reaching across the aisle and working to develop a consensus, some have limited themselves to Republican-only Dear Colleague letters and seeking to pick off a few Democratic allies. Juvenile crime should not be a Republican or Democratic issue. There are things we can do to assist State and local law enforcement without partisanship and by consensus.

Afterschool programs and crime prevention programs should be central to those efforts. I hope that the Senate Republican leadership will join in a truly bipartisan effort.

We still face the same problems and challenges with which we began the year. We need to make progress on encryption policy and we need to promote personal privacy in the electronic age.

Given the lack of attention to congressional responsibilities and the real problems of working families in the first half of this session, I fear what the remainder of this year may hold.

I expect the Republican leadership will find time for some carefully choreographed media efforts and will make time for more personal attacks against the President and the First Lady. In an election year, I will not be surprised if they look to rewrite the Constitution of the United States through a series of popular-sounding amendments.

I hope that the Republican majority will find the time to make progress on the legislative agenda that can make a difference in the lives of American people and lead to economic opportunity in the coming century.

INDEPENDENT COUNSELS AREN'T ABOVE THE LAW, EITHER

Mr. LEVIN. Mr. President, about one year from now, in June 1999, the independent counsel law is due to expire unless Congress acts to renew it. In the Senate, the Governmental Affairs Committee, of which I am a member, is responsible for examining whether the independent counsel law ought to be reauthorized. I rise today because, as I've begun to look at the reauthorization issues, one stands out as central to the law, central to the question of reauthorization, and central to the issue of whether the independent counsel law is a tool of fairness or a weapon of politics.

In a recent Law Day speech, independent counsel Kenneth Starr proclaimed that, ''No one is above the law.'' He is correct. No one is above the law—certainly not the President, who was the focus of Starr's remarks, but equally so, not an independent counsel.

The question I want to discuss today is whether independent counsels are themselves complying with the law, in particular a provision at 28 U.S.C. 594(f)(1), which states that independent counsels ''shall'' comply with the ''written or other established policies of the Department of Justice.''

This is a straightforward provision. The law says ''shall,'' not ''may,'' not ''should.'' It makes compliance with established Justice Department policies mandatory, not discretionary, for every independent counsel. The only exception to this rule is where compliance with Departmental policies would be ''inconsistent with the purposes of the statute'' such as, for example, compliance with a policy requiring the permission of the Attorney General to take a specific act. Barring this exception, the law's clear general rule is that independent counsels must comply with established Justice Department policies.

This provision in the law is an important one. It is a key constraint to ensure that persons who are subject to independent counsel investigations receive the same treatment as ordinary citizens—no better and no worse. It is a key safeguard against an overly zealous prosecutor.

The Senate felt so strongly about this requirement that, during the law's 1994 reauthorization, the Senate approved an amendment by Senator Bob Dole emphasizing that failure to follow Justice Department policies constitutes ''cause'' for removing an independent counsel from office. The final conference report on the law, while omitting the Senate provision as accurate but too limiting, said, ''refusal to follow important Department guidelines . . .—like many other circumstances—do provide potential grounds for removing an independent counsel from office.''

Independent counsel compliance with Justice Department policies was important to the Supreme Court. In the key decision upholding the independent counsel law, Morrison v. Olson, the Supreme Court referred to the requirement as one of the keys to the law's constitutionality. The Court did so when determining whether the independent counsel law, ''taken as a whole, violates the principle of separation of powers by unduly interfering with the role of the Executive Branch,'' in particular the Constitutional requirement that the President, as head of the executive branch, ensure that the laws be faithfully executed. The Supreme Court stated:

> It is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity. . . . Nonetheless, the Act does give the Attorney General several means of supervising or controlling the prosecutorial powers that may be wielded by an independent counsel. Most importantly, the Attorney General retains the power to remove the counsel for 'good cause,' a power that we have already concluded provides the Executive with substantial ability to ensure that the laws are 'faithfully executed' by an independent counsel. No independent counsel may be appointed without a specific request by the Attorney General, and the Attorney General's decision not to request appointment if he finds 'no reasonable grounds to believe that further investigation is warranted' is committed to his unreviewable discretion. . . . In addition, the jurisdiction of the independent counsel is defined with reference to the facts submitted by the Attorney General, and once a counsel is appointed, the Act requires that the counsel abide by Justice Department policy unless it is not 'possible' to do so.

The Court then went on to say, in language directly relevant to this issue: ''Notwithstanding the fact that the counsel is to some degree 'independent' and free from executive supervision to a greater extent than other federal prosecutors, in our view these features of the Act give the Executive Branch sufficient control over the independent counsel to ensure the President is able to perform his constitutionally assigned duties.''

The Supreme Court thus highlighted four ''features'' of the independent counsel law which enable the Attorney General to meet the constitutional requirement that the President, as head of the executive branch, ensure the faithful execution of the law. The four features identified by the Court are the Attorney General's sole authority to request appointment of an independent counsel, her authority to remove an independent counsel from office for good cause, her authority to define the scope of an independent counsel's investigation, and the requirement that independent counsels must abide by Justice Department policy.

Mandatory compliance with Justice Department policies is important not only for the law to be constitutional, but also because that compliance is one of the few practical constraints on the conduct of an independent counsel. The Supreme Court has held that the special court which appoints independent counsels ''has no power to supervise or control the activities of the counsel'' it has appointed. Congress, legally empowered to oversee independent counsels, has shown little interest under the current Republican leadership in monitoring independent counsels investigating the Clinton Administration.

The law does empower the Attorney General to remove an independent counsel from office for good cause, but that draconian penalty is not a practical one and has never been used. For example, if Attorney General Reno were to fire independent counsel Starr for enforcing subpoenas served on Secret Service personnel, the Republican Congress as well as the news media would have her head. The power to terminate an independent counsel, while an essential element in the law's architecture for purposes of constitutionality, is simply not, except for unusual circumstances, a practical means for limiting an independent counsel's individual prosecutorial decisions.

That means a key remaining constraint on independent counsels is the legal requirement that they comply with established Justice Department policies.

Yet questions have increasingly arisen about whether sitting independent counsels are acting in ways that an ordinary federal prosecutor would, or

whether they are taking actions outside the established practices of the Department of Justice.

A prime example is an independent counsel subpoena so troubling that the Supreme Court has agreed to review it on an expedited basis next month. This subpoena was served by independent counsel Starr on a private attorney who, in 1993, met with Vincent Foster nine days before his suicide to discuss representing him during inquiries into the White House travel office. The Starr subpoena demands the notes taken by the attorney during that meeting, on the ground that the attorney-client relationship dissolved upon Mr. Foster's death.

The U.S. Attorney Manual states that the Justice Department, ''as a matter of policy will respect bona fide attorney-client relationships, wherever possible, consistent with its law enforcement responsibilities and duties.'' But instead of respecting the bona fide attorney-client relationship between Mr. Foster and his attorney, Starr asserted a legal position that the Justice Department—in over one hundred years of criminal prosecution—has never taken. As Starr admits in a Supreme Court filing, the Foster case ''is the first federal decision addressing the question . . . of whether attorney-client privilege fully survives the client's death.''

A federal trial judge asked to enforce the Starr subpoena struck it down for violating attorney-client confidentiality, but an appeals court, in a 2–1 decision over a strong dissent, reversed. The dissenting judge wrote that the Starr subpoena is contrary to the law in all 50 states, the Supreme Court's advisory committee, and model codes of evidence. He characterized the Starr subpoena as striking ''a fundamental blow to the attorney-client privilege.'' An independent counsel stretching that far is assuming the authority of the Justice Department to set legal policy for the United States.

Required compliance with Departmental policies not only helps ensure that persons who are subjects of independent counsel investigations receive the same treatment as ordinary citizens, but also guards against an independent counsel's misuse of the authority to represent the United States. Developing federal legal policy is the province of the Justice Department, which is institutionally motivated and equipped to consider competing public policies, constitutional values, and the long-term health of the American legal system. It is not the province of an independent counsel who has a narrow mandate and operates without accountability for legal positions that may reverberate throughout the federal criminal justice system.

Yet in the Foster matter, we have an independent counsel arguing a dramatically new position, that the attorney-client privilege disappears at death, without the Justice Department's ever determining whether that is a suitable position for the United States to take.

And the prosecutorial stretch illustrated by the issuance of the Foster subpoena is not the only instance in which an independent counsel appears to have stretched his authority. Just last week, over the strenuous objection of the Justice Department and for the first time in the nation's history, Starr asked a federal court to force Secret Service personnel to disclose how they operate and what they have observed of the President in the course of protecting him. No federal prosecutor has ever before asked a court to compel such testimony from a Secret Service agent, according to the Justice Department.

But Starr is undeterred by the opposition of both the Justice Department and Secret Service. Discounting arguments regarding the safety of the presidency and effective operation of Secret Service personnel, Starr has assumed the role of policymaker. In so doing, he has issued subpoenas which are not only unprecedented, but also, judging from the opposition of the Justice Department, in violation of Justice Department policy and in violation of Mr. Starr's obligation to comply with Justice Department policy.

There's more. The Department of Justice has carefully constructed policies determining when government attorneys may contact possible targets of prosecution without the knowledge and consent of their attorney. These policies are intended to protect every citizen's right to legal counsel in the criminal justice arena. In a Departmental regulation, 28 CFR 77.8, the Justice Department explicitly prohibits federal prosecutors from offering an immunity deal to a target without the consent of the target's legal counsel. Yet independent counsel Starr's staff reportedly confronted Monica Lewinsky, in the first contact they had with her, at a shopping mall outside the presence of her counsel for the express purpose of offering her an immunity deal. Indeed, it has been alleged that the independent counsel's office made the immunity deal contingent upon her NOT contacting her counsel. The press has reported that the judge supervising independent counsel Starr's grand jury proceedings issued a sealed opinion expressing concern about the actions of the independent counsel in this matter and indicating she may refer the matter to the Justice Department's Office of Professional Responsibility which is authorized to examine alleged violations of the rules prohibiting contact with a represented person.

There's more. Independent counsel Starr issued subpoenas to force two bookstores to disclose all purchases by Monica Lewinsky over a 2 year period. The bookstores, supported by the publishing and bookselling communities, the American Library Association and others, moved to quash the subpoenas. Ruling that the subpoenas implicate the First Amendment, the presiding judge required Starr to provide additional justification for the subpoenas. The American Booksellers Foundation for Free Expression has stated that ''in the long experience'' of their members, these subpoenas are ''unprecedented'' in their breadth and ''threaten free speech by making people afraid that the government will find out what they are reading.''

Then there are the subpoenas Starr has issued to news organizations to obtain nonpublic information from their news gathering efforts. Long-standing Justice Department regulations caution federal prosecutors against such subpoenas in order to safeguard freedom of the press. The regulations require trying elsewhere for the information, negotiating requests for information first, and, in a final provision that a court has found falls within the exception to the compliance requirement, obtaining the Attorney General's permission prior to issuing a subpoena. Despite the established policy discouraging media subpoenas, independent counsel Starr and independent counsel Donald Smaltz have issued subpoenas to news organizations on several occasions. When ABC News objected to one such subpoena, Starr stated in a court pleading that the Justice regulations ''do not govern an Independent Counsel, who, by statutory design, operates for the most part outside the Department of Justice.''

Then there are the subpoenas Starr issued calling a White House aide before the grand jury to question him about his communications with the media and calling another White House aide before the grand jury to question him about his communications with his local Democratic party. In both cases, Starr created the appearance of using the grand jury to silence or intimidate critics of his office—surely not an established practice of the Justice Department.

Then there is the subpoena to Monica Lewinsky's mother despite a stated policy in the U.S. Attorneys' Manual that, ''the Department will ordinarily avoid seeking to compel the testimony of a witness who is a close family relative of . . . the person upon whose conduct grand jury scrutiny is focusing.''

The list goes on.

The key question, here, is whether the actions taken by Starr were in compliance with established Justice Department policies or whether they were actions that no ordinary federal prosecutor would take. The test, by the way, is not whether a judge would uphold the action in a court of law—prosecutorial conduct not in accordance with Justice policies may still be legal. The proper test is not whether the prosecutor's action is legal, but whether it is the type of action that the Justice Department has determined represents what federal prosecutors ought to be doing.

A federal prosecutor may be legally able to subpoena a target's mother, but

should he? A federal prosecutor may be legally able to subpoena a Secret Service agent, but should he? A federal prosecutor may be legally able to offer immunity to a target without telling her attorney, but should he? A federal prosecutor may be legally able to subpoena the media's nonpublic information, but should he? Justice Department policy says, in most cases, he should not. Such policies raise serious questions as to whether independent counsel Starr is meeting his legal obligation to comply with Justice Department policies.

Starr is not, by the way, the only independent counsel to raise these concerns. Independent counsel Smaltz, appointed to determine whether then-Agriculture Secretary Mike Espy violated criminal laws, is another example. One key issue in this area involves the role that courts play in enforcing independent counsel compliance with Justice Department policies, as mandated by statute. To date, several courts have held that criminal defendants lack standing to enforce such compliance and have declined to examine the substance of their claims. One judge handling a prosecution by independent counsel Smaltz went further, all but reading the requirement to comply with Justice Department policies out of the law.

The case involved Ronald Blackley, one time chief of staff to Secretary Espy. Independent counsel Smaltz charged Blackley, among other crimes, with making false statements on a financial disclosure form. Blackley moved for dismissal, in part by citing section 9–85A.304 of the U.S. Attorneys' Manual which he said prohibited:

> prosecuting alleged violations of financial disclosure requirements under 18 U.S.C. 1001 ''unless a nondisclosure conceals significant wrongdoing.'' . . . [T]here is no allegation of any underlying wrongdoing. . . . We have found no case where an individual filer has been criminally prosecuted in a situation similar to this one.

In a published decision, *United States* v. *Blackley*, 986 F. Supp. 607 (1997), the judge held the following:

> It undeniable that Congress's addition of section 594(f) to the Independent Counsel statute in 1982 created somewhat of a paradox between that provision's purpose and the rationale underlying the overall Independent Counsel framework. On the one hand, through section 594(f)(1), Congress is ensuring that there are not two different standards of justice depending on the prosecutor; that ''treatment of officials is equal to that given to ordinary citizens under similar circumstances.'' . . . To prevent against public officials being subject to potentially capricious prosecutorial conduct, an Independent Counsel needs to be tethered to some quantifiable standard, and the Department of Justice policy guidelines provide arguably the most complete, detailed and time-tested standards available. Furthermore . . . adherence to the executive branch's established prosecutorial guidelines helps to guard against constitutional separation-of-powers challenges to the Independent Counsel statute. . . . On the other hand, if an Independent Counsel is supposed to operate as nothing more than the identical twin of the Department of Justice, with no permissible variance in prosecutorial discretion, then the need for the Independent Counsel structure becomes highly questionable. . . . For the Independent Counsel to play a meaningful role, he or she is necessarily expected to act in a manner different from, and sometimes at odds with, the Department of Justice. . . . Therefore, the Independent Counsel may prosecute this case, even if said prosecution is contrary to the general prosecutorial policies of DOJ. . . . Potential criminal ethical violations that may be too small to concern the Department of Justice are nonetheless properly within the purview of the Independent Counsel because the Independent Counsel is, in a sense, charged with the responsibility of ensuring that public officials have maintained the highest standards of ethical conduct.

The court then upheld the indictment of Blackley, ruling that it was irrelevant whether or not the charge in question complied with Justice Department policy.

Contrary to the court's ruling, however, Congress has never charged independent counsels with ethics enforcement. Independent counsels are federal prosecutors required to act in accordance with established Justice Department policies. The Blackley decision misreads both the law and the legislative history, not only by expanding the mission of independent counsels beyond criminal law into ethics enforcement, but also in essentially reading out of the statute the requirement that independent counsels comply with Justice Department policies.

The Blackley decision is now on appeal. It brings legal focus to the issue of independent counsel compliance with established Justice Department policies—its importance to the law and the question of how to enforce it.

The Supreme Court stated the following in a 1935 case about prosecutorial misconduct, *Berger* v. *United States*, 295 U.S. 78:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

This language applies with equal force to an independent counsel, and mandatory compliance with established Justice Department policies is a means to that end.

As the chief law enforcement officer of the United States, the Attorney General is responsible for ensuring that ''no one is above the law.'' The law requires independent counsel compliance with established Justice Department policies. Where there is evidence that independent counsels are not complying with Justice Department policies, the Attorney General has a legal obligation to determine if that is so and, if so, to take whatever action is appropriate to obtain independent counsel compliance. In light of court rulings that persons who are the victims of independent counsel noncompliance lack standing to contest the independent counsel's actions in this area, no one other than the Attorney General has the responsibility and the capability to enforce independent counsel compliance with the law.

If the Attorney General does not act, we need to understand why. If the reason is that the Attorney General feels she has insufficient statutory authority to obtain independent counsel compliance with Justice Department policies, we need to clarify the statute. If the reason is not the wording of the law, but politics that makes it impossible for the Attorney General to insist on compliance, we need to design new enforcement mechanisms which are more politically feasible. Stronger enforcement mechanisms could include, for example, amending the law to require an independent counsel to obtain from the Attorney General a certification of compliance with Justice Department policies before seeking court enforcement of a subpoena or filing an appeal of a question of law, or adding a provision giving affected persons legal standing in court to force independent counsel compliance with Justice Department policies.

The requirement for compliance with Justice Department policies is central to the law's constitutionality and fairness. The Attorney General and the Attorney General alone can enforce it. Since an independent counsel is not above the law, the Attorney General must enforce Section 594(f), which is the law of the land and essential to the independent counsel law's constitutionality and purpose.

ISRAELI MEMBERSHIP IN A UNITED NATIONS REGIONAL GROUP

Mr. MOYNIHAN. Mr. President, today a unanimous Senate will state in clear and simple terms that we will no longer abide by the discrimination faced by Israel at the United Nations. I speak of the fact that Israel is excluded from a United Nations regional group. Israel is the only one of the 185 member states of the United Nations barred from membership in a regional group. The United Nations member states have organized themselves by regional groups since before Israel joined the United Nations in 1949. Membership in a United Nations regional group confers eligibility to sit on the Security Council, the Economic and Social Council, as well as other United Nations councils, commissions, and committees.

For the first time, the Senate provides notice of its intention to work to end this Cold War anachronism. One sorry throwback to an era when the institutionalized isolation of Israel was a given in international affairs—the ugly