STATEMENT OF JANET RENO, ATTORNEY GENERAL

Before the Senate Committee on Governmental Affairs
March 17, 1999

Mr. Chairman, Members of the Committee:

Thank you for inviting me to present the views of the Department of Justice on the Independent Counsel Act. The Justice Department has administered the Act since its inception in 1978. It has done so under my watch since 1994, when the statute was last reenacted. Since its reauthorization, the Department has had extensive experience with the statute -- experience that has influenced our assessment of it. After much reflection and inquiry, we have decided - reluctantly - to oppose reauthorization of the Independent Counsel Act.

Before explaining the reasons for this decision, I must preface my observations with a caveat. It is very important that my remarks do not, in any way, interfere with any ongoing investigations or litigation involving an independent counsel. And so I cannot comment on the work of any particular Independent Counsel, or provide examples or details regarding a specific investigation. I will focus, instead, on the structure of the Independent Counsel Act itself and on what I believe are its inherent, though unintended, consequences. In 1993, as many of you know, I testified in support of the statute. I said that the law has been a good one, helping to restore public confidence in our system's ability to investigate wrongdoing by high-level Executive Branch officials. I believed then, and I believe now, that there are times when an Attorney General will have a conflict of interest. I also believed then -- as I do now -- that to keep the public's faith in impartial justice, that in such a case someone other than the Attorney General must sometimes be put in charge of the investigation.

Prior to becoming Attorney General, I had functioned under a procedure in Florida under which the Governor could reassign a particular matter to another prosecutor in the event of a conflict of interest. This mechanism provided for parity and accountability. Parity was ensured because an elected prosecutor of equal rank would oversee the case as part of his or her caseload and within his or her budget; accountability because the elected Governor and the prosecutor would both have to answer to the public for their actions. This procedure also insured that the prosecutor who was recused had no further control of the case. Based on that experience, I believed that the Independent Counsel Act could have the same effect due to its particular mechanism for transferring prosecutorial power to an outside person.

However, after working with the Act, I have come to believe -- after much reflection and with great reluctance -- that the Independent Counsel Act is structurally flawed and that those flaws cannot be corrected within our constitutional framework.

<u>The Origins of the Independent Counsel Act</u>

Let me begin by addressing the reasons that gave rise to the present Independent Counsel Act. Congress passed the Act as a post-Watergate reform, intending to prevent the reoccurrence of the crisis in government that arose when President Nixon directed that Special Prosecutor Archibald Cox be fired. President Nixon's decision ultimately precipitated the resignation of the Attorney General and the Deputy Attorney General.

The Act was based upon the premise that a conflict of interest may exist when the Justice Department of any particular Administration investigates the highest ranking officials of that Administration. Therefore, the Act established a prosecutorial entity to handle such cases that would be separate and apart from the Administration and the Department of Justice. Only in this way, the drafters reasoned, could the investigation have sufficient credibility to provide assurance to the American people that there had been no coverup and no undue political influence exerted in favor of the Administration.(1)

There can be no question that these goals are highly desirable. In fact, by seeking to prevent conflicts of interest, the Independent Counsel Act appeared to be consistent with the long-established practices of the Department of Justice and other prosecutorial offices, in that it provided an alternative prosecutor in those limited circumstances in which the prosecutor with original jurisdiction was forced to recuse himself or his office.

The Act Has Failed to Promote Public Confidence that Politics is Absent From the Process

Unfortunately, the Act has failed to live up to its promise. In the first place, it has failed to instill confidence among the public that politics has been removed from the process. This is so, in large part, because the Act requires the Attorney General to make key decisions at several critical stages of the process -- whether to open a preliminary investigation, whether to seek appointment of an independent counsel, what subject matter to refer to the court when seeking a counsel, and whether to remove him or her. This central role for the Attorney General was not just a congressional choice, but a constitutional mandate. In Morrison v. Olson, the Court made clear that the Act was constitutional because it required the Executive Branch -- through the Attorney General -- to play a critical role in these key decisions. But the very thing that makes the statute constitutional is also what prevents it from accomplishing its goals. For an Attorney General, after all, is a member of the President's cabinet, and as such, his or her decisions will inevitably be second guessed and criticized no matter what decision is made.

Whenever a high-level official is accused of wrongdoing, the stakes are high. Almost by definition, these are significant cases that generate a lot of interest -- in the newspapers, up here on Capitol Hill, and in political circles across the country. As a consequence, just about every decision becomes controversial - be it an Attorney General decision whether to trigger the Act and seek the appointment of an independent counsel, or an independent counsel's decision to pursue a particular prosecutorial course. And I have come to believe that the statute puts the Attorney General in a no-win situation. Or, as I have said in the past: an Attorney General is criticized if she triggers the statute, and criticized if she doesn't.

On the other side of the equation, the decisions of an independent counsel are no less subject to criticism and second-guessing. Once again, I'm not saying any of this is fair or not fair, justified or not justified, right or wrong. I'm just saying that it is natural, and that this climate of criticism and controversy weakens -- rather than strengthens -- the public's confidence in the impartial exercise of prosecutorial power. And that, at the end of the day, undercuts the purpose of the Act. Instead of giving people confidence in the system, the Act creates an artificial process that divides responsibility and fragments accountability.

The Act Removes the Constraints of Prosecutorial Discretion

The Act has other built-in characteristics that, I believe, have also contributed to the public's disenchantment over the years. We have heard much about the extraordinary expense associated with a number of independent counsel investigations. These costs are, in large part, built into a system that requires an independent counsel to set up a brand-new office -- which means hiring lawyers, administrators, clerical staff, consultants, and renting out office space -- and are compounded by the unique expectations placed upon a Counsel: that the Independent Counsel will go down every investigative side street, that he or she will prepare a comprehensive final report, that the Counsel will litigate attorneys' fees. This is a very expensive way to do business.

The statute imposes other costs that are not so easily quantified - such as its effect on the role of the prosecutor and her or his relationship to the subjects of the investigation. I have been a prosecutor for most of the last 25 years, and I think I can fairly say that the Independent Counsel Act creates a prosecutor who is unlike any other. Virtually all other prosecutors have limited time, limited budgets, and a great many actual and potential targets. And so we have to make choices: We have to identify the most important cases, make judgments about the most important allegations, and allocate our limited resources accordingly. Also, we draw upon the collective experience of senior prosecutors to develop consistent prosecutorial practices from case to case.

I'm talking, of course, about what's known as prosecutorial discretion. Several of you are former prosecutors, and so you know that the exercise of this discretion is not a formulaic science. Rather, much like common sense, judgment, and wisdom, it comes with experience, and it comes from handling a variety of cases so that you learn to treat similar cases similarly. Deciding to prosecute isn't a simple matter of deciding that the law has been broken. It also entails a much more complicated judgment about competing priorities, prosecutorial policies, and the public interest.

The Independent Counsel Act distorts this process. In trying to ensure independence, the statute creates a new category of prosecutors who have no practical limits on their time or budgets. They have no competing public duties, and no need to make difficult decisions about how to allocate scarce resources. They are not required to take into account the overall prosecutorial interests or traditions of the Department of Justice (they are bound only to comply with the written and other established policies of the Department of Justice to the extent not inconsistent with the purposes of the statute). An independent counsel typically is charged with investigating one person -- and so all of his or her energy, ingenuity, and resources are pointed in one direction. Add to this the fact that an Independent Counsel may labor in the public spotlight and under the watchful eye of

history. An independent counsel will be judged, not on the basis of a broad track record, but on one case alone. If the Counsel uncovers nothing, or fails to secure an indictment and conviction, some may conclude that he or she has wasted both time and money.

All of these factors combine, I believe, to create a strong incentive for the independent counsel to do what prosecutors should not be artificially pushed to do -- that is, to prosecute. Again, I am not commenting on the work of any particular independent counsel. These are simply the incentives that the statute creates.

A Return to First Principles

It is for these reasons that the Justice Department has concluded that the Independent Counsel Act is structurally and fundamentally flawed, and that it should not be reauthorized. But let me be clear, also, about what our position does not mean. It does not mean that allegations of high-level corruption should be pursued with anything less than the utmost vigor and seriousness of purpose. And it does not mean that the Department considers itself capable of pursuing, in the ordinary course, each and every allegation of corruption at the highest levels of our government. We know that, sometimes, a special prosecutor is in order.

Yet we have come to believe that the country would be best served by a return to the system that existed before the Independent Counsel Act -- when the Justice Department took responsibility for all but the most exceptional of cases against high-ranking public officials, and when the Attorney General exercised the authority to appoint a special prosecutor in exceptional situations.

Our Founders set up three branches of government: a Congress that would make the laws, an Executive that would enforce them, and a judiciary that would decide when they had been broken. The Attorney General, who is appointed by the President and confirmed by the Senate, is publicly accountable for her decisions. The Attorney General must answer to the Congress -- and, ultimately, to the American people. And in this day of aggressive journalism, sophisticated public advocates, and skilled congressional investigators, we are held -- I believe -- more accountable than ever.

In contrast, the independent counsel is vested with the full gamut of prosecutorial powers, but with little of its accountability. He has not been confirmed by the Senate, and he is not typically subject to the same sorts of oversight or budgetary constraints that the Department faces day in and day out. Accountability is no small matter. It goes to the very heart of our constitutional scheme. Our Founders believed that the enormity of the prosecutorial power -- and all the decisions about who, what, and whether to prosecute -- should be vested in one who is responsible to the people. That way -- and here I'm paraphrasing Justice Scalia's dissent in *Morrison v. Olson* - whether we're talking about over-prosecuting or under-prosecuting, "the blame can be assigned to someone who can be punished."

It was for this reason that the American republic survived for over 200 years without an Independent Counsel Act. When high-level officials have been accused of wrongdoing, the

Department has not hesitated to fully investigate. Over the last two decades, the Department of Justice has obtained the convictions of 13,345 public officials and employees from both sides of the political aisle. The Department prosecuted Vice President Spiro Agnew while he held office and also Bert Lance, the Director of the Office of Management and Budget, soon after he left the Administration.

The Attorney General has also stood ready, under his or her authority, to appoint a special prosecutor when the situation demanded it. Paul Curran investigated allegations concerning a peanut warehouse owned by President Carter's family while he was still in office. Leon Jaworski investigated President Nixon, members of his Cabinet, and others. And although the President ordered the firing of Mr. Jaworski's predecessor, Archibald Cox, Jaworski showed that a non-statutory special prosecutor can do exactly what must be done: investigate high-level members of an Administration even when the President is bent on subverting the investigation. Perhaps the real lesson of our nation's experience with the Special Prosecutor during Watergate is not that the old system was broken -- but that it worked.

Apart from the Act's overall structural problems, our experience has persuaded us that other problems further exacerbate the statute's costs and burdens. These other problems exist in a different category from the ones I have been talking about, as they could be addressed -- with varying degrees of effectiveness -- with changes to the statutory language here and there. And although I will share these thoughts with you, I want to reiterate that the Department believes that any such changes -- while making a bad law better -- would not remedy the statute's fundamental flaws.

The Scope of the Act

First, we have concluded that the group of individuals automatically covered by the Act is too broad. By extending mandatory coverage to so many individuals -- including White House officials at a certain pay level, cabinet officers, campaign officers, and others -- the Act presumes a conflict of interest where none usually exists.

The Department of Justice can effectively, aggressively and credibly investigate or prosecute the majority of these public officials. Mandatory coverage of such a large group is particularly unnecessary in light of the Act's alternative provisions -- which give the Attorney General discretion to seek appointment of an independent counsel whenever the prosecution of any individual would constitute a conflict of interest.

The Triggering Mechanism

Another area where the Department has encountered repeated difficulties involves the mechanisms and standards by which the Act is "triggered." Having now applied these concepts, I understand how hard it is to write into the U.S. Code the sort of intricate standards that prosecutors develop after years of experience. I can only say that the statute, while making a valiant attempt, does not succeed.

During an initial inquiry under the Act, the Attorney General must decide in 30 days whether there are grounds to investigate whether a covered person "may have violated any Federal criminal law." In making this decision, the Act requires the Attorney General to decide whether the information supporting the allegations is 1) specific, and 2) from a credible source. Now, as a prosecutor, I've had a fair amount of experience with assessing credibility. I've learned -- sometimes the hard way -- that credible sources are sometimes mistaken. And I've also learned that less than credible sources are sometimes accurate. The statute seems to ignore these possibilities. Also, the term "may have violated" is very broad and subject to many interpretations. As a result, the Act sometimes requires the Department to take action that it would never take in an ordinary case against a non-covered person.

The most serious problem with the Act during the initial inquiry phase, however, is its treatment of the issue of criminal intent. The Act tells the Attorney General that no matter what the evidence shows -- or does not show -- about the subject's intent, she is not to consider it. Now, as many of you well know, intent is often the critical question in criminal law. Forcing the Attorney General to decide whether an allegation is specific and credible -- and at the same time barring her from considering the central element of intent -- is unfair to the subject and misleading to the public.

The Decision Whether to Seek an Independent Counsel

Following a preliminary investigation, an Attorney General must decide whether an independent counsel should be appointed. She must seek an independent counsel if she concludes that "there are reasonable grounds to believe that further investigation is warranted." This standard, too, is unclear and subject to differing interpretations. After all, most of us think that "some" further investigation can almost always be warranted, and there's usually a doubt or two that you'd like to resolve -- especially if there are no constraints on time and money. But should an investigation proceed even where there is no reasonable prospect of making a prosecutable case? The statute does not provide a clear answer to that question. And any effort to read reason into the standard in a particular case often generates much criticism and controversy.

The problem regarding criminal intent persists into this phase of the process as well. Again, the Act prohibits the Attorney General from deciding that no further investigation is warranted because of a lack of criminal intent -- unless, that is, there is clear and convincing evidence that the subject did not have the requisite intent. This standard -- which requires proof of a negative by clear and convincing evidence -- is extraordinarily difficult to apply. And it also stands traditional prosecutorial decisions on their heads. In almost every criminal case, we will not proceed without some positive evidence of intent.

Another problem with the statute is that it deprives the Department of the normal investigative tools: we cannot subpoena witnesses or documents, convene grand juries, plea bargain, or grant immunity during the preliminary investigation. Without the subpoena power, we are greatly handicapped in our search for the truth. And coupled with the short timetable for conducting the investigation, this restriction can prompt the unwarranted appointment of an independent counsel -- because we can't find all the facts that we otherwise could have, given the proper tools.

The Selection Process for an Independent Counsel

After the Attorney General has decided to seek the appointment of an independent counsel under the Act, the next step involves the actual selection process by the three-judge panel known as the Special Division. However, the Act gives the judges no real standards or qualifications to look for in making their choice. It provides for no selection protocol, visible or otherwise. And, as Judge Butzner has stated, in some instances the Special Division has encountered great difficulty in finding someone available for appointment as an Independent Counsel, resulting in a significant delay of the investigation.

Jurisdictional Disputes

The Act's jurisdictional provisions have emerged as a serious problem, at times leading to disagreements between independent counsels and the Department and often requiring a great deal of time to resolve. While most disagreements have been ironed out cooperatively between independent counsels and the Department, there have been several conflicts over who should handle certain matters. At the heart of these disagreements seems to be a basic and fundamentally different view as to the appropriate role of the independent counsel. The Department views the Act as a limited solution to a limited problem: that is, as an appropriate response when a conflict of interest precludes us from investigating specific allegations against a particular person. In our view, matters outside that limited category of cases can -- and should -- be handled by the Department in the ordinary course.

Given the ambiguities in the statute, however, there is a natural tendency for independent counsels to view themselves as full-scale prosecutors, and to believe themselves authorized to investigate all avenues -- wherever (and to whomever) they may lead. This impulse to expand one's jurisdiction is, again, a natural reaction to the statutory scheme itself -- and to the incentives it creates to secure convictions or to otherwise justify an investigation's time and expense.

There has been some litigation over this issue. Rejecting the Department's position that the Attorney General's consent is required, the Special Division has held that it may refer to an Independent Counsel the jurisdiction to investigate matters that are "related" to the original grant of jurisdiction without first obtaining the consent of the Attorney General.

In addition, the courts have defined a "related" matter in a way that we believe is unduly expansive. As a result, an Independent Counsel can be given jurisdiction to investigate the friends and associates of a covered person for alleged crimes that have only the most tangential relationship to the core allegations. I suggest that this expansion goes far beyond any possible need for the statute, and that it hurts -- rather than helps -- the statute's effectiveness.

In addition to the "relatedness" problem, there is also confusion about what constitutes a matter "arising out of" an independent counsel's investigation. Remember, the statute gives an independent counsel jurisdiction to investigate crimes that "may arise out of" the central investigation. The Department has always taken the position, based on examples in the Act and

the legislative history, that this language refers to interference with the investigation itself, like obstructing justice or committing perjury. Some independent counsels and some courts, however, have read the language to cover any crime unearthed by the independent counsel during the course of the investigation. Again, we believe that such jurisdictional expansions are unwarranted, unintended, and unwise.

Finally, there have also been disagreements between the Department and independent counsels over the counsels' authority to handle civil matters. The Department does not believe that independent criminal prosecutors should be able to bind the United States in civil suits and settlements. We believe that this provision was intended to be limited to instances where the civil authority is essential to the successful completion of the criminal matter, such as handling a civil contempt case involving a witness, or intervening to request that a civil case be stayed pending resolution of the criminal case.

Removal

This discussion of jurisdictional disputes and issues brings me back to the subject of checks and balances -- or the lack thereof -- provided by the Act. It is difficult for the Department to litigate or even express these views without being accused of improper interference with an independent counsel's work. Indeed, I will not be surprised if my observations today are challenged by some on that ground -- though, as I said at the outset, and as I've tried to make clear, I am talking about the structure of the Act and the incentives it creates, not the actions of any particular independent counsel. If even such generalized testimony can be read as impinging on an independent counsel's independence, I would ask you to think about how much more difficult it would be for an Attorney General to exercise his removal authority under the Act. The removal provision -- which the Supreme Court highlighted as central to the statute's constitutionality -- allows the Attorney General to remove an independent counsel for enumerated causes. Implicit in the Attorney General's authority to remove must be the authority to investigate serious allegations of misconduct that come to her attention. But how can the Department investigate an independent counsel without being charged with trying to bridle the Counsel's independence? It will always be extremely difficult for any Attorney General to exercise the authority to investigate, let alone remove, an independent counsel.

The Final Report Requirement

A final problem that I wish to address briefly is the Act's requirement that an independent counsel prepare a final report. On one hand, the American people have an interest in knowing the outcome of an investigation of their highest officials. On the other hand, the report requirement cuts against many of the most basic traditions and practices of American law enforcement. Under our system, we presume innocence and we value privacy. We believe that information obtained during a criminal investigation should, in most all cases, be made public only if there is an indictment and prosecution, not in lengthy and detailed reports filed after a decision has been made not to prosecute. The final report provides a forum for unfairly airing a target's dirty laundry. And it also creates yet another incentive for an independent counsel to over-investigate -- in order, again, to justify his or her tenure and to avoid criticism that the independent counsel

may have left a stone unturned. We have come to believe that the price of the final report is often too high.

Conclusion

The mission of the Independent Counsel Act is as worthy today as it was back in 1978. There are a limited number of criminal matters that should be handled in a special way, in order to assure the American people that politics will play no role in our criminal justice process.

But we at the Department have come to believe that the Act's goals have not been well-served by the Act itself -- and that we would do better without a statute. Instead, the Department would utilize the Attorney General's authority to appoint a special prosecutor when the situation demands it. The regulations that are now on the books provide a set of procedures for the appointment of such a non-statutory independent counsel. These regulations would naturally require review in the event that the Act lapses. But I want to emphasize that this Committee and Congress can rest assured that if the Act expires with no new legislation enacted, that the Department will be prepared to enforce its regulations to address any issue that the Act was intended to cover. As we move forward in making changes to these regulations, we greatly encourage input from this Committee.

As I said at the outset, my change of heart about this statute has not come lightly. To those who question me about this -- or who tell me, as some already have, that they told me so -- I can only say this: I've now seen how the statute operates close-up, and I know more than I did before. It is as simple as that. I'm reminded of something Justice Frankfurter once said:

Wisdom too often never comes, and so one ought not to reject it merely because it comes late.

Again, I appreciate the chance to share my thoughts with you, and I will be happy to respond to your questions.

1. H.R. Rep. No. 1307, 95th Cong., 2d Sess. 3 & n.5 (1978); S. Rep. No. 170, 95th Cong., 2d Sess. (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 4221, 4281-82.