STATEMENT OF ROBERT S. BENNETT

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Good morning Senator Thompson and members of the Committee. My name is Robert S. Bennett, and I am a partner in the Washington office of Skadden, Arps, Slate, Meagher & Flom. I want to thank Senator Thompson and the Committee for inviting me to present my views on the Independent Counsel Act, about which I feel very strongly, and with which I have had much experience. My comments today are my own views and I do not speak for the President nor any other client.

I and my firm have represented both targets and witnesses in Independent Counsel investigations. We have represented Republicans and Democrats, public officials and corporations involved in Independent Counsel investigations. These included Caspar Weinberger, the former Secretary of Defense in the Reagan administration; Harold Ickes, former White House Chief of Staff; and of course, President Clinton. Additionally, I served as special counsel to the Senate Ethics Committee in three investigations: the Harrison Williams investigation; the David Durenberger investigation; and the so-called "Keating Five" investigation. Before going into private practice, I was a federal prosecutor, serving in the District of Columbia as an Assistant United States Attorney. I believe this range of experience gives me some insight into the functioning, and the flaws, of the Independent Counsel Act.

Can this statute be saved? I have come to the view that it cannot, and should not be re-enacted. I did not always hold this view. Several years ago I felt that it was necessary for public acceptability to have such a statute although even then I thought it necessary to make substantial changes.

However, as events over the last few years have made clear, the Act has failed to fulfill that purpose and I believe it should not be re-enacted in any form:

- Rather than freeing prosecutorial discretion from political bias, the Act has become yet another weapon -- indeed, a nuclear weapon -- in the arsenal of partisan politics.
- Rather than ensuring that public officials are not treated with kid gloves, the Independent Counsel Act has become a vehicle for subjecting them, and those around them, to seemingly perpetual scrutiny more intense than any private citizen would have to endure. The mere appointment of an Independent Counsel puts the scandal machine in overdrive.
- And rather than being invoked in limited and extraordinary instances, the Act is structured in such a way, and has been interpreted by the courts in such a way, as to give Independent Counsels ever-expanding jurisdiction. This has resulted in the prosecution of peripheral individuals -- some of whom have never held public office or have never had any dealings whatsoever with the public figure who is supposed to be the target of the

Independent Counsel -- for matters which would normally not subject anyone to prosecution.

Former Attorney General Edward Levi was able to spot the problems with the Independent Counsel Act two decades ago -- before any Independent Counsel had even been appointed under the Act. In testimony he gave before the House Judiciary Committee in 1976, when the Act was first proposed, he warned that it would create opportunities for actual or apparent partisan influence in law enforcement; publicize and dignify unfounded, scurrilous allegations against public officials; result in the continuing existence of a changing band of multiple Special Prosecutors; and promote the possibility of unequal justice.

Senators, we should have listened to Attorney General Levi.

Some of the Act's fundamental flaws are well-known to this Committee -- the lack of deadlines for completing an Independent Counsel investigation, the limitless resources available to an Independent Counsel, the fact that an Independent Counsel has just one case to pursue. Senators, beware of a lawyer with one case who has an endlessly deep pocket to finance it and no time limit in which to get the job done. As Justice Scalia stated in his now-prescient dissent in Morrison v. Olson,

How frightening it must be to have your own Independent Counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile--with whether it is worthwhile not depending upon what such judgments usually hinge on, competing responsibilities.

I believe these problems will be well canvassed by the other witnesses before the Committee. The Committee also, no doubt, is hearing from legal scholars who will discuss the separation of powers and other constitutional concerns posed by the Independent Counsel regime. I hope today to provide the Committee with some practical insight into how the Act actually functions, based on my experience representing individuals who have come within its purview. From this practical perspective, I have concluded that the Act is fatally flawed.

The first flaw is the hair-trigger provision for activating an Independent Counsel investigation. The Act requires the Attorney General to appoint an Independent Counsel at the end of a preliminary investigation if he or she concludes there are "reasonable grounds to believe that further investigation is warranted." Further, the Attorney General cannot avoid the appointment of an Independent Counsel unless there is "clear and convincing evidence" that the target lacked criminal intent. At the same time, the Act precludes the Attorney General from using basic investigative tools -- such as subpoenas, a grand jury, grants of immunity -- to develop evidence that might exonerate the covered person. Thus, proving a negative, which is hard enough in itself, becomes nearly impossible.

This system is repugnant to the rights of the individual who is the subject of a preliminary inquiry. First, it is counter to one of the most basic tenets of our jurisprudence -- that you are presumed innocent until proven guilty. Indeed, this reverse burden of proof has a very real

impact on the rights of the targeted public official. He effectively has no choice but to forego his constitutional right to remain silent in the face of a preliminary inquiry, because if the target does not submit to a voluntary interview with DOJ prosecutors, the Attorney General will be forced to conclude that further investigation is warranted. On the other hand, if the target does cooperate, and an Independent Counsel is appointed nonetheless, his statements to prosecutors in the preliminary inquiry can be used against him by the Independent Counsel.

We ask our public officials to make numerous sacrifices in order to enjoy the privilege of public office. But sacrificing basic constitutional protections is, I respectfully submit, too high a price to ask of anyone. Certainly none of you would welcome being put to that choice.

Notwithstanding this Hobson's choice, it is very telling that most defense counsel advise their clients to submit to a voluntary interview in the hope of avoiding an Independent Counsel. This is because no responsible defense counsel that I know of would choose to have his or her client investigated by an Independent Counsel rather than the Department of Justice. That fact speaks volumes about the Independent Counsel Act. It says that the Act has failed in one of its most important missions -- to provide equal justice under the law, regardless of status.

Pursuant to the Act, an Independent Counsel in theory is to provide the same "justice" as would the Department of Justice; the only aspect that is supposed to be different is that an Independent Counsel, not the Attorney General, is the final arbiter of prosecutorial discretion. To this end, the Act provides that an Independent Counsel is to follow established Justice Department policy and guidelines. Indeed, the Supreme Court in part relied on this provision when it upheld the constitutionality of the Act in Morrison v. Olson. In 1994, after the Morrison decision, Congress attempted to fortify this requirement further, by providing that deviations from DOJ policy would be tolerable only if applying DOJ policy would be inconsistent with the purposes of the Act. The legislative history makes clear that the only deviations Congress had in mind were in cases where DOJ policy required a prosecutor to get approval from the Attorney General or another DOJ official before acting.

The reality is, however, that Independent Counsels often do not follow Department guidelines. The reality is that any individual who becomes entangled in an IC investigation -- even private peripheral actors as well the target public official -- are treated much more harshly at the hands of an Independent Counsel than they would be by the Department of Justice. And unlike a normal DOJ prosecution -- where a prosecutor has numerous senior and more broadly experienced superiors with whom to consult, and where a target of any investigation can take steps to ensure that a prosecutor's decision-making is reviewed by such experienced people -- there are no such resources available in an Independent Counsel investigation. There is no one to appeal to. We have placed the enormous law enforcement power of the Executive branch in the hands of a single individual who for both political and practical reasons is unaccountable, unchecked and who cannot meaningfully be challenged.

Most troubling, recent court decisions have rendered this requirement -- the requirement that Independent Counsels follow Department guidelines -- unenforceable. In this regard, I draw the

Committee's attention to the case of Ronald Blackley, issued a month ago by the U.S. Court of Appeals for the District of Columbia. Mr. Blackley was Chief of Staff to Agriculture Secretary Michael Espy. He was prosecuted by the Espy Independent Counsel not for anything he did in connection with the allegations that Mr. Espy improperly accepted gifts. Indeed, Mr. Blackley was not even called as a witness at Mr. Espy's trial.

Mr. Blackley was prosecuted for failing to disclose $22,000 on his financial disclosure form. Yet, the Department of Justice had a policy not to subject persons to criminal sanctions for such non-disclosure unless it could be proved that the undisclosed income came from an illegal source, and the Department of Justice had previously investigated Mr. Blackley and had declined to prosecute. There thus was clear evidence that prosecuting Mr. Blackley on this basis would be contrary to DOJ policy. Nonetheless, the Independent Counsel prosecuted Mr. Blackley, and he was convicted. On appeal, the D.C. Circuit held that an individual convicted by an Independent Counsel had no standing to enforce the Act's requirement that the Independent Counsel follow DOJ guidelines. The only remedy for a failure to follow such guidelines, the Court said, was for an Independent Counsel to explain his failure to do so in his final report.

This decision guts Congress's already limited efforts to reign in Independent Counsels and to ensure that they do not provide uneven justice. Ironically, Mr. Blackley was sentenced to 27 months in prison, while Mr. Espy was acquitted. The Espy Independent Counsel, displayed further disregard for the role of the prosecutor in our system when he indicated after Mr. Espy's acquittal that "the actual indictment of a public official may, in fact, be as great a deterrent as a conviction."

Two other statutory provisions aimed at restraining an Independent Counsel have likewise proven to be toothless tigers. One is the requirement that each Independent Counsel periodically submit reports to the Special Division -- the panel of judges who oversee IC appointments. Judge David Sentelle of the Special Division said in a recent speech that when he receives these reports, he just sticks them in a file. As quoted in an article in the February 22 Legal Times, Judge Sentelle said he has no idea why the statute requires Independent Counsels to file such reports, inasmuch as "it gives us no duties, no authority and no responsibility with regard to that report." Even if he thought the report disclosed "the worst behavior in the world," Judge Sentelle honestly observed, "I couldn't do a thing about it."

The final, and perhaps most significant, statutory effort to control out-of-control Independent Counsels has proved especially problematical. That is the provision that permits the Attorney General to remove an Independent Counsel for good cause. The Act does not lay out procedures for how an Attorney General is to determine whether good cause exists for removing an Independent Counsel; nor does it explain who is to investigate an IC, and whether discipline short of removal may be invoked. Right now, we have the DOJ, Independent Counsel Ken Starr, and the Special Division engaged in a dispute over how to investigate allegations against the Independent Counsel. This provision, moreover, has only turned into another opportunity to inject partisan attacks into the process. The upshot may be the appointment of an Independent Counsel to investigate an Independent Counsel! Where will it end?

I have come to the conclusion that we do not need an Independent Counsel Act. In the passion that followed the Watergate scandal, it seems the country and Congress may have ignored the most obvious lesson of Watergate: the system worked. Despite the Saturday night massacre, a special counsel, appointed within the existing Justice Department structures and regulations, was able to pursue the most serious charges against the highest officer in the land. President Nixon did not shut down the prosecution by firing Archibald Cox. A free press and firm Congress would not permit him to do that. In the end, he turned over the tapes and resigned.

There is every reason now to revert to that structure. Outside the Independent Counsel Act, there still exist mechanisms which an Attorney General can use in the extraordinary case to appoint a special counsel who cannot be fired except for cause, but who otherwise would operate within the Justice Department. The practical reality is that there could never be a cover-up of a serious crime by a President or other high-ranking official. Congressional oversight, an aggressive press, and professional prosecutors and agents would blow the whistle on any such attempt. The Independent Counsel Act simply is not needed.

Moreover, any benefits to be derived from an Independent Counsel regime are outweighed by the costs it imposes on our society. These costs include the corrosion of public confidence in our justice system; the erosion of the separation of powers; and incursions into the rights of individuals in and out of public office. Perhaps most troubling, I strongly believe, is that the Act and its accompanying scandal mentality are discouraging the best and brightest from serving in government.

On the other side of the ledger, I no longer see any benefit to having an Independent Counsel Act. The justification for the Act was never, in my mind, that the Department of Justice could not be trusted to vigorously pursue investigations into politically important people. To the contrary, it has always been my experience, both in and out of government, that the professional prosecutors of the federal government are thorough, fair and impartial no matter who is the target of their investigation. For example, during a Democratic administration, the Department did not shrink from prosecuting Congressman Rostenkowski, arguably the most powerful Democrat in Congress and an ardent supporter of President Clinton.

Now, however, partisan politics infects every phase of the Independent Counsel process. Every step of the process -- the very first call for an Independent Counsel, the decision to make a referral, the court's choice of an Independent Counsel, the conduct of the investigation by an Independent Counsel once appointed -- every step has become an opportunity for one side or the other to cry political foul. We can argue for days about who is to blame for this; there is, I sense, plenty of blame for all to share. But the bottom line is this: the public now views the Independent Counsel process as largely a political process. This has not only undermined respect for the Department of Justice but has also led to disrespect for Congress who many believe are willing to interfere with impartial law enforcement for the sake of partisan gain.

The Independent Counsel concept is therefore of no benefit anymore, and the Act should be scrapped. The Act should be allowed to die. It cannot be fixed. All the proposed fixes will make it more complicated and unwieldy, and will raise as many questions as they solve.

I would even go further. I would propose that once the Act is allowed to lapse, all currently active Independent Counsel investigations should be referred to the Public Integrity Division of the Department of Justice, which can assess all pending prosecutions and investigatory leads and determine which to abandon and which to pursue. They should be brought back within the Department of Justice budgetary system and under the auspices of DOJ guidelines. These cases, if need be, can be referred to a Leon Jaworski-type special prosecutor within the DOJ framework and even, if the Attorney General decides, the current Independent Counsel can be retained to continue their work.

While I am vigorously opposed to the re-enactment of the statute, I would urge this Committee to conduct radical surgery on it, if it is to continue in any form. My recommendations for change follow:

- The single most important change must be to bring the Independent Counsel within the Department of Justice budgetary system and under the auspices of DOJ guidelines.
- Any renewed Act should be limited in application only to the President, Vice President and the Attorney General. No discretionary authority is needed because existing Government Ethics regulations already requires the Attorney General to recuse herself when she has an actual, personal or financial conflict.
- Any renewed Act should be invoked only in connection with charges of felony-level offenses that occurred while the target held public office. You should not permit an Independent Counsel to have a hunting license to pursue a covered official in all aspects of his or her past life.
- Preliminary inquiries should not have artificial 90-day deadlines.
- The Attorney General should be authorized to issue subpoenas and use a grand jury during the preliminary inquiry phase.
- The standard for referring a matter to an Independent Counsel should be probable cause, or at a minimum, a rational basis to believe that a felony offense has occurred. The requirement that a referral must be made if "further investigation is warranted" should be eliminated. The burden should always be on the government to affirmatively establish some quantum of evidence to go forward with an IC investigation.
- The Act should make explicit that an Independent Counsel's jurisdiction is to be strictly construed, and should not be expanded beyond that necessary to prosecute obstruction and perjury in connection with its original jurisdiction.
- Each IC investigation should have a deadline and a budget stated in the jurisdictional referral. It should be part of the Attorney General's mandate to set a deadline and a budget which in his or her judgment is reasonable to complete the investigation, given the nature of the referral. If an IC determines that he or she will need more time or money, they can apply to the Special Division of the Court.

- Independent Counsels should be selected from a pre-existing roster of highly qualified professional prosecutors or former prosecutors, compiled by the Department of Justice based on names solicited from sources such as the American Bar Association, Federal District Courts and U.S. Attorneys throughout the country. The appointment should not be made because someone seeks the job or because a well-placed friend recommends him or her to a Judge on the Special Division.
- A significant percentage of an Independent Counsel's staff should be required to be highly experienced career prosecutors. Perhaps career prosecutors in the Public Integrity Division should be regularly assigned to staff Independent Counsel investigations.
- An Independent Counsel should be required to give up his or her private practice until the investigation is completed.
- There should be no requirement that an Independent Counsel issue a final report and all who are appointed should agree not to write books about their investigation. Reports and books serve no prosecutorial purpose and only further politicize the process and tarnish the reputations of individuals whom the IC may have chosen not to prosecute. Moreover, the report writing requirement increases the cost of investigation because they cause Independent Counsel's to pursue aspects or details of investigation which have little investigatory value but only serve the purpose of protecting the Independent Counsel from future criticism and placing him or her in a favorable historical light.
- There should be no requirement that the Attorney General report to Congress on why he or she chose not to refer a matter to an Independent Counsel. In the current law, the Attorney General must do so if she declines to make a referral that was initiated by a request from the majority of members of either party on the Judiciary Committee. This simply creates opportunities to use the Independent Counsel Act as a weapon in partisan politics, and subverts well-established and warranted rules concerning the secrecy of criminal investigations.
- Any Independent Counsels should be clearly required to follow DOJ policy and guidelines except for those that require approval of the Attorney General or other high-ranking DOJ officials. Witnesses, subjects and targets of IC investigations should be recognized in the statute as having standing to enforce this requirement.
- The Attorney General should be authorized to remove or discipline an Independent Counsel for good cause, including a failure to follow DOJ guidelines or a violation of ethical rules applicable to prosecutors. The procedures for removing an IC, and who should conduct investigations of independent counsels, should be spelled out in statute or regulation. There is no need to fear that an Attorney General will use this authority improperly; Congressional oversight and the news media will see to that.