OPENING STATEMENT OF HOWARD H. BAKER, JR.
BEFORE THE
UNITED STATES SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS
ON THE FUTURE OF THE INDEPENDENT COUNSEL ACT

Former Attorney General Griffin Bell and I served as co-chairmen of the Miller Center Commission on the Separation of Powers. The Miller Center of Public Affairs at the University of Virginia was established in 1975 as a non-partisan research institute that supports scholarship on the national and international policies of the United States. The report on the Separation of Powers, which included a section on the Independent Counsel Statute, was released on December 7, 1998. Judge Bell, a distinguished lawyer, judge and U.S. Attorney General in the Carter Administration, was a major contributor to the deliberation of the Commission, but particularly on the Independent Counsel Statute. The Commission based its findings and recommendations largely on his paper on this subject.

Both Judge Bell and I lived through, and in the wake of, the chaos surrounding Watergate. I remember vividly the Senate debates on the enactment of the first Independent Counsel Act in 1978. At that time, there was a general consensus that something had to be done to separate from the Justice Department the responsibility to investigate and prosecute alleged crimes by named individuals, including the President, the Vice President and the Attorney General. At the same time, I and many others had serious doubt about the constitutionality of a proposal that would diminish or displace the authority of the President and, through him, the Department of Justice for faithful execution of the laws of the land. However, subsequently, the Supreme Court in *Morrison v. Olson* (1988) held the Act to be constitutional.

But the Independent Counsel Act was one of a series of measures enacted after Watergate which, if not unconstitutional, have been proved by experience to be unwise. These measures, bearing virtuous-sounding titles such as "campaign finance reform" and "ethics in government", have in practice had pernicious effects on campaigns and on the operation of the government. This disappointing and frustrating result only confirms that the mind of man is incapable of anticipating for very long the practical effects of sweeping public policy legislation.

It seems clear to me that, with respect to the Independent Counsel Statute, the time has long since come for mid-course corrections. Our system is good at that. We recognize that our legislative and policy ideas and proposals are never perfect and that the public policy arena is one of continuing readjustment.

It was the conclusion of the Miller Center report that the Independent Counsel Statute should be permitted to expire by its terms in June of this year. We believe that some sort of policy is necessary to insulate the President, the Attorney General and others in high office from the possibility of conflict, but that the complexities and deficiencies of the Independent Counsel Statute are such that it seems to us better to start by writing on a clean slate.

As pointed out by Professor Sam Dash, who was Counsel for the Majority in the Senate Watergate Committee, in a recent column appearing in the *New York Times,* the problems and difficulties involving the Independent Counsel Statute really are a commentary on how federal

prosecution routinely operates. If that is so, as it may well be, then I would commend to the Committee a broader inquiry than just the renewal of the Independent Counsel Statute.

I have no doubt that the Congress, through this committee and others, can draft a statute appropriate to the challenge and minimize the difficulties with the present law. I am also convinced that the better part of legislative discretion would be to let this act expire, to let tempers cool and to address the issue of federal prosecution in a broader, more detached and objective way.