TESTIMONY OF ROBERT B. FISKE, JR.
HEARING ON INDEPENDENT COUNSEL ACT
BEFORE UNITED STATES SENATE
COMMITTEE ON GOVERNMENTAL AFFAIRS
WASHINGTON, D.C.
MARCH 3, 1999

I understand that one of the purposes of today's hearing is to examine how the system might work in the event that the Independent Counsel Statute is not renewed. I have been requested to appear to give the Committee the benefit of my experience in 1994 following my appointment as an Independent Counsel by the Attorney General under 28 C.F.R. § 600.1. I also have some views as to how the Independent Counsel Statute should be modified if it is to be renewed which I will address at the end of my statement. For the convenience of the Committee, I have attached a brief biographical statement of my experience and qualifications.

As the Members of the Committee undoubtedly recall, the Independent Counsel Statute, which was first enacted in 1978, had a "sunset" provision which meant that it expired after five years unless it was renewed. The statute was renewed with similar five-year sunset provisions in 1982 and 1987. Pursuant to the 1987 renewal, the statute expired on December 14, 1992 and was not renewed at that time. Accordingly, there was no Independent Counsel Statute in effect in December 1993 when demands began to be made for the appointment of an Independent Counsel in connection with allegations against President Clinton relating to Whitewater and Madison Guaranty Savings and Loan.

Demands were made upon the Attorney General, initially by Republicans, for her to appoint an Independent Counsel under the power that she had under 28 C.F.R. § 600.1. She resisted such requests, stating that she was concerned that anyone that she appointed, no matter what his or her qualifications were, would be subject to criticism on the grounds that he or she could not have the appearance of independence if he or she were appointed by an Attorney General who was accountable to the President to be investigated by the Independent Counsel. In early January 1994, several Democratic senators, including Senators Moynihan, Bradley, Robb and Feingold joined in the call for the appointment of an Independent Counsel. On January 12, President Clinton himself asked the Attorney General to make such an appointment and that same day the Attorney General stated that she would. I was subsequently contacted by two high-ranking officials in the Justice Department: Philip Heymann, the Deputy Attorney General; and JoAnn Harris, the Assistant Attorney General in charge of the Criminal Division. I had worked with both of them when I was United States Attorney for the Southern District of New York.

They told me I was on a short list of people being considered, and asked me whether, if asked to do so, I would be willing to accept an appointment by the Attorney General as Independent Counsel to investigate the Whitewater matter. I said that I would. The following week, I went to Washington and had a series of meetings with Mr. Heymann, Ms. Harris and others at the Justice Department. In those discussions with the Justice Department, three important issues emerged: (1) independence; (2) authority; and (3) jurisdiction. With respect to the first issue, I was assured that whoever was appointed would be totally independent from the Justice Department; that no one would make any effort to influence what he or she was doing; and that the person appointed

was not expected to report to anyone in the Justice Department until after the entire investigation had been completed.

With respect to authority, I examined the provisions of the Code of Federal Regulations which were in effect at the time and was satisfied that, if appointed, I would have all the powers that an Independent Counsel appointed under the statute would have had -- indeed in practical effect I would be the Attorney General in the areas covered by my jurisdiction.

On the third subject -- the scope of my jurisdiction -- I was told that it was very important to the Attorney General that whoever was appointed should have all the jurisdiction necessary to do the job properly. I was told to draft up what I thought the jurisdiction should be. The Justice Department had a draft of a proposed jurisdictional provision which they gave me to consider. I then rewrote it to my satisfaction. That was the jurisdiction which I subsequently was given, which was codified in 28 C.F.R. § 603.1 as follows:

"§ 603.1 Jurisdiction of the Independent Counsel

"(a) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to investigate to the maximum extent authorized by part 600 of this chapter whether any individuals or entities have committed a violation of any federal criminal or civil law relating in any way to President William Jefferson Clinton's or Mrs. Hillary Rodham Clinton's relationships with:

(1) Madison Guaranty Savings & Loan Association;

(2) Whitewater Development Corporation; or

(3) Capital Management Services.

"(b) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal or civil law by any person or entity developed during the Independent Counsel's investigation referred to above, and connected with or arising out of that investigation.

"(c) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to investigate any violation of section 1826 of title 28 of the U.S. Code, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal law, in connection with any investigation of the matters described in paragraph (a) or (b) of this section.

"(d) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to seek indictments and to prosecute, or to bring civil actions against, any persons or entities involved in any of the matters referred to in paragraph (a), (b) or (c) of this section who are reasonably believed to have committed a violation of any federal criminal or civil law arising out of such matters, including persons or entities who have engaged in any unlawful conspiracy or who have aided or abetted any federal offense."

(I should note, parenthetically, that this is precisely the same jurisdiction which was conferred upon Kenneth Starr when he was later appointed by the Special Division for Appointing Independent Counsels of the U.S. Court of Appeals for the D.C. Circuit.)

During the course of my discussions with Mr. Heymann and Ms. Harris, I was told that they were going to recommend to the Attorney General that I be appointed. On the afternoon of Wednesday, January 19, 1994 I met with the Attorney General. After thanking me for being willing to undertake this appointment, she said that she wanted to make sure that I was satisfied that I had all the authority that I needed, and that I was satisfied that I had all the independence that I needed. I said that I was, as to both. She said that she would make the announcement the following day, and that she did not expect to talk to me again after that until the entire matter was over.

It is important to note that during the period of my service from January 21, 1994 until October 6, 1994 the commitments that were made to me by the Attorney General, Mr. Heymann and Ms. Harris as to my independence were totally and completely fulfilled. At no time did anyone in the Justice Department make any effort to influence anything that I was doing. Indeed, at no time did anyone ask how things were going or what I was doing. On one or two occasions, at my request, I was put in touch with career people in the Justice Department to answer questions about Justice Department practices and procedures which I was making every effort to follow. Those contacts were initiated by me and consisted only of my obtaining information from them that I thought would be helpful to me in discharging my responsibilities. On a few occasions we initiated discussions with a representative of the Solicitor General's Office on a legal question.

On Monday, January 24, I took a leave of absence from my firm and went down to Little Rock to set up an office. I also made arrangements to set up an office in the District of Columbia because I had committed to investigate the circumstances surrounding the death of Vincent Foster.

I immediately started to put together a staff of former prosecutors and other lawyers from around the country to conduct the investigations. The people that I recruited were as follows:

Roderick C. Lankler, a New York lawyer who had spent thirteen years in the Manhattan District Attorney's Office under Frank Hogan and Robert M. Morgenthau, serving as Deputy Chief of the Homicide Bureau and subsequently Chief of the Trial Division.

Rusty Hardin, from Houston, Texas, who had spent 15 years in the Harris County District Attorney's Office where he had obtained over 100 felony convictions, including 13 first-degree murder convictions, and had been designated "Texas Prosecutor of the Year" in 1989.

James E. Reeves, from Caruthersville, Missouri, an experienced trial lawyer who had served as United States Attorney for the Eastern District of Missouri in 1969 and 1973.

Denis J. McInerney, a Deputy Chief of the Criminal Division in the United States Attorney's Office in the Southern District of New York.

Mark J. Stein, also a Deputy Chief of the Criminal Division in the Southern District of New York.

Julie O'Sullivan, an Assistant United States Attorney in the Southern District of New York and a former law clerk to Justice Sandra Day O'Connor.

William S. Duffey, Jr., from Atlanta, Georgia, a partner in King & Spalding who was highly recommended to me by former Attorney General Griffin Bell and Frank Jones of that firm.

Gabrielle R. Wolohojian, from the Boston firm of Hale & Dorr who was highly recommended to me by Robert S. Mueller III, the Assistant Attorney General in charge of the Criminal Division under President Bush.

Carl J. Stich, Jr., a partner in the Cincinnati firm of Dinsmore & Shohl, who was highly recommended to me by several lawyers who had worked with him in the investigation and prosecution of savings and loan fraud in the State of Ohio. He had also served as a Special Attorney General in Kentucky in investigating election crimes.

Patrick J. Smith, Timothy J. White and Beth Golden, all of whom were then young associates from my law firm, Davis Polk & Wardwell. (Mr. Smith is now an Assistant United States Attorney in New York and Ms. Golden, after serving as an Assistant United States Attorney in Minnesota, is now a Deputy Attorney General in New York.)

At the time I was appointed, there was a pending indictment in Little Rock which had been obtained by the United States Attorney's Office against David Hale, a former municipal judge, who had been president of Capital Management Services, Inc. The indictment charged Hale and two lawyers, Charles Matthews and Eugene Fitzhugh, with fraud against the Small Business Administration. Mr. Hale's public allegation that then-Governor Clinton had pressured him into making an illegal SBA loan had been one of the events leading to the call for the appointment of an Independent Counsel. The case was set for trial on March 24. An immediate priority, of course, was to get that case ready for trial. We did so and, in early March, David Hale agreed to plead guilty to a superseding two-count information (Matthews and Fitzhugh, whose trial was severed, pleaded guilty during trial in June and received jail sentences).

The first count of the information against Mr. Hale replicated the pending charge of fraud against the SBA. The second count was a broad mail fraud count covering Mr. Hale's activities over a six-year period with a number of other individuals. The plea agreement, which called for Mr. Hale's complete and truthful cooperation, was entered into after intensive debriefings of Mr. Hale by our office. Following the plea, Mr. Hale continued to cooperate with our office and with Kenneth Starr after he took over.

Pursuant to the plea agreement, I appeared at Mr. Hale's sentencing in March 1996 to state to the Court the extent of his cooperation while I was Independent Counsel. I advised the Court that:

". . . .[B]etween March and August of 1994, Mr. Hale provided substantial information to our office in connection with investigations that subsequently led to guilty pleas by the following individuals: Robert Palmer, who pleaded guilty to conspiracy to make false entries in the records of Madison Guaranty Savings & Loan Association; Chris Wade, who pleaded guilty to bankruptcy fraud and making a false statement to a financial institution; Stephen Smith, who pleaded guilty to conspiracy to misapply the funds of CMS; and Larry Kuca, who also pleaded

guilty to conspiracy to misapply the funds of CMS. Finally, Mr. Hale had also provided a great deal of information to my office in connection with that part of the investigation that relates to the case that is currently being tried before Judge Howard [this was the case which resulted in convictions of Governor Tucker, James McDougal and Susan McDougal]. My office was intensively investigating that information at the time Mr. Starr took over." (Transcript of Hale Sentencing, 3/25/96, pp. 13-14).

In addition to those matters, I also told the Court that Mr. Hale had brought to our attention several entirely new matters of which we had no prior knowledge. One example of such a matter was a bankruptcy and tax fraud in which, Mr. Hale alleged, Governor Tucker and others had participated. The investigation that followed Mr. Hale's providing us with that information ultimately led to the indictment and conviction of Governor Tucker, as well as William Marks and John Haley, for tax and loan fraud.

The investigation of the bankruptcy and tax fraud involving Governor Tucker was conducted by our office pursuant to paragraph (b) of the jurisdictional statement which gave us authority to:

"investigate other allegations or evidence of violation of any federal criminal or civil law by any person or entity developed during the Independent Counsel's investigation."

This was one of three principal areas which have since become public where we exercised jurisdiction beyond the original Whitewater/Madison Guaranty mandate. The second such situation involved the investigation of Webster Hubbell for fraud against his clients and his partners in the Rose Law Firm arising from fraudulent billing practices. A complaint making those allegations was filed against Mr. Hubbell by the Rose Law Firm before the Arkansas Grievance Committee and made public in March 1994. In discussions with the Justice Department, it was agreed that it made sense for our office to investigate this matter. We began that investigation in March 1994 and, by the time I left, we had developed substantial evidence establishing Mr. Hubbell's guilt, which he admitted in his guilty plea in December 1994. The other area was an investigation which we undertook in the spring of 1994 into the financing of then-Governor Clinton's 1990 campaign for governor. In the course of this investigation we obtained evidence which led to a conviction, by guilty plea, of Neal Ainley, the former president of the Perry County Bank in Perryville, Arkansas, for currency transaction reporting violations in connection with large cash withdrawals by the Clinton campaign.

In Washington, we completed an investigation into the death of Vincent Foster. We concluded that Mr. Foster's death was a suicide in Fort Marcy Park. We also investigated allegations of possible obstruction of justice in connection with conversations and meetings in 1993 and early winter of 1994 between the White House and Treasury officials concerning referrals from the Resolution Trust Corporation. We issued a report in June 1994 in which we concluded that there was not sufficient evidence of obstruction of justice to warrant a prosecution.

On June 30, 1994, the Independent Counsel Statute was reenacted, and on that same day, the Attorney General applied to the Special Division of the D.C. Circuit asking for the appointment of an Independent Counsel with the same jurisdiction under which I was then operating pursuant to 28 C.F.R. § 603.1. In that application, she recommended that I be appointed. On August 5,

1994, the Court granted the application for the appointment of an Independent Counsel and selected Kenneth Starr for that position. In explaining the decision, the Court stated:

". . . . The Court, having reviewed the motion of the Attorney General that Robert B. Fiske, Jr., be appointed as Independent Counsel, has determined that this would not be consistent with the purposes of the Act. This reflects no conclusion on the part of the Court that Fiske lacks either the actual independence or any other attribute necessary to the conclusion of the investigation. Rather, the Court reaches this conclusion because the Act contemplates an apparent as well as an actual independence on the part of the Counsel. As the Senate Report accompanying the 1982 enactments reflected, '[t]he intent of the special prosecutor provisions is not to impugn the integrity of the Attorney General or the Department of Justice. Throughout our system of justice, safeguards exist against actual or *perceived* conflicts of interest without reflecting adversely on the parties who are subject to conflicts.' S. Rep. No. 496, 97th Cong., 2d Sess. at 6 (1982) (emphasis added). Just so here. It is not our intent to impugn the integrity of the Attorney General's appointee, but rather to reflect the intent of the Act that the actor be protected against perceptions of conflict. As Fiske was appointed by the incumbent administration, the Court therefore deems it in the best interest of the appearance of independence contemplated by the Act that a person not affiliated with the incumbent administration be appointed. . . ."

As stated above, I understand that one of the purposes of today's hearing is to examine how the system would work if the Independent Counsel statute is not renewed. In my opinion, during the time I served as regulatory Independent Counsel, I functioned every bit as effectively as if I had been appointed pursuant to the statute. My powers, my actual independence and my jurisdiction, were identical. Based on that experience, I believe that if the statute is not renewed, there is an effective mechanism for dealing with what in my view should be an extremely limited number of situations where someone outside of the Justice Department should be appointed to handle a sensitive investigation. That was, of course, what happened in Watergate, which occurred before the statute was adopted, when independent prosecutors functioned extremely effectively under appointments from the Attorney General. That is also what happened in 1978 when Paul Curran, my predecessor as United States Attorney for the Southern District of New York, functioned extremely effectively under an appointment by Attorney General Griffin Bell to investigate allegations of wrongdoing against Billy Carter in connection with his peanut warehouse.

In terms of jurisdiction and investigative and prosecutorial authority, there is no difference between what an Independent Counsel can do under the statute and under the regulations. This was the case when I was appointed in 1994 under the regulations. The only difference is in the circumstance leading to the appointment and even in that situation, to a significant extent, the difference may be more apparent than real.

Under the regulations, the Attorney General has total discretion as to whether and when to appoint an Independent Counsel, as to the identity of the Independent Counsel selected, and as to the scope of the Independent Counsel's jurisdiction. Under the statute, the Attorney General is required to apply for the appointment of an Independent Counsel when there are allegations against specified individuals which, after a 90-day period of investigation, are of sufficient weight that he or she cannot say there is no reasonable basis to believe that an investigation would produce evidence of a crime. But even there, whether or not an application for

appointment of an Independent Counsel should be made is entirely the Attorney General's decision to make. A decision not to apply is not reviewable by any court, under 28 U.S.C. § 592(f). See Banzhaf v. Smith, 737 F.2d 1167 (D.C. Circuit 1984).

I believe that, in the vast majority of situations now covered by the statute, it would be far preferable to allow the career prosecutors in the Justice Department and the United States Attorneys around the country to be responsible for investigating and prosecuting allegations of misconduct by high-ranking government officials. The prosecution of Vice President Agnew by the United States Attorney in Baltimore, and the prosecution of Congressman Rostenkowski by the United States Attorney for the District of Columbia are but two examples of the ability and willingness of the Justice Department to effectively investigate and prosecute such cases.

If the statute were to be renewed, I would limit its coverage to the President, the Vice President and the Attorney General and would make the appointment a full-time position.

Robert B. Fiske, Jr., Litigation Partner in the firm of Davis Polk & Wardwell, graduated from Yale University, B.A. 1952 and the University of Michigan, J.D. 1955, where he was a member of Order of the Coif and an Associate Editor of the Michigan Law Review. In May 1997, he received an Honorary Degree of Doctor of Laws from the University of Michigan.

After law school, Mr. Fiske went to work for Davis Polk Wardwell Sunderland & Kiendl. Two years at the firm were followed by four years at the United States Attorney's Office for the Southern District of New York where he served as Assistant Chief of the Criminal Division and head of the Special Prosecutions Unit on Organized Crime. In that position, he successfully prosecuted labor racketeer John Dioguardi ("Johnny Dio") who had been responsible for the acid blinding of labor columnist Victor Riesel.

Mr. Fiske returned to Davis Polk & Wardwell in 1961 where he became a litigation partner in 1964, specializing in securities and antitrust litigation.

Mr. Fiske was appointed United States Attorney for the Southern District of New York by President Gerald Ford on March 1, 1976. During his four-year term as United States Attorney, Mr. Fiske handled a number of important cases personally, including the conviction of narcotics kingpin Leroy "Nicky" Barnes; the labor racketeering conviction of Anthony Scotto and Anthony Anastasio; and the representation of Attorney General Griffin B. Bell in connection with contempt proceedings in the Socialist Workers Party litigation. After completing his term as United States Attorney, Mr. Fiske returned to Davis Polk & Wardwell on March 24, 1980 where he has since handled a number of significant cases, including the defense of Babcock & Wilcox, the manufacturer of the nuclear reactor at Three Mile Island, in a $4 billion damage suit brought by General Public Utilities; the defense, as co-counsel, of the National Football League in the antitrust suit brought by the United States Football League; and the defense of a number of major law firms throughout the country in suits for malpractice and violation of the securities laws. He has represented a number of corporations and individuals in white collar criminal investigations

and is currently representing the Judicial Council of the Court of Appeals for the Fifth Circuit in disciplinary proceedings against a District Judge under 28 USC § 372.

From January 24, 1994 until October 6, 1994, Mr. Fiske served as Independent Counsel appointed by Attorney General Janet Reno to conduct the Whitewater/Madison Guaranty investigation.

From April 1977 to April 1979 he was a member of Attorney General Griffin Bell's Advisory Committee of United States Attorneys, serving as Chairman from April 1978 to April 1979. Mr. Fiske is a past President of the American College of Trial Lawyers, a former Chairman of the American Bar Association Standing Committee on Federal Judiciary, a past President of the Federal Bar Council and a former Chairman of the Judicial Conference of the Second Circuit Planning and Program Committee.