STATEMENT OF JULIE R. O'SULLIVAN

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Chairman Thompson and members of the United States Senate Governmental Affairs Committee, my name is Julie Rose O'Sullivan, and I am a professor of law at Georgetown University Law Center. I appreciate the opportunity to appear before you to express my view that Congress should allow the Independent Counsel ("IC") statute to lapse, or should at least substantially revise that statute. My view is shaped by my experiences as an Assistant United States Attorney in the Southern District of New York from 1991-1994, and as an Associate Counsel in the office of the regulatory Whitewater Independent Counsel, Robert B. Fiske, Jr., and in the office of the statutory Whitewater Independent Counsel, Kenneth Starr, in 1994. In my incarnation as a law professor, I have studied this issue and published two law review articles on the subject of the independent counsel mechanism.(1) I have appended to this statement one of those articles, which sets out at some length the full basis for the opinions I express in summary form today. A few preliminary points seem to me clear:

First, the statute, as presently constituted, is not achieving its intended purpose: ensuring the appearance and the reality of equal justice in cases where allegations of wrongdoing have been lodged against public officials of importance to the executive branch. The IC statute is overused; it is invoked to displace the Department of Justice ("DOJ") in many cases where, in public perception and in reality, the likelihood is low that political pressure will taint the investigation. Thus, the statute guards against the appearance of a DOJ conflict in lower profile cases where no such problem exists. In the higher profile cases at the heart of the statute, and particularly where the President is the subject of the investigation, the statute creates political incentives for partisans to attack the appearance of impartiality the statute is intended to safeguard. Given the visibility of the statute, and press and public interest in its workings, the political consequences of a referral and either an indictment or a declination in a high-profile case are too serious for political actors to leave the process unattended. Politics today seem to demand that doubt be cast on the independence, judgment, or ability of an IC where the actions of that IC may interfere with partisan interests, either of the administration or of its political foes.

Thus, the administration under investigation and its allies have every interest in appearing cooperative while attacking as biased or incompetent any IC who actually uncovers criminal conduct. The opposing political party has every incentive to keep the case in the news, to press for a result discrediting the person under investigation and the administration with which that person is affiliated, and to attempt to create questions about the judgment of an IC who exonerates the subject. In the high-profile cases at the heart of the statute, then, the partisan object--and the predictable consequence of this political dynamic--is to undermine what the statute seeks to promote: public confidence in the results of an IC investigation in politically sensitive cases.

Even if the statute does not effectively cure "appearance" problems, one could argue that it is necessary to ensure the "reality" of the equitable administration of the criminal laws. The statute has increasingly come under attack because of perceived inequities and excesses in IC functioning. It is my impression that the IC statute, while deeply flawed, is not as pernicious as is

presently perceived. It seems to me likely that at least some of the allegations of IC abuse currently circulating will not be proved or will, in retrospect, be thought to be problems endemic to the vast powers and discretion vested in federal prosecutors in general and not to ICs in particular. However, for all the reasons set forth in the attached article, I do believe that in the final analysis the statute, and the political dynamic it generates, creates unique incentives for ICs to employ their vast, unchecked powers to impose a harsher and potentially inferior brand of justice upon those subject to IC investigations. On balance, it seems to me that the IC statute is not worth its high cost in human, financial, and systemic terms.

Second, there is no magic solution to the problem sought to be addressed through the statute. Any proposed solution--whether it be a substantially revised statutory independent counsel regime or regulatory treatment by the Department of Justice--will be subject to criticism and will ultimately depend upon the good faith, ability, and perceived honesty of future Attorneys General and investigating attorneys.

Third, despite this, we cannot simply abandon the effort to arrive at the best possible solution. A critical part of that solution is narrowing the scope of the problem by separating those potential targets that require the extraordinary intervention of an IC from those that do not. In presumptively covering persons by reference to their office, and not distinguishing among subjects by reference to their actual importance to the President, the heavy artillery of the IC statute is often brought to bear on persons and cases that do not warrant it in terms of any realistic likelihood of the actual or perceived subversion of law enforcement. We all know that the operation of the statute--and the operation of politics and the press on the statute--mean that IC targets will be subjected to scrutiny that is longer, more intensive, more invasive, more expensive, and more public than that which the average citizen would suffer. If such burdens are imposed where there is no reason to suppose that they are necessary to ensure the appearance or reality of equal justice, it seems to me very unfair and very wasteful. Overuse also needlessly undermines public confidence in the integrity of the DOJ--a systemic consequence that should be of major concern to all involved in criminal law enforcement.

Fourth, as even the most vocal critics (myself included) of the IC statute concede, there must be *some* mechanism through which serious charges of criminal misconduct by the President or those closest to him can credibly be investigated and resolved. The challenge is selecting the approach that has the best chance--given institutional and political realities--of promoting the appearance and reality of justice in these extraordinary cases *and* of providing some means of political accountability in the event justice is not done. The choice, it seems to me, comes down to whether Congress should enact a truncated statute that requires the Attorney General (or her delegee in situations of conflict) to appoint an IC when allegations of qualifying criminal misconduct have been lodged against the President, and perhaps the Vice President and Attorney General, or whether the appointment of ICs should be effected through DOJ regulations in appropriate cases.

I believe the latter option is the better one principally because it holds out at least the possibility of political accountability for the selection and conduct of an IC. The advantages of such accountability outweigh whatever price may be paid in perceived independence, especially given my thesis that the political dynamic growing out of the statute works to severely undermine the

public credibility of IC results. Commentators have traditionally isolated the tradeoff between independence and accountability as the heart of the difficulty in allocating responsibility for criminal investigations of important Executive Branch officials. The way that this is normally expressed is that the prosecutor's independence from executive control is indispensable to a credible result. Yet with true independence comes the potential for prosecutorial abuses of power because ICs are, for practical purposes, not accountable to or controllable by anyone. Since the last reenactment of the statute, commentators have increasingly come to recognize that the accountability tradeoff is more complex and more serious than was previously discussed. Viewed from the IC's perspective, the more independent an IC is, the more vulnerable he is to politically-inspired attacks. The fact that an IC is not appointed by the administration or confirmed in the normal course means that no politically responsible person stands behind the IC and everyone can take a shot--with predictable consequences for the perceived politicization of the investigation. The accountability that has been traded for independence, then, is not simply the accountability of the prosecutor for his own actions, but also the political responsibility of public officials for the actions of the IC. By returning responsibility to the DOJ for the choice of ICs, and giving DOJ some limited authority in the IC's investigation (by, for example, controlling the IC jurisdiction and budget), we can potentially address both accountability concerns: an abusive IC can be reigned in, and the appointing administration will have to take political responsibility for the actions (or inaction) of the IC.

To illustrate, three cardinal features of the IC statute are designed to ensure that the public can have confidence in an independent investigation of executive wrongdoing. An examination of each reveals that regulations probably would be equally effective in furthering this congressional objective while increasing the potential for political accountability.

1. "Forced" Attorney General Referrals. The statute purports to restrict the Attorney General's discretion in appointing an IC. By having allegedly mandatory triggers with respect to certain "covered persons," the statute attempts to ensure that the executive will not simply sweep wrongdoing under the carpet when allegations are leveled against the Executive Branch officials presumed to be closest to the President and Attorney General. In response to the failure of an Attorney General to refer matters to the Special Division in instances where Congress felt such referrals were warranted, Congress has constrained the scope of the Attorney General's referral discretion and mandated a very low referral standard. The problem is, of course, that Congress constitutionally cannot divest the Attorney General of authority regarding the initiation of criminal investigations. Thus, Congress's efforts do not change the fact that an Attorney General still has the unreviewable power to refuse to make a referral for illegitimate reasons--for example, because an IC investigation would be politically injurious to the administration. All that Congress has succeeded in doing, then, is forcing an Attorney General who is committed to the principled application of the statute or who is not particularly concerned about the fallout in cases of little political importance to refer a great many more cases than the purposes of the statute require.

Perhaps more important than the statute's inability to achieve its aim is the fact that the highly technical statutory triggering mechanism may in fact provide a sort of shield against political accountability. If complete discretion for the appointment of an IC were returned to the Attorney General, he would be subject to pressure to appoint an IC without respect to the technical

requisites of the statute. An Attorney General, then, would have to take responsibility for a failure to appoint an IC when, in public perception, it is necessary. The focus of the debate would not be technical arguments about whether certain evidentiary standards have been met but rather whether the interests of justice require an IC appointment under the circumstances.

A regulatory regime in which the Attorney General is solely responsible for its invocation potentially would have another benefit: ensuring that (what should be) the extraordinary IC mechanism is only invoked in instances where the DOJ truly has an appearance of a disabling conflict. A statute that presumes that the DOJ will be conflicted with respect to office, rather than the perceived importance or connection of a particular person to the Attorney General or President, will necessarily be both under- and over-inclusive.

2. Selection of the IC by the Special Division. The statute attempts to ensure the appointment of someone not beholden to the administration by vesting appointment powers in the U.S. Court of Appeals for the District of Columbia Circuit, Special Division for Appointing Independent Counsels ("Special Division"). The theory is that if an IC appointed by the Attorney General declines a case, that declination will always be suspect because the public can never be entirely certain that the failure to go forward was not influenced by the source of the IC's power. As I understand it, this is one of the principal reasons articulated for the continuation of the statutory IC regime--that it is critical to ensure public confidence in declinations involving high-ranking executive branch officials. My quarrel with this evaluation is one of degree--I do not believe that a declination by a regulatory IC can never be credible because credibility depends to some extent on who the IC is, how the IC has conducted the investigation, and what the IC has found. I do concede, however, that the fact that an IC was chosen by the Attorney General will provide hostile partisans with additional ammunition with which to attempt to impeach the eventual result of an investigation if that result is a declination.

In determining whether this factor should be determinative, one must examine whether a statutory IC is immune from this dynamic. I submit that experience demonstrates that statutory ICs are subject to a similar problem. In a high-profile case in which, for example, the President is under investigation, and where the Special Division appoints the IC, those under investigation or their political allies have every incentive to impugn the integrity and impartiality of any statutory IC who uncovers wrongdoing. They are able to do so precisely because the IC was not chosen by the administration and thus can be painted as inevitably opposed to it. Selection by the Special Division, far from providing an IC cover against political attack, may actually aggravate the problem because partisans may call into question the impartiality of that body. Thus, where a regulatory IC's perceived connection with the administration may be employed by partisans to discredit an eventual declination, a statutory IC's distance from, and perceived hostility to, the administration may be used by partisans to discredit an eventual finding of criminality.

In the end, given the political incentives created by the existence of any independent counsel investigation where the President or those closest to him are under investigation, it may well be that *no* statutory or regulatory IC will emerge entirely unscathed but some results will be more immune from attack than others. Where a declination is the eventual result of the investigation, it will be most credible if rendered by a statutory IC; if, however, a criminal prosecution is instituted, it will probably be most credible if initiated by the administration's own regulatory

counsel. The difficulty is, of course, that we cannot forecast the result of any investigation in advance and use the appointing mechanism that will likely generate the most credible result. Further, to some extent the degree to which politically motivated attacks may be successful in undermining the public confidence necessary to a successful IC investigation--whether under statute or regulation--may depend on the credentials, vulnerabilities, and conduct of the IC at issue and not on the person who actually performed the selection. We simply cannot today forecast how future regulatory or statutory ICs will fare.

That said, we know that the statutory selection mechanism probably will not achieve its desired end in many cases. It also may have serious collateral consequences in that the incentive it creates for partisans to attack sitting federal judges as politically motivated may impair the confidence of the American public in the impartiality of the federal judiciary generally. It is time, then, to consider the advantages inherent in Attorney General selection under DOJ regulations.

The principal virtue of this approach would be to return the entire responsibility for the fair and effective administration of justice in these difficult cases to the Attorney General. Even where a regulatory counsel is under the regulations "independent," the Attorney General would likely suffer at least some of the fallout if the IC proves to be dishonest, ineffective, or abuses the powers of his office. No longer will politically unaccountable and publicly invisible actors--the Special Division--be the sole persons standing behind an IC. The Attorney General--a politically accountable actor--will be responsible for his choice. At the very least, it will be much more difficult for political partisans to undermine the result of a criminal investigation by creating a perception that an IC is operating out of personal or political animus. I think it fair to say that an administration under investigation will have greater difficulty calling into question the integrity of an IC selected by that administration and thereby undermining public confidence in a determination of executive wrongdoing. Finally, an Attorney General may be able to blunt (although likely not eliminate) criticism of any eventual declination decision by making a wise and bipartisan selection of the regulatory IC. Serious consideration should also be given to submitting the name of proposed ICs to the Senate for its advice and consent, as was done once in the past.[2] Such a procedure presumably would provide additional bipartisan credibility to regulatory ICs.

3. "Good Cause" Removal. The statute attempts to ensure true independence by making an independent counsel removable by the Attorney General only upon a determination of "good cause," which determination is reviewable in court. Removal of any IC in a high-profile case will, except in extraordinary circumstances where it is obvious that such removal is justified, be politically untenable (and in today's environment, even politically counterproductive). The "good cause" requirement, then, is probably unnecessary. Further, it is my belief that the "good cause" requirement is also unsound because it affirmatively shields both ICs and Attorneys General from responsibility. If this requirement were removed, it "not only would make the special counsel accountable, but it also would force the President and his surrogates to put up or shut up," that is, to fire an IC who the administration alleges is demonstrably and unfairly "'out to get'" the President.[3] Finally, even were this safeguard deemed necessary and desirable, DOJ regulations have, and can in future, contain the same "good cause" removal standard.

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If Congress rejects the above thesis and determines to reenact the IC statute,[4] I respectfully submit that the following amendments are critically important:

1. The list of "covered persons" under § 591(b) should be reduced to one individual: the President. The discretionary referral standards of § 591(c) should be retained. All other cases should be investigated, where possible, by federal prosecutors located not in main Justice but rather in local U.S. Attorneys Offices.

2. The Attorney General should be given full powers to investigate allegations of wrongdoing (§ 592(a)(2)(A)); she should be able to decline a case upon satisfying herself by a preponderance of the evidence that no criminal intent is present (§ 592(a)(2)(B)(i), (ii)); and she should only have to make a referral if she discovers substantial evidence of a federal criminal violation (§ 592(b)(1), (c)(1)(A)).

3. Some mechanism should be put in place for pre-qualifying persons subject to appointment by the Special Division (§ 593(b)(2)). All such persons should have some experience in federal criminal law enforcement and should agree to undertake the appointment on a full-time basis.

4. The Attorney General, not the Special Division, should define the jurisdiction of the IC at the inception of the investigation and throughout its course (§ 593(b), (c); § 594(e)). Should the IC decide that he wishes to pursue other matters not obviously within his mandate, the IC should work out the appropriate allocation of jurisdiction with the DOJ.

5. The statute should make clear that the Special Division's responsibilities are limited to selection of an IC from the pre-qualified list and adjudicating attorneys fees provisions (§ 593).

6. The present statute provides that "[a]n independent counsel shall, *except to the extent that to do so would be inconsistent with the purposes of this chapter*, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws." (§ 594(f)) This italicized exception is sufficiently vague to render the primary prohibition meaningless. DOJ policies are rarely worded as categorical rules. Because they permit sufficient room for the exercise of discretion in particular cases, this imprecise exception is not needed. Further, it being unclear what, if any, remedy there is for IC violations of section 594(f), the entire provision is virtually unenforceable. The statute should make absolutely clear that ICs shall follow DOJ policy, except with respect to securing approvals from the Attorney General for anything except wiretap authority, and that failure to adhere to DOJ policy may constitute good cause for removal.

7. The reporting requirement should be amended to require (and permit) ICs only to concisely state the result reached at the conclusion of their investigation (§ 594(h)).

8. The impeachment referral provision should be eliminated (§ 595(c)). This omission should not alter Congress's ability to gather relevant raw evidence, from an IC and other sources, by subpoena.

1. Julie R. O'Sullivan, The Interaction Between Impeachment and the Independent Counsel Statute, 86 Geo. L.J. 2193 (1998); Julie R. O'Sullivan, The Independent Counsel Statute: Bad Law, Bad Policy, 33 Am. Crim. L. Rev. 463 (1996).

2. For an excellent discussion of the advantages of such a procedure, see Brett M. Kavanaugh, The President and the Independent Counsel, 86 Geo. L.J. 2133, 2146-2151 (1998).

3. *See* Kavanaugh, supra note 2, at 2151.

4. Many of these suggestions would be equally applicable to a revision of the DOJ regulations governing the appointment of regulatory ICs. *See* 28 C.F.R. § 600.1 *et seq.*