STATEMENT OF SENATOR CARL LEVIN
COMMITTEE ON GOVERNMENTAL AFFAIRS
HEARING ON
THE FUTURE OF THE INDEPENDENT COUNSEL ACT

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This is the fourth time in the 20 year history of the independent counsel law that we have considered its reauthorization. Although I was not in the Senate at the time the law was initially enacted, I have been involved in each of the reauthorizations. And at each of these turning points - when we could have terminated the law rather than continue it - Congress concluded that the independent counsel law performed an important function. But at reauthorization time, coterminus with support for a mechanism for independent investigations of high level officials, was our concern with ensuring that the individuals who conduct such investigations also be subject to restraints and limits on their authority like everyone else in our system of government with its checks and balances.

In 1978 when Congress first enacted what was then called the "special prosecutor" law, we did it to promote public confidence in the impartial investigation of alleged wrongdoings by high-level government officials. At the same time, we established important checks on this new power. Congress required the special prosecutor to comply with Justice Department guidelines; Congress gave the Attorney General the authority to terminate the special prosecutor for cause; and Congress limited the jurisdiction of the special prosecutor to the subjects prescribed by the Special Court based upon information provided by the Attorney General.

In 1982, we faced the first reauthorization of the law. This Committee, in its report recommending reauthorization, stated:

Prompted by the events of Watergate, Congress recognized that actual or perceived conflicts of interest may exist when the Attorney General is called on to investigated alleged criminal activities by high-level government officials. When conflicts exist, or when the public believes there are conflicts, public confidence in the prosecutorial decisions is eroded, if not totally lost. Thus, a statutory mechanism providing for a temporary special prosecutor is necessary to insulate the Attorney General from making decisions in these instances.

The Committee went on to conclude, that "the special prosecutor provisions must be retained." The Committee also concluded, however, that "the special prosecutor provisions require significant amendment."

During that reauthorization we made a number of changes to the statute. For example, we reduced the number of persons mandatorily covered by the statute; we increased the threshold for seeking the appointment of an independent counsel, restricting the number of times the Attorney General would need to invoke the statute; we changed the name of the officer from "special

prosecutor" to "independent counsel;" and we allowed for the reimbursement of attorney fees for subjects of investigations who were never indicted.

During the second reauthorization in 1987, this Committee concluded in its report, that "[T]he independent counsel provides an effective and essential procedure to investigate persons close to the President." At the same time, we made changes to the statute based upon our observation of its implementation over the preceding 5 year period. We reorganized the statute, made adjustments in the procedures for preliminary investigations, and to address cost concerns, required GAO to audit the expenditures of each independent counsel office.

By the time of the third reauthorization in 1993, the U.S. Supreme Court had upheld the constitutionality of the law. During this review of the statute, the Committee concluded that the law had achieved "remarkable public acceptance in terms of restoring public confidence in criminal investigations of top executive branch officials, but that additional fiscal and administrative controls on independent counsel proceedings were needed." In its 1993 report, the Committee determined:

[T]he statute should be reauthorized, because it meets a critical need - public trust in government. In 15 years of operation, the independent counsel law has gained the public's trust as establishing a system that provides fair and impartial criminal investigations and prosecutions. It has proven to be both constitutional and a trusted means of handling the rare case in which an Administration is asked to investigate and prosecute its own top officials. While not perfect, it is a law that has met the test of time and the bitter lessons of Watergate.

Concerns about the statute at that time centered on establishing stronger cost controls and greater accountability. We imposed limits on staff salaries, office space, and travel. We gave the special court authority to terminate an independent counsel office if it found the independent counsel had substantially completed their responsibilities; and we made it clear that the independent counsel process could be used to investigate Members of Congress.

At each step of the way, we reviewed the advantages and disadvantages of the independent counsel system, and each time we concluded that it was a worthwhile law. But each time we also tried to improve it and fix it.

We face the same decision today, 20 years after the law was first enacted, but this time the issues and concerns are different. This time we have an independent counsel, Kenneth Starr, who has spent 4-1/2 years and over $40 million investigating the President and only 25% of the American people have any confidence in him. And no wonder. Mr. Starr pushed the envelope of his prosecutorial powers to the extreme time and time again -- challenging the attorney-client relationship after the death of a client (his argument was handily rejected by the Supreme Court) , jeopardizing the relationship between the Secret Service and the President of the United States, subpoenaing lists of book purchases, wiring an informant for a matter in which his office had no jurisdiction, and discussing immunity with a target without her attorney present, indeed, threatening to withhold immity if she called her attorney.

But he's not the only independent counsel who has raised public concerns. This time we also have an independent counsel who was appointed in 1990 to investigate President Reagan's Secretary of HUD and who is still in office almost 9 years later, having spent almost $30 million and having announced over 4 years ago there would be no indictment of the Secretary. And this time we have an independent counsel who was appointed to investigate gifts to the Secretary of Agriculture and who has spent over $17 million to do so. He put the Secretary through a seven-week trial, calling more than 70 witnesses, and his charges were resoundingly rejected with a verdict of "not guilty" by the jury.

These recent developments have shaken the foundations of the independent counsel law. What they tell us is that the integrity and effectiveness of the independent counsel law depends at its core on the good judgment and common sense of the individuals appointed to serve. Several independent counsels in the last number of years have exhibited neither good judgment nor common sense, and their investigations have caused many to lose faith in the independent counsel system. The question is whether we should end the independent counsel law over the troubling behavior of a handful of recent independent counsels. The answer to that question is another question -- is it possible to amend the statute to place effective limits on the excessive power wielded by some independent counsels? If not, what would take its place?

If we were to let the law expire, we would be left with the Justice Department's inherent authority to appoint a special prosecutor at the discretion of the Attorney General. The Attorney General used this inherent authority when she appointed Robert Fiske to investigate Whitewater, because the independent counsel law had lapsed. In that case, once the independent counsel law was reenacted, the Special Court terminated Mr. Fiske's service and appointed Mr. Starr in his place, contending that the appointment of Mr. Fiske by Ms. Reno had tainted his independence. We have no reason to believe that similar arguments would not be made in future cases were the Justice Department to rely, again, on its own authority to appoint independent counsels.

Other alternatives to the independent counsel law have also been considered over the years. One alternative, which I find attractive, would be to place these investigations with the Public Integrity Section of the Department of Justice and make the head of that section subject to Senate confirmation, appointed for a fixed term, and given responsibilities to report to Congress as well as to the Attorney General. This alternative is similar to one that I understand Senator Baker has proposed.

Over the next few months we will be determining whether the current law can be repaired. I believe we should consider keeping it only if major changes are made, including:

-- requiring selection of independent counsels with significant prosecutorial experience, little or no political involvement and no real or apparent conflicts of interest, from a list of candidates consisting of 2 or 3 persons proposed by each federal judicial circuit;

-- applying the statute only to crimes allegedly committed while in office;

-- limiting an independent counsel's office to 3 years, after which time any ongoing investigation would revert to the Justice Department unless the Attorney General determined that extending the independent counsel office were essential to the public interest;

-- providing practical mechanisms to enforce effectively the statutory requirement that independent counsels comply with established Justice Department policies;

-- requiring a stronger showing for the Attorney General to seek appointment of an independent counsel by permitting such appointment only if the Attorney General finds reasonable evidence to believe that a covered official committed a covered crime; and

-- reducing the coverage of the statute to the President and Vice President and members of the Cabinet.

My support for the independent counsel law has been based on the premise that high ranking federal officials should be investigated and prosecuted in a manner certainly no better than a private citizen, but equally important, in a manner no worse than a private citizen. We should not forget that in 20 years of operation, we have had 20 independent counsels, half of whom never brought an indictment and the majority of whom spent less than $1 million and operated for less than 3 years. In return, the American people had the reassurance that criminal allegations against our very top officials were being investigated by persons independent from the political appointees in the Executive Branch.

But, our system of government is based on the premise that no official has unlimited power; we are all supposed to be subject to effective checks in how we exercise our authority. That premise has been repeatedly challenged by some independent counsels who seem to interpret reasonable oversight as a violation of their independence. We will have to decide whether the current law can be amended to include appropriate checks and balances.

Another problem is the politicization of the independent counsel process. Instead of insulating the investigation of top officials from politics as the law was meant to do, the law has too often become a political weapon offering repeated political flashpoints. For example, in addition to political criticism of independent counsels, the Attorney General has been subjected to severe attacks for either appointing independent counsels too readily or for failing to appoint them in particular cases. Since the Supreme Court has held that the Attorney General's authority to request appointment of independent counsels is a constitutional necessity, I don't see any way to cure that aspect of this statute by amendment, even if cures can be found in other areas. If this statute is renewed, that's a problem we would just have to live with.

In the next few months, this Committee and the Congress will decide whether to amend the current law or whether a different approach is required. I'm open to both solutions. However, I am not supportive of simply letting the independent counsel law expire and leaving to chance or fate how we handle the future criminal investigations against our very top federal officials.