The Politics of Prosecution: The Independent Counsel Statute

Committee on Federal Legislation

The following report was completed in August 1998, prior to the release of the report of Independent Counsel Kenneth Starr in September 1998.

INTRODUCTION

The Independent Counsel law, originally enacted in 1978 as the Ethics in Government Act, will expire in 1999. Between now and then, Congress will have to determine whether to renew this controversial statute as it is presently configured, to renew it with modifications, or to let it lapse. On December 9, 1997, the Committee on Federal Legislation of the Association of the Bar of the City of New York sponsored a panel discussion at the Association House entitled "The Politics of Prosecution: The Future of the Independent Counsel Statute." Before a public audience of several hundred, crucial questions about the Independent Counsel statute were debated by six individuals central to its history: Archibald Cox, Harvard Law School Professor, a former Solicitor General and Watergate Special Prosecutor; Elliott Richardson, Attorney General under President Nixon who appointed Mr. Cox as Special Prosecutor and who resigned rather than obey President Nixon's order to fire him; Alexia Morrison, Independent Counsel in the investigation of Reagan Justice Department official Theodore Olson; the Honorable Lawrence E. Walsh, former United States

District Judge and Independent Counsel in the Iran/Contra Investigation; Samuel Dash, Georgetown Law Professor, Chief Counsel for the Senate Watergate Committee, an original proposer of the Ethics in Government Act and currently Ethics Advisor to Independent Counsel Kenneth Starr; and Robert B. Fiske, Jr., the original Special Counsel in the Whitewater Investigation.

The topic could not have been more timely. The panel discussion took place on the very day that Attorney General Janet Reno announced her refusal to appoint an independent counsel in the campaign finance controversy surrounding President Clinton's re-election in 1996. In the weeks following the forum, public debate surrounding the Independent Counsel statute and its politicization intensified as Mr. Starr began to probe the President's relationship with Monica Lewinsky and as Independent Counsels began to investigate Interior Secretary Bruce Babbit and Secretary of Housing and Urban Development Alexis Hermann.

All of the Panelists believed that the statute should be renewed in 1999. They differed, however, as to what changes, if any, should be made. The Committee on Federal Legislation agrees with the Panelists that the statute should be renewed. The Committee also believes, as do some Panelists, that substantial modifications to the statute are needed. Specifically, the Committee recommends that the statute be narrowed to cover only allegations of criminal activity involving abuse of power by high government officials while in office, and allegations of crimes committed in connection with the electoral process. In addition, the Committee also recommends changes in the process for selecting the panelists who appoint the Independent Counsel and reducing the list of government officials subject to Independent Counsel investigations.

Part I of this report describes the background and legislative history of the Independent Counsel statute and the history of its use. Part II describes the views of our Panelists in light of this history and of their own participation in it. Part III sets forth the Committee's views of the statute's most significant problems, and recommendations for change.

I. BACKGROUND

A. The Watergate Scandal: Genesis of the Independent Counsel Statute

On June 17, 1972, five men equipped with burglary tools, cameras and electronic surveillance equipment—including James W. McCord, security director for the Committee to Re-elect the President—were arrested

inside the Democratic National Committee's Watergate headquarters.[1] Two others with connections to the Administration, E. Howard Hunt and Gordon Liddy, were also quickly implicated. During their trial in January 1973, the possibility arose that White House officials might have been involved in the break-in or in an elaborate cover-up. An ensuing Senate committee investigation led to the resignation of several top White House aides and the Attorney General, John Mitchell.

On May 18, 1973, at the Senate's request and under Department of Justice regulations, Attorney General Elliott R. Richardson appointed Archibald Cox—a Harvard law professor and former Solicitor General—as "special prosecutor." In late June, a White House aide, Alexander Butterfield, disclosed the existence of a secret tape recording system in the Oval Office, giving rise to suspicions that President Nixon himself had recorded conversations linking him to the cover-up. The Senate Committee subpoenaed several of the tapes, which Nixon refused to produce, claiming executive privilege. The courts upheld the privilege. Cox also issued a subpoena ordering the President to deliver the Oval Office tapes, which Nixon also defied. Nixon offered, instead, to provide Cox with transcribed summaries of the tapes in lieu of the originals. Cox refused and pressed his demand for the tapes.

What happened next has gone down in history as "the Saturday Night Massacre." On the evening of October 20, 1973, having declined tape summaries, Cox was ordered by President Nixon to cease his attempts to obtain the tapes. Cox refused and publicly accused the President of disobeying a court order. Nixon responded by directing Attorney General Richardson to fire Cox. Richardson resigned his office rather than obey. It then fell to Deputy Attorney General William Ruckleshaus to fire Cox. Ruckleshaus also resigned rather than obey. Cox was ultimately dismissed late that night by Acting Attorney General Robert Bork.

Although Nixon unquestionably enjoyed the legal power to remove the special prosecutor—an executive branch official—the political fallout ultimately destroyed his Presidency. An outraged Senate pressed its inquiry. Leon Jaworski succeeded Cox as special prosecutor. Large parts of the tapes were eventually made public and revealed that Nixon had actively obstructed justice. Faced with imminent impeachment proceedings, he resigned on August 9, 1974.

---

1. The information in this section is drawn from Jonathan Schell's *The Time of Illusion* (Vintage Books, 1975) and *The American Constitution: Its Origins and Development*, 7th Ed., Vol. II (editors: Kelly, Harbison, and Belz).

B. Ethics in Government Act of 1978

1. Legislative History[2]

The public outcry over Watergate in general, and Cox's firing in particular, fueled numerous congressional hearings on proposals for "removing politics from the administration of justice."[3] Discussions centered on a statutory process requiring the appointment of a special prosecutor from outside the Department of Justice to investigate and, if necessary, prosecute high-level public officials suspected of criminal activity. After years of hearings and debates, Congress concluded that these temporary outside counsels should be appointed by a special court and could be removed by the Attorney General only in limited instances.

In October 1978, the Ethics in Government Act ("the Act") was enacted. Its legislative history identified four specific justifications for the creation of the office of "statutory special prosecutor":

> (1) The need to avoid conflicts of interest or appearances thereof that would compromise the public's confidence in the administration of justice. As Archibald Cox testified: "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."
>
> (2) The presumed reluctance of the President or Attorney General to appoint a special prosecutor in the early stages of an investigation.
>
> (3) The possibility that a special prosecutor may uncover additional crimes that would otherwise go undetected or unprosecuted.
>
> (4) The hope that a special prosecutor will deter abuses of power such as the Watergate break-in and related obstructions of justice.

The 1978 Act required the Attorney General to conduct a preliminary investigation upon receipt of "specific information" that any high-level

2. Information in this section is derived from legislative history found in 1978 U.S. Code of Congressional and Administrative News ("U.S.C.C.A.N.") at page 4216 *et seq.*

3. *Id.* at 4218.

official covered by the Act had violated any federal criminal law other than a petty offense. After a 90-day investigation period, the Attorney General was required to report to the Special Prosecutor Division of the United States Court of Appeals for the District of Columbia ("Special Division"),[4] and submit a memorandum which explained why the claim involved was "so unsubstantiated that no further investigation or prosecution was warranted," or explained why further investigation was warranted and called for the appointment of a special prosecutor. A decision by the Attorney General not to seek appointment of a special prosecutor was not reviewable. If on the other hand, the Attorney General called for a special prosecutor, her report was required to be specific enough to enable the Special Division to appoint an appropriate individual and to properly define his jurisdiction. If the investigation was not completed within the 90-day period, the Act required the Attorney General to seek appointment of a special prosecutor. The statute also provided that a majority of either party's members on the House or Senate Judiciary committee could request that the Attorney General seek appointment of a special prosecutor. If the Attorney General declined, she was required to submit a detailed explanation.

Once appointed, the special prosecutor had "full power and independent authority" to investigate matters within his jurisdiction, including the power to convene grand juries, to issue subpoenas, to grant immunity to witnesses, to inspect tax returns, and to contest claims that privilege or national security considerations justified withholding of evidence. The Department of Justice was to provide support to the special prosecutor by providing access to resources and files. The special prosecutor could also request additional jurisdiction from the Attorney General if he uncovered "related" matter during the investigation. He could also accept referral of related matters from the Attorney General.

The special prosecutor could be removed by the Attorney General only for "extraordinary impropriety" or mental or physical incapacity. Such removal was subject to judicial review. The Act also established procedures for judicial and congressional oversight of the special prosecutor and required him to submit periodic reports to Congress. The statute required that the House of Representatives be provided with any "substantial and credible evidence that may constitute grounds for an impeachment." At the end of the investigation, the special prosecutor was re-

4. The Special Division is comprised of three Article III judges designated to serve on the panel by the Chief Justice of the U.S. Supreme Court.

quired to submit a report to the Special Division, providing a full description of the work completed, the disposition of all cases brought, and reasons for decisions not to prosecute matters within his jurisdiction.

Other provisions of the Act provided that the special prosecutor's appointment, identity, and jurisdiction would be made public only upon request of the Attorney General, by order of the Special Division, or when an indictment was brought (to avoid the appearance of "star chamber" proceedings). The Act strictly limited disclosure of information regarding the Attorney General's preliminary investigation and the special prosecutor's investigation. Material filed with the Special Division would be disclosed only by leave of the court. Finally, the Act provided that the special prosecutor provisions would expire in October 1983, unless reenacted.

2. Experience Under the 1978 Act[5]

From 1978 through 1982, the Justice Department conducted twelve preliminary investigations and sought appointment of a special prosecutor in three of those cases:

(1) Arthur Hill Christy investigated Carter aide Hamilton Jordan for alleged cocaine possession from November 1979 through May 1980. This investigation cost the government $182,000 and resulted in no indictment.

(2) Gerald Gallinghouse investigated Timothy Kraft for alleged cocaine possession from December 1980 through March 1981. This investigation cost $3,300, and resulted in no indictment.

(3) Leon Silverman investigated Ray Donovan, Secretary of Labor under President Reagan, from December 1981 through September 1982, and from June 1985 through October 1987. The total cost of these investigations was $326,000 and resulted in no indictment.

Between 1978 and 1982, a number of other cases arose which, although they did not trigger the Act, further aroused public debate about the concerns that gave rise to it:

(1) Attorney General Griffin Bell appointed Paul J. Curran as "special counsel" (i.e. non-statutory special prosecutor) to in-

5. This section contains a summary found in 1987 U.S.S.C.A.N. at pages 2155-57.

vestigate allegations of questionable loan transactions between the Carter family business and the National Bank of Georgia and of possible illegal diversion of funds borrowed by the warehouse to the Carter 1976 election campaign. Curran's prosecutorial decisions were initially subject to review by Bell, but public criticism fueled by the media forced Bell to render Curran independent. Curran issued a report clearing President Carter and his brother of any wrongdoing,

(2) The Attorney General investigated allegations that the President's brother, Billy Carter, had improper dealings with the Libyan government. The Department of Justice decided not to prosecute.

C. 1982 Amendments[6]

1. Statutory Changes

Following two years of studies and testimony from a number of sources, including the American Bar Association and The Association of the Bar of the City of New York, Congress reauthorized the Act with the following significant amendments:

a. Reduced the Number of "Covered Persons." The 1978 Act authorized the appointment of a special prosecutor to investigate approximately 120 different officials. Ninety-three of these were in the Executive Office. Many of these 120 persons were "middle-level Executive Branch officials who are often unknown to the public, as well as remote from the Department of Justice and the President."[7] Investigation of some of these people by the Justice Department, Congress concluded, "would create no significant conflict of interest."[8] Congress reduced the number of covered officials to seventy, thirty-six of whom were employed by the Executive Office.[9] Congress also reduced the number of campaign officials subject to the Act.[10]

b. Permitted the Attorney General to Investigate Conflicts of Interest by Persons Not Explicitly Covered. The "Billygate" and the Carter Peanut Warehouse cases reinforced the concern in Congress that Justice Department

6. Information in this section is drawn from 1982 U.S.S.C.A.N. at pages 3539 *et seq.*

7. *Id.* at 3542.

8. *Id.* at 3543.

9. 28 U.S.C. § 591(b).

10. *Id.*

investigations of family, close friends, or business associates of the President can lead to actual or apparent conflicts of interest. The law was amended to allow the Attorney General to call for appointment of a special prosecutor whenever she determines that an investigation by the Justice Department of someone not covered by the Act might result in "a personal, financial, or political conflict of interest."[11]

c. Reduced and Standardized the Term. Under the 1978 Act, a covered person was subject to investigation for the period of the President's incumbency and the incumbency of the successor President if he or she was from the same political party. Thus, coverage under the Act could extend for up to 16 years. Rejecting the concept that "a political party will be more lenient in prosecuting former officials who are its own members,"[12] Congress amended the 1978 Act to cover a person for the incumbency of the President he or she serves plus one year, but in no case longer than two years after the covered person left office.[13] This relieved the disproportionate burden placed on officials who left office early in an administration. The amendment limited investigations of officials who served less than ninety days in a new administration to the duration of their service plus one year.[14]

d. Revised the Standard Triggering Preliminary Investigation. The 1978 Act required the Attorney General to conduct a preliminary investigation whenever she received "specific information" that a person covered by the Act was engaged in criminal wrongdoing. The 1982 amendment altered that standard to call for a preliminary investigation when she received "sufficient information to constitute grounds to investigate."[15] This amendment allowed the Attorney General to consider both the specificity and credibility of the information received.

e. Restricted the Attorney General's Use of Investigative Tools During the Preliminary Investigation. The legislative history of the 1978 Act suggested it had been Congress' intent to prohibit the Attorney General from convening grand juries, plea bargaining, granting immunity, or issuing subpoenas during the preliminary investigation, but these restrictions did

11. 28 U.S.C. § 591(c).

12. 1982 U.S.S.C.A.N. at 3546-47.

13. 28 U.S.C. § 591(b)(6). In 1987, this section was amended again to cover individuals up to three years after leaving office.

14. 28 U.S.C. § 591(b)(7).

15. 28 U.S.C. §§ 591 and 592.

not appear in the text. The 1982 amendment made these restrictions explicit to prevent the Attorney General from usurping the special prosecutor's role by conducting a full-blown investigation at the preliminary stage.[16]

f. Incorporated Prosecutorial Policies of Justice Department. Under the 1978 Act, the Attorney General was required to seek appointment of a special prosecutor unless she could report to the Special Division that the allegations were "so unsubstantiated that no further investigation or prosecution is warranted." In particular, the Jordan and Kraft cases would not have been prosecuted by the Department of Justice under its own guidelines, which called for consideration of alternatives to criminal prosecution, the federal interest in prosecuting the case, the nature and seriousness of the offense, and the subject's culpability and past record. Congress concluded that disallowing consideration of these policies "creates unfairness by imposing a stricter application of criminal law on public officials" than on ordinary citizens.[17] The amendment required the Attorney General to seek appointment of a special prosecutor only where she finds "reasonable grounds to believe that further investigation or prosecution is warranted."[18]

g. Limited Abuse of Power by Special Prosecutor. Due to concerns that the special prosecutor could unduly prolong an investigation for publicity, personal reprisal or political advantage, Congress amended the Act in four other ways. First, the law was changed to require the special prosecutor summarily to dismiss a case if the circumstances so warranted.[19] Second, the special prosecutor was required to follow DOJ policies unless he could justify his departure from those policies.[20] Third, the special prosecutor was authorized to consult and work with the United States Attorney from districts where the crimes allegedly occurred.[21] Fourth, the law was changed to allow for removal of the special prosecutor upon a showing of good cause by the Attorney General.[22] Anticipating the challenges that came later in *Morrison v. Olson*, Congress noted "[a]nother advantage

16. 28 U.S.C. § 592(a)(2).

17. 1982 U.S.S.C.A.N. at 3551.

18. 28 U.S.C. § 592(b)(1).

19. 28 U.S.C. § 594(g).

20. 28 U.S.C. § 594(f).

21. 28 U.S.C. § 594(a)(10).

22. 28 U.S.C. § 596(a)(1).

of the good cause removal standard is that it would enhance the constitutionality of the statute."[23]

h. Changed Title to "Independent Counsel." Congress changed the name from "special prosecutor" to "independent counsel"[24] to avoid the suggestion that an indictment had been brought in cases where indictments were never issued. The name of the Special Division was correspondingly changed to "Independent Counsel Division of the U.S. Court of Appeals for the District of Columbia."

i. Allowed for Reimbursement of Attorneys' Fees. Congress noted that Hamilton Jordan spent six figures to defend himself against an investigation that resulted in no indictment. Congress gave the courts discretion to award attorneys' fees—but not expenses—where no indictment is brought and in rare instances where an ordinary citizen would not have incurred such fees.[25]

j. Reauthorization. Finally, the law would sunset in 1987, unless it was reauthorized.[26]

2. Experience under the 1982 Act[27]

From 1982 to 1987, the Justice Department processed thirty-six cases under the Independent Counsel statute. Twenty-five were closed prior to the Attorney General initiating a preliminary investigation.[28] Of those, twenty were closed for insufficient information[29] and five concerned persons not covered by the statute.

---

23. 1982 U.S.S.C.A.N. at 3553.

24. *Id.* at 3554.

25. 28 U.S.C. § 593(f).

26. 28 U.S.C. § 599.

27. Information in this section is taken from 1997 U.S.S.C.A.N. at pages 2155-57.

28. Of these 25 cases, twelve were requests from private citizens. Of those, nine were dismissed on procedural grounds and the DOJ determined not to initiate a preliminary investigation with respect to the remaining three cases. In those three cases, private citizens appealed dismissal of the case to the federal courts. In each case, the appellate court reversed a decision by the trial court and concluded that the DOJ's determination not to conduct a preliminary investigation was not reviewable. *Id.*

29. Of these 20 cases, ten were closed for lack of specific or credible information or both. The remaining ten were closed because the Justice Department concluded the conduct alleged did not constitute a "crime." In five of those ten, DOJ found no evidence of criminal intent. Each of the "threshold inquiries" conducted by DOJ in these 20 cases lasted an average of 75 days. *Id.*

In the eleven remaining cases, preliminary investigations were conducted, resulting in the appointment of independent counsels in the following six instances:

(1) Jacob A. Stein investigated Edwin Meese from April through September 1984. The investigation cost $312,000 and resulted in no indictment.

(2) Alexia Morrison investigated Theodore Olson from May 1986 through March 1989. The investigation cost $1.5 million and resulted in no indictment.

(3) Whitney North Seymour, Jr. investigated Michael Deaver from May 1986 through June 1989. The investigation cost $1.5 million and led to a conviction of Deaver.

(4) Lawrence Walsh investigated the Iran-Contra affair for more than eight years, beginning in December 1986. The investigation produced fourteen indictments, seven guilty pleas, four convictions after jury trials of which two (Oliver North and John Poindexter) were overturned on appeal on grounds related to use of immunized testimony, one dismissal because of the Attorney General's refusal to release classified documents (Joseph Fernandez), and two indictments (Duane Clarridge, Caspar Weinberger) withdrawn after pardons. The total cost was $35 million.

(5) James McKay investigated Wedtech from February 1987 until January 1990. The investigation produced two indictments, resulting in one acquittal (Mark Bragg) and one conviction after a jury trial, which was overturned on appeal (Lynn Nofziger), at a total cost of $2.6 million.

(6) Two investigations were conducted by confidential Independent Counsels. Neither investigation resulted in an indictment. They cost $17,000, and $46,000.

This reflected roughly the same number of preliminary investigations that had been conducted during the previous five years under the law, but greater activity because more preliminary investigations led to the appointment of an Independent Counsel. The period 1982 through 1987 also saw the first indictment (*In re Deaver*) and the first conviction (*In re Iran/Contra*) under the statute.

D. Independent Counsel Reauthorization Act of 1987

1. 1987 Amendments[30]

In determining whether to reauthorize the statute, Congress conducted six months of review, interviewing present and former Justice Department employees, Special Division members, current and former Independent Counsels, and others. Proponents of reauthorization included the American Bar Association, Archibald Cox, Benjamin Civiletti, and Lloyd Cutler. Chief among those opposing reauthorization was the Justice Department. Ultimately, Congress reenacted the statute, with the following changes:

a. Reduced the Attorney General's Discretion in Conducting Preliminary Investigations. Concerned that the Justice Department had been circumventing reporting requirements by conducting elaborate "threshold inquiries" prior to any preliminary investigation by the Attorney General, Congress reduced the Attorney General's discretion. Congress amended the statute to require a preliminary investigation (and a report to Special Division) whenever the Attorney General receives information that a covered person "may have violated" a federal criminal law.[31] The prior language required a preliminary investigation only upon a finding that the covered person "had committed" a violation. Congress also added language requiring the Attorney General to consider "only" the specificity and credibility of the information received in determining whether to conduct a preliminary investigation, rather than criminal intent[32] and prohibiting the Attorney General from basing her decision not to appoint an Independent Counsel on lack of criminal intent unless supported by "clear and convincing" evidence.[33]

b. Clarified That the Independent Counsel was Not Subject to Department of Justice Standards of Conduct with Respect to Earnings and Postemployment Restrictions. The Department of Justice had been taking the position that the Independent Counsel and his staff were subject to such strictures. This caused the resignation of one Independent Counsel and his entire staff. The amendment supported the Independent Counsel's position on this issue.

c. Reduced the Attorney General's Discretion in Deciding Whether to Appoint an Independent Counsel. Congress amended the statute to provide that

30. Information contained in this section is drawn from 1987 U.S.S.C.A.N. at pages 2154-79.

31. 28 U.S.C. § 591(a).

32. 28 U.S.C. § 591(d)(1).

33. 28 U.S.C. § 592(a)(2)(B).

the Attorney General will seek appointment of an Independent Counsel whenever she has "reasonable grounds to believe that further investigation is warranted."[34]

d. Required the Attorney General to Recuse Herself. Congress amended the statute to require the Attorney General to consider recusal in every case involving a high-level official, whether it is a newly initiated case or a matter related to an ongoing case.[35] It further amended the statute to require the Attorney General to file a written report with the Special Division on the recusal question, specifying the facts and reasons considered in reaching the decision.[36]

e. Changed the Procedure for Seeking Expanded Jurisdiction for Independent Counsel Investigations. Under the law as it then existed, the Independent Counsel asked either the Attorney General or the Special Division for an expansion of jurisdiction, but the Special Division had ruled that it was not authorized to expand jurisdiction where the Attorney General had denied the same request. Congress amended the statute to provide that the Independent Counsel can only request expansion of jurisdiction from the Attorney General. The Attorney General must then conduct a 30-day preliminary investigation on the issue and decide whether to grant the request and, if so, whether to seek appointment of a new Independent Counsel or assign the matter to an existing Independent Counsel. The amendment requires the Attorney General to give "great weight" to any recommendations from an existing Independent Counsel.[37] Congress further amended the statute to allow the Special Division to remand for a fuller explanation any decision by the Attorney General refusing to appoint an Independent Counsel or expand an existing Independent Counsel's jurisdiction, thereby increasing accountability of the Attorney General in making such decisions.[38] These solutions were designed to protect the constitutionality of the statute while giving a meaningful role to the existing Independent Counsel in the decision-making process.

f. Reduced Conflicts of Interest by the Independent Counsel. At least one Independent Counsel and one Independent Counsel staff member have caused a stir by accepting employment as defense counsel in another on-

34. 28 U.S.C. § 592(c)(1).

35. 28 U.S.C. § 591(e).

36. *Id.*

37. 28 U.S.C. § 593(c)(2).

38. 28 U.S.C. § 593(d).

going Independent Counsel investigation. This raises actual or apparent conflicts of interest. The statute was amended to prohibit an Independent Counsel or his staff members from representing a person subject to proceedings under the statute. This prohibition also applies to law partners or law firms with which the Independent Counsel or his staff are affiliated.[39]

g. Imposed Cost Reporting. The statute was amended to impose upon an Independent Counsel a series of reporting requirements and standards for cutting costs and limiting expenditures to those that are reasonable.[40]

h. Made it Easier for Congress and Interested Parties to Obtain Reports. The 1982 law provided that no documents concerning the Attorney General's preliminary investigation or the Independent Counsel's investigation in chief or other reports would be disclosed except by approval of the Special Division. The Special Division had been reluctant to disclose such documents. Congress amended the statute to provide that the Special Division will give special consideration to requests by congressional committees charged with overseeing the Independent Counsel's process.[41] It further amended the statute to authorize the Special Division, when presented with "significant legal issues," to disclose sufficient information to allow interested parties to participate in the dialogue through the filing of amicus briefs.[42]

2. Morrison v. Olson[43]

The above amendments were passed by the House and Senate, and President Reagan signed them into law on December 14, 1987. In doing so, he commented that "[a]n officer of the United States exercising Executive authority in the core area of law enforcement necessarily, under our constitutional scheme, must be subject to Executive branch appointment, review, and removal. There is no other constitutionally permissible alternative . . . . In order to ensure that public confidence in government not be eroded while [the Supreme Court reviews the constitutionality of the law], I am taking the extraordinary step of signing this bill despite my

39. 28 U.S.C. § 594(j).

40. 28 U.S.C. § 594(h).

41. 28 U.S.C. § 593(g).

42. 28 U.S.C. § 593(h).

43. Information in this section is taken from 1994 U.S.S.C.A.N. at page 751, unless otherwise specified.

very strong doubts about its constitutionality."[44]

Seven months later, the Supreme Court rendered its decision in *Morrison v. Olson*, 487 U.S. 654 , 108 S. Ct. 2597 (1988). In a 7-1 decision, the Court upheld the constitutionality of the Independent Counsel statute. Writing for the majority, Chief Justice Rehnquist concluded the law had been carefully crafted so as not to invade the President's law enforcement powers or notions of separation of powers. The Court reasoned that the Independent Counsel statute was the most reasonable solution to the problem of high-level misconduct.

3. Experience under the 1987 Act[45]

From 1987 to 1992, the Department of Justice handled fifty-two cases under the statute. Thirty-eight were closed during the threshold inquiry phase because they did not concern covered individuals, the information provided was not specific or credible or both, or the conduct alleged did not constitute a crime. The other fourteen cases went to the preliminary investigation stage. Of these, five were closed as a matter of record following preliminary investigations: allegations against former Assistant Attorney Generals Douglas Ginsburg and William Weld, the so-called "Iraqgate" matter, the Inslaw case, and the Banca Nazionale de Lavoro prosecutions. Six other cases were closed following entirely confidential preliminary investigations. Independent Counsels were appointed in three cases. Arlin Adams conducted an investigation of HUD which lasted more than four years, cost $10 million and resulted in twelve indictments, which produced seven guilty pleas, three convictions after jury trials, and one acquittal. In 1992, Joseph di Genova began an investigation of searches of passport records of presidential candidate Bill Clinton and his mother. The investigation cost $84,000 and resulted in no indictment. Finally, a confidential Independent Counsel conducted a $27,000 investigation which resulted in no indictment.

E. Two Year Lapse

In 1992, members of Congress recommended that the statute be reauthorized with amendments placing additional fiscal and administrative controls on the Independent Counsel. Due to opposition to the bill's consideration in the closing days of the 102nd Congress, however, the stat-

44. Statement by President Ronald Reagan upon signing H.R. 2939. Reprinted in 1987 U.S.S.C.A.N. at 2206.

45. Information in this section is drawn from 1994 U.S.S.C.A.N. at pages 756-58.

ute lapsed as of December 1992. Ongoing investigations continued to their conclusions.[46]

In the absence of legislation authorizing appointment of an Independent Counsel, in January 1994 Attorney General Janet Reno appointed Robert B. Fiske, Jr. as special counsel to investigate the Clintons' involvement in the Whitewater land deal. As part of his Whitewater investigation, Fiske announced that he would also investigate the death of Deputy White House Counsel Vincent W. Foster, Jr. who was allegedly involved with the details of the Whitewater scandal. In May 1994, Fiske concluded that Foster's death was a suicide. His investigation of Whitewater was still ongoing in June 1994 when the Independent Counsel statute was re-enacted.

F. Independent Reauthorization Act of 1994

1. Amendments to the Statute

In January 1993, bills to re-enact the law were once again proposed. On June 30, 1994, the law was re-enacted with strong support from the Clinton Administration with the following amendments:

a. Further Cost-Cutting Limitations on Independent Counsel. The first set of amendments was designed to place fiscal and administrative cost controls on Independent Counsels. Chief among them is the requirement that the Independent Counsel immediately appoint a staff person as a "certifying official" with personal liability for certifying that each expenditure made by the Independent Counsel is reasonable.[47] The law was also amended to require the Independent Counsel to comply with the Department of Justice's spending policies to the extent possible and consistent with the purpose of the statute.[48] The law was also amended to provide that the Independent Counsel submit annual expense reports to Congress,[49] in addition to his semi-annual expense reports to the Special Division[50] and that he may be called upon to justify expenses by filing responses to requests by targeted individuals for reimbursement of attorneys' fees.[51] These amendments were intended to bring the Independent Counsel in line with spending by other federal prosecutors.

---

46. Id. at 752.

47. 28 U.S.C. § 594(1).

48. *Id.*

49. 28 U.S.C. § 595(a)(2).

50. 28 U.S.C. § 594(h)(1).

51. 28 U.S.C. § 593(f).

The law was also amended to make it clear that the Attorney General and the Office of Government Ethics have authority to enforce the standards of ethical conduct imposed on the Independent Counsel and his staff.[52] Further amendments require the Administrator of General Services to provide immediate temporary office space, equipment and supplies to the Independent Counsel and his staff until more permanent accommodations can be made.[53] The Independent Counsel may also request that certain Department of Justice employees be detailed to his staff to assist in his investigation.[54]

The 1993 amendments also required the Special Division to conduct a review during the second and fourth years of an Independent Counsel's investigation to determine whether the standard for terminating the Independent Counsel has been met.[55] After the fourth year, these reviews are to be conducted on an annual basis.[56]

b. Strengthening the Role of the Attorney General. Other amendments were designed to clarify and strengthen the role of Attorney General. These included an amendment expanding the time period for a threshold inquiry from 15 to 30 days,[57] clarifying that when the Attorney General is implicated in a case she must automatically recuse herself[58] and clarifying that the Attorney General need not seek leave of the Special Division before disclosing documents to persons outside the Department of Justice where such disclosure is "necessary for law enforcement purposes."[59]

c. Coverage Adjustments. The law was amended to provide for coverage of members of Congress.[60]

d. Expiration. The Independent Counsel Reauthorization Act of 1994 is scheduled to expire on June 30, 1999, unless it is reauthorized.[61]

---

52. 28 U.S.C. § 594(j)5).

53. 28 U.S.C. § 594(l)(3).

54. 28 U.S.C. § 594(d)(1).

55. 28 U.S.C. § 596(b)(2). The Special Division may move for termination of an Independent Counsel if its review concludes that the investigation or prosecution has been completed or so substantially completed that it would be appropriate for the Department of Justice to take over the matter. *Id.*

56. *Id.*

57. 28 U.S.C. § 591(d)(2).

58. 28 U.S.C. § 591(e).

59. 28 U.S.C. § 592(e).

60. 28 U.S.C. § 592(e).

61. 28 U.S.C. § 599.

2. Recent Events

In August 1994, shortly after the Independent Counsel statute was reenacted with the above amendments, the Special Division refused to reappoint Fiske as special prosecutor to continue his investigation of Whitewater. The Special Division noted possible conflicts of interest because Fiske had been appointed directly by Attorney General Reno. Instead, the Special Division named Kenneth W. Starr as Independent Counsel to succeed Fiske in the Whitewater investigation. Starr is a former federal appeals court judge and Solicitor General under Presidents Reagan and Bush. Since the reenactment of the Independent Counsel statute in 1994, Attorney General Reno has also called for, and the Special Division has appointed, Independent Counsels in the following matters:

1. In September 1994, Donald Smaltz was named Independent Counsel to investigate allegations that Secretary of Agriculture Mike Espy accepted improper gifts.

2. In February 1995, David Barrett was appointed as Independent Counsel to investigate whether Housing Secretary Henry Cisneros made false statements to the FBI in a background check.

3. In June 1995, Daniel Pearson was appointed Independent Counsel to investigate the business dealings of Commerce Secretary Ron Brown.

4. In November 1996, Curtis Von Kann was appointed to investigate alleged campaign finance improprieties by Eli J. Segal, former head of Clinton's national service organization.

5. In March 1998, Carol Elder Bruce was appointed to investigate allegations that Interior Secretary Bruce Babbitt lied to Congress about his role in an Indian casino proposal.

6. On May 26, 1998 Ralph I. Lancaster Jr. was appointed to investigate alleged financial improprieties by Secretary of Labor Alexis Herman.

Starr's investigation has taken several turns since it first began in August 1994. Starr was initially authorized to investigate matters concerning the Whitewater land deal and Madison Guaranty Savings and Loan. In March 1996, his investigative authority was expanded to include the "Travel Office Affair," in which the White House fired seven employees in the White House travel office and allegedly ordered an FBI and IRS inves-

tigation of travel office employees in an attempt to justify the firings. In May 1996, Starr's jurisdiction was expanded to investigate "Filegate," the White House's collecting of FBI background reports on hundreds of individuals, including some prominent Republicans.

So far, Starr's investigation has resulted in convictions of former Arkansas Governor Jim Guy Tucker and James and Susan McDougal for bank fraud and conspiracy charges, and acquittals of Arkansas bankers Herby Branscum, Jr. and Robert Hill for allegedly using bank funds to reimburse themselves for political contributions made to the campaigns of Clinton and others. In July 1997, Starr concluded, as had Fiske in May 1994, that Vincent Foster's death was a suicide not related to the Whitewater scandal.

Most recently, in January 1998, Starr's mandate was expanded to allow him to investigate whether President Clinton committed perjury by denying in a deposition taken in the sexual harassment lawsuit filed against by Paula Corbin Jones that he had had sexual relations with Monica Lewinsky, a former White House intern, or had obstructed justice by encouraging Ms. Lewinsky to lie under oath.

II. THE PANEL DISCUSSION

At the Association's Panel discussion on December 9, 1997, the Panelists all agreed that the Independent Counsel statute should be retained in some form to protect the integrity of investigations of possible high level wrongdoing. Several Panelists noted that the independent investigation conducted by an Independent Counsel invariably achieves one of its main intended goals: to remove apparent and actual conflicts of interest arising when an administration is charged with investigating itself through the Department of Justice.

Judge Walsh, Alexia Morrison, and Samuel Dash all agreed that the statute serves to maintain public confidence in the Attorney General, by allowing her to step aside in matters rife with actual or apparent conflicts of interest. Mr. Dash commented: "I don't care how decent and honest the attorney general is, the appearances of conflict are so great the public won't have confidence." This is especially true where it is the Attorney General herself that is under investigation. Mr. Dash gave the example of Independent Counsel Jacob Stein's investigation of Attorney General Meese in 1984. The investigation exonerated Meese of any alleged wrongdoing. As Mr. Dash explained:

> If the Justice Department had investigated that and said the

> same thing, you would have had cries of cover up and whiting it out, whitewash. But there wasn't a single criticism in the newspapers of America when Jake Stein, the Independent Counsel, concluded no indictment against Meese and that's what we need in federal administration of justice—confidence of the public in it.

Ms. Morrison gave another example: her own experience with the Olson investigation. She explained that her conduct during the investigation was criticized every step of the way, but that her final conclusion—that no indictable offense occurred—was not. This was true even though her decision not to indict was contrary to the findings of a congressional investigation that concluded that there were grounds for prosecution. "It would not have been the same," she commented, "if the Department of Justice had disagreed with Congress." She concluded, "the bottom line result is likely to be widely accepted because people do see the independence factor as eliminating any cause for concern over bias."

Elliott Richardson, Sam Dash and Judge Walsh cited an additional reason for retaining the Independent Counsel statute in some form: to prevent another Saturday Night Massacre. Judge Walsh pointed out that in the absence of the statute, the Attorney General would still be free to appoint an investigator to ferret out possible high level wrongdoing. "Throughout our history, 200 years, Attorneys General have had the power to appoint an Independent Counsel." That was what Elliott Richardson did in appointing Archibald Cox to investigate Watergate. The problem with such a system, however, in Judge Walsh's view, is that absent statutory protection, the Independent Counsel may be removed at will without the need for any explanation, as happened to Archibald Cox when he closed in on Nixon's involvement in the Watergate conspiracy. But for the public outcry that followed, Nixon may have succeeded in keeping his involvement covered up. Sam Dash added:

> I don't think we want a system anymore where we rely on the Attorney General to make the appointment [of an Independent Counsel] and chance because of that appointment the firing of that Independent Counsel or that Special Prosecutor if he gets too close. It's not a perfect system. It's a human system. And I don't believe we can do without it.

Mr. Dash also pointed out that in the absence of the Independent Counsel statute, the public is dependent on Congress to keep them aware

of possible wrongdoing in high office and that Congress may not be up to the task:

> Unfortunately, Congress has not shown . . . that they are competent enough to present the kind of hearing that will get the American people outraged enough to respond to a firing of a man like Professor Cox. I think that if the public in the summer of 1973 was not watching the Senate Watergate Hearings and did not become sensitive to the issues involved, if Cox had been fired in Washington, most of the people of America would have said "well that's just another political thing." They wouldn't have known anything about it.

The only Panelist who voiced caution in retaining the Independent Counsel statute was Robert Fiske, who, while agreeing that the statute should be retained, noted that many other formidable authorities on the subject believe the statute to be unconstitutional notwithstanding the Supreme Court's ruling in *Morrison v. Olson*. In particular, he cited the positions of Attorney Generals Edward Levy, Griffin Bell, and William French Smith. He suggested that perhaps in today's climate of repeated appointments of Independent Counsels, their criticisms of the statute should be re-examined.

With the exception of Mr. Dash, who believes that "it's the nature of the beast" for the Independent Counsel statute to have become a political tool, the Panelists uniformly agreed that the Independent Counsel and his investigations have become over-politicized. In particular, Professor Cox's feels the statute must be "cleansed of its present political overtones":

> The statute is doomed to be a political instrument and the success or failure of the Independent Counsel will be measured by whether he catches his quarry or not, and how many quarry he catches until we recognize that [the purpose of the statute] is equally to exonerate those who deserve to be exonerated and the emphasis must be on finding a way to do that.

Professor Dash asserted that the role of the Independent Counsel is and has always been "not to hunt out and convict, but to seek justice." He believes the notion that the public has lost confidence in the Independent Counsel is just "media spin" of a "dangerous viewpoint." Ms. Morrison agreed with Professor Cox that the primary focus of proponents of the statute must be to protect the statute from over-politicization:

> If there is anything that will bring down this statute, in my view, it is not going to be the structure of the statute itself, or the viability of the mechanism that Sam [Dash] and Congress on his recommendation enacted and have continuously re-enacted. It will be the fact that the statute itself becomes politicized in a way that takes the credibility out of that process.

Many of the Panelists also took issue with the media's characterization of the Independent Counsel as a maverick investigator subject to no rules or boundaries. Judge Walsh cited his own experience in the Iran-Contra investigation:

> Actually, when you get down to Washington as an Independent Counsel, you'll find that you're all alone. Within the first week of my being there I was told by the Committees of Congress that they were about to grant immunity to Oliver North and Admiral Poindexter because they needed a witness. My staff hadn't been cleared for classified information when I got that word. And then the Attorney General, his legislative representative, began to attack me for spending too much money within two months, let alone what came afterwards. So you are on the defensive, that's what I'm trying to say. You'll look up at Congress with all their congressional staffs. They want you to stand aside and let them do it their way. They want to give immunity. They don't want to bother the President. They don't want to bother the Vice President because they don't want to get into a political controversy on the eve of a presidential year. You'll look up in the other direction at all of the agencies of government with their public relations staff and their capability of making news stories and what have you got? You're looking for a yellow pad and the pencil to start work.

Professor Dash pointed out that the Independent Counsel is nothing more than a federal prosecutor selected by other means. Speaking of Judge Walsh and his Iran-Contra Investigation, Professor Dash explained that most of the criticism heaped on Judge Walsh came from his targets. "[T]he origin of the charge of overreaching comes from the target who is attempting to deceive or ruin the work of an Independent Counsel." He went on to point out the myriad groups or individuals with power to review and regulate the work of an Independent Counsel: Congress and the Special Division (through oversight provisions of the Independent Counsel statute), the Attorney General (through her power to remove the

Independent Counsel for cause and other checks provided for in the Independent Counsel statute), the federal courts (through their criminal procedures and the Constitution's Bill of Rights), and the Bar (through their ethics rules). And, Professor Dash added, the Independent Counsel is "under the thumb and spotlight of the media. He is . . . watched in every step he takes, and therefore [it is inaccurate] to say that this is an unaccountable officer who can run roughshod over people." Both Professor Dash and Ms. Morrison noted that the Independent Counsel is also bound to follow the policies and procedures of the Department of Justice. If he fails to do so, Ms. Morrison believes this would be a credible reason for the Attorney General to seek the Independent Counsel's removal.

All of the Panelists agree that the scope of the Independent Counsel statute should be narrowed, but they cited different reasons. Mr. Richardson opened the discussion of reform by stating: "When I wrote about Watergate, that must have been about three or four years after the event, I noted that I had been aware of only two Independent Counsels appointed prior to the appointment of Archie Cox and I guessed that there might not be more than one or two more appointed in the balance of the century. Obviously, a pretty far from the mark guess." Robert Fiske and Ms. Morrison believe the statute should be narrowed to preserve the integrity and jurisdiction of the Department of Justice; whenever a matter is referred to an Independent Counsel, it is taken from the DOJ with the implication that the DOJ is not capable of doing the job. Mr. Richardson would narrow the statute to preserve the credibility of an Independent Counsel; requiring the Independent Counsel to investigate matters concerning too many people, too often, trivializes the Independent Counsel's role in the process. Professor Cox believes narrowing the statute would diminish the ability of the media to attack the Independent Counsel and reduce politicization of the statute.

The Panelists were in agreement that it could be narrowed in any of four major ways: the number of persons covered, the period of time for which a person is covered, the types of crimes covered, and the scope of the Independent Counsel's investigation.

a. The Number of Persons Covered. Judge Walsh and Mr. Fiske took the most restrictive view, suggesting that the statute should cover only the President, the Vice President and the Attorney General. Professor Cox would expand that group to include certain cabinet members and senior staff persons. Professor Dash, by contrast, argued that all cabinet members must be included because they are selected by the President and he has every

reason to use his influence with the Attorney General to see that they are exonerated of any alleged wrongdoing. Judge Walsh countered that the need to sweep large numbers of Executive Branch people into the statute is not as critical as it once may have been: "[T]here is simply not the same intimacy between the divisions of the Executive Branch as there used to be." Like Professor Dash, Ms. Morrison agreed that the statute should not be limited in this area. She believes this would hurt the credibility of the statute because it would fail to address and eliminate apparent or actual conflicts in a number of areas.

b. Period of Time a Person is Covered. Professor Cox, Judge Walsh and Professor Dash believe that a person should only be covered for crimes committed during their term of office. This would of course exclude investigation by an Independent Counsel for crimes such as those alleged in connection with Whitewater. Ms. Morrison was the only Panelist to express opposition to this viewpoint. She does not believe that high level officials should be "given a pass" for the commission of a federal crime simply because the crime was not committed while in office. She added: "I agree with the sentiment of narrowing the statute; I just don't know how you can do it without creating room for frolic."

c. Scope of Crimes Covered. Closely related to the time of coverage question is the question of which crimes should trigger the statute. Professor Cox suggests that the statute should be triggered only when "Watergate-type" crimes are committed. Professor Dash would favor such a limitation but believes it impossible to draft legislation with that intended outcome. Professor Cox suggested that the statute could be limited to crimes involving "abuse of power in office" or "attempts to improperly influence legislation." Judge Walsh suggested that the statute be limited to "misconduct involving the exercise of government power."

d. Scope of Independent Counsel's Investigation. The Panelists spent a large part of their discussion debating possible limitations in this area. Professor Cox proposed that the Independent Counsel's investigation be limited to two years, subject to extensions of time for cause shown, and that the "related crimes" provision should be narrowed. He also believes that the Independent Counsel should be charged with his duties on a full-time basis during any particular investigation and not be permitted to share his time between the investigation and his law firm practice, which would reduce the amount of time spent on an investigation.

Ms. Morrison responded to Professor Cox's proposed two-year limitation on investigations by noting, again, that the Independent Counsel is just like any other federal prosecutor and that limiting his investigation

to a two-year period would put the Independent Counsel at a disadvantage over other DOJ prosecutors charged with investigating alleged crimes of even lesser magnitude:

> [I]f you deal with the Department of Justice on a regular basis, I know that you would find that there are lots of investigations that take a long time. These are not straightforward eyewitness account kinds of criminal allegations. They are complex, document heavy, and sensitive allegations that involve people who may or may not want to be as cooperative as you would like them to without some urging and, so, they are time-consuming. It takes the Department [of Justice] in similar cases a very long time to investigate them and to overcome the natural resistance in cases that are of high visibility as are most Independent Counsel investigations. And, frequently, it takes them that long even when there is not a high visibility factor in the matter. . . . [L]ots of DOJ investigations end up going up to the point where the statute of limitations is about to run and that's not an extraordinary event, and those are frequently cases that are much easier than the ones the Independent Counsel faces.

Ms. Morrison believes that to require an Independent Counsel to establish "good cause" to extend his investigation beyond a two-year limit would as a practical matter require him to disclose leads in an ongoing investigation—a step which could compromise the success of the investigation. Moreover, such leads or allegations may be unsubstantiated. To require the Independent Counsel to reveal them in this context would make it difficult for the target of the investigation to respond in his defense.

For a number of reasons, Ms. Morrison, Judge Walsh and Mr. Fiske also oppose limiting the related crimes provision. Ms. Morrison explained that like any other federal prosecutor, an Independent Counsel should be able to "follow an investigation where it logically takes [her]." Like any other federal prosecutor, the Independent Counsel should not be told that there are particular areas into which he cannot go or particular people he cannot question or investigate. Mr. Fiske agreed with Ms. Morrison and elaborated:

> You can limit the scope of the statute, but it is harder to limit the scope of an investigation ... In order to preserve that person's independence and that person's ability to do the job the right

> way, you have to allow that person to use all of the tools that person would use if they were a line prosecutor in the Department of Justice. And if that means if there is somebody close to the target and the only way to get that information is to prosecute that person for a crime you believe that person has committed then I believe that is entirely proper and the Independent Counsel should have that authority.

Speaking of his own experience in handling the Iran-Contra Investigation, Judge Walsh explained that "if the line of inquiry is so narrow....it's easy to defeat it."

Professor Dash also opposes limiting the related crimes provision and suggests that abuse can be curbed by placing emphasis on appointing accomplished lawyers who have already made a name for themselves in the legal community and have an established law practice which they would not want to be away from for too long. He noted that "no matter how you sharpen the statute it is always going to be administered by human beings and therefore the appointment of better people is key. Legislative language is not going to breed honesty or the kinds of things you would like to see in the duties of a prosecutor."

III. PROBLEMS WITH THE CURRENT STATUTE AND PROPOSED SOLUTIONS

As demonstrated by the comments of our panelists, as well as by the history of the amendment process, the decision whether to allow the Independent Counsel statute to expire has historically generated an intensely political debate. Thus, the current controversy surrounding the investigation by Independent Counsel Kenneth Starr of President Clinton illustrates what some Panelists regard as an unavoidable consequence of the statute: its use as a political weapon.

Notwithstanding this criticism of the statute's politicization, none of our Panelists advocated the statute's abolition. The Committee on Federal Legislation agrees. But, like the panelists, we believe that the statute is in need of substantial modification. Below we highlight some of the more serious problems that have been raised concerning the statute and propose recommendations to depoliticize it. Although some on this Committee advocate allowing the statute to expire, a substantial majority believes that the better course is for Congress to enact amendments that address the statute's current failures.

A. Problems and Recommendations

1. Problem: *The Independent Counsel Statute Covers Too Many Crimes*

The statute requires the Attorney General to seek an Independent Counsel when, after preliminary investigation, she determines "that there are reasonable grounds to believe that further investigation is warranted."[62] Only if she determines that "there are no reasonable grounds to believe that further investigation is warranted,"[63] can she decline to request the appointment of an independent counsel. This procedure has been criticized because it can lead to the appointment of an Independent Counsel not only when there is some—but not a substantial—reason to believe that a law has been violated, but also when, outside the particular context of this statute, no prosecution would occur. As Archibald Cox has written: "Attorneys General should not have to call for an independent counsel when they determine, and publicly state, that even if evidence of an indictable offense were found, prosecution would be inconsistent with established Justice Department policies."[64]

Recommendation: *Permit the Attorney General Not to Appoint an Independent Counsel if She Determines that Prosecution Would be Inconsistent with Established Justice Department Policies Even if Evidence of an Indictable Offense were Found*

We agree with Professor Cox on this issue. The politicization of the statute has resulted in part from the requirement that the Attorney General appoint an independent counsel even where the normal exercise of prosecutorial discretion would clearly lead to a decision not to prosecute. The Committee recommends that 28 U.S.C. § 592(b)(1) be amended to permit the Attorney General to notify the special division that "prosecution would be inconsistent with established Justice Department policies even if evidence of an indictable offense were found." The Attorney General should be required to identify the policies and to state the reasons her prosecution would be inconsistent with these policies. Similar language should be added to 28 U.S.C. § 592(c), to make clear that an Independent Counsel need not be sought under these circumstances. These changes are consistent with Congress' concerns as reflected in the legislative history discussed in the first part of this Report. The statute, as currently drafted, does not adequately meet this concern.

62. 28 U.S.C. § 592(c)(1)(A).

63. 28 U.S.C. § 592(b)(1).

64. Archibald Cox, Op-Ed, *New York Times*, December 11, 1996.

One possible objection to this modification of the statute is the potential for the Attorney General to abuse this discretion. We believe that serious abuses can be handled by the political branches. If, for example, credible allegations of bribery arise concerning a covered person, an Attorney General who declines to appoint an Independent Counsel on the grounds that established Justice Department policies do not call for the prosecution of bribery will have to answer to Congress. It is unlikely that such serious abuses will occur at all, and if they do occur, it is even more unlikely that they will go uncorrected after they are publicly aired and criticized.

2. Problem: *The Independent Counsel Statute Requires the Attorney General to Seek an Independent Counsel Too Often*

The Independent Counsel statute was a reaction to the Watergate scandal, which brought to light systemic and grave abuses of Presidential power, including the use of government agencies to spy on and discredit the President's political adversaries and to interfere with the electoral process itself. The Act as it is currently drafted, however, is not confined to such dramatic and dangerous situations. Rather, the Attorney General is obligated to appoint an Independent Counsel whenever a person covered by the statute "may have violated any Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction."[65]

As currently structured, it is irrelevant whether the alleged violation occurred while the covered person was in office or whether it has anything at all to do with his or her job. Thus, the panelists, along with most other commentators, believe that the law, if it is renewed, should be narrowed to include only crimes involving the position to which the covered person was appointed or elected.[66] Thus, for example, the investigation of the charge that an administration official (i.e., Hamilton Jordan, White House Chief of Staff in the Carter Administration) used cocaine in a New York club would seem wholly unrelated to the purposes of the statute. There is no reason, we believe, that such allegations could not be referred to the United States Attorney for the district in which such alleged conduct occurred.

The current expansiveness of the statute cheapens its use and exacerbates its politicization. The Act was intended to defuse the potential for

65. 28 U.S.C. § 59(a).

66. For a recent statement by one member of the panel, *see* Lawrence E. Walsh, "Kenneth Starr and the Independent Counsel Act," *New York Review of Books*, March 5,1998.

genuine constitutional crises like that which emerged during Watergate. We do not believe that the Justice Department cannot be trusted to investigate crimes that have nothing to do with the conduct of the highest levels of government.

Moreover, targets of Independent Counsel face, in practice, greater risk than do targets of investigations conducted by the Department of Justice.[67] The public nature of these investigations, the reporting requirements and the considerable resources of the Independent Counsel place undue pressure on an Independent Counsel to establish that he has done the job thoroughly. Consequently, decisions not to indict must be justified in ways that are unheard of in ordinary criminal investigations. In extraordinary cases, these risks of potentially harsher treatment of targets may be worth the cost in order to enhance the integrity of government. But careful thought should be given before any such disparate treatment is accepted. The breadth of the law as it now stands accepts these consequences in cases in which it should not.

Recommendation: *Limit the Types of Crimes Covered by Independent Counsel Statute*

28 U.S.C. § 591(a) should be modified to replace "any Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction" with "any Federal criminal law concerning that person's election to office, or that person's performance of his or her duties in office, other than a violation classified as a Class B or C misdemeanor or an infraction."

This modification would continue to cover Watergate-type crimes, which threaten the electoral process. It would also continue to cover situations like the Iran/Contra affair, involving the illegal diversion of funds and weaponry in violation of federal law. It would also continue to cover allegations that cabinet members accepted gifts or payment in exchange for taking positions on government matters. It would also continue to cover potential campaign finance law violations.

Under this modification, however, there would be no Independent Counsel investigating Hamilton Jordan's alleged cocaine use. Neither would

67. Professor Sunstein points out that the financial cost and potential damage to reputation of the target of an Independent Counsel, even if ultimately cleared of wrongdoing, will deter potential public servants from assuming high-level appointments. (*See* Cass Sunstein, "Unchecked, Unbalanced: The Independent Counsel Act," *The American Prospect*, May-June 1998, pp. 20-27.)

there be any Independent Counsel looking into possible perjury in civil cases unrelated to the conduct of government, such as whether Mr. Clinton lied in a deposition in the lawsuit that Paula Jones brought against him. More significantly, there would be no Independent Counsel investigating Whitewater, since those allegations deal with events that occurred prior to Clinton's having taken office. The statute would not authorize Independent Counsel investigations into the cabinet appointment process either.

The greatest significance of this modification is that it would limit the use of the Independent Counsel to those situations that involve dereliction of duty while in office or crimes in the electoral process. Such a modification should restore morale in the Justice Department, which will become responsible for all other investigations.

3. Problem: *The Process for Selecting an Independent Counsel is not Neutral*

A special division of the United States Courts of Appeals has been established for the purpose of appointing Independent Counsels.[68] Under the statute, the Chief Justice "shall designate and assign three circuit court judges or justices, one of whom shall be a judge of the United States Court of Appeals for the District of Columbia."[69] In determining who should sit on the panel, "priority shall be given to senior circuit judges and retired judges."[70] Members of the division sit for a two-year term.[71] The Senate Governmental Affairs Committee that reported on the bill recognized that members of the Special Division "will be dealing with very sensitive matters of great concern to the present Administration and other elected officials. As retired judges their ambitions would have been largely achieved and their activities would be less likely to involve them in any conflict situation."[72]

The purpose of the Independent Counsel statute is to enhance the credibility of investigations into the conduct of high government officials. As currently drafted, the statute permits the Chief Justice to appoint to the Special Division recently appointed judges when no senior judges are available, especially from the D.C. Circuit. It further does not prohibit the reappointment of Special Division judges to successive terms.

68. 28 U.S.C. § 49.

69. 28 U.S.C. § 49(d).

70. 28 U.S.C. § 49(c).

71. 28 U.S.C. § 49(a).

72. S. Rep. No. 95-170, at 78 (1977), *reprinted in* 1978 U.S.C.C.A.N. 4216, 4294.

The purpose of the law is not served, we believe, if the Special Division panel is too closely allied with either the administration being investigated, or with an administration recently voted out of office.[73] Such appointments may lead to a public perception that the Independent Counsel herself is in a position of conflict of interest.

Justice Scalia recognized this problem in his dissent in *Morrison v. Olson*: He wrote:

> An independent counsel is selected, and the scope of his or her authority prescribed, by a panel of judges. What if they are politically partisan, as judges have been known to be, and select a prosecutor antagonistic to the administration, or even to the particular individual who has been selected for this special treatment.[74]

Recommendation: *Modify the Manner in which Judges are Appointed to the Special Division*

Former Senator Rudman has suggested that the Special Division be selected on a rotating basis for a term of only 18 months. The Committee believes that 28 U.S.C. § 49 should be modified to require that the members of the Special Division be appointed for two-year, non-renewable terms and that appointments rotate among the federal circuits. The chief judge of each circuit should make such appointments. Priority should continue to be given to senior judges. If no senior judges are available, then the length of service on the bench should be the criterion. The requirement that one of the judges be a member of the D.C. Circuit does not appear to serve any important function, and should be eliminated. These modifications should reduce the possibility that members of the special division are closely allied with an administration under investigation, or one which has recently been voted out of office. Rather, the special division will consist of a rotating panel of seasoned judges. The proposed changes should, therefore, serve to reduce the extent to which the

73. Cf. Wilkinson and Ellis, *Independent Counsel Symposium: The Independent Counsel Process: Is it Broken and How Should it be Fixed?*, 54 Washington and Lee Law Review 1515, 1539 (Fall 1997) (comments of Judge Sentelle). Judge Sentelle drew implicit comparisons between Kenneth Starr and Archibald Cox by pointing out that the ideal independent prosecutor would be, like Cox, allied with the previous administration of the opposite party and active in party politics. Sentelle argued that someone in this position is more favorable because he "has no ax to grind to defend any abuse of power that might exist. It puts the covered person in the same position they would be if they had been in a prior administration and the present Justice Department was investigating them."

74. 487 U.S. 654, 729 (1988) (Scalia, J. dissenting).

panel, and therefore the Independent Counsel office, is seen as having become politicized.

4. Problem: *The Reporting Requirements Put Undue Pressure on Independent Counsels to Seek Indictments*

As the law now stands, post-investigative reports are issued to the Congress and to the Special Division.[75] While targets are given the opportunity to review the report before submission, this opportunity is of little value, because the target is not given access to the wealth of material that the Independent Counsel used in writing the report.[76] In particular, he is not given access to grand jury materials. The reporting requirement makes it essential that an Independent Counsel justify any decision not to prosecute. In one sense, it is at the heart of the statute. It means that the public can be confident that allegations of wrongdoing by senior government officials will be treated seriously, and decisions not to prosecute them will be explained fully. On the other hand, as described above, the reporting requirement causes investigations to be prolonged and enhances the likelihood of prosecutions. Nowhere else in our criminal justice system does a target have to bear the burden of being prosecuted unless the federal prosecutor can justify publicly why such prosecution was inappropriate. The reports are also expensive and time-consuming.[77]

Recommendation: *Truncate the Reporting Requirements*

Despite the good intentions of Congress in requiring these reports, we recommend that 28 U.S.C. § 594(h)(1)(B), which requires the Independent Counsel to "file a final report with the division of the court, setting forth fully and completely a description of the work of the independent counsel, including the disposition of all cases brought," be modified to require the Independent Counsel to "file a brief statement setting forth the disposition of all cases brought." With respect to cases not brought, the report should succinctly set forth the number of witnesses interviewed, the extent of documentary and other evidence reviewed, and the reasons why the Independent Counsel did not bring the case.

The same adjustment should be made with respect to reports to Con-

75. 28 U.S.C. § 594(h)(1)(B).

76. 28 U.S.C. § 594(h)(2).

77. *See* Independent Counsel Symposium, supra note 73, at 1555-56 (comments of former Independent Counsels Robert B. Fiske, Jr., Jacob A. Stein, Larry D. Thompson and Lawrence E. Walsh on the many problems with the final report requirement).

gress, except that the Independent Counsel should continue to be obliged to notify Congress in detail of any potentially impeachable offenses. The Committee does not advocate eliminating or relaxing those statutorily required reports that deal with accounting for the Independent Counsel's expenses.

These modifications should remove some of the pressure to prosecute that distinguishes the Independent Counsel from other federal prosecutors. They should thus serve to reduce the perception that those who are being investigated by an Independent Counsel are subjected to a higher standard of conduct than the remainder of the population with respect to criminal statutes.

5. Problem: *There are Too Many Covered Persons Under the Statute*

The Committee believes the Act presently covers too many people. We think the Department of Justice is perfectly capable of investigating any allegation of wrongdoing by many officials who currently are covered persons. Moreover, to whatever extent the Department of Justice might soft-pedal such an inquiry, Congress certainly has a strong stake in uncovering improprieties in the confirmation process.

We believe that the number of covered persons is at the heart of this statute's problems. While some argue that some cabinet positions covered by the statute are sufficiently remote from the core of governmental function that any conflict of interest in the Justice Department will be less serious, the statute as now written generally covers only individuals at the highest level of government who were appointed by and report to the President. Most negative comments on the number of covered individuals, we believe, are really concerned with the fact that cabinet members not working closely with the President can be the subject of an Independent Counsel investigation having nothing to do with the performance of their governmental duties. We have already suggested that this problem be remedied by drastically reducing the kinds of alleged criminal activities that can trigger the Independent Counsel statute.

In contrast, we do believe that senior members of the political campaign committee of the administration's party should not be the subject of this statute. First, the Justice Department should be able to investigate any abuses. Second, members of Congress from the party not occupying the White House have enormous incentive to bring such abuses to the public's attention, adding to the likelihood that the Attorney General will be forced to act. Finally, to the extent that campaign finance violations are committed by both parties, it seems incongruous to have an Independent Counsel investigate abuses of the party in power, and the

Department of Justice investigate similar activities involving the party not in power. This duality will put pressure on an Attorney General not to appoint an Independent Counsel, and not to investigate abuses by the party not in power for fear of triggering pressure for the appointment of an Independent Counsel to investigate abuses by the Attorney General's own party.

Recommendation: *Eliminate Reference to Senior Members of Political Campaign Committees from the List of Persons Covered by the Statute*

We recommend deleting § 591(b)(6), which covers senior members of national campaign committees. We do not recommend any of the other changes frequently suggested. For example, Robert Fiske has called for limiting the statute to the President, the Vice President and the Attorney General. The statute now also includes senior White House officials, cabinet members, senior members of the Department of Justice, and the Director and Deputy Director of Central Intelligence. It is our opinion that the Independent Counsel statute should apply to all of these individuals, but only with respect to crimes involving the performance of the duties of office.

B. Desired Consequences of Proposed Modifications

The goal of these modifications is to eliminate or reduce five of the serious problems identified in the previous section without eliminating a statutory mechanism to ensure credible investigation into alleged crimes by high government officials involving the performance of their duties. Limiting the covered crimes will reduce expenditures and reserve the appointment of Independent Counsels for sufficiently serious matters. Reducing the kinds of crimes, the number of individuals covered by the statute, and the reporting requirements should help to create, statutorily, an environment in which it is easier for the Independent Counsel to exercise the kind of discretion that federal prosecutors usually exercise, making the statute fairer to targets. Randomizing the selection of the special division of the United States Court of Appeals among senior judges from across the country will make the application of the statute fairer and less prone to political manipulation. These modifications should serve to impose the kind of good judgment for resort to the Independent Counsel that politicians may find difficult to exercise on their own in today's political climate.

C. Limitations on What Can Be Accomplished: The Abolitionist View

The question remains, of course, whether these suggested modifications, if enacted, will depoliticize the statute sufficiently to make it worth saving. We cannot realistically expect politicians of either party to fore-

bear from using the statute for political gain. A majority of this Committee believes that, with the proposed amendments, the Independent Counsel statute can nonetheless serve a positive role in government. A minority of our members disagree and would allow the statute to lapse in 1999. We believe that it is important that these views be expressed here. They remind us that the Independent Counsel statute, if it is renewed and modified as we suggest, is still a very powerful tool that must be used only when serious allegations of misconduct by high government officials reduce the likelihood that adequate investigation will occur through ordinary governmental structures.

Those favoring abolition point out that the constitutional system of checks and balances is designed to cope effectively with the issues which gave rise to the Independent Counsel statute. Congress has investigatory jurisdiction broader than that of an Independent Counsel, extending to any matter which affects the public interest. The Independent Counsel is restricted to jurisdictional limits framed by the Justice Department. Congress has subpoena authority no less than that of the Independent Counsel. Congress can likewise grant immunity. Congress can cite persons for contempt; and Congress may turn to the courts to enforce its authority. Watergate is a good example of Congress successfully using its powers to expose serious criminal wrongdoing within the Executive Branch. Congress must exercise its oversight responsibilities, the abolitionists argue, not delegate those responsibilities to a special prosecutor whose sole function is to investigate and prosecute the Executive Branch. This may lead to irreparable damage to the Presidency as an institution. Few in Congress would approve the creation of such a special prosecutor to scrutinize them in the same manner. Congress would presumably conclude its ethics committees are better suited for such investigations. If the Independent Counsel Act is such a good statute, the thinking goes, then what is good for the goose is good for the gander.

Another proposal supported by some on the Committee would expand the jurisdiction of the Public Integrity Section of the Criminal Division of the Justice Department and separate that office from direct control of the Justice Department. That section now investigates and prosecutes cases of fraud and corruption by state, local and federal government officials. The public integrity section could be established as a separate agency subject to the control of a permanent independent counsel appointed for a ten-year term by the President, like the Director of the FBI, and would be subject to dismissal for cause. Its jurisdiction could be expanded to cover the high federal officials now subject to the Indepen-

dent Counsel Act. Investigators in the Public Integrity Section, the argument goes, have the requisite background and experience to qualify them to investigate possible wrongdoing at high levels. Unlike an Independent Counsel under the present Act, who investigates individuals, the Public Integrity Section operates on a continuous basis in the field of public corruption or other high-level criminality. There is no incentive to find a basis for prosecution against a single target[78] since the Section already has a wide range of possible subjects. Normal prosecutorial discretion would therefore be applied instead of the single-minded focus of the current scheme.

All of these concerns are valid. Our three branches of government can suffer if we subject them to constant attack from the others. Nonetheless, a majority of the Committee, and all of our distinguished Panelists, have concluded that an Independent Counsel statute, properly limited to abuses of power by high government officials will, in the long run, strengthen our confidence in government.

CONCLUSION

The goal of the Independent Counsel statute is to enhance confidence in government by establishing procedures that subject the most powerful members of the Executive Branch to prosecution for abusing their power. But the statute currently in effect does too much. It requires the appointment of an Independent Counsel even when alleged crimes are of a sort that the Justice Department would not prosecute and that have nothing to do with official duties. Demands for the appointment of Independent Counsels have become a routine form of political warfare. This practice further debases our already unedifying political discourse. It trivializes the statute and, we fear, will undermine its effectiveness in the situations it was meant to address—credible allegations of abuse of Executive power. Some believe this process of politicization is unstoppable and, accordingly, that the statute is beyond hope and should lapse. We recognize that the Independent Counsel statute, if used at all, will inevitably burden targeted individuals and, at least in some instances, lead to political foul play. But the majority of this Committee believes that the Statute, with the modifications we propose, can and will serve its important purpose.

August 1998

78. *See* Cass Sunstein, "Unchecked, Unbalanced: The Independent Counsel Act," *The American Prospect*, May-June 1998, pp. 20-27.

Committee on Federal Legislation

Louis A. Craco, Jr. *Chair*
Paul B. Sweeney, *Secretary*

Derek Adler
Antonia M. Apps
Joy C. Barson
Marjorie E. Berman
Blaine H. Bortnick
Douglas D. Broadwater
Stacey B. Chervin
Stuart M. Cobert
Marla Eisland*
David P. Felsher
Charles W. Fournier
Leon Friedman
Rita W. Gordon**
Jennifer Gray
Gregory L. Harris*
Richard K. Hayes
Cornelius P. McCarthy
Eileen P. McCarthy
Andrew Musicus*
Edmund M. O'Toole
James F. Parver
David Proshan
Risa M. Rosenberg
Adrienne L. Saldana*
Lawrence Solan*
Chantal Thomas
Diane S. Wilner

*Members of the Independent Counsel Sub-Committee
**Chairperson of the Independent Counsel Sub-Committee