Statement of

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Chairman Thompson, Senator Lieberman and members of the Committee:

I am pleased once again to have the honor to appear before this Committee to testify in favor of the reauthorization of the independent counsel legislation. As Chairman Thompson and other members of the Committee know, as Chief Counsel of the Senate Watergate Committee, I urged that Committee to make this legislation a priority recommendation shortly after President Nixon fired Special Prosecutor Archibald Cox. It was the Committee's first recommendation in its Final Report. Senator Sam Ervin, the beloved and respected Chairman of the Senate Watergate Committee, strongly supported the Independent Counsel legislation up until his death in 1985. Because of the many conversations I had with Senator Ervin about this legislation, I feel certain that if he were alive today, he would appear before this Committee to urge the reauthorization of the legislation. He frequently expressed his firm belief to me of the need of an independent counsel to obtain the public's confidence in federal criminal justice when specific and credible criminal charges are made against the highest federal public officials in the country.

From 1978, when the statute was first enacted , until 1992, when it was allowed to lapse, Congress was very supportive of the legislation, and re-endorsed it, with corrective changes, each time it came up for review under the sunset provision of the act. Bipartisan support was accomplished through the leadership of Senator Carl Levin and Senator William Cohen. During that period the legislation had the complete support of the American Bar Association, Common Cause and numerous other organizations promoting accountable democratic government. The principal opposition came from the justice department which saw the legislation as an insult to the integrity of federal prosecutors. Ignoring history and logic, the justice department, in the 1978-1992 hearings on the independent counsel statute, rejected claims it had a conflict of interest in any investigation of the president or his cabinet members. The legislation was opposed by every attorney general until Janet Reno was appointed attorney general.

Then, in 1993, in a remarkable turnaround for the justice department, Attorney General Reno appeared before this Committee and enthusiastically urged the Committee to reauthorize the legislation. She rejected prior Justice department claims that the department had no conflict in investigating high executive branch officials. Instead, she stated that the reason she supported the independent counsel legislation was that "there is an inherent conflict whenever senior executive branch officials are to be investigated by the department and its appointed head, the attorney general." Attorney General Reno's 1993 testimony on the impact of this conflict on public confidence in federal law enforcement directly contradicts her present position before this Committee that the Justice Department now should be trusted with these investigations. She said in 1993:

The attorney general serves at the pleasure of the president. Recognition of this conflict does not belittle or demean the professionalism of the department's career prosecutors. . . They are not political, they are splendid lawyers . . . I still feel there will be a need for [this legislation], based on my experience as a prosecutor for 15 years in Dade County. It is absolutely essential for the public, in the process of the criminal justice system, to have confidence in that system, and you cannot do that when there is a conflict or an appearance of conflict in the person who is, in effect, the chief prosecutor.

Attorney General Reno's break with the position of prior attorneys general was remarkable, especially considering the context in which she testified in 1993. In the first place, Attorney General Reno supported reauthorization of the legislation at a time when the Whitewater charges mentioning President Clinton and the first lady had become public. Second, only one year before, in 1992, Congress had allowed the independent counsel legislation to lapse in outraged protest against the alleged abuses of Independent Counsel Lawrence Walsh in the Iran-Contra investigation. If you were to look back at the news stories and editorials of that time you would find Walsh being bitterly attacked as "out of control", "rogue elephant ", "unaccountable", and running a "political witch hunt". Walsh was accused of taking too much time --7 years -- and spending too much money -- 60 million dollars. The complaint was made then that the statute was fatally flawed. Not only did Attorney General Reno reject this complaint, so did the American Bar Association, Common Cause and former Watergate Special Prosecutor Archibald Cox.

The near hysterical attacks against Walsh should sound familiar today. As in 1992, this Committee is holding hearings in the midst of an onslaught of accusations of abuse against Independent Counsel Kenneth Starr. The attacks against Starr are, for the most part, the same as those against Walsh, and as Attorney General Reno found in Walsh's case, they are similarly unsubstantiated. They are the understandable result of a publicized investigation against the president, unleashing White House counter attacks in a scorched earth public relations war to destroy the prosecutor. Members of this Committee should recognize this strategy.

Janet Reno recognized this when she testified in support of the legislation in 1993. She knew of the counter attacks against Walsh and of the complaint that the legislation was so flawed by the abuses it allegedly permitted that it could not be rescued. She rejected these complaints then, and said, instead, "It is neither fair nor valid to criticize the act for what politics has wrought." Contrary to widespread arguments made in 1992 that Walsh's handling of the Iran-Contra investigation justified the termination of the statute, Attorney General Reno testified in 1993:

While there are legitimate concerns about costs and burdens associated with the act, I have concluded that these are far, far outweighed by the need for the act and the public confidence it fosters . . It is my firm conviction that the law is a good one, helping to restore public confidence in our system's ability to investigate wrong doing by high-level executive branch officials. ... *The Iran-Contra investigation, far from providing support for doing away with the act, proves its necessity. I believe that this investigation could not have been conducted under the supervision of the attorney general and concluded with any public confidence inits thoroughness or impartiality. (Italics provided).*

Janet Reno was right then. The American Bar Association and Common Cause echoed her views, and they were right then. On the basis of their testimony at that time, they should be here now before the Committee saying the same sensible things about the publicly distorted image of the Whitewater and Monica Lewinsky investigations by Independent Counsel Kenneth Starr, and urging the need for this legislation. Instead, they have reversed themselves and are urging this Committee to recommend allowing the legislation to lapse and to entrust the justice department in the future with investigations of the president and cabinet members.

Why? What has changed since 1993? For the record, they say they now support the old complaints against Walsh, now reincarnated as Starr, that the independent counsel is not accountable, is prone to abusing power, is unmindful of time or money, and, like Inspector Javert in *Les Miserables*, relentlessly pursues a single target. The sad fact is that the attorney general knows better. She knows that there is no fatal flaw in the structure of the statute permitting prosecution excesses unsanctioned by the justice department. Clearly, nothing in the legislation permits this. To the contrary, the statute defines the power and authority of the independent counsel as the same as the attorney general or a United States attorney. Nothing more. The attorney general has been close enough to Starr's investigations to appreciate that they have been conducted no differently from the traditionally aggressive federal investigations conducted by regular federal prosecutors. Indeed, she knows that Starr's investigation has been conducted by federal prosecutors and FBI agents on loan to Starr. Also, she knows that the alleged abusive conduct charged to Starr, represents, for the most part, standard operating procedures and strategies of justice department prosecutors with her approval and support.

Changing her position from what she testified in 1993, the attorney general now claims, without explanation or example, that the structure of the statute makes the independent counsel unaccountable. Far from being unaccountable, the independent counsel has more eyes and ears probing him than does the attorney general. In the first place, Congress has oversight powers over the independent counsel, and can call him to account at hearings. The independent counsel's expenditures are now audited by the GAO with the additional requirement that the independent counsel file financial reports to Congress. Because of the nature of the targets, the independent counsel operates in a gold fish bowl with the media breathing over his shoulder from morning until night. As any other federal prosecutor, the independent counsel's investigation before a grand jury is supervised by the federal judge in charge of the grand jury. How can the attorney general forget so soon Judge Norma Holloway Johnson's frequent hearings into charges against the independent counsel's office? Any prosecution the independent counsel brings is supervised by a federal trial judge, and is reviewable by appellate courts, including the Supreme Court. The independent counsel is bound by the Federal Rules of Evidence and the Federal Rules of Criminal Procedure, as well as the Rules of Professional Conduct. And, of course, the independent counsel is restricted by the Supreme Court's interpretation of the Bill of Rights protections for the criminally accused.

The attorney general also knows that complex white collar crime cases, as are given to an independent counsel, take a long, long time to investigate and cost a lot of money. When she now talks about the resource limitations on federal prosecutors, she is wrongly comparing the case load of a United States attorney's office with the exceptional investigation responsibilities of the independent counsel. She knows that charges against high government or corporate officials for corruption or fraud are traditionally assigned by her to task forces or the public integrity section. These complex white collar crime cases take the justice department just as long or longer to process and cost just as much or more than an independent counsel's investigation. Both Senators Levin and Cohen emphasized these facts at the 1993 hearings. Senator Levin said:

Another criticism has been the length of the investigations. Some of them have taken a long time, some of them have not.Complex federal criminal cases often take years to investigate. I think you [Attorney General Reno] would concur. The McDade case [Pennsylvania congressman charged with bribery] -- there werefour years of investigation before indictment; Ill Wind [Pentagon procurement fraud], six years so far.

Senator Cohen made this point again when he said:

I would also point out . . . this notion that somehow we impose greater expense upon those who are investigated by independent counsels is so far greater than imposed by the Justice department. I daresay, as Senator Levin's pointed out, Joseph McDade was investigated for four years prior to the bringing of an indictment. Six years for the prosecution of Noriega. Ill Winds and Abscam took years.

With regard to the criticism that the independent counsel is able to employ substantial resources in pursuing an individual target, Senator Cohen added:

And so I would say that when the justice department focuses upon an individual, be it a member of Congress or not a member of Congress, there are substantial resources brought to bear againstthat individual.

So, what has changed since 1993 to cause such powerful and influential supporters of the legislation to reverse their positions and now oppose reauthorization of the statute? I believe nothing substantive has changed to cause this reversal. Rather, I believe that the attorney general, the ABA and Common Cause have succumbed to partisan and emotional attacks on the independent counsel and the legislation creating him. Although the attorney general carefully refused to comment on the conduct of any particular independent counsel, the clearly identified culprit charged with creating this hostility to the legislation is Independent Counsel Kenneth Starr and his Whitewater and Monica Lewinsky investigations. I believe it would have been more helpful to this Committee if the attorney general had specified what had gone wrong in these investigations as a result of the structure of the legislation. Instead, she confined herself to broad conclusions which directly contradicted her 1993 testimony.

The question this Committee must now resolve is whether the attorney general and other critics of the legislation are right that the legislation, itself, is fatally flawed and induces improper criminal investigations against high executive branch officials. For example, was the Whitewater investigation an improper one? Did the charges involve serious enough crimes to warrant a criminal investigation? The federal bank regulators clearly believed so. So did Attorney General Reno when she appointed a regulatory special prosecutor to investigate these charges. They involved the looting of a savings and loan bank in Arkansas by its owners, lawyers and co-conspirators causing ordinary bank customers to lose millions of dollars in savings.

Robert Fisk, a highly qualified former federal prosecutor recognized for his integrity and skill, was appointed by the attorney general as her special prosecutor in the Whitewater matter because she recognized she had a conflict of interest where the investigation would be of former business partners of the president. Fisk conducted an aggressive investigation -- not much different from Starr's later investigation which depended, in large part, on evidence he obtained from Fisk. Yet despite Fisk's excellent qualifications, as well as his being a Republican, Republican leaders, followed by some main line press, raised doubts as to his impartiality and called for the reauthorization of the independent counsel legislation. As we have seen, Attorney General Reno supported this position because she believed that a special prosecutor appointed by her would not have the same public confidence as an independent counsel.

Ironically, she proved to be right. When Fisk thoroughly and objectively investigated the mysterious death of Vincent Foster, he concluded that it had been a suicide and not a murder, and filed a report supporting this conclusion. Fisk was harshly criticized publicly for this report as having done a shoddy job to protect the White House. Yet when Starr was appointed independent counsel under the newly reauthorized legislation and redid the Foster investigation, and filed a report agreeing with Fisk that Foster's death was a suicide, that conclusion was generally accepted publicly, except for some die hard conspiracy theorists.

There are other examples of this difference of public perception of a justice department appointed special prosecutor and an independent counsel. Frequently cited are the decisions by two separate independent counsels not to bring any criminal charges against former Attorney General Edwin Meese. Then and now the observation is made that if the justice department or a justice department special prosecutor had cleared Meese, news headlines would have screamed "white wash" and "cover up" Yet the decisions of the independent counsels were publicly well received and accepted without any critical comments in the media. An independent lawyer had looked at the evidence and found it insufficient for prosecution.

During the 1993 hearings, Senator Joseph Lieberman gave another striking example of this public perception:

Perhaps our most recent, vivid example of the problem that the independent counsel law aims to address was Judge Lacey's investigation into the Department of Justice's handling of the BNL case [Banca Nazionale del Lavoro 5.5 Billion bank fraud]. Judge Lacy carried out that investigation as a special prosecutor, not as an independent counsel. He was appointed by the attorney general, not by a court. And he served at the attorney general's pleasure, and reported to the attorney general. When Judge Lacey announced that he found no misconduct, howls of protest went off that his decision was a political whitewash, rather than one based on the facts and law.

Senator Lieberman observed that Judge Lacey's findings would have had much more legitimacy if he had been an independent counsel.

Going back to the attorney general's position that somehow the structure of the legislation causes improper investigations, was that true in Whitewater, or what it actually became, the Madison Bank fraud case? Was this fraud investigation by the independent counsel's office flawed because of the statute? It was a difficult and complex federal white collar fraud case, involving the uncovering of many devious schemes and the analysis of hundreds of documents collected as evidence. Any fair review of that investigation will demonstrate that it was a classic example of difficult white collar crime prosecution by the justice department. The case was so strong that a Little Rock jury, otherwise unsympathetic to the independent counsel, returned verdicts of guilty against the governor of Arkansas, James Tucker, and Jim and Susan McDougal. A number of the other co-conspirators had pleaded guilty and cooperated with the prosecutors as witnesses.

Yet, some critics of Starr, including prominent media columnists, judged this prosecution a failure because Starr didn't "get" the president or first lady. I need not tell this Committee how deplorable this view is. A fair and honest prosecutor does not bring charges unless his evidence is strong enough to convince a jury of the accused's guilt beyond a reasonable doubt. If the prosecutor decides not to prosecute because the evidence is insufficient, that is not a failure of prosecution, but a success and a vindication of the principles of fair administration of criminal justice.

Starr has been attacked most severely for his Monica Lewinsky investigation. These attacks no doubt caused the otherwise deliberative and discriminating ABA and Common Cause to abandon the independent counsel legislation. If the evidence of perjury and obstruction of justice -- albeit about a sexual relationship -- contained in Linda Trip's tapes had involved not the president, but a judge or a congressman, what would the justice department have done? Ignored it or cover it up? What howls of public protest would there be when the story leaked out!

Indeed, after Starr corroborated the informer evidence Tripp brought, he went to the justice department and suggested that he may not have jurisdiction over the matter and asked the deputy attorney general whether the department should take it over. The deputy attorney general sent two assistants to Starr's office to listen to the tapes. When they reported back, Attorney General Reno quickly decided that an investigation was necessary, but could not be made by her department, and referred it back to Starr, notifying the special division of the court of the referral. Of course, she was right. How could anybody even imagine these particular charges against the president being investigated by the justice department or any appointee of the department?

Underlying most of the criticism of Starr's investigation was the sordid and seamy nature of the subject matter. However, as an investigation had to be made by someone, and the attorney general had taken the justice department out of it, could Starr do anything else than conduct an aggressive investigation into the facts? The success of this investigation was demonstrated in the impeachment proceedings in the House and the Senate. Rightly or wrongly, the entire body of evidence during the impeachment hearings in the House Judiciary Committee and in the Senate trial came from Starr's investigation and referral to the House of Representatives. In both bodies of Congress, this evidence was not questioned for its credibility or strength. Rather, the debate was over whether the crimes identified in the referral report met the constitutional standard of high crimes and misdemeanors.

The important point I want to make from all these facts is that the independent counsel legislation did not fail in these independent counsel investigations, but worked as it was supposed to work, even under such powerful pressures and attacks from the White House. Clearly, as Attorney General Reno said about Walsh's Iran-Contra investigation, Starr's Monica Lewinsky investigation far from proving the legislation should be done away with, proves, instead, its need. In no way could the justice department have credibly undertaken this investigation. And if the independent counsel legislation lapses, and the department refuses or can't be trusted to conduct this kind of an investigation, who will? Is this what we really want -- a vacuum in federal law enforcement?

The attorney general now infers that the Monica Lewinsky investigation did not accomplish the purpose of the legislation which was to assure public confidence in federal law enforcement. The polls demonstrated that the public did not like Starr and what he was doing. This reaction of the public is not surprising when you consider the high volume of unfounded partisan inspired attacks on Starr dumped every day on the public. The real question, however, as to the need of the statute, is how much less confidence would the public have had if Janet Reno and her justice department had undertaken the Monica Lewinsky investigation. As much as the public was persuaded to dislike Starr, they could have no faith, whatsoever, in any impartial investigation by the justice department into the sordid events of the Monica Lewinsky matter.

Also, Common Cause and Attorney General Reno now argue that the justice department can be trusted with investigations of the president and high executive branch officials, either through the criminal division or by appointing a regulatory special prosecutor. Most astonishingly, they point to the Watergate experience as justification for keeping these investigations in-house. Showing complete ignorance of history, they say that the appointment of Leon Jaworski after Cox was fired demonstrated that a special prosecutor appointed by the president could be trusted to make an impartial and strong investigation of the president. If this were so, why did Congress believe it necessary to enact the independent counsel legislation in the first place? The reason, known by anyone familiar with those tragic events 25 years ago, is that Jaworsky's appointment was not a voluntary one by President Nixon. He had hoped to end the criminal investigation by firing Cox. But what was unique at that time was the fact that the American people had become outraged by the revelations of the Watergate scandal during the televised hearings of the Senate Watergate Committee, and fully understood the gravity of the firing of Cox. They responded angrily by the millions to the firing, writing an calling their congressmen and the White House, demanding a new special prosecutor. President Nixon had no choice but to appoint one, and could not, in that atmosphere, interfere with the new special prosecutor. These were unique events, that cannot be expected to be repeated in any later scandal investigation. It was because there could not be any realistic expectation that the public would be similarly informed of presidential wrongdoing so vividly as in Watergate that Congress decided it could not rely on the presence of public outrage to protect a future justice department appointed special prosecutor. It chose, instead, to provide for a prosecutor who would be independent of the president and the attorney general. The need for such an independent counsel is as strong today as it was in 1978.

Therefor, I urge this Committee to recommend the reauthorization of the independent counsel legislation for the public good, and to reject the justice department's efforts to get back control over politically sensitive investigations of the president and high executive branch officials.

Recent experience, however, has shown that there are some corrective changes needed in the statute, and, as I've done before, I would be willing to work with the chief counsel of this Committee and his staff on the needed changes. For example, the present provisions allow the independent counsel too much freedom to expand his investigation by allowing him to look into "related" matters. The legislation was never meant to give a roving hunting license to the independent counsel, who should be restricted to a narrow mandate created by the justice department's conflict of interest. Therefor, the independent counsel should be prohibited from investigating any matter outside his mandate unless that investigation is essential for him to fulfill his mandate, and the decision whether it is or is not essential should be made by the attorney general.

In addition, I have developed serious doubts about the usefulness and fairness of a final report to the special division of the court. Regular federal prosecutors do not file such reports after an investigation, whether they decide to prosecute or not. It is basically unfair for an independent counsel to spell out why a target who was not been indicted still is believed to be guilty. The 1994 reauthorization act made some changes here, but it is still permissible for an independent counsel to label a target as guilty, even though the evidence was insufficient for an indictment. Further, the requirement to file a final report tends to lengthen the investigation. It leads the independent counsel to want to show in the report that substantial work was done and that he has dotted every i and crossed every t. An example of this was Starr's conclusions on the Foster suicide, which could have been publicly released at least two years before the written report was filed. The need for the written report and the controversy over Fisk's findings compelled Starr to continue to make an exhaustive investigation, piling up evidence on top of evidence, well after he had become convinced that the death was a suicide.

There are additional recommendations others have made to which I would subscribe. They include narrowing the group of covered persons; giving the attorney general more investigative authority to determine whether there is need for further investigation; requiring the independent counsel to spend full time in the office and not take on private matters, and providing tighter qualifying standards for appointment of an independent counsel, such as requiring extensive federal prosecution or defense investigation and trial experience. Starr had no such experience, and heavily relied on the career federal prosecutors he had borrowed.

But I strongly urge this Committee not to recommend limits on time of the investigation or on the resources available to an independent counsel. As all federal prosecutors know, and Janet Reno recognized in 1993, a prosecutor limited in time and resources is a boon to the targets of the investigation who, through numerous strategies, can wait out the prosecutor and make the investigation moot. Tough financial audits and oversight by Congress is what is needed, not the tieing of the prosecutor's hands.