Judge David B. Sentelle
Opening Statement Before
SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS HEARINGS
April 14, 1999

My appearance is in response to your request and is authorized by Canon 4 of the Code of Judicial Conduct which provides that judges may "consult with a legislative body . . . on matters concerning the administration of justice." Code of Conduct for Judges, Volume II, Chapter 1, Canon 4.

As I stated in my letter to the Committee of March 25, 1999, I cannot ethically speak to purely political questions, including the fundamental question of whether to reauthorize the Act. Further, I cannot breach the confidence of my colleagues on matters on which the Court conferred *in camera*. I will however attempt to address the specific issues suggested by Senators Thompson and Lieberman in their letter of March 19, 1999, as well as some other areas consistent with the administration of justice exception created in Canon 4.

First, as to the areas mentioned in your letter:

(l) The Committee expresses an interest in my views concerning the appointment process. I can only relate to you the mechanics of the appointment process as followed in the last 6 ½ years under my service as Presiding Judge and what I have gathered from the files and correspondence of my immediate predecessor The Honorable George E. MacKinnon who served for approximately 7 ½ years next preceding me. During my tenure the Court has maintained a Talent Book including the names and brief biographies of attorneys of relevant skill, particularly in federal and white collar crime. We have emphasized those attorneys who have experience as federal prosecutors and/or federal judges. The names are drawn from the personal experience and recollection of the judges comprising the panel and we have accepted suggested names from anyone who has chosen to submit either themselves or acquaintances as possible nominees. At such time as the Attorney General has requested the appointment of an independent counsel, I have searched the file of names to assemble a long list of attorneys whom I believed to be qualified and well-suited for the particular investigation at hand. Each of my colleagues has added names which he considered appropriate possible nominees and deleted such names from the list as he might consider inappropriate. Most but not all of the names we consider have come from the existing Talent Book. Others have been suggested by members of the panel or outside sources.

When we have satisfied ourselves that we have removed all those names who have apparent conflicts or for other reasons might not be appropriate nominees, we take the resulting shorter list and either I or one of my colleagues contacts each person on it to ask if he or she is interested in serving as an independent counsel for the particular matter at hand. If so, we inquire whether the person knows of any conflicts of interests which might create a problem. This has generally resulted in a reduction of the list to a short list from 4 to 7 names. We have then generally submitted that list to the Federal Bureau of Investigation for a name check. If any of the name checks had resulted in sufficiently negative information, we have removed that name. We then

schedule interviews with the remaining potential nominees. These interviews have been held with all three judges present in Washington, except during the two year tenure of Judge Joseph Sneed of the Ninth Circuit who was unable to travel for medical reasons. During that period, the interviews were often done by conference telephone call. At the interviews, we have explored any possibilities of conflict that might have been theretofore overlooked. Because of the shortness of the list and the confidentiality of the setting, we have been able to go into more detail on the subject matter of the investigation. This process has often resulted in the removal of still further names so that only around 2, 3, or 4 possibilities remained. From that remaining very short list the Court has usually been able to achieve consensus on the person to be appointed. In a few instances the interview process resulted in the removal of all potential nominees and the panel had to begin the process all over.

From what I have gathered from files of my predecessor, Judge MacKinnon's panels followed approximately the same process, with the exception that he did not maintain a Talent Book although he did keep files of persons considered in previous appointments but rejected for case-specific conflicts. It appears from the records that in at least 1 or 2 instances, those panels also rejected all possible nominees and started over.

(2) You have asked me to address the question whether the Court can exercise any oversight over an Independent Counsel. My answer is that the panel can exercise no or at least virtually no oversight. When the Supreme Court upheld the constitutionality of that portion of the Ethics in Government Act creating Independent Counsels and empowering the Special Division to appoint them in the *Morrison v. Olson* opinion, it upheld the Act as constitutional precisely because the powers bestowed on the Panel by the Act, "do not impermissibly trespass upon the authority of the Executive Branch." 487 U.S. 680-681. Therefore, the Supreme Court held that the Act as a whole "does not violate the separation of powers principle by impermissibly interfering with the functions of the Executive Branch." *Id*. at 696-97. In short, we are an Article III panel. If we supervise the carrying out of Executive functions, we then cross the line of separation of powers by interfering with the carrying out of Article II of the Constitution by an Article II officer. While there may be peripheral matters within the relationship of the Independent Counsel to the Courts which could be said to be within the oversight of the Article III institution, in the end the short answer is that we do not oversee the functioning Independent Counsel and cannot constitutionally do so.

(3) You have further asked that I address the manner in which an existing Independent Counsel's jurisdiction can be expanded. There are two. The first is a literal "expansion of jurisdiction" pursuant to 28 U.S.C. § 593(c). Under that section, "the Division . . . may expand the prosecutorial jurisdiction of an independent counsel and such expansion may be in lieu of the appointment of another independent counsel." The Division may make such an expansion only upon the request of the Attorney General. Thus, for actual expansion of jurisdiction in the terms of the statute to occur, the Attorney General must request such an expansion from the Division and the Independent Counsel must accept that expanded jurisdiction just as in the case of an appointment of a new independent counsel. 593(c)(2) provides the procedure by which the Independent Counsel upon finding information concerning possible violations of criminal law not encompassed within the original jurisdiction may submit such information to the Attorney General preliminary to such an expansion.

The second manner in which an existing Independent Counsel might be said to be expanded is through a referral of a related matter pursuant to § 594(e). Under this section the Independent Counsel may apply either to the Attorney General or directly to the Division for referral of matters related to the Independent Counsel's prosecutorial jurisdiction. If the Counsel applies to the Attorney General and she rejects that application, under our case law, we have held that the Court cannot reconsider her rejection, but that her word is final. If she grants the application, then the panel routinely accepts it. If the Independent Counsel applies directly to the Court, we can then make an independent determination as to whether the matter in question is a related matter within the terms of the statute. If it is, we can so hold and make a referral placing the matter within the jurisdiction of the Independent Counsel. We have held that such a referral from the Court must be "demonstrably related" to the Independent Counsel's current jurisdiction. *In re Espy*, 80 F.3d 501, 509.

(4) Finally, you have asked that I address the Court's role in determining whether an Independent Counsel's investigation has been substantially completed. The present version of 28 U.S.C. § 596(b)(2), provides for termination by the Court upon the Court's determination that the Independent Counsel has so substantially completed the assigned investigation or investigations that it would be appropriate for the Department of Justice to complete that investigation. Although we have considered this question on a few occasions, we have never as yet found ourselves in a position to make the determination that an Independent Counsel's task has been substantially completed absent an application by the Independent Counsel. Because we are an Article III body and not a supervisor, we are not well-suited to make that determination absent a proceeding initiated either by the Independent Counsel, the Attorney General, or a subject of the investigation. On at least 2 occasions, parties other than the Independent Counsel have asked the Court to declare a task of an Independent Counsel substantially completed and terminate the office. We then heard from the Independent Counsel. In neither instance was the court convinced that this was appropriate. As an Article III body, we are ill-suited to decide that question in the abstract, and I would reserve an answer for specific facts that might be brought before the Court.

That concludes the matters about which you had asked me directly. With the indulgence of the Committee, I would like to speak to a few of the proposals which I have been advised may come before the Committee as revisions if the statute is retained at all. Before making these remarks I would hasten to say that I am NOT taking a position on whether the statute should be continued in existence, but rather simply making some observations based on my experience that I hope the Committee will consider if it does decide to continue the statute.

(1) Under § 599 of the existing statute, if the statute is allowed to lapse by its terms, ongoing investigations continue. I understand that there are proposals to set termination dates for continuing investigations. In the interest of the administration of justice and as a former trial judge, federal prosecutor, and defense attorney, I would suggest that such a deadline would be inimical to the ends of justice. Such a deadline would provide dual perverse incentives. It would first be an incentive to prosecutors to act in haste, perhaps precipitously either indicting people who should not be indicted or dismissing cases that should not be dismissed. Conversely, it would give an incentive to defense attorneys to cause delay, already a great problem with the courts.

(2) There are two features of the existing Act that I suggest the Committee might wish to re-visit if it proposes to continue the legislation in effect. Both relate to the avowed purpose of the Congress in enacting the original statute of placing persons within an Administration on the same footing as other citizens who might potentially become the subjects of criminal investigation and prosecution. The first is the requirement of the existing Act that the Independent Counsel file a final report, "setting forth fully and completely a description of the work of the Independent Counsel, including the disposition of all cases brought." This report requirement has no counterpart in federal criminal law outside the Act and exposes the subjects of investigation to derogatory information that has never been tested by a trial process and was apparently not sufficient to be the foundation for an indictment. The present version of the Act is an improvement over the pre-1994 version which required that the Report "includ[e] the reasons for not prosecuting any matter within the prosecutorial jurisdiction of such Independent counsel." Compliance with that earlier provision made it difficult, if not impossible, for an Independent counsel to file the Report without such derogatory information but it remains problematic even without the express requirement. I therefore suggest that the Committee, if it decides to propose a continuance of the statute at all, seriously consider revision or deletion of the final Report requirement.

Almost as a footnote to my discussion of that reporting requirement, I would further suggest that the Committee might reexamine § 594(h)(1)(a) which requires the filing with the Court of 6-month reports of expenditures by each Independent Counsel. That section neither requires nor empowers the Court to do anything with those filings so that we review and file the reports at the expense of the taxpayers and the Courts to no good end. Other provisions of law require that the Independent Counsel make financial reports to the accounting arms of the Congress. Accounting entities are far better equipped to deal with the financial reports than the Courts. The General Accounting Office is a much more appropriate recipient of such reports than the Court and the Committee might consider deleting the requiring of the filing with the Court in any future version of the Act.

Finally, § 593(f) of the statute provides for the award of reasonable attorney's fees to any individual who has been the subject of an Independent Counsel investigation but was never indicted and would not have incurred the attorney's fees in question except for the requirements of the Independent Counsel Statute. Like the reporting requirements, this attorney's fees award has no counterpart in standard federal criminal law. I am not suggesting that the award provision should necessarily be deleted from any new version of the statute, but I note that its administration will be more difficult if the reporting requirement is deleted as I have suggested it might be. I would therefore suggest that the Committee might give serious consideration to a more specific statute setting forth the criteria for the award in more specific terms. I do not suggest that the Court could not manage to administer the present provision with the well-advised input of both the Independent Counsel and the Department of Justice, but I do suggest that Congress might consider giving more specific guidance.

That would conclude my prepared remarks.