**Statement of Kenneth Starr before the**
**United States Senate Committee on Governmental Affairs**
**Hearing on the Future of the Independent Counsel Act**

Thursday, April 14, 1999, 9:30 a.m.
Hart Senate Office Building, Room 216

Mr. Chairman, Senator Lieberman, and Members of the Committee:

I am grateful for your invitation to testify today on the reauthorization of the Independent Counsel Act, and possible alternatives to the Act. This law represents one response to an enduring question, a question that seems to take on more immediacy each day: How can the government retain the trust of the people when high-level officials stand accused of misconduct? In answering that question, we do not write on a blank slate. We are mindful of the strictures laid down by the Founders, who themselves sought to promote trust in government. We are mindful, too, of the lessons of history and experience.

The principles that guide us are crucial ones. I have thought about them as Counselor and Chief of Staff to the Attorney General of the United States, as an appeals court judge, as the Solicitor General, as a teacher of constitutional law, and now as an Independent Counsel -- the first Independent Counsel to be assigned five distinct investigations, and the first to inherit the wide-ranging work of a regulatory special counsel, the distinguished lawyer Robert Fiske. My evaluation of the statute grows out of the whole of this experience.

My current role must limit my remarks in one important respect. I cannot address certain topics in light of grand jury secrecy, pending prosecutions, and ongoing investigations. I respectfully ask your forbearance.

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Judge Learned Hand observed that every law is "at once a prophecy and a choice." The prophecy and the choice embedded in the Independent Counsel statute were, from the law's first enactment 21 years ago, somewhat tentative. Unlike most laws, this one was written to expire after five years. It has been retooled and reenacted three times since, but always with this sunset provision.

Now, once again, the experiment is scheduled to come to a close. And once again, witnesses have drawn varying lessons from the experiences of the last five years.

I too have drawn some lessons, as I will explain. But I must make one point clear from the outset: I am not here to outline the perfect solution. To the contrary, the Independent Counsel law forces us to make painful trade-offs. Not all of our goals can be achieved. As Attorney General Reno testified, we face "a very complex, difficult issue in which there may be no right answer."

This is the core of that issue: On occasion, government officials face actual or apparent conflicts of interest. Their judgment might be swayed by outside considerations. Even if some of them are

capable of superhumanly blocking out such concerns and deciding solely on the merits, the public may distrust them.

The classic example, the one underlying this law, is when an Attorney General tries to investigate criminal allegations relating to the President or those close to the President. In the words of Archibald Cox, testifying in the 94th Congress: "The pressures, the divided loyalty are too much for any man, and as honorable and conscientious as any individual might be, the public could never feel entirely easy about the vigor and thoroughness with which the investigation was pursued. Some outside person is essential." By appointing outside counsel, we seek to ensure three things: (i) that government officials are held to the highest standards; (ii) that allegations of misconduct are closely scrutinized; and (iii) that those who betray the public trust are prosecuted vigorously.

This practice was established long ago. Presidents or their Attorneys General appointed prominent outside lawyers to investigate and prosecute the Whiskey Ring in the 1870s, Teapot Dome in the 1920s, corruption in the Justice Department in the 1950s, and Watergate in the 1970s. While political pressures were sometimes brought to bear, Presidents retained their full discretion. No law forced the appointment of these historic Special Prosecutors.

And no law regulated the firing of them, as was done to Archibald Cox. In response to the public outcry, the Administration installed a new Special Prosecutor, Leon Jaworski. The investigation proceeded, leading to the conviction of a number of Administration officials and, ultimately, to the resignation of the President.

Although we commonly hear that the system worked in Watergate, success was not preordained. Testifying before this Committee last month, Henry Ruth -- a senior official in the Watergate Special Prosecutor's office -- described the period between Archibald Cox's dismissal and the appointment of Leon Jaworski by saying: "it's impossible to describe how thin a thread existed."

In the years after Watergate, Congress pondered various reforms. Many deemed it essential to take at least some investigations and prosecutions out of the hands of a presidentially appointed Attorney General, and to do so through the force of law, lest Henry Ruth's "thin thread" give way. Some favored creating a permanent, independent office to investigate and prosecute high government officials. Others recommended making the Justice Department as a whole independent of the Administration. Senator Sam Ervin proposed an autonomous Attorney General who would serve a fixed term longer than the President's.

Such proposals raised pragmatic as well as constitutional issues. For example, Theodore Sorensen, the author (and attorney) who had served in the Kennedy White House, wrote that such well-intentioned reforms would diminish the potency of voters in our system. As he noted, some citizens, perfectly appropriately, decide how to vote based on such issues as civil rights, antitrust, environmental protection, and the war on drugs -- issues that would be largely expunged from the presidential campaign if Attorneys General became autonomous. In this respect (as in many others), politics ultimately cannot be separated from accountability.

While rejecting the notion of an independent Justice Department, Congress continued to seek some statutory solution. The ultimate approach -- the Independent Counsel provisions of the

Ethics in Government Act -- sought to institutionalize what had been done ad hoc: the selection of outside lawyers to conduct certain sensitive investigations.

But critics have argued that our efforts to institutionalize have only worsened the problems. Former Attorney General Civiletti, for example, told the House Judiciary Committee last month that "the Act is hopelessly flawed and cannot be repaired," a belief rooted in what Mr. Civiletti diagnoses as "insurmountable inherent problems with the structure and operation of the Act." Attorney General Reno and Deputy Attorney General Holder made similar points in their testimony here and in the House.

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Let me briefly discuss two key changes from the pre-Act status quo. First, the language of the statute makes the appointment of an outside prosecutor mandatory under certain circumstances. Second, this outside prosecutor is selected by a special three-judge court.

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I start with the mandatory language in the statute. Attorneys General historically enjoyed absolute discretion on whether to appoint outside lawyers to handle particular investigations. As enacted in 1978 and reenacted since, the statute commands that, under certain circumstances, the Attorney General must do so. This represented a dramatic break from our traditions.

It also represented a break from broader legislative trends. The statute was first passed in an era of deregulation, when the legal constraints on many important Article II functions were being loosened, and when we were moving away from the familiar "command and control" regulatory approaches.

The statute is also unusual in what it seeks to regulate: the professional legal judgment of the Attorney General as to a criminal investigation. The evaluations of evidence, including its specificity and credibility, are not like parts per million of a toxic substance in groundwater. Rarely if ever had Congress tried to regulate so specifically such unquantifiable matters. And rarely had Congress sought to tell the Attorney General precisely how, and how not, to reach a professional judgment. The statute, in its current form, bars Attorneys General from using grand juries, plea bargains, immunity, or subpoenas in their preliminary investigations, and it restricts their ability to consider one element of most crimes, the individual's state of mind.

There is another, more fundamental anomaly, one that colors the statutory system as a whole. When Congress regulates through broad language -- the phrase "public convenience and necessity" in the 1934 Communications Act, for instance -- it ordinarily relies on an administrative agency (such as the FCC) to flesh out the generalization through detailed regulations. The courts then review those regulations in what amounts to a back-and-forth dialogue with the agency, which in turn informs future Congressional action.

The regulatory regime of the Independent Counsel law is strikingly different. An Attorney General's decision on triggering the statute is not subject to judicial review. In a sense, then, Congress enacted a statute covering situations when the Attorney General's objectivity, for one

reason or another, cannot be trusted -- and then placed total, unreviewable trust in the Attorney General. The language of the statute evokes the regulatory model, but the language proves, in practice, hortatory, not mandatory.

There are powerful constitutional concerns underlying this anomaly. Law enforcement is at the heart of the Executive power under our Constitution. It is the President's solemn duty to take care that the laws be faithfully executed. When asked to direct the exercise of this duty, the courts are ill at ease (and perhaps institutionally ill-equipped).

Indeed, many students of the Constitution believed that the Independent Counsel statute, even absent judicial enforcement, would be found unconstitutional as a violation of the separation of powers. That was my own view. But, in Morrison v. Olson, the Supreme Court upheld the law. The Court stressed that the law did not and could not substantially trespass on the Executive power of law enforcement. The Justices noted the "unreviewable discretion" conferred on the Attorney General in certain matters. So, for a variety of pragmatic and constitutional reasons, the Independent Counsel law only partially reflects the regulatory model of legislation. Two consequences bear mention.

First, as I noted, the lack of judicial review bars the sort of evolution that we see in other regulatory realms, where the agency, the courts, and Congress conduct a continuing dialogue. Under this law, Attorneys General are free to make completely ad hoc decisions. They must explain some but not all decisions, but they are never required to reconcile a current one with the Department's past interpretations of the statute.

Second, I believe that the public, for perfectly understandable reasons, does not fully apprehend the magnitude of the Attorney General's discretion under the statute. As a result, an Administration is not held fully accountable for the exercise of that discretion. People tend to believe that laws are enforceable by the judiciary. This one, in substantial part, is not.

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Along with the superficially mandatory but legally toothless statutory language, a second major shift from past practice concerns the selection of the outside prosecutor. The job of choosing the outsider is no longer in the Administration's hands. Instead, the three-judge panel makes the appointment.

Like the statute as a whole, this provision grew out of concerns about public trust. Soon after Leon Jaworski's appointment, the New York Times editorial page asserted that "Mr. Jaworski's personal integrity is not in doubt, but he is fatally handicapped from the outset because he enters the Watergate investigation as the President's man." If the Attorney General could not be trusted to conduct an investigation, then perhaps he or she could not be trusted to select the investigator either.

That principle led to my appointment. In 1993, the Justice Department was investigating Madison Guaranty Savings & Loan, Whitewater Development Corporation, and the relationship between the two. Pressure mounted for the Attorney General to appoint a regulatory special counsel to take over the investigation -- a counsel, that is, whose independence would be

protected only by Justice Department regulations, and not by federal statute. Attorney General Reno resisted. Echoing the 1973 New York Times editorial, she argued that people who didn't trust her to conduct the investigation wouldn't trust her to select the investigator.

Then, in early 1994, the President himself requested that she appoint a special counsel. The Attorney General complied. Senior Justice Department staff sounded out several candidates -- I was one of them -- before the Attorney General decided on Robert Fiske.

Six months into Mr. Fiske's investigation, the 103d Congress

reenacted the Independent Counsel law. Pursuant to the statute, the Attorney General asked the three-judge panel to appoint an Independent Counsel to carry the investigation forward. She recommended the statutory appointment of Mr. Fiske. But the judges decided to appoint someone new -- not, they emphasized, because of any dissatisfaction with Mr. Fiske's performance, but rather because of the philosophy underlying the statute. The law said that Independent Counsels were not to be chosen by the Attorney General, so the three-judge panel appointed someone else.

A word about party identification. Like Mr. Fiske, I am a Republican assigned to investigate a Democratic official. This has been the usual practice. Someone identified with the party out of power has ordinarily been chosen to conduct the investigation. In Watergate, for example, Professor Cox was a Democrat who had held positions in three Democratic administrations. Senator Thurmond said at the time that he was pleased to have a Democrat investigating President Nixon, because "it might instill more confidence in the investigation."

If the statute is not reenacted, I anticipate that this practice will continue. Indeed, Attorney General Reno told this Committee that she would appoint as special prosecutors (if the occasions arose) such individuals as "a former U.S. attorney who served in a Republican administration."

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Those, then, are the key features of the statute concerning the appointment of an Independent Counsel. Let me turn now to the Independent Counsel's investigation. The statutory goal, again, is to bypass the Administration's conflict of interest -- to empower an outsider to investigate and, if appropriate, to prosecute. In other words, to do what the Justice Department itself would do but for the conflict.

That's the theory. The reality is more complicated.

For one thing, an Independent Counsel must start from scratch. Judge Walsh made the point well in his final report on Iran-contra: "[An] Independent Counsel is not an individual put in charge of an ongoing agency as an acting U.S. attorney might be; he is a person taken from private practice and told to create a new agency . . . ." Doing so not only takes time; the costs can be substantial.

In addition to the start-up costs and delays, an Independent Counsel's office is obliged to do for itself what the Justice Department does for most federal prosecutors. In practice, this means that some lawyers in Independent Counsel offices get diverted from their prosecutorial work by

Freedom of Information Act requests and the like. An Independent Counsel cannot benefit from the economies of scale that the Justice Department has achieved over time. This, too, increases the cost of Independent Counsel investigations.

Alongside these prosaic distinctions, there is a fundamental difference between an Independent Counsel and a U.S. Attorney. The Independent Counsel is a prosecutor of limited jurisdiction. He possesses authority to investigate the subject matter that led to his appointment, and (in the words of the law) "all matters related to that subject matter." But that's all. As Deputy Attorney General Holder testified before the House, Independent Counsels simply do not possess "all the authority that other prosecutors have," and they cannot "investigate and prosecute all avenues, wherever those avenues may lead." My office, like other Independent Counsel offices, has referred matters outside our jurisdiction back to the Justice Department.

The jurisdictional limits on Independent Counsels are entirely understandable. The statute seeks to shift responsibility for the rare investigation that raises a conflict, not for federal law enforcement in general. The strict limits on the Independent Counsel, moreover, were central to the Supreme Court's constitutional holding in Morrison. An Independent Counsel's jurisdiction may be "fuzzy at the borders," as the D.C. Circuit said a few years ago, but there are borders. Constitutionally, there have to be.

Still, these limits complicate our investigations enormously. A U.S. Attorney sometimes can persuade a witness to cooperate by gathering evidence of an unrelated crime that the witness committed. Mr. Fiske followed this tack as regulatory special counsel investigating Whitewater. A statutory Independent Counsel, in contrast, must seek jurisdiction to cover the unrelated crime. Without it, he or she may not be as effective.

More important day to day, the jurisdictional limits give rise to a powerful weapon for delay. Witnesses or subjects, fighting subpoenas or indictments, can argue in court -- and frequently do -- that the Independent Counsel has exceeded his or her jurisdiction. Such arguments arise even when the Independent Counsel has scrupulously followed the steps in the law for establishing jurisdiction. And that, like all litigation, can consume enormous amounts of time.

For example: On June 7, 1995, a grand jury in Little Rock indicted then-Governor Jim Guy Tucker and two associates, in a matter initially investigated by Mr. Fiske and then, after reenactment of the statute, specifically referred to my office by the Attorney General. Three months later, the Little Rock trial judge dismissed the indictment on jurisdictional grounds. We appealed, with the aid of the Justice Department (which filed an amicus brief on our behalf), and the Eighth Circuit not only reversed this unfounded ruling, but assigned the case to a different judge. The defendants took months unsuccessfully seeking further review. The last step -- the Supreme Court's denial of certiorari -- came on October 7, 1996, exactly sixteen months after the grand jury in Little Rock had returned the indictment. (Mr. Tucker eventually entered a guilty plea in February 1998, almost three years after the indictment.)

We faced jurisdictional issues again last year in the tax case against former Associate Attorney General Webster Hubbell. To confirm that a particular matter falls within the office's jurisdiction, an Independent Counsel can go either to the Attorney General or to the Special Division under Section 594(e) of the statute. We had made a prudential decision, under the circumstances, to

seek Special Division authorization for matters related to Mr. Hubbell rather than going before his former colleagues at the Department. The Special Division unanimously confirmed that we possessed the necessary jurisdiction, and we proceeded. The grand jury indicted Mr. Hubbell and three other defendants on April 30, 1998. But the district court here in Washington dismissed the indictment. We appealed. On January 26 of this year, the D.C. Circuit reversed the trial court's jurisdictional ruling and reinstated the indictment. Further appellate review remains possible.

We lost sixteen months to the Tucker jurisdictional battle and, so far, nearly a year to the Hubbell one. These are battles that a U.S. Attorney's office would not have to fight. This is a serious problem, one that is inherent in the Independent Counsel structure.

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An Independent Counsel differs from a Justice Department prosecutor in another important respect: the duty to report.

In his testimony before this Committee in 1973, Archibald Cox -- who had not yet taken office as Special Prosecutor -- observed that the public wanted enforcement of the criminal laws and prompt public disclosure of the facts. Professor Cox told the Committee that "the focuses of these two inquiries . . . their character and the responsibilities wouldn't always be identical."

Indeed they are not. Independent Counsels originally were required to produce final reports discussing, among other things, their reasons for not prosecuting any matters within their jurisdiction. Federal prosecutors do not ordinarily allege improprieties without charging them in court. Congress, concerned about this deviation from normal law-enforcement practice, modified the reporting requirement in 1994 but did not drop it. Here as elsewhere, Congress seemed to be trying to use the Independent Counsel mechanism to achieve ends traditionally served by Congress itself, in this case public hearings and reports.

The witnesses before this Committee have been virtually unanimous in their opposition to final reports. I concur. If the statute is reauthorized, I respectfully recommend that Congress eliminate the report requirement. Compiling the report and (as the statute dictates) seeking comments from persons named in it are burdensome and costly tasks. And, as Mr. Fiske said in his testimony here, the requirement may encourage Independent Counsels to continue turning stones after they have concluded that no prosecutable criminal case exists. We should leave to others -- to Congress, journalists, and, ultimately, the people

-- the task of making broader judgments about matters under investigation.

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In addition to the final report requirement, Independent Counsels are subject to a second reporting requirement. It, too, is one that does not apply to ordinary prosecutors. This is the requirement, embodied in Section 595(c) of the Act, that an Independent Counsel inform the House of Representatives of particular information that, in the words of the statute, "may constitute grounds for an impeachment."

When we searched the legislative history for guidance on this provision, we found almost nothing. The root of the requirement seemed to be Leon Jaworski's report to Congress during the Nixon impeachment. We learned that the Justice Department opposed the provision in 1977, arguing (presciently) that, "[i]n view of the ambiguity of what constitutes grounds for impeachment, this provision will only serve to create confusion."

We could have shipped the raw evidence with nothing more last fall, but we believed, like Mr. Jaworski, that we were obliged to try to bring order and coherence to the information. In 1974, with House impeachment proceedings already underway, this was a relatively straightforward task for Mr. Jaworski. Under different circumstances and with a different legal obligation, we believed that we needed to include a fuller analysis.

Indeed, we felt we had some obligation to explain to Congress why, in our judgment, this information met the 595(c) standard. The law required us to decide whether particular presidential acts might be impeachable, and we believed that we ought to share our reasoning, at least to the extent of explaining how the evidence comported with the elements of particular federal felonies and with the apotheosis of impeachable misconduct, abuse of power.

We limited our report to matters that we had investigated, and we limited our investigation to possible crimes related to Jones v. Clinton. We omitted from the report certain information in our possession, including now-public, gravely serious allegations, because evaluating those matters was beyond the scope of our law enforcement investigation.

While we did our best to heed Section 595(c), I question its wisdom. For one thing, it is curious to impose this statutory duty on one, and only one, federal prosecutor. Justice Department attorneys may come across information that might lead to the impeachment of federal judges, for instance, but there is no parallel disclosure requirement. Whatever rule is adopted, it ought to apply to all federal prosecutors.

In addition, this responsibility further politicizes Independent Counsel investigations. An impeachment inquiry, Alexander Hamilton predicted in Federalist 65, often "will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other." By complying with Section 595(c), we were invariably but wrongly seen as part of the political proceeding of impeachment.

More important, impeachment is a central, nondelegable Congressional duty. As Professor Akhil Amar of Yale Law School has pointed out, it is curious for the legislative branch to defer on so vital a matter to an inferior officer of the Executive branch.

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Impeachment is not unique in this regard. Testifying here last month, former Senator Baker observed that the Independent Counsel mechanism has encouraged Congress to back away from its oversight responsibilities and (in his words) to "say, not only [that] the independent counsel will handle it, but that perhaps there's something not quite right about Congress looking into the matters that are being investigated by an independent counsel."

When a government scandal arises, we often face a choice between prompt public disclosure of the facts or vindication of the criminal laws. In the main, Congress can get the facts out quickly by immunizing witnesses, but, as the Iran-contra investigation demonstrated, immunized testimony can vastly complicate prosecutions. The criminal justice process, in contrast, ordinarily will not disclose all the facts. Prosecutors often talk of the gulf between what they know and what they can prove beyond a reasonable doubt to a jury, bearing in mind the elements of the crime and the limits on admissibility of evidence. The breadth of their inquiries also differs. As Professor Sam Dash has observed: "The scope of congressional committee investigations and hearings is generally broader than those of investigations and prosecutions conducted by independent counsel." And the criminal justice process may not disclose critical facts for months or years -- especially when, as I have noted, the prosecutor must frequently litigate over jurisdiction.

Facing this choice between prompt public disclosure and vigorous law enforcement, Congress in 1978 struck the balance in favor of law enforcement. It seemed all to the good, but we must also consider that when a scandal is eroding public confidence, speedy disclosure is preferable to slow justice.

Moreover, citizens' political and policy judgments will be shaped, quite properly, by an unfolding Congressional investigation. If an Administration withholds crucial documents or testimony on the basis of Executive privilege, for example, citizens ought to be able promptly to incorporate that into their assessment. The American people can get that information in a timely manner from a Congressional investigation. Not so with a grand jury investigation.

When Congress defers to the criminal justice system, presidential accountability thus may suffer. As former Assistant Attorney General Timothy Flanigan testified before the House Judiciary Committee last month, the Framers would have said that the cure for misconduct by Executive branch officials is "vigilance on the part of the Legislative Branch and appropriate use by Congress of its investigative and, yes, even its impeachment powers."

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Now I would like to discuss, briefly, accountability of a different sort. I mentioned that the Department of Justice filed an amicus brief on our behalf in the Tucker litigation. It may surprise some to learn that the Justice Department is filing briefs in Independent Counsel cases. The Independent Counsel possesses, in the words of the statute, "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice." Shouldn't the two entities be walled off from each other?

In theory, perhaps they should be, but in practice they are not. Institutionally, in fact, they cannot be. To a much greater degree than people realize, the Department can help or hinder an Independent Counsel.

The statute provides that an Independent Counsel "may request assistance from the Department of Justice . . . and the Department of Justice shall provide that assistance." But this provision, like so many parts of the statute, lies beyond judicial review.

The Department has the raw power to refuse to provide assistance, or to drag its feet. In this regard, an Independent Counsel is dependent upon, and thereby vulnerable to, the Administration that he is investigating. The tension is an institutional one, which exists regardless of the particular Administration or Independent Counsel. As Attorney General Reno testified in 1993, "the relationship between the Department and Independent Counsels [is] difficult at times," characterized by "undue suspicion and resistance, on both sides."

The Justice Department also has ample power to hinder an investigation directly. In Judge Walsh's words, "Since World War II only five independent counsel have investigated a president; two were dismissed; two of us have been investigated by the displaced attorney general; only Leon Jaworski was unmolested." Mr. Jaworski of course took office under exceptional circumstances. History thus teaches that outside prosecutors investigating Presidents are likely to be scrutinized, impeded, and sometimes fired.

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Independent Counsels are vulnerable in a larger sense as well. In high-profile cases, as Professor Julie O'Sullivan said in her testimony, "those under investigation or their political allies have every incentive to impugn the integrity and impartiality of any statutory IC who uncovers wrongdoing." For Presidents under investigation, Henry Ruth observed, the lesson of recent history is: "[A]ttack. Attack the lawyers, attack the witness[es], attack the prosecutor, attack the laws the prosecutor seeks to enforce."

There are several dimensions to this attack strategy. First, independence can be misrepresented as antagonism. As Professor O'Sullivan noted: "[P]recisely because the Independent Counsel is independent of the administration . . . [he] can be painted as hostile to it."

Second, the Department of Justice -- which has incentives to come to the aid of a U.S. Attorney or a regulatory special counsel under assault -- has no incentive to help a statutory Independent Counsel. With no institutional defender, Independent Counsels are especially vulnerable to partisan attack. In this fashion, the legislative effort to take politics out of law enforcement sometimes has the ironic effect of further politicizing it.

Third, it is impossible for an Independent Counsel to respond effectively to attacks. The Justice Department, as part of an Administration, can invariably get its message out, but an Independent Counsel who responds to criticism simply invites more of it.

Prosecutors investigating public figures, of course, are accustomed to brickbats. The point was well stated in an article co-written a few years ago by Deputy Attorney General Holder: "[P]owerful figures increasingly seem to characterize criminal investigations of their alleged illegal conduct as 'political witch hunts.' This type of epithet only serves to unfairly impugn the motives of prosecutors and to undermine our legal system . . . ."

But I think we have seen something more than the norm. Our office was subjected to what the Washington Post's Howard Kurtz has termed "an extraordinary assault on a sitting prosecutor."

My office was not the only target. The three judges on the Special Division likewise were subjected to remarkable attacks, to which they could not respond.

In the midst of this tumult, we found ourselves litigating Executive privilege, governmental attorney-client privilege, and a Secret Service privilege. We won virtually every case. Most of the rulings came quickly, thanks to the tireless labors of highly conscientious judges (Chief Judge Johnson in particular), but the litigation consumed months of time.

While the judges worked diligently inside the courthouse, a carnival-like atmosphere prevailed outside. Some grand jury witnesses cowered in anguish as they were aggressively pursued by TV cameras. Other witnesses used the cameras for their own ends, including to disseminate falsehoods about what had transpired in the grand jury room.

Meanwhile, the assaults took a toll. A duly authorized federal law-enforcement investigation came to be characterized as yet another political game. Law became politics by other means. The impact on public attitudes was unmistakable, as the comments of potential jurors in the Susan McDougal trial demonstrated. As noted by others, including Attorney General Reno, the statutory mechanism intended to enhance confidence in law enforcement thus had the effect of weakening it.

After carefully considering the statute and its consequences, both intended and unintended, I concur with the Attorney General. The statute should not be reauthorized.

The reason is not that criminality in government no longer exists. Nor is the reason that the public has grown serenely indifferent to our tradition of holding government officials to a high standard. Rather, the reason is this: By its very existence, the Act promises us that corruption in high places will be reliably monitored, investigated, exposed, and prosecuted, through a process fully insulated from political winds. But that is more than the Act delivers, and more than it <u>can</u> deliver under our constitutional system. Briefly:

- The statutory trigger is unenforceable. If we're going to rely on the Attorney General's good faith, then we should do so forthrightly. We should acknowledge that the Attorney General is the indispensable actor in federal law enforcement, and hold her accountable for the exercise of that authority. Significantly, this is the view of Attorney General Reno and all of her predecessors who have testified here or in the House this year.
- The mechanical simplicity of the language in the statute camouflages the inescapable exercise of professional judgment and discretion. The focus should be on whether the Department is capable of conducting an impartial investigation. The statute, by trying to create a litmus test for partiality, distracts us from that central concern.
- Because the Independent Counsel is vulnerable to partisan attack, the investigation is likely to be seen as political. If politicization and the loss of public confidence are inevitable, then we should leave the full responsibility where our laws and traditions place it, on the Attorney General (or, where she deems it appropriate, her appointee as special counsel) and on the Congress.
- The statute leaves the Independent Counsel substantially dependent on the Department of Justice, which may have incentives to impede, or at least not assist, his work.

- The law may have the unfortunate effect of eroding respect for the judiciary, through attacks -- unanswered and institutionally unanswerable -- on the Special Division. It is one thing to turn the political attack machine on a prosecutor; it is quite another to turn it on the judiciary.
- The law also may have the effect of discouraging vigorous oversight by the Congress, in a departure from our traditions.
- In a variety of ways, the statute tries to cram a fourth branch of government into our three-branch system. But, invariably, this new entity lacks (in Madison's phrase) the "constitutional means . . . to resist encroachments." The result is structurally unsound, constitutionally dubious, and -- in overstating the degree of institutional independence -- disingenuous.

To be sure, returning to the pre-Act regime entails undisputed disadvantages. There was no golden age of special prosecutors.

If the past is any guide, more investigations are likely to stay in the Justice Department, with no outsider appointed. That means -- again, if the past is any guide -- more politically tinged cases in which the investigation will be seen, fairly or unfairly, as something less than thoroughgoing.

Then there is the possibility that politics will play a role. On occasion, as Timothy Flanigan pointed out last month, "men and women who are deeply involved in the political passions of their times" will be overseeing a law enforcement investigation "that may have far-reaching political implications."

Professor Cass Sunstein, though he opposes the statute, acknowledges that the law probably has deterred crime by (in his words) "letting high-level officials know of the serious consequences of any illegal conduct." As investigations into public corruption are seen as becoming less vigorous, the deterrent effect will diminish.

When a case is closed with no indictments, the public may be more skeptical. As Nathan Lewin pointed out, a statutory Independent Counsel provides additional reassurance of fairness and thoroughness in such instances.

More gravely, restoring the regime of regulatory special counsels may invite another Saturday Night Massacre, this time with a different outcome. The "thin thread," as Mr. Ruth put it, may give way the next time; the final cover-up may succeed -- as, in the view of some historians, occurred in the 1870s when President Grant fired a special prosecutor at a crucial moment of the investigation.

We should not overlook these risks. But we have to make trade-offs. In light of all the factors, I respectfully recommend that the statute not be reenacted.

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If, however, the Congress does decide to modify and reenact the statute, I urge you to beware of gimmicks. Attorney General Reno said of the current system, "It can't get any worse . . . ." With all due respect, I disagree. The system could indeed be made worse, and one of the proposals before you would have just that effect.

I speak of the proposal to impose a time limit on investigations. As Senator Levin said in 1993, "Complex Federal criminal cases often take years to investigate." And, as Senator Levin also wisely noted, many of the people who complain the loudest about the slow pace of an investigation tend to be the ones who themselves have delayed it.

Remember, too, the tactics of defense attorneys. According to his biographer, the legendary trial lawyer Edward Bennett Williams invariably employed the same strategy in each major criminal case that he handled. The strategy: delay. As Mr. Ruth said before this Committee last month, "[t]he second you set a time limit, 23 people get a one-way trip to China," for "delay is the first principle of defense."

A time limit, even if it allowed extensions in unusual circumstances, would confer few benefits while imposing significant costs. Any attorney worth his or her salt knows how to delay proceedings in subtle and not-so-subtle ways, such as the sixteen months we lost while litigating jurisdiction in the Tucker case. A Procrustean time limit would invite lawyers to run out the clock.

If you do reauthorize the statute, I urge you to broaden the Attorney General's discretion. Greater emphasis should be placed on Section 591(c), which gives the Attorney General the authority to seek appointment of an Independent Counsel whenever an investigation raises a conflict of interest. The list of categorical triggers in Section 591(b) should be shortened. As for the preliminary investigation under Section 592, the time limit should be extended or abandoned. The Attorney General should be given authority to use traditional law enforcement tools to gather information, and the authority to take into account the full panoply of traditional prosecutorial considerations.

Some witnesses have suggested that the Independent Counsel's jurisdictional limits be tightened, perhaps by eliminating the provision for expansions. In the view of these witnesses, an Independent Counsel with an expanding mandate, as the law now permits, may appear to be pursuing a personal vendetta, or at least a prosecutorial fiefdom.

In our investigation, the Department and the Special Division expanded our jurisdiction four times, to cover matters related to the firing of White House Travel Office employees, the accumulating of FBI files in the White House, the Congressional testimony of a former White House Counsel, and, finally, Monica Lewinsky. In some of those instances, the expansion came at the Department's initiative; we agreed to accept the added jurisdiction, which we had not sought. The number of expansions is unique, and it may have fed the misconception that we were investigating individuals rather than crimes. Let me make clear: that was not the case. Indeed, I am as proud of our decisions not to bring several indictments as I am of anything else we have done.

Keep in mind that in each of the jurisdictional expansions, the Attorney General concluded that she faced a conflict of interest. If she had not acted to expand our jurisdiction, she would have been obliged to seek the appointment in each instance of a new Independent Counsel. Eliminating jurisdictional expansions thus will substantially increase start-up costs and delays. It also may produce even more litigation over jurisdiction, leading to still greater costs and delays.

There is one proposal that I endorse wholeheartedly: Senator Baker's suggestion that the Congress postpone any decision on the statute for a cooling-off period, or, perhaps more aptly, a ceasefire. Let the statute lapse. Monitor the Justice Department's record in selecting regulatory special counsels. And then reassess after the current intensities have passed, and when -- in the words of Federalist 2 -- no one will be "influenced by any passions except love for their country."

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In conclusion, I think it is fair to say that the Act has been a worthwhile experiment. Like most experiments that are professionally conducted, it has yielded significant results. The results, I believe, support this conclusion: Jurisdiction and authority over these cases ought to be returned to the Justice Department. And who will oversee them? The Congress, the press, and the public.

This is not, as I said, a perfect solution. It will no doubt give rise to imperfect outcomes. But it puts me in mind of Winston Churchill's famous remark about democracy -- the worst system, he called it, except for all the others. Returning the authority over these prosecutions to Attorneys General, and relying on them to appoint outside counsel when necessary, is the worst system -- except for all the others.

In this difficult realm, solutions are bound to be transitory. Twenty-five years after the Saturday Night Massacre, we are still searching for a reasonable, effective, and constitutional approach. No matter what the Congress decides, no matter what microsurgical precision is applied to fine-tune the statute, these problems will endure.