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An Original Model of the Independent Counsel Statute

Ken Gormley
Duquesne University

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AN ORIGINAL MODEL OF THE INDEPENDENT COUNSEL STATUTE

Ken Gormley*

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* Professor of Law, Duquesne University. B.A. 1977, University of Pittsburgh; J.D. 1980, Harvard. Professor Gormley is author of ARCHIBALD COX, CONSCIENCE OF A NATION (1997), the biography of the first Watergate Special Prosecutor. — Ed.

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INTRODUCTION

On Friday, October 19, 1973, President Richard M. Nixon took a risky step to de-fang the Watergate investigation that had become a “viper in the bosom” of his Presidency.¹ The U.S. Court of Appeals had just directed him to turn over tape-recordings subpoenaed by Watergate Special Prosecutor Archibald Cox; these tape-recordings might prove or disprove White House involvement in the Watergate cover-up. Rather than challenge this ruling, the President conceived a new plan. The White House would prepare *summaries* of the nine tape-recordings in question, which would be verified by Senator John Stennis, a seventy-two-year-old Democrat from Mississippi, working alone with the assistance of a single White House lawyer. Cox would be entitled to the verified transcripts, but nothing else. It was a generous offer, in the President’s mind; there would be no further negotiations.

The following day, October 20th, Cox held a dramatic press conference, spelling out for the American public why he could not

1. RICHARD NIXON, RN: THE MEMOIRS OF RICHARD NIXON 929 (1978).

agree to the Stennis proposal. President Nixon turned off his television set and summoned Attorney General Elliot Richardson to the Oval Office: Cox had to be fired — immediately. Richardson refused the Presidential directive and resigned. Deputy Attorney General William Ruckelshaus attempted to resign and was “fired” by the President. Finally, Solicitor General Robert Bork carried out the President’s order, terminating Cox. “In the shock of that moment,” one commentator later recounted, “the American public got a taste of what it would be like to live in a country where their ruler is above the law.”² A firestorm of public protest erupted that led to the appointment of a new special prosecutor — Leon Jaworski — and the slow unraveling of the Nixon presidency.³

Nine days after the infamous “Saturday Night Massacre,” Congress began hearings to consider legislation that would create a statutory special prosecutor. The purpose: allow the Watergate investigation to resume and prevent future crises such as Nixon’s firing of Cox.⁴ A lineup of distinguished witnesses filed through the House and Senate to testify during those stormy days of October and November. Archibald Cox himself was one of the chief spokesmen in favor of a statutorily-created special prosecutor. Before packing up his boxes and driving with his wife to their secluded farmhouse in Maine, the ousted Watergate Special Prosecutor told a subcommittee of the House Judiciary Committee that an investigation by an outside, neutral prosecutor was almost essential if the

2. Simon Lazarus & Jane E. Larson, *The Constitutionality of the Independent Counsel Statute*, 25 AM. CRIM. L. REV. 187, 187 (1987). Lazarus participated in drafting, and lobbying in favor of, the final independent counsel statute as a White House advisor to President Jimmy Carter. *Id.*

3. For a more detailed examination of these events, see KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION 318-58 (1997). The White House lawyer who was intended to assist Senator Stennis in verifying the tapes was J. Fred Buzhardt, a friend of Stennis. *Id.* at 332.

4. See Katy J. Harriger, *Damned If She Does and Damned If She Doesn't: The Attorney General and the Independent Counsel Statute*, 86 GEO. L.J. 2097, 2101-02 (1998). Cox had been appointed Special Prosecutor by Attorney General Elliot Richardson, as part of a package by which the Senate insisted upon the selection of a neutral prosecutor for the Watergate case, before it approved the President’s choice (Richardson) to replace Attorney General Richard Kleindienst, who had resigned due to allegations of impropriety in handling the Watergate prosecution. Cox was governed by a hastily-made charter that was drafted by Richardson’s office and refined by Cox and Richardson even before Cox accepted the position. See GORMLEY, *supra* note 3, at 232-51. The charter was formalized pursuant to a regulation adopted by the Attorney General. See 38 Fed. Reg. 14,688 (1973). For a copy of Cox’s charter, designated “Duties and Responsibilities of the Special Prosecutor,” see also *Hearings on H.J. Res. 784 and H.R. 10937 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong. 110 (1973) [hereinafter 1973 *Hearings Before the Subcomm. on Criminal Justice*], and WATERGATE SPECIAL PROSECUTION FORCE REPORT app. I, at 250-51 (1975) [hereinafter WATERGATE REPORT].

country was to survive future crises like Watergate.⁵ As Cox reiterated in a second round of congressional testimony: "The pressures, the tensions of 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 absolutely essential."⁶

Even as he testified, however, Cox was keenly aware that the concept of a special prosecutor divorced from the executive branch raised serious constitutional concerns, particularly relating to separation of powers. But he felt strongly that an office could be crafted to surmount these constitutional obstacles. "[I]t is a doubt which I have satisfied myself that I would be willing to run," he told the Representatives, "if I were in the position of the members of the committee."⁷

Five years later, in 1978, the Ethics in Government Act was adopted by Congress after much haggling.⁸ It was signed into law on October 26, 1978, by an ebullient President Jimmy Carter.⁹

Recent events in Washington have spawned an increasingly public debate as to the effectiveness, constitutionality, and sanity of that nobly conceived Watergate-era statute. With the expansions in 1998 of the Whitewater investigation by independent counsel Kenneth Starr, moving into the Monica Lewinsky affair¹⁰ and other matters only remotely connected to his original charter, the public questions about the independent counsel law have become intense and vocal. Twenty years after its adoption, the statute teeters on the verge of collapse.

Whitewater Independent Counsel Kenneth Starr — a distinguished lawyer, former Solicitor General, and former federal appeals court judge — has tested the independent counsel law as no other prior special prosecutor, and has revealed serious design de-

5. See 1973 *Hearings Before the Subcomm. on Criminal Justice*, *supra* note 4, at 295.

6. *Removing Politics From the Administration of Justice: Hearings on S. 2803 and S. 2978 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 94th Cong. 200 (1974) [hereinafter *Removing Politics From the Administration of Justice*].

7. 1973 *Hearings Before the Subcomm. on Criminal Justice*, *supra* note 4, at 307.

8. See Ethics in Government Act of 1978, Pub. L. No. 95-521, § 601(a), 92 Stat. 1824, 1867-73 (independent counsel provisions are codified as amended at 28 U.S.C. §§ 49, 591-99 (1994)).

9. See Ethics in Government Act of 1978: Remarks on Signing S. 555 Into Law, II PUB. PAPERS 1854-55 (Oct. 26, 1978).

10. See Francis X. Clines & Jeff Gerth, *Subpoenas Sent as Clinton Denies Reports of an Affair with Aide at White House*, N.Y. TIMES, Jan. 22, 1998, at A1; Jodi A. Enda & Angie Cannon, *New Sex, Coverup Scandal Engulfs Clinton*, MIAMI HERALD, Jan. 22, 1998, at A1.

fects in the statute. At the time he was appointed in 1994, Starr's jurisdictional charter was a narrow one authorizing him to investigate an Arkansas land deal involving Bill and Hillary Clinton that took place in the 1980s.¹¹ From that launch pad he has gone on to investigate the suicide of Clinton friend and deputy White House Counsel Vince Foster (1994);¹² irregularities in firings within the White House Travel Office (1996);¹³ alleged false statements to the House Committee on Government Reform and Oversight by White House Counsel Bernard Nussbaum;¹⁴ the improper request for FBI background files on prominent Republicans by White House officials (1996);¹⁵ and alleged perjury and subornation of perjury by President Clinton, in denying a sexual affair with White House intern Monica Lewinsky, during his civil deposition in the Paula Jones case (1998).¹⁶

In the course of the Lewinsky investigation, and his subsequent referral of impeachment material to Congress, Starr has further tested the limits of the statute's boundaries by making prosecutorial

11. See *In re Madison Guar. Sav. & Loan Assn.*, No. 94-1, 1994 WL 913274 (D.C. Cir. Aug. 5, 1994) (order appointing Kenneth W. Starr as Independent Counsel).

12. See *Starr's Galaxy of Investigations*, NEWSWEEK, Feb. 2, 1998, at 52. Robert Fiske had originally expanded his investigation into the Vince Foster suicide, but uncovered no impropriety. See Peter Baker, *One Death Altered Path of Presidency: Five Years Later, Clinton White House Still Facing Aftermath of Foster Suicide*, WASH. POST, July 20, 1998, at A1. Kenneth Starr later revisited the Foster matter and issued a report that found no wrongdoing but left many mysteries. See *In re Madison Guaranty*, 1994 WL 913274 (Oct. 10, 1997), (report on the Death of Vincent Foster, Jr., by the Office of the Independent Counsel). For a lively discussion of the Foster matter, and some of its puzzles, see Richard Brookhiser, *Body Politics*, N.Y. TIMES, Sept. 28, 1997, § 7, at 13 (reviewing CHRISTOPHER RUDDY, *THE STRANGE DEATH OF VINCENT FOSTER: AN INVESTIGATION* (1997)).

13. The court's order expanding Starr's jurisdiction into the Travel Office matter can be found in *In re Madison Guaranty*, 1994 WL 913274 (Mar. 22, 1996) (order expanding authority of the Independent Counsel to the matter of William David Watkins).

14. The court's order expanding Starr's investigation into the Nussbaum matter can be found in *In re Madison Guaranty*, 1994 WL 913274 (Oct. 26, 1997) (order expanding authority of the Independent Counsel to the matter of Bernard Nussbaum).

15. The court's order expanding Starr's jurisdiction into the FBI files matter can be found in *In re Madison Guaranty*, 1994 WL 913274 (June 21, 1996) (order expanding authority of the Independent Counsel to the matter of Anthony Marceca).

16. The court's order expanding jurisdiction in the Monica Lewinsky matter can be found in *In re Madison Guaranty*, No. 94-1, 1998 WL 472444 (D.D.C. Jan. 16, 1998) (order expanding authority of the Independent Counsel to the matter of Monica Lewinsky). Starr also received permission, pursuant to the Attorney General's referral powers under 28 U.S.C. § 594(e) (1994), to explore whether former Deputy Attorney General (and Clinton friend) Webster Hubbell violated federal law in connection with his billing and expense practices while a member of the Rose Law Firm, of which Hillary Clinton was also a partner. See *In re Madison Guar. Sav. and Loan Assn.*, 1994 U.S. App. LEXIS 34673, at *1 (D.C. Cir. Sept. 1, 1994) (order expanding authority of the Independent Counsel to the matter of Webster L. Hubbell). For a discussion of how these spin-offs of the Whitewater case may affect future Presidents, see Deborah Zabarenko, *Will Case Isolate Presidents?* PITT. POST-GAZETTE, Aug. 11, 1998, at A5.

decisions that (whether one agrees or disagrees with them) can certainly be categorized as aggressive. He has subpoenaed Monica Lewinsky's mother to testify about her daughter's sex life;¹⁷ subpoenaed Secret Service agents to testify about the President's whereabouts in the Oval Office;¹⁸ subpoenaed White House lawyers to reveal their conversations with President Clinton concerning the Lewinsky case;¹⁹ and subpoenaed the President to testify before the grand jury, all of which culminated in impeachment proceedings in Congress.²⁰ The expansive power that Starr has sought to vest in the independent counsel (at times with the apparent blessing of the attorney general and the judiciary), has prompted commentators — Democrats, Republicans, and agnostics alike — to question whether the independent counsel statute has outlived its usefulness.²¹

This Article seeks to diagnose the troubles plaguing the independent counsel law, particularly in light of the recent blizzard of activity during the tenure of Whitewater Independent Counsel Kenneth Starr. The "sunset" provision of the statute establishes a deadline of June 30, 1999, by which Congress must face the difficult task of determining if and under what terms the statute should be reauthorized. This Article will offer specific proposals, arguing that the law is worth saving — but in a dramatically overhauled form designed to return the statute to its original purpose.

17. See Naftali Bendavid, *Lewinsky's Mother Testifies: Starr's Subpoena Stirs Up Ethical and Legal Debates*, CHI. TRIB., Feb. 11, 1998, at 1.

18. See Peter Baker & Bill Miller, *3 Secret Service Agents Testify*, WASH. POST, July 18, 1998, at A1. The U.S. Court of Appeals ultimately upheld this power, and the Supreme Court denied certiorari on the issue. See *In re Sealed Case*, 148 F.3d 1079 (D.C. Cir. 1998), cert. denied sub nom. Rubin v. United States, No. 98-93, 1998 WL 407152 (Nov. 9, 1998).

19. See Stephen Labaton, *Secret Session Led to Ruling on Privilege*, N.Y. TIMES, May 28, 1998, at A24; Ruth Marcus, *Court Rejects Privilege Claim: White House Loses Appeal on Shielding Attorney-Client Talks*, WASH. POST, July 28, 1998, at A1; Roger Simon, *Clinton's Lawyers Must Testify, Rehnquist Rules*, CHI. TRIB., Aug. 5, 1998, at 1; *Excerpts from Rules in Compelling Testimony of 3 in the Lewinsky Case*, N.Y. TIMES, May 28, 1998, at A24. The U.S. Court of Appeals affirmed the power of Starr to compel testimony from from deputy White House Counsel Bruce Lindsey, and the Supreme Court denied certiorari on the issue. See *In re Lindsey*, 148 F.3d 1100 (D.C. Cir. 1998), cert. denied sub nom. Office of President v. Office of Independent Counsel, No. 98-316, 1998 WL 541012 (Nov. 9, 1998).

20. See Susan Schmidt & Ruth Marcus, *President Has Been Served Subpoena: Testimony Sought For This Week, Legal Source Says*, WASH. POST, July 26, 1998, at A1. The White House worked out a deal by which the subpoena was withdrawn, and President Clinton reluctantly agreed to give his testimony by closed circuit television, to avoid the "indignity" of a personal appearance. See Peter Baker & Susan Schmidt, *Clinton Agrees to Testify for Grand Jury*, WASH. POST, July 30, 1998, at A1; Scott Turow, *A Secret Proceeding With No Secrets*, N.Y. TIMES, Aug. 2, 1998, § 4, at 15.

21. See *infra* note 160 and accompanying text.

In Part I of the Article, I review the genealogy of the special prosecutor law, starting from the time of its conception in Congress during the Watergate crisis. Focusing upon legislative history that is often overlooked by scholars because much of it relates to early proposals that were rejected during the five-year gestation period of the statute, I will demonstrate that the global vision of Congress was quite different from the scheme which has actually developed under the statute. Indeed, I conclude that the independent counsel law has evolved into precisely the sort of "Frankenstein monster" that congressional leaders and commentators feared. In part due to the conflicting signals sent by the Supreme Court in its 1988 decision of *Morrison v. Olson*,²² and in part due to the failure of the statutory language to match its original purpose, the law has bedeviled the American system of government. What began as a cautious piece of legislation, designed to deal primarily with extreme crises, has transformed itself into a runaway statute creating the equivalent of a permanent special prosecutor.

In Part II of the Article, I briefly review the constitutional debates that consumed the first twenty years of the statute's existence. That scholarship has largely validated the Supreme Court's decision in *Morrison v. Olson*, upholding the constitutionality of the special prosecutor statute. Rather than rehashing the conceptual questions of the past, however, I will assume that the general framework is constitutional and instead suggest that Congress should move forward toward a frank examination of the tedious details of the statute, addressing its obvious gaps and patent failures.

In Part III, I advocate over a dozen specific reforms that are essential if the independent counsel law is to be brought back on track. The proposed reforms fall broadly into three categories: reforming the process by which independent counsels are appointed; reforming the role of the independent counsel; and reforming the role of the special court.

With respect to the appointment process, it will be argued that the statutory triggering device must be set much higher, so that it is "sprung" only rarely; the category of individuals covered by the statute must be dramatically reduced; and the attorney general must be given much more discretion to decide whether to appoint special prosecutors in the lion's share of cases.

With respect to reforming the role of the independent counsel, it is of paramount importance that his jurisdictional limits be firmly

22. 487 U.S. 654 (1988).

established, with a strong presumption against expansion of those limits. As well, the independent counsel should be required to work full-time; should be carefully monitored to determine when his investigation is "substantially complete"; and should be relieved of the burdensome (and costly) task of producing a voluminous final report.

With respect to the special court, it should be given much more explicit duties, and authority to carry out those duties. Among other changes, it should be explicitly authorized to consult with the attorney general in selecting an independent counsel (and in determining when his or her work is "substantially complete"), and should possess the power to replace an independent counsel under certain circumstances.

This Article concludes that the independent counsel statute is worth salvaging, but only if Congress pushes beyond those cosmetic changes adopted during previous reauthorizations. Only dramatic and radical reforms, bringing the special prosecutor law back to its post-Watergate origins, will save it from complete destruction at this period in American history.

I. HISTORY OF THE INDEPENDENT COUNSEL STATUTE

The modern independent counsel law is a direct byproduct of the Saturday Night Massacre and the collapse of public confidence in government officials that followed. Although the early legislative history of the statute is often overlooked — because Congress did not enact the law until 1978 — an enormous amount can be gleaned from the initial hearings at which the concept of a statutory independent counsel was developed.²³

Immediately after Cox's firing in the fall of 1973, thirty-five different bills were introduced in the House and Senate with at least 165 sponsors.²⁴ Most of the focus was upon quick legislation that would authorize the appointment of a new Watergate Special Prosecutor to replace Cox, and ensure that this new appointee was

23. Two books do an excellent job of examining the early congressional debates and hearings surrounding the independent counsel law. See TERRY EASTLAND, *ETHICS, POLITICS AND THE INDEPENDENT COUNSEL: EXECUTIVE POWER, EXECUTIVE VICE 1789-1989*, at 31-65 (1989); KATY J. HARRIGER, *INDEPENDENT JUSTICE: THE FEDERAL SPECIAL PROSECUTOR IN AMERICAN POLITICS 40-72* (1992).

24. See HARRIGER, *supra* note 23, at 43. During the remainder of the 93d Congress alone, at least 57 bills providing for special prosecutors were introduced. See Constance O'Keefe & Peter Safirstein, Note, *Fallen Angels, Separation of Powers, and the Saturday Night Massacre: An Examination of the Practical, Constitutional, and Political Tensions in the Special Prosecutor Provisions of the Ethics in Government Act*, 49 BROOK. L. REV. 113, 118 n.29 (1982) (citing CONG. INDEX (CCH) 222 (1974)).

protected from another "massacre" by the executive branch.²⁵ Yet congressional leaders also had an eye on long-term corrective measures. Their broader goal was to institutionalize the position of special prosecutor in order to deal with future crises in unborn administrations.

A. *An Urgent Push for Legislation*

One of the first and most significant bills, S. 2611, was introduced in October 1973 by Senator Birch Bayh, Jr. (D. Ind.), a prominent member of the Judiciary Committee. The Bayh bill, a bipartisan legislative effort joined by fifty-five other Senators, proposed the creation of a temporary (rather than a permanent) special prosecutor, appointed by the U.S. District Court for the District of Columbia.²⁶ Although there was a flurry of other proposals — including a bill sponsored by Senator Taft that would have allowed the appointment of a special prosecutor by the attorney general in consultation with the Senate²⁷ — the germ of the original concept offered by Senator Bayh was the one that ultimately prevailed five years later.

The cast of legal scholars and political leaders who supplied testimony for and against the proposed legislation was quite remarkable. Besides Cox himself, Senators Adlai E. Stevenson III (D. Ill.) and Robert Taft, Jr. (R. Ohio), Acting Attorney General Robert H. Bork, Harvard Law Professor Paul Freund, Chicago Law Professor Philip B. Kurland, former Attorney General Elliot Richardson, and a spectrum of other luminaries paraded through the Capital to offer guidance.²⁸

Professor Freund, a preeminent constitutional scholar, sought to allay the immediate concerns of the Senate Judiciary Committee

25. See HARRIGER, *supra* note 23, at 42-43.

26. See *Hearings Before the Subcomm. on Criminal Justice, supra* note 4, at 98-100. The general concept embodied in the Bayh bill was debated extensively in the Senate. See also *Special Prosecutor Hearings Before the Senate Comm. on the Judiciary*, 93d Cong. (1973) [hereinafter *Special Prosecutor Hearings*]. S. 2611 was first introduced by Senator Bayh on October 26, 1973, and is reported in S. REP. NO. 93-596 (1973). In the House, H.R. 11401 took a similar approach. See EASTLAND, *supra* note 23, at 35-36. Although the original version of the Bayh bill provided for the District Court (i.e. Judge Sirica) to appoint the special prosecutor directly, later amendments to S. 2611 provided that the district court, sitting *en banc*, would designate a panel of three of its members to appoint the special prosecutor. See S. REP. NO. 93-596. This approach thus mirrored that embodied in House Bill 11401. See EASTLAND, *supra* note 23, at 35.

27. Senator Taft's bill, S. 2642, was introduced on November 2, 1973. See S. REP. NO. 93-596, (1973). For a discussion of this and other early bills, see EASTLAND, *supra* note 23, at 35-36; O'Keefe & Safirstein, *supra* note 24, at 118 n.29.

28. See *Special Prosecutor Hearings, supra* note 26, at III-IV.

that any plan divorcing the special prosecutor from the executive branch would be flatly unconstitutional. Freund mollified the Senators by reporting that forty-nine deans of American law schools and the American Bar Association had endorsed the Bayh bill or similar legislation. "I think that if you are really interested in the independence of the prosecutor," Freund told the Senators, "you have to forgo executive control."²⁹ Professor Kurland of the University of Chicago Law School submitted written comments supporting the law,³⁰ as did Harvard Law Professors Philip B. Heymann and Stephen Breyer, both of whom had worked on Cox's Watergate Special Prosecution force.³¹

Archibald Cox spent the bulk of his Senate testimony setting forth the facts relating to his termination.³² A week later in the House, however, Cox was more focused on the special prosecutor proposal. He strongly urged the passage of such legislation, in part because it would solve the problem of "divided loyalty or conflict of interest" that had been so evident in the Justice Department during Watergate.³³ Cox also felt — although he understood the constitutional complexities of the issue — that Congress would be wise to vest the power of appointing special prosecutors in the U.S. District Court. The judiciary, he felt, assured the "greatest independence" from political pressure. It also offered the greatest "appearance" of that virtue.³⁴

At the same time, the concerns of those who opposed this legislation were taken quite seriously. Dean Roger C. Cramton of Cornell Law School voiced a worry that would haunt the legislation until its passage five years later: the special prosecutor law would

29. *Special Prosecutor Hearings*, *supra* note 26, at 368. The "Statement by Law School Deans" endorsing such legislation is reprinted in *Special Prosecutor Hearings*, *supra* note 26, at 551.

30. *See Special Prosecutor Hearings*, *supra* note 26, at 319.

31. *See Special Prosecutor Hearings*, *supra* note 26, at 556-60.

32. For a brief exchange in the Senate hearings in which Cox spoke about proposed legislation, and suggested that a special prosecutor under the supervision of the courts was probably constitutional, see *Special Prosecutor Hearings*, *supra* note 26, at 29-31.

33. *1973 Hearings Before the Subcomm. on Criminal Justice*, *supra* note 4, at 295 (remarks of Archibald Cox).

34. *See 1973 Hearings Before the Subcomm. on Criminal Justice*, *supra* note 4, at 304. In the event that Congress feared the constitutional uncertainties of placing this power in the judiciary, Cox suggested that an acceptable compromise might be to provide for the appointment of the special prosecutor by the President, with the advice and consent of the Senate. However, the District Court would remain in charge of appointments if Congress was in recess, to avoid manipulation of the process by the executive branch. *See 1973 Hearings Before the Subcomm. on Criminal Justice*, *supra* note 4, at 304.

allow Congress and the courts to usurp the function of the executive branch. Cramton explained:

The prosecution of crime is an essential element of the executive function in the American scheme of government. Although the Constitution shares and diffuses powers among the three branches in a manner that departs from the purity urged by Montesquieu, the fundamental scheme calls for the legislature to write the laws, an executive to enforce them, and a judiciary to interpret them in individual cases.³⁵

Federal District Judge John Sirica, the Watergate icon who had resuscitated the original Justice Department prosecution of that case and had displayed great courage in directing President Nixon to turn over the tapes to Cox, wrote a letter to the Judiciary Committee admitting that he was leery of any statute that shifted the responsibility to appoint and supervise the special prosecutor onto the shoulders of the judiciary.³⁶ District Judge Gerhard Gesell, in an opinion handed down shortly thereafter declaring that the dismissal of Special Prosecutor Cox had been invalid, joined Judge Sirica in warning against the intermingling of executive and judicial functions. Gesell cited the memory of Judge Learned Hand, cautioning: "Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge."³⁷

Perhaps the most ardent critic of the proposed new legislation was the man who had fired Archibald Cox at the direction of President Nixon. Acting Attorney General Robert Bork, in Senate testimony, focused on the separation of powers issue and hammered away at it. "The Executive alone," Bork contended, "has the duty and the power to enforce the laws by prosecutions brought before the courts."³⁸ If Congress was permitted to take away that duty from the executive branch,

I do not see why Congress could not simply abolish the Antitrust Division or the Criminal Division of the Department of Justice and hand their law enforcement functions over to itself, to the courts, or to the

35. *Special Prosecutor Hearings*, *supra* note 26, at 352.

36. *See Special Prosecutor Hearings*, *supra* note 26, at 556.

37. *Nader v. Bork*, 366 F. Supp. 104, 109 (D.D.C. 1973) (quoting *United States v. Marzano*, 149 F.2d 923, 926 (2d Cir. 1945)). Judge Gesell (like Judge Sirica) was responding to suggestions that the judiciary should shoulder the task of appointing a new special prosecutor to replace Cox and finish the Watergate case. He wrote these words in ruling that Robert Bork's firing of Cox was illegal, in the context of a civil suit brought by citizen activist Ralph Nader. Cox himself never put much stock in Gesell's ruling, and took no steps to have himself reinstated. *See GORMLEY*, *supra* note 3, at 558 n.135.

38. *Special Prosecutor Hearings*, *supra* note 26, at 451.

Secretary of State. I do not see why it could not abolish the Department of Justice and enforce the laws itself on such a theory.³⁹

Bork concluded bluntly: "That is simply not our system of government."⁴⁰

In the House of Representatives, where simultaneous hearings had been launched to consider parallel legislation,⁴¹ Bork was even more insistent. He feared that the creation of statutorily-built special prosecutors would encourage witch hunts of the sort made infamous by Senator Joseph McCarthy in the 1950s,⁴² with "ugly legal and political results." The idea of a *permanent* special prosecutor — which was being floated in some House and Senate proposals — was even more alarming to Bork. In a phrase that would be much-quoted in later years, Bork warned: "[W]hat you are doing is building an office whose sole function is to attack the executive branch throughout its tenure. It is an institutionalized wolf hanging on the flank of the elk, which does not seem to me to be the way to run a government."⁴³

One House Judiciary Committee member, Republican Lawrence J. Hogan of Maryland, summed it up in equally dark terms: "Now, my question is, do you think that maybe we are creating a Frankenstein monster, creating someone that does not have to answer to anyone, to have unfettered power . . . ?"⁴⁴

All of those debating the issue, both for and against the proposed legislation, understood that the legal questions facing Congress were grave ones.

39. *Special Prosecutor Hearings*, *supra* note 26, at 452.

40. *Special Prosecutor Hearings*, *supra* note 26, at 451.

41. Although the House hearings jumbled together debate on at least ten different bills, the focus was on a joint House-Senate resolution (H.R.J. Res. 784) and a House bill (H.R. 11401) that — like the Bayh bill in the Senate — sought to create a temporary special prosecutor supervised by the courts. See 1973 *Hearings Before the Subcomm. on Criminal Justice*, *supra* note 4, at 98 (remarks of Senator Bayh). Technically, H.R.J. Res. 784 was designed to preserve the machinery of the existing Watergate Special Prosecution Force in the wake of Cox's firing. See 1973 *Hearings Before the Subcomm. on Criminal Justice*, *supra* note 4, at 28. H.R. 11401 was a broader bill that would have allowed the courts to create future special prosecutors. See 1973 *Hearings Before the Subcomm. on Criminal Justice*, *supra* note 4, at 487.

42. See 1973 *Hearings Before the Subcomm. on Criminal Justice*, *supra* note 4, at 263 (remarks of Hon. Robert Bork). McCarthy, a Republican from Wisconsin, led controversial Senate hearings aimed at proving that Communists had infiltrated positions of trust in the U.S. government. The McCarthy hearings were later discredited as driven by political paranoia. See generally, ROBERT GRIFFITH, *THE POLITICS OF FEAR: JOSEPH R. MCCARTHY AND THE SENATE* (1970).

43. 1973 *Hearings Before the Subcomm. on Criminal Justice*, *supra* note 4, at 263.

44. 1973 *Hearings Before the Subcomm. on Criminal Justice*, *supra* note 4, at 188.

B. The Constitutional Quandaries

Three constitutional issues dominated the debate during those early hearings on the special prosecutor law. These were the same three issues that would occupy Congress and scholars for the next two decades.

1. The Appointments Clause

First, there was a question whether Congress had the power to place authority to select a special prosecutor in the judicial branch, without violating the Appointments Clause of Article II, Section 2 of the Constitution.⁴⁵ The 1839 decision of *Ex parte Hennen* stated that "the appointing power . . . was no doubt intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged,"⁴⁶ which permitted the inference that the appointment of a special prosecutor could be delegated only to the executive branch. Yet, a later decision seemed to abandon this rigid interpretation.⁴⁷ The Court in *Ex parte Siebold* had stated that although certain election supervisors were executive creatures, Congress could authorize the judiciary to appoint them.⁴⁸ Even though it might be "usual and proper to vest the appointment of inferior officers in that department . . . to which the duties of such officers appertain," the Court concluded, there was "no absolute requirement to this effect in the Constitution."⁴⁹ This decision provided a credible basis for the argument that the judiciary could appoint special prosecutors. Yet the precedent remained murky.⁵⁰

45. U.S. CONST. art. II, § 2, cl. 2 provides that the President, with the advice and consent of the Senate, shall have the power to "appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law" The section goes on to provide, however, that "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. CONST. art. II, § 2, cl.2. Thus, early cases distinguished between "principal officers" (who could be appointed only by the President) and "inferior officers" (whom Congress had some discretion to appoint themselves or delegate power to others to do so). See, e.g., *United States v. Germaine*, 99 U.S. 508, 509-10 (1878).

46. 38 U.S. (13 Pet.) 230, 257-58 (1839) (upholding the ability of federal district courts to appoint their own clerks).

47. See *Ex parte Siebold*, 100 U.S. 371 (1879).

48. See *Siebold*, 100 U.S. at 397-98.

49. *Siebold*, 100 U.S. at 397.

50. The Court in *Siebold* concluded that the question in each case turned on whether the exercise of appointment power by the judiciary (or any other branch) created an "incongruity," because it was inconsistent with the powers of another branch. *Siebold*, 100 U.S. at 398. For a discussion of the Appointment Clause debate in Congress, see EASTLAND, *supra* note 23, at 36-38. Cf. O'Keefe & Safirstein, *supra* note 24, at 128-35; Robert G. Solloway, Note, *The Institutionalized Wolf: An Analysis of the Unconstitutionality of the Independent*

2. The Removal Controversy

The second perplexing question was whether the removal provision of the legislation — that would locate power to remove the special prosecutor in the judiciary — encroached upon the President's domain. The Constitution nowhere explicitly stated whether Congress, the President, or both possessed the power to remove federal officers once they were appointed. When it came to certain subordinate employees who clearly served at the will of the President, an early case suggested that the President was vested with power to "remove an officer when in his discretion he regards it for the public good."⁵¹ When it came to a hodgepodge of other federal officials, however, the precedent was blurred. *Myers v. United States* suggested that the Chief Executive's removal power was broad.⁵² *Humphrey's Executor v. United States*, decided a decade later, abandoned that stance and suggested that the President could be prevented statutorily from removing certain officials in the executive branch, so long as they were not "purely executive officers."⁵³ *United States v. Wiener* reinforced *Humphrey's* "functional" approach.⁵⁴

Counsel Provisions of the Ethics in Government Act of 1978, 21 IND. L. REV. 955, 969-73 (1988).

51. *Parsons v. United States*, 167 U.S. 324, 343 (1897) (involving the removal of a U.S. Attorney by President Grover Cleveland).

52. 272 U.S. 52 (1926). *Myers* involved an attempt by Congress to require the Senate's assent before the President could remove certain postmasters. The Court took a "formalistic" approach, declaring that "[t]he power of removal is incident to the power of appointment." 272 U.S. at 122. The presidential power to appoint a postmaster thus implied the power of removal. Chief Justice Taft (formerly President Taft) expressed in dicta a broad view of the President's power. According to Taft, the Chief Executive could constitutionally remove "executive officers and members of executive tribunals," even those who had "duties of a quasi-judicial character." 272 U.S. at 135. This was so because the President possessed an independent duty to faithfully execute the law, as he saw fit. See 272 U.S. at 135.

53. 295 U.S. 602, 632 (1935). *Humphrey's Executor* acknowledged that the President could remove "purely executive officers" without cause. 295 U.S. at 631-32. But the President had no inherent power to remove a member of the Federal Trade Commission (FTC), in *Humphrey's*, because this Commissioner exercised quasi-judicial and legislative functions and was not a "purely executive officer." 295 U.S. at 628-32. President Roosevelt had removed Humphrey from the FTC after only two years in the position, even though Congress had established a seven-year term for the Commissioners and stipulated that the President could only remove those officers for "inefficiency, neglect of duty, or malfeasance in office." The modern version of the relevant statute can be found at 15 U.S.C.A. § 41 (West 1997).

54. See 357 U.S. 349, 356 (1958). *Wiener* reaffirmed the *Humphrey's Executor* approach, concluding that the President could not remove a member of the War Claims Commission. That body was established to adjudicate claims of individuals who had suffered personal injury or property losses during World War II. Despite congressional silence as to removal power, the Court concluded that the Commission in question was designed to remain free of executive interference, and the Commissioners' duties were "quasi-judicial" in nature. Removal power thus did not attach to the President. See 357 U.S. at 356. For a discussion of the removal issue, see EASTLAND, *supra* note 23, at 38-40; Laura L. Cox, Case Note, *Political*

The latter two cases thus provided a certain amount of comfort for those supporting special prosecutor legislation in the wake of Watergate. At the same time, congressional leaders were acutely aware that the proposed special prosecutor would be assigned prosecutorial functions that looked and smelled uniquely executive. Thus, even the most generous removal cases — *Humphrey's Executor* and *Wiener* — provided only shaky guideposts.⁵⁵

3. The Separation of Powers Bugaboo

The third question that nagged the draftsmen of the special prosecutor law subsumed the other two. Did the proposed legislation run broadside into the doctrine of separation of powers? The separation of powers doctrine warned that no branch of government should aggrandize itself by usurping the powers directly or implicitly assigned to another branch.⁵⁶ Dean Cramton of Cornell Law School neatly summed up the principle during one House hearing: "Each of the three branches of Government has a central core of functions upon which the other branches may not unduly encroach," Cramton explained. "[T]he basic tasks of one branch cannot be removed from it and placed in either another branch or an independent agency."⁵⁷ Because the Constitution mandated that the President "shall take Care that the Laws be faithfully executed,"⁵⁸ did it not follow that one of the "core functions" of the executive branch was criminal prosecution? If that was the case, did it not further follow that any effort to encroach upon this "core

Accountability and the Independent Counsel: A Sheep in Wolf's Clothing? 57 U. CIN. L. REV. 1471, 1483-85 (1989).

55. For a more complete discussion of the constitutional removal question, see Cox, *supra* note 54, at 1483-85; O'Keefe & Safirstein, *supra* note 24, at 135-39; Solloway, *supra* note 50, at 973-76.

56. The doctrine of separation of powers dates back at least as far as the writings of John Locke. See Malcolm P. Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. CHI. L. REV. 385, 387-88 (1935). James Madison was one of the earliest proponents of the doctrine in America. Writing in *The Federalist No. 47*, Madison explained that the doctrine was essential because "there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates." THE FEDERALIST NO. 47, at 325 (James Madison) (Jacob E. Cooke ed., 1961). Following the theory of Montesquieu, Madison maintained that absolute separation among the three branches was not required; rather, some overlap was both necessary and desirable. THE FEDERALIST NO. 47, *supra*, at 327-31.

57. 1973 *Hearings Before the Subcomm. on Criminal Justice, supra* note 4, at 339 (testimony of Dean Roger C. Cramton).

58. U.S. CONST. art. 2, § 3.

function" of the executive branch by passing it off to an unelected special prosecutor was constitutionally impermissible?⁵⁹

The appointment, removal, and separation of powers issues thus divided experts from the start, leading to lengthy (and unsatisfying) hearings as Congress struggled to fit a square peg into an oblong hole.⁶⁰

A brief reprieve was granted to Congress on November 19, 1973, just one month after Cox's firing, when Leon Jaworski was appointed as successor Watergate prosecutor.⁶¹ Jaworski's appointment removed pressure on congressional leaders to find an instant solution to the special prosecutor quandary. The following day, November 20th, the Senate brought its hearings to a close, ending the opening volley of debate.

Yet that first round of hearings in 1973, at which the concept of a statutory independent counsel was invented and roughly defined, shed important light on Congress's original vision of that office. It revealed that the statutory special prosecutor was designed, most immediately, to prevent the recurrence of a naked exercise of executive power that had manifested itself in the Saturday Night Massacre of Watergate. Second, it was designed to build into the American system of government a failsafe mechanism that would protect future generations from constitutional meltdowns by allowing the judiciary (rather than the attorney general) to appoint and monitor this neutral prosecutor. At the same time, Congress understood that the law had to carefully circumscribe the roles of the president, the attorney general, and the courts, if it was to be effective and constitutional. The initial goal of the statute was to

59. For a fuller discussion of the separation of powers issue, see EASTLAND, *supra* note 23, at 40-41; Cox, *supra* note 54, at 1478-83; Solloway, *supra* note 50, at 963-68.

60. A nice discussion of these issues as they were intertwined with the early special prosecutor law hearings can be found in EASTLAND, *supra* note 23, at 35-41. Some examples of the discussions of the appointment, removal, and separation of powers issues in the early congressional debates can be found in 1 *Watergate Reorganization and Reform Act of 1975: Hearings on S. 495 Before the Senate Comm. on Govt. Operations*, 94th Cong. 240-43 (1975) [hereinafter *Hearings Before the Senate Comm. on Govt. Operations*] (remarks of Erwin Griswold); 2 *Hearings Before the Senate Comm. on Govt. Operations*, *supra* (remarks of Michael L. Uhlmann); *Special Prosecutor Hearings*, *supra* note 26, at 28-32 (remarks of Archibald Cox); *Special Prosecutor Hearings*, *supra* note 26, at 479-86 (dissenting views of Representative McClory et al.).

61. This was accomplished pursuant to a carefully worded order of Acting Attorney General Bork that required consent of a Senate Committee before Jaworski could be terminated. See Atty. Gen. Order No. 551-73, 38 Fed. Reg. 30,738 (1973); GORMLEY, *supra* note 3, at 380-81, 547 & n.25. Technically, Jaworski was named by the White House to replace Cox on November 1st. See Remarks of Acting Attorney General Robert H. Bork Announcing His Appointment of Leon Jaworski, 9 WEEKLY COMP. PRES. DOC. 1303 (Nov. 1, 1973). Bork's formal order re-establishing the Watergate Special Prosecution Force, however, was not issued until several weeks later. See HARRIGER, *supra* note 23, at 43, 228 & nn.18-19.

maintain a delicate balance among the three branches of government, while grafting onto it a fourth sprig that would support weight only during brief, unusual moments of crisis.

C. *A New Start: Permanent Special Prosecutors and Other Proposals*

In August 1974, President Richard M. Nixon left the White House on a drab green helicopter, and the torment of Watergate was brought to a close. Congress resumed debate over special prosecution legislation in the calmer environs of the Ford administration. Senator Sam Ervin's Watergate Committee issued a final report in June 1974, recommending the creation of a *permanent* Office of Public Attorney, whose occupant would serve the function of a special prosecutor whenever conflicts in the executive branch arose.⁶² By 1975, Ervin's idea found embodiment in a new piece of legislation — S. 495 — that proposed the creation of a permanent special prosecutor lodged in the Office of Public Attorney, under the control of three retired judges from the U.S. Court of Appeals.⁶³

The debates over S. 495 are routinely overlooked by scholars, because the concept of a permanent special prosecutor never took root. But it is unfortunate that this legislative history has been forgotten. Not only are the debates involving S. 495 fascinating and lively, but they provide invaluable clues concerning the nature of the legislation that Congress was attempting to build during the five-year gestation period of the independent counsel law. The hearings relating to S. 495 that absorbed the 94th and 95th Congresses are critical because they make explicit what had been implicit when the special prosecutor law was first conceived in 1973: that the finished legislation was meant to deal with rare, major crises like Watergate and the Teapot Dome scandal of the 1920s, rather than garden variety scandals that routinely dogged high level officials in any administration.

S. 495, the Watergate Reorganization and Reform Act of 1975, was introduced by Senator Abraham Ribicoff at the start of the 94th Congress on January 30, 1975. The initial version of this legis-

62. See SAM ERVIN, FINAL REPORT OF THE SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES, S. REP. NO. 93-981, at 80-81 (1974) [hereinafter FINAL REPORT OF THE SENATE SELECT COMMITTEE]. Senator Ervin also chaired a subcommittee of the Senate Judiciary Committee that Spring, which considered proposals to establish a permanent "special" or "public" prosecutor. See *Removing Politics from Administration of Justice*, *supra* note 6.

63. A copy of S. 495 can be found at S. REP. NO. 94-823, at 159 (1976).

lation proposed creating an Office of Public Attorney that would operate independently of the Department of Justice and the President. It would investigate and prosecute abuses in the executive branch and relating to federal elections, with appointment to be made by the special judicial panel for a five-year renewable term.⁶⁴

The logic behind S. 495 was similar to that underlying the string of special prosecutor bills that had preceded it. Washington lawyer Lloyd N. Cutler, who had worked with Senator Ervin on an early draft of the bill (and would later serve as White House Counsel to Presidents Carter and Clinton), explained the purpose of S. 495 in fundamental terms: "The Attorney General and his principal assistants in the Department of Justice are not simply prosecuting officers but also appointees of the President and members of an elected administration team that usually hopes for reelection. They have an obvious conflict of interest when they investigate whether crimes have been committed in their own election campaigns or thereafter by high officers of the executive branch."⁶⁵

Not only would the appointment of a permanent Public Prosecutor — charged with examining alleged improprieties in the executive branch on a regular basis — allow a neutral outsider to remain "on call" to investigate allegations of corruption, but the mere presence of such a "watchdog" would presumably discourage abuses of the law in the first place.⁶⁶

The response to S. 495 was swift, loud, and intensely negative. Senator Howard H. Baker, Jr., who had been a key legislative figure throughout Watergate, declared that the bill would "establish a virtually inviolate fourth branch of Government, and would sub-

64. See *Hearings Before the Senate Comm. on Govt. Operations*, *supra* note 60, at 2-3. See also S. REP. NO. 94-823, at 93-99 (1976).

65. *Hearings Before the Senate Comm. on Govt. Operations*, *supra* note 60, at 207-08. There was a great deal of concern expressed in the hearings about conflicts of interest involving the Attorney General. One source of particular concern related to the practice of some modern Presidents to appoint their campaign managers and political advisors as Attorneys General, heightening the chance of partisan political influence upon those individuals. See Jack Maskell, *Legislative History and Purposes of Enactment of the Independent Counsel (Special Prosecutor) Provisions of the Ethics in Government Act of 1978*, at 3-6 (Mar. 4, 1987), *microformed on Major Studies and Issue Briefs of the Congressional Research Service*, 1987-88 Supplement, Reel 30784 (Univ. Publications of Am.).

66. See *Hearings Before the Senate Comm. on Govt. Operations*, *supra* note 60, at 90 (remarks of Sam Dash). Professor Dash, former Chief Counsel to the Senate Watergate Committee who helped draft an earlier version of the bill, did not view the purpose of the statute as creating a permanent special prosecutor, *per se*. "You do not have a public attorney running wild beginning any prosecution he wants and interfering with the Attorney General. Most often he acts as an ombudsman making inquiries. Only rarely, in a crisis, does he become a special prosecutor." *Hearings Before the Senate Comm. on Govt. Operations*, *supra* note 60, at 89.

stantially diminish the accountability of law-enforcement officials to the President, the Congress, and the American people.”⁶⁷ Veteran presidential advisor Clark M. Clifford opposed the measure as overkill. “My experience in Washington for the past 30 years,” Clifford told the assembled Senators, “convinces me that corruption in federal government is rare; it is an aberration and an exception. Excessive zeal or possibly boredom by the Public Attorney, or a desire to avoid being tagged as a ‘do-nothing’, could lead to petty prosecutions and harassment of persons in the Executive Branch”⁶⁸

Philip A. Lacovara, a Republican who had worked with Archibald Cox and Leon Jaworski on the Watergate Special Prosecution Force (and argued *United States v. Nixon* in the Supreme Court) warned that such legislation would undercut the role entrusted to the Attorney General since 1789. “Even though I consider the work of the Special Prosecutor’s Office to be a major contribution to vindication of the rule of law and indeed to public confidence in government,” stated Lacovara, “it does not follow that such a function should be institutionalized permanently.”⁶⁹ Lacovara also feared that the jurisdiction of the proposed Public Attorney was too “open-ended.” It would allow a permanent prosecutor “to inquire into every instance of alleged mismanagement or petty bungling by every minor bureaucrat in the Executive Branch.”⁷⁰

Former Attorney General Elliot Richardson, a Watergate hero who recently had been appointed Ambassador to Great Britain, told the Senate Committee in a letter from London that the appointment of a special prosecutor was (and should remain) a rare occurrence in American history. S. 495 was a dangerous piece of legislation because it would transform such appointments into a preoccupation: “I feel strongly that this [establishment of a permanent Special Prosecutor’s office] is neither necessary nor desirable,” Richardson wrote. He continued:

67. *Hearings Before the Senate Comm. on Govt. Operations*, *supra* note 60, at 21. The Watergate Special Prosecution Force mirrored Senator Baker’s concerns, noting that a “special organization” rarely remains “special” for more than several years before turning into a rigid bureaucratic body. See WATERGATE REPORT, *supra* note 4, at 138. “Such rigidity is especially likely, and especially harmful, in an agency that is as unaccountable as a permanent special prosecutor would be.” WATERGATE REPORT, *supra* note 4, at 139.

68. *Hearings Before the Senate Comm. on Govt. Operations*, *supra* note 60, at 204.

69. *Hearings Before the Senate Comm. on Govt. Operations*, *supra* note 60, at 262.

70. *Hearings Before the Senate Comm. on Govt. Operations*, *supra* note 60, at 270-71.

It implies that the kinds of problems which twice in our history (Teapot Dome and Watergate) have called for the creation of a Special Prosecutor's office are chronic and continuing. To put it the other way around, it assumes that the regularly constituted law enforcement authorities are neither sufficiently competent nor trustworthy to be capable of dealing with the more-or-less routine problems of corruption and abuse of power that have to be dealt with from year to year. I do not believe that this assumption is warranted.⁷¹

The American Bar Association (A.B.A.) likewise panned the idea of a permanent special prosecutor as undesirable and unwise. In a report issued for the benefit of Congress, the A.B.A. declared S. 495 to be legislative overkill. In most cases, the A.B.A. insisted, the Attorney General could appoint a special U.S. Attorney or Assistant Attorney General to handle a case in which a potential conflict existed — and build a "Chinese Wall" around this government lawyer — rather than going to the extraordinary lengths of appointing a special prosecutor. Only in "exceptional circumstances," the A.B.A. report suggested, was it desirable that a special prosecutor from outside the Department of Justice should be recruited.⁷²

Senator Howard Baker concluded the assault on the proposed "permanent special prosecutor" bill by quoting an ominous passage from *History of the Republic of the United States*, authored in 1859: "Nothing is more common than for a free people, in times of confusion . . . to gratify momentary passions, by letting into government principles and precedents which afterwards prove fatal to themselves."⁷³

Hit by this barrage of opposition, supporters of S. 495 sought to amend the bill to delete the permanent Public Attorney provision and provide for an elaborate *temporary* special prosecutor provision, similar to that proposed by Archibald Cox (among others) during earlier hearings.⁷⁴ This new version of the bill relied upon a

71. *Hearings Before the Senate Comm. on Govt. Operations*, *supra* note 60, at 284-85.

72. *Hearings Before the Senate Comm. on Govt. Operations*, *supra* note 60, at 418. The A.B.A. report appears in *Hearings Before the Senate Comm. on Govt. Operations*, *supra* note 60, at 342-430, and is entitled *Removing Political Influence From Federal Law Enforcement Agencies*. The A.B.A. position found support in the WATERGATE REPORT, *supra* note 4, published by the Cox-Jaworski prosecutors in October 1975. The Watergate Report took the unusual step of declaring the idea of a permanent special prosecutor unacceptable:

Central to the question is the fact that such a public officer would be largely immune from the accountability that prosecutors and other public officials constantly face. Lack of accountability of an official on a permanent basis carries a potential for abuse of power that far exceeds any enforcement gains that might ensue.

Hearings Before the Senate Comm. on Govt. Operations, *supra* note 60, at 437.

73. *Hearings Before the Senate Comm. on Govt. Operations*, *supra* note 60, at 84 n.75 (quoting JOHN C. HAMILTON, *HISTORY OF THE REPUBLIC OF THE UNITED STATES* 34 (1859)).

74. See EASTLAND, *supra* note 23, at 46, 50. Cox and former Attorney General Ramsey Clark had offered this proposal. *Id.* at 50.

mechanism by which a special prosecutor could be appointed by a special judicial panel of the U.S. Court of Appeals, after a preliminary investigation conducted by the Attorney General, if sufficient evidence existed of high-level misconduct.⁷⁵

Although Senate opponents may have been mollified by the newly overhauled S. 495, the White House was not. President Ford sent a stiffly-worded communication to the Senate on July 19, 1976, raising multiple constitutional concerns about the revised legislation. Not only did this proposed statute resurrect worrisome separation of powers issues, the White House transmission stated, but the whole notion of a temporary special prosecutor sprouting up outside the Department of Justice unleashed a host of practical problems. President Ford's official communication stated: "The Department of Justice estimates that if S. 495 were now law, approximately half a dozen special prosecutors would have to be appointed, and close to 50 other matters possibly requiring appointment would be under advisement by a special court." This "extraordinary result," concluded the President, was bad for the American legal system and bad for the country.⁷⁶

In its place, the White House transmission proposed yet another version of S. 495 that would make the special prosecutor (once again) a permanent creature. Three important changes, however, were introduced to make it a net gain for the executive branch. Under the new White House plan, the special prosecutor would be appointed by the President, with the advice and consent of the Senate, for a three year term. This would allow the President to control, to a large extent, the appointment process. Even more importantly, the special prosecutor would remain within the Justice Department, meaning that the Attorney General would retain supervisory and removal power over this official. Finally, the White House proposal would make the independent counsel law applicable to allegations of criminal wrongdoing in all three branches of government, including Congress and the judiciary. This would ensure that the executive branch was not singled out for adverse treat-

75. See *id.* at 50-51; MASKELL, *supra* note 65, at 7. This version of S. 495 included a mechanism by which the Attorney General was required to petition a three-judge division of the Court of Appeals for the District of Columbia for the appointment of a special prosecutor under certain circumstances. See generally S. REP. NO. 94-823 (1976).

76. See *Watergate Reforms: Communication from the President of the United States, Transmitting Proposed Substitute Language to Correct Constitutional and Practical Problems Contained in S. 495*, H.R. Doc. No. 94-550, at 5 (1976) [hereinafter *Watergate Reforms*].

ment. What was good for the goose was good for the legislative gander.⁷⁷

In response to an intense lobbying blitz by Attorney General Edward Levi (who ardently defended President Ford's plan), and in order to make peace with the White House in anticipation of difficult congressional elections in the Fall, the Senate switched allegiance to the President's revised version of S. 495, and approved it by a vote of 91 to 5.⁷⁸

But in the House, the retooled version of S. 495 drew harsh criticism from those who feared the notion of a permanent special prosecutor in any form. Peter W. Rodino, Jr., Chairman of the House Judiciary Committee, objected: "I think the circumstances that are contemplated [for appointment of a special prosecutor] are unusual circumstances, which I think arise because of unusual events, and therefore would require us to act in an extraordinary manner. I do not believe that setting up the Office of Permanent Special Prosecutor would meet that kind of an exigency."⁷⁹

Archibald Cox, having returned to his faculty position at Harvard Law School, flew back to Washington to testify against the Ford administration proposal. He worried that it would create too many special prosecutors too easily. Cox told a House Subcommittee that a permanent special prosecutor, even one given the blessing of the Senate, reflected too little trust in the Justice Department. "In the end," insisted Cox, "we have to rely upon the integrity of men, particularly on the integrity of the Attorney General and of the lawyers in the Department of Justice; and I am convinced that on the whole and over the years they have proved fully worthy of that trust." It was a bad idea, he told the Representatives in conclusion, to attempt to "substitute laws for character."⁸⁰

Cox reminded the House Subcommittee that the original point of the legislation was as follows:

there may be a few extraordinary situations like the Teapot Dome scandal, or like the Watergate affair, in which it is not fair to ask any Attorney General to be responsible for the investigation and prosecution because so much is at stake; and while many of them no doubt

77. The White House proposal is set forth in Ford's transmission to the Senate. See *Watergate Reforms*, *supra* note 76.

78. See *Provision for Special Prosecutor: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 94th Cong. 1-3 (1976) [hereinafter *1976 Hearings Before the Subcomm. on Criminal Justice*]; EASTLAND, *supra* note 23, at 52-54. For a discussion of the political concerns hovering over Congress before the 1976 elections, see HARRIGER, *supra* note 23, at 50-59.

79. *1976 Hearings Before the Subcomm. on Criminal Justice*, *supra* note 78, at 153-54.

80. *1976 Hearings Before the Subcomm. on Criminal Justice*, *supra* note 78, at 155.

would act with complete honor and integrity, questions would be raised about full public confidence. As I understand it, the original conception was that this would be truly a very narrow class of exceptional cases.⁸¹

In lieu of S. 495, Cox proposed the creation of a temporary special prosecutor who would be appointed by a panel of U.S. Court of Appeals judges, but only in a very narrow category of cases. In other cases, the attorney general would have *discretion* to apply for a special prosecutor, but no legal duty to do so.⁸²

Cox's proposed law (which looked much like the special prosecutor law that was ultimately adopted in 1978), was designed in such a way that it would rarely be triggered.⁸³ Cox and others feared that if the permanent model was adopted, Congress's quest to cure abuses in the executive branch would lead to overuse.⁸⁴ In some cases it might lead to abuse by over-ambitious special prosecutors. As John Doar, former special counsel to the House Judiciary Committee, expressed it:

With the whole criminal code at his disposal, the permanent special prosecutor could embark on a self-defined crusade for all sorts of reasons including making a name for himself. The idea that any federal official, appointed not elected, should have the uncontrolled power to thumb through the entire federal criminal code as a basis for investigating a targeted group of public officials is anathema to me.⁸⁵

The cautious position of Cox and others who shared his view won the day. President Ford's proposal calling for a permanent special prosecutor within the executive branch died in the House, where Representatives were skittish about the upcoming Fall election.⁸⁶ Democrats quickly regained control of the White House and increased their majority in Congress.⁸⁷ Buoyed by this success (and with Republicans shell-shocked from their significant losses in the election as a backlash to Watergate), Senators Abraham A. Ribicoff (D. Conn.), Charles H. Percy (R. Ill.), and twenty-four co-sponsors introduced S. 555 on February 2, 1977.⁸⁸

81. 1976 *Hearings Before the Subcomm. on Criminal Justice*, *supra* note 78, at 155-56.

82. See 1976 *Hearings Before the Subcomm. on Criminal Justice*, *supra* note 78, at 157-58.

83. See 1976 *Hearings Before the Subcomm. on Criminal Justice*, *supra* note 78, at 155-56, 158-59.

84. See 1976 *Hearings Before the Subcomm. on Criminal Justice*, *supra* note 78, at 155-59.

85. 1976 *Hearings Before the Subcomm. on Criminal Justice*, *supra* note 78, at 172.

86. See EASTLAND, *supra* note 23, at 55; HARRIGER, *supra* note 23, at 66.

87. HARRINGER, *supra* note 23, at 59.

88. See O'Keefe & Safirstein, *supra* note 24, at 119 n.29.

D. *Legislation Is Born: S. 555*

S. 555 was the infant version of what became mature legislation the following year. As Senator Ribicoff explained the bill, it established a mechanism for creating a *temporary* special prosecutor, "to deal with the *extraordinary* case involving criminal misconduct of high-level Government officials."⁸⁹ It closely resembled the second version of S. 495 that had been poised for approval before President Ford's compromise intervened. In line with recommendations by a special committee of the A.B.A., the bill provided that the special prosecutor would be appointed by a panel of U.S. Court of Appeals judges upon application of the attorney general.⁹⁰ S. 555 faced the same recurring constitutional issues (appointment, removal, and separation of powers) that had confronted each prior bill. Yet the opposition was weakening. Senator Baker offered an amendment attempting to move the special prosecutor back to the Department of Justice.⁹¹ Senator Ribicoff rehashed four years of congressional debates and swiftly dismissed Senator Baker's challenge.⁹² The amendment failed and on June 27, 1977, S. 555 soared through the Senate by a vote of 74 to 5.⁹³

After a full year of delays due to unrelated ethics provisions that were bogged down in the House, the House and Senate hammered out a deal by which the Senate version of S. 555 was incorporated into a joint piece of legislation.⁹⁴ On October 7, 1978, the related conference report was adopted by the Senate.⁹⁵ On October 12th, by an overwhelming margin of 370 to 23, the Ethics in Government Act of 1978 was enacted by the House, containing (in Title VI of the legislation) the Senate's version of the special prosecutor provi-

89. 123 CONG. REC. 20,956 (1977) (remarks of Sen. Ribicoff) (emphasis added).

90. See 123 CONG. REC. 20,970 (1977) (remarks of Sen. Scott); HARRIGER, *supra* note 23, at 59-60. For a detailed discussion of the A.B.A. recommendations concerning a temporary special prosecutor, see MASKELL, *supra* note 65, at 9-12.

91. See 123 CONG. REC. 20,996 (1977). Senator Baker's amendment would have created a Division of Government Crimes in the Justice Department, under the supervision of an Assistant Attorney General for Government Crimes, to be appointed by the President with the advice and consent of the Senate.

92. See 123 CONG. REC. 20,997 (1977).

93. See 123 CONG. REC. 21,007 (1977). See also *New Senate Watergate Bill Allows Special Prosecutor, Sets Financial Disclosure*, 35 CONG. Q. WKLY. REP. 1235 (predicting easy passage of bill).

94. See H.R. REP. NO. 95-1756, at 65, 77-78 (1978). For a discussion of these events, including the delays in the House, see EASTLAND, *supra* note 23, at 57; HARRIGER, *supra* note 23, at 60-62. For a look at the separate House and Senate bills, see H.R. 9705, 95th Cong. (1978), analyzed in H.R. REP. NO. 95-1307, at 6-12 (1978); S. 555, 95th Cong. (1978), analyzed in S. REP. NO. 95-170, at 51-160 (1978) reprinted in 1978 U.S.C.C.A.N. 4265-66.

95. See 124 CONG. REC. 34,526 (1978) (Senate vote on conference report); 124 CONG. REC. 36,469 (1978) (House vote on conference report).

sions.⁹⁶ Five years to the month after Cox's firing in the Saturday Night Massacre, the modern special prosecutor law was born, a product of extensive bipartisan hearings and debate.

President Jimmy Carter, a consistent supporter of the legislation, commented that the law provided essential authority to investigate crimes at the highest level of an administration. "I'm hopeful, of course, that this authority will rarely be needed," stated Carter at a bill-signing ceremony in the Cabinet Room of the White House, "but I believe it is necessary in response to the lessons that we have learned to the embarrassment of our country in the past."⁹⁷

The special prosecutor statute, as finally enacted, embodied much of the consensus reached during its five-year incubation period in Congress.⁹⁸ The law established a temporary, rather than a permanent office. It created a special prosecutor removed from the executive branch and loosely appended to the judicial branch, with only limited involvement by the attorney general. As originally adopted, the statute neatly compartmentalized duties. The attorney general was required to conduct a limited "preliminary investigation" upon receiving "specific information" that the President, Vice-President, cabinet members, or other high-level executive officials designated in the statute had violated a federal criminal law (the statute was not triggered by "petty offenses").⁹⁹ The Attorney General then had ninety days to complete the "preliminary investigation."¹⁰⁰ If the Attorney General determined that the matter warranted "further investigation" (or if the ninety-day period elapsed without a determination that the matter was "so unsubstantiated as not to warrant further investigation"), the Attorney General was required to apply to a special three-judge court for the appointment of a special prosecutor.¹⁰¹ This Special Division of the Court of Appeals for the D.C. Circuit was appointed by the Chief Justice of the United States, and consisted of one judge from the D.C. Circuit, and two appellate judges from two different cir-

96. See Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824, 1867-75 (codified at 28 U.S.C. §§ 49, 591-99 (1994)); HARRIGER, *supra* note 23, at 61-62. For a detailed chronology of the history of the Ethics in Government Act through 1977, see S. REP. NO. 95-170, at 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4265-66.

97. Ethics in Government Act of 1978: Remarks on Signing S. 555 Into Law, II PUB. PAPERS 1854-55 (Oct. 26, 1978).

98. For a section-by-section analysis of the statute as originally adopted, see 1978 U.S.C.C.A.N. 4267, 4267-97.

99. See 28 U.S.C. § 591 (1994).

100. See 28 U.S.C. § 592(a) (1994).

101. See 28 U.S.C. § 592(c)(1).

cuits.¹⁰² The special panel was then charged with appointing "an appropriate independent counsel;" defining the scope of his or her jurisdiction; and generally monitoring the activities of the special prosecutor (including making decisions about expanding jurisdiction) from that point forward.¹⁰³ The special prosecutor could be removed by the attorney general only for physical or mental incapacity, or "extraordinary impropriety" (a term borrowed from Cox's Watergate charter).¹⁰⁴ The three-judge panel, however, exercised ultimate authority over the case, and could terminate the office of a special prosecutor at any time by determining that the prosecutor had "substantially completed" his or her work such that it was "appropriate for the Department of Justice to complete such investigations and prosecutions."¹⁰⁵

E. *The Lessons of Legislative History*

It is possible to make several global observations about the special prosecutor law as adopted by Congress, based upon the extensive legislative history that constitutes its genealogy. First, the statute's overarching purpose was to drag certain investigations of the President and other high-level executive officials out of the muck of partisan politics in order to restore public confidence in government. Watergate had virtually destroyed public trust in government — particularly in the presidency, but it tainted all three branches. The number of citizens who felt government could not be fully trusted to do what was right had risen by a dramatic twenty-two percent between 1972 and 1978.¹⁰⁶ Reversing this lack of trust, by adopting legislation that addressed the appearance of conflict as much as actual conflict, was a goal that transcended all others in crafting the special prosecutor legislation.¹⁰⁷

The second lesson that can be distilled from the statute's protracted history is that (at least in theory) it was built to address "big

102. See 28 U.S.C. § 49 (1994).

103. See 28 U.S.C. § 593(b), (c) (1994).

104. See 28 U.S.C. § 596(a)(1) (1994); GORMLEY, *supra* note 3, at 237.

105. 28 U.S.C. § 596(b)(2). For a fuller discussion of the mechanics of the statute as originally drafted, see EASTLAND, *supra* note 23, at 58-65; O'Keefe & Safirstein, *supra* note 24, at 119-26.

106. See HARRIGER, *supra* note 23, at 44.

107. Senator Joseph Biden, Jr. (D. Del.) would later write: "There are certain extraordinary moments of crisis when the people's faith in the integrity and independence of their elected officials is caused to waiver To restore the utmost public confidence in the investigation of criminal wrongdoing by high-ranking government officials, the appointment of a special prosecutor then becomes necessary." Joseph R. Biden, Jr., *Shared Power Under the Constitution: The Independent Counsel*, 65 N.C. L. REV. 881, 886 (1987).

problems.” It was primarily designed to deal with rare, major crises in the executive branch — like Watergate in the 1970s and the Teapot Dome scandal in the 1920s — rather than the ongoing stream of picayune matters that inevitably dog high-level executive officials during any administration. Congress’s unequivocal rejection of a *permanent* special prosecutor provision, in the latter part of 1976, strongly supports this interpretation of the legislative history. The special prosecutor law was never meant to ordain a permanent inquisitor (or inquisitors), sniffing into alleged scandal on a regular basis while setting up a fixed post-office box. The temporary prosecutor, set into motion by a triggering mechanism that was (at least in theory) fairly difficult to trip, was expected to come alive only under extraordinary circumstances involving major conflicts.¹⁰⁸

Evidence of Congress’s general intent on this score is quite tangible. The hearings and debates are littered with references to Watergate and Teapot Dome as models.¹⁰⁹

Although the facts of the Teapot Dome scandal are generally buried in hasty footnotes in modern discussions of the independent counsel law,¹¹⁰ they provide powerful insight into the meaning of

108. As Peter Rodino, Jr., Chairman of the House Judiciary Committee, stated during debates: “I think the circumstances that are contemplated are unusual circumstances, which I think arise because of unusual events, and therefore would require us to act in an extraordinary manner.” 1976 *Hearings Before the Subcomm. on Criminal Justice*, *supra* note 78, at 153-54.

109. See, e.g., *Hearings Before the Senate Comm. on Govt. Operations*, *supra* note 60, at 155-56 (remarks of Archibald Cox). Cox also made reference to Teapot Dome and Watergate in his Senate testimony. In 1974, he told a Senate Subcommittee:

Teapot Dome, Watergate, and all its associated wrongdoings have taught us the sad lesson that crime and the interference with the administration of justice can reach toward the top of the executive branch. Where there is reason to believe that this may have happened, investigation and prosecution cannot be left under the Attorney General or Assistant Attorney General or others in the Department of Justice appointed by the President and necessarily answerable to him.

Removing Politics From the Administration of Justice, *supra* note 6, at 200; MASKELL, *supra* note 65, at 5. Former Attorney General Elliot Richardson likewise used these two major scandals as guideposts in commenting on the proposed legislation. See *Hearings Before the Senate Comm. on Govt. Operations*, *supra* note 60, at 284-85. Even Senator Ervin’s select committee referred to Watergate and Teapot Dome in advocating the creation of a permanent special prosecutor. The Committee wrote: “In each of the Nation’s two major scandals during the past half century, Teapot Dome and Watergate, the appointment of a special prosecutor was essential to preserve the integrity of the criminal justice system and public confidence in the rule of law. In both situations, the office was created after serious abuses had occurred.” FINAL REPORT OF THE SENATE SELECT COMMITTEE, *supra* note 62, at 96. The Senate Government Operations Committee that reported favorably on S. 495 in the 94th Congress discussed the Watergate affair and the Teapot Dome scandal, in explaining the need for a statutorily created temporary special prosecutor. See S. REP. NO. 94-823, at 2-6 (1976). Finally, the legislative history at the time the Ethics in Government Act was adopted in 1978 also refers back to these scandals. See 1978 U.S.C.A.N. 4218, 4218-19.

110. See, e.g., O’Keefe & Safirstein, *supra* note 24, at 115-16 n.16.

the statute and perceived parallels between that scandal and Watergate as impetuses for the legislation. The Teapot Dome crisis erupted shortly after the death of President Warren G. Harding in 1923. It involved the corrupt leasing of government-owned naval oil reserves in Teapot Dome, Wyoming, by Harding's Secretary of the Interior, Albert B. Fall. The leases were made to oil tycoons Harry F. Sinclair (of Mammoth Oil Company) and Edward L. Dohany (of Pan-American Petroleum), in return for personal "loans" to Fall totaling approximately \$400,000.¹¹¹ With President Harding's Attorney General, Harry M. Daugherty, under suspicion for his own improprieties in office, the Justice Department was viewed as incapable of conducting an impartial investigation of the charges.¹¹² President Calvin Coolidge therefore appointed two special prosecutors (one Democrat and one Republican) to look into the allegations at the request of the Senate, following Congress's own internal investigation.¹¹³ The two special prosecutors nominated by the President and confirmed by the Senate were Senator Atlee Pomerene (of Ohio) and attorney (later Supreme Court Justice) Owen Roberts of Philadelphia. Their investigation culminated in the conviction of former Secretary of the Interior Fall on bribery charges in 1929.¹¹⁴ Fall was fined \$100,000 and sentenced to a year in prison.¹¹⁵

Watergate and Teapot Dome thus shared much in common, historically. Both involved allegations of criminal activity by high-ranking executive officials while holding federal office. Both in-

111. See ROBERT K. MURRAY, *THE HARDING ERA: WARREN G. HARDING AND HIS ADMINISTRATION* 461-73 (1969); FRANCIS RUSSELL, *THE SHADOW OF BLOOMING GROVE: WARREN G. HARDING AND HIS TIMES* 488-532 (1968). Teapot Dome was named for a distinctive rock resembling a teapot that sat on the controversial oil-lands.

112. See MURRAY, *supra* note 111, at 473-85. Daugherty's alleged improprieties, although not directly related to Teapot Dome, raised serious questions as to whether he could conduct that investigation in a neutral fashion. *Id.* at 474-82. In turn, these raised questions about the entire Harding administration. *Id.* at 482. Daugherty had been Harding's mentor from Ohio political days.

113. See S.J. Res. 54, 68th Cong., 43 Stat. 5 (1924) (resolution requesting special prosecutors); S. Res. 282, 67th Cong., 62 CONG. REC. 6097 (1922) (congressional investigation).

114. See *Fall v. United States*, 49 F.2d 506 (D.C. Cir. 1931); *United States v. Fall*, 10 F.2d 648 (D.C. Cir. 1925), *cert. denied*, 281 U.S. 757 (1930). Fall was the only cabinet officer ever convicted of a crime committed while in office. See Stephen A. Wolf, *In the Pursuit of Power Without Accountability: How the Independent Counsel Statute is Designed and Used to Undermine the Energy and Independence of the Presidency*, 35 S.D. L. REV. 1, 13 n.22 (1989).

115. See RUSSELL, *supra* note 111, at 488. At the early stages of the Teapot Dome scandal, Attorney General Daugherty had resigned in disgrace in 1924 (after the House attempted to impeach him). He was indicted twice and barely escaped conviction for attempting to defraud the government. (His alleged improprieties were only marginally related to Teapot Dome). Daugherty's account can be found in HARRY M. DAUGHERTY, *THE INSIDE STORY OF THE HARDING TRAGEDY* (1932).

volved a tainted Justice Department that could not be trusted to conduct a neutral investigation. At the time of the Teapot Dome debacle, Attorney General Harry M. Daugherty was himself engulfed in scandal, and could not be relied upon to investigate executive branch officials to whom he might owe allegiance.¹¹⁶ In Watergate, two of President Nixon's Attorneys Generals — John Mitchell and Richard Kleindienst — had been forced to resign under the cloud of suspicion. The head of the Justice Department's Criminal Division, Assistant Attorney General Henry Petersen, was also tainted and had become "a conduit for a constant flow of information from the grand jury and the prosecutors first to [John] Dean and then to the President."¹¹⁷ A neutral investigation by the Justice Department, by the time a special prosecutor was brought in, was considered an impossibility.

Thus, Congress was particularly alert to situations in which the attorney general and/or the Department of Justice might be part of the problem. As Chief Justice Taft once stated, the attorney general was "the hand of the President" in enforcing the laws of the United States.¹¹⁸ Although the legislative draftsmen were also concerned with the *appearance* of impropriety, to the extent this fueled the public perception of mistrust in government, the most urgent candidates for the appointment of special prosecutors were those cases in which evidence existed that the Justice Department was tainted. Although there had been other special prosecutors in American history — such as those appointed to investigate the "Whiskey Ring" during the Grant administration,¹¹⁹ and the "special assistant" named during the Truman administration to investigate allegations of a tax fix and other improprieties by high-ranking executive officials¹²⁰ — Watergate and Teapot Dome remained the prototypes.

116. See *supra* note 112.

117. FINAL REPORT OF THE SENATE SELECT COMMITTEE, *supra* note 62, at 80; see also GORMLEY, *supra* note 3, at 256-60, 368-71; MASKELL, *supra* note 65, at 1-3.

118. See *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1922).

119. The "Whiskey Ring" was the name given to a network of Midwest distillers who bribed revenue officers and pocketed liquor taxes; some of the funds allegedly made their way into Grant's reelection campaign fund through his close friend and secretary, Orville E. Babcock. The Whiskey Ring investigation was mentioned in Senate Report 823, see S. REP. NO. 94-823, at 2-6 (1976), in reviewing past special prosecutors in American history. For a more detailed account of the Whiskey Ring investigation, see 7 JAMES FORD RHODES, HISTORY OF THE UNITED STATES 182-89 (1906).

120. See S. REP. NO. 94-823, at 2-6 (1976). During the Truman administration, Attorney General J. Howard McGrath appointed a "special assistant" to investigate alleged improprieties in granting government loans and engaging in "tax fixes," by high level executive officials (including President Truman's Appointment Secretary and high-ranking Justice Department

A final lesson that can be gleaned from the legislative history is that Congress intended that the scope of the special prosecutor's job would be narrowly circumscribed. True, the special prosecutor's authority would be broad in the sense that he or she would have the same power as the attorney general to investigate and prosecute an alleged crime, once the parameters of his or her jurisdiction were established.¹²¹ At the same time, the jurisdictional limits would be carefully mapped out by the three-judge panel. One of the few duties specifically assigned to the special court, in the otherwise obscure statutory language, was the obligation of defining the precise boundaries of the special prosecutor's jurisdiction in a written statement or charter.¹²² Both proponents and opponents of the law understood that if such a statute gave the special prosecutor *too* much power to roam — beyond carefully delineated jurisdictional borders — the statute would be patently unconstitutional. Congress's final piece of legislation, which created a temporary (rather than permanent) special prosecutor and issued that prosecutor a passport identifying his or her precise jurisdiction, was meant to avoid that dangerous precipice.¹²³

For reasons that remain obscure, however, the statute as finally drafted and implemented has not matched the original noble design of Congress. In the twenty years since the law's enactment, the office of independent counsel has managed to become everything that the framers of the law initially intended that it should not become. While at least many of the key draftsmen envisioned a special prosecutor cropping up rarely — perhaps every generation or two — the statute has collapsed into a horribly overused (and costly) law, with investigations triggered almost effortlessly by either political

lawyers). When Special Assistant Newbold Morris sought McGrath's files, McGrath fired him. Truman then fired McGrath for interfering in the investigation. Several convictions were ultimately obtained by the special assistant during the Eisenhower administration. See *Connelly v. United States*, 249 F.2d 576 (8th Cir. 1957), *cert. denied*, 356 U.S. 921 (1958). This episode is discussed in Wolf, *supra* note 114, at 13.

121. Archibald Cox advocated this sort of broad authority during the course of his House testimony. See 1973 *Hearings Before the Subcomm. on Criminal Justice*, *supra* note 4, at 300-04, 317.

122. See 28 U.S.C. § 593(b) (1994). As Charles Ruff, one of the Watergate Special Prosecutors who succeeded Cox and Jaworski, stated: "One of the advantages of the temporary Special Prosecutor mechanism that has been proposed is that there would be limited jurisdiction in that temporary Special Prosecutor . . ." 1976 *Hearings Before the Subcomm. on Criminal Justice*, *supra* note 78, at 116.

123. The American Bar Association strongly pushed the requirement of a clearly delineated statement of jurisdiction, since this "would serve as a restricting influence on any temporary special prosecutor who might otherwise have notions of expanding an investigation beyond its proper limits." 2 *Hearings Before the Senate Comm. on Govt. Operations*, *supra* note 60, at 164-65.

party pushing easily manipulated buttons. While the statute was built to confine the special prosecutor's jurisdiction to a narrow piece of turf, and thus minimize separation of powers worries, the law has devolved in such a way that an independent counsel can virtually write his or her own jurisdictional ticket.

Precisely how this disconnect has occurred remains one of the great puzzles of the legislation. The early House and Senate history reveals a relatively clear picture of what Congress *thought* it was attempting to accomplish in assembling a special prosecutor law after Watergate. Yet the original goal is almost unrecognizable in the modern statute, as applied.

Congressional intent, of course, is an evanescent concept. It can be argued with force that Congress intended the independent counsel statute to mean whatever the words of the statute say. As Oliver Wendell Holmes once wrote: "We do not inquire what the legislature meant; we ask only what the statute means."¹²⁴ Pursuant to this view of the statute's history, prior debates and oral blusterings are irrelevant.¹²⁵ If one examines the words of the statute itself and limits the inquiry to that document alone, the extremely broad sweep of the independent counsel law that has evolved today is warranted (if not mandated) by the statutory text. An opposing view of congressional intent, however, would place much more weight upon the paper trail left during debates, congressional hearings, and other evidence of legislative history. The words of the independent counsel statute would be properly shaped and interpreted with reference to those legislative proceedings that led up to the law's codification — most of which suggest a more cautious piece of legislation.¹²⁶

124. OLIVER WENDELL HOLMES, *Theory of Legal Interpretation*, in COLLECTED LEGAL PAPERS 203, 207 (1920). Holmes also wrote, however, that "the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down." *United States v. Whitridge*, 197 U.S. 135, 143 (1905).

125. Judge Kenneth Starr, while on the federal bench, espoused such a narrow view of the value of legislative history. See Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371. See also *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (Day, J.) (stating that when statutory language is plain, legislative history cannot be examined); *Hirschey v. Federal Energy Regulatory Commn.*, 777 F.2d 1, 7 (D.C. Cir. 1985) (Scalia, J., concurring); WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POLY. 59, 65-66 (1988). For a statement of the related principle in the law of contracts, see JOHN EDWARD MURRAY, JR., *MURRAY ON CONTRACTS* §§ 105-07 (2d rev. ed. 1974).

126. See *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) (Brewer, J.) (stating the "spirit" of a statute, evidenced in part by its legislative history, controls over seemingly clear statutory language); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988); Felix Frankfurter, *Some Reflections on the*

Given the protracted and public nature of the debates over the special prosecutor law, the latter notion of congressional intent is particularly apropos in this case. It is fair to say, in retrospect, that the global intent of Congress became lost in the words of the statute. Perhaps due to the pro-good-government, put-Watergate-behind-us fervor of the Carter years (when the Congressional plan was finally reduced to text), and an over-ambitious desire by the legislature to avoid *appearances* of conflict even where no actual conflicts of interest existed, Congress overshot its mark. The devil has now emerged from the details, and wreaked havoc upon the statute. Nowhere in the congressional history does one find a core of legislative support for a law that looks like the one that presently exists. Indeed, it is fair to state (based upon the legislative history recounted above) that if a statute had been drafted in the 1970s resembling the independent counsel law as currently implemented, it would have been viewed as more shocking and abhorrent than any other proposal on the table, including the permanent special prosecutor provisions of S. 495 that were so overwhelmingly rejected.¹²⁷

Fortunately, the "textualists versus purposivists" debate that has found new life in recent years — particularly due to the lively and controversial writings of Justice Scalia¹²⁸ — can be largely avoided when it comes to the current controversy over the independent counsel law. Those who fasten tightly onto the statutory text generally do so primarily out of separation of powers concerns — the judiciary should not usurp the function of the legislature, by re-writing statutes.¹²⁹ In the instant case, however, it is not necessary to argue that *courts* should "reform" and re-interpret the independent counsel law. Rather, the simpler (and less controversial path) is for Congress itself to repair the statute.

Congress is free to determine for itself within the next year what the statute was meant to accomplish; the House and Senate are empowered to adjust the statutory language accordingly. If the statute is to be salvaged before the "sunset provision" ticks to a close in

Reading of Statutes, 47 COLUM. L. REV. 527 (1947); Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380.

127. See *supra* text accompanying notes 64-86.

128. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutman ed., 1997) (advancing a strong argument in favor of "textualism"); William N. Eskridge, Jr., *Textualism, The Unknown Ideal?* 96 MICH. L. REV. 1509, 1513 (1998) (listing critics of the "new textualism").

129. See ANTONIN SCALIA, *Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in SCALIA, *supra* note 128, at 9-14.

1999, Congress must squarely face the disconnect between the words of the statute and its original purpose, and bring the law back to its sensible moorings.

II. THE FIRST TWENTY YEARS: ESTABLISHING THE LAW'S CONSTITUTIONALITY

This Article will not rehash the debate concerning the legislation's constitutionality. That subject consumed commentators for the first decade of the statute's life, leading to the landmark clash between the executive and legislative branches in *Morrison v. Olson*.¹³⁰ *Morrison* was a hard fought tug-of-war, with the Senate and House of Representatives filing *amicus* briefs in the Supreme Court staunchly defending the independent counsel statute, and the Reagan Department of Justice (led by Solicitor General Charles Fried) filing an *amicus* brief arguing that the statute was patently unconstitutional.¹³¹ The Justice Department's position was summed up best in an old provision from the Massachusetts Constitution, that presumably demonstrated the Founders' desire to achieve a strict separation among the three branches of government. That 1780 provision read:

In the Government of this Commonwealth, the Legislative Department shall never exercise the Executive and the Judicial Powers, or either of them; the Executive shall never exercise the Legislative and Judicial Powers or either of them; the Judicial shall never exercise the Legislative and Executive Powers, or either of them: To the end, it may be a Government of Laws and not of Men.¹³²

130. 487 U.S. 654 (1988). *Morrison* involved a challenge to the independent counsel provisions of the Ethics in Government Act filed by Theodore B. Olson, Carol E. Dinkins, and Edward C. Schmults. These three former Justice Department lawyers were under investigation for providing false testimony and withholding evidence from the House Judiciary Committee, in connection with a congressional investigation into efforts by the Environmental Protection Agency and the Justice Department to enforce the so-called "Superfund Law." See *Morrison*, 487 U.S. at 665-68. After a divided panel of the U.S. Court of Appeals for the District of Columbia Circuit held that Title VI of the Ethics Act was unconstitutional, see *In re Sealed Case*, 838 F.2d 476 (D.C. Cir. 1988), Independent Counsel Alexia Morrison took an appeal to the Supreme Court. For a copy of the briefs filed by the parties in the Court of Appeals, see Editor's Note, *The Constitutional Validity of the Ethics in Government Act: Morrison v. Olson*, 16 HOFSTRA L. REV. 65 (1987).

131. A slew of other interested parties submitted *amicus* briefs for and against the statute. These included the citizen watchdog group Common Cause (then chaired by Archibald Cox), who filed an *amicus* brief defending the constitutionality of the Ethics Act provisions.

132. MASS. CONST. OF 1780, pt. 1, art. XXX. Fried would later cite this paragraph in lamenting the Court's ruling in *Morrison*. See Charles Fried & Paul M. Bator, Debate: *After the Independent Counsel Decision: Is Separation of Powers Dead?* 26 AM. CRIM. L. REV. 1667, 1669 (1989). Justice Scalia also quoted this Massachusetts provision in his vigorous dissent. See *Morrison*, 487 U.S. at 697 (Scalia, J., dissenting).

This purist view of separation of powers, however, did not prevail. On the last day of its October 1987 term, the Supreme Court upheld the independent counsel statute in a strong seven-to-one decision authored by Chief Justice William H. Rehnquist.¹³³ The Court's lengthy opinion in *Morrison v. Olson* considered and dismissed as un compelling the three constitutional concerns that had haunted the statute since its inception. It also rejected sweeping assertions that the special three-judge panel, as part of the judicial branch, was constitutionally unfit to play a role under the independent counsel statute.¹³⁴ First, the *Morrison* Court concluded that there was no Appointments Clause problem under Article II, Section 2, because the independent counsel was an "inferior officer" and the judiciary had historically shared a certain amount of power to appoint such officers with the president.¹³⁵ Second, the Court declared that limiting the ability of the attorney general to terminate an independent counsel — for "good cause" only — did not impermissibly impinge upon the executive branch's removal power. Cases like *Humphrey's Executor*¹³⁶ and *Wiener v. United States*¹³⁷ supported the proposition that as long as vesting the removal power in another branch did not impede the president in carrying out his constitutional duties as chief executive, such a removal provision was legitimate.¹³⁸ Third, the Court swept aside the overarching sep-

133. See *Morrison*, 487 U.S. at 660. Justice Kennedy did not take part in the consideration or decision of the *Morrison* case.

134. In this regard, the *Morrison* Court considered and rejected an argument that the Act violated the "cases and controversies" provision of Article III. The Court concluded that the judiciary possessed ample power to perform the duties Congress delegated to the special court under the statute (including the appointment of the special prosecutor), even though they were not strictly judicial in nature. See *Morrison*, 487 U.S. at 677-85. For a further discussion of these issues, see notes 344-56 and accompanying text.

135. See *Morrison*, 487 U.S. at 670-77. The Court has interpreted the Appointments Clause to mean that: "Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary." *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (per curiam). For a detailed discussion of the Appointments Clause issue in *Morrison*, see Stephen L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105, 111 (1988); Kenneth R. Feinburg, *The Separation of Powers Issue in the Independent Counsel Debate*, 25 AM. CRIM. L. REV. 171, 175-82 (1987); Eric R. Glitzenstein & Alan B. Morrison, *The Supreme Court's Decision in Morrison v. Olson: A Common Sense Application of the Constitution to a Practical Problem*, 38 AM. U. L. REV. 359, 362-66 (1989); Lazarus & Larson, *supra* note 2, at 191-92; Cox, *supra* note 54, at 1486-88; Solloway, *supra* note 50, at 969-73; Alexander I. Tachmes, Note, *Independent Counsels Under the Ethics in Government Act of 1978: A Violation of the Separation of Powers Doctrine or an Essential Check on Executive Power?* 42 U. MIAMI L. REV. 735, 743-54 (1988).

136. 295 U.S. 602 (1935).

137. 357 U.S. 349 (1958).

138. See *Morrison*, 487 U.S. at 685-93. In essence, the Court in *Morrison* was distancing itself from the "formalistic" approach of *Myers v. United States* — which favored strict separation of powers and focused on whether the official was performing a "purely executive"

aration of powers concern, concluding that neither Congress nor the judiciary was guilty of improperly encroaching upon executive terrain under the statute, in view of the limited overlap among the branches of government authorized by the legislation.¹³⁹

Morrison represented an "unqualified victory" for supporters of the Watergate-era special prosecutor law.¹⁴⁰ Justice Scalia spoke as the lone voice of dissent, berating the majority for shattering the constitutional balance embodied in the American legal system. "Frequently," Scalia wrote, "an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis." Scalia concluded with a pessimistic observation: "But this wolf comes as a wolf."¹⁴¹

In the decade since *Morrison v. Olson*, a vast mountain of legal literature was produced, most of which focused upon the constitutional questions. The statute and the Court's opinion in *Morrison*

function that belonged to the President — and embracing a less rigid "functional" approach that had its seed in *Humphrey's Executor* and *Wiener*, tolerating much more overlap among the branches of government so long as Congress was not invading the "core function" of the executive branch. For an in-depth examination of the formalist versus functional issue, see Peter B. Davidson, Note, *Chipping Away at the President's Control Over His Administration: An Analysis of Morrison v. Olson and Beyond*, 6 J.L. & POL. 205 (1989); William L. Weingard III, Comment, *Morrison v. Olson: Renewed Acceptance for a Functional Approach to Separation of Powers*, 16 HASTINGS CONST. L.Q. 603 (1989). For a more complete discussion of the removal issue, see Cox, *supra* note 54, at 1483-85; Michael L. McCoy, Note, *The Office of Independent Counsel — A Constitutional Overview*, 28 WASHBURN L.J. 150, 167-71 (1988); Solloway, *supra* note 50, at 973-78.

139. See *Morrison*, 487 U.S. at 693-96. For a fuller discussion of the separation of powers issue, see William C. Banks, *When They Get Close to the Truth: Challenging the Special Prosecutors*, 38 SYRACUSE L. REV. 623, 628-36 (1987); Feinburg, *supra* note 135, at 171-73; Glitzenstein & Morrison, *supra* note 135, at 369-82; Cox, *supra* note 54, at 1478-83; Solloway, *supra* note 50, at 963-68.

140. See David O. Stewart & Scott Nelson, *Separation of Powers, Cont.*, A.B.A. J. Sept. 1, 1988, at 40, 44.

141. *Morrison*, 487 U.S. at 699 (Scalia, J., dissenting).

were criticized,¹⁴² lauded,¹⁴³ commented upon,¹⁴⁴ and analyzed at such length that few rocks were left unturned. Most of the scholarship churned out pre- and post-*Morrison* tended to validate the Supreme Court's path of logic. Scholars confirmed that Congress, since the founding of the nation, had delegated a wide range of tasks to the judiciary which intersect with those of the executive branch, including the appointment of "inferior" executive officers.¹⁴⁵ Scholars also demonstrated that the prosecution of fed-

142. See, e.g., Carter, *supra* note 135; Donald A. Daugherty, Recent Case, *The Separation of Powers and Abuses in Prosecutorial Discretion*, 79 J. CRIM. L. & CRIMINOLOGY 953 (1988); Thomas S. Martin & David E. Zerhusen, *Independent Counsel — Checks and Balances*, 58 GEO. WASH. L. REV. 536 (1990); Beth Nolan, *Removing Conflicts From the Administration of Justice: Conflicts of Interest and Independent Counsels Under the Ethics in Government Act*, 79 GEO. L.J. 1 (1990); *Independent Counsel Symposium* 25 AM. CRIM. L. REV. 167 app. A at 279 (1987); Kevin R. Morrissey, Comment, *Separation of Powers and the Individual: Morrison v. Olson*, 55 BROOK. L. REV. 965 (1989).

143. See, e.g., Biden, *supra* note 107; Harold H. Bruff, *Independent Counsel and the Constitution*, 24 WILLAMETTE L. REV. 539 (1988); Earl C. Dudley, Jr., *Morrison v. Olson: A Modest Assessment*, 38 AM. U. L. REV. 255 (1989); Feinburg, *supra* note 135; Glitzenstein & Morrison, *supra* note 135; Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons From History*, 38 AM. U. L. REV. 275 (1989); Richard J. Pierce, *Morrison v. Olson, Separation of Powers, The Structure of Government*, SUP. CT. REV. 1, 1 (1988); Donald J. Simon, *A Constitutional Rationale for the Independent Counsel Law*, 25 AM. CRIM. L. REV. 229 (1987); Frank Tuerkeimer, *Prosecution of Criminal Cases: Where Executive and Judicial Power Meet*, 25 AM. CRIM. L. REV. 251 (1987).

144. See, e.g., Steven Breyer, *Foreword to Independent Counsel Symposium*, 25 AM. CRIM. L. REV. 167 (1987); Fried & Bator, *supra* note 132; Glitzenstein & Morrison, *supra* note 135; Lazarus & Larson, *supra* note 2; Alan B. Moore, Recent Development, *Separation of Powers and the Independent Counsel Act — Morrison v. Olson*, 12 HARV. J.L. & PUB. POLY. 259 (1989); Irvin B. Nathan & David P. Gersch, *Strengthening the Independent Counsel Law Requires Judicial Review of the Attorney General's Decisions*, 25 AM. CRIM. L. REV. 199 (1987); Stewart & Nelson, *supra* note 140; Carolyn M. Corry, Note, *On the Constitutionality of the Independent Counsel Provisions of the Ethics in Government Act: Do They Comport with the Separation of Powers?*, 26 DUQ. L. REV. 715 (1988); Davidson, *supra* note 138; Alton L. Lighthousey, Note, *Constitutional Law: The Independent Counsel and the Supreme Court's Separation of Powers Jurisprudence*, 40 FLA. L. REV. 563 (1988); McCoy, *supra* note 138; Solloway, *supra* note 50; Edward Susolik, Note, *Separation of Power and Liberty: The Appointments Clause, Morrison v. Olson, and Rule of Law*, 63 S. CAL. L. REV. 1515 (1990); Weingard, *supra* note 138.

145. See James A. Cohen, *Self-Love and the Judicial Power to Appoint a Special Prosecutor*, 16 HOFSTRA L. REV. 23 (1987); Lazarus & Larson, *supra* note 2, at 191-94. A number of states have similarly permitted the judicial branch to appoint special prosecutors. See *People ex rel. Lindsley v. District Court*, 66 P. 896 (Colo. 1901); *State ex rel. Kelly v. Alcorn*, 6 Conn. Supp. 210 (Conn. Super. Ct. 1938); *Pelaez v. State*, 144 So. 364 (Fla. 1932); *Mach v. State*, 135 S.E.2d 467 (Ga. 1964); *State v. Bell*, 370 P.2d 508 (Idaho 1962); *People v. Sears*, 273 N.E.2d 380 (Ill. 1971); *Hendricks v. State*, 196 N.E.2d 66 (Ind. 1964); *White v. Polk County*, 17 Iowa 413 (1864); *Attorney General v. Flynn*, 120 N.E.2d 296 (Mass. 1954); *In re Investigation of Recount*, 258 N.W. 776 (Mich. 1935); *State v. Jones*, 268 S.W. 83 (Mo. 1924); *Lizar v. State*, 166 P.2d 119 (Okla. Crim. App. 1946); *State v. Bute*, 234 N.W. 605 (S.D. 1931); *State v. Gonzales*, 26 Tex. 197 (1862). See also Janet Fairchild, Annotation, *Validity, Under State Law, of Appointment of Independent Special Prosecutor to Handle Political or Controversial Prosecutions or Investigations of Persons Other Than Regular Prosecutor*, 84 A.L.R. 3d 29 (1978).

eral crimes were neither exclusively reserved to the executive branch,¹⁴⁶ nor a "core function" of that branch.¹⁴⁷

Yet little scholarly synergy went into examining the mechanics of the law, or the important question: "[H]as it worked properly, as a policy matter?"¹⁴⁸ As a result, twenty years later, a host of bumps, warts, and now malignant tumors have revealed themselves growing across the statute's surface.

This Article will avoid reiterating debate over the constitutional questions that surrounded the special prosecutor law after it was adopted in the 1970s. Five years' worth of congressional hearings and a plethora of scholarship have covered that ground, and it need not be revisited.¹⁴⁹ Nor will this Article quarrel with the Supreme Court's decision in *Morrison v. Olson*, upholding the specific method employed by Congress to implement its special prosecutor apparatus.¹⁵⁰ The lion's share of legal scholarship since *Morrison* has tended to support the position that it is constitutionally sound to allow a three-judge panel to appoint and oversee the independent counsel.¹⁵¹ It will therefore be assumed that the general frame-

146. One of the finest articles on this subject is Krent, *supra* note 143. See also Cohen, *supra* note 145; Feinburg, *supra* note 135; Lazarus & Larson, *supra* note 2; Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 603-06 (1989). For a recent case holding that federal courts could appoint private counsel to prosecute criminal contempt charges, see *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787 (1987). Such cases frequently arose in the patent/counterfeit trademark area, where the court had little power to enforce its contempt orders without appointing a special prosecutor to do so. See Cohen, *supra* note 145, at 23-24.

147. The best pieces of scholarship on this subject are Krent, *supra* note 143 and Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers' Intent*, 99 YALE L.J. 1069 (1990). See also Dudley, *supra* note 143. But see Solloway, *supra* note 50, at 964-68 (suggesting that prosecution is a core function of the executive).

148. One of the most impressive articles devoted to sorting out how to cure the statute's defects is Julie O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463 (1996). See also Judge Griffin B. Bell et al., *A Roundtable Discussion on the Independent Counsel Statute*, 49 MERCER L. REV. 457 (1998); Benjamin R. Civiletti, *Post-Watergate Legislation in Retrospect: The Alfred P. Murrah Lecture on the Administration of Justice*, 34 SW. L.J. 1043 (1981).

149. See *supra* notes 142-44.

150. See *supra* notes 134-39 and accompanying text. But see Carter, *supra* note 135, at 136-41 (criticizing decision in *Morrison* as misguided); *Independent Counsel Symposium*, *supra* note 142, app. A at 279 (statement by former Attorney General Griffin Bell to House Judiciary Committee, calling legislation unconstitutional and unwise).

151. See, e.g., Glickenstein & Morrison, *supra* note 135; Keith Werhan, *Toward an Eclectic Approach to Separation of Powers: Morrison v. Olson Examined*, 16 HASTINGS CONST. L.Q. 393 (1989); Morrissey, *supra* note 142. For an engaging debate between two prominent constitutional scholars on the separation of powers question presented in *Morrison*, see Fried & Bator, *supra* note 132. More recently, Professor Akhil Amar has sharply questioned the constitutionality of the independent counsel law. See Akhil Reed Amar, *A Constitutional Nightmare*, WASH. POST, Sept. 20, 1998, at C1. Amar's lively discussion with Professor Laurence Tribe about the constitutionality of the statute, in light of its recent application in the

work of the statute is constitutional. Despite the creative arguments by Professor Akhil Amar that the independent counsel law is patently invalid under the separation of powers doctrine, and his contention that the present Court has signaled its readiness to junk the statute,¹⁵² it is doubtful that this position — although eloquently presented — will win the day. There is scant indication that the Court would abandon its position in *Morrison*, even considering subsequent changes in the composition of the Court.¹⁵³

The more important question that now faces Congress, legal scholars, and the American public is this: Can the language of the independent counsel statute be reformed and rehabilitated, such that its provisions (as applied in the real world that intersects with politics) conform to its original theoretical design? Can Congress rewrite the legislation, such that its tedious details match the cautious model that Congress seemed to envision when it went to the drafting table in the 1970s?

This Article will advance the proposition that the independent counsel statute can be salvaged — but only through aggressive surgery. Those cosmetic reforms that have been undertaken by Congress in the past¹⁵⁴ will not be sufficient to save the statute now, in the face of mounting public (and legislative) opinion that grows increasingly hostile toward its failures. Serious reforms that rebuild the statute's defective components are necessary if it is to become

Lewinsky investigation, can be found in Akhil Reed Amar & Laurence Tribe, *The Independent Counsel*, SLATE (Sept. 10, Sept. 15, Sept. 29, Oct. 1, Oct. 12, 1998) <<http://www.slate.com/code/DDD/DDD.asp?file=IC&iMsg=1>>. A masterful argument by Amar with respect to the unconstitutionality of the independent counsel law appears in Akhil Reed Amar, *Intertextualism*, 112 HARV. L. REV. (forthcoming Jan. 1999). However, this author remains unpersuaded.

152. Amar, *supra* note 151; Amar & Tribe, *supra* note 151. Professor Amar hinges his prediction upon the recent decision of *Edmond v. United States*, 520 U.S. 651 (1997), in which the Court (per Justice Scalia) discussed the concept of "inferior" and "principal" officers under the Appointment Clause of Article II, Section 2, in some detail. See also Nick Braven, *Is Morrison v. Olson Still Good Law? The Court's New Appointment Clause Jurisprudence*, 98 COLUM. L. REV. 1103 (1998). Yet, *Edmond* dealt with the unique subject of military law, and specifically avoided casting any stones at the *Morrison* decision. See 520 U.S. at 661-62. Thus, Professor Amar's conclusion that *Edmond* effectively repudiates the Court's decision in *Morrison* seems to be a stretch (however valiant). Professor Tribe, in his September 15th reply to Amar in the Internet publication *Slate*, above, apparently agrees. Amar & Tribe, *supra* note 151.

153. Justice Ginsburg, as a federal appeals judge, favored the position that the independent counsel law was constitutional. See *In re Sealed Case*, 838 F.2d 476, 518 (D.C. Cir. 1988) (Ginsburg, J., dissenting). Justice Breyer, as a First Circuit judge and former Harvard Law professor, participated in a Symposium for the *American Criminal Law Review* that was generally supportive of the independent counsel law, although Breyer himself remained neutral in his comments. See Breyer, *supra* note 144.

154. See *infra* note 156-58 and accompanying text.

the viable failsafe mechanism it was intended to be, rather than a dysfunctional drag upon the American justice system.

III. REFORMING THE INDEPENDENT COUNSEL LAW

On June 30, 1999, the sunset provision contained in the independent counsel statute will tick to a close. Unless Congress reauthorizes the legislation, it "shall cease to be effective."¹⁵⁵ This represents the fourth — and most controversial — occasion on which the statute will face reauthorization. The law was amended and renewed by Congress in 1982 and 1987 without a significant struggle.¹⁵⁶ In 1992, the statute was allowed to lapse for two years when Senate Republicans blocked it, angry and weary from the Iran-Contra investigation.¹⁵⁷ Congress then renewed the law in 1994¹⁵⁸ after President Bill Clinton moved into the White House. Clinton himself lauded the independent counsel statute at that time, calling it "a force for Government integrity and public confidence."¹⁵⁹

That enthusiasm has now waned, however, within the White House and beyond. Particularly since the recent uproar over the expansion of Kenneth Starr's Whitewater investigation into the Monica Lewinsky matter, there has been a deluge of commentary calling for the gutting and scrapping of the independent counsel law, from both Democrats and Republicans.¹⁶⁰ Whitewater Associ-

155. 28 U.S.C. § 599 (1994).

156. See Ethics in Government Act, Amendments of 1982, Pub. L. No. 97-409, 96 Stat. 2039; Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293. For a discussion of the 1982 reauthorization and related amendments, see Thomas J. Satery, *The Ethics in Government Act of 1978 and Subsequent Reforms: The Effect of Political and Practical Influences on the Creation of Public Policy*, 13 SETON HALL LEGIS. J. 243, 251-59 (1990). For a discussion of the 1987 reauthorization and amendments, see Stanley I. Kutler, *In the Shadow of Watergate: Legal, Political, and Cultural Implications*, 18 NOVA L. REV. 1743, 1751-54 (1994); Satery, *supra*, at 260-67.

157. See James P. Fleissner, *The Future of the Independent Counsel Statute: Confronting the Dilemma of Allocating the Power of Prosecutorial Discretion*, 49 MERCER L. REV. 427, 440 (1998); Kutler, *supra* note 156, at 1754.

158. See Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, 108 Stat. 732.

159. President's Statement on Signing the Independent Counsel Reauthorization Act, I PUB. PAPERS 1169 (June 30, 1994). President Clinton later had a change of heart about the statute, after being hounded by the Whitewater scandal. Following the 1996 election, he reportedly told his opponent, Senator Bob Dole, who had opposed reauthorization of the independent counsel law: "You were right and I was wrong on the independent counsel." BOB WOODWARD, *THE CHOICE: HOW CLINTON WON* 444 (1997).

160. See Paul T. Cappuccio, *Scalia Was Right About the Independent Counsel Law*, WALL ST. J., June 29, 1998, at A19 (stating that the "statute has utterly failed to achieve its overriding goal" and should be scrapped); Gerard E. Lynch, *The Problem Isn't in the Starrs But in a Misguided Law*, WASH. POST, Feb. 22, 1998, at C3; Julia Malone, *Some Rethinking Support of 1978 Counsel Statute*, AUSTIN AM.-STATESMAN, Feb. 12, 1998, at A10, available in

ate Counsel Brett M. Kavanaugh would scrap the present system in favor of a new statute that allows the President to nominate the independent counsel, and the Senate to approve the selection, with significant discretion granted to the President in deciding when to appoint a special prosecutor.¹⁶¹ Two-time White House counsel Lloyd Cutler would similarly provide for the selection of an independent counsel from a pre-established panel nominated by the President and confirmed by the Senate; or in the alternative, he would create an Office of Public Prosecutor charged with prosecuting alleged ethical crimes committed by all public officials, as in Britain or Northern Ireland.¹⁶² Inspector General Michael R. Bromwich and Professor Kathleen Clark would replace or supplement the independent counsel law with an "Inspector General" for the White House, assigned to keep a watchful eye for ethical violations in order to prevent abuses from occurring.¹⁶³ Former Justice Department official Terry Eastland would abandon the present statute entirely, and allow the dual mechanism of congressional investigations and the impeachment process to take care of any problems of executive malfeasance.¹⁶⁴

The call for complete abandonment of the statute — an understandable reaction when legislation reveals such ugly design defects — is an expedient yet unsatisfying solution. Virtually every former special prosecutor, although acknowledging serious flaws in the law, has endorsed its preservation in conjunction with major reforms.¹⁶⁵ Few pieces of legislation in this century have been fashioned after so much soul-searching, deliberation, and congressional resolve. The original special prosecutor legislation was created after five years of legislative debate. The constitutional issues relating to the

ALLNEWS, 1998 WL 3627743; Jeremy Rabkin, *Rule by Unaccountability: Critics of the Independent Counsel Don't Go Far Enough*, AM. SPECTATOR, July 1998, at 52; David E. Rovella, Ken Starr: A Hard Man to Fire, NAT'L. L.J., Feb. 16, 1998, at A1; James Toedtman, *Independent Counsel Law — Democrats Eating Humble Pie Now*, SEATTLE TIMES, July 24, 1998, at A2.

161. See Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L.J. 2133, 2135-36 (1998).

162. See Bell et al., *supra* note 148, at 477-78; Fleissner, *supra* note 157, at 449.

163. See Michael R. Bromwich, *Running Special Investigations: The Inspector General Model*, 86 GEO. L.J. 2027 (1998); Kathleen Clark, *Toward More Ethical Government: An Inspector General for the White House*, 49 MERCER L. REV. 553 (1998). The Inspector General Act of 1978 is codified as amended at 5 U.S.C. app. 3 §§ 1-12 (1994).

164. See EASTLAND, *supra* note 23, at 134; see also *Sixty-Seventh Judicial Conference of the Fourth Circuit: The Independent Counsel Process: Is It Broken and How Should it be Fixed?*, 54 WASH. & LEE L. REV. 1515, 1590 (1997) [hereinafter *Sixty-Seventh Judicial Conference*] (remarks of Terry Eastland).

165. See Kenneth Jost, *Independent Counsel Disconnect: Some Critics Suggest Limiting Lengths and Targets of Investigations*, A.B.A. J., Apr. 1997, at 30, 30.

general structure of the statute were hashed out for another decade, culminating in *Morrison v. Olson*. The statute was reauthorized three times by Congress, each time with detailed amendments. Although Congress may not have succeeded in reducing to text, gracefully, those core provisions that had seemingly driven the statute's creation after Watergate, the framework remains a viable one.

Rather than throwing out two decades' worth of legislative work inspired by a legitimate perception that some form of special prosecutor law was necessary, Congress should tackle the more daunting but productive task of reforming the statute. If members of the House and Senate take a hard look at the lessons to be learned from the current Whitewater imbroglio, they may succeed in fighting off the political pox that has debilitated the statute in recent years. Over a dozen specific reforms are essential if the law is to be returned to its original, sensible purpose. These can be roughly organized into three categories: Reforms relating to the appointment of special prosecutors; reforms relating to the functions of special prosecutors; and reforms relating to the role of the special court.

A. *Reform the Method and Frequency of Appointing Independent Counsels*

Since the statute's adoption in 1978, there have been twenty separate independent counsel investigations (eighteen public and two under seal) with the number growing with each administration.¹⁶⁶ Some independent counsels have branched off into multi-

166. The twenty independent counsel investigations, and their subjects, are as follows. *Carter Administration*: Investigation of White House Chief of Staff Hamilton Jordan for cocaine use (Independent Counsel: Arthur H. Christy) (no charges filed); Campaign Manager Timothy Kraft for cocaine use (Independent Counsel: Gerald J. Gallinhouse) (no charges). *Reagan Administration*: Labor Secretary Raymond Donovan for larceny and fraud (Independent Counsel: Leon Silverman) (no charges); White House counsel Edwin Meese for financial improprieties (Independent Counsel: Jacob A. Stein) (no charges); Assistant Attorney General Theodore B. Olson for lying in congressional testimony (Independent Counsel: Alexia Morrison) (no charges); White House Aide Michael K. Deaver for lying about lobbying foreign clients (Independent Counsel: Whitney North Seymour, Jr.) (convicted of perjury); Various Reagan Administration officials for illegally selling arms to Iran and diverting funds to Nicaraguan Contras (Independent Counsel: Lawrence E. Walsh) (multiple indictments, convictions, and guilty pleas, some nullified by presidential pardon); Attorney General Edwin Meese and White House Aide Franklyn Nofziger for contracting scandal involving Wedtech Corp. (Independent Counsel: James C. McKay) (one acquittal, one conviction overturned on appeal); Assistant Attorney General W. Lawrence Wallace for finance-related abuses (Independent Counsels: James R. Harper; Carl Rauh) (no charges); White House aide James Cicconi for improper loan (under seal) (Independent Counsel: Dan Webb) (no charges); Housing and Urban Development Secretary Samuel Pierce for fraud and mismanagement (Independent Counsels: Arlin Adams; Larry D. Thompson) (multiple convictions and guilty pleas, one acquittal) (final report not yet filed). *Bush Administration*: Under seal (name of subject and independent counsel under seal) (no charges); Bush Administration officials for illegal search of Bill Clinton's passport file during campaign (Independ-

ple investigations.¹⁶⁷ As of late 1998, six different independent counsels are in existence, operating simultaneously.¹⁶⁸ As discussed above, this proliferation of special prosecutors — unattached to the executive branch — was not what Congress seemed to envision when it conceived the law during the Watergate era. The concept of a *permanent* special prosecutor's office, built to root out scandal in the executive branch on an ongoing basis, was flatly rejected. It was viewed as dangerous, constitutionally infirm, and abhorrent to the tripartite system of American government. Yet with a half dozen independent counsels being bred and sustained at any given time, under the statute as drafted, it has produced the "institutionalized wolf hanging on the flank of an elk" that Acting Attorney General Robert Bork warned against at Congressional hearings as early as 1973.¹⁶⁹

The runaway nature of the statute is not attributable to a single independent counsel or a single political party. Both Democrats and Republicans have discovered how to push the buttons and tilt the machine, in the years following Watergate. They have discovered that careers can be made and political opponents eviscerated

ent Counsels: Joseph E. DiGenova; Michael Zeldin) (no charges). *Clinton Administration*: Bill and Hillary Clinton regarding Whitewater land deal (Independent Counsels: Robert Fiske; Kenneth W. Starr) (multiple indictments, guilty pleas, acquittals, and convictions) (pending); Secretary of Agriculture Mike Espy for accepting improper gifts (Independent Counsel: Donald C. Smaltz) (multiple convictions, guilty pleas, and acquittals) (acquitted); HUD Secretary Henry G. Cisneros for lying to FBI about size of payments to mistress (Independent Counsel: David M. Barrett) (pending); Secretary of Commerce Ronald H. Brown for personal financial irregularities (Independent Counsel: Daniel S. Pearson) (case terminated and transferred to Justice Department upon Brown's death); AmeriCorps head and former campaign chief of staff Eli Segal for conflict of interest allegations (Independent Counsel: Curtis von Kann) (no charges); Secretary of Interior Bruce Babbitt for allegedly testifying falsely to Congress regarding rejection of Wisconsin Indian casino license (Independent Counsel: Carol Elder Bruce) (pending); Labor Secretary Alexis M. Herman for allegedly receiving kickbacks to steer contributions to the Democratic party as director of White House Office of Public Liaison (Independent Counsel: Ralph I. Lancaster, Jr.) (pending). See Jack Maskell, *The Independent Counsel Law*, FED. LAW., July 1998, at 28, 31; Donald E. Smaltz, *The Independent Counsel, a View from Inside*, 86 GEO. L.J. 2307, 2323-24 (1998); Susan Page, *Independent Counsel Law: Parties Switch Sides*, USA TODAY, Nov. 14, 1997, at 4A; Roberto Suro, *Labor Secretary Under Investigation: Reno Seeks Independent Counsel*, AUSTIN AM.-STATESMAN, May 12, 1998, at A1; *Counsel Appointed for Babbitt Inquiry*, N.Y. TIMES, Mar. 20, 1998, at A14; *Independent Counsel Investigations*, WASH. POST, Apr. 13, 1997, at A12; *Investigator Chosen in Labor Secretary's Case*, N.Y. TIMES, May 27, 1998, at A18.

167. Besides the multiple investigations of Kenneth Starr, discussed *supra* at notes 12-16 and accompanying text, Independent Counsel Donald C. Smaltz has broadened his investigation of Mike Espy through a "referral" by the special court. See *In re Espy*, 80 F.3d 501 (D.C. Cir 1996). See discussion *infra* note 268.

168. The pending investigations are those involving Samuel Pierce (Reagan administration); and Bill and Hillary Clinton, Henry Cisneros, Bruce Babbitt, and Alexis Herman (Clinton administration). See *supra* note 166.

169. 1973 Hearings Before the Subcomm. on Criminal Justice, *supra* note 4, at 263.

through a good scandal.¹⁷⁰ As this undignified game of political pinball has been perfected, there has come with it an abandonment of the original notion that the special prosecutor law would be reserved for rare and special crises. The number of independent counsels will only continue to multiply, in future years, if significant changes are not made. Watergate prosecutor Archibald Cox recently commented that only two investigations triggered by the statute since its enactment have matched his conception of the law at the time he testified in its favor.¹⁷¹ This over-use and trivialization of the independent counsel law is the single greatest flaw that has emerged since 1978.

Most of the allegations that have set the gears of the independent counsel statute whirring thus far — such as allegations of cocaine use by President Carter's White House Chief of Staff Hamilton Jordan, and assertions that President Clinton's HUD Secretary Henry Cisneros lied in an FBI background check about the size of payments to a mistress — are a far cry from the sort of national crises and executive branch conflicts that provided the initial impetus for the law. Watergate and Teapot Dome both involved special prosecutors who were appointed to defuse national crises when the normal chain-of-command in the Justice Department had collapsed. We have learned from two decades' worth of experience, unhappily, that when a special prosecutor law can be triggered at the earliest stages of alleged wrongdoing with a faint puff of smoke, it will be triggered constantly.

There are three adjustments that must be made to the independent counsel statute, if it is to be reserved for the sort of rare and extreme cases for which it was originally built.

170. See Ken Gormley, *When prosecutors aren't so special*, BOSTON GLOBE, Dec. 7, 1997, at C7. For an excellent discussion of the harmful politicizing of the statute, see Cass R. Sunstein, *Bad Incentives and Bad Institutions*, 86 GEO. L.J. 2267 (1998).

171. See *Sixty-Seventh Judicial Conference*, *supra* note 164, at 1579-80 (remarks of Archibald Cox). The two matters were the first investigation of Attorney General Edwin Meese by special prosecutor Jacob Stein that involved serious allegations against the Attorney General himself, and the Iran-Contra affair of the Reagan administration. The latter raised weighty questions whether the President, Vice President, Attorney General, and other high-level executive officials had abused their offices in conspiring to sell arms to Iran in violation of the federal Arms Control Export law; diverting those funds to freedom-fighting Contras (rebels) in Nicaragua after Congress had forbidden such action; and conspiring to cover up this activity. See LAWRENCE E. WALSH, FIREWALL: THE IRAN-CONTRA CONSPIRACY AND COVER-UP (1997); Bell et al., *supra* note 148, at 466-67 (containing Lawrence Walsh's own defense of his investigation); Sandra D. Jordan, *Classified Information and Conflicts in Independent Counsel Prosecutions: Balancing the Scales of Justice After Iran-Contra*, 91 COLUM. L. REV. 1651, 1667 n.82 (1991); Christopher Drew & Christopher J. McNulty, *7-Year Tale of Intrigue Concludes: Iran-Contra Inquiry Faults Reagan, Bush*, CHI. TRIB., Jan. 19, 1994, at A1.

1. Amend the Triggering Device

The first crucial (yet simple) adjustment that must be made to the statute is retooling the triggering device contained in Section 592 of the statute. At present, Section 592(c) requires that — after conducting a preliminary investigation — the Attorney General must apply to the special three-judge panel for the appointment of an independent counsel if she determines that there are “reasonable grounds to believe that further investigation is warranted.”¹⁷² Regrettably, this standard is so loose that virtually any half-credible allegation against an individual covered by the statute will amount to “reasonable grounds” to move to the next stage, forcing the Attorney General to seek appointment even in cases that present only marginal evidence of criminal wrongdoing. As Lloyd Cutler has criticized, the threshold is “about one micro millimeter high.”¹⁷³ The result, as Theodore Olson’s lawyers have accurately described, is that a target is forced to prove the “negative” to the Attorney General, i.e. “that no reasonable grounds to investigate exist.”¹⁷⁴ This has been a principal villain in causing the statute to malfunction, since (1) it strays far from the “crisis” model originally envisioned by Congress, and (2) it triggers the statute even when there is only a remote chance that some conflict within the Justice Department might prevent the Attorney General from handling the case as a routine matter. In short, the present statute has sanctioned the use of “howitzers to combat mice” and spawned a large number of investigations in which criminal wrongdoing is not ultimately found.¹⁷⁵

How should the statutory language be reformed? Lloyd Cutler has proposed, in place of the present language, a new threshold that requires the Attorney General to find “reasonable grounds for believing that a significant federal crime may have been commit-

172. 28 U.S.C. § 592(c)(1)(A) (1994).

173. Bell et al., *supra* note 148, at 470.

174. Martin & Zerhusen, *supra* note 142, at 544.

175. Stephen Labaton, *Rethinking a Law: Time and Targets Alter Capitol Views on the Independent Counsel Statute*, N.Y. TIMES, Dec. 13, 1997, at A10. Out of the 19 independent counsel investigations to date, indictments have been handed down in only seven of those investigations. See Maskell, *supra* note 166, at 39. Even after cases go to trial, juries are not necessarily impressed. In the recent trial of former Secretary of Agriculture Mike Espy, by independent counsel Donal D. Smaltz, the federal jury acquitted Espy of all thirty criminal counts. Espy’s acquittal came after a four-year, \$17 million investigation related to charges that he had accepted gifts, including sports tickets and other favors, from companies with whom he had dealt as Agriculture Secretary. See Neil A. Lewis, *Espy is Acquitted on Gifts Received While in Cabinet*, N.Y. TIMES, Dec. 3, 1998, at A1.

ted.”¹⁷⁶ The “reasonable grounds” language is still weak, however; it does little to strain out cases that are based more upon rumor and speculation than hard evidence. The American Bar Association’s White Collar Crime Committee of the Criminal Justice Section has recommended a flat “probable cause” requirement,¹⁷⁷ that would mandate probable cause of criminal wrongdoing, before the Attorney General was required to apply for appointment of a special prosecutor. But this has its problems, as well. Since probable cause is the standard that historically governs grand juries, adopting a probable cause standard for the preliminary investigation phase would jumble together the roles of the Attorney General and the grand jury, creating confusion.¹⁷⁸ It might also cause the Justice Department to keep the appointment of an independent counsel in abeyance until a grand jury was ready to be empaneled, injecting the Attorney General into the process longer than she needs to be involved. The ideal standard thus should be a new one, unique to the independent counsel law, that helps to reserve the triggering mechanism for extraordinarily serious matters.

Thus, Section 592(c) should be amended to require the Attorney General to appoint an independent counsel when there exist “*substantial* grounds to believe that a *felony* has been committed and further investigation is warranted.”¹⁷⁹ Not only does this language ratchet the threshold upwards, but it provides a nice balance between weak, premature allegations (which should not trigger the statute) and weighty, well-developed allegations (which should cause an independent counsel to be appointed). It also grants the Attorney General much-needed discretion to determine which types of crimes are serious enough to warrant further investigation

176. Bell et al., *supra* note 148, at 470.

177. See Jost, *supra* note 165, at 30. Probable cause, in the context of an arrest, exists when an officer has within her knowledge reasonably trustworthy facts and circumstances sufficient to warrant a reasonably prudent person to believe the suspect has committed, or is committing a crime. See *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

178. For criticism of the probable cause standard in this context, see Martin & Zerhusen, *supra* note 142, at 544. See also Bell et al., *supra* note 148, at 471-72. A well-known case that supports the proposition that grand juries are governed by a probable cause standard is *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) (“The role of the grand jury is restricted to a finding as to whether or not there is probable cause to believe that an offense has been committed.”) See also *United States v. Calandra*, 414 U.S. 338, 343 (1974) (“The grand jury’s responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions.”).

179. The “substantial grounds” language is similar to the “substantial evidence” test that is frequently used in agency law. See, e.g., *Gouveia v. Immigration & Naturalization Serv.*, 980 F.2d 814, 818 (1st Cir. 1992); *Silwany-Rodriguez v. Immigration & Naturalization Serv.*, 975 F.2d 1157, 1160 (5th Cir. 1992).

and prosecution, taking into account established Justice Department policies.¹⁸⁰ The inability to make this sort of common-sense judgment has been a perennial thorn in the side of those implementing the statute, leading to the forced appointment of special prosecutors in cases that would ordinarily lead to a slap on the wrist for any Justice Department lawyer who attempted to bring such a case in the door.¹⁸¹ Once the triggering mechanism is adjusted in this fashion, the statute will operate in a much more restrained (and sensible) fashion.

2. *Allow the Attorney General to Exercise More Power in Conducting the Preliminary Investigation*

The second change necessary to reform the runaway independent counsel statute involves allowing the Attorney General to exercise much more authority in conducting the preliminary investigation. As presently drafted, Section 592 unnecessarily constricts the power of the Attorney General. Once she receives information that an individual covered by the statute may have committed a crime, her ability to conduct a preliminary investigation is dramatically limited. Unlike a typical investigation carried out by the Justice Department, the independent counsel statute does not permit her "to convene grand juries, plea bargain, grant immunity, or issue subpoenas."¹⁸² The theory behind restricting the Attorney General's power during the ninety-day preliminary investigation stage is that the Justice Department — because it is potentially enmeshed in a conflict of interest — should not be permitted to take action that might "spoil" the case for future independent prosecutors.¹⁸³ Yet this restriction has made it virtually impossible for the Attorney General to perform her statutory task in a respon-

180. For a similar argument that the Attorney General must be vested with more discretion when it comes to triggering the statute, see Harriger, *supra* note 4, at 2115-16. Former Attorney General Benjamin Civiletti also would limit the statute to federal felonies, eliminating all misdemeanors. See Civiletti, *supra* note 148, at 1054.

181. Cf. Civiletti, *supra* note 148, at 1044-45. One example of a case that most likely would not have been brought pursuant to ordinary Department of Justice policy was the case against Henry Cisneros, involving "a false statement under oath where the only falsity is in the size of the payment that is acknowledged by the possible defendant." See Bell et al., *supra* note 148, at 472.

182. 28 U.S.C. § 592(a)(2)(A) (1994).

183. See Bell et al., *supra* note 148, at 470. As Lawrence Walsh explained: If you are going to investigate and prosecute someone, you do not want somebody else getting in there first and getting the documents and giving everybody time to think up what their defense is going to be and tell other people what it is going to be so they can accommodate it.

Id.

sible fashion, and has contributed to the unrestricted flood of cases that have been spawned by the statute. As President Bush's Attorney General, William P. Barr, described the Justice Department's unenviable position: "[Y]our hands are tied during the investigation phase"¹⁸⁴

The problem, of course, is that the hurdles are already set too low. Section 591 of the statute directs the Attorney General to initiate a preliminary investigation if she receives "information sufficient to constitute grounds to investigate" whether a person covered by the statute may have committed a crime.¹⁸⁵ At the first puff of smoke, she must take action to determine if there *may* be a conflagration. She is permitted to consider, under Section 591(d), only the "specificity" of the information and the "credibility" of the source.¹⁸⁶ As law enforcement officials are acutely aware, it is difficult to knock out any allegation on the basis of credibility and specificity, except in extreme cases.¹⁸⁷ The statute, by design, inevitably propels even weak allegations toward a preliminary investigation.¹⁸⁸ The problem is only compounded by the fact that the statute prohibits the Attorney General from using her ordinary investigative tools — the subpoena power, the empanelling of grand juries, the use of immunity — in completing her preliminary investigation.¹⁸⁹ This phase thus becomes a shallow legal exercise, with the vast majority of cases unleashing a special prosecutor, like it or not.¹⁹⁰ As former Attorney General Barr explained the problem:

184. *Sixty-Seventh Judicial Conference*, *supra* note 164, at 1529-30 (remarks of William P. Barr).

185. See 28 U.S.C. § 591(a) (1994).

186. See 28 U.S.C. § 591(d)(1)(A), (B).

187. As one commentator joked, it might be necessary for the informant to display mental instability by asserting that "the CIA requires them to wear a colander on their head to avoid getting [gamma] rays, or something like that," before his or her credibility could be questioned. See *Sixty-Seventh Judicial Conference*, *supra* note 164, at 1529 (remarks of William P. Barr).

188. For a disturbing description of how the statute "compelled" the dubious Olson investigation, despite the fact that the vast majority of prosecutors would have declined to prosecute it, see *EASTLAND*, *supra* note 23, at 132-33. For a similar discussion of how the weak statute allowed the media to propel forward the Bruce Babbitt inquiry, see Robert Worth, *How The New York Times, The Washington Post, and the Independent Counsel Law Screwed Bruce Babbitt*, *WASH. MONTHLY*, Apr. 1, 1998, at 14. For an excellent look at investigations that take up an enormous amount of time by the Justice Department, but do not trigger a formal preliminary investigation, see Wolf, *supra* note 114, at 26-27.

189. See 28 U.S.C. § 592(a)(2)(A) (1994).

190. One recent exception where Attorney General Reno refused to request the appointment of an independent counsel related to her decision not to ask the special court to name a special prosecutor to investigate whether Vice President Al Gore lied to Justice Department officials during their inquiry into fund raising phone calls Gore placed from the White House during the 1996 campaign. See Robert Suro, *Probe of Gore on Lying Ruled Out: Reno Rejects One Investigation Involving Fund-Raising*, *WASH. POST*, Nov. 25, 1998, at A1. Under

"It is very hard to conceive of a case where you can make that call where you haven't subpoenaed documents and you haven't brought witnesses before the grand jury, [and] you haven't compelled certain people to speak to you"191

Admittedly, there is a danger in allowing the Attorney General to delve too far into the merits of a case, when the investigation may soon be bumped to an independent counsel. If, for instance, the Justice Department grants immunity to an individual during the preliminary investigation stage, this can later thwart the ability of an independent counsel to prosecute that individual.¹⁹² In extreme cases, it might allow an Attorney General to block intentionally the prosecution of high-level executive officials, by handing out immunity and preventing further criminal action. Yet such unlikely possibilities should not justify emasculating the preliminary investigation at the Justice Department level.

At a minimum, the statute must be amended to permit the Attorney General to subpoena witnesses and gather reliable evidence during the ninety-day investigation period, as in any other criminal case. This will ensure that she can make an informed decision whether the appointment of an independent counsel is justified and sensible.¹⁹³ At the same time, the convening of a grand jury by the Attorney General is something that should remain discouraged (or prohibited) under the statute.¹⁹⁴ First, it represents a major intrusion into the merits of the criminal matter, leaving the independent counsel — if appointed — with a partially-baked proceeding not of his or her creation. Second, as a practical matter, ninety days is an

the weak statutory standard, this matter most likely *could* have prompted the appointment of a special prosecutor. However, given the controversial nature of the Lewinsky investigation, the Attorney General most likely has decided to guard against the appointment of new special prosecutors, except where absolutely necessary, thus rebelling against the statute.

191. *Sixty-Seventh Judicial Conference*, *supra* note 164, at 1530 (remarks of William P. Barr); *see also* Martin & Zerhusen, *supra* note 142, at 544 (suggesting the difficulty in establishing lack of reasonable grounds absent the Attorney General's investigative tools). A similar point was made by former White House Counsel Lloyd Cutler. *See* Bell et al., *supra* note 148, at 469.

192. *See* Bell et al., *supra* note 148, at 470-71.

193. Even Lawrence Walsh, who has expressed concern about allowing the Attorney General to wade too far into a case before the independent counsel is appointed, agrees that the subpoena power is essential. *See id.*; Lawrence E. Walsh, *The Need for Renewal of the Independent Counsel Act*, 86 GEO. L.J. 2379, 2385 (1998).

194. It is true that a grand jury was convened in the Whitewater case, by Attorney General Janet Reno, before the independent counsel statute was triggered. But this was an unusual case. The first Whitewater independent counsel, Robert Fiske, was appointed by the Attorney General in 1994, during a period in which the statute had lapsed. *See* O'Sullivan, *supra* note 148, at 471-72. Thus the original grand jury was attached to a more traditional investigation under the control of the Justice Department.

exceedingly short amount of time in which to convene and complete a major grand jury investigation. It makes good sense to withhold (or at least strongly discourage) the use of grand juries by Attorneys General during the preliminary investigation stage.¹⁹⁵ However, it is neither productive nor sensible to ban the use of subpoenas by the Attorney General. The current version of Section 592, which strips the Attorney General of this rudimentary investigative tool, only exacerbates the problems that flow from a weak triggering mechanism. The inability to gather evidence and reliable information prevents any meaningful screening of serious cases from the mundane — which is supposed to be the Attorney General's principal function during the initial process.

Finally, a related problem is that the Attorney General must refer each case for further investigation unless there exists "clear and convincing evidence" that the subject lacked the requisite state of mind.¹⁹⁶ As a result, the key question normally assessed by a prosecutor in a criminal matter before exercising his or her discretion to prosecute — i.e. whether the conduct was inadvertent or negligent rather than knowing and intentional — cannot be considered by the Attorney General.¹⁹⁷ This provision should be deleted entirely, since it further hamstring the Attorney General and prevents her from conducting a meaningful preliminary investigation to separate serious cases from minor, politically mischievous matters.

3. *Limit the Categories of Persons Covered by the Statute*

The third essential reform, that garners almost universal support among former special prosecutors and commentators, is the limiting of the list of individuals covered by the statute.¹⁹⁸ Presently, Section 591(b) sweeps within its ambit not only the President and Vice-President, but a laundry list of other executive officials. It covers seventeen cabinet officials,¹⁹⁹ any individual working in the Execu-

195. Many administrative agencies (including the Internal Revenue Service, the Securities Exchange Commission, the Federal Trade Commission and others) possess subpoena power to interrogate witnesses, compel production of documents, and gather information in an investigation, even though they cannot convene a grand jury. See Donald R.C. Pongrace, Comment, *Requirement of Notice of Third-Party Subpoenas Issued In SEC Investigations: A New Limitation On the Administrative Subpoena Power*, 33 AM. U. L. REV. 701, 708-19 (1984).

196. See 28 U.S.C. § 592(a)(2)(B)(ii) (1994).

197. See O'Sullivan, *supra* note 148, at 480; *Sixty-Seventh Judicial Conference*, *supra* note 164, at 1531-33 (remarks of Jamie Gorelick and William Barr).

198. See *infra* note 207.

199. The statute encompasses "any individual serving in a position listed in section 5312 of title 5." This provision, in turn, sets forth 17 different cabinet officers, namely: Secretary of State, Secretary of the Treasury, Secretary of Defense, Attorney General, Secretary of the

tive Office who is compensated above a certain level;²⁰⁰ any Assistant Attorney General and any Justice Department employee who is compensated above a certain level;²⁰¹ the Director of Central Intelligence, the Deputy Director of Central Intelligence, and the Commissioner of Internal Revenue;²⁰² certain individuals who held the above positions during the incumbency of the current President;²⁰³ and the chairman, treasurer, and other high-ranking members of the committee seeking the election or reelection of the President.²⁰⁴ In all, nearly 240 persons are covered, most of whom hold "considerably subordinate positions" in the executive hierarchy.²⁰⁵

Not only is this list of "covered individuals" absurdly broad, but it cheapens the independent counsel statute by forcing its application in cases that are far from kindling for incendiary national crises. Professor Julie O'Sullivan, who worked as Associate Counsel on the Whitewater investigation under both Robert Fiske and Kenneth Starr, has criticized the statute for its overbreadth, stating that it "guard[s] against 'appearance' problems in lower profile cases where no such problems truly exist."²⁰⁶ A parade of former special prosecutors including Archibald Cox, Lawrence Walsh, Jacob Stein, Joseph DiGenova, Robert Fiske, and others have concluded that the reach of coverage is far too broad, although no precise consensus exists as to how sharply to limit the language.²⁰⁷

Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health and Human Services, Secretary of Housing and Urban Development, Secretary of Transportation, United States Trade Representative, Secretary of Energy, Secretary of Education, Secretary of Veterans Affairs, Director of the Office of Management and Budget, and Commissioner of Social Security of the Social Security Administration. See 28 U.S.C. § 591(b)(2) (1994); 5 U.S.C. § 5312 (1994).

200. See 28 U.S.C. § 591(b)(3). The level of compensation is that set forth in 5 U.S.C. § 5313 (1994) for certain sub-cabinet officials.

201. See 28 U.S.C. § 591(b)(4). The level of compensation is that set forth for various administrative heads and other officials enumerated in 5 U.S.C. § 5314 (1994).

202. See 28 U.S.C. § 591(b)(5).

203. See 28 U.S.C. § 591(b)(6), (7).

204. See 28 U.S.C. § 591(b)(6).

205. Civiletti, *supra* note 148, at 1054.

206. O'Sullivan, *supra* note 148, at 464. Specifically, Professor O'Sullivan referred to the Theodore Olson and Timothy Kraft investigations as low-profile matters unsuited for a special prosecutor. *Id.*

207. Some commentators suggest limiting the field to the President and cabinet officers. See, e.g., Martin & Zerhusen, *supra* note 142, at 541. An ABA subcommittee has also made that recommendation. See *id.* Archibald Cox would limit the statute to covering the President, Vice-President, and "maybe the three most important Cabinet officers." See Bell et al., *supra* note 148, at 473. Jacob Stein, the first independent counsel assigned to investigate Attorney General Edwin Meese during the Reagan Administration, would limit coverage to the "highest people in the government." See *Sixty-Seventh Judicial Conference*, *supra* note 164, at 1549 (remarks of Jacob Stein). Lawrence Walsh, the Iran-Contra independent coun-

The statute should be amended to reduce the list of covered individuals to an essential core, at least when it comes to the *mandatory* application of its provisions. The original impetus for the special prosecutor law — eliminating actual and apparent conflicts to restore public faith in the system of government — points toward the President,²⁰⁸ Vice-President, and the Attorney General as essential candidates for coverage. Since the law was designed to ensure that individuals at the top of the executive pyramid could not, and would not, investigate themselves, the statute would be hollow if it did not subsume these three key members of the executive branch. Likewise, the highest officials on the committees to elect and reelect the President, who have been covered by the statute since its adoption in 1978 because they act as alter egos for the President with respect to fund-raising — an activity that inherently creates potential for criminal abuse under the American electoral system — must also remain listed under the mandatory provision.

With respect to the laundry list of other cabinet officers, sub-cabinet officers, and administrative heads presently covered by Section 591 of the statute, however, these should be moved into a new “optional” category. When it comes to allegations of criminal activity involving such lower-level officials, the Attorney General should be *permitted* to set the statute into motion by initiating a preliminary investigation pursuant to its provisions — on her own initiative or at the request of Congress — but she should not be *bound* to do

sel, would restrict the statute to the same categories as Cox. See Bell et al., *supra* note 148, at 473-74. Joseph DiGenova, the independent counsel appointed to investigate the Bush Administration's search of Bill Clinton's passport file, would limit the statute's reach to the President, Vice-President, Attorney General, and top Justice Department officials. See Jost, *supra* note 165, at 30. Robert Fiske, the first Whitewater independent counsel, would limit the coverage to the President, Vice-President, Attorney General, and perhaps the Deputy Attorney General and head of the F.B.I. See *Sixty-Seventh Judicial Conference*, *supra* note 164, at 1533, 1564 (remarks of Robert Fiske). Leon Silverman, however, who led the investigation of President Reagan's first labor secretary, Raymond Donovan, would continue fairly broad coverage under the statute, allowing it to encompass all cabinet officers and White House staff members. Silverman has stated “[t]he attorney general ought not be put in the position of pursuing an investigation against a political friend.” Jost, *supra* note 165, at 30.

208. Significant issues arise, however, when the President is the subject of an independent counsel investigation. Because there exists a serious question whether a sitting President can be indicted and/or prosecuted while in office, issues arise as to the proper function of an independent counsel when the primary target of an investigation is the President. Related issues also arise concerning whether Congress can permit the independent counsel to take over the role of the legislature in gathering evidence for the purposes of impeachment proceedings (as opposed to gathering evidence for an actual criminal prosecution). For the author's detailed views on these fascinating but distinct subjects, see Ken Gormley, *Impeachment and the Independent Counsel: A Dysfunctional Union*, 51 STAN. L. REV. — (1999).

so.²⁰⁹ The Attorney General should also remain free to conduct her own investigation, unconstrained by the statute. The Attorney General should possess complete discretion to determine whether the existence of a conflict, or the potential thereof, warrants the triggering of the extraordinary machinery of the independent counsel law in such cases. The Attorney General's determination on this score should be final and nonreviewable.

The reach of the statute should be narrowed further by amending Section 591 to limit it to crimes committed while in federal office, or in seeking that office. Currently, the statute sweeps with a broad brush, mandating a preliminary investigation whenever the Attorney General receives a whiff of evidence that a covered individual "may have violated any Federal criminal law" (other than certain petty offenses enumerated in the statute).²¹⁰ This standard is unbounded in terms of time; it also requires no link whatsoever to misbehavior in public office, which was the *sine qua non* of the statute when it was conceived during Watergate. As Jacob Stein, independent counsel in the first investigation involving Attorney General Edwin Meese (and later lawyer for Monica Lewinsky), summed it up: "The nature of the inquiry should be limited to things done in office, misuse of the office."²¹¹

The above three modifications would alter dramatically the number of cases swept within the mandatory provisions of the statute, and help return the legislation to a sensible path. The statute would be reserved, by definition, for rare crises involving the top members of the executive branch. Since the public has "come to distrust" the office of independent counsel itself,²¹² due to overuse

209. Section 591(c) of the independent counsel statute already creates a sort of "optional" category, under which the Attorney General *may* trigger the machinery of the independent counsel if she believes that a particular investigation "may result in a personal, financial, or political conflict of interest." 28 U.S.C. § 591(c)(1). Thus, there is already a mechanism in place by which the Attorney General *may* trigger the statute with respect to any lower-level executive official, if she believes that such a course is appropriate. *See also* 28 U.S.C. § 592(g)(1) (1994), which allows members of the Judiciary Committee of the House or Senate to request appointment of an independent counsel.

210. *See* 28 U.S.C. § 591(a). The petty offenses are those listed as Class B or C misdemeanors in the federal criminal code. *See* 18 U.S.C. § 3559(a) (1994).

211. *Sixty-Seventh Judicial Conference*, *supra* note 164, at 1549 (remarks of Jacob Stein). Not only would this approach "limit the type of crime" that was covered by the statute, but it would also — as a practical matter — limit "how far back you went." Bell et al., *supra* note 148, at 474 (comments of Archibald Cox). Lawrence Walsh concurs that the statute should be limited to crimes committed while in office, and those involving significant misuse of that office. *See Sixty-Seventh Judicial Conference*, *supra* note 164, at 1563-64 (remarks of Lawrence Walsh); Walsh, *supra* note 193, at 2384.

212. *See Sixty-Seventh Judicial Conference*, *supra* note 164, at 1594 (remarks of Archibald Cox); *see also* S. REP. NO. 103-101, at 11 (1993) (remarks of former Attorney General

of the statute during its controversial twenty-year lifetime, reducing the field of coverage to essential cases would enhance its central purpose of rehabilitating public trust in American government.

4. *Leave Other Investigations to Ad Hoc Appointments of Special Prosecutors*

Assuming that the above reforms to the independent counsel statute are implemented by Congress, the question will still linger: What happens to the rest of the investigations concerning allegations of wrongdoing by high-level executive officials? Based upon the narrowed list of covered individuals, proposed above, most of the recent independent counsel inquiries would never have come into existence. Investigations into alleged illegal gratuities received by Secretary of Agriculture Mike Espy;²¹³ allegations that HUD Secretary Henry Cisneros lied to FBI during a background check about the size of his payments to a mistress;²¹⁴ the investigation into the personal finances of deceased Commerce Secretary Ronald Brown;²¹⁵ claims of perjury involving Secretary of the Interior Bruce Babbitt in connection with his Congressional testimony concerning an Indian casino license;²¹⁶ the investigation of Secretary of Labor Alexis Herman relating to alleged kickbacks for steering contributions to the Democratic party²¹⁷ — all of these investigations would fall outside the purview of the “reformed” independent counsel statute.²¹⁸ Moreover, since the statute would be limited to alleged crimes committed while occupying or seeking federal office, the Whitewater investigation²¹⁹ that has spawned so much contro-

Nicholas deB. Katzenbach) (stating that the law “has served to destroy rather than preserve public confidence in the integrity of government”).

213. See David Johnston, *Agriculture Chief Faces New Inquiry on Business Gifts*, N.Y. TIMES, Aug. 10, 1994, at A1.

214. See David Johnston, *Concluding that Cisneros Lied, Reno Urges a Special Prosecutor*, N.Y. TIMES, Mar. 15, 1995, at A1.

215. See *The Ron Brown Problem*, N.Y. TIMES, May 19, 1995, at A30.

216. See *Counsel Appointed for Babbitt Inquiry*, *supra* note 166, at A14. For a fascinating discussion of how the Babbitt inquiry was driven by the media, see Worth, *supra* note 188.

217. See *Investigator Chosen in Labor Secretary's Case*, *supra* note 166, at A18.

218. But see *Reno's Decision Activates a Sixth Investigation of Clinton's White House*, MINN. STAR TRIB., Feb. 12, 1998, at A19 (describing the recent investigation relating to Clinton campaign chief of staff Eli Segal (who later served as director of AmeriCorps)). This case still might have fallen within the statute pursuant to 28 U.S.C. § 591(b)(8) relating to campaign officials. For more information concerning these investigations during the Clinton Administration, see *supra* note 166.

219. This matter involved alleged improprieties in an Arkansas land deal relating to Bill and Hillary Clinton in the 1980s, long before Clinton was elected President. For a good discussion of the original Whitewater matter, see, for example, JAMES B. STEWART, BLOOD SPORT: THE PRESIDENT AND HIS ADVERSARIES (1996); Michael Isikoff & Howard Schnei-

versy during the Clinton administration would never have been initiated, at least under the mandatory provisions of the statute. Additionally, Kenneth Starr's Whitewater add-ons involving the Vince Foster suicide, the White House Travel Office firings, and "Filegate" (involving the improper request for key Republicans' FBI background files by White House administrators) would not have triggered the statute.²²⁰ Indeed, of the twenty-plus independent counsel investigations initiated under the statute since its inception in 1973,²²¹ only four — the two investigations of Attorney General Edwin Meese; the Iran-Contra matter (because it involved allegations that encompassed the President, Vice-President, Attorney General, and others); and the investigation involving Clinton campaign chief of staff Eli Segal (because it presumably involved irregularities by a top campaign official acting as a surrogate for the President) — would have triggered the mandatory provisions of the statute.²²²

What would have happened to the rest of the twenty investigations and cases like them? They would have remained governed by the state and federal criminal justice systems that have successfully handled such matters for the past two hundred years. Much of the problem relating to the modern epidemic of special prosecutors flows from the fact that the nation, traumatized by Watergate, has forsworn its trust in the Attorney General and other government lawyers. Ever since 1789,²²³ the Attorney General has supervised difficult cases, many of them involving corrupt public officials in-

der, *Clintons' Former Real Estate Firm Probed*, WASH. POST, Nov. 2, 1993, at A1; Michael Isikoff & Howard Schneider, *The Unfolding of Whitewater*, WASH. POST, Jan. 21, 1994, at A20.

220. For a review of the "add-ons" appended to Kenneth Starr's Whitewater investigation, see Adam Cohen, *Is the Prosecutor Running a Starr Chamber?*, TIME, Feb. 2, 1998, at 58; Ken Gormley, *Starr Should Give Case to the House*, NEWSDAY, Apr. 3, 1998, at A55; *Starr's Galaxy of Investigations*, *supra* note 12, at 52.

221. Although there have been 20 independent counsels appointed, several of them (most prominently Kenneth Starr) have branched out into multiple investigations. See *supra* notes 12-16, 167, and accompanying text.

222. The Monica Lewinsky investigation, because it is appended to the Whitewater probe, presumably would not have been authorized either. However, to the extent the Lewinsky case involves alleged criminal wrongdoing by the President — perjury in a civil deposition and suborning perjury — it still could have (independently) triggered the mandatory appointment of an independent counsel under the proposed amendments to the statute set forth above. Of course this also depends on whether a sitting President can be the direct target of an independent counsel investigation, which in turn depends on whether a sitting President can be indicted or prosecuted. See *supra* note 208.

223. See *Hearings Before the Senate Comm. on Govt. Operations*, *supra* note 60, at 261 (remarks of Philip A. Lacovara). The Judiciary Act of 1789 created the office of the Attorney General, but the Department of Justice was not established until 1870. See Biden, *supra* note 107, at 883-84.

cluding those in the executive branch.²²⁴ The presumption in recent years has been that any allegation that involves even a hint of potential conflict — because it relates to an actor within the executive branch — must be removed from the Justice Department and farmed out to an outside prosecutor. The reverse presumption, however, should apply. As former Attorney General Elliot Richardson testified eloquently in the Senate in 1975, to do otherwise assumes that “the regularly constituted law enforcement authorities are neither sufficiently competent nor trustworthy to be capable of dealing with the more-or-less routine problems of corruption and abuse of power that have to be dealt with from year to year. I do not believe that this assumption is warranted.”²²⁵

The point of retooling the present law is not to allow guilty public officials to go free or unpunished. Rather, it is to prevent the triggering of the extraordinary mechanism of the independent counsel law — with its potentially limitless resources — except in special cases.²²⁶ Every purported scandal that touches an official in the executive branch is not special enough. It is detrimental to assume that competent, professional, aggressive career prosecutors in the Justice Department and U.S. Attorneys’ offices are not capable of investigating and prosecuting charges simply because White House aides or cabinet officers are the targets. “Indeed, if ambition plays a role,” Professor Julie O’Sullivan has astutely pointed out, “it probably would be better served by indicting a big name official than by exonerating him.”²²⁷ As Clinton administration Deputy Attorney General Jamie Gorelick recently noted: “I don’t think that there is any reason why Attorney General Reno couldn’t inves-

224. During the Garfield Administration, the Justice Department investigated the “Star Route Frauds,” which involved alleged fraud in contracting for mail delivery, and implicated the secretary of the Republican National Committee (who had also been Garfield’s campaign manager). In the Kennedy Administration, the Justice Department investigated conflict-of-interest charges against President Kennedy’s Secretary of Navy. President Nixon’s Attorney General investigated allegations of extortion and bribery against Vice-President Spiro T. Agnew, that led to Agnew’s resignation. See EASTLAND, *supra* note 23, at 8.

225. *Hearings Before the Senate Comm. on Govt. Operations*, *supra* note 60, at 284-85. Archibald Cox similarly testified that it was not “desirable to start off with the presumption that our Attorneys General cannot be trusted. The presumption should be the other way, and they should be held responsible when they were proved incompetent or unfaithful.” See *Removing Politics from the Administration of Justice*, *supra* note 6, at 211 (remarks of Archibald Cox); see also Martin & Zerhusen, *supra* note 142, at 541 (arguing that the Department of Justice generally should be permitted to use its normal investigative process unless there is an actual conflict of interest); O’Sullivan, *supra* note 148, at 475 (suggesting that Justice Department lawyers “are privy to a store of institutional knowledge and experience” that makes them particularly suited for even the most sensitive investigations).

226. See Gormley, *supra* note 170, at C7.

227. O’Sullivan, *supra* note 148, at 477.

tigate [HUD Secretary] Henry Cisneros.”²²⁸ Although the Attorney General (ironically) and the special court may have contributed to the under-reliance on Justice Department lawyers, in recent years, this skewed outlook must be repaired.²²⁹

Several backups will exist to ensure that serious cases requiring the injection of a neutral prosecutor do not fall through the cracks, intentionally or unintentionally. First, as discussed above, the statute would include an “optional” category (encompassing those cabinet officers, sub-cabinet officers, agency heads, and other individuals currently subsumed under Section 591 of the legislation). The Attorney General would thus have the ability to conduct a preliminary investigation relating to these high-level executive officials, and refer the matter to the special three-judge panel for appointment of an independent counsel, if she believed that the threat of conflict warranted it. For example, in a serious case where a close friend or advisor to the president in the White House were implicated, the Attorney General might voluntarily elect to trigger the statute, in order to distance herself from any appearance of political influence, even if the statute did not mandate that she do so.

Second, in the event that the Attorney General suffered from an *actual* conflict of interest because of her personal or financial association with a member of the executive branch under investigation (including another member of the Justice Department), the statute still would mandate her automatic recusal under Section 591(e).²³⁰ Thus, the overt case of a conflict of interest would be amply covered.

Third, the Attorney General would still retain the ability to appoint *ad hoc* special prosecutors under his or her own supervision, without going through the costly machinery of the independent counsel statute, as an alternative in select cases. The appointment of *ad hoc* prosecutors by the executive branch was the normal practice prior to the Watergate crisis.²³¹ Even after Watergate, Attor-

228. *Sixty-Seventh Judicial Conference*, *supra* note 164, at 1533 (remarks of Jamie Gorelick). For a suggestion that the independent counsel statute has adversely affected the morale of Justice Department lawyers, see Feinburg, *supra* note 135, at 184.

229. See Alison Frankel, *Blame the Law, Not the Lawyer*, AM. LAW., Mar. 1998, at 58 (describing Attorney General Reno's hasty use of the statute); Ken Gormley, *Starr's Three Silent Chaperons*, N.Y. TIMES, Mar. 7, 1998, at A25 (criticizing the court's passive role under the statute).

230. See 28 U.S.C. § 591(e) (1994) (providing for mandatory recusal of the Attorney General in specified cases).

231. President Grant appointed a special counsel to help prosecute the “Whiskey Ring,” in which his personal secretary was allegedly involved. See EASTLAND, *supra* note 23, at 8.

neys General in several instances appointed their own *ad hoc* special prosecutors where the danger of conflict warranted it. President Carter's Attorney General, Griffin Bell, appointed a former U.S. Attorney from New York to investigate charges that the President's brother, Billy Carter, was funneling money from the Bank of Georgia through the Carter peanut warehouse to the presidential campaign. At the conclusion of the investigation, the special prosecutor "accounted for every peanut and every nickel" and filed an expeditious report.²³² President Bush's Attorney General William Barr exercised his inherent authority to appoint neutral investigators to handle three politically sensitive matters, dealing with the "Inslaw Octopus Scandal," "Iraqgate," and a controversy involving alleged abuse of the House of Representatives Bank. In each case, Attorney General Barr hired prominent retired judges to investigate the allegations, and "I did that on my own nickel, not under the statute."²³³ More recently, the original special prosecutor in the Whitewater case — Robert Fiske — was appointed by Attorney General Janet Reno pursuant to her own inherent powers during a lull in which the independent counsel law had lapsed.²³⁴ Thus, the *ad hoc* method of appointing special prosecutors that has been followed by the Justice Department for much of this century has

President Theodore Roosevelt's Attorney General appointed a special prosecutor to investigate a land fraud ring, allegedly involving the Commissioner of the General Land Office. *See id.* President Roosevelt himself named a special prosecutor to investigate alleged corruption by Post Office officials. *See id.* President Coolidge appointed (and the Senate confirmed) two special prosecutors in the Teapot Dome scandal. *See id.* President Truman appointed a commission to investigate tax-fixing in his administration. *See HARRIGER, supra* note 23, at 15-16. Attorney General Robert Kennedy appointed Leon Jaworski as special counsel to handle the prosecution of Governor Ross Barnett of Mississippi for contempt, relating to his defiance of federal civil rights laws, where the danger existed that the public might perceive the Kennedy Administration as too soft on Barnett. *See 1976 Hearings Before the Subcomm. on Criminal Justice, supra* note 78, at 175 (remarks of John Doar). For a discussion of the appointment of such *ad hoc* special prosecutors, generally, *see EASTLAND, supra* note 23, at 7-16; HARRIGER, *supra* note 23, at 13-39; Kavanaugh, *supra* note 161, at 2143; Small, *supra* note 166, at 2311-20.

232. *See* Fleissner, *supra* note 157, at 464-65; *see also* S. REP. NO. 97-496, at 5 (1982), *reprinted in* 1982 U.S.C.A.N. 3537, 3541 (noting success of this investigation). The special prosecutor appointed by Attorney General Bell was Paul Curran.

233. *Sixty-Seventh Judicial Conference, supra* note 164, at 1533 (remarks of William P. Barr). In the "Inslaw" scandal, Barr appointed Senior U.S. District Judge Nicholas Bua of Illinois. In the "Iraqgate" matter, he appointed retired Judge Frederick Lacey of the U.S. District Court for New Jersey. In the House bank controversy, Barr appointed former U.S. Court of Appeals Judge Malcolm Wilkey of the D.C. Circuit to investigate the matter. For a discussion of the "Inslaw" scandal, *see* Mary Fricker & Stephen Pizzo, *Outlaws at Justice*, S.F. CHRON., June 14, 1992, § 7, at 11. The "Iraqgate" scandal is reviewed in Peter Mantius, *Cover-up on BNL? The Idea is Absurd, Investigator Claims*, ATLANTA JOURN. & CONST., Dec. 10, 1992, at A5. The House bank scandal is discussed in David Johnson, *Ex-Manager of House Bank Accepts Plea Deal and Admits Embezzlement*, N.Y. TIMES, Oct. 6, 1993, at A18.

234. *See* O'Sullivan, *supra* note 148, at 471-72.

worked effectively. For the bulk of minor investigations involving cabinet and sub-cabinet officials, agency heads, and Justice Department officials below the Attorney General, this method will remain perfectly satisfactory.

Additionally, Section 592(g) of the statute acts as a final safeguard, since it permits the members of the Judiciary Committee of either the House or the Senate to request the appointment of an independent counsel directly.²³⁵ Working in tandem with the above three devices, this back-up will provide the political impetus necessary to spur the Attorney General to appoint an independent counsel in non-mandatory cases that may warrant the injection of a neutral, outside investigator. Because Congress can directly request that the Attorney General take action, and can exert political influence upon her to do so when extraordinary cases arise (as occurred when the Senate pushed the Nixon administration to appoint a special prosecutor during Watergate),²³⁶ the legislature has a direct safety-check against unsatisfactory decisions by the Attorney General. Congress can further strengthen Section 592(g) by amending that provision to allow the full House or Senate to call for the appointment of an independent counsel — rather than limiting the decision to the Judiciary Committees that may be aligned with a particular political party at a given time — in order to increase the influence of the legislature in this important function.²³⁷

With these minor adjustments made, there will exist little danger that important cases will slip through the cracks. Three separate mechanisms will allow the Attorney General to appoint a special prosecutor, even in non-mandatory cases. Coupled with Congress's ability to exert political pressure (and indeed to conduct its own investigations)²³⁸ when it concludes that an outside prosecutor is essential, the vision of a renegade Attorney General refusing

235. See 28 U.S.C. § 592(g) (1994). This section provides: "The Committee on the Judiciary of either House of the Congress, or a majority of majority party members or a majority of all nonmajority party members of either such committee, may request in writing that the Attorney General apply for the appointment of an independent counsel." 28 U.S.C. § 592(g)(1). That provision goes on to require the Attorney General to provide a written report to the congressional committee, within 30 days, explaining whether a preliminary investigation will be conducted and why. See 28 U.S.C. § 592(g)(2). After the preliminary investigation is completed, the statute requires a report to the committee notifying it whether an application for an independent counsel has been made and why. See 28 U.S.C. § 592(g)(3).

236. See GORMLEY, *supra* note 3, at 241-45.

237. See 28 U.S.C. § 592(g)(1).

238. For a discussion of Congress's own ability to conduct investigations, see Harriger, *supra* note 180, at 2116-17.

to ensure a neutral investigation for a potentially conflicted criminal case will remain a remote and unlikely possibility, at worst.

B. *Reform the Role and Regulate the Power of
Independent Counsels*

Even after Congress establishes an appropriate line of demarcation between those serious (and exceptional) cases that should automatically trigger the statute, and those that should be left to the sound judgment of the Attorney General, much work still remains. The job description of the independent counsel himself — and the scope of his extraordinary power — require close scrutiny. First, the special prosecutor's jurisdictional statement, or charter, should serve carefully to limit the extent of his permissible work. Second, a string of miscellaneous reforms should be implemented to reel in otherwise limitless (and costly) investigations.

1. *The Independent Counsel's Jurisdictional Limits Must Be
Strictly Controlled*

The most serious breakdown in the regulation of independent counsels, once appointed, has occurred in territory unfamiliar to most non-lawyers. The multiple expansions of Whitewater prosecutor Kenneth Starr from his original charter into unrelated terrain — culminating in the Monica Lewinsky investigation — have revealed a gaping hole in the statute. Although few newspaper or television accounts have cast it in these terms, the recent crisis involving the independent counsel law had far less to do with a young White House intern and far more to do with a single, unsexy word: jurisdiction.²³⁹

One of the principal features of the legislation that saves it from patent unconstitutionality is its careful limitation of the special prosecutor's field of authority. The congressional debates are abundantly clear in this regard. One of the ways that Congress intended to ensure that the special prosecutor could not run amok, and become the dreaded "Frankenstein monster" uncontrolled by any branch of government, was to narrowly constrain his or her scope of authority and nail down his or her jurisdictional limits in a written charter.²⁴⁰ Thus, one of the few duties of the special court that *was* carefully delineated in the statute was its duty to define the

²³⁹. See Ken Gormley, *Starr is Overstepping His Mandate*, *NEWSDAY*, Jan. 30, 1998, at A43.

²⁴⁰. See *supra* discussion at notes 121-23 and related text. For another example of the general concern about allowing overly-broad jurisdiction in creating the special prosecutor,

“prosecutorial jurisdiction” of the newly ordained independent counsel.²⁴¹ Section 593(b)(3) of the statute directs the court to define the jurisdiction in such a way as to “assure that the independent counsel has adequate authority to fully investigate and prosecute the subject matter with respect to which the Attorney General has requested the appointment.”²⁴² It also contemplates that the special prosecutor will have power to explore “all matters related to that subject matter.”²⁴³

The sweep of the independent counsel’s jurisdiction is thus broad in one sense — allowing him or her (in essence) to stand in the shoes of the Attorney General in conducting a particular inquiry. Yet it is narrow in another crucial sense. Unlike an ordinary prosecutor sitting in the Justice Department or U.S. Attorney’s office, this *special* prosecutor is not free to investigate and prosecute any federal crime placed upon his or her desk. Rather, he or she is forever tied to the written statement of jurisdiction, formulated by the Attorney General and reduced to writing by the special court.

This narrow jurisdictional lock is an essential component of the independent counsel law. Senator Carl Levin (D. Mich.), one of the Senate leaders intimately involved with the statute since its inception,²⁴⁴ has underscored the importance of the jurisdictional charter. Senator Levin recently stated on the floor of the Senate: “[T]he most fundamental limit in the law is that an independent counsel can investigate only that which is within the scope of jurisdiction granted by the court that appoints him.”²⁴⁵ Likewise, when the Supreme Court upheld the law in *Morrison v. Olson*, it specifi-

see the remarks of Henry S. Ruth, Jr., who succeeded Leon Jaworski as Watergate Special Prosecutor, in *Hearings Before the Senate Comm. on Govt. Operations*, *supra* note 60, at 121.

241. See 28 U.S.C. § 593(b)(1) (1994).

242. 28 U.S.C. § 593(b)(3).

243. 28 U.S.C. § 593(b)(3). The statute provides that jurisdiction should include the authority to investigate and prosecute other federal crimes — excluding certain petty offenses — “that may arise out of the investigation or prosecution of the matter with respect to which the Attorney General’s request was made, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.” 28 U.S.C. § 593(b)(3). Section 593(b)(3) authorizes the court — and the court alone — to make public the written statement of jurisdiction (i.e. the special prosecutor’s charter). This may occur only upon the request of the Attorney General or after the court reaches its own determination “that disclosure of the identity and prosecutorial jurisdiction of such independent counsel would be in the best interests of justice.” 28 U.S.C. § 593(b)(4).

244. Senator Levin served as Chairman of the Subcommittee on Oversight of Government Management, which has legislative jurisdiction in the Senate over the independent counsel statute. See Carl Levin & Elise J. Bean, *The Independent Counsel Statute: A Matter of Public Confidence and Constitutional Balance*, 16 HOFSTRA L. REV. 11 (1987).

245. 144 CONG. REC. S11, 952, at S11, 953 (daily ed. Oct. 8, 1998) (statement of Sen. Levin). See also Levin & Bean, *supra* note 244, at 20-21 (“Authorizing the court to describe the scope of the counsel’s inquiry is an inherent part of the appointment power since the

cally referred to the restricted nature of the special prosecutor's jurisdiction in justifying the constitutionality of the statute. As Chief Justice Rehnquist explained in unequivocal terms: "Unlike other prosecutors, [the independent counsel] has no ongoing responsibilities that extend beyond the accomplishment of the mission that she was appointed for and authorized by the Special Division to undertake."²⁴⁶

It is absolutely essential that the independent counsel's jurisdiction remain carefully circumscribed. First, if it were not so, he or she would no longer be an "inferior officer" constrained by the parameters set by the executive and judicial branches. Rather, he or she would have become a "principal officer," subordinate to no other official in determining his or her responsibilities. The statute would thus be facially unconstitutional (since only the President can appoint principal officers).²⁴⁷ Second, if the independent counsel could dictate the terms of his or her own jurisdiction, this would create separation of powers problems of mammoth proportions, because Congress would be creating a free-floating satellite branch of government unaccountable to any other, a cardinal sin under our tripartite constitutional system.²⁴⁸ Regrettably, the independent counsel statute has evolved in such a way that the jurisdictional constraints envisioned by Congress have been rendered worse than impotent. This has been accomplished, primarily, through the defective "expansion of jurisdiction" provisions codified in Section 593(c). It has been exacerbated, moreover, by the recent strain of the multiple Whitewater investigations.

Section 593(c) of the statute allows the court, upon the request of the Attorney General, to "expand the prosecutorial jurisdiction" of an independent counsel "in lieu of the appointment of another

court appoints the independent counsel to a temporary office whose tenure must be defined by the completion of a particular task.").

246. *Morrison v. Olson*, 487 U.S. 654, 671-72 (1988). The Court made this point in connection with its analysis under the Appointments Clause. The Court concluded that independent counsels are "inferior officers" rather than "principal officers," and thus subject to appointment by the judiciary (rather than exclusively by the President), in part because the independent counsel "is empowered by the Act to perform only certain, limited duties," and his or her office "is limited in jurisdiction." *Morrison*, 487 U.S. at 671-72.

247. See *Morrison*, 487 U.S. at 670-72; *Buckley v. Valeo*, 424 U.S. 1, 132 (1976).

248. For a discussion of the dangers of creating an unaccountable fourth branch of government, see discussion *infra* note 330 and accompanying text. For a spirited argument that it is "empty" to contend that modern independent counsels are "unaccountable," since they are bound by the same policies as the Justice Department and can be removed for misconduct, see Samuel Dash, *Independent Counsel: No More, No Less a Federal Prosecutor*, 86 GEO. L.J. 2077, 2081-83 (1998).

independent counsel” under certain circumstances.²⁴⁹ Section 593(c)(2)(A) of the statute provides that if an independent counsel receives information concerning possible criminal violations committed by persons covered by the statute — but outside of the scope of this particular independent counsel’s jurisdiction — he or she may forward such information to the Attorney General and request permission to expand the investigation into this unrelated matter.²⁵⁰ The Attorney General is then required to conduct a preliminary investigation (similar to that mandated when the independent counsel is first created). However, rather than the ninety-day period that applies in the first instance,²⁵¹ the Attorney General is given only thirty days to conduct a preliminary investigation to determine if expansion of jurisdiction is warranted.²⁵² During that abbreviated investigation, the statute mandates that the Attorney General give “*great weight to any recommendations of the independent counsel*” concerning expansion of jurisdiction.²⁵³

Section 593(c)(2)(B) goes on to provide that if the Attorney General concludes that “there are no reasonable grounds to believe that further investigation is warranted,” she must notify the special court and the issue is closed.²⁵⁴ If, on the other hand, the Attorney General determines that reasonable grounds *do* exist to believe that further investigation may be warranted (giving great weight to the recommendation of the independent counsel), the court *must* expand the independent counsel’s jurisdiction to encompass this matter, or appoint another special prosecutor to investigate the same matter.²⁵⁵

The net effect of these statutory provisions is to create a chamber of horrors for the potential target of an investigation, almost guarantying (and mandating) that the expansion of jurisdiction occur once an independent counsel requests it. The statute’s three-step procedure, coupled with an aggressive independent counsel in a particular case, yields a recipe by which the independent counsel can perform a feat of prestidigitation and expand his jurisdiction

249. 28 U.S.C. § 593(c)(1) (1994).

250. See 28 U.S.C. § 593(c)(2)(A).

251. See 28 U.S.C. § 592(a)(1) (1994).

252. See 28 U.S.C. § 593(c)(2)(A).

253. 28 U.S.C. § 593(c)(2)(A) (emphasis added).

254. See 28 U.S.C. § 593(c)(2)(B).

255. See 28 U.S.C. § 593(c)(2)(C). It is unclear from the language of the statute whether the special court has the power, unilaterally, to appoint a different independent counsel to investigate the matter (rather than expanding the jurisdiction of the existing special prosecutor), or whether this can only occur at the request of the Attorney General.

almost at will. The rapid expansion of Kenneth Starr's Whitewater probe into the unconnected Monica Lewinsky matter provides a useful case study of how effortlessly this statutory jump can be accomplished.

As Step #1 of the statutory process, Starr — after receiving information from Linda Tripp that President Clinton may have lied in his affidavit in the unrelated Paula Jones civil case when he denied a sexual affair with Lewinsky — contacted Attorney General Reno and requested permission to expand his jurisdiction into this matter.²⁵⁶ Starr's initial request to the Attorney General was explicitly premised upon a potential link to the existing Whitewater investigation. Starr conveyed to the Attorney General that Clinton friend Vernon Jordan may have steered consulting work and other improper benefits to Webster Hubbell (a primary target in the Whitewater investigation) in order to buy his silence in that case. It similarly appeared that Jordan might be providing Lewinsky attractive job interviews, in order to buy her silence about her affair with President Clinton. The Whitewater independent counsel explained to the Attorney General that he had only thirty-six hours in which to confront Lewinsky and seek cooperation, since *Newsweek* was preparing to publish an article breaking open the story and alerting Jordan to the inquiry.²⁵⁷

As Step #2 of the process, Attorney General Reno then conducted a truncated "preliminary investigation" of the matter, and decided one day later to authorize expansion of Starr's jurisdiction to cover the Lewinsky case.²⁵⁸ The Attorney General's order noted the potential link to Whitewater.²⁵⁹ That connection, however,

256. See Dan Balz, *Washington's Extraordinary Week: How the Events Unfolded, From Jones to Lewinsky*, WASH. POST, Jan. 25, 1998, at A1. One criticism of Starr, at the time these events took place, was that he authorized the placement of a wire on Linda Tripp to obtain further inculpatory statements from Monica Lewinsky before he requested expansion of jurisdiction from the Attorney General or received approval to expand jurisdiction into the Lewinsky matter by the three-judge panel. See, e.g., Gormley, *supra* note 239, at A43. For an excellent summary of the events leading to the expansion of Starr's jurisdiction into the Lewinsky matter, and criticism thereof, see the statement of Senator Levin in the *Congressional Record*, *supra* note 245, at S11, 954-56.

257. These events are discussed in numerous sources. See Balz, *supra* note 256; Ronald Brownstein & Kenneth T. Walsh, *Starr Struck*, U.S. NEWS & WORLD REPORT, Feb. 2, 1998, at 14, 16-17; Nancy Gibbs, *Clinton's Crisis*, TIME, Feb. 2, 1998, at 21; Gormley, *supra* note 229, at A25; Michael Isikoff & Evan Thomas, *Clinton and the Intern*, NEWSWEEK, Feb. 2, 1998, at 31, 41-43.

258. Brownstein & Walsh, *supra* note 257, at 16-17; Isikoff & Thomas, *supra* note 257, at 41-42.

259. Attorney General Reno's order stated: "It would be appropriate for Independent Counsel Starr to handle this matter because he is currently investigating similar allegations involving possible efforts to influence witnesses in his own investigation. Some potential subjects and witnesses in this matter overlap with those in his ongoing investigation." See Notifi-

proved largely irrelevant — indeed, little mention was made of it thereafter, at least until Kenneth Starr testified in front of the House Judiciary Committee nearly a year later.²⁶⁰ Regardless of the lack of overlap between Whitewater and the Lewinsky matter, pursuant to Section 593 of the statute Attorney General Reno had little alternative but to honor the request to expand jurisdiction, once it was made by Starr.²⁶¹ Because the independent counsel had asked that this matter be referred to him,²⁶² the Attorney General was mandated to give “great weight” to that request. She therefore approved it.

As Step #3, the special panel then endorsed the expansion of Starr’s jurisdiction on that same day — January 16, 1998 — allowing the Whitewater independent counsel to investigate “whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law . . . in dealing with witnesses, potential witnesses, attorneys, or others concerning the civil case *Jones v. Clinton*.”²⁶³ This result was literally inevitable. Pursuant to the statute, the special court had no option but to expand jurisdiction (or perhaps appoint a new independent counsel), since Section 593(c)(2)(C) mandates that the court “shall expand the jurisdiction of the appropriate independent counsel to include the matters involved or shall appoint another independent counsel to investigate such matters,” if so directed by the Attorney General.²⁶⁴

Thus, although observers commenting upon the Lewinsky investigation have stated that Whitewater independent counsel Starr was

cation to the Court of the Initiation of a Preliminary Investigation and Application to the Court for the Expansion of the Jurisdiction of the Independent Counsel [hereinafter Application for Expansion of Jurisdiction] at 2, *In re Madison Guaranty Savings & Loan Assn.*, No. 97-1, 1998 WL 472444 (D.D.C. Jan. 16, 1998).

260. See Ken Gormley, *Court Must Do Its Duty in Starr Case*, *Newsday*, July 9, 1998, at A45. Kenneth Starr did discuss the putative connection between the Lewinsky matter and Whitewater during his House Judiciary Committee testimony in November of 1998. See Independent Counsel Kenneth Starr’s Prepared Testimony Before the House Judiciary Committee, 1998 WL 801023 (F.D.H.C.) (Nov. 19, 1998); see also Alison Mitchell, *Rancorous House Panel Hears Starr’s Case for Impeachment*, *N.Y. Times*, Nov. 20, 1998, at A1.

261. See 28 U.S.C. § 593(c)(2)(A) (1994). For a discussion of how Attorney General Reno may have contributed to the general over-use of the jurisdictional provisions, however, see Frankel, *supra* note 229.

262. See Application for Expansion of Jurisdiction, *In re Madison Guaranty*, 1998 WL 472444, at 2.

263. *In re Madison Guaranty*, 1998 WL 472444, at 1 (order granting expansion of prosecutorial jurisdiction, unsealed by order filed Jan. 29, 1998).

264. See 28 U.S.C. § 593(c)(2)(C). The court also presumably has the power to appoint a different independent counsel to investigate the same matter, rather than expanding jurisdiction. However, it is unclear whether the court is bound by the request of the Attorney General, or can make an independent judgment on the matter. See 28 U.S.C. § 593(c)(2)(C).

only carrying out his duty to investigate the Lewinsky matter — since it was assigned to him by the Attorney General and the court²⁶⁵ — such a characterization misses the mark. Once independent counsel Starr set the process in motion by requesting permission to expand his jurisdiction into the Lewinsky case, the statute almost guaranteed that the Attorney General and the court would authorize it. A serious internal flaw was thus revealed within the folds of the statute: it permits virtually unlimited expansion of jurisdiction, if an aggressive independent counsel seeks to stake out new territory for himself.

Of all the defects exposed within the statute over the past twenty years, relating to the powers of the independent counsel, this is the most serious. It defeats the elaborate system of controls built into the special prosecutor law by Congress, and creates a separation of powers nightmare. It means that the independent counsel can leap from one matter to the next, becoming a permanent inquisitor of a president or some other target of choice.²⁶⁶ It means that the already-minuscule threshold for triggering and conducting a preliminary investigation can be bypassed, since the Attorney General must grant great deference to the independent counsel's recommendation in favor of expansion. It also means that the important pronouncement of the Supreme Court in *Morrison v. Olson*, that the independent counsel shall have "no ongoing responsibilities that extend beyond the accomplishment of the mission that she was appointed for and authorized by the Special Division to undertake," becomes rubbish.²⁶⁷

265. See, e.g., Alison Mitchell, *Judiciary Panel, In Party Vote, Urges Impeachment Hearings; House Will Decide*, N.Y. TIMES, Oct. 6, 1998, at A1 (Rep. Howard L. Berman (D. Cal.), stated that "it was Mr. Clinton's Attorney General, Janet Reno, who approved Mr. Starr's inquiry into the Lewinsky matter."). See also Michael Hedges, *Starr Says More to Come*, PGH. POST-GAZ., Oct. 10, 1998, at A1 (Charles Bakaly, a spokesman for Starr's office, stated: "We are committed to discharging our duties to investigate the matters that the attorney general requested we investigate, and that the special division gave us jurisdiction over.").

266. See David E. Rosenbaum, *Some Experts are Faulting Counsel Law*, N.Y. TIMES, Jan. 26, 1998, at A14.

267. See *Morrison v. Olson*, 487 U.S. 654, 672 (1988). Another problem with the flimsy jurisdictional standard is that an independent counsel can circumvent an Attorney General's decision to reject expansion of his or her jurisdiction, by requesting the court to rule that the new subject matter is implicit in the original grant of jurisdiction. Since Section 593 has considerable play in the joints, and allows the court to define jurisdiction to cover "all matters related to that [primary] subject matter," 28 U.S.C. § 593(b)(3), an independent counsel can use this as an end-run if the attorney general refuses to expand jurisdiction. See Morrissey, *supra* note 142, at 990-91; O'Sullivan, *supra* note 148, at 485-88. This is precisely what the independent counsel in *Morrison v. Olson* succeeded in doing, in seeking to pursue conspiracy charges against two targets after other allegations evaporated. See *In re Sealed Case*, 838 F.2d 476, 480 (D.C. Cir. 1988); Morrissey, *supra* note 142, at 990-91. If Congress amended the statute to create a presumption against expanding jurisdiction of the independ-

Indeed, we have discovered that even where the Attorney General puts up a fight, and seeks to prohibit expansion of jurisdiction, the independent counsel can still approach the court (as Donald Smaltz did in the Espy case), and seek a determination that the matter is "related" to the subject of his original charter.²⁶⁸ Thus, expansions can be accomplished both directly and indirectly, even without the consent of the Attorney General.

The only cure for this fundamental flaw in the jurisdictional machinery is to amend the statute to create a presumption *against* expansion into matters unrelated to the special prosecutor's original charter. This change is essential for several reasons. First, there is an inherent danger in allowing unlimited jurisdiction for a prosecutorial creature like the independent counsel. Unlike other prosecutors (even the Attorney General herself), the independent counsel operates outside the sphere of political and constitutional accountability. As the first Whitewater independent counsel, Robert Fiske, put it: "[T]he independent counsel doesn't have to seek authority from anybody to do anything. He or she can do whatever they feel is appropriate, without any review by anyone."²⁶⁹ Jacob Stein, the independent counsel in the first investigation of Attorney General Edwin Meese concurred: "I had more authority than anybody should have. I was reviewing myself."²⁷⁰ Moreover, the existence of such potentially unbounded power (and

ent counsel directly, it would simultaneously curtail the independent counsel's ability to indirectly expand his authority through this "related matter" approach.

268. For an excellent discussion of how the independent counsel accomplished his desired result in the Espy case, see Maskell, *supra* note 166, at 36-37; O'Sullivan, *supra* note 148, at 485-88. The "related matter" provision of the independent counsel statute is contained in 28 U.S.C. § 593(b)(3). The Supreme Court in *Morrison* held that such matters must be "demonstrably related to the factual circumstances that gave rise to the Attorney General's investigation and request for the appointment of the independent counsel in the particular case." *Morrison*, 487 U.S. at 679. The Eighth Circuit has interpreted this to mean that the "related matter" provision is "exceedingly broad." See *United States v. Tucker*, 78 F.3d 1313, 1316-19 (8th Cir. 1996). At the same time, that circuit has ruled that the determination of the Attorney General as to the independent counsel's jurisdiction is final and non-reviewable. See *Tucker*, 78 F.3d at 1316-19 holding that it was exclusively within the power of the Attorney General to make determinations as to relatedness, and that this decision was not subject to judicial review). However, the special court apparently has not embraced the latter position. See *In re Espy*, 80 F.3d 501 (D.C. Cir. 1996) (rejecting the Attorney General's determination that a matter was not "related"). But see *In re Espy*, 145 F.3d 1365 (D.C. Cir. 1998) (agreeing with the Attorney General that a matter was not "related" to independent counsel's original jurisdiction charge.)

269. *Sixty-Seventh Judicial Conference*, *supra* note 164, at 1546 (remarks of Robert Fiske).

270. *Sixty-Seventh Judicial Conference*, *supra* note 164, at 1549 (remarks of Jacob Stein). Attorney General (later Justice) Robert Jackson once described the danger inherent in overbroad prosecutorial power as follows:

The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. . . .

. . . .

resources) can easily skew the exercise of prosecutorial discretion. As Professor O'Sullivan — who worked on the Whitewater investigation herself — observed, the intense focus on a single case combined with the extraordinary power of the office poses unique hazards. An independent counsel's performance — and entire career — may be "assessed on the basis of the one matter referred to him." This awkward fact "will certainly alter his perspective and may well alter his substantive decisions."²⁷¹ The further the independent counsel's power is stretched, the greater the danger that the braking mechanism known as prosecutorial discretion will fail entirely.

Third, there is a built-in inconsistency in allowing an independent counsel to spring from one matter to another, given the ultimate purpose of the statute. The goal is to select the most neutral person available — in both fact and appearance — in order to shore up public confidence in highly controversial cases. An existing independent counsel, by definition, arrives with the baggage of the extant investigation on his or her back. Given the inevitable split of public opinion as to whether a special prosecutor in any case — particularly one involving the president or high administration official — is motivated by political bias or the desire to build a career at the expense of a political foe, an existing independent counsel is almost never the best choice for a new investigation.²⁷²

A number of specific amendments to the statute must be accomplished by Congress, in order to switch the presumption against expanding an independent counsel's jurisdiction into unrelated turf. First, Section 593(c)(2)(A) should be revised to give the Attorney General a full ninety-day period in which to complete her preliminary investigation, when the independent counsel seeks to expand

... With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm . . . that the greatest danger of abuse of prosecuting power lies.

Robert H. Jackson, The Federal Prosecutor, Address Before the Second Annual Conference of United States Attorneys (April 1, 1940), in 24 AM. JUDICATURE SOC'Y. 18, 18-19 (1940).

271. O'Sullivan, *supra* note 148, at 490.

272. The perception of a large segment of the American public that Kenneth Starr was "out to get the President" in the Whitewater investigation — even before the Lewinsky matter arose — is well documented. See Donald Kaul, *Special Counsels Spend Millions Working as Hatchet Men for GOP*, ARIZ. REPUBLIC, Dec. 15, 1997, at B7; Richard Reeves, *Witch Hunt*, DALLAS MORNING NEWS, June 27, 1997, at 29A; Angie Cannon, *Independent Counsel Starr Losing Reputation For Impartiality*, HOUSTON CHRON., June 1, 1997, at A6, available in ALLNEWS, 1998 WL 8414316. Thus, regardless of Starr's actual bias, or lack thereof, he was far from the "best choice" for a controversial new investigation.

jurisdiction. The existing thirty-day period encourages shortcuts and discourages a serious investigation of the new matter. Moreover, Section 593(c)(2)(A) should be amended to strike the language that requires the Attorney General to "give great weight to any recommendations of the independent counsel."²⁷³ In its place, language should be inserted stating that "there exists a presumption against expansion of jurisdiction into subjects unrelated to the original grant of jurisdiction to the independent counsel by the Special Court." In making a determination whether extension of jurisdiction is appropriate, the Attorney General should be required to take into account the "degree of relatedness" between the two matters. The more remote the connection between the new matter and the independent counsel's original charter, the stronger the presumption should be against authorizing expansion. The Attorney General's decision not to expand jurisdiction should be deemed final and nonreviewable. However, in the event that she recommends expansion, Section 593(c)(2)(C) could be amended to allow the special court — the entity that established jurisdiction in the first place — to review the Attorney General's recommendation determine for itself whether an enlargement of the jurisdictional boundary line is prudent.²⁷⁴

Once the existing presumption is switched in this fashion, facile expansions of jurisdiction will be curbed and one of the greatest deficiencies of the statute will be corrected. The legislative history of the statute makes clear that a critical duty of the special court was to guard against expansions of jurisdiction that "convert a temporary special prosecutor into a permanent special prosecutor."²⁷⁵ A statutorily-imposed presumption against expansion will constitute a major step toward accomplishing that end.

Besides re-asserting strict jurisdictional controls over independent counsels, Congress should fine-tune a number of other provisions that govern the identity and breadth of power of special prosecutors. These should be aimed at correcting two other perennial problems with the modern-day special prosecutor: lack of time limits and lack of budgetary constraints.

273. 28 U.S.C. § 593(c)(2)(A) (1994).

274. 28 U.S.C. § 593(c)(2)(B) also would have to be amended to eliminate the "reasonable grounds" threshold for triggering the appointment of an independent counsel. A higher threshold should be inserted consistent with revisions to Section 592(c)(1)(A), discussed *supra* at notes 176-81 and accompanying text.

275. See Ethics In Government Act of 1978, Pub. L. No. 95-521, 1978 U.S.C.C.A.N. 4281 (103 Stat. 1724).

2. *Control the Duration of Investigations Through Periodic Review*

One recurrent criticism of the statute, after twenty years of fine-tuning, is that there is still no practical limitation upon the length of time a particular investigation may take. The Iran-Contra investigation consumed seven years.²⁷⁶ The less noteworthy probe into irregularities of the Reagan administration's Department of Housing and Urban Development has taken an equal length of time, and is still not complete.²⁷⁷ The Whitewater investigation commenced in January 1994. Its many appendages have already kept the case going for nearly five years, as if animated by a life and breath of its own.²⁷⁸

In response to the seemingly endless time-line for a modern independent counsel inquiry, some commentators have proposed a statutory cap on investigations. Archibald Cox has suggested a one-year time limit after which an independent counsel must demonstrate to the court that his or her investigation should continue "for good cause shown."²⁷⁹ Several bills have been introduced in Congress that would require, in a similar vein, that an independent counsel must "go back to Congress" or petition the court for additional funding after two years have elapsed.²⁸⁰

These proposals, although based upon legitimate concerns for the slinky-like ability of investigations to grow, are nonetheless unsatisfying. Iran-Contra independent counsel Lawrence Walsh, who oversaw one of the longest investigations in modern history, expressed legitimate concern that any such arbitrary time limit would place the special prosecutor in an unwinnable position: "All [the opposition] has to do is hold back documents, delay testimony, let the time run out, and talk about the expense of your office. That is

276. See Drew & McNulty, *supra* note 171, at 1. See also LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN-CONTRA MATTERS (1993).

277. See Tom Hamburger, *Latitude Given to Special Prosecutors Draws Fire; Sprawling Investigations Into Reagan, Clinton Cases Trigger Demands for Change*, MINN. STAR TRIB., May 10, 1998, at 17A.

278. See, e.g., Howard Fineman & Karen Breslau, *What Will He Say?* NEWSWEEK, Aug. 10, 1998, at 22.

279. See Bell et al., *supra* note 148, at 474; *Sixty-Seventh Judicial Conference*, *supra* note 164, at 587 (remarks of Archibald Cox). Cox envisioned that the request for extension of time would be made to the court "in camera, if necessary" and could be renewed each year for good cause shown. See Bell et al., *supra* note 148, at 474. Lloyd Cutler also would impose a one-year time limit, but would allow the Attorney General some say over whether such an extension was appropriate. See *id.* at 475-76.

280. See Jost, *supra* note 165, at 30.

the way to undercut an independent counsel.”²⁸¹ Not only would the targets of investigations and their political allies find creative ways to sabotage the work of a special prosecutor by stalling until deadlines ticked to a close, but the nature of a criminal investigation is such that its precise duration can never be mapped out in advance. The Teapot Dome scandal of the 1920s took nearly six years to investigate, from start to finish.²⁸² Watergate took two and a half years, from the time Cox was appointed in May 1973 until the Final Report of the Watergate Special Prosecution Force was issued in October 1975.²⁸³

Rather than placing artificial time limits on the duration of an independent counsel's work, the simpler (and more sensible) approach would be for Congress to insert teeth into the existing provision that requires the special court to review the status of an independent counsel investigation every two years (and after two such cycles, every year).²⁸⁴ As will be discussed in greater detail, Section 596 of the statute already mandates that the court periodically assess the independent counsel's work and determine if it is “substantially completed” such that his or her office should be terminated.²⁸⁵ By ensuring that periodic reviews actually take place, and by establishing concrete standards by which the court must make its assessment, Congress will strengthen the incentive for the independent counsel to wrap up his or her work expeditiously, and avoid the embarrassment of being terminated for over-staying his or her welcome.

Congress also should provide the court with standards for assessing whether an investigation is “substantially completed” under Section 595(b)(2). In rendering this important determination, the court should be required to consider: (1) the amount of work that has been completed by the independent counsel and the amount of remaining work that he or she can reasonably anticipate; (2) the amount of the remaining work of the independent counsel that relates to the subject matter of his or her original jurisdictional statement, and the amount of remaining work that is peripheral (the

281. Bell et al., *supra* note 148, at 475. Larry Thompson, one of two independent counsels investigating fraud and mismanagement in the Reagan Administration Department of Housing and Urban Development, raised similar concerns about placing “artificial limits” upon the length of an investigation. See *Sixty-Seventh Judicial Conference*, *supra* note 164, at 1550-51 (remarks of Larry Thompson).

282. See MURRAY, *supra* note 111, at 471-73.

283. See WATERGATE REPORT, *supra* note 4.

284. See 28 U.S.C. § 596(b)(2) (1994).

285. See discussion *infra* notes 368-75 and accompanying text.

more work that is peripheral, the more reason to conclude that the assignment is "substantially complete"); and (3) the amount of the remaining work that could be completed by the Justice Department without the danger of conflict or appearance thereof.

The statute should specifically authorize the special court to seek input from the Attorney General, as well as from the independent counsel, in determining whether the above criteria point toward the near completion of the special prosecutor's assigned task. In this way, lingering investigations will be brought to a definitive close, and artificial time limits will become unnecessary.

3. *Require That Each Independent Counsel Work Full-Time*

Another controversy that reached a crescendo in the recent Whitewater matter relates to the question whether a special prosecutor must work full-time. Kenneth Starr, throughout most of his tenure as Whitewater independent counsel, treated the appointment as a part-time position. Starr continued to earn approximately \$1 million per year in private legal practice, as a lawyer for the prestigious Kirkland & Ellis firm in Washington, leading some to criticize him as a high-priced moonlighter.²⁸⁶ Judge David Sentelle, on the other hand, has suggested that a full-time job commitment from potential independent counsels would "make our job very nearly impossible." Sentelle's concern was that "attorneys who have the ability, the reputation and the proven integrity for the job do not want to give up years of their career . . . in order to do something that will be lower paying, unpopular, and may not lead anywhere."²⁸⁷ Congress itself worried about this possibility, and declined to build a requirement of full-time job commitment into the statute.²⁸⁸ As Judge Butzner, who formerly sat on the special court explained, a salary of \$55.43 per hour with a maximum statu-

286. See Naftali Bendavid, *Starr Takes Leave From Chicago Firm*, CHI. TRIB., Aug. 1, 1998, at 8; Timothy Burger, *Starr Still Stalling on 1997 Take*, N.Y. DAILY NEWS, July 2, 1998, at 8; Robert Scheer, *Setting Fire to Tobacco Legislation; Kenneth Starr Lives in a Glass House When it Comes to Conflicting Duties*, L.A. TIMES, July 28, 1998, at B7. Starr was also criticized for representing tobacco interests in challenging anti-tobacco legislation, a high priority of the Clinton Administration. See Scheer, *supra*. Even after he expanded his Whitewater inquiry to encompass the Monica Lewinsky matter, Starr argued a major appeal for Meineke Discount Mufflers. See Burger, *supra*. In response to increased criticism about his outside legal work, Starr took a leave from his law practice in August of 1998, just as the controversial Lewinsky investigation reached a crescendo. See Bendavid, *supra* note 286.

287. *Sixty-Seventh Judicial Conference*, *supra* note 164, at 1540 (remarks of David B. Sentelle).

288. See H.R. CONF. REP. NO. 100-452, at 26-27 (1987).

tory cap of \$115,682 per year, would make it "very, very difficult" to attract someone with a first-rate law practice.²⁸⁹

Although not all special prosecutors have worked full time,²⁹⁰ many former special prosecutors and commentators have concluded that a statutory amendment mandating full-time work by an independent counsel is essential.²⁹¹ For Archibald Cox, such a reform would represent a "symbolic plus."²⁹² Moreover, if the statute were limited to serious cases and major crises, as originally envisioned by Congress, Cox found it hard to believe that "there aren't qualified people who aren't willing to put aside their normal lives in order to serve in a position of this responsibility under these circumstances."²⁹³ As former Attorney General Griffin Bell expressed in a similar vein: "If it is important enough to have this procedure, then I think you ought to work at it full time."²⁹⁴

A statutory amendment mandating a full-time commitment by each independent counsel has many things to recommend it. First, an Attorney General is not permitted to engage in private legal practice, during the term of his or her office.²⁹⁵ There is no reason to permit independent counsels, who stand in the shoes of the Attorney General and wield extraordinary power in cases of critical importance, to live by different rules. Second, such a requirement would boost public confidence in the independent counsel's office, something that is desperately needed after the divisive Whitewater investigation.²⁹⁶ Third, such a requirement would help screen out frivolous cases. As Professor Julie O'Sullivan has noted, few attorneys would drop their careers and make financial sacrifices to work on marginal cases that were not of "sufficient public import to draw

289. See *Sixty-Seventh Judicial Conference*, *supra* note 164, at 1540 (remarks of John D. Butzner). After Judge Butzner made his comments, the statutory maximum for Starr's salary was raised to \$118,000. See Chris Caldwell, *The All Starr Team*, *GEORGE*, Apr. 1998, at 126. The salary is that established pursuant to 5 U.S.C. § 5315, level IV of the Executive Schedule. See 28 U.S.C. § 594(b) (1994).

290. For a review of those special prosecutors who have worked part-time, in the years prior to the appointment of Kenneth Starr, see Nolan, *supra* note 142, at 22 n.96.

291. See Bell et al., *supra* note 148, at 476-77; See Jost, *supra* note 165, at 30; *Sixty-Seventh Judicial Conference*, *supra* note 164, at 1587.

292. *Sixty-Seventh Judicial Conference*, *supra* note 164, at 1587 (remarks of Archibald Cox).

293. *Id.* at 1587.

294. Bell et al., *supra* note 148, at 476-77. This sentiment was also expressed by Michael Zeldin, independent counsel in the investigation involving the Bush Administration search of Bill Clinton's passport records. See Jost, *supra* note 165, at 30.

295. See 5 C.F.R. § 3801.106 (1998); 61 Fed. Reg. 59811-01, 1996 WL 675232 (F.R.) (Nov. 25, 1996).

296. A similar point was made in O'Sullivan, *supra* note 148, at 482.

them from their practices.”²⁹⁷ Just as importantly, a full-time requirement for independent counsels would bring investigations to a close much more swiftly. Archibald Cox was paid a salary of \$38,000 per year as Watergate Special Prosecutor, and took a leave from his tenured position on the Harvard Law School faculty to accept the post.²⁹⁸ Leon Jaworski, who succeeded Cox as Watergate Special Prosecutor, likewise left behind his lucrative Texas law firm practice to re-locate to Washington throughout the duration of his service.²⁹⁹ In each case, the special prosecutor had a powerful incentive to complete the investigation, wrap up his work, and go home.³⁰⁰ In the Whitewater case, there is ample room to wonder whether it would have spun off into so many addendums (including the Monica Lewinsky investigation) if independent counsel Starr had been required to work at the initial Whitewater investigation full-time, write a report, and return to his legal practice at Kirkland & Ellis.³⁰¹

When Attorney General-designate Elliott Richardson asked Archibald Cox to move to Washington, at age 61, and take on an ill-defined and untested position in the Watergate case, seven prominent lawyers and judges had already turned Richardson down.³⁰² Cox accepted the post, knowing it was probably a “no-win job,” because he concluded that “[s]omebody clearly has to do it.”³⁰³ The only hope for the independent counsel statute, in the future, is that conscientious lawyers and jurists will continue to accept such positions, regardless of the relatively low pay and large time commitment.³⁰⁴ To gear the statute to attract lawyers who wish to keep one foot in their existing jobs, is to attract individuals who are not prepared to unqualifiedly accept the position at the outset.

297. *Id.* at 482.

298. See GORMLEY, *supra* note 3, at 240-41.

299. See JAMES DOYLE, NOT ABOVE THE LAW: THE BATTLES OF WATERGATE PROSECUTORS COX AND JAWORSKI 237-39 (1997).

300. Jaworski returned to Texas as soon as the Watergate case was in a position for trial by his litigation team. See *id.* at 349, 374-76.

301. For an argument that independent counsels really do not have unlimited time to conduct their investigations, since the special court can terminate them pursuant to 28 U.S.C. § 596(b)(2) (1994) if it determines that their work is “substantially completed,” see Dash, *supra* note 248, at 2083-84.

302. See GORMLEY, *supra* note 3, at 233-34.

303. GORMLEY, *supra* note 3, at 240.

304. Every federal judge and cabinet official in the nation presumably has to make such financial trade-offs in deciding whether or not to engage in public service.

4. *Control Costs by Reducing the Number of Cases That Trigger the Statute*

Another public criticism leveled at the independent counsel statute relates to the enormous financial costs it generates.³⁰⁵ The statute provides that the Justice Department must "pay all costs relating to the establishment and operation" of an independent counsel office.³⁰⁶ As former Deputy Attorney General Philip Heymann has commented, the office has turned into a "juggernaut" unconstrained by practical pressures including budget and time constraints.³⁰⁷ The price-tag for the twenty independent counsel investigations launched under the statute thus far, since 1978, is roughly \$136 million.³⁰⁸ The cost of Kenneth Starr's Whitewater investigation and its various appendages is approximately \$40 million (and counting) as of late 1998.³⁰⁹ On top of these direct tabs run up by the independent counsels, there are additional hidden costs. For instance, the FBI spent approximately \$4.6 million in carrying out its work in the Iran-Contra investigation,³¹⁰ on top of the almost \$48 million expended directly by independent counsel Lawrence Walsh.³¹¹ All of these expenses are ultimately borne by the taxpayer.

No talisman exists for controlling the cost of the independent counsel mechanism, other than regulating the number, scope, and duration of investigations. The most cost-effective manner in which to conduct any investigation at the federal level, of course, is to

305. See, e.g., Paul Delaney, *Losing Faith in the Independent Counsel Act*, BALT. SUN, July 5, 1998, at 17A, available in ALLNEWS, 1998 WL 4974596; Anthony Lewis, *Abroad at Home: After Kenneth Starr*, N.Y. TIMES, Mar. 9, 1998, at A19; *Relax, It's Just Money*, GEORGE, Apr. 1998, at 130. In the first four years of existence of the independent counsel statute, the median length of an investigation was seven months and the median cost was less than \$200,000. In the last four years, the median length of an investigation was two and a half years, and the median cost was nearly four million dollars. See Kathleen Clark, *Paying the Price for Heightened Ethics Scrutiny: Legal Defense Funds and Other Ways That Government Officials Pay Their Lawyers*, 50 STAN. L. REV. 65, 127 (1997). For a detailed list of costs by investigation, see Kathy Kiely, *\$54M For Independent Counsels*, N.Y. DAILY NEWS, May 12, 1998, at 2, available in ALLNEWS, 1998 WL 11032723 (covering Clinton Administration); *Investigations, by Administration*, USA TODAY, Nov. 14, 1997, at A4 (covering entire span of the statute).

306. 28 U.S.C. § 594(d)(2) (1994).

307. See Philip B. Heymann, *Four Unresolved Questions About the Responsibilities of an Independent Counsel*, 86 GEO. L.J. 2119, 2120-21 (1998).

308. See Malone, *supra* note 160, at A10; Maskell, *supra* note 166, at 31; Page, *supra* note 166, at A4;

309. See *Relax, It's Just Money*, *supra* note 305, at 130; Page, *supra* note 166, at A4; Kiely, *supra* note 305, at 2; Gormley, *supra* note 170, at C7; Gormley, *supra* note 260.

310. See EASTLAND, *supra* note 23, at 124.

311. See *Investigations, by Administration*, *supra* note 305, at A4.

have the Justice Department handle it. The Justice Department is a massive operation with 115,667 employees, thousands of lawyers, and a budget of \$18.6 billion.³¹² Each time an independent counsel is created, a mini-law firm must be set up, divorced from the Department of Justice, requiring its own office space, staff, equipment, and overhead. All of this only duplicates the resources already in place at the Justice Department, and represents a horribly inefficient way of doing business at an enormous cost to the taxpayer.

Some commentators have suggested that the Attorney General should establish staffing levels and budgetary constraints for the independent counsel, at the time of appointment, in order to build a *de facto* cap onto potential expenditures.³¹³ However, this approach is impractical; an Attorney General could then use the purse strings to effectively suffocate an investigation that posed a threat to his or her administration. The better solution is to address the root of the problem. If Congress amends the statute such that it is triggered only on rare and serious occasions,³¹⁴ as discussed above, the spiraling costs will recede (quite naturally) to an acceptable level. This check on the escalating costs of special prosecutors is far superior to artificial budgetary caps, because it will keep spending under control without hampering legitimate investigations.

5. *Sharply Limit Final Reports*

A final way that the independent counsel statute can be strengthened, while simultaneously containing costs, is sharply to limit the practice by which independent counsels draft voluminous (and expensive) reports at the conclusion of their investigations. Once again, the statute itself is the principal culprit. Professor O'Sullivan has expressed the problem by stating that the statute "creates incentives for [independent counsels] to investigate too long and report too fulsomely."³¹⁵ Section 594(h)(1)(A) requires that each independent counsel file a report with the court, every six months, which "identifies and explains major expenses, and summarizes all other expenses, incurred by that office" during the relevant period, and "estimates future expenses."³¹⁶ This is a sensible re-

312. See 1997 ATTY. GEN. ANN. REP. 1, available at <<http://www.usdoj.gov/ag/ar97/doj1997.pdf>>.

313. See Martin & Zerhusen, *supra* note 142, at 542-43 (arguing that the independent counsel should be required to seek enlargements of time and money from the court).

314. See *supra* discussion at notes 172-238 and accompanying text.

315. O'Sullivan, *supra* note 148, at 500.

316. 28 U.S.C. § 594(h)(1)(A) (1994).

quirement. The Court and Congress have a strong interest in monitoring expenditures and ensuring that the independent counsel — who, unlike other federal entities, has no precise budget — does not indulge in lavish expenses.

Section 594(h)(1)(B), however, drops a fly in the ointment. This section requires, before the office of the independent counsel is terminated, that such counsel “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.”³¹⁷ This means that the independent counsel must go beyond reporting the input and output of funds. Section 594(h)(1)(B) requires every special prosecutor, prior to leaving office, to explain the work history of his or her operation, and justify (in essence) all of his or her actions.³¹⁸

This is a daunting task for independent counsels, most of whom are top professionals and have much at stake if the public is permitted to scrutinize each move and decision made during a protracted, politically-charged investigation.³¹⁹ Not surprisingly, independent counsels have thus tended to err on the side of over-completeness, preparing vast reports that leave no stone unturned, and racking up significant time and expenses in discharging their final statutory duty.³²⁰ A prime example is Lawrence Walsh’s Iran-Contra investigation report, which consisted of three bound volumes comprised of nearly 1,500 pages,³²¹ and kept his office working long after the subjects of the investigation had left office.³²²

Almost universally, the “final report” requirement has been criticized by former independent counsels and those intimately familiar with the process. It has been called a “wasteful requirement,”³²³ an expensive chore that “serve[s] to overly politicize the investigation,”³²⁴ and a “pain in the neck.”³²⁵ Not only is this kind of report foreign to any other prosecutor’s office in the country,³²⁶

317. 28 U.S.C. § 594(h)(1)(B).

318. See 28 U.S.C. § 594(h)(1)(B).

319. See *Sixty-Seventh Judicial Conference*, *supra* note 164, at 1559.

320. See O’Sullivan, *supra* note 148, at 484-85.

321. See *Sixty-Seventh Judicial Conference*, *supra* note 164, at 1558.

322. See Drew & McNulty, *supra* note 171, at 1; Carl P. Leubsdorf, *Report Says Reagan Fostered Iran-Contra; He Denies Creating Climate For Aides’ Efforts*, DALLAS MORNING NEWS, Jan. 19, 1994, at 1A.

323. *Sixty-Seventh Judicial Conference*, *supra* note 164, at 1556.

324. *Id.* at 1558.

325. *Id.*

326. See Martin & Zerhusen, *supra* note 142, at 547.

it also raises serious concerns about basic fairness.³²⁷ Criminal investigations are traditionally shielded from blow-by-blow accounts and detailed public scrutiny. Particularly where no indictment is lodged or no prosecution is commenced, there is a tradition of circumspection and silence, designed to safeguard the reputation and privacy of the individuals under investigation. In the typical case, professional and ethical limitations sharply limit what prosecutors can say and do about criminal investigations, beyond what is contained in the public record.³²⁸ When it comes to the high-profile world of special prosecutors, however, the "final report" requirement casts these practices to the wind, and forces an independent counsel (in essence) to air the dirty laundry of his targets.³²⁹

The most sensible solution to this problem is for Congress to dramatically shrink the scope of the information that must be provided at the conclusion of the independent counsel's work. Since the independent counsel must provide periodic reports to the court, at six-month intervals, accounting (in detail) for each expenditure pursuant to Section 594(h)(1)(A), the court will have ample chance to become familiar with the nature of the work being performed by the office. At the conclusion of the investigation, the statute should require nothing more than a reckoning of expenditures, personnel information, and a concise summary of the work performed by the office. If the special court wishes to obtain further information, on particular subjects, the statute may authorize the court to request additional details from the special prosecutor in order to resolve specific questions. Yet the presumption should be toward a lean, straightforward report. Grand jury information and other material generally shielded from public disclosure should be excluded from the principal report, since it will inevitably be made public. If the court determines that such confidential information is essential to complete its own review, the statute should permit the independent counsel to provide a sealed, supplemental report containing such information. Because the special court has no veto power over the

327. See Heymann, *supra* note 307, at 2128-30; Kavanaugh, *supra* note 161, at 2155-57.

328. See Martin & Zerhusen, *supra* note 142, at 547; O'Sullivan, *supra* note 148, at 484-85.

329. One significant injustice decried by commentators is that an individual against whom criminal charges are not brought can still be "publicly branded a criminal or wrongdoer" in the final report. See Martin & Zerhusen, *supra* note 142, at 546-47. This occurred, most notably, in the second investigation of Attorney General Edwin Meese by independent counsel James McKay. See EASTLAND, *supra* note 23, at 123; Martin & Zerhusen, *supra* note 142, at 547 n.39. See also OFFICE OF INDEPENDENT COUNSEL, REPORT OF INDEPENDENT COUNSEL IN RE EDWIN MEESE III 73-76, 95-99 (1988) (suggesting that evidence "probably" existed to convict Meese for certain offenses, although criminal charges were not brought).

prosecutorial decisions of the independent counsel,³³⁰ in any event, the court (as a general rule) need not explore the nitty-gritty of the independent counsel's operation. A short and pithy report (in conjunction with the information the court receives from periodic budget reports) will more than suffice.

One independent counsel charged with handling the unusually lengthy (and costly) investigation of the Reagan administration Department of Housing and Urban Development lamented: "When I was a prosecutor in the Department of Justice, when I ended a case, I simply shut the door and turned the lights out. Now I have to spend millions of your money doing this report."³³¹ If costs are to be controlled and investigations are to be brought to a close, the statute must allow independent counsels to turn their lights out — at some point — and shut the door.

C. *Reform and Clarify the Duties of the Special Court*

One of the great failures of the independent counsel statute in recent years is that the body that Congress envisioned acting as a moderating and restraining influence on special prosecutors — the special three-judge panel — has all but surrendered any meaningful role in the process. In the debates that shaped the original statute, Congress settled upon the judiciary to appoint and monitor the special prosecutor because it believed that the special three-judge panel could act as a wise and moderating influence in certain politically treacherous cases. Congress had several reasons for placing this important responsibility in the judicial branch. First, Judge John Sirica had been a hero in Watergate and had emerged as one figure whom the American people trusted in that unseemly mess.³³² Second, the 1970s was a period of great reliance (perhaps over-reliance) upon the judiciary to resolve problems that were not being adequately resolved by other branches of government. The abortion controversy,³³³ the fight for gender equality,³³⁴ the school bus-

330. See *Morrison v. Olson* 487 U.S. 654, 681 (1988).

331. *Sixty-Seventh Judicial Conference*, *supra* note 164, at 1556 (remarks of Larry D. Thompson).

332. See HARRIGER, *supra* note 23, at 47 & 229 n.35. Sirica had won public respect because his refusal to believe that the Watergate burglars were telling the whole truth — and his questioning of the sufficiency of the Justice Department's prosecution in the original Watergate trial — led to the unraveling of the White House cover-up. See generally JOHN SIRICA, *TO SET THE RECORD STRAIGHT* (1979).

333. See e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

334. See e.g., *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

sing battle,³³⁵ and other political hot potatoes of the day were thrown onto the doorstep of the judiciary after Congress and the executive branch punted them away. At the time the original special prosecutor legislation was fashioned, the courts appeared to be the safest haven to locate the appointment and oversight power, in order to avoid any possible corruption in the process.³³⁶

Unfortunately, Congress envisioned one thing, but the legislation did another in practice. Congress's purpose in vesting a three-judge panel with the power to appoint and monitor the special prosecutor was to shift this duty away from the Justice Department (where there existed potential conflicts), and move it down Constitution Avenue to the special court. After all, Watergate Special Prosecutor Archibald Cox had been fired by President Nixon because he was an appointee of the executive branch, directly accountable to Attorney General Elliot Richardson.³³⁷ The whole point of the new legislation was to fight off potential conflicts and prevent incidents like the "Saturday Night Massacre" from recurring, by moving oversight responsibility to a neutral court.³³⁸

There is no indication that Congress intended the court to remain invisible. Elliot Richardson, as the Attorney General overseeing the Watergate case, had played a cautious but essential role in interfacing with, and maintaining a check over, special prosecutor Cox.³³⁹ Congress certainly envisioned that a similar oversight function would be carried out by the special court under the statute. This was the only guarantee, layered into the statute, that the special prosecutor would not become an unaccountable fourth branch of government.³⁴⁰ The "someone" to whom he or she was meant to be answerable was the three-judge panel, in conjunction with the

335. See e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

336. It is noteworthy that the first major "special prosecutor" bill introduced by Senator Birch Bayh in Congress, in the week following Archibald Cox's firing in the Saturday Night Massacre, placed the power to appoint and oversee the special prosecutor in the federal District Court. See S. REP. NO. 93-595, at 2 (1973).

337. For an account of the legal debate over whether President Nixon had the power to fire Cox, see GORMLEY, *supra* note 3, at 323, 383, 420 & 558 n.135.

338. For a discussion of the conflicts of interest that abounded in the Watergate investigation prior to Cox's appointment, see *id.* note 3, at 257-61, 282 & 368-71.

339. The relationship between Cox and Richardson, that was essential to Cox's effective performance as special prosecutor, is summarized in *id.* at 294-99, 318-22. Professor John Barrett thoroughly discusses the importance of a healthy relationship between the Attorney General and independent counsels in John Q. Barrett, *All Or Nothing, Or Maybe Cooperation: Attorney General Power, Conduct, and Judgment in Relation to the Work of an Independent Counsel*, 49 MERCER L. REV. 519, 549-50 (1998).

340. For an expression of Congress's concern that the special prosecutor legislation should not be permitted to create a "fourth branch of Government," see *Hearings Before the Senate Comm. on Govt. Operations*, *supra* note 60, at 23 (remarks of Sen. Baker).

Attorney General whose direct control was filtered through the special court. Unfortunately, the court has shrunk down its own role to almost nothing. After appointing an independent counsel and establishing his or her jurisdiction,³⁴¹ the court has done little more than rubber-stamp the special prosecutor's actions.³⁴² Indeed, the court itself has articulated a minimalist vision of its functions. Judge John D. Butzner, Jr. of the Fourth Circuit, a Reagan appointee and a member of the special court since 1988, directly addressed the question: "Once the independent counsel has been appointed and the order signed defining his scope, what does the court have to do as far as the investigation?" Judge Butzner's reply was: "Very little, and less than that."³⁴³

Judge Butzner's response may accurately sum up the approach taken by the special court to date, but it hardly matches the model envisioned by Congress. Although it is dangerous to allow the Attorney General to meddle too much in the work of the independent counsel, it is even more dangerous to allow the special court to meddle too little, such that the special prosecutor can become a branch of government unto itself. Two factors have contributed to the special court's failure to fulfill its essential role under the statute. The first is the Supreme Court's decision in *Morrison v. Olson*. The second is the statute itself.

Chief Justice Rehnquist's opinion in *Morrison v. Olson* resolved the separation of powers conundrum, inherent in the independent counsel statute, by distancing the judiciary from any functions of the independent counsel that were even remotely prosecutorial. Writing for a near-unanimous Court, the Chief Justice stated:

[Although] provisions of the Act do require the court to exercise some judgment and discretion, . . . the powers granted by these provisions are themselves essentially ministerial. The Act simply does not give the Division the power to 'supervise' the independent counsel in the exercise of his or her investigative or prosecutorial authority.³⁴⁴

Chief Justice Rehnquist acknowledged that a number of functions of the special court necessarily interfaced with the prosecutor's

341. 28 U.S.C. § 593 (1994).

342. See Gormley, *supra* note 229, at A25; Gormley, *supra* note 260.

343. *Sixty-Seventh Judicial Conference*, *supra* note 164, at 1541 (remarks of John D. Butzner).

344. See *Morrison v. Olson*, 487 U.S. 654, 681 (1988) (footnote omitted). The Special Division itself has likewise written: "The Independent Counsel does not operate under our supervision and his acts . . . do not bear our aegis." *In re North*, 16 F.3d 1234, 1239 (D.C. Cir. 1994).

work.³⁴⁵ He also conceded that the special court's power to terminate an investigation under Section 596(b)(2) was quasi-executive.³⁴⁶ Yet he went on to conclude that "the functions that the Special Division is empowered to perform are not inherently 'Executive'; indeed, they are directly analogous to functions that federal judges perform in other contexts."³⁴⁷

Chief Justice Rehnquist was searching for the safest path on the treacherous separation of powers catwalk. An independent counsel significantly controlled by the judiciary would almost certainly encroach upon the executive branch's traditional powers to enforce the laws and prosecute criminals.³⁴⁸ Yet the Court's stern language in *Morrison* has caused the special panel to become scared of its own shadow. The purpose of the independent counsel statute was to allow the special court to oversee the special prosecutor (in place of the Justice Department), but limit its involvement scrupulously. As part of this plan, the court's oversight functions were carefully separated from its traditional judicial functions, so that it could not act as both judge and prosecutor. The statute's draftsmen were keenly aware that too much involvement by the special court would tip the statute into the realm of unconstitutionality. Yet too little involvement would constitute an even worse sin, creating the "roving Frankenstein monster" that Congress assiduously sought to avoid exhuming.³⁴⁹

345. These functions included the ability of the special court to determine whether the Attorney General had shown "good cause" for extending a preliminary investigation beyond the time limit; deciding whether to make public the various reports of the Attorney General and the independent counsel; and deciding whether to award attorneys fees. See *Morrison*, 487 U.S. at 681 n.19.

346. See *Morrison*, 487 U.S. at 682. 28 U.S.C. § 596(b)(2) (1994) allows the special court to terminate the office of the independent counsel when, based upon a request from the Attorney General or upon its own motion, it determines that an investigation is "so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions."

347. *Morrison*, 487 U.S. at 681. The examples that Chief Justice Rehnquist gave included (a) the ability of federal judges to decide whether to allow the disclosure of matters occurring before a grand jury pursuant to Fed. Rule Crim. Proc. 6(e); (b) the ability of federal judges to extend a grand jury investigation pursuant to Rule 6(g); and (c) the ability of federal judges to award attorneys fees in civil rights cases pursuant to 42 U.S.C. § 1988. See *Morrison*, 487 U.S. at 681.

348. See Tuerkeimer, *supra* note 143, at 251-52.

349. For a discussion of some of the specific dangers inherent in permitting the independent counsel to become an unaccountable "fourth branch" of government, see Daugherty, *supra* note 142, at 984-90, and Feinburg, *supra* note 135, at 183-84. Senator Howard Baker also warned against creating a "virtually inviolate fourth branch of Government" that "would substantially diminish the accountability of law-enforcement officials to the President, the Congress, and the American people." See *Hearings Before the Senate Comm. on Government Operations*, *supra* note 60, at 23.

The wishy-washy language of the statute has not helped matters. The statutory language is oddly silent as to what the special court should do — if anything — once the investigation proceeds forward. The statute fails to spell out even the most basic duties of the three-judge panel. In reforming the independent counsel statute, Congress must face and resolve this fundamental question: Is the special court the monitor of the special prosecutor, or is no branch of government the monitor? Does the court have a role after the independent counsel is appointed, or none at all? If the latter, the statute must be junked as patently unconstitutional, since no branch is minding the store. If the former is true (as Congress seems to have intended), Congress must lay out the court's powers and responsibilities in painstaking detail, or the judiciary will continue to bury its head in the sand.

The Supreme Court and scholars can no longer duck this uncomfortable fact: If the independent counsel statute is indeed constitutional (as *Morrison* held), the independent counsel must be "inferior" to someone.³⁵⁰ That someone, like it or not, is the special court as much as it is the Attorney General. The special court acts as a filter, straining out potential bias or conflict that may exist within the Department of Justice in select cases. The Attorney General retains some role; but a number of the Justice Department's ordinary duties are shifted to the three-judge panel. The court not only has the power to appoint,³⁵¹ but it has the power to set the written jurisdictional boundaries of the independent counsel;³⁵² determine when investigations are substantially completed;³⁵³ and make a host of interim decisions governing the investigations.

For instance, as the Supreme Court itself noted in *Morrison*, Congress specifically gave the special court power to determine whether the Attorney General had demonstrated "good cause" for extending a preliminary investigation beyond the original time limit pursuant to Section 592(a)(3) of the statute; deciding whether to refer "related" matters to the independent counsel under Section 594(e); deciding whether to make public the independent counsel's identity and his or her jurisdiction under Section 593(b)(4), as well

350. I take this to be the underlying message of Professor Tribe, in his recent dialogue with Professor Amar. Tribe laments that the independent counsel statute *as it has evolved* destroys the notion of separation of powers, since the special prosecutor is "inferior" to no one. See Amar & Tribe, *supra* note 151.

351. See 28 U.S.C. § 593(b)(1) (1994).

352. See 28 U.S.C. § 593(b)(1).

353. See 28 U.S.C. § 593(b)(2).

as various documents filed with court pursuant to Section 593(h); deciding whether to release the independent counsel's final report to Congress and the public and whether any protective orders should be issued under Section 594(h)(2); and deciding whether to award attorneys' fees to individuals investigated but not indicted pursuant to Section 593(f).³⁵⁴ It can hardly be said that Congress envisioned that the special court would do nothing.

At the same time, Chief Justice Rehnquist was absolutely correct in *Morrison* when he suggested that this is dangerous constitutional turf. Federal judges should not be in the business of running prosecutions, nor do they possess expertise to do so. But the statute toes the line carefully. It assigns to the special court a combination of traditional judicial functions and quasi-executive, "ministerial" functions, and this is why the Supreme Court upheld it. Congress intentionally constructed the special court using senior and retired judges from the Courts of Appeals³⁵⁵ who would act as a sort of buffer zone between the independent counsel and the Justice Department, but would not decide the merits of any case in contravention of the separation of powers doctrine. As the *Morrison* Court noted, there is precedent for allowing members of the judicial branch to perform functions that intersect with those of the executive branch to ensure the proper functioning of the criminal justice machinery. For instance, federal judges supervise grand juries, assist in their "investigative functions" by compelling the testimony of witnesses, participate in the issuance of search warrants, review applications for wiretaps, and otherwise involve themselves in criminal investigations in a limited fashion.³⁵⁶ Thus, when Congress fashioned the special court under the independent counsel statute, it purposely built a hybrid creature. It merged traditional judge-like functions with quasi-executive, ministerial functions, because the Attorney General's ministerial role was necessarily limited. It built a court, in other words, like no other court.

It is not necessary to broaden the powers of the special court to make it work properly. Rather, its duties must be spelled out more clearly so that it is empowered to carry out the functions that Congress has already given it, and the Supreme Court has already affirmed. Otherwise, the entire statutory scheme is a terrible

354. See *Morrison v. Olson*, 487 U.S. 654, 680 (1988).

355. See 28 U.S.C. § 49(c) (1994).

356. These points are discussed in *Morrison*, 487 U.S. at 681 n. 20. The provision of the independent counsel statute that mandates that the special court shall not decide the merits of a case is 28 U.S.C. § 49(f).

constitutional hoax. At least three adjustments are essential to make the special court more effective.

1. *Authorize the Special Court to Consult with the Attorney General in Selecting an Independent Counsel*

Some observers have questioned the selection process by which independent counsels are appointed by the three-judge court.³⁵⁷ The inherently secret nature of the appointive process, and the political nature of that process, are both concerns.³⁵⁸ The controversial decision by the special court to replace Robert Fiske with Kenneth Starr — which took place after an alleged lunchtime meeting between presiding Judge Sentelle and conservative Republican Senator Lauch Faircloth (R. North Carolina) — has been cited as proof that the ugly hand of politics controls the process.³⁵⁹

Lloyd Cutler has responded with a proposal that would allow the President to nominate five or ten potential independent counsels, to be confirmed by the Senate; from this list the special court would be required to select its appointee.³⁶⁰ But such efforts to squeeze every drop of political influence from the selection process are impractical and produce undesirable results. The prospect of allowing the president himself to appoint an independent counsel defeats the whole purpose of the statute. It heightens the public perception that the decks are being stacked from the start. President Ford's proposal in 1976 that squarely placed such an alternative in front of Congress was wisely (and definitively) rejected.³⁶¹ Moreover, Lloyd Cutler's plan is extremely impractical. Few lawyers of the caliber sought for high-profile special prosecutor investigations will commit to being considered for such a position until

357. See, e.g., Amar, *supra* note 151, at C1.

358. See *id.* at C2.

359. In part, criticism relating to the manner of Starr's appointment turned upon the fact that Judge Sentelle's wife worked in Senator Faircloth's office, and reportedly arranged the lunchtime meeting to discuss the replacement of Fiske with someone who would be more aggressive, in order to satisfy anti-Clinton Republicans. See Bell et al., *supra* note 148, at 477-78; Joan Biskupic, *Choosing the Independent Counsel; Power of Three-Judge Panel Breeds Questions of Partisanship*, WASH. POST, Apr. 13, 1997, at A12; Sen. Robert Torricelli, *It's Time to Reconsider Independent Counsel Statute's Effectiveness*, ROLL CALL, Mar. 20, 1997, at Guest Observer section. For a response to these criticisms involving the controversial lunch, see O'Sullivan, *supra* note 148, at 471-73.

360. See Bell et al., *supra* note 148, at 477-78.

361. See *Watergate Reforms*, *supra* note 76 at 5, and discussion *supra* text accompanying notes 76-78. For a similar proposal that the President appoint a special prosecutor at the beginning of each term, to be confirmed by the Senate and operate within the Justice Department, see Victor H. Kramer & Louis P. Smith, *The Special Prosecutor Act: Proposals For 1983*, 66 MINN. L. REV. 963 (1982).

they know the precise circumstances, the timing, and all of the nuances of the case.³⁶² The better approach is to allow the special judicial panel to choose the independent counsel as they see fit, but to amend Section 593(b) to specifically authorize the court to consult with the Attorney General in making its selection.

As drafted, Section 593(b) sets no real ground rules for the selection process.³⁶³ The special panel simply gathers recommendations from a wide variety of sources, and makes its decision. As Judge David Sentelle explained, the judges maintain an informal "talent book" that is constantly updated with potential names from a host of contacts. They then select from this pool as the need arises.³⁶⁴ Such an informal process is perhaps inevitable. The statute, however, should build in an ounce of prevention by specifically authorizing the three-judge panel to obtain input from the Attorney General before making its ultimate selection. First, this will help to ensure that an individual perceived to be biased against the President will not become the court's appointee. Since the penultimate purpose of the statute is to select an independent counsel who is *perceived* to be independent by all concerned, it can only enhance that goal if the Attorney General is permitted to raise red flags with respect to potential prosecutors who may be viewed as politically tainted.³⁶⁵ Congress built the independent counsel statute so that the special court and the Attorney General would be able to cautiously interact, and this was a healthy thing.³⁶⁶ Separation of powers concerns that dominated debate over the statute were resolved, in part, by allowing the Attorney General to retain input at appropriate stages. The critical appointment stage should be no excep-

362. Before Attorney General Elliot Richardson asked Archibald Cox to serve as Watergate Special Prosecutor, for instance, seven prominent lawyers and judges turned Richardson down. See GORMLEY, *supra* note 3, at 233-34. Given the controversial nature of such investigations, few prominent attorneys will become involved rashly.

363. The statute provides only that the court shall seek to appoint "an individual who has appropriate experience and who will conduct the investigation and any prosecution in a prompt, responsible, and cost-effective manner," and an individual "who will serve to the extent necessary to complete the investigation and any prosecution without undue delay." 28 U.S.C. § 593(b)(2) (1994).

364. See *Sixty-Seventh Judicial Conference*, *supra* note 164, at 1537.

365. Thus, for instance, it might have been useful if Attorney General Reno had the opportunity to inform the court that the White House perceived Kenneth Starr to be an inappropriate selection, because he purportedly had taken steps to file an *amicus* brief in the Paula Jones case taking a position against the President. See Sara Fritz, *Fiske Ousted in Whitewater Case; Move is Surprise*, L.A. TIMES, Aug. 6, 1994, at A1; Rovella, *supra* note 160, at A1; Gary Wills, *Cabal and Courtiers*, AUSTIN AM.-STATESMAN, July 27, 1998, at A9, available in ALLNEWS, 1998 WL 3619483. Instead, this anti-Starr sentiment in the White House festered and led to an increasingly hostile relationship between the two camps.

366. See Barrett, *supra* note 339, at 548-51.

tion. Ultimately, the special court must (and will) decide whom to appoint as independent counsel, unconstrained by political shackles. Yet this decision should be informed by the same relevant facts that the Attorney General would have at her disposal, in seeking to select an unbiased appointee. Although Congress was silent on this subject in drafting the statute in 1978, it should make the special court's authority to consult with the Attorney General in making appointments explicit, in renewing the statute in 1999.

2. *Give the Court Express Power to Carry Out Its Duties*

A principal reason that the special court has shrunk from taking any role in keeping the independent counsel law on course is that the statute itself gives scant direction as to how the court is to carry out its proper functions. Fearful of stepping over the boundary line by interfering with the prosecutorial function, the court has instead elected to remain passive to the point of paralysis.³⁶⁷ If the court is going to perform its statutory duties in a responsible fashion, it is essential that the three-judge panel have a means by which it can gather information, hold limited (if necessary closed-door) proceedings, and otherwise equip itself to carry out the essential role that Congress fashioned for it.

A vivid example relates to the court's duty, pursuant to Section 596(b)(2) of the amended statute, to periodically review whether an independent counsel should continue his or her work.³⁶⁸ The present version of Section 596(b)(2), added to the statute by amendment in 1994, requires the special court "on its own motion" to determine every two years (and after two such cycles, every year) whether an independent counsel's office should be terminated because his or her work is "substantially completed."³⁶⁹ This provision — quite distinct from the section that permits the Attorney General to fire the independent counsel for "good cause" (because of some misconduct etc.)³⁷⁰ — was inserted by Congress in order to "ensure that the special court inquires on a periodic basis"³⁷¹ as to

367. For a criticism of the special court's ill-defined role under the statute, see Martin & Zerhusen, *supra* note 142, at 539.

368. See 28 U.S.C. § 596(b)(2) (1994).

369. Section 596(b)(2) also permits the Attorney General to request such termination. However, the special court must automatically make such a determination every two years (and then every year), even if the Attorney General takes no action. See U.S.C. § 596(b)(2). Prior to the adoption of the present language in Section 596(b)(2), the original statute permitted the special court to terminate a special prosecutor if his work was "substantially completed," but did not mandate a periodic review by the court.

370. See 28 U.S.C. § 596(a).

371. H.R. CONF. REP. NO. 103-511, at 23 (1994), *reprinted in* 1994 U.S.C.C.A.N. 748, 806.

the continued viability of the investigation. When Congress added this section, it was well aware that the Supreme Court's decision in *Morrison v. Olson* embraced a narrow view of the court's appropriate role when it came to terminating an independent counsel's work.³⁷² Yet Congress nonetheless adopted the amendment, wisely concluding that such limited review by the court was essential to prevent a special prosecutor from lingering beyond his or her useful lifetime.³⁷³

Although the "periodic review" provision has been in place for four years, and a similar "termination" provision existed even before 1994, the special court has almost never requested a brief or held any kind of proceeding to determine whether the work of an independent counsel has been "substantially completed." In Kenneth Starr's recent investigation of the Whitewater affair, Mr. Starr's statutory deadline came and went without a whisper. Although there was an intense national debate over whether Starr should be permitted to press forward on the seemingly unrelated Lewinsky case, or instead wrap up his Whitewater investigation and pass off the Lewinsky matter to the Justice Department or a new independent counsel, the three-judge court entered a perfunctory one-sentence order continuing Starr's jurisdiction on the last day before his statutory deadline, without requesting written memoranda or holding any proceeding designed to elicit input from the Attorney General or the independent counsel himself.³⁷⁴

This extreme judicial passivity debilitates the heart and soul of the statute. When Congress provided that the special court should periodically review the status of an independent counsel, it certainly did not intend that the court would do so based upon gut instincts or the most recent newspaper accounts. It obviously intended that

372. See 487 U.S. 654, 682-83 (1988).

373. See H.R. CONF. REP. NO. 103-511, at 23, reprinted in 1994 U.S.C.C.A.N. 748, 806.

374. See Order, *In Re Madison Guaranty Savings & Loan Associates*, Aug. 4, 1998; Gormley, *supra* note 260. The special court had done the same thing two years earlier, at the time of its first mandatory review. See Order, *In Re Madison Guaranty Savings & Loan Association*, Aug. 5, 1996. The only reported instance in which the special court took more than *pro forma* action to determine if an investigation was "substantially completed" occurred towards the end of the Iran-Contra case. There, President Ronald Reagan filed a document entitled "Suggestion that the Court Exercise its Power to Terminate the Office of Independent Counsel," requesting that the special court terminate the special prosecutor's office except for the "ministerial" function of completing his Final Report. The Court entered an order directing Independent Counsel Lawrence Walsh to "show cause" why his office should not be terminated in this fashion, and allowed the independent counsel to file a response thereto. Ultimately, the special court granted the President's request. See *In re Oliver L. North*, 10 F.3d 831 (D.C. Cir. 1993). Judge Butzner dissented in part, arguing that the court should not use its termination power to exercise "control" over the independent counsel in this fashion. See *In re North*, 10 F.3d at 61-63.

the court would act as courts typically act, gathering information from necessary parties in order to make a reasoned decision. In the Whitewater example, the special court could have convened a proceeding (closed to the public if necessary) in order to solicit input from Attorney General Reno, Independent Counsel Starr and others, before determining whether Starr's work was "substantially complete" within the meaning of the statute.³⁷⁵ The absence of specific statutory authorization to do so, and the court's general "hands off" approach, prevented the judiciary from carrying out its essential function.

The duties of the special court may be relatively few in number. But with respect to each specifically enumerated power delegated to the court, from the beginning of an independent counsel investigation to the end, the statute should make explicit what is implicit in Congress's scheme: that the court shall possess power to gather information, review materials *in camera*, request written input, convene limited proceedings (where necessary), and otherwise exercise those auxiliary powers that courts routinely rely upon to do their jobs properly. Rather than violate separation of powers, this limited involvement would ensure that the court has the tools to do its job completely, and thus protect the institutional interests of all three branches of government.³⁷⁶ Indeed, once the court is placed into this hybrid role of appointing an independent counsel, establishing his or her jurisdiction, and performing certain judicial and quasi-executive functions (of a ministerial sort) until the investigation is ended, anything less seems to be a gross abdication of its responsibility.

Finally, although the federal rules of appellate procedure and local rules do not apply to the special court, because it is not han-

375. This was particularly true since Starr's original charter limited him to the Whitewater matter. To the extent that the Attorney General authorized the expansion of jurisdiction into the Lewinsky case in the first place, based upon conversations with Starr about its potential link to Whitewater, the court would have benefitted from hearing from both the Attorney General and the independent counsel in rehearsing their conversations and determining how far the extension of jurisdiction was meant to go.

376. In other settings, the judicial branch has been given oversight functions to ensure that criminal prosecutions are being conducted fairly and even-handedly. See *supra* note 356 and accompanying text. In the Third Circuit, for instance, if a grand jury subpoena is challenged, the federal courts require that government prosecutors supply them with "some preliminary showing by affidavit that each item is at least relevant to an investigation being conducted by the grand jury and properly within its jurisdiction, and is not sought primarily for another purpose." See *In re Grand Jury Proceedings* (Schofield I), 486 F.2d 85, 93 (3d Cir. 1973); *In re Grand Jury Proceedings* (Schofield II), 507 F.2d 963, 966 (3d Cir.), *cert. denied sub nom.* Schofield v. United States, 421 U.S. 1015 (1975). Such a minimal intrusion by the judicial branch upon the prosecutorial function, in order to responsibly monitor criminal cases, is deemed appropriate.

ding appeals from the district court in the usual sense,³⁷⁷ it is imperative that some sort of comprehensive rules (covering filing practices, service of process, hearings, etc. in the special court) be implemented if parties are to be treated uniformly and fairly in proceedings before that tribunal. At present, much of the interaction among independent counsel, the special court, and the Attorney General seems to be based upon *ad hoc*, *ex parte*, contacts.³⁷⁸ Two former attorneys for the target of a special prosecutor investigation have written: "[I]f the litigation process before the Special Division is to meet minimal standards of fair practice," the creation of uniform rules and standards "are an essential prerequisite."³⁷⁹

To correct this obvious gap in the statute, Congress should authorize the Supreme Court, pursuant to its rulemaking power,³⁸⁰ to establish rules and standards for the special court such that the ground rules for all litigants are clear and even-handed. It should also carefully delineate between the functions of the special court and the functions of the ordinary federal district court when it comes to matters involving independent counsel investigations, so that this important line is not left to guess-work.³⁸¹

3. *Give the Court Power to Replace an Independent Counsel Under Certain Circumstances*

Although it is a question of obvious importance, the statute never addresses whether the special court is empowered to replace one independent counsel with another, subsequent to appointment. The only putative precedent on this subject lies in the substitution of Robert Fiske with Kenneth Starr in the Whitewater investigation.³⁸² However, Fiske was appointed by Attorney General Reno

377. See 28 U.S.C. § 1291 (1994).

378. For one example of an *ex parte* motion by Starr, that raised some concern in the White House, see Stephen Labaton, *Starr Accused of Misleading Appeals Court*, N.Y. TIMES, Oct. 6, 1998, at A20 (discussing Starr's *ex parte* petition to send impeachment material to Congress).

379. Martin & Zerhusen, *supra* note 142, at 546. The authors represented Theodore Olson, an Assistant Attorney General in the Reagan Administration who was alleged to have provided false information in congressional testimony. Olson was cleared of the charges.

380. See 28 U.S.C. § 2071 (1994).

381. The special court has been routinely criticized for establishing ambiguous ground rules for litigants who are the subject of investigations. See, e.g., Martin & Zerhusen, *supra* note 142, at 539. There is also much confusion as to whether certain decisions should be made by the special court, or the federal district court. For instance, it is far from clear whether the special court should have considered and granted Kenneth Starr's request to release the *Starr Report* to Congress, pursuant to Rule 6(e) of the Rules of Evidence, or whether this decision appropriately rested with the district court.

382. See *supra* note 234 and accompanying text.

through her inherent powers, rather than via statute, during a lull in which the legislation had expired.³⁸³ Thus, when the court appointed Starr, it was exercising its power to appoint an independent prosecutor *ab initio*, rather than replacing one with another. It is thus wise for Congress to insert a provision into Section 596, specifically authorizing the court to relieve an independent counsel and substitute a different individual in his or her place, in the unusual event that the court concludes that the person originally appointed for the task is no longer capable of remaining (or appearing to remain) objective and neutral.³⁸⁴

The legislative history makes clear that the hallmark of the independent counsel law was to foster public trust in the American system of government by replacing the Attorney General with a dispassionate outsider in certain high-profile cases.³⁸⁵ To the extent that this schema is frustrated by the appointment of a prosecutor who turns out to be biased in fact or in perception, the statute becomes a greater burden on the system than a benefit. Although it is undesirable to have an Attorney General who is biased and conflicted, conducting a high-level criminal investigation, it is even worse to have an independent counsel who is plagued with that same defect. The Attorney General (at least) is duly appointed by the chief executive and confirmed by the Senate, and thus operates squarely within the confines of the constitutional ballpark. The independent counsel is a hybrid creature on the fringes of the established tripartite system of government. His or her existence can be justified only if he or she provides neutral expertise.

In every politically-charged investigation, there inevitably will be impassioned and recurrent allegations that the independent counsel is "out to get the President" or other target.³⁸⁶ This alone

383. See O'Sullivan, *supra* note 148, at 471-72.

384. At least one state, Indiana, has statutorily required the courts to relieve a prosecutor from duty and appoint a replacement prosecutor where the former exhibits "bias, prejudice" or hostility toward the state's interest. See *Hendricks v. Indiana ex rel. Northwest Ind. Crime Commn., Inc.*, 196 N.E.2d 66, 67 (Ind. 1964). A court in New York has specifically authorized the replacement of one special prosecutor with another, where the initial appointment was deemed a poor selection for the particular case. See *People v. Gallagher*, 143 A.D. 2d 929, 533 N.Y.S. 2d 554 (1988).

385. See 1973 *Hearings Before the Subcomm. on Criminal Justice, supra* note 4, at 101 (remarks of Sen. Bayh). Senator Joseph R. Biden, Jr. (D. Del.), then-Chairman of the Senate Judiciary Committee, wrote in 1987: "There are certain extraordinary moments of crisis when the people's faith in the integrity and independence of their elected officials is caused to waiver To restore the utmost public confidence in the investigation of criminal wrongdoing by high-ranking government officials, the appointment of a special prosecutor then becomes necessary." Biden, *supra* note 107, at 886.

386. In Watergate, President Nixon and his advisors vehemently asserted that Cox was a biased "Kennedyite" who was out to bring down the President. See GORMLEY, *supra* note 3,

should not justify a "substitution." At the same time, in extreme cases the court should retain the power to assess, after receiving input from the Attorney General, whether bias or the appearance thereof have crippled the particular independent counsel and rendered him or her incapable of continuing in the position. In the Monica Lewinsky matter, for instance, evidence surfaced shortly after Kenneth Starr expanded his investigation into this subject that Mr. Starr had maintained ties to influential and wealthy Republicans who were actively funding the Paula Jones civil case, and otherwise engaging in a covert battle against President Clinton.³⁸⁷ Given the intense and sustained national uproar over Starr's perceived anti-Clinton bias — particularly in connection with the Paula Jones sexual harassment suit — the prudent course would have been for the court to reassess whether its approval of Starr to head the separate Monica Lewinsky investigation was a sensible one. To the extent that Starr had become (or was perceived to be) incapable of undertaking a neutral investigation in the separate Monica Lewinsky matter,³⁸⁸ the simple solution would have been for the court to gather the facts, and intelligently render a decision whether to replace Starr with another (less controversial) appointee in that distinct case. Thus far, however, the special court has taken the position that the statute does not grant it that power.³⁸⁹

The beauty of the independent counsel law is that it enables the judiciary to select from a pool of thousands of distinguished lawyers, from across the expanse of the United States, in order to choose the very best person — a one hundred percent neutral individual — suited for the sensitive contours of the particular case. Section 596 of the statute should be amended to facilitate that goal, by allowing the court to reassess and adjust its selections along the

at 265-68. In the Iran-Contra affair, Lawrence Walsh was routinely accused of being bent on disrupting or destroying the Reagan and Bush Administrations. See, e.g., Robert H. Bork, *Against the Independent Counsel*, COMMENTARY, Feb. 1993, at 24-25; *Can't Beat 'Em?' Indict 'Em'*, DAILY OKLAHOMAN, July 30, 1992, at 4.

387. See, e.g., Richard Cohen, *Starr Crosses the Line*, WASH. POST, June 26, 1997, at A19; Mark Hosenball & Evan Thomas, *The Man Behind the Curtain*, NEWSWEEK, May 18, 1998, at 32; Gene Lyons, *Kenneth Starr's Clear Partisanship*, ARK. DEM.-GAZETTE, Aug. 13, 1997, at B9; Robert Parry, *Was Hillary Right? Right-Wing Conspiracies & Hardball Politics*, IN THESE TIMES, June 14, 1998, at 17.

388. See, e.g., Jane Fullerton, *First Lady Sees "Conspiracy:" "Nonsense," Starr Says As President's Secretary Testifies*, ARK. DEM.-GAZETTE, Jan. 28, 1998, at A1.

389. In 1994, Senator Carl Levin (D. Mich.) raised questions about Starr's ability to fairly conduct the Whitewater investigation. The special court "brushed aside" this challenge, indicating that the statute did not authorize it to render opinions concerning a special prosecutor's fitness to remain in that post, once appointed. See David Johnston, *Three Judges Spurn Protest on Whitewater Prosecutor*, N.Y. TIMES, Aug. 19, 1994, at A16; see also Statement of Senator Levin in the *Congressional Record*, *supra* note 245, at S11,957.

way, in the unusual event that neutrality deteriorates, or the appearance of perceived bias undermines the public trust in the process.

IV. CONCLUSION

When Archibald Cox served as Watergate Special Prosecutor, in the troubled summer of 1973, there were enormous pressures upon him to expand his inquiry and turn his focus on a host of disparate allegations against President Richard M. Nixon. When charges surfaced, for instance, that President Nixon was using the Secret Service to "bug" his own brother, Donald, there was a clamor — particularly by Democrats — for the special prosecutor to investigate. Cox declined.³⁹⁰ When information was brought to Cox's attention suggesting that President Nixon may have funneled public funds into his homes in San Clemente, California, and Key Biscayne, Florida, and failed to pay adequate taxes on the property, Cox elected not to investigate. He met with Attorney General Elliot Richardson, talked over his jurisdictional guidelines, and chose not to diverge from his principal Watergate assignment.³⁹¹

The special prosecutor law that was formulated between 1973 and 1978 looked upon Cox as its model. It envisioned a special prosecutor of enormous self-restraint, who acted more as a neutral referee — dedicated to proving the truth *or* innocence of a high-level official in order to quickly restore calm to the system of government — than a common prosecutor of street crimes. Indeed, the name of the statute was amended by Congress for this precise reason, in 1982, when Congress switched the title from "special prosecutor" to "independent counsel," in order to convey its vision of that unique office.³⁹² As the legislative history reports: "[T]he name 'independent counsel' more accurately indicates that the investigation is being handled outside of normal government channels

390. See Ken Gormley, *Bring On the Impeachment Inquiry*, CHI. TRIB., Apr. 26, 1998, § 1 at 21; Interview with Archibald Cox by Phillip Heymann et al., Feb. 19, 1974, Archibald Cox Papers, Box 24, folder 1, Harvard Law School Library, at 16.

391. See Interview with Archibald Cox, *supra* note 390; see also GORMLEY, *supra* note 3, at 295-96; WATERGATE REPORT, *supra* note 4, at 195. Cox also declined to investigate charges that General Al Haig, President Nixon's Chief of Staff, might be improperly receiving two salaries, one from the military and one from the White House. See Interview with Archibald Cox, *supra* note 390, at 16.

392. The statute was amended by Ethics in Government Act Amendments of 1982, Pub. L. No. 97-409, § 2(a)(1)(A), (B), 96 Stat. 2039 (1983).

by an impartial investigator and does not suggest, as does the name 'special prosecutor,' that an indictment has or will be brought."³⁹³

This ennobled vision of the independent counsel has proven itself a naive failure. With the politicizing of independent counsel investigations since Watergate, by Democrats and Republicans alike, the temptation to use the statute as a cudgel to stun the opponent and gain swift political advantage has become irresistible.³⁹⁴ With the vast expansion of independent counsel staffs, and the delegation of more power to front-line advisors who are aggressive career prosecutors by training,³⁹⁵ the artless vision of an independent counsel steeped in self-restraint has become antiqued.

Yet our society cannot afford to scrap the independent counsel statute entirely. In moments of crisis when a serious institutional conflict arises, our system must have some failsafe device in place that prevents a constitutional meltdown. In Watergate, absent a special prosecutor, President Nixon's Department of Justice "might well have taken the position that the President was not subject to any judicial process and was not subject to the subpoena for the tapes."³⁹⁶ No mechanism in the legal system would have existed to challenge that position. It is true that the Watergate crisis resolved itself, in the end, without a statutory independent counsel position. But President Nixon came very close to succeeding in his effort to extinguish the Watergate investigation entirely, through the "Stennis plan."³⁹⁷ And the constitutional stress created by the lack of a legal mechanism to deal with such crises came close to permanently damaging the American system of government. It is hardly worth risking such irreversible institutional harm in future Watergates.

393. S. REP. NO. 97-496, at 18 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3537, 3554. Professor Beth Nolan called the new name "a benign-sounding title that suggests neutrality." Nolan, *supra* note 142, at 18. A later House report explained: "This change was made to remove any implication that the subject of an investigation under the provisions of this statute had been already determined to have committed the alleged crime." H.R. REP. NO. 100-316, at 10 n.2 (1987).

394. See Gormley, *supra* note 170.

395. For a profile of the principal prosecutors employed by Whitewater independent counsel Kenneth Starr, see Caldwell, *supra* note 289, at 129-31, 146.

396. *Sixty-Seventh Judicial Conference*, *supra* note 164, at 1586 (remarks of Archibald Cox); see also Walsh, *supra* note 193, at 2389 (arguing that Act will prevent another "Saturday Night Massacre"). For an argument, however, that a special prosecutor law is not necessary because such crises will work themselves out politically, as they did in Watergate, see Joseph E. DiGenova, *The Independent Counsel Act: A Good Time to End a Bad Idea*, 86 GEO. L.J. 2299, 2305 (1998).

397. For a discussion of how close President Nixon came to succeeding in his plan to abolish the special prosecutor and derailing the Watergate investigation, see GORMLEY, *supra* note 3, at 371-77.

In any event, American society has become accustomed to and reliant upon special prosecutors. They will not disappear, no matter what course Congress chooses. If the independent counsel statute is allowed to expire in 1999, the system of government will simply revert to increased *ad hoc* appointments of special prosecutors, and increased calls for Congressional appointments of special investigators, when allegations of misconduct in the executive branch arise.³⁹⁸ It is far more prudent to rely upon a solid statutory mechanism, with an established set of ground-rules, than upon a hit-or-miss method that relies upon the vagaries of politics to guard against serious conflicts of interest within the executive branch. The present statutory model, which combines limited control by the Justice Department with ministerial oversight by a special judicial panel, may not be perfect, but it is still preferable to any other system that we have invented.³⁹⁹

Yet, major reforms are necessary if the statute is to resemble Congress's original design. The image of a special prosecutor riding in on a white horse, restoring public trust, and riding off quickly does not square with Washington life circa 1999. Not only have the politics of the situation become more brutal now that both parties have learned to manipulate the independent counsel law, following Watergate, but the media has become a silent partner in the corruption of the statute. Journalists have cast aside time honored standards of professionalism, in the rush to publish startling assertions of official misconduct (however unsubstantiated) in the impatient world of internet news.⁴⁰⁰ In part, the statute must be rehabilitated based upon a renewed commitment by the special court to search out appointees willing to exercise self-restraint, even where the temptations to become dragged into political battles and media extravaganzas are enormous. In part the rehabilitation must be brought about by the forced leadership of Congress, in overhauling the law radically. Until the original vision of an independent counsel as a neutral referee is specifically injected into the words of the

398. For a discussion of *ad hoc* appointments, see *supra* discussion at notes 231-34 and accompanying text.

399. For other scholars and commentators who have supported the preservation of the independent counsel statute, albeit with certain reforms, see Dash, *supra* note 248, at 2094-95; Harriger, *supra* note 180, at 2116-17; Walsh, *supra* note 193, at 2381-82, 2389; Archibald Cox, *Curbing Special Counsels*, N.Y. TIMES Dec 12 1996, at A1.

400. See Dash, *supra* note 248, at 2094-95; Norman J. Ornstein, *Doing Congress's Dirty Work*, 86 GEO. L.J. 2179, 2189-90; Cass R. Sunstein, *Bad Incentives and Bad Institutions*, 86 GEO L.J. 2267, 2269-71, 2277-79 (1998).

statute, it will remain one of the greatest legislative failures of the 20th century.

It is better for Congress to allow the statute to lapse in 1999, temporarily, in order to carry out this task properly, than to rush to a deadline and create the problems of the past anew. Without dramatic changes of the sort outlined above, few individuals worth attracting to public office — Presidents, Vice-Presidents, cabinet officers, or hundreds of other public servants — will be willing to endure public service in the next century.

No matter how cynical our nation may have become, in the span of time since Watergate, such a prospect should give us great pause.