WRITTEN STATEMENT

OF

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HEARING ON
THE IMPLEMENTATION OF THE U.S. DEPARTMENT OF JUSTICE'S SPECIAL COUNSEL REGULATIONS

BEFORE THE SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

COMMITTEE ON THE JUDICIARY

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Thank you,

I very much appreciate the opportunity to address the subcommittee on this important subject, and would also like to note that my remarks here are delivered on my own behalf, and not on behalf of my law firm or any of its clients.

On April 1, 1940, Attorney General Robert H. Jackson stood before the Nation's chief prosecutors, the United States Attorneys, who were then assembled in the Great Hall of the Main Justice Department Building, only a few blocks from here. He delivered a speech titled "The Federal Prosecutor." In that address, Jackson warned that the greatest potential for prosecutorial abuse exists when individuals – rather than offenses – are chosen for investigation: "Therein," he explained,

> is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.

If proof were needed that these sentiments are true, it was provided nearly forty years later with enactment of the independent counsel statute.

An ill-judge reaction to the Watergate Affair, and especially to President Nixon's dismissal of Special Counsel Archibald Cox in the 1973 "Saturday Night Massacre," the independent counsel statute first became law as part of the 1978 Ethics in Government Act. By its very nature, the independent counsel law required a prosecutorial focus on individuals and not on offenses. It established a system that required a special court to appoint an independent counsel to investigate alleged wrongdoing by certain high level Executive Branch officials, including the President, unless, after an initial inquiry, the Attorney General determined that there were no "reasonable grounds to believe that further investigation or prosecution is warranted." Although independent counsels were required by law to follow normal Justice Department policies, "except where not possible," there was no effective means of enforcing this requirement.

The law was upheld against constitutional attack in *Morrison v. Olsen*, 487 U.S. 654 (1988). In that case, the Supreme Court ruled that the independent counsel statute did not violate the Constitution's separation of power principles by permitting the Judiciary – in the form of a special division of the United States Court of Appeals for the District of Columbia Circuit – to select an Executive Branch official because (it concluded) the independent counsel was an "inferior," rather than a "principal" officer of the United States. In addition, the Court also concluded that the statutory limitations on an independent counsel's dismissal – for "good cause" only – did not trench upon the President's constitutional authority over the Executive Branch. It did not, they felt, undercut the President's ability to "perform his constitutionally assigned duties." *Id.* at 696.

Justice Antonin Scalia challenged the majority's rule and reasoning in what must surely be rated one of the most prescient judicial dissents in our history. Noting that issues like those

raised by the independent counsel statute frequently "will come before the Court clad, so to speak, in sheep's clothing," he made clear that "[t]his wolf comes as a wolf." 487 U.S. at 699. Justice Scalia, of course, was speaking to the separation of powers questions presented by the independent counsel statute – but his description was equally applicable to its practical force and effect. As he explained later in his opinion, putting a finger precisely on that law's problematic core:

> [N]othing is so politically effective as the ability to charge that one's opponent and his associates are not merely wrongheaded, naïve, ineffective, but in all probability, "crooks." And nothing so effectively gives an appearance of validity to such charges as a Justice Department investigation and, even better, prosecution. The present statute provides ample means for that sort of attack, assuring that massive and lengthy investigations will occur, not merely when the Justice Department in the application of its usual standards believes they are called for, but whenever it cannot be said that there are "no reasonable grounds to believe" they are called for. The statute's highly visible procedures assure, moreover, that unlike most investigations these will be widely known and prominently displayed.

Id. at 713-14. It is hardly surprising that, more recently, many of President George W. Bush's bitterest opponents waited anxiously for a "Fitzmas," as they termed Special Counsel Patrick Fitzgerald's expected indictments of Administration officials for allegedly "outing" a CIA employee, in the final weeks of 2005. An independent counsel investigation – and Fitzgerald operated very much as an independent counsel, if under a different name – can give uniquely effective political gifts. It is, however, a double-edge weapon.

Throughout the 1980s and 1990s, a series of relentless, costly and often fruitless independent counsel investigations overwhelmed successive presidential administrations. For Republicans, the low point doubtless came when an Iran-Contra independent counsel announced a second indictment of former Reagan-Bush Administration Secretary of Defense Caspar W. Weinberger on October 30, 1992 – four days before the November 3, 1992 presidential election.

For Democrats, the nadir of the independent counsel experience was surely in 1998, when the Whitewater independent counsel demanded a sample of President Clinton's "genetic material" to test against Monica Lewinsky's soiled dress. As the Subcommittee knows, that investigation – initiated to review the President and First Lady's involvement in certain real estate transactions – led to President Clinton's impeachment and a President's trial in the Senate for only the second time in our history.

The independent counsel law expired in 1999, and it was not reauthorized. Ironically, however, the last independent counsel report was submitted only two years ago, on January 19, 2006. This report was prepared by a special prosecutor appointed in 1994 to investigate claims that Secretary of Housing and Urban Development Henry Cisneros had lied to FBI agents, about payments to a onetime girlfriend, during his background investigation for appointment to that office by President Clinton. The investigation into this matter took more than a decade and cost in excess of twenty million dollars. Lying to federal investigators is a serious offense, and serious allegations that high level government officials have lied must be investigated. However, one can fully agree with these propositions and nevertheless question whether this independent counsel was a good use of our Nation's prosecutorial resources. Much the same could be said of other independent counsel investigations over the years.

The Subcommittee is doubtless familiar with the June, 2006, Report of the Congressional Research Service on Independent Counsels Appointed Under the Ethics in Government Act of 1978, Costs and Results of Investigations. In that document, CRS summarized the results of our national independent counsel experience as follows:

> Of the 20 independent counsel investigations, 12 of the investigations returned no indictments against those investigated. Of the eight investigations that did return at least one indictment, in three of those instances, there was no indictment brought against

> the principal government official originally named as the target of that independent counsel's investigation; in three other instances, the principal government official indicted was either acquitted or his conviction was overturned on appeal. Thus, of the 20 independent counsel investigations initiated, although several independent counsels obtained multiple convictions of certain persons relating to the original subject matter or peripheral matters (including convictions of several federal officials or former federal officials), only two federal officials who were actually the named or principal subjects of the 20 investigations were finally convicted of or pleaded guilty to the charges brought; in one of those two instances, that person was pardoned by the President.

At the same time, the report notes, the estimated costs of all 20 independent counsel investigations was approximately $228,712,589. *See CRS Report for Congress, Independent Counsels Appointed Under the Ethics in Government Act of 1978, Costs and Results of Investigations* (Updated, June 8, 2006). That, of course, is simply the monetary expense to the taxpayer. It does not account for the economic and personal costs imposed on those investigated, and on their families and friends, whether or not they were ever indicted, let alone convicted, of any offense.

If the special counsel regulations the Subcommittee is today considering have one great and indisputable virtue, it is that they are *not* the independent counsel statute. Among the other clear improvements made by these regulations are the following:

* The regulations make clear that appointment of a special counsel should be an extraordinary act reserved for extraordinary circumstances where the public interest demands it, not a foregone conclusion simply because a high level official has been accused of criminal wrongdoing. Most investigations of public officials can, and should, be handled through the Department of Justice's ordinary channels, including the United States Attorney offices and the Criminal Division's Public Integrity Section. Under 28

C.F.R. part 600, a special counsel is to be appointed only where a criminal investigation is warranted and (1) the Justice Department would have a conflict of interest or there are "other extraordinary circumstances;" and (2) the Attorney General finds that "under the circumstances it would be in the public interest to appoint an outside Special Counsel." 28 C.F.R. § 600.1.

* Appointment of a special counsel is truly within the Attorney General's discretion, a decision subject to the ordinary limitations of political accountability to the President, the Congress, and ultimately to the American people. 28 C.F.R. § 600.2. In particular, the Attorney General can also conclude that an investigation should go forward without appointment of a special counsel, but still take appropriate steps to "mitigate any conflicts of interest, such as recusal of particular officials," 28 C.F.R. § 600.2, that may be presented.

* Although a special counsel must be from outside the federal government and may hire staff, the clear import of the regulations is that he or she should first and foremost depend on the Justice Department's existing staff and resources – and particularly on its experienced, career prosecutors and investigators. 28 C.F.R. § 600.5; 64 Fed. Reg. 37038, 37039.

* The special counsel's jurisdiction is established by the Attorney General and only the Attorney General can expand that jurisdiction as the investigation continues. 28 C.F.R. § 600.4.

* The special counsel's annual budget is subject to review and approval by the Attorney General and, on an annual basis, the Attorney General must determine whether the investigation should continue. 28 C.F.R. § 600.8.

* Perhaps most significantly of all, the regulations require the special counsel to comply with "the rules, regulations and procedures and policies of the Department of Justice." 28 C.F.R. 600.7. If, in an extraordinary instance, a special counsel believes that an exception to this requirement is warranted, he or she may take this up with the Attorney General. Otherwise, while not within the day-to-day supervision of Justice Department officials, the office of the special counsel is subject to same disciplinary and ethical rules of other Department components.

* Finally, the Attorney General can remove a special counsel for good cause, *and that includes the special counsel's failure to follow Departmental policies.*

These provisions do not entirely alleviate the problems identified by Justice Jackson so long ago – especially since exceptions can, and have, been made to the rule requiring a special counsel to following normal Department of Justice procedures. Most significantly, Special Counsel Patrick J. Fitzgerald – who actually was appointed outside of the regulations published at 28 C.F.R. 600 – was granted "plenary" authority to pursue his investigation, effectively recreating an independent counsel. *See* Letter of James B. Comey, Acting Attorney General, to The Honorable Patrick J Fitzgerald (Feb. 6, 2004).

However, there is no doubt that the rules codified at 28 C.F.R. part 600 go a very long way in the right direction – perhaps as far as it is possible to go considering that all institutions are capable of abuse in some manner. At least it no longer is the case that a special prosecutor must be appointed unless the Attorney General can say that "there are no reasonable grounds to believe that further investigation or prosecution is warranted," a standard of "practical compulsion" as noted by Justice Scalia. *Morrison*, 487 U.S. at 702. The special counsel regulations' stated purpose was "to strike a balance between independence and accountability in certain sensitive investigations, recognizing that there is no perfect solution to the problem." 64 Fed. Reg. 37038. In that, they were successful.

In particular, a special counsel – subject to jurisdictional and budgetary limits established by the Attorney General – is far more effectively subject to the Justice Department's overall resource constraints and perspective. It is that perspective, where consideration must be given to the importance of pursuing a particular investigation in the context of the Department's other important work, that can act as a most effective check on the potential for prosecutorial abuse. Again, to quote Justice Scalia's *Morrison* dissent:

> The mini-Executive that is the independent counsel . . . operating in an area where so little is law and so much is discretion, is intentionally cut off from the unifying influence of the Justice Department, and from the perspective that multiple responsibilities provide. What would normally be regarded as a technical violation (there are no rules defining such things), may in his or her small world assume the proportions of an indictable offense. What would normally be regarded as an investigation that has reached the level of pursuing such picayune matters that it should be concluded, may to him or her be an investigation that ought to go on for another year. How frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile – with whether it is worthwhile not depending upon what such judgments usually hinge on, competing responsibilities. And to have that counsel and staff decide, with no basis for comparison,

> whether what you have done is bad enough, willful enough, and provable enough, to warrant an indictment.

Morrison, 487 U.S. at 732.

With regard to the most recent calls for appointment of a special counsel, to investigate the 2005 destruction of CIA tapes showing the interrogation of high level al Qaeda prisoners, there is no doubt that Attorney General Mukasey has made the right decision. He has not appointed a special counsel. Rather, he has designated Mr. John H. Durham, First Assistant United States Attorney for the District of Connecticut and a highly experienced prosecutor, to act as United States Attorney for this matter. It is this very kind of accommodation that is contemplated by 28 C.F.R. § 600.2, which permits the Attorney General to conclude that the public interest would not be served by removing an investigation from normal Justice Department processes, but which also allows him to take "appropriate steps . . . to mitigate any conflicts of interest such as recusal of particular officials." 28 C.F.R. § 600.2(c).

Here, Mr. Durham's appointment as acting United States Attorney was necessary because the United States Attorney for the Eastern District of Virginia, who would ordinarily handle the matter, asked to recuse his office. Although there appears to have been no actual conflict of interest here, the Attorney General acted in an "abundance of caution" to "avoid any possible appearance of a conflict with other matters handled by that office" – presumably a reference to the longstanding and close working relationship between the United States Attorney's office and the CIA on various anti-terrorism and counter-espionage cases in the Eastern District of Virginia.

By all accounts, Mr. Durham will operate as would any other United States Attorney, fully subject to the rules and regulations of the Department of Justice and reporting to the Attorney General through the Deputy Attorney General's office. There is every reason to believe that this investigation will be both searching and professional. If, as the matter

progresses, it appears that the Justice Department would have an actual conflict of interest, or other “extraordinary circumstances” appear, the Attorney General can revisit the question whether a special counsel should be appointed under the regulations.

It is axiomatic in our system of ordered liberty that no individual should be above the law. Neither, however, should any individual be subject to its particular prosecutorial focus merely because he or she holds public office. Allegations of criminal wrongdoing by federal officials must be investigated, but in all but the most extraordinary of circumstances they should be pursued through the normal investigative and prosecutorial processes of the United States Department of Justice.

Thank you.