This Appendix sets forth the historical background of the elimination of the declination clause from the statutory language of the Independent Counsel Reauthorization Act of 1994 ("Act"). The history of the declination clause's deletion is relatively clear. Consideration of the Act's reauthorization began shortly prior to Independent Counsel Lawrence E. Walsh's issuance of his final report on the Iran-Contra matter. Several observers anticipated that the declination clause would result in the publication of a final report that contained accusations of misconduct against individuals who had not been charged or convicted of criminal offenses. For example, Lt. Col. Oliver North's attorney testified before Congress:

> The [Independent Counsel] intends to issue a report to do what he could not do in court. It will be a "final shot" -- a mammoth document assessing blame across government. But who can fight back -- who can amass the funds to rebut such a report? What about reputations and notions of fairness?[1]

Thus, some suggested that the declination clause be modified or deleted to prevent what they perceived to be inappropriate prosecutorial conduct.

House Consideration -- The version of the reauthorization of the Act reported by the House Judiciary Committee for consideration by the House of Representatives (H.R. 811, 103d Cong.) retained the declination clause in section 594(h)(1)(B) unmodified.[2] The limited record of the House's initial consideration of the Act's reauthorization supports a congressional intent (at that time) to maintain the broad disclosures necessitated by the declination clause. This can be seen in the proposed amendment to section 594(h)(2), which was adopted by the House.

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[1] 139 Cong. Reg. E660 (Mar. 17, 1993) (statement of the Honorable Henry J. Hyde) (reprinted testimony of Mr. O'Donnell).

[2] See H. R. Rep. 103-224, at 22, 29 (1993).

Prior to 1994, the Act authorized the Special Division to release to the public any materials the Court deemed "appropriate."[3] As reported by the Judiciary Committee, H.R. 811 included a proposed amendment that would have authorized the Special Division to release materials it considered:

> in the public interest, consistent with maximizing public disclosure, ensuring a full explanation of independent counsel activities and decision making, and facilitating the release of information and materials which the independent counsel has determined should be disclosed.[4]

The House's expressed intent was to provide greater guidance to the Court on materials to be released.[5] The language demonstrates that the House envisioned disclosure of a comparatively comprehensive report -- one that maximized public disclosure -- whose content would turn, at least in part, on the independent counsel's judgment. When the House passed H.R. 811 on February 10, 1994, it contained this provision.[6]

Senate Consideration -- When the Senate Committee on Governmental Affairs reported the reauthorization bill's first version (S. 24, 103d Cong.) for the Senate's consideration, the declination clause again remained unchanged.[7] Later that year, however, during consideration of S. 24 on the Senate floor, Senator Dole sought to amend the reauthorization bill to limit the scope of the independent counsel's final report. Senator Dole's amendment, adopted by the

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[3] 28 U.S.C. 594(h)(2), Pub. L. 100-191, 101 Stat. 1293, 1302 (1987).

[4] H. Rep. No. 103-224, at 29 (1993).

[5] Id. at 22.

[6] 140 Cong. Reg. H442 (Feb. 10, 1994).

[7] See S. Rep. 103-101, at 60 (1993).

Senate, changed the text of section 594(h)(1)(B) in two ways: (1) it struck the words "fully and completely"; and (2) it struck the declination clause.[8]

Senator Cohen, one of the bill's managers, explained the reason for the amendment's adoption this way:

> Senator Levin and I would like to clarify something for the record so there will be a proper legislative history to this particular amendment.
>
> . . . .
>
> We believe the final report should be a simple declaration of the work of the independent counsel . . . [W]ith respect to cases in which the independent counsel had determined that no . . . indictment should be brought, [the amendment] preclude[s] that independent counsel from expressing an opinion or conclusion as to the culpability of any of the individuals involved.
>
> . . . .
>
> So the purpose of the amendment is quite clear, to restrict the nature of the report to the facts without engaging in either speculation or expressions of opinion as to the culpability of individuals unless that culpability . . . rise[s] to a level of an indictable offense.[9]

Senator Levin immediately reiterated the same point:

> [T]he amendment we are accepting relative to the final report is, indeed, to try to avoid having independent counsel state conclusory opinions that the subject of an investigation engaged in criminal wrongdoing in the absence of bringing an indictment against that person.[10]

Senator Dole, the amendment's sponsor, explained its purpose that same day:

> [W]e have modified the final report language, because Lawrence Walsh could not indict you or could not convict you, he would try to do it in the court of public opinion by filing some report, in effect venting all of his spleen. . . . I am pleased

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[8] 139 Cong. Rec. S15886 (Nov. 17, 1993).

[9] Id.

[10] Id.

> that the managers of the bill, Senators Cohen and Levin, have accepted my amendment limiting the report's permissible scope.
>
> . . . .
>
> It is my hope that . . . the amendment limiting the permissible scope of the final report, will help inject some safeguards into the independent counsel statute so that future abuses can be avoided . . . . [W]e hope we have been able to make the changes there, maybe state some facts, but not opinions, not editorialize.[11]

As Senator Dole said the next day:

> This . . . amendment would retain the final report requirement, but would eliminate the language in the reauthorization bill that allows the independent counsel to describe, in the final report, the "reasons for not prosecuting any matter within the prosecutorial jurisdiction of such independent counsel."
>
> If retained, this language would have been an open invitation to independent counsels to editorialize on cases that they, for whatever reason, chose not to bring, smearing hard-earned reputations in the process.[12]

Reflecting further on his amendment in January 1994 (after the Iran-Contra final report was issued), Senator Dole reiterated his intent: "This amendment . . . was designed to ensure that future independent counsels will not resort to Walsh-style smear tactics in their final reports."[13]

Conference Report -- The reauthorization bill's competing House and Senate versions differed substantially on the final report requirement. The House version contained provisions that expanded the scope of public disclosure authorized for the Special Division and left the final report obligations of an Independent Counsel unmodified. The Senate, by contrast, left the Special Division's disclosure authorization unchanged and made two substantive changes to the final report language -- deleting "fully and completely" and the declination clause.

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[11] Id. at S15887.

[12] 139 Cong. Rec. S15972 (Nov. 18, 1993).

[13] 140 Cong. Rec. S41 (Jan. 25, 1994).

The conference committee resolved these two views as follows:

First, the committee deleted the House's proposed change to section 594(h)(2) relating to the Special Division. As the conference committee explained, the Special Division's decision to release the Iran-Contra report made clear that amending the provision to provide for greater public disclosure was unnecessary:

> [T]he standards in the 1987 law on releasing the final report to the public are not overly restrictive, as evidenced by the special court's decision to release the final report in the Iran-Contra matter despite numerous motions by persons named in the report to repress all or portions of it. For this reason, the conferees have determined that additional statutory language encouraging disclosure is unnecessary.[14]

Second, the conference committee modified the proposed changes to section 594(h)(1)(B), retaining (as in the House bill) the language requiring an independent counsel to report "fully and completely," while deleting (as in the Senate bill) the declination clause. The conference explained its decision this way:

> [I]n response to concerns about the proper scope of the final report, the conference agreement retains the requirement in the 1987 law that these reports include a full and complete account of the independent counsel's activities, but eliminates the requirement that the independent counsel explain the reasons for not prosecuting any matter.
>
> . . . .
>
> [Requiring a final report] is justified by the unique environment in which an independent counsel must operate -- without direct and ongoing supervision by senior Justice Department officials. It serves as an important check on independent counsel investigative and prosecutorial activities by requiring them to identify and explain their actions.
>
> . . . .

[14] H. Conf. Rep. 103-511, at 21 (1994).

The conference agreement reaffirms the duty of independent counsels to provide a full and complete description of their work. Congress continues to view this requirement as a key measure for insuring accountability. Under this provision, independent counsels are expected to provide a summary of the key steps taken in the investigatory and prosecutorial stages of their work and to explain the basis for their decisions.

. . . .

The conference agreement eliminates the requirement that independent counsels explain, in every instance, their reasons for not prosecuting any matter within their jurisdiction . . . . The power to damage reputations in a final report is significant, and the conferees want to make it clear that the final report requirement is not intended in any way to authorize independent counsels to make public findings or conclusions that violate normal standards of due process, privacy or simple fairness.

The conferees believe that, in assessing whether an explanation should be provided with respect to a specific unindicted individual, an independent counsel should base the decision on whether it would be in the public interest for such information to be disclosed. The public interest encompasses a wide range of concerns which need to be carefully balanced, including understanding the basis for the independent counsel's decision not to indict; taking into account the extent to which the individual was central or peripheral to the independent counsel's jurisdictional mandate; exonerating the innocent; and protecting individual rights to due process, privacy and fairness. For example, it may be in the public interest to report that the evidence did not sustain the allegations that gave rise to the investigation or that the evidence demonstrates an individual's innocence.

With regard to an individual whose conduct was only tangential to that of the person for whom the independent counsel was appointed, an independent counsel should normally refrain from commenting on the reason for not indicting that person unless it is to affirm a lack of evidence of guilt. On the other hand, the conferees consider to be crucial a discussion of the conduct of the person for whom the independent counsel was appointed to office. This discussion should focus on the facts and evidence and avoid use of conclusory statements in the absence of an indictment. However, in the rare event that an indictment is forestalled because of an event beyond the control of the independent counsel,

> public accountability may well require such independent counsel to express a professional opinion on whether the grounds for an indictment had been present.[15]

With these changes, Congress reauthorized the Ethics in Government Act, which remained in effect until expiration by its own terms on June 30, 1999.

* * *

[15] Id. at 19-20 (emphasis supplied).