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Open Session Statement before the
United States Senate Committee on Governmental Affairs
Hearing on the Future of the Independent Counsel Act

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Chairman Thompson, Ranking Minority Member Lieberman and Members of the Committee:

My name is John Barrett. I am an Assistant Professor of Law at St. John's University in New York City, where I teach criminal law and legal ethics courses. From 1988 through 1993, I served as an Associate Counsel in the Office of Independent Counsel Lawrence E. Walsh, where I worked as an attorney on Iran/Contra criminal investigations and prosecutions. In the Office of Independent Counsel Walsh, I worked under the 1987 predecessor version of the independent counsel law that the Committee is considering in this series of hearings. Since becoming a law professor, I have continued to study and have written about the independent counsel statute.*

I appreciate very much this opportunity to testify in support of the reenactment of an independent counsel statute to succeed the current version of the law. In my view, the general rationale for such a statute is still correct and compelling today, just as it was when the first independent counsel law was enacted in 1978 and when the successor versions were enacted in 1982, 1987 and 1994.

The core argument for an independent counsel act is the possibility, grounded in historical experience, that we may need independent counsel *appointments* in rare but truly significant instances. Building on that recognition, the next version of the law should increase the Attorney General's discretion to limit its use to the core cases where that need is the greatest. The next statute also should contain provisions that will make it more likely that independent counsel will be credible and successful *after* their appointments, in their work as federal prosecutors. We should not pretend, however, that the existence of any independent counsel law or its demise will ensure investigations and outcomes that produce national unity and gratitude.

In this statement, I will address briefly five topics:

First, in the rare instances when evidence suggests that a President of the United States or someone close to him has committed a serious federal crime, it is not credible to ask that President's Attorney General, or any other prosecutor who is personally or professionally dependent on either the President or the Attorney General, to investigate that matter. The defining purpose and great success of the independent counsel law is that it has, in its twenty years of existence, provided a legal mechanism to assign these investigations to someone who is not beholden to the President.

* Second, to facilitate the process of getting the right independent counsel appointments in the right cases, the statute can be improved significantly for its next five years through a series of amendments that provide more investigative power to the Attorney General during preliminary

investigations; that recognize and increase her discretion not to trigger independent counsel appointments in those cases where the need is not considerable; that change the method by which federal judges are selected to serve on the Special Division; and that reduce their role to ministerial tasks, such as appointing qualified independent counsel to conduct the investigations that the Attorney General has requested.

* Third, current critics of the independent counsel law and advocates of various alternative mechanisms are being unrealistic in their general expectations that federal law enforcement investigations of senior government officials can proceed without significant controversy, and that they can achieve ideal results. Critics of the statute also are mistaking issues of personal behavior and judgment that have arisen in particular criminal investigations of senior government officials for defects in the independent counsel law, which they are not.

* Nonetheless, fourth, the statute can be improved in this respect too, through amendments that clarify that the independent counsel's role is to function solely as a federal prosecutor, and that change the current law in other respects.

* Finally, fifth, as this series of Committee hearings well demonstrates, Members of Congress and other citizens who are concerned with our national life can contribute significantly to the success of a future independent counsel statute and, if future independent counsel are appointed, to their successful work by recognizing anew the desirability of apolitical federal law enforcement investigations of senior officials, and by providing to investigators the breathing space and cooperation that will help that important work to occur better.

I. The Rationale for and the Success of the Independent Counsel Law

The core rationale for the independent counsel law begins with the belief, supported by much historical experience, that credible information can come to light which suggests that a President of the United States or some other person to whom he is intimately connected has committed a serious federal crime.

When this does occur, an Attorney General of the United States and the Department of Justice that she or he runs cannot credibly investigate the alleged crime or determine whether to prosecute its perpetrator(s) because they all work for the President. Watergate, among other examples, confirmed that, from the President on down, executive branch officials can endeavor to impede, can actually interfere with and, simply by their supervisory presence, can chill, the proper work of federal law enforcement in these cases.

The independent counsel law prescribes the right remedy for this possible conflict of interest: reassigning the responsibility for making these investigative and prosecutorial decisions from the Attorney General to a lawyer who will have the power to do the job and the freedom to do it outside of direct Department of Justice supervision. The realistic argument for the independent counsel law is, in other words, an argument for a process that can, when needed, appoint a credible investigator and prosecutor who does not work for the President.

In this respect, the independent counsel law has worked well. In each of the more than twenty instances in which statutory independent counsel have been appointed during the past two decades, the appointee has been independent in fact and thus generally credible to the public at the time of his or her appointment.

II. Improving the "Front End" of the Statute to Get the Right Independent Counsel in the Right Cases

As portions of these hearings illustrate, the recognized fact that we will need independent counsel appointments in some instances does not mean that our current statute creates the best process by which to identify and obtain those independent counsel appointments.

The current law defines a sequence of events – the so-called "front end" of the law – that will precede the moment when someone becomes an independent counsel and commences the investigation that the Department of Justice cannot continue to conduct with public credibility and/or actual independence. This sequence includes the Department of Justice conducting a preliminary investigation of allegations that a President or someone close to him in fact or by official position has committed a federal crime; the Attorney General determining whether the findings of that preliminary investigation require her to request an independent counsel; the Attorney General asking the Special Division to appoint an independent counsel to investigate a particular matter; and the Special Division identifying an independent counsel and defining the boundaries of his jurisdiction as an investigator and prosecutor.

Some of the most serious and legitimate criticisms of the independent counsel law today focus on these "front end" processes. Critics point to a range of "trigger"-related issues. They see the Attorney General's power during the preliminary investigative phase as too great or too small. Some believe that Attorneys General have abused their discretion by not seeking independent counsel in certain matters. More critics seem to claim today that Attorneys General have triggered the independent counsel law much too often. Others criticize the process by which the Special Division selects particular persons to be independent counsel.

Congress can improve the front end of the statute to address these concerns:

* First, the Department of Justice should be empowered to conduct preliminary investigations of "covered persons" with all the regular tools of law enforcement, including grand juries, subpoenas, plea bargaining and immunity orders. This would help Attorneys General make better-informed choices about which matters really *need* to be investigated by an outsider.

* Second, the current statute's time limits on preliminary investigations should be changed into mere notification requirements. This will keep the Department's work visible while eliminating drop dead dates that may truncate and impede the Attorney General's evaluation process.

* Third, the law should state clearly that the Attorney General may trigger an independent counsel appointment at any time, without the requirement that she invoke a statutory standard

that explains her need to act. This will clean up any ambiguity that the current law may contain and make the Attorney General's power and discretion clear.

* Fourth, a new independent counsel law should reverse the current statutory tilt toward seeking an independent counsel when a senior official is alleged to have committed a federal crime. Under the current law, the Attorney General must, in effect, prove a negative at the end of the Department's preliminary investigation (which is itself limited in duration and power). Unless she determines that there are no "reasonable grounds to believe that further investigation is warranted," the current law requires her to ask the court to appoint an independent counsel. (28 U.S.C. § 592(b)(1).) A better statute would direct the Attorney General to seek an independent counsel only if she concludes that there is "substantial and credible evidence of criminal conduct of a type that is prosecuted by the Department." The law should, in other words, force the Attorney General to seek an independent counsel only when she believes that "there is a real crime here," and it should free her not to seek the appointment when she does not.

* Fifth, the law should change the process by which Circuit Judges are selected to serve on the Special Division. In recent years, some have come to suspect that partisan politics plays a role in this process. We would avoid these corrosive suspicions if the law prescribed the random selection of three Chief Judges from the federal Circuits to perform the appointment function.

* Sixth, the law also should change the independent counsel selection process. The law should require the Attorney General to give to the Special Division each year a roster of fifteen or so experienced and available persons who would, in her view, make fine independent counsel in the event she later requests one. The law also could direct the Special Division to pick independent counsel from this list or, if it did not, to state why none of the listed candidates was selected.

* Seventh, the law should require the Special Division to give independent counsel exactly the jurisdiction that the Attorney General has requested.

The framework in which these recommendations fit is a general idea that the Attorney General should be authorized to narrow, lengthen and close, in her discretion, the channel that leads to the appointment of an independent counsel in the less serious cases. We should trust the Attorney General a lot more on the front end of investigations of alleged crimes by senior executive branch officials, permitting her explicitly to determine whether a matter lacking substantial and credible evidence of criminal conduct of a type that is prosecuted by the Department of Justice nonetheless should travel through that channel.

Although these proposals to empower the Attorney General would probably result in fewer independent counsel appointments, they would run the risk that, in the hands of a corrupt Attorney General, we would not get an independent counsel in the case where we needed one the most. As the bitterest opponents of the statute have pointed out, however, most Attorneys General have been and will be persons of impeccable character. In addition, in the big cases that are at issue here, the visibility of Department of Justice inaction would be a powerful check on any Attorney General's temptation to cover up for his President. An Attorney General who intentionally thwarted the independent counsel law by not seeking an appointment in a case where we truly needed it would also, of course, be placing us in no worse a position that we will be in if the law is permitted to lapse. Thus in the end, or at least for the next five years of

experimentation with this statute that has been improved in each of its three previous reenactments, these ideas strike the right political and policy balance for our time.

III. Assessing the Criticisms of Independent Counsel Investigations in Operation

My proposals regarding the "front end" of the independent counsel law do not address directly the "back end" issues that so many critics raise when they attack the independent counsel law. In evaluating the future of this statute, the Committee, Congress and the President also must consider the powerful claims that some independent counsel have been, in operation, political, abusive, expensive and unproductive.

My general response is that these critics are asking the independent counsel law and, indeed, federal law enforcement, to do too much. Prosecutors are human and inevitably make (we hope minor) mistakes. In addition, in the kinds of cases that result in independent counsel appointments, and certainly in the most serious ones that an Attorney General would choose to send to an independent counsel under the reformed statute described above, lack of controversy is a supremely unrealistic expectation. Whether we have independent counsel or not, a criminal investigation of a president or anyone close to him will be contested bitterly by the subjects of the investigation, their political allies and their excellent and numerous lawyers, and these matters will be topics of saturation media coverage. The prosecutor will feel all of that heat, however cautious and correct his behavior may be. And at the end of his work, the partisans will be, in almost every case, still fighting bitterly about what the facts were and what the investigations and prosecutions did and did not accomplish. What we got at the conclusion of Watergate, in other words – central players confessing in public to their clear crimes and implicating others; the discovery of taped evidence that corroborated their claims and made a President's crimes audible to the world; and a President and his subordinates deciding not to destroy or withhold key incriminating evidence – likely will not happen again. If people expected the independent counsel law to produce such outcomes, they were supporting a realistic statute for the wrong reasons.

IV. Improving the Statute's Provisions Regarding

Independent Counsel Conduct in Office

That said, the back end of the independent counsel statute could be improved by*:*

* Requiring independent counsel to announce their decisions to close investigations when they make them;

* Eliminating the statutory provision that permits the Special Division to expand an independent counsel's jurisdiction;

* Abolishing the impeachment reporting requirement; and

* Narrowing the final report requirement.

Although these amendments would produce an independent counsel statute that addressed some of the criticisms of independent counsel investigations, they do not address some of the most personalized criticisms of independent counsel and their staffs. In this respect, the critics are plainly right. There are behaviors that are real misconduct if and when they happen in any independent counsel's office, just as they are when the prosecutor who commits these acts works for the Department of Justice. These include:

* Leaks of grand jury information;

* Charging cases that lack proof, jury appeal and/or prosecutive merit;

* Violating other Department of Justice policies that bind any regular federal prosecutor (which is what an independent counsel is supposed to be);

* Over-investigating and other acts reflecting bad judgment;

* Profligate spending; and, finally,

* Personal ambition, in an independent counsel himself or at the staff level, that affects conduct of the public's business.

Although each of these behaviors is, if it occurs, deeply problematic, each is just that: an act of personal behavior, not a command or even a product of the independent counsel law. While the personal failings and mistakes of any independent counsel thus are not reasons to abandon the independent counsel statute -- the Department of Justice, after all, is filled with people, too – they are things for Congress and the Executive Branch to think about in structuring and improving the law's processes and federal law enforcement generally, and for future independent counsel to address directly as public officials, leaders and managers.

V. Depoliticizing Criminal Investigations of Senior Government Officials

A final behavioral issue to consider at this time is the practice, which undeniably has become more frequent since the independent counsel statute was first enacted in 1978, of treating the law as a political weapon and each independent counsel as a political actor. Some critics of the law argue that this phenomenon is part of a larger climate, at least in and relating to Washington, D.C., and that the independent counsel law itself bears some of the blame for this because it rewards such behavior. Others simply see the independent counsel act as a victim of a larger storm.

I will side with the optimists who know that all storms pass, and that good communities gather to repair the damage they leave behind, and to prepare themselves to fare better the next time. The independent counsel law does, like any of our great legal institutions, embody a certain faith in the decency and fairness of the people who deal with it, and in it, and around it. This law has the added benefit of being an ongoing experiment in five-year increments. The challenge now, as it

has been on each previous occasion when the statute came up for renewal, is to step back from the particular loyalties it has challenged, to identify the real lessons of our recent experiences with it, and to use that knowledge to craft improvements in the law.

Beyond the mechanics of legislating, we should use this opportunity to craft improvements in ourselves. One area for reconsideration is the conduct of public officials while an independent counsel law is in effect. Some officials have, for instance, in the past, sought to force the Attorney General's hand in the direction of triggering independent counsel appointments in various matters. Some officials also have, at times, sought to command or to defeat an independent counsel's investigative and prosecutorial work. These behaviors have been parts of our experience with the current law, at least in the "covered President," big headline-type cases, and they generally have not been helpful to Attorneys General or independent counsel carrying out their law enforcement responsibilities under the statute.

A second behavioral issue for everyone to reconsider is the widespread practice of demonizing an independent counsel. At least in the big cases, the subjects of the independent counsel's investigation, their lawyers, their political allies, their friends and so forth begin, almost from day one, to cast aspersions on independent counsel. This kind of opposition may be inevitable, but each of us may be able to do small things to minimize it, and thus to enhance the quality and credibility of any independent counsel's proper work for the public.

The claim that the independent counsel law has failed is really a claim that we are not up to handling it responsibly, and thus that we can do no better than the system of apparent and real conflicts of interest that it replaced. That claim remains unproven, and our challenge to do better remains.