executive is allowed to control the action of the courts in the administration of criminal justice their independence is gone." In re Miller, 17 Fed. Cas. 295 (No. 9,552) (C.C.D. Ind. 1878). In the case at bar, movant asks the Court to apprise it of its full province and powers, and asks for an order that the OIC provide the panel with certain evidence.

Since the grand jury is an adjunct of the Court, this Court has some power to take remedial measures against the perverse employment of the grand jury's great authority. In United States v. Cowan, 524 F. 2d 504, 513 (5th Cir. 1975), the Court affirmed the existence of an "essentially judicial function of protecting the public interest in the evenhanded administration of criminal justice without encroaching on the primary duty of the Executive to take care that the laws are faithfully executed."

**Conclusion**

Unlike the DOJ, the Act limits the scope of the OIC's jurisdiction, and its duration. Its jurisdiction is also exclusive. Several provisions of the Act work in tandem in limiting prosecutorial jurisdiction. The limitations on

the OIC's scope and duration evidence congressional intent to treat the OIC's jurisdiction as a single mandate, ongoing until the OIC files its single, final, report. The Act is in sui generis. This circumstance has significant ramifications for the OIC. Its Foster death probe is not, under the Act, closed.

Movant is a grand jury witness and illegal target of an ongoing prosecutorial jurisdiction. He asks that the Court take remedial action to stop this ongoing grand jury abuse, and to apprise the grand jury of its powers and rights to view evidence gathered by a previous panel operating under the very same limited jurisdiction. The OIC should not be permitted to continue withholding from the panel evidence of its own wrongdoing, gathered by a previous panel, thus precluding the grand jury from performing its duties.

The OIC's wrongful conduct prevents the panel from effectively participating in government, as the grand jury process is designed. Movant asks that the grand jury see the subject grand jury minutes whether or not the Court presently grants him the opportunity to see them.

Mr. Knowlton respectfully suggests that the Court consider reviewing the grand jury minutes in camera, and

consider appointing counsel to advise the grand jury of its obligations and rights in this matter.

Movant's proposed appendix proves the existence of an ongoing criminal conspiracy. It therefore proves that the executive, the legislature, and the press failed. The only democratic institution that has not failed in this instance is the judiciary. The relief proposed is in keeping with the system of checks and balances mandated by our Constitution. Moreover, the objects this relief sought are the same as the objects of the Act -- to ensure that:

(1) Justice is done;

(2) Justice appears to have been done;

(3) Those named in a Report are afforded a measure of fairness;

(4) Reports are full and complete; and

(5) The Independent Counsel is accountable.

As the Supreme Court noted in John Hancock Mut. Ins. Co. v. Harris Trust & Sav. Bank, 114 S. Ct, 517, 523 (1993), "[W]e examine first the language of the governing statute, guided not by a single sentence or member of a sentence, but looking to the provisions of the whole law, and to its object and policy."

**WHEREFORE**, Patrick Knowlton respectfully moves this Court to appoint counsel to apprise the grand jury of its duties and rights in this matter, and to order the Office of Independent Counsel to present to the grand jury:

(1) His proposed appendix together with its exhibits; and

(2) The grand jury minutes of:

(i) His own testimony: and

(ii) The minutes of the following witnesses, who testified before the grand jury from August of 1994, through March, 1995:

Park Police Officer Kevin Fornshill
Firefighter Todd Hall
Paramedic George Gonzalez
Paramedic Richard Arthur
Firefighter Ralph Pisani
Firefighter Lieutenant James Iacone
Firefighter Jennifer Wacha
Park Police Officer Franz Ferstl
Park Police Investigator Christine Hodakievic
Park Police Investigator Christine Hodakievic
Park Police Lieutenant Patrick Gavin
Park Police Investigator John Rolla
Park Police Investigator Cheryl Braun
Park Police Investigator Renee Abt
Park Police Evidence Technician Peter Simonello
Dr. Donald Haut
Firefighter Corey Ashford
Firefighter Roger Harrison

Respectfully submitted,

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**Certificate of Service**

I hereby certify and affirm that on June 23, 1999 a copy of the foregoing motions, with proposed Appendix and exhibits delivered, by hand, to:

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John H. Clarke