10-1-1998

Mend It or End It? What To Do With the Independent Counsel Statute

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I. INTRODUCTION

The tenure of Independent Counsel Kenneth Starr has generated much debate among scholars, politicians, and the media in recent years regarding the efficacy of the independent counsel statute, which is scheduled to expire in June 1999.[1]

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1. Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, 103 Stat. 732 (codified at 28 U.S.C. §§ 591-599 (1994)). Historically, this statute was first enacted as part of the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1867. Subsequently, Congress passed the Ethics in Government Act Amendments of 1982, Pub. L. No. 97-409, 96 Stat. 2049, and the Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293.

Enacted in response to the Watergate saga, and particularly the infamous "Saturday Night Massacre," the independent counsel statute was designed to remove politics from the prosecution of executive branch officials and to foster public confidence in the prosecutorial process.[2] Advocates claim that the statute, though flawed, is the best system available to address alleged criminal wrongdoing by high-ranking executive branch officials, as well as the conflict-of-interest problems inherent in internal executive branch prosecutions.[3] Opponents insist that the statute is dispensable, maintaining that the prosecutorial system was not in need of reform when the statute was enacted.[4] They further stress that independent counsel excesses are proof that the current structure is unmanageable. Thus, they contend, statute modification is not a feasible alternative.[5]

These arguments are but a sampling of those advocated in support of, and in opposition to, the independent counsel statute. As June 1999 approaches, advocates and foes alike will raise these and other arguments as Congress decides the statute's fate.[6] This article attempts to synthesize the various arguments, proposals, and counterproposals in the debate with legal norms and statutory policies. To this end, the article commences with a description of the current terms and provisions of the independent counsel statute. Thereafter, the article identifies, discusses, and analyzes the leading arguments for and against renewal, as well as the various alternatives suggested by prominent scholars and practitioners. Finally, the article concludes with suggested measures of reform which, I submit, will result in a much more efficient and productive

2. *See In re* Olson, 818 F.2d 34, 41-43 (D.C. Cir. 1987) (noting that prior to the enactment of the independent counsel statute, the prosecution of high ranking executive branch officials was handled by the Department of Justice); 143 CONG. REC. S10,277-80 (daily ed. Oct. 1, 1997) (statement of Sen. Levin); 139 CONG. REC. E331-32 (daily ed. Feb. 16, 1993) (statement of Rep. Brooks).

3. *See* Katy J. Harriger, *The History of the Independent Counsel Provisions: How the Past Informs the Current Debate*, 49 MERCER L. REV. 489, 515-17 (1998); 129 CONG. REC. S425-26 (daily ed. Jan. 21, 1993) (statement of Sen. Cohen).

4. *See* Julie O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463, 476-77 (1996); TERRY EASTLAND, ETHICS, POLITICS, AND THE INDEPENDENT COUNSEL 19 (1989) (arguing that traditional means of responding to executive misconduct proved effective in Watergate).

5. *See* Jonathan Alter, *Depleting His Account: This Scandal Has Imposed A Long-Term Opportunity Cost–For Clinton And For Us*, NEWSWEEK, Apr. 13, 1998, at 34; Roger K. Lowe, *Independent-Counsel Law In Trouble*, COLUMBUS DISPATCH, Apr. 5, 1998, at 3B.

6. *See* 28 U.S.C. § 599 (setting five-year sunset provision for statute).

prosecutorial process.

II. THE INDEPENDENT COUNSEL STATUTE

The statute delineates several individuals subject to independent counsel investigation. These individuals include the President and Vice President, executive branch officials listed in 5 U.S.C. § 5312,[7] certain employees in the Executive Office of the President, any Assistant Attorney General, certain high ranking individuals in the Department of Justice, the Director and Deputy Director of the Central Intelligence Agency, the Commissioner of Internal Revenue, the chairman and treasurer of the principal national campaign committee seeking the election or reelection of the President, and any officer of a national campaign committee exercising authority at the national level during the incumbency of the President.[8]

In addition, the statute provides a procedural mechanism that must be adhered to prior to the appointment of an independent counsel. When the Attorney General receives information alleging the commission of federal criminal conduct[9] by any of the individuals covered under the statute, the Attorney General[10] must initially determine whether this information is sufficient to warrant further investigation.[11] In making this assessment, she may consider only two factors: "the specificity of the information received" and "the credibility of the source of the information."[12] However, when assessing specificity and credibility, the accused's mental state

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7. The following positions are listed therein: Secretary of State, Secretary of the Treasury, Secretary of Defense, Attorney General, 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, Social Security Administration. *See* 5 U.S.C. § 5312 (Supp. II 1996).

8. *See* 28 U.S.C. § 591(b). These officials are covered under the statute for a year after leaving their employment, except for the chairman and treasurer of the principal national campaign committee, and any officer of such committee exercising authority at the national level during the President's administration.

9. Violations of Class B or C misdemeanors or infractions are not within the purview of this statute. *See* 28 U.S.C. § 591(a), (c).

10. *See* 28 U.S.C. § 591(e) (if the information received implicates the Attorney General, the Attorney General must recuse himself or herself from the investigation. "[T]he next most senior official in the Department of Justice" shall conduct the investigation).

11. *See* 28 U.S.C. § 591(a), (d).

12. 28 U.S.C. § 591(d)(1).

may not be considered.[13] The Attorney General must complete this assessment within thirty days of receipt of the information.[14] If the Attorney General determines that the information received is insufficient to warrant further investigation, the matter is closed.[15] If, however, the Attorney General deems the information sufficient to warrant further inquiry, then she shall conduct a preliminary investigation.[16]

In contrast to section 591(a), which mandates a preliminary investigation upon receipt of sufficient information, section 591(c) provides the Attorney General with discretion with respect to conducting preliminary investigations of persons not mentioned in section 591(b).[17] Specifically, this discretionary authority exists when the Attorney General determines that a Department of Justice criminal investigation could present "a personal, financial, or political conflict of interest."[18] The Attorney General may also exercise this discretion with respect to members of Congress if she concludes that such an investigation "would be in the public interest."[19]

The preliminary investigation is restricted to those matters

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13. *See* 28 U.S.C. § 592(a)(2)(B)(i).

14. *See* 28 U.S.C. § 591(d)(2).

15. *See id.*

16. *See* 28 U.S.C. § 591 (a), (c), (d). In addition, a preliminary investigation is mandated in the event the Attorney General is unable to determine, within thirty days, whether further investigation is warranted. 28 U.S.C. § 591(d)(2).

17. *See* 28 U.S.C. § 591(c).

18. 28 U.S.C. § 591(c)(1).

19. 28 U.S.C. § 591(c)(2). Former Deputy Attorneys General Jamie S. Gorelick and William P. Barr have interpreted the discretionary provisions narrowly:

> MS. GORELICK: "Well, the mandatory sections are easier to interpret. I think that the discretionary sections ought to be used in only rare circumstances .... I think Attorney General Barr could investigate almost anybody, with very, very few exceptions, without having a so-called political conflict of interest. Now, if he had a financial relationship with someone under investigation, that is another story; but that is not what comes up. It is the so-called political conflict .... And so I would, if I were Attorney General, take a very, very narrow view of the discretionary power to seek an independent counsel."
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> MR. BARR: "I took a very narrow view of it, too, because I disapproved of the statute in general and I wasn't going to invoke the statute unless I was absolutely compelled by the law to invoke the statute. So I never used the discretionary provision, but I do believe that there are quite a few cases that don't necessarily involve covered people, or don't clearly involve covered people, that should not be handled on a business-as-usual basis by the Justice Department with people, in the bowels of the department, carrying out the investigation."

J. Harvie Wilkinson, III & T.S. Ellis, III, *The Independent Counsel Process: Is it Broken and How Should it Be Fixed?*, 54 WASH. & LEE L. REV. 1515, 1532 (1997).

that the Attorney General deems deserving of further inquiry, and must be completed within ninety days,[20] unless a single sixty-day extension is received from the division of the court (hereinafter "Special Division").[21] Despite the fact that Department of Justice prosecutors routinely utilize a myriad of investigative methods, the Attorney General may not employ many of these processes during this investigative period. Specifically, the statute prohibits the use of grand juries, plea bargains, immunity grants, and subpoenas.[22]

At the conclusion of the investigation, the Attorney General must inform the Special Division of her determination. If the Attorney General deems the information insufficient to warrant further investigation, the matter is closed.[23] If, however, the Attorney General determines that reasonable grounds exist to warrant further investigation, she shall submit a request to the Special Division for the appointment of an independent counsel.[24] Notably, absent clear and convincing evidence to the contrary, the Attorney General may not decline further investigation on the basis that the subject lacked the mental state to commit the violation.[25] The statute grants the Attorney General sole discretion over whether an independent counsel should be appointed to investigate alleged criminal activity.[26]

The Special Division is part of the United States Court of Appeals for the District of Columbia Circuit, and is composed of three United States Circuit Court judges, "one of whom shall be a judge of the United States Court of Appeals for the District of Columbia."[27] In assigning judges to the panel, the Chief Justice of the United States gives priority to judges or justices who are retired or on senior status.[28] The Special Division is

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20. *See* 28 U.S.C. § 592(a)(1).

21. *See* 28 U.S.C. § 592(a)(3). *See also* discussion of the Special Division *infra* notes 27-56, 278-83, and accompanying text.

22. *See* 28 U.S.C. § 592(a)(2)(A).

23. *See* 28 U.S.C. § 592(b)(1). Generally, private citizens lack standing to seek the appointment of an independent counsel. *See In re* Visser, 968 F.2d 1319 (D.C. Cir. 1992) (holding that the Special Division is without jurisdiction to appoint an independent counsel absent a request from the Attorney General).

24. *See* 28 U.S.C. § 592(c)(1). Similarly, in the event the Attorney General fails to make the required determination, an independent counsel will be appointed. *See id.*

25. *See* 28 U.S.C. § 592(a)(2)(B)(ii).

26. *See* 28 U.S.C. § 592(f).

27. 28 U.S.C. § 49(a), (d).

28. *See* 28 U.S.C. § 49(c), (d).

empowered to appoint an independent counsel[29] and define his prosecutorial jurisdiction.[30]

Whether that prosecutorial jurisdiction is truly subject to defined limitations is the subject of much debate. The statute plainly indicates that the independent counsel's original jurisdictional grant extends beyond the matters preliminarily investigated by the Attorney General. It mandates that the Special Division "shall assure that the independent counsel has adequate authority to *fully* investigate and prosecute the subject matter" giving rise to his appointment, "and all matters *related* to that subject matter."[31] To assure such full investigations, subsection (b)(3) further authorizes the investigation and prosecution of other federal crimes "that may arise out of the investigation or prosecution . . . including perjury, obstruction of justice, destruction of evidence, and intimidation of

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29. Currently, the three members of the Special Division are Peter Fay, United States Circuit Judge, Eleventh Circuit Court of Appeals; John D. Butzner, Jr., United States Circuit Judge, Fourth Circuit Court of Appeals; and David B. Sentelle, United States Circuit Judge, District of Columbia Circuit Court of Appeals. *See* Wilkinson & Ellis, *supra* note 19, at 1536. Judge Sentelle describes the assignment process, in general, as follows:

> We maintain a talent book, but it is, by no means, exclusive, that contains the names and brief biographies of a large number of attorneys around the country whom we consider as possibilities for independent counsel. Those names can come to us from anywhere–first, from Judge Butzner's institutional memory or our own official institutional memory where we've accumulated names in prior instances. We don't throw them away. We keep them in the book for the next time....
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> So my memory, John's contacts in the judiciary, and at Judge Butzner's suggestion, we obtain from the Administrative Office of the Courts the names of the most recent [sic] resigned judges in the last several years. We also just get suggestions from attorneys and judges who just call us or mail us the names of people who they think would be good. We keep virtually all of them and we review that talent book, winnow it down to a short list, take off anybody who we see has obvious conflicts of any sort, and then we call them and see if they're interested in meeting with us and interview and decide if they should be an independent counsel....
>
> [T]he purpose of the independent counsel statute–and I want to underline the "independent"–is to find a special prosecutor or independent counsel who is free of connection with the administration that is under investigation. So if you have someone who is politically connected with the President or with the covered individual who is the subject of the investigation, that person doesn't have the kind of independence contemplated by the statute and we wouldn't choose that person. Beyond that, political affiliation per se is not really a consideration; it exists.

Wilkinson & Ellis, *supra* note 19, at 1537-38.

30. *See* 28 U.S.C. § 593(b)(1).

31. 28 U.S.C. § 593(b)(3) (emphasis added).

witnesses."[32]

This original jurisdictional grant may be further expanded upon request of the Attorney General to the Special Division.[33] If, for example, the independent counsel encounters evidence of criminal infractions not within the original jurisdictional grant, he may present such information to the Attorney General for preliminary investigation.[34] Unlike the ninety day period delineated in section 592(a), the Attorney General has thirty days from the date the information is received to complete this investigation.[35] The Attorney General's already sharply limited investigative and qualitative review authority is further restricted by the qualification that she "give great weight to any recommendations of the independent counsel."[36] If, after giving such deference, the Attorney General determines that there are reasonable grounds to warrant further investigation, the Special Division shall expand the independent counsel's original jurisdictional grant accordingly.[37] Consistent with section 592(f), the Attorney General's decision not to seek expansion of the independent counsel's jurisdiction is not subject to judicial review.[38]

Once appointed, the independent counsel is vested with the authority to "appoint, fix the compensation [subject to certain compensatory limitations], and assign the duties of [his] employees as such independent counsel considers necessary (including investigators, attorneys, and part-time consultants)."[39] Although theoretically independent from the executive branch, the independent counsel may avail himself of assistance from the Department of Justice. Such assistance, if requested, is potentially broad in scope, and its provision is mandatory. Specifically, the Department of Justice, upon request, must provide:

> access to any records, files, or other materials relevant to

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32. *Id.*
33. *See* 28 U.S.C. § 593(c)(1).
34. *See* 28 U.S.C. § 593(c)(2)(A).
35. *See id.*
36. *Id.*
37. *See* 28 U.S.C. § 593(c)(2)(C). The independent counsel's jurisdictional grant is also expanded should the Attorney General fail to make a recommendation to the Special Division within the thirty-day period. *See id.*
38. *See* 28 U.S.C. § 593(c)(2)(B).
39. 28 U.S.C. § 594(c).

> matters within such independent counsel's prosecutorial jurisdiction, and the use of the resources and personnel necessary to perform such independent counsel's duties. At the request of an independent counsel, prosecutors, administrative personnel, and other employees of the Department of Justice may be detailed to the staff of the independent counsel.[40]

Costs associated with the "establishment and operation" of the independent counsel's office are incurred by the Department of Justice.[41] Indeed, the independent counsel has virtually unchecked discretion with respect to expenditures. The most notable budgetary "restrictions" contained in the statute require the independent counsel to "conduct all activities with due regard for expense," and to "authorize only reasonable and lawful expenditures."[42] In addition, the independent counsel is required to prepare reports two times per year detailing expenditures incurred during specified six-month periods.[43] The Comptroller General, in turn, conducts financial assessments of these reports and submits the results to various Senate and House committees.[44]

During the prosecutorial process, the independent counsel may avail himself of all the investigative techniques traditionally employed by the Department of Justice, including use of the grand jury, immunity grants, subpoena requests, and indictments.[45] Either the Attorney General or the Special Division may expand an independent counsel's jurisdictional mandate by referral of a matter related to the original jurisdictional grant.[46]

The independent counsel is required to submit annual reports to Congress describing the progress of the investigation or prosecution, and justifying the office's expenditures.[47] The independent counsel is authorized, however, to withhold information it considers confidential.[48] Distinct from this

40. 28 U.S.C. § 594(d)(1).
41. 28 U.S.C. § 594(d)(2).
42. 28 U.S.C. § 594(l)(1)(A)(i), (ii).
43. *See* 28 U.S.C. § 596(c)(1).
44. *See* 28 U.S.C. § 596(c)(2).
45. *See* 28 U.S.C. § 594(a).
46. *See* 28 U.S.C. § 594(e).
47. *See* 28 U.S.C. § 595(a)(2).
48. *See id.*

annual obligation, the independent counsel is further required to submit to the Special Division a final report providing a complete description of the investigations undertaken and of any prosecutions.[49] This report, which is submitted at the conclusion of the independent counsel's work, may be distributed to Congress or the public if deemed appropriate by the Special Division.[50] The independent counsel is further obligated to inform the House of Representatives of any information received that "may constitute grounds for an impeachment" if such information is "substantial and credible."[51]

The Attorney General is empowered to remove an independent counsel from his duties "only for good cause, physical or mental disability . . . or any other condition that substantially impairs the performance of such independent counsel's duties."[52] If an independent counsel is removed, the Attorney General must submit a report to the Special Division and certain congressional committees detailing the reasons underlying the removal.[53] In contrast to sections 592(f) and 593(c)(2)(B), which prohibit judicial review of the Attorney General's determinations not to seek independent counsel investigation, an independent counsel may seek review of an Attorney General's removal decision in the United States District Court for the District of Columbia.[54]

If an indictment is not returned against the subject of the independent counsel probe, that individual may apply to the Special Division for reimbursement of reasonable attorneys fees.[55] Prior to any such award, the Attorney General and independent counsel shall have an opportunity to address the sufficiency of the documentation in support of the fee request, the need or justification for the fees, whether each fee item would have been incurred but for the independent counsel investigation, and the reasonableness of the fees requested.[56]

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49. *See* 28 U.S.C. § 594(h)(1)(B).
50. *See* 28 U.S.C. § 594(h)(2).
51. 28 U.S.C. § 595(c).
52. 28 U.S.C. § 596(a)(1).
53. *See* 28 U.S.C. § 596(a)(2).
54. *See* 28 U.S.C. § 596(a)(3).
55. *See* 28 U.S.C. § 593(f)(1).
56. *See* 28 U.S.C. § 593(f)(2).

III. CRITICAL ANALYSIS

A. Return Prosecution Function to the Executive Branch

The Kenneth Starr investigation and the statute's upcoming expiration in 1999 have prompted a proliferation of suggested statutory reforms and other prosecutorial alternatives. Of particular note is an intriguing article by Julie O'Sullivan, associate professor at Georgetown University Law Center, who advocates the dissolution of the independent counsel statute and a return of the prosecutorial function to the executive branch.[57]

First, Professor O'Sullivan argues that the stated objective of the independent counsel statute–public reassurance that high-ranking executive branch officials will be fairly and reliably subjected to criminal investigation and prosecution–is not satisfied under the current regime.[58] To this end, she analyzes the statute's application in low-profile and high-profile cases respectively.[59] In low-profile matters, she argues that the statute is frequently invoked unnecessarily. Given the negligible public, media, and political attention characteristic of such cases, Professor O'Sullivan submits that there is little likelihood that "political pressure will derail the appearance or reality of prosecutorial fairness."[60] Thus, in the absence of any real or apparent conflict of interest, invocation of the independent counsel mechanism, she contends, is inconsistent with the underlying rationale of the statute and unnecessarily displaces the Department of Justice in a majority of prosecutions.[61] Professor O'Sullivan further argues that the greater public, media, and political awareness attendant to high-profile cases inevitably generates partisan commentary, which maligns the integrity and impartiality of the

57. O'Sullivan, *supra* note 4, at 463-64.

58. *See id.*

59. Jamie S. Gorelick agrees that the Department of Justice is usually capable of conducting impartial investigations: "I think that it undermines our system of justice to say that our primary institution of justice, the Department of Justice, cannot find the wherewithal, with all of those career prosecutors, with only a very thin overlay of political appointees, to investigate most cases." Wilkinson & Ellis, *supra* note 19, at 1532.

60. O'Sullivan, *supra* note 4, at 464, 475-79.

61. *See id.*

independent counsels and the Special Division.[62] These attacks, she contends, undercut the statute's public confidence rationale.

> [I]n cases where the political stakes are high-where, for example, the allegations of misconduct concern the President or Attorney General-the growth of the perceived function and importance of the [independent counsel] mechanism has heightened the political consequence of [independent counsel] investigations . . . . Recent experience demonstrates that the favored means by which to blunt the political damage posed by an [independent counsel] investigation is to attack as biased the [independent counsel], or the judges that appoint him . . . . [I]n cases of potentially great political import it creates partisan incentives to generate the very "appearance" problems that the statute sought to erase . . . . [T]he political dynamics of the statute mean that in the high-profile cases at the heart of the statute partisans will seek to destroy that which the statute is designed to further: public confidence in the integrity of the results of the independent investigation.[63]

To "promote[] public confidence,"[64] it is imperative that a prosecutorial system concern itself with actual fairness as well as apparent fairness. Thus, any prosecutorial process ultimately adopted must produce fair litigative results and be fair in appearance. Though compelling, Professor O'Sullivan's focus upon low-profile and high-profile cases as a measure for assessing the utility of the independent counsel statute is misplaced. The shortcomings of this analysis lie in its assessment, not of actual fairness, but of the appearance concept. In assessing appearance, Professor O'Sullivan's focus is external-upon the extent of public, press, and political attention. However, an appearance of impropriety is not, and indeed should not be, assessed pursuant to such criteria. Rather, the appearance of a conflict has abstract significance, irrespective of attendant public, press, and political attention.

In *Young v. United States ex rel. Vuitton et Fils S.A.*,[65] the United States Supreme Court noted the dangers, both real and apparent, to prosecutorial integrity and individual litigants

62. *See id.* at 464.
63. *Id.*
64. *Id.* at 475.
65. 481 U.S. 787 (1987).

inherent in prosecutions compromised by conflicts of interest:

> Prosecution by someone with conflicting loyalties "calls into question the objectivity of those charged with bringing a defendant to judgment." . . . It is a fundamental premise of our society that the state wield its formidable criminal enforcement powers in a rigorously disinterested fashion, for liberty itself may be at stake in such matters. We have always been sensitive to the possibility that important actors in the criminal justice system may be influenced by factors that threaten to compromise the performance of their duty . . . . Furthermore, appointment of an interested prosecutor creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general . . . .
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> Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life. For this reason, we must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice.[66]

Robert H. Aronson, Professor at the University of Washington School of Law, writes:

> The admonition that "[a] lawyer should avoid even the appearance of impropriety" is particularly applicable to potential conflicts of interest. Fostering public confidence in the impartiality of the legal system and the integrity of the legal profession requires more of a lawyer than not being overtly influenced by interest other than those of his client. Because the appearance of impropriety can be just as damaging as actual impropriety to public respect for the law and clients' belief in their attorney's loyalty, attorneys must ensure that their conduct does not reasonably appear to have been influenced by conflicting interests.[67]

Fostering public confidence in the integrity and impartiality

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66. *Id.* at 814 (citations omitted). The lower court had appointed, as a contempt prosecutor, a person who also represented an interested party in the underlying civil action. The Supreme Court held that harmless error analysis was not applicable to this situation. *See id.* at 809-14.

67. Robert H. Aronson, *Conflict of Interest*, 52 WASH. L. REV. 807, 810 (1977); *see* Michael P. Ambrosio & Denis F. McLaughlin, *The Redefining of Professional Ethics in New Jersey Under Chief Justice Robert Wilentz: A Legacy of Reform*, 7 SETON HALL CONST. L.J. 351, 398 (1997).

of the legal system thus underlies the appearance of impropriety doctrine. To obtain this confidence, the integrity of the prosecutorial process must be publicly evident. Therefore, a prosecutorial system must ensure that it adopts and implements procedures that are impartial, both in reality and in appearance. Integrity must emanate from within the system.

Professor O'Sullivan's assessment of the independent counsel statute, however, is based upon a barometric assessment of *external* criteria–public, media, and political attentiveness. While it is thoughtful and insightful, I ultimately disagree with this approach. The appearance of impropriety doctrine, and thus the utility of the statute, does not depend upon external affirmation.

Nor does the doctrine discriminate among cases, whether they be high-profile or under seal. It has independent significance. Avoiding improper appearances is significant not only to the public at large, as Professor O'Sullivan acknowledges, but *also to the individual client, target, or defendant.* They, too, have perceptive interests that must be respected during the prosecutorial process–interests that have not escaped congressional recognition.[68]

In the context of independent counsel assessment and reform, the appearance of impropriety concept must be fully appreciated. To date, the structure of the statute has respected this principle.[69] Indeed, as detailed in the following discussion of Watergate and the legal battle over presidential tapes, this very concern of avoiding the inherent appearance problems inextricably associated with internal executive branch

68. *See* 139 CONG. REC. S425-26 (daily ed. Jan. 21, 1993) (statement of Sen. Cohen) ("I believe that an institutional mechanism, such as the independent counsel law, will always be necessary to guard against inherent conflicts of interest that will occur whenever the executive branch is called upon to investigate itself. Not only does a statutory process enhance public confidence in the handling of prosecutions involving officials, but it also helps the officials themselves who have been cleared by such a process, by removing the suspicion that the official was let off easy by his or her own administration.").

69. In addition to the foregoing critique, the argument that the Department of Justice should handle high-profile prosecutions, given the fervor of partisan attacks upon the independent counsel and the Special Division, fails because any internal investigation conducted by executive branch prosecutors is subject to the same partisan-based criticisms. *See* Susan Schmidt, *Reno: No Part of Funds Probe Yet Completed; 'Every Lead' Will be Pursued Attorney General Declares*, WASH. POST, Oct. 13, 1997, at A1 (stating that Attorney General Janet Reno was criticized by Republican Senator Dan Burton for not naming an independent counsel to investigate alleged fund-raising violations).

investigations prompted Congress to enact the independent counsel legislation.[70]

In August 1973, Judge John J. Sirica[71] ordered President Richard Nixon to comply with a subpoena issued by Special Prosecutor Archibald Cox[72] requesting the production of audio tapes made by the President in the Oval Office.[73] Cox believed that the tapes, which included conversations with high-ranking executive branch officials, might contain evidence implicating the President in the Watergate break-in.[74] Initially, however, Nixon refused to comply with the court's order. Instead, Nixon announced that a transcript summarizing the conversations would be provided in lieu of the actual tapes.[75] The President concurrently announced that he had "*ordered Cox, 'as an employee of the executive branch* to make no further attempts by judicial process to obtain tapes, notes, or memoranda of presidential conversations.'"[76] After Cox refused Nixon's proposed summary and his directive, Nixon ordered that Cox be fired.[77] Attorney General Elliot J. Richardson, who was ordered to implement the presidential directive, refused and submitted his resignation. Deputy Attorney General William Ruckelshaus similarly refused and resigned as well. Cox was ultimately discharged by Solicitor General Robert Bork. This sequence of events became known as the "Saturday Night Massacre."[78]

In the face of "fierce public reaction to the 'Saturday Night Massacre,'" Nixon changed course, appointed Leon Jaworski as the new Special Prosecutor, and eventually released transcripts implicating the President in the Watergate conspiracy.[79] By fall 1973, the public, given its increasing "distrust of major

70. *See* O'Sullivan, *supra* note 4, at 463, 468-69; EASTLAND, *supra* note 4, at 16-30.

71. Judge Sirica, of the United States District Court for the District of Columbia, was assigned to handle the Watergate prosecutions. *See* EASTLAND, *supra* note 4, at 17-18.

72. Attorney General Elliot J. Richardson appointed Cox to the position of Special Prosecutor. *See id.* at 18.

73. *See* JOHN J. SIRICA, TO SET THE RECORD STRAIGHT, 136, 159 (1979). Contrary to Cox's request, however, Sirica ordered that the tapes be turned over to the court for an *in camera* inspection. *See id.* at 159.

74. *See id.* at 136-39.

75. *See id.* at 166; EASTLAND, *supra* note 4, at 19.

76. SIRICA, *supra* note 73, at 166 (emphasis added).

77. *Id.* at 166-67; EASTLAND, *supra* note 4, at 19.

78. *See* EASTLAND, *supra* note 4, at 19; SIRICA, *supra* note 73, at 167.

79. JOHN DEAN, BLIND AMBITION 343 (1976); EASTLAND, *supra* note 4, at 19.

institutions," demanded that Watergate be investigated thoroughly.[80] Although some believe that this public sentiment predated the Watergate scandal,[81] all agree that Watergate, at a minimum, contributed to the decline in public confidence in our public institutions.[82]

As a result of this public distrust, the Ethics in Government Act containing the special prosecutor provisions was signed into law in 1978.[83] By this time, many questioned the executive branch's ability to conduct an impartial internal investigation.[84] Since 1978, public distrust has been the catalyst for three successive reauthorizations of the law.[85] As with the original enactment, Congress has steadfastly reiterated the importance of avoiding appearances of impropriety during each reauthorization.[86]

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80. GLADYS ENGLE LANG & KURT LANG, THE BATTLE FOR PUBLIC OPINION 135 (1983).

81. *See id.* at 244.

82. *See id.* at 246. According to a Harris poll, the percentage of people in 1973 who had a "great deal" or "quite a lot" of confidence in the executive branch and the White House was 19% and 18% respectively. *Id.* at 316 tbl.14; *see also* O'Sullivan, *supra* note 4, at 463; Stephen L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105, 107 (1988).

83. Title VI of the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824, 1867-75 (1978) (codified as amended at 28 U.S.C. §§ 591-599 (1994)); *see In re* Olson, 818 F.2d 34, 41-43 (D.C. Cir. 1987) (per curiam).

84. *See* EASTLAND, *supra* note 4, at 16.

85. Ethics in Government Act Amendments of 1982, Pub L. No. 97-409, 96 Stat. 2039 (codified as amended at 28 U.S.C. §§ 591-599 (1994)); Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293 (codified at 28 U.S.C. §§ 591-599 (1994)). The statute expired in 1992 but was reauthorized in 1994. Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, 108 Stat. 732, 733 (codified at 28 U.S.C. §§ 591-599 (1994)).

86. Eastland notes:

> The answer is evident: Congress was persuaded by the argument of "appearances." Thus, Sam Dash, in supporting extension [of the 1983 Reauthorization Act] said in his testimony that the issue is "one of appearances of conflict." It's not what an Attorney General might actually do in a given case, he said, but "what the public might feel, the appearances." Likewise, Washington lawyer Lloyd Cutler testified: "[I]t's a matter of appearances . . . to preserve faith in the system." Co-sponsor [Sen. Warren] Rudman went so far as to say that he did not doubt the ability of the Justice Department to investigate cases fairly; he simply wanted "to prevent potential conflicts of interest that would give rise to an appearance that the Attorney General would be incapable of impartially investigating allegations."

EASTLAND, *supra* note 4, at 77.

> This legislation [Independent Counsel Reauthorization Act of 1987] is of vital concern to our country and to the Congress, because the independent counsel statute addresses one of the most delicate tasks facing any government: the investigation and prosecution of high-ranking government officials for criminal misconduct. In such politically sensitive cases, the public must have confidence that the investigations are being handled fairly and the suspected

The appearance of impropriety, however, is not the sole conflict-of-interest principle applicable to this discussion. An equally compelling conflict-of-interest policy, similarly undervalued in Professor O'Sullivan's proposal to restore the prosecutorial function to the executive branch, is fairness to the accused.

Professor Charles Wolfram observes that there are, in essence, two types of personal interests among government attorneys that can produce a conflict of interest: financial and emotional.[87] Illustrative of the former interest is *United States v. Heldt*.[88] In *Heldt*, the District of Columbia Circuit Court of Appeals addressed, and rejected, a claim by the appellants that the trial court erred in refusing to disqualify the prosecutors given an alleged disqualifying conflict of interest.[89] In so holding, the D.C. Circuit observed the importance of

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> officials are receiving no better and no worse treatment than anyone else in our criminal justice system.
>
> For the government to enjoy the trust of our people, our people need to know that, in criminal cases involving high government officials, cronyism and political protectionism will not be substituted for justice.
>
> That was the purpose of the independent counsel statute when it was enacted in 1978 and reauthorized in 1982. It remains our objective as we prepare to reauthorize the statute once more, before its current expiration date of January 2, 1988.

133 CONG. REC. S7304 (daily ed. May 28, 1987) (statement of Sen. Levin).

> The law serves two ends, both equally important in our democratic society. One is that justice be done, and the other that it must appear to be done. The appearance of justice is just as important as justice itself, in terms of maintaining public confidence in our judicial system. Such confidence is undermined when the administration of the law appears to be compromised.
>
> By providing for a judicially appointed independent counsel to handle such cases in limited circumstances, the process established by the Ethics Act helps to assure the public that criminal wrongdoing by top-level government officials will not be buried or tolerated, and that top-level officials will not be treated as if they are above the law.

139 CONG. REC. S425 (daily ed. Jan. 21, 1993) (statement of Sen. Cohen).

87. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 453-54 (1986).

88. 668 F.2d 1238 (D.C. Cir. 1981).

89. *See id.* at 1278. Appellants argued that the prosecutors should have been recused from the litigation because some of the prosecutors within the United States Attorney's Office were defendants in a civil suit filed ten days after a governmental search of offices belonging to the Church of Scientology. Appellants were members of this church. Appellants contended that dismissal of the civil case was made a "bargaining chip" during plea negotiations. Thus, they argued that the prosecutors were attempting to use the criminal prosecution to gain advantage in the civil law suit. Although the appellants characterized this as an emotional conflict of interest, the court addressed the obvious pecuniary interest possibility as well. *Id.* at 1275-78.

preserving prosecutorial integrity and the rights of the citizenry:

> It is of course improper for a prosecutor to participate in a case when he has a pecuniary interest in the outcome. The threat posed to a prosecutor's interests in his personal and professional reputation by a *bona fide* civil action alleging bad faith in the performance of official duties should give rise to a similar concern. The conflict in such cases arises because a public prosecutor, as the representative of the sovereign, must "seek justice–to protect the innocent as well as to convict the guilty." Our system of justice accords the prosecutor wide discretion in choosing which cases should be prosecuted and which should not. If the prosecutor's personal interest as the defendant in a civil case will be furthered by a successful criminal prosecution, the criminal defendant may be denied the impartial objective exercise of that discretion to which he is entitled.[90]

A disqualifying emotional personal interest is exemplified by *People v. Doyle*.[91] In *Doyle*, a Michigan Appeals Court affirmed a trial court's decision to disqualify an elected county prosecutor and his entire staff based upon a familial relationship between one of the prosecutors and a named defendant.[92] As in *Heldt*, preserving prosecutorial integrity and fairness to individual defendants were central to the Court's reasoning:

> Courts around the country recognized two policy considerations underlying the disqualification of prosecuting attorneys for a conflict of interest. The first policy served by the rule is fairness to the accused. It is universally recognized that a prosecutor's duty is to obtain justice, not merely to convict. While the prosecutor must prosecute vigorously, he must also prosecute impartially . . . . [T]he California Supreme Court recognized that the prosecutor's discretionary functions are not confined to pretrial matters. The prosecuting attorney, like other lawyers, has the ability to conduct the case in the manner he chooses. "A district attorney may thus prosecute vigorously, but both the accused and the public have a legitimate expectation that his zeal, as reflected in his tactics at trial, will be borne of objective and impartial consideration of each individual case." . . . The second policy served by disqualification of a prosecuting attorney for conflict of

90. *Id.* at 1275-76 (citations omitted).

91. 406 N.W.2d 893 (Mich. Ct. App. 1987). *Doyle* involved two cases consolidated on appeal.

92. *See id.*

> interest is the preservation of public confidence in the impartiality and integrity of the criminal justice system . . . . American courts have consistently held that the appearance of impropriety is sufficient to justify disqualification of a prosecuting attorney . . . . Whether [the prosecuting attorney's] personal interest in the *Doyle* case would appear to incline him in favor of or against Doyle is irrelevant. Recusal is equally appropriate where the prosecuting attorney has a personal interest in convicting the accused, since the state's interest is in attaining impartial justice, not merely a conviction . . . .[93]

In the case of the independent counsel, we have a situation akin to the "emotional" personal interest situation described in *Doyle*. When the executive branch investigates itself, it presents an "emotional" conflict; a conflict that suggests that certain high-ranking officials may receive more lenient consideration, given their executive branch affiliation, than others dissimilarly situated. Admittedly, in the context of such investigations the "emotional" conflict at issue will typically produce a perception, if not a reality, that the target will be the beneficiary of *favorable* prosecutorial consideration. This may not always be the case, however. In some instances, targets may be prosecuted, not on account of the strength of the evidence or the nature of the alleged criminal offense, but to appease political opponents.[94] Irrespective of the prosecutorial inclination, or appearance thereof, a disqualifying "emotional" conflict of interest nonetheless exists whenever the executive branch investigates itself. In any such investigation, the prosecutor is no longer a disinterested participant. His conflicting loyalties will necessarily impair his impartiality. In any prosecutorial system, it is imperative that the rights of the

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93. *Id.* at 898-99 (citations omitted). *See* Wright v. United States, 732 F.2d 1048 (2d Cir. 1984) (finding that a long-standing adversarial relationship between the defendant and the wife of a prosecutor created the appearance of a conflict of interest on the part of the prosecutor; however, the appellate court refused to reverse the trial court since this was a habeas petition and the type of relief requested could not be granted during a collateral proceeding).

94. *See* Tom Rhodes, *Reno To Work With FBI on Funds Scandal*, TIMES (London), Oct. 17, 1997, at 15 ("Janet Reno, the US Attorney-General, has tried to appease Republican critics by promising not to close any part of her inquiry into fundraising by President Clinton or Vice-President Al Gore without prior FBI approval."); Albert R. Hunt, *Politics & People: Will Justice Be a Bystander as Campaign Finance Laws Erode?*, WALL ST. J., Nov. 13, 1997, at A23 (speculating about the subsequent prosecution of President Clinton if "Attorney General Janet Reno bows to Republican pressures and names an independent counsel" to investigate alleged campaign finance violations).

accused be protected. If the prosecutorial function were returned to the executive branch, however, the presence of an interested prosecutor would necessarily compromise this principle.

In addition, Professor O'Sullivan contends, irrespective of the aforementioned conflict-of-interest arguments, that the independent counsel statute does not provide "better justice" than if it were left to the Department of Justice to pursue the investigation and prosecution.[95] In this regard, Professor O'Sullivan argues that, given certain flaws in the statute itself, the independent counsel, ironically, is more likely to render uneven justice.[96]

Professor O'Sullivan freely admits that her conclusions, at least in part, are influenced by her prior experiences as an Assistant United States Attorney.[97] Indeed, as a former Assistant United States Attorney in the District of Nevada and the District of Columbia, I can attest to the validity of the professor's impressions as to the absence of political consideration in regard to the assignment and conduct of cases.

A historical retrospective of the independent counsel investigations, however, paints a different picture. The independent counsel mechanism has demonstrated, with certain exceptions, that it is fully capable of exonerating the accused, convicting the guilty, and operating in an efficient manner. Several notable investigations absolving executive branch officials of wrongdoing have been conducted expeditiously and with limited expense.[98]

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95. *See* O'Sullivan, *supra* note 4, at 475.

96. *See id.* ("[T]he statute gives an [independent counsel] an excess of time, means and incentive to pursue a far greater number of people, over a wider investigatory landscape, with less justification, and at greater human, financial and institutional cost than is reasonably necessary to promote the reality, or appearance, of evenhanded justice. In most cases, [Department of Justice] prosecutors, who have a necessarily broader focus and are privy to a store of institutional knowledge and experience, are better positioned to exercise their discretion in a professional and equitable manner, and are accountable if they do not.").

97. *See id.* at 476. ("My own conclusion (which I freely concede is colored by my experiences in the Southern District of New York, where Assistants' political affiliations were unremarked and completely irrelevant to the assignment or conduct of cases) is that it is far more reasonable to assume that Executive Branch prosecutors will be fair and professional than not.").

98. There have been twenty independent counsel investigations since the independent counsel law was enacted. Eleven have concluded without returned indictments. Todd S. Purdum, *Former Special Counsels See Need to Alter Law That Created Them*, N.Y. TIMES, Aug. 11, 1998, at A1, 16.

Investigation of Hamilton Jordan

Illustrative of such an investigation is that of President Jimmy Carter's Chief of Staff, Hamilton Jordan.[99] This investigation stemmed from a December 1978 raid by Internal Revenue Service agents of Studio 54, a discotheque located in New York City.[100] As a result of this raid, a twelve-count indictment was returned charging several individuals with, *inter alia*, "conspiracy to evade income taxes by failing to report in excess of $2,500,000 of cash receipts of Studio 54."[101] During plea negotiations with Steven Rubell, one of those indicted, the Government was informed that Rubell may have witnessed Jordan in possession of cocaine while both were at the discotheque.[102]

After a preliminary investigation by then-Attorney General Benjamin R. Civiletti and submission of a report to the "Special Prosecutor Division,"[103] Arthur H. Christy was appointed special prosecutor and was ordered to investigate Jordan for a possible violation of 21 U.S.C. § 844(a) (possession of cocaine).[104] Jordan's principal accuser was Rubell. Rubell informed the special prosecutor and the Federal Bureau of Investigation that he met Jordan in the basement of Studio 54, that at the time Jordan was with several other individuals, and that he witnessed Jordan, while in the presence of a drug distributor known as "Johnny C," in possession of cocaine near some pinball machines.[105] Rubell's inability to recall critical facts and his vacillating version of events ultimately undermined his credibility, however. As noted by Christy:

> Mr. Rubell is unable to recall who told him that Hamilton Jordan had asked for cocaine; who introduced him to Hamilton Jordan; any conversation with Mr. Jordan; that Johnny C was with him; whether Johnny C had given Hamilton Jordan cocaine; the identity or description of the other man Mr. Rubell said was with Mr. Jordan; what drug Mr. Jordan took, if he took anything; or the manner in which

99. *See Special Prosecutor Provisions of Ethics in Government Act of 1978: Hearings Before the Subcomm. on Oversight of Gov't Management of the Senate Comm. on Governmental Affairs*, 97th Cong. 359 (1981).

100. *See id.* at 383-91.

101. *Id.* at 384.

102. *See id.* at 387.

103. *Id.* at 359-63.

104. *See id.* at 367.

105. *See id.* at 387, 395-400.

> the drug was taken. Finally, Mr. Rubell admitted that when he said on the 20/20 Program that Mr. Jordan had taken "a hit in each nostril" he could not say this of his own independent recollection, but only because that is what he recalled Johnny C had told him.[106]

Interviews with Johnny C produced similarly vague accounts. Johnny C was unable to identify Jordan or to corroborate that the distribution occurred the night Jordan was present at the discotheque.[107] Finally, interviews with Jordan and the other individuals in his company at Studio 54 revealed no support for the allegation.[108] In the end, Christy submitted a report, dated May 28, 1980, finding no basis to charge Jordan with possession of cocaine.[109] Christy's investigation was completed in approximately six months. In that time, Christy interviewed and acquired the grand jury testimony of all the principal witnesses in the case and produced a report which found no basis for prosecution.[110] The total cost of the investigation was $182,000.[111]

Investigation of Edwin Meese

The independent counsel investigation of former Attorney General Edwin Meese is considered by many to be a model of an efficiently conducted investigation.[112] The investigation

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106. *Id.* at 399-400.

107. *See id.* at 405.

108. *See id.* at 414-29.

109. *See id.* at 378-83. Christy also investigated allegations that Jordan used cocaine while visiting an eating establishment in California. Christy similarly found these allegations baseless. *See id.* at 424-29.

110. *See id.* Timothy Kraft, Assistant to the President in Charge of the Office of Appointments, Personnel and Political Coordination, was with Jordan at Studio 54. *See id.* at 391-92. Kraft was also the subject of an independent counsel investigation. After approximately three months, Special Prosecutor Gerald J. Gallinghouse concluded his investigation, finding no basis to prosecute Kraft. The investigation costs totaled $3,300.00. *See id.* at 291; S. REP. NO. 103-101, at 13 (1993).

111. *See* S. REP. NO. 103-101, at 13.

112. Professor Archibald Cox: "I think the first investigation of Edwin Meese by Jacob Stein was probably a case for which something like the independent counsel procedure is needed, and that the investigation was pressed forward quickly and efficiently," Wilkinson & Ellis, *supra* note 19, at 1579; Theodore B. Olson: "Jake Stein conducted the best model of an investigation; and I say that because it was quick, it was relatively short in duration, and it was as quiet as Jake could make it. Everybody knew what was happening because it involved the nominee to be Attorney General of the United States. But Jake is a very discreet guy and was not talking to the press and conducted it in a very, very discreet way," *id.* at 1581; Terry H. Eastland: "[Jacob Stein] began on April 2, 1984, I believe it was, and issued his report on the 20th of September. That was a quick investigation and it was thorough, and it was regarded as such. The

emanated from an array of accusations directed at Meese during Senate hearings on his nomination to be President Ronald Reagan's Attorney General.[113] In all, the independent counsel investigated eleven separate allegations regarding Meese.[114]

Thematic of several of the inquiries was the allegation that Meese had accepted financial favors from individuals in exchange for federal jobs.[115] One such allegation concerned a January 7, 1981, loan of $15,000 made to Ursula Meese, Edwin Meese's spouse, from Edwin W. Thomas.[116] Meese and Thomas, who both worked for President Reagan when he was governor of California, had a friendship that dated back to the late 1960s.[117] Meese was on Reagan's transition team after his presidential victory in 1980, and he asked Thomas to assist in the effort. Thomas accepted the invitation, and, in December 1980, he accepted another offer from Meese to become Assistant Counselor to the President.[118] Thomas left this post in February 1982.[119]

At the time of the loan, neither interest rates nor repayment schedules were discussed, and the loan was not reduced to writing.[120] Additionally, in 1979, Thomas had extended to Meese loans of $8,000 and $6,500 for a car purchase and home repairs, respectively, and in December 1981, money to pay property taxes.[121] The independent counsel, however, exonerated Meese of any criminal wrongdoing, finding "no direct evidence linking the offer of the loan, or the subsequent making of the loan, to Mr. Meese's offer of a job to Mr.

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important aspect of his investigation was the fact that in his report he did not go beyond what I think is the proper mandate of any prosecutor. He did not opine on the ethics, if you will, of Mr. Meese, instead speaking directly to the issues that were before him. So that is what made that a good and, I think, probably the best model, if you will, of any investigation we have had." *Id.* at 1582.

113. *See* 131 CONG. REC. S2592 (daily ed. Feb. 19, 1985).

114. *See* 131 CONG. REC. S2768 (daily ed. Feb. 20, 1985).

115. *See* 131 CONG. REC. S2793 (daily ed. Feb. 20, 1985).

116. *See Confirmation of Edwin Meese III: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong. 358 (1985). Ursula Meese sought the loan in order to purchase stock for her children in the Biotech Capital Corporation. *See id.*

117. *See id.*

118. *See id.*

119. *See* 131 CONG. REC. S2797 (daily ed. Feb. 20, 1985). "In the fall of 1982, Mr. Thomas' wife became an attorney-examiner with the Merit Systems Protection Board and his son took a job with the Department of Labor." *Id.*

120. *See Meese Hearings*, *supra* note 117, at 358.

121. *See id.* None of the loans were reduced to writing and all were without interest.

Thomas."[122]

Although most of the allegations centered upon a financial *quid pro quo*,[123] other allegations were pursued by the independent counsel as well. Principal among them was a controversy relating to Meese's status and rank in the Army Reserve.[124] In June 1981, Meese, who since 1977 had been a member of the Retired Reserve, was approached by Colonel Joseph Sullivan, General William Berkman's[125] program and liaison officer, to discuss the prospect of changing Meese's army status to active.[126] After much discussion among Army officials, Meese's status change was approved.[127] During this same time period, General Berkman, who at the time was Army Reserve Chief, sought reappointment for a successive term. Meese expressed his support for Berkman to Defense Secretary Caspar Weinberger and Army Secretary John Marsh. Berkman was ultimately reappointed.[128]

The independent counsel exonerated Meese of any criminal wrongdoing, finding "no direct evidence that Mr. Meese took action favorable to General Berkman in return for something done for Mr. Meese by General Berkman."[129] The independent counsel investigation that commenced on April 2, 1984, concluded on September 20, 1984, and expended only $312,000.[130]

The aforementioned cases are illustrative of the apolitical

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122. 131 CONG. REC. S2797 (daily ed. Feb. 20, 1985).

123. Meese was cleared of any criminal wrongdoing with respect to, *inter alia*: 1) loans extended to him in June and December 1981, from John R. McKean, who was nominated to positions on the U.S. Postal Board of Governors in October 1981 and January 1983; 2) loans extended to him in 1981 and 1982 by the Great American First Savings Bank (four bank officials, Gordon Luce, Edwin J. Gray, Marc Sandstrom, and Clarence Pendleton, were appointed to various federal posts during the Reagan Administration); 3) the appointment of Thomas J. Barrack, Jr., an attorney and real estate developer, who "assisted" the Meeses in the sale of their California home, to a position as Assistant Secretary of Commerce for Trade Development; and 4) "insider trading" based upon Meese's friendship with Dr. Earl Brian, Chief Executive Officer of Biotech Capital Corporation (Brian was nominated to the National Science Board). *See Meese Hearings, supra* note 116, at 359-66, 370-71 (1985).

124. *See id.* at 367.

125. Several years prior to this conversation, General Berkman was Meese's Reserve Commander. According to one report, however, their relationship was "limited and professionally based." 131 CONG. REC. S2796 (daily ed. Feb. 20, 1985).

126. *See Meese Hearings, supra* note 116, at 367.

127. *See id.*

128. *See* 131 CONG. REC. S2796 (daily ed. Feb. 20, 1985).

129. *Id.*

130. *See* S. REP. NO. 103-101, at 13 (1993).

investigations of executive branch officials and limited expenditures that have characterized many independent counsel investigations.[131] The yardstick by which the success of the independent counsel mechanism should be measured, however, should not be restricted to examinations of its high-profile exonerations and the brevity of its investigations. Its convictions must also be assessed.

Investigation of Michael Deaver

Michael Deaver, former Deputy Chief of Staff to President Reagan, was the first person convicted under the independent counsel law.[132] On May 29, 1986, Whitney N. Seymour, Jr., was appointed independent counsel to investigate allegations that Deaver violated the Ethics in Government Act through "particularly egregious" lobbying of executive branch officials.[133] Shortly after President Reagan's reelection in 1984, Deaver, who had served as a "top aide" to the President since 1980, resigned his position and began a consulting firm, Michael K. Deaver and Associates, approximately eight and one-half months after his departure.[134] In this capacity, Deaver served as a hired lobbyist and attempted, through various means, to contact and influence executive branch officials with respect to policy and other matters.[135]

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131. Additional independent counsel investigations fitting, to varying degrees, the above profile include: 1) the investigation of Raymond J. Donovan by Independent Counsel Leon Silverman (December 29, 1981 to September 10, 1982 and June 13, 1985 to October 22, 1987; total cost: $326,000); 2) the investigation of Theodore Olson by Independent Counsel Alexia Morrison (May 29, 1986 to March 1989; total cost: $1,500,000); 3) three confidential independent counsel investigations (combined total cost: $90,000), *see* S. REP. NO. 103-101, at 14; and 4) the investigation of the Clinton passport search by Independent Counsel Joseph E. diGenova (1992-1995; total cost: $2,800,000). *See Investigations by Independent Counsels*, PORTLAND OREGONIAN, Mar. 6, 1997, at A12.

132. *See* KATY J. HARRIGER, INDEPENDENT JUSTICE: THE FEDERAL SPECIAL PROSECUTOR IN AMERICAN POLITICS 6 (1992); Robert G. Solloway, Note, *The Institutionalized Wolf: An Analysis of the Unconstitutionality of the Independent Counsel Provisions of the Ethics in Government Act of 1978*, 21 IND. L. REV. 955, 956 (1988).

133. 135 CONG. REC. S11297-03 (daily ed. Sept. 19, 1989).

134. *Id.* at S11298-S11299.

135. *See id.* at S11298-S11300. At Deaver's trial, James H. Lake, former Director of Communications for George Bush during his 1988 campaign, defined lobbying as follows: "Lobbying is to make a direct appeal to a member of the executive branch of government or a member of Congress to try to persuade them to direct action for or against a bill, to approve policy or disapprove policy, go directly to the policy-making official responsible and ask for his support or lack of it or to support or oppose. That's lobbying." *Id.* at S11299.

Deaver's client list consisted of foreign countries, such as South Korea, Canada, and Saudi Arabia, and several prominent corporations, including Trans World Airlines, Smith Barney, Boeing, and Rockwell International.[136] In its first year, Deaver's firm amassed a minimum of $3 million in retainer commitments.[137] Indeed, his success prompted newspaper attention and eventual hearings before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, which investigated his lobbying practices.[138] Deaver, who testified at the hearings and before a federal grand jury, was eventually indicted by Seymour on five counts of committing perjury before both bodies.[139] He was ultimately convicted on three of the counts and sentenced to three years imprisonment (suspended), three years probation, and a $100,000 fine.[140]

Investigation of Michael Espy

Although beset with criticism and controversy,[141] the independent counsel investigation of former Clinton Agriculture Secretary Michael Espy, which commenced September 9, 1994,[142] has produced more than twelve convictions of individuals and corporations.[143] The various investigations stemmed from a press allegation that Tyson Foods, Inc., a poultry processing company, "was receiving lenient treatment from the Department of Agriculture on pending regulatory issues" and that "Espy had received some

136. *See id.* at S11300.

137. *See id.* at S11298.

138. *See id.* at S11297, S11300-S11301.

139. *See id.* at S11297.

140. *See id.* Deaver was convicted of lying before the committee concerning "whether he 'facilitated' a meeting between Reagan and South Korean trade representative Kim Kih-wan while Deaver represented South Korea on a $475,000-a-year contract." Andrew J. Glass, *Deaver Guilty of Telling Lies to Congress; Former White House Aide Denied Improper Lobbying*, ATLANTA CONST., Dec. 17, 1987, at A1. Deaver was also adjudged guilty of lying before a grand jury regarding his contacts within the Reagan administration, as well as his contacts with then Department of Transportation Secretary Elizabeth Dole and others on behalf of Trans World Airlines. *See id.*

141. *See* Robert L. Jackson, *Ride on Investigative Roller Coaster Another Independent Counsel Spent Big, Drew Big Criticism. But He Won Indictment of Cabinet Target*, L.A. TIMES, Mar. 9, 1998, at A5 (detailing criticisms of Independent Counsel Donald Smaltz).

142. *See In re* Espy, 80 F.3d 501, 502-03 (D.C. Cir. Indep. Couns. Div. 1996).

143. *See* Bill Miller & George Lardner, Jr., *Tyson Executive, Lobbyist Convicted of Espy Probe Charges*, WASH. POST, June 27, 1998, at A2. Espy himself was ultimately acquitted. *See* Bill Miller, *Espy Acquitted in Gifts Case*, WASH. POST, Dec. 3, 1998, at A1.

improper gifts."[144]

The convicted include Tyson Foods, Inc., which, on December 29, 1997, pled guilty to a single count of providing gratuities in excess of $12,000 to the former Secretary.[145] The prominent food company was ordered to pay a fine of $4,000,000 and an additional $2,000,000 to cover investigation costs incurred by the prosecution.[146]

In a separate trial, Jack L. Williams, a Tyson lobbyist, was also convicted of lying to federal investigators from the Department of Agriculture's Inspector General's Office and from the Federal Bureau of Investigation.[147] In addition, Robert H. Blackley, former Espy chief of staff, was convicted on three counts of giving false statements to federal investigators on a Public Financial Disclosure Report.[148] As of June 1998, the

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144. United States v. Espy, No. 96-198, 1996 WL 586364, at *1 (E.D. La. Oct. 9, 1996).

> The indictment [charging defendant Jack Williams] describes various interests of Tyson-Foods that were pending before [the Department of Agriculture] while Secretary Alphonso Michael ("Mike") Espy was Secretary of Agriculture, ¶¶ 12-16, and charges that gifts and perquisites worth $12,218 were given to or for the benefit of the Secretary, his girlfriend, and the then-Acting Assistant Secretary of Agriculture over a 13-month period from January 1993 to February 1994. The gifts and perquisites-seats to the 1993 Presidential inaugural gala, travel and lodging connected with a Tyson birthday party in Russellville, Arkansas, travel, lodging and tickets to a National Football Conference playoff game in Dallas, a Tyson foundation scholarship for the Secretary's girlfriend, and, for the Acting Assistant Secretary of Agriculture, a $13 basketball ticket and a first-class upgrade coupon for an airplane flight from Memphis to Washington National Airport—are the factual bases [for several counts of the indictment].

United States v. Williams, 7 F. Supp. 2d 40, 43 (D.D.C. 1998).

145. *See* Independent Counsel Donald C. Smaltz, *In re* Secretary of Agriculture, Summary of Prosecutions to Date, as of August 7, 1998, ¶ 16 (on file with author).

146. *See id.*; Peter Sinton, *Independent Counsel Online/Donald Smaltz is the First to Set Up a Web Site*, S.F. CHRON., June 18, 1998, at D1.

147. *See* Miller & Lardner, *supra* note 143. Archibald L. Schaeffer, III, a Tyson vice-president in charge of government and media relations, was also convicted on two counts of providing Espy with illegal gifts. *See id.*; *Tyson Executive Convicted of Giving Espy Illegal Gifts*, WALL ST. J., June 29, 1998, at B3. Schaeffer's convictions were subsequently overturned. *See* George Lardner Jr. & Bill Miller, *Judge Voids Convictions of 1 in Espy Gifts Case*, WASH. POST, Sept. 23, 1998, at A2.

148. *See Current Implementation of the Independent Counsel Act, Hearing Before the House Comm. On Gov't Reform and Oversight*, 105th Cong. 59-61 (1997) (statement of Independent Counsel Donald C. Smaltz). "As Chief of Staff, Blackley had significant input and considerable influence in many of the wide variety of USDA [United States Department of Agriculture] programs and decisions including government subsidies to agri-businesses. Blackley was convicted of three counts of lying to hide $22,000 he received in 1993, in violation of 18 U.S.C. § 1001, from Mississippi agri-businesses he previously represented. These businesses sought and received in excess of $400,000 in USDA subsidies in the one year that Blackley served as Espy's Chief of Staff, and Blackley attempted to influence and reverse a USDA decision not to provide one of

independent counsel investigation of Espy had expended approximately $14,000,000.[149]

Other Independent Counsel Investigations

Other convictions produced by independent counsel investigations include the 1987 conviction of Lynn Nofziger, former Assistant to President Reagan for Political Affairs.[150] Independent Counsel James McKay prosecuted Nofziger for alleged illegal lobbying on behalf of the Wedtech Corporation, a defense contractor. Nofziger, who was convicted after a jury trial "on three counts of communicating with officials at the White House," in violation of the Ethics in Government Act, later had his conviction reversed on appeal.[151] Also, an investigation of former Housing and Urban Development Secretary Samuel Pierce, Jr., headed by Independent Counsels Arlin M. Adams and Larry D. Thompson, produced twelve guilty pleas and four jury convictions.[152]

Undoubtedly, the most controversial independent counsel investigations to date have been the Iran-Contra investigation, conducted by Lawrence Walsh, and the Whitewater investigation, led by Kenneth Starr. Walsh was appointed to investigate an array of matters stemming from an alleged diversion of funds, obtained from Iran pursuant to United States arms sales to that country, to the Nicaraguan Contras in violation of congressional statutes and administration policy.[153] In the end, the investigation, which cost an estimated $47,900,000 and lasted approximately eight years, produced eleven convictions, seven by guilty plea and four by trial.[154] Starr's investigation of a failed Arkansas land deal involving

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those businesses with the amount of subsidies it requested." *Id.* at 59-60.

149. *See* Miller & Lardner, *supra* note 143.

150. *See* United States v. Nofziger, 878 F.2d 442 (D.C. Cir. 1989).

151. *Id.* at 443 (reversing conviction due to prosecution's failure to prove that "Nofziger had knowledge of the facts that made his conduct criminal"); *see* HARRIGER, *supra* note 132, at 6-7.

152. At issue in that investigation was alleged "fraud and favoritism in the awarding of HUD contracts." HARRIGER, *supra* note 132 at 7. The investigation lasted from 1990 to 1996 and expended approximately $25,800,000. *See Investigations by Independent Counsels*, *supra* note 131.

153. *See* HARRIGER, *supra* note 132, at 6.

154. Two of the convictions were reversed on appeal and other individuals were ultimately pardoned. *See Investigations by Independent Counsels*, *supra* note 131; S. REP. No. 103-101, at 14 (1993).

President Clinton and his wife Hillary[155] is yielding expense and conviction figures rivaling those achieved in the Iran-Contra investigation. Since 1994, Starr and his predecessor Robert Fiske have generated almost $40,000,000 in expenditures[156] and have obtained fourteen convictions, either by guilty plea or by trial.[157]

On the whole, I submit that the independent counsel mechanism has operated effectively. As demonstrated above, several independent counsel investigations have proceeded impartially, absolving the accused of criminal wrongdoing when evidence is lacking, and obtaining convictions when substantial evidence of criminal misbehavior is present. To return the prosecutorial function to the executive branch would not only ignore the successful history of the statute, but it would ignore, or improperly discount, the critical importance of avoiding conflicts of interest.

B. Permanent Office Of Independent Counsel

A second reform suggested has been the creation within the Department of Justice of a permanent Office of Special Counsel.[158] Andrew L. Frey and Kenneth S. Geller, both former Deputy Solicitors General, submit that this alternative would preserve prosecutorial independence as well as protect the rights and "legitimate concerns" of the accused.[159] Structurally, they suggest that the office be headed by an attorney nominated by the President,[160] subject to Senate confirmation.[161] Once confirmed, this person would serve for a

155. *See* Michael D. Harris, *Whitewater Crafting*, CAL. LAW., Jan. 1998, at 21; *Ex-Gov. Tucker Will Testify on Land Deal Castle Grande Deal Interests Prosecutors*, FLA. TODAY, Feb. 21, 1998, at 3A.

156. *See* Julian E. Barnes & Marianne Lavelle, *Where Did All the Starr-bucks Go? The Independent Counsels' $35 Million*, U.S. NEWS & WORLD REP., May 25, 1998, at 41 (estimating over $35 million in expenses through 1997).

157. *See* Stephen J. Hedges, *An Arkansas Cleanup is Starr's Real Legacy*, U.S. NEWS & WORLD REP., Apr. 20, 1998, at 30, 32.

158. See EASTLAND, *supra* note 4, at 130; Andrew L. Frey & Kenneth S. Geller, *Better Than Independent Counsels*, WASH. POST, Feb. 14, 1988, at C7.

159. Frey & Geller, *supra* note 158, at C7.

160. The President would also retain discretionary power of removal. *See id.*

161. *See id.* Former White House Counsel Lloyd Cutler has also proposed a variant of this proposal. Cutler suggests "that the President nominate, by and with the consent of the Senate, some five or ten potential independent counsels who are selected because they are nonpartisan in the political sense, and experienced federal prosecutors at some point in their career, which Ken Starr incidentally was not. When a need for an

fixed term that would "extend well beyond the presidential term."[162] Unlike the independent counsel statute, which specifically delineates those persons covered under the statute,[163] Frey and Geller fail to identify precisely who would be subject to special counsel prosecution.[164] The office would be modestly staffed with permanent employees, subject to expansion given the particular needs of the investigator.[165] Notably, under this proposal the Attorney General's initial screening function would be eliminated.[166]

Terry Eastland admits that the proposal has shortcomings, "the chief one being that such a special office, if it lacked 'business,' might try to generate some in order to be a bureaucratic success."[167] While Eastland's observation is undoubtedly true, the proposal has even more fundamental flaws. As with the proposal advanced by Professor O'Sullivan,[168] the establishment of an Office of Special Counsel would present conflict-of-interest problems. Since the Office of Special Counsel would be a component of the Department of Justice, any investigation and prosecution of executive branch officials would necessarily be conducted by individuals within that branch of government. Irrespective of the office's physical location, the appearance problems, as well as the "emotional" conflicts, inherent in such investigations remain. Absent removal of the investigative and prosecutorial function to a

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independent counsel comes and the Attorney General requests an appointment, the special panel selects from that panel of ten who have been previously confirmed and who meet the tests of nonpartisanship and independence and in whom the public presumably has confidence, and one of those is selected." *A Roundtable Discussion on the Independent Counsel Statute*, 49 MERCER L. REV. 453, 477-78 (1998).

162. Frey & Geller, *supra* note 158, at C7. Frey and Geller note, "This would also help to ensure that the occupant of the office had minimal political or personal ties to those he or she might be called upon to investigate." *Id.* Eastland suggests that the attorney in charge of the office might serve for a term of ten years. *See* Wilkinson & Ellis, *supra* note 19, at 1592.

163. *See* 28 U.S.C. § 591(b).

164. The authors suggest that the jurisdiction of the Office of Special Counsel be limited to "high government officials." Frey & Geller, *supra* note 158, at C7. Eastland suggests that members of Congress and the judiciary could also be encompassed within this jurisdictional grant. *See* EASTLAND, *supra* note 4, at 130.

165. Though part of the Department of Justice, the Office of Special Counsel would be physically located outside the Department. *See* Frey & Geller, *supra* note 158, at C7. Eastland acknowledges that the physical location of the office is symbolic, but asserts that it is "the only one needed-of its independence." EASTLAND, *supra* note 4, at 131.

166. *Compare* EASTLAND, *supra* note 4, at 131, *with* 28 U.S.C. § 591.

167. EASTLAND, *supra* note 4, at 132.

168. *See supra* notes 57-94 and accompanying text.

body truly independent of the executive branch, any internal investigation will be met with public and individual skepticism.

Congressman Henry J. Hyde, Chairman of the House Judiciary Committee, who supports the concept of an independent counsel, recognizes these inherent conflicts:

> In 1975, after his firing triggered the constitutional crisis that led to the first version of this Act, Watergate special prosecutor Archibald Cox testified that an independent counsel was needed in certain limited cases and he said, "The pressure, the divided loyalty, are too much for any man, and as honorable and conscientious as any individual might be, the public could never feel entirely easy about the vigor and thoroughness with which the investigation was pursued. Some outside person is absolutely essential." . . .
>
> The reason that I support the concept of an independent counsel with statutory independence is that there is an inherent conflict of whenever senior Executive Branch officials are to be investigated by the Department and its appointed head, the Attorney General. The Attorney General serves at the pleasure of the President. Recognition of this conflict does not belittle or demean the impressive professionalism of the Department's career prosecutors . . . . It is absolutely essential for the public to have confidence in the system and you cannot do that when there is a conflict or an appearance of conflict in the person who is, in effect, the chief prosecutor. There is an inherent conflict here, and I think that that is why this Act is so important . . . . The Independent Counsel Act was designed to avoid even the appearance of impropriety in the consideration of allegations of misconduct by high-level Executive Branch officials and to prevent . . . the actual or perceived conflicts of interest. The Act thus served as a vehicle to further the public's perception of fairness and thoroughness in such matters, and to avert even the most subtle influences that may appear in an investigation of highly-placed Executive officials.[169]

In addition to this severe fundamental flaw, the proposal has other significant shortcomings. Notably, the retention of authority by the President to remove the head of the Office of Special Counsel improperly discounts the public outcry, and the lessons learned, after the Saturday Night Massacre. After

169. Wilkinson & Ellis, *supra* note 19, at 1585-86.

the Cox firing, there was an "overwhelming public outrage" which "convinced Congress that it must act to insure an independent investigation in this case and set the stage for the discussion of a long-term solution for future cases."[170] Indeed, public skepticism has persisted, even influencing President Reagan to sign amendments to the Act into law despite his administration's position that the Act was unconstitutional.[171]

Moreover, the economic and societal costs of this proposal would prove enormous. In light of the multitude of independent counsel investigations burdening the Clinton Administration,[172] many future presidents, despite the requirement of Senate confirmation, will strive to appoint as heads of the Office of Special Counsel individuals with a disinclination to vigorously pursue allegations of executive branch wrongdoing. Although the days of presidential siblings serving as Attorney General are probably past,[173] there is little to prevent the successful appointment of highly-credentialed

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170. Harriger, *supra* note 3, at 495. "According to Western Union, the number of telegrams that arrived in Washington after the 'massacre' was the 'heaviest volume on record.' By Monday, 150,000 telegrams arrived in the District. Ten thousand went to the White House, the rest to the Watergate Special Prosecution Force . . . and Congress. Ten days later the number had risen to 450,000." *Id.* at 495 n.24 (citations omitted). Professor Harriger, however, questions whether the statute does, in fact, remove conflict of interest and foster public confidence. *See* HARRIGER, *supra* note 132, at 117-38, 168-98. She asserts, *inter alia*, that the "potential for conflict of interest that existed prior to Watergate remains in the current arrangement" given the continuous influence of the attorney general over independent counsel prosecutions, and that the interests and influences of certain political and governmental elites, as well as the want of meaningful public awareness of the independent counsel arrangement, raise genuine questions as to whether the statute fosters public confidence. *See id.* at 137, 168-98.

171. *See* Harriger, *supra* note 3, at 511.

> [I]t is worth noting that almost fifteen years after the firing of Cox, that event still resonated with members of Congress, and the concern of public confidence was strong enough to get presidential approval for a bill that his administration claimed was unconstitutional . . . . President Reagan signed the amendments into law "over the advice of top aides and despite strong personal reservations" because of the perceived impact on public confidence if he were to veto it. In his signing message, he said he was approving the legislation because it was necessary to insure public confidence even though he believed that the new restrictions on the Attorney General only served to "aggravate the infirmities" of the arrangement.

Id. (citations omitted).

172. Through June 1998, seven independent counsels had been appointed during Clinton's administration. *See* Mary Leonard, *Reno Fights Back after Citation for Contempt*, BOSTON GLOBE, Aug. 9, 1998, at A1. There were also seven independent counsels named during President Reagan's term. *See Major Actions Under the Independent Counsel Law*, WASH. POST, Aug. 17, 1994, at A17.

173. Robert F. Kennedy served as Attorney General for his brother, President John F. Kennedy. *Presidential Power*, ECONOMIST, July 4, 1998, at 22.

individuals who would impede the prosecution of high-ranking executive branch officials. Moreover, with the requirement of Senate confirmation, political opponents may vigorously oppose the nomination of such candidates. As a result, an inordinate amount of public money would be spent, and wasted, by both parties during these confirmation battles. Ultimately, confirmation of a department head would undoubtedly be delayed, imposing needless strains on already limited public resources.[174]

Finally, the recommendation that the department head serve an extended term, perhaps ten years, is simply unworkable. Not only would premature departures become typical, but also it would be difficult to recruit qualified individuals to serve in this capacity. In arguing against the concept of a full-time prosecutor, Judge David B. Sentelle commented:

> [I]t would so greatly limit the people that you could find who would be willing to undertake this that we think could go on for years and years and years; and the attorneys who have the ability, the reputation and the proven integrity for the job do not want to give up years of their career that they have spent their lifetime up to now establishing-to take years of it out in order to do something that will be lower paying, unpopular, and may not lead to anywhere.[175]

C. Modify the Statute

A third proposal recommends that the statute be renewed, subject to certain modifications. Advocates of this approach include former White House Counsel Lloyd Cutler, former Watergate Special Prosecutor and Harvard Law School

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174. The delay in the appointment of federal judges, caused in part by Senate Republicans on the Judiciary Committee, provides an example of how nominations requiring Senate confirmation can be protracted and impose large-scale societal costs. As of May 1997, of the 844 federal court positions, 100 were vacant. In the Ninth Circuit, approximately one-third of its 28 seats were unfilled. As a result, the Ninth Circuit had to "cancel hearings for about 600 cases" in 1997. "[I]t is civil cases that have been crowded out. Civil rights cases, shareholder lawsuits, product-liability actions, medical-malpractice claims and so forth are being pushed to the back of the line, however urgent the complaints." While Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, admits that the appointment process should be expedited, "those close to him say he's feeling pressure from the right, and indeed his remarks have become more combative. Last week he told a group of judges that he would refuse 'to standby to see judicial activists named to the federal bench.'" Viveca Novak, *Empty-Bench Syndrome: Congressional Republicans Are Determined to Put Clinton's Judicial Nominees on Hold*, TIME, May 26, 1997, at 37.

175. Wilkinson & Ellis, *supra* note 19 at 1540.

Professor Archibald Cox, and former Deputy Attorney General Jamie Gorelick. I, too, believe that the statute should be renewed. However, I respectfully submit that many of the suggested reforms are ill-advised. The principal modifications advocated by Cutler, Cox, and Gorelick will be analyzed below, followed by a discussion of other reforms that I believe will greatly enhance the effectiveness of the independent counsel statute.

1. Section 591(b)[176]

One of Professor Cox's suggested reforms constricts the number of executive branch officials, listed in section 591(b), subject to independent counsel investigation.[177] In this regard, Cox would limit such investigations to the President, the Vice-President, and "maybe the three most important Cabinet officers."[178] The rationale underlying this recommendation is similar to that applicable to the proposal advanced by Professor O'Sullivan, who advocates a return of the prosecutorial function to the executive branch. To this end, she reasons that the Department of Justice is fully capable of handling the vast majority of investigations typically assigned to independent counsels.

Few question the integrity and prosecutorial capability of Department of Justice prosecutors. However, the integrity and capability of these prosecutors is not at issue. Rather, preserving prosecutorial integrity and reassuring the public and the accused that the prosecutorial function will be pursued impartially is the impetus underlying the statute. As noted by Sam Dash, former Chief Counsel to the Senate Watergate Committee:

> What the independent counsel legislation has done is to remove the threat of another Saturday Night Massacre, attempt to take such special prosecution out of politics, as humanly as possible, and seek to assure the public that criminal investigations of the president and high executive branch officials will not be burdened with conflicts of interest, and will be objectively and independently

176. 28 U.S.C. § 591(b). *See supra* notes 7-8 and accompanying text.

177. *See A Roundtable Discussion on the Independent Counsel Statute, supra* note 161, at 473-74.

178. *Id.*

> conducted. No matter how competent and honest an attorney general may be, history has shown that the public has little confidence in Justice Department prosecutors investigating their boss, the president, even though, in fact, these prosecutors would carry out such investigations with skill and integrity.[179]

To this critical justification, I add that the proposed constriction of covered individuals would necessarily entail a subjective determination. Any congressional assessment as to which executive branch officials are deemed worthy of inclusion and exclusion from section 591(b) would invite criticism demanding explanation. Thus, any limitation upon the number of officials covered under the statute would invite as much criticism as it deflects. Given the subjective nature of the proposed task, and the inherent problems associated with internal executive branch investigations, I submit that section 591(b) should remain undisturbed.

2. Sections 591(d),[180] 592(a)(2)(B)(i)[181] and 592(a)(2)(B)(ii)[182]

Jamie Gorelick proposes that sections 592(a)(2)(B)(i) and 592(a)(2)(B)(ii) be amended to permit consideration by the Attorney General of an accused's intent when assessing the need for either a preliminary investigation or the appointment of an independent counsel.[183] Former Attorney General William P. Barr argues that the existing prohibition results in a needless waste of investigative resources:

> That is an area of great mischief, because I would say most of these cases turn on intent and it sort of reverses the burden to say that the Attorney General can't dispose of this unless he has clear and convincing evidence of that, because ultimately the prosecutor has to have proof beyond a reasonable doubt; and what happens is, even though it is pretty clear that the prosecutor will not be able to prove beyond a reasonable doubt, the Attorney General still has to go to an independent counsel, down the independent counsel track, and the independent counsel's investigation really consists of . . . months or years of trying to dig up

179. Sam Dash, *Why We Have the Independent Counsel Law*, WASH. POST, Jan. 9, 1998, at A21.

180. 28 U.S.C. § 591(d). *See supra* note 12 and accompanying text.

181. 28 U.S.C. § 592(a)(2)(B)(i). *See supra* note 13 and accompanying text.

182. 28 U.S.C. § 592(a)(2)(B)(ii). *See supra* note 25 and accompanying text.

183. *See* Wilkinson & Ellis, *supra* note 19, at 1530-31, 1534.

> some ancillary evidence somewhere to somehow prove a state of mind. I mean, you can pretty much say up front that it is going to be something that is going to be difficult to prove.[184]

It is undoubtedly true that some cases referred to an independent counsel could be handled independently and expeditiously by the Department of Justice. However, it does not follow that the Attorney General should be authorized to make assessments based upon intent. First, I do not accept the proposition that when an Attorney General can "pretty much say up front" that intent is lacking in a particular case, that an independent counsel will take "months or years of trying to dig up some ancillary evidence somewhere to somehow prove a state of mind."[185] This presumption assumes that the Attorney General is a responsible actor, while the independent counsel is not. I see no reason for this distinction. If intent is lacking, the responsible independent counsel should similarly and expeditiously conclude that prosecution is unwarranted. As discussed above, there have been several independent counsel investigations, most notably the investigation of Edwin Meese by Jacob Stein, which have expeditiously exonerated the accused.[186] Moreover, as discussed *infra*, by placing discretionary, duration, and expenditure restrictions upon the independent counsel, the scope and conduct of independent counsel investigations can be effectively regulated.[187]

As emphasized throughout much of this article, the independent counsel provision is largely concerned with avoiding conflicts of interest and engendering public confidence in the integrity of the prosecutorial process. However, adoption of this proposal would run counter to this objective. If enacted, the Attorney General would be empowered to exert even greater control over the prosecution of executive branch officials than under the current structure. And, as noted, the lessons from Watergate caution against any such approach.[188] Finally, this proposal would encourage

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184. *Id.* at 1531-32.

185. *Id.*

186. *See supra* notes 99-131 and accompanying text.

187. *See infra* notes 217-77, 284-92.

188. Though not concerned with the issue of criminal intent, Attorney General Janet Reno's decision in December 1997 not to seek appointment of an independent counsel to investigate President Bill Clinton and Vice President Al Gore for alleged illegal

Presidents to nominate Attorneys General who are disinclined to refer cases for independent counsel investigation. As a consequence, partisans will engage in protracted nomination battles, inevitably producing intolerably high fiscal and societal costs.[189]

3. Section 592(a)(2)[190] and 592(c)[191]

Lloyd Cutler suggests that the Attorney General be permitted to employ, during the preliminary investigation phase, traditional investigative techniques—for example, the use of subpoenas and grand juries—currently prohibited under section 592(a)(2).[192] He further suggests that the threshold that must be satisfied prior to referral of a matter for independent counsel prosecution be heightened. Specifically, Cutler suggests that the Attorney General be required to refer a matter for independent counsel prosecution only when there are reasonable grounds to believe that a significant federal crime has been committed.[193]

With respect to Cutler's section 592 proposal, supporters would presumably argue that an expansive preliminary investigation would avert the referral of insignificant cases for independent counsel investigation. However, this recommendation suffers from the same faulty premise attendant to Gorelick's proposal. Cutler's suggestion improperly presumes good-faith evaluation on the part of the Attorney General and bad-faith conduct on the part of the independent counsel.[194] I see no basis for this presumption. In fact, history suggests that independent counsels are typically responsible actors.

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campaign fund-raising is instructive. In response to Reno's announcement, Republican Indiana Congressman Dan Burton commented, "The question is: Will the American People have confidence that no coverup is going on? . . . As a result of today's announcement, the answer remains, 'no.'" Robert Suro, *Reno Decides Against Independent Counsel to Probe Clinton, Gore*, WASH. POST, Dec. 3, 1997, at A1. Indeed, a USA Today/CNN/Gallup Poll taken the evening after Reno's announcement found that 52% believed that an independent counsel should have been appointed. *Reno Says No to Probe; GOP Charges Politics Protect Clinton, Gore*, USA TODAY, Dec. 3, 1997, at 1A.

189. *See supra* note 174 and accompanying text.

190. 28 U.S.C. § 592(a)(2). *See supra* note 22 and accompanying text.

191. 28 U.S.C. § 592(c). *See supra* note 24 and accompanying text.

192. *See A Roundtable Discussion on the Independent Counsel Statute, supra* note 161, at 469.

193. *See id.* at 469-70.

194. *See supra* notes 185-187 and accompanying text.

Moreover, if implemented, a diminution in public confidence in the prosecutorial process would inevitably result. Among the critical lessons from Watergate is that the public distrusts internal executive branch investigations of alleged criminal wrongdoing. Thus, the public will not readily accept, irrespective of the magnitude of a preliminary investigation, a refusal by the Attorney General to submit a matter for independent counsel prosecution. This proposal, rather than enhancing public trust, would instead hasten public skepticism of the prosecutorial process.

Cutler's proposed heightened standard for section 592(c) referrals is not only subject to the aforementioned criticisms, but it also suffers from practical limitations. What constitutes a "significant" or "insignificant" federal crime is necessarily arbitrary and subjective. Moreover, the gravity of a criminal offense is often fact-dependent. A comparatively less significant criminal infraction can attain added significance when coupled with egregious facts. Given this dependence, it is virtually impossible to meaningfully evaluate the significance of innumerable federal crimes without reference to the concrete facts of a particular case. Codification of this concept is simply not feasible.

4. Section 593(b)(3)[195]

Gorelick further recommends that the "related" case jurisdiction provision, contained in section 593(b)(3), be amended to require Attorney General consent prior conferring such prosecutorial authority.[196] Although concerns about the "runaway" prosecutor have been widely expressed,[197] particularly in reference to the various investigations conducted by Independent Counsel Kenneth Starr,[198] Gorelick's

195. 28 U.S.C. § 593(b)(3). *See supra* note 31 and accompanying text.

196. *See* Wilkinson & Ellis, *supra* note 19, at 1534.

197. Gorelick seemingly concurs with this concern: "Now, anybody who has been a prosecutor knows that you have to have some ability to deal with people who are potential witnesses against your target, but, in my personal view, there are no practical limitations on the jurisdiction of an independent counsel who wants to take his investigation out beyond secondary and tertiary witnesses to the 'nth' degree." *Id.*

198. When asked whether Kenneth Starr was justified in having Linda Tripp wear a wire during conversations she had with Monica Lewinsky, Lawrence Walsh responded: "I think it is very doubtful that it was, and I think that it was ill advised

suggested remedy is ill-advised.

Any reform of the statute must respect the historical rationale underlying the independent counsel law. For reasons previously stated, however, Gorelick's proposal to vest the Attorney General with an additional check upon the prosecutorial jurisdiction of the independent counsel would simply frustrate this purpose. It improperly discounts the significance of Watergate and the extent of public distrust of internal executive branch investigations. Nevertheless, Gorelick's concern can be largely satisfied through the imposition of discretionary, duration, and spending controls.[199] Moreover, such controls would fully honor the rationale underlying the independent counsel statute without further empowering the Attorney General with additional prosecutorial authority. Finally, such restraints would respect the latitude needed by prosecutors to conduct an effective investigation, yet prevent the independent counsel from needlessly wasting public resources.

IV. RECOMMENDATIONS

While the reforms suggested by Cox, Cutler, and Gorelick are ill-advised, they nonetheless properly focus the debate upon modification, rather than eradication, of the current statute. Thus, two focal issues emerge: 1) which sections of the statute are in need of reform, and 2) how should the reforms be implemented. By review of various independent counsel investigations, I have argued that the independent counsel mechanism has, on the whole, operated fairly and efficiently. However, a review of the Whitewater investigation headed by Kenneth Starr will assist in illustrating those aspects of the statute which fail to adequately constrain independent counsel activity and thus are in need of reform.

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that after $30-odd million spent investigating Whitewater he ends up policing the Paula Jones private litigation. I think it was bad judgment if he was the one who initiated it.... It was beyond his jurisdiction.... He had no duty." *Internight* (MSNBC television broadcast, Jan. 21, 1998), *available in* 1998 WL 6633283. *But see* Dennis Shea, *Shooting Starr*, NAT'L. REV., Nov. 9, 1998, at 22 (arguing that "Starr's tactics were ultimately ratified by Attorney General Janet Reno and the supervising three-judge panel when they authorized Starr to investigate the Lewinsky matter.").

199. *See* discussion of discretionary, cost and duration controls, *infra* notes 217-77, 284-92 and accompanying text.

Whitewater Investigation

The Whitewater investigation stems from a 1978 property development venture entered into by Bill Clinton, then Arkansas Attorney General, his wife Hillary, and their friends James and Susan McDougal.[200] In 1982, James McDougal purchased a savings and loan which he renamed Madison Guaranty.[201] Between 1982 and March 1989, when the savings and loan failed, Madison Guaranty made a series of high-risk real estate loans to "entities [James McDougal] and his associates controlled as well as loans to thrift insiders and members of the Little Rock political establishment."[202] Among the issues that have been investigated, by both federal regulators and the independent counsel, is whether Madison Guaranty improperly diverted funds to the Whitewater project and into Clinton's gubernatorial campaign.[203]

In January, 1994, former federal prosecutor Robert B. Fiske, Jr., was appointed by Attorney General Janet Reno to serve as an independent counsel to investigate, *inter alia*, the Clinton's financial involvement in the Whitewater land development, their relationship with James McDougal,[204] and the apparent suicide of Vincent W. Foster, former deputy counsel to President Clinton.[205] Approximately four months later, Fiske issued a report concluding that Foster had indeed committed suicide, that his death was not attributable to Whitewater, and that neither White House nor Treasury officials had obstructed

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200. *See A Tangle of Probes*, CONG. Q. WKLY. REP., Jan. 15, 1994, at 62; Macon Moorehouse, *The Who, What, Why of a Tangled Scandal*, ATLANTA J. & CONST., May 30, 1996, at A14.

201. *See The Unfolding of Whitewater*, WASH. POST, Jan. 21, 1994, at A20. In 1982, Clinton also won another term as Governor of Arkansas. *See id.*

202. *A Tangle of Probes*, *supra* note 200, at 62. McDougal was removed from his position in 1986. At the time, the institution was considered a "problem institution" by federal regulators. *Id.*

203. *See id.*; Moorehouse, *supra* note 200, at A14; *Navigating the Maze: Whitewater*, CHI. SUN-TIMES, June 2, 1996, at 27.

204. *See* Andrew Taylor, *Thrift Industry: Former U.S. Prosecutor Named as Whitewater Investigator*, CONG. Q. WKLY. REP., Jan. 22, 1994, at 108; Andrew Taylor, *Executive Branch: First Phase of Whitewater Probe Yields No Criminal Charges*, CONG. Q. WKLY. REP., July 2, 1994, at 1771-72.

205. Foster was found dead in a national park outside of Washington, D.C. Although originally considered a suicide, Fiske investigated the death given allegations that Foster may have killed himself over the Whitewater affair or that his death was not a suicide. *See* Taylor, *Executive Branch*, *supra* note 204, at 1771-72. Foster, a former partner at Hillary Clinton's former firm, the Rose Law Firm, had performed some legal work with respect to Whitewater and had Whitewater-related files in his office at the time of his death. *See id*; *Navigating the Maze: Whitewater*, *supra* note 203, at 27.

a previously conducted inquiry into the Whitewater matter by federal regulators.[206] However, Fiske had not issued a report concerning the larger investigation of the Clintons and their relationship to James McDougal and Madison Guaranty Savings and Loan. That investigation was ongoing.[207]

Approximately one month later, Kenneth Starr, to the surprise of many, was appointed by the Special Division to succeed Fiske as independent counsel.[208] During his tenure, Starr's investigative jurisdiction has expanded beyond the original Whitewater land deal mandate to include further investigation into the circumstances surrounding Vincent Foster's death,[209] the firing of White House Travel Office personnel,[210] the acquisition and possible misuse by the White House of FBI files of various Republicans,[211] and allegations of perjury and obstruction of justice arising out of a sexual affair

206. *See* Taylor, *Executive Branch*, *supra* note 204, at 1771-72.

207. See *id.*

208. *See* Andrew Taylor, *Stories Conflict, Tempers Flare in Marathon Week of Hearings*, CONG. Q. WKLY. REP., Aug. 6, 1994, at 2225-28; *NBC Nightly News* (NBC television broadcast, Aug. 5, 1994), *available in* 1994 WL 3518969 (noting that Starr's selection "sent shock waves through the White House and Congress" because Fiske had served as Independent Counsel for seven months and had been recommended by Reno to remain in his position).

209. *See supra* note 205 and accompanying text.

210. At issue was the firing of the White House travel staff, who had been assigned to handle the travel arrangements for the press. The fired personnel had been replaced with employees of World Wide Travel, a travel agency located in Little Rock, Arkansas. Former White House Director of Administration David Watkins was accused of having lied to General Accounting Office (GAO) investigators about the firings. Both Watkins and Hillary Clinton told GAO investigators that Mrs. Clinton did not directly order the terminations. Rather, they insisted, it was Watkins's decision to make the personnel move. However, in a previously prepared memo addressed to President Clinton's Former Chief of Staff, Thomas F. McLarty, Watkins stated that Mrs. Clinton had ordered the firings. Starr was appointed by the Special Division to investigate the travel staff firings in March 1996. *See* Michael J. Sniffen, *Whitewater Prosecutor Expands Probe of White House Firings*, Associated Press, Mar. 22, 1996, *available in* 1996 WL 4417789; *Whitewater Counsel Expands Probe*, FLA. TODAY, Mar. 23, 1996, at 3A; Toni Lucy & Susan Schmidt, *Starr Given Authority to Widen Probe; At Issue Are Accounts of Travel Office Firings*, WASH. POST, Mar. 23, 1996, at A1.

211. In June 1996, Starr's jurisdiction was expanded by the Special Division to investigate possible crimes associated with the gathering, and possible misuse, by the White House of over 400 FBI files. Many of the files were of Republican officials serving under former Presidents Ronald Reagan and George Bush. According to the White House and Anthony B. Marceca, an Army civilian investigator who was working temporarily at the White House, the files were obtained as a result of bureaucratic inadvertence. *See* George Lardner, Jr., *FBI to Make 'Thorough' Files Probe; Agency to Investigate Conduct of White House*, WASH. POST, June 19, 1996, at A1; John F. Harris & George Lardner, Jr., *Reno Seeks Starr Probe of FBI Files*, WASH. POST, June 21, 1996, at A1; *Independent Counsel Will Probe FBI Files Case*, FLA. TODAY, June 22, 1996, at 8A.

between President Clinton and Monica Lewinsky,[212] among various other matters.[213]

Criticisms of Starr commenced with his appointment in August 1994.[214] In successive years, the scope and ferocity of the criticism has continuously escalated.[215]

It is beyond the scope of this article to critique the intricacies of the Starr investigation. Rather, the Starr investigation provides a lens through which to view possible reforms of the

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212. Starr's jurisdiction was again expanded on January 16, 1998, to investigate possible perjury, subornation of perjury, and obstruction of justice arising out of a relationship between President Clinton and Monica Lewinsky. In a civil lawsuit alleging sexual harassment filed by Paula Jones against the President, Lewinsky, a former White House intern, signed an affidavit in which she denied a sexual relationship with the President. Similarly, President Clinton denied a sexual relationship with the intern when he was deposed in the same suit. However, the truthfulness of these sworn statements came into question when it was discovered that Linda Tripp had secretly taped telephone conversations between herself and Lewinsky. *See* John F. Harris, *Clinton Denies Affair, Says He 'Did Not Urge Anyone' to Lie*, WASH. POST, Jan. 22, 1998, at A1; *Chronology of a Sex Scandal*, FRESNO BEE, Jan. 23, 1998, at A6; Howard Fineman & Karen Breslau, *Sex, Lies and the President*, NEWSWEEK, Feb. 2, 1998, at 20.

213. *See* Michael Duffy & Viveca Novak, *Has Starr Gone Too Far? The Three Year, $30 Million Probe of a Small-Time Arkansas Land Deal Has Taken Some Troubling Turns*, TIME, July 7, 1997, at 26; Christopher Ogden, *Case Dismissed A Federal Judge Throws Out Paula Jones' Sexual Harassment Suit Against the President, Effectively Ending the Threat of Impeachment*, TIME INT'L, Apr. 13, 1998, at 22.

214. *See Sam Dash Joins Whitewater Unit as Ethics Chief*, CHI. TRIB., Oct. 6, 1994, at 18 (stating that five past presidents of the American Bar Association question whether politics underlay Starr's appointment); Andrew Taylor, *Whitewater: Altman, Once a Rising Star, Resigns at Treasury*, CONG. Q. WKLY. REP., Aug. 20, 1994, at 2439 (noting that Democrats are critical of Starr's appointment based upon past Republican affiliations).

215. Ken Gormley, *Starr is Overstepping His Mandate*, NEWSDAY, Jan. 30, 1998, at A43 (Gormley, a law professor at Duquesne University, questions the connection between the Whitewater land deal mandate and the Lewinsky investigation); Marcia Coyle & Harvey Berkman, *Bar to Starr: Clinton Lied, But So What; NLJ Poll Show Lawyers Oppose Impeachment, Indictment and Ouster*, NAT'L L.J., June 29, 1998, at A1 (stating that 65% of lawyers polled disagree with Starr's position that the attorney-client privilege ends with the death of the client; over 50% of attorneys polled believe that Starr should not have expanded his jurisdiction to include Lewinsky matter); Dave Rossie, *Starr's Pseudo Revelation Sparks Imagination*, FLA. TODAY, Aug. 1, 1997, at 16A (criticizing the duration of Starr's investigation into the death of Vincent Foster); Brian Knowlton, *2 New Starr Subpoenas Refuel Fire White House Says Summonses Aim to Quash Criticism of Prosecutor*, INT'L HERALD TRIB., Feb. 25, 1998, at 3 (noting criticism of the expansion of Starr's investigation, and the issuance of grand jury subpoenas to Lewinsky's mother and to presidential adviser Sidney Blumenthal); *Starr Subpoenas Records of Lewinsky's Book Buys*, ORLANDO SENTINEL, Apr. 4, 1998, at A16 (noting criticism by Democrats of Starr's decision to subpoena records of Lewinsky's book purchases); *Republican Leaders Appear at Odds Over Clinton Strategy*, FLA. TODAY, Mar. 8, 1998, at 6A (reporting that Republican Senator Trent Lott claimed that Starr has had sufficient time to conclude his investigation of the Lewinsky matter); *The White House: Press Briefing by Mike McCurry*, M2 Presswire, June 9, 1998, *available in* 1998 WL 12973649 (calling into question the duration and expense of the Starr investigation).

independent counsel statute.[216] In light of these lessons, I recommend that the statute be reformed to address the following: 1) prosecutorial discretion; 2) the Special Division; 3) cost containment; and 4) investigative duration.

A. Prosecutorial Discretion

To appreciate the importance of this concept, it is crucial to understand the scope of a prosecutor's duties and power. A prosecutor is not merely an individual who seeks to convict the guilty, but a person who can control the course of a case from the beginning of an investigation, and affect the lives of countless others in the process. It is the prosecutor, not the defense attorney, who controls the initiation, progress, and ultimate impact of an investigation and prosecution.

> Prosecutors represent a party whose resources and powers can be matched by few if any adversaries. As then-Attorney General Robert H. Jackson, later to become a Supreme Court Justice and the chief prosecutor at the Nuremberg War Crimes Trials, reflected in a 1940 address to a conference of federal prosecutors:
>
> > The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial... While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.[217]

Thus, with a prosecutor's enormous power comes a parallel ethical duty to render even justice. But what are the checks

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216. *See supra* Part IV, first paragraph.

217. Daniel Wise, *Assistant Prosecutors Barred From Campaigns of District Attorneys; State Bar Ethics Committee Turns Down Association's Plea for Reconsideration*, N.Y.L.J., July 24, 1996, at 1.

upon independent counsels beyond a mere ethical obligation to prevent the undue harassment of the accused and the citizenry? An examination of the independent counsel statute reveals few meaningful safeguards. Arguably the most significant restraint is found in section 596(a)(1), which authorizes the Attorney General to remove an independent counsel "only for good cause, physical or mental disability . . . or any other condition that substantially impairs the performance of such independent counsel's duties."[218] As the plain language suggests, the Attorney General's ability to exercise her authority under this section is severely restricted. In addition, this already-limited authority is subject to judicial review.[219] It is further obstructed by political realities. In fact, this authority is so hampered that former Independent Counsel Robert Fiske considers section 596(a)(1) an "[un]realistic check."[220] An Attorney General will certainly be constrained by the public's perception that the independent counsel is being removed solely for political advantage.[221] As Fiske suggests, this fact alone serves to largely insulate an independent counsel from removal.

Another notable restriction pertains to an independent counsel's investigative jurisdiction. An independent counsel may investigate only those matters assigned to him by the Special Division pursuant to section 593(b)(1).[222] However, the scope of an independent counsel's investigative jurisdiction can easily be enlarged. First, with the original jurisdictional grant comes authority to prosecute all matters related to that grant, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.[223] In addition, the Attorney General may expand an independent counsel's jurisdiction if the special prosecutor encounters criminal

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218. 28 U.S.C. § 596(a)(1). *See supra* note 52 and accompanying text.

219. *See* 28 U.S.C. § 596(a)(2); *supra* note 53 and accompanying text.

220. Former Whitewater Independent Counsel Robert Fiske: "Judge Walsh referred to the power of the Attorney General to remove an independent counsel for cause. It is not surprising that that has not happened to date. It is hard to imagine politically how that could ever happen except in the absolutely most extreme circumstances. I don't think that is a realistic check against what some of the alleged abuses of conduct of independent counsel have been." Wilkinson & Ellis, *supra* note 19, at 1550.

221. *See* discussion of the Saturday Night Massacre and the events that followed, *supra* notes 71-86 and accompanying text.

222. 28 U.S.C. § 593(b)(1). *See supra* notes 29-30 and accompanying text.

223. *See* 28 U.S.C. § 593(b)(3); *supra* notes 31-32 and accompanying text.

activity not within the original grant.[224]

Responding to critics who charge that Starr's investigation has become overly broad,[225] some of Starr's defenders argue that he is merely responding to the investigative requests of the Attorney General. George Washington University Law School Professor Jonathan Turley contends:

> The second explanation is that Clinton should not testify [before the federal grand jury investigating the Lewinsky matter] because Starr's investigation has strayed far from its original mandate of investigating the Whitewater dealings. Again, echoing the statements of the other former White House counsels, Lanny Davis stated that "we went from Whitewater now to this Lewinsky matter in a stretch . . . (and) in that type of situation, he should not cooperate." The problem with this explanation is that Clinton's attorney general (not Starr) expanded the investigation into these allegations. Clinton has been asked to testify on the very questions that Atty. Gen. Janet Reno asked to be investigated.[226]

However, Professor Turley overlooks the other relevant provisions of the statute that influence the referral of additional matters for independent counsel investigation. When presented with additional indicia of criminal activity, the Attorney General does not conduct a *de novo* review of the evidence. Rather, the Attorney General must, pursuant to section 593(c)(2), give "great weight" to the recommendations of the independent counsel.[227] Contrary to Turley's intimation, the Attorney General has little choice under the statute but to make a referral. Thus, when presented with evidence of alleged criminal activity arising from a sexual relationship between the President and Lewinsky, Reno was required by statute to heed carefully Starr's recommendation. Given the deference required under the statute, Reno's requested expansion of investigative jurisdiction is of qualified significance.[228]

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224. *See* 28 U.S.C. § 593(c)(1); *supra* notes 33 and accompanying text.

225. *See supra* note 215 and accompanying text.

226. Jonathan Turley, *Hashing Out Ockham's Razor Over Eggs; Why a President, Who Has Publicly Sought Advice on Creating a Lasting Legacy, Would Prefer to Face Impeachment Than to Testify Under Oath*, CHI. TRIB., July 13, 1998, at 11.

227. 28 U.S.C. § 593(c)(2). *See supra* note 36 and accompanying text.

228. "George Dargo, professor of constitutional law at New England School of Law, said he believes Starr is 'within the scope of the law' in broadening his investigation, given the deference the judgment of the counsel receives." Peter S. Canellos, *Starr's Expanding Probe Puts Focus on Counsel Law*, BOSTON GLOBE, Jan. 22, 1998, at A1.

Other than some comparatively insignificant expenditure provisions[229] and reporting requirements,[230] the independent counsel is otherwise free to conduct his investigation without oversight. As former Independent Counsel Jacob Stein notes, the current structure provides few, if any, meaningful reins upon the conduct of an independent counsel:

> My experience is that I had unlimited authority as an independent counsel. These ideas expressed by others concerning limitations were not the way I saw it. I had no limits. I was astonished at the authority I had, and I felt it was a personal test of my own sanity in the exercise of that authority . . . . I had more authority than anybody should have. I was reviewing myself.[231]

I share Stein's view that no prosecutor, not even an independent counsel, should have "unlimited authority." Thus, the question arises as to how the statute should be reformed. A review of the restrictions imposed upon other prosecutors is instructive.

Unlike independent counsels, prosecutors within the United States Attorneys' Offices do not enjoy unfettered discretion. United States Attorneys and their Assistants are subject to an array of regulations governing their pre-trial, plea, and post-trial practices.[232] Among the rationales underlying these regulations are the administration of fair, even-handed justice, and the consistent exercise of prosecutorial discretion.[233] Absent such regulations, uneven application of the federal criminal laws and investigative methodologies would be

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229. *See* 28 U.S.C. § 594; *supra* notes 41-42 and accompanying text.

230. *See* 28 U.S.C. §§ 595-596; *supra* notes 43-44, 47-48 and accompanying text.

231. Wilkinson & Ellis, *supra* note 19, at 1549.

232. *See* UNITED STATES ATTORNEYS' MANUAL, § 9-2.400 (1997).

233. As stated by Robert Fiske:

> As United States Attorney for the Southern District of New York, I was part of the Department of Justice, headed, of course, by the Attorney General in Washington, and there is a whole system of review procedures in place that control what Assistant U.S. Attorneys or United States Attorneys can do in the investigation and prosecution of criminal cases. You can't take certain kinds of investigative steps, like subpoenaing members of the media. You can't bring certain kinds of cases, such as racketeering cases, without getting the approval of career people in the Justice Department. And the whole purpose of that is so that there can be a uniform, cohesive system of law enforcement throughout the United States, with the centralized control in Washington, to make sure that some Assistant or some U.S. Attorney isn't going off half-cocked in a way that would be detrimental to law enforcement in general.

Wilkinson & Ellis, *supra* note 19, at 1546.

inevitable, resulting in a diminution in public confidence in the justice system.

Several regulations overseeing the pre-trial activity of Department of Justice prosecutors are particularly noteworthy. For example, United States Attorneys are prohibited from issuing grand jury or trial subpoenas to attorneys seeking "information relating to the attorney's representation of a client," without obtaining prior approval from the Assistant Attorney General of the Criminal Division.[234] Whenever possible, prosecutors are instructed to make reasonable efforts to obtain the information from alternative sources prior to issuing a subpoena.[235] If such attempts are unsuccessful, the Assistant Attorney General, upon application, will consider several factors when determining whether such a subpoena will issue, including whether the information sought is protected by a claim of privilege; whether all reasonable alternative means to obtain the information have been pursued; whether there are reasonable grounds to believe that criminal activity has taken place, and that the information sought in the subpoena is reasonably needed for the prosecution; and whether "[t]he need for the information . . . outweigh[s] the potential adverse effects upon the attorney-client relationship."[236]

Discussion of this regulation of pretrial activity is particularly appropriate in light of *Swidler & Berlin v. United States*.[237] In July 1993, Deputy White House Counsel Vincent Foster met with Attorney James Hamilton in reference to legal representation arising from the firing of several employees from the White House Travel Office.[238] Hamilton prepared handwritten notes during the session and wrote the word "privileged" on at least one of the pages. Foster took his life

234. UNITED STATES ATTORNEYS' MANUAL, *supra* note 232, at § 9-13.410(A). The Department of Justice "exercises close control over such subpoenas" given "the potential effects upon an attorney-client relationship that may result from the issuance of a subpoena" seeking such information pertaining to the attorney's representation. *Id.*

235. See *id.* at § 9-13.410(B). "These attempts shall include reasonable efforts to first obtain the information voluntarily from the attorney, unless such efforts would compromise the investigation or case, or would impair the ability to subpoena the information from the attorney in the event that the attempt to obtain the information voluntarily proves unsuccessful." *Id.*

236. *Id.* at § 9-13.410(c).

237. 118 S. Ct. 2081 (1998).

238. *See id.* at 2083.

nine days after the meeting. In December 1995, Independent Counsel Starr, who was investigating the travel office firings, issued subpoenas to Hamilton and his law firm seeking production of the notes prepared by Hamilton.[239] Hamilton and his firm resisted, claiming attorney-client privilege and work-product privilege.[240] Starr, however, considered the attorney-client privilege inapplicable given the death of Hamilton's client and the relevancy of the notes to Starr's criminal investigation.[241] The dispute ultimately reached the Supreme Court which, by a 6 to 3 vote, sided with Hamilton, finding "[t]he great body of this case law supports, either by holding or considered dicta, the position that the privilege does survive in a case such as the present one."[242]

While section 9-13.410 constrains the actions of the Department of Justice prosecutor prior to the issuance of such a subpoena, the independent counsel can issue such grand jury requests without restriction.[243] Had Starr been required to obtain approval from the Department of Justice prior to his December 1995 request of Hamilton, the protracted litigation culminating in the *Swidler & Berlin* decision might have been avoided.[244]

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239. *See id.*

240. *See id.*

241. *See id.* at 2084.

242. *Id.* at 2085.

243. 28 U.S.C. § 594(f)(1) (emphasis added) provides:

> In General. An independent counsel shall, *except to the extent that to do so would be inconsistent with the purposes of this chapter,* comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws. To determine these policies and policies under subsection (1)(1)(B), the independent counsel shall, *except to the extent that doing so would be inconsistent with the purposes of this chapter,* consult with the Department of Justice.

See United States v. Poindexter, 725 F. Supp. 13, 38 (D.D.C. 1989); *In re* Grand Jury Subpoena ABC, Inc., 947 F. Supp. 1314, 1321-22 (E.D. Ark. 1996); Professor James P. Fleissner of Mercer University's Walter F. George School of Law considers the section 594(f) provision an insignificant restraint upon an independent counsel ("The statute states that the independent counsel is supposed to follow Department of Justice policies and file periodic reports on expenditures, but these provisions are hardly fetters."). 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, 435 (1998).

244. Senator Carl Levin (D-MI) accused Starr of "arguing a dramatically new position, that the attorney-client privilege disappears at death, without the Justice Department's ever determining whether that is a suitable position for the United States to take." *Conscience of a Clintonite*, DETROIT NEWS, June 14, 1998, at B10 (quoting Sen. Levin).

Federal prosecutors are similarly required to secure approval prior to issuing a grand jury subpoena to a target of the investigation.[245] The prosecuting attorney should initially make an effort to secure the target's voluntary appearance. If this cannot be achieved, then approval must be obtained from either the United States Attorney or the Assistant Attorney General. At least three factors are considered in connection with such a request–the importance of the testimony to the success of the grand jury investigation, whether alternative witnesses could provide the evidence sought, and whether the subject of the intended questioning is protected by a valid privilege.[246]

During his investigation of the Clinton-Lewinsky affair, Starr, in July 1998, issued a grand jury subpoena to President Clinton.[247] Unlike the federal prosecutor, for whom compliance with section 9-11.150 is a prerequisite, Starr is without similar constraints. As with the discussion of section 9-13.410,[248] it is debatable whether a Department of Justice prosecutor could have secured the necessary approval in this instance. Starr's perjury investigation centered around an alleged lie committed during a deposition and in an affidavit about a sexual affair,[249] which was deemed inadmissible in a dismissed civil action.[250] Not only is it debatable whether such a lie, even if proven, amounts to a "material" falsehood,[251] but considering the array

245. *See* UNITED STATES ATTORNEYS' MANUAL, *supra* note 232, at § 9-11.150.

246. *See id.*

247. *See* Jerry Seper, *Clinton Will Testify on Tape Aug. 17 Tripp Finishes Her Testimony, Rebukes 'Paid Prevaricators,'* WASH. TIMES, July 30, 1998, at A1.

248. *See supra* notes 234-44 and accompanying text.

249. *See* Harris, *supra* note 212; *Chronology of a Sex Scandal*, *supra* note 213; Fineman & Breslau, *supra* note 212.

250. *See* Brian McGrory, *Lewinsky, Starr Talks at Impasse; Judge Rules Allegations Inadmissible in Jones Case*, BOSTON GLOBE, Jan. 30, 1998, at A1. The dismissed Paula Jones civil case had been appealed to the U.S. Court of Appeals for the Eighth Circuit. *See* David Rovella, *Impeachment: A Murky Realm Ark. Contempt Charge Looms as House Mulls*, NAT'L L.J., Sept. 21, 1998, at A1. The case subsequently settled. *See Clinton Apology No Longer Important*, WASH. POST, Nov. 22, 1998, at A28.

251. 18 U.S.C. § 1621 is the general perjury statute. That section provides, in pertinent part:

> Whoever . . . having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any *material* matter which he does not believe to be true . . . is guilty of perjury.

18 U.S.C. § 1621 (1994) (emphasis added). *See* Jerome J. Shestack, *Sex, 'Crimes' and*

of witnesses called before the Lewinsky grand jury,[252] the information they have provided, the apparent existence of a Fifth Amendment privilege against self-incrimination,[253] and the comparative penal insignificance of the alleged offenses, it is tenable to surmise that the Department, if presented with the proposal, would reject such a subpoena request.

Federal prosecutors are also required to get Department of Justice approval prior to offering immunity.[254] The independent counsel statute, however, places no similar restrictions upon the independent counsel. For example, during the Clinton-Lewinsky investigation, Starr was not required to obtain approval prior to extending transactional immunity to Monica Lewinsky and her mother.[255]

Similarly, Department of Justice authorization is required prior to initiating or recommending prosecution of an individual who "has testified or provided information pursuant to a compulsion order–except in the case of act-of-production immunity," for criminal offenses "first disclosed in, or closely related to, such testimony or information without the express written authorization of the Attorney General."[256] Again, the Starr investigation illustrates the differing standards applicable to Department prosecutors and independent counsels.

While serving a twenty-one-month term of imprisonment pursuant to a guilty plea to mail fraud charges, Webster L. Hubbell was served with a subpoena, issued by Starr, seeking the production of "his business, financial, and tax records from January 1, 1993 to the date of the subpoena."[257] Citing his Fifth

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Revealing Videotapes, CHI. TRIB., Sept. 24, 1998, at 23 (discussing the possibility that the alleged lie about the sexual affair may lack the materiality required for perjury conviction); *Internight* (MSNBC television broadcast, Aug. 31, 1998), *available in* 1998 WL 6633628 (Professor Steve Lubet, Northwestern University Law School: "They're not impeachable, they're probably not even indictable. The false statements–and they were false statements during the deposition–weren't material, so they don't amount to perjury.").

252. *See* John C. Henry, *Foundation Is Laid in Sex Scandal Case by Early Witnesses*, HOUSTON CHRON. Feb. 22, 1998, at 14.

253. *See* Susan Schmidt & Peter Baker, *Clinton May 'Provide Information' to Starr*, WASH. POST, July 25, 1998, at A1.

254. *See* UNITED STATES ATTORNEYS' MANUAL, *supra* note 232, at § 9-23.130.

255. *See* Don Van Natta Jr. & Jill Abramson, *Lewinsky's Odyssey to Witness Box*, SACRAMENTO BEE, Aug. 2, 1998, at A1; Ann Scales & Chris Black, *Lewinsky Expected to Appear Before Federal Grand Jury Today*, BOSTON GLOBE, Aug. 6, 1998, at A1.

256. UNITED STATES ATTORNEYS' MANUAL, *supra* note 232, at § 9-23.400.

257. United States v. Hubbell, 11 F. Supp. 2d 25, 33 (D.D.C. 1998). Starr's Whitewater

Amendment privilege against self-incrimination, Hubbell refused to comply with the subpoena request. Thereafter, Starr obtained an order from the district court compelling production of the documents. In so ordering, the district court granted Hubbell "immunity to the extent allowed by law."[258] After Hubbell turned over several thousand pages of documents in response to the subpoena, Starr admittedly used the contents of the documents to charge Hubbell with tax evasion. The court, in granting Hubbell's motion to dismiss the indictment, found, *inter alia*, that the indictment violated the earlier immunity grant.[259] The court relied upon several factors, including the plain language of the district court's immunity grant order, Starr's admission that he "used the contents of these documents to identify and develop evidence that led to this prosecution," Starr's lack of knowledge of any criminal tax violations at the time of the subpoena's issuance, the broad scope of the subpoena, and the production of the documents adding to the "sum total of the government's information," thus implicating Hubbell's Fifth Amendment privilege against self-incrimination.[260]

Had the Department of Justice handled the investigation, it is certain that prior to the initiation of an investigation of Hubbell on tax charges, there would have been a review pursuant to § 9-23.400. This provision is designed to prevent the very thing that happened in *Hubbell*–the dismissal of an indictment on account of a Fifth Amendment privilege.

A myriad of other regulations govern pretrial investigations within the Department of Justice. For example, Department approval is required prior to the interception of oral, wire, or

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investigation was expanded to include allegations of criminal conduct directed toward Hubbell. Specifically, the Special Division expanded Starr's jurisdiction as follows: "[W]hether Webster L. Hubbell, a covered person under 28 U.S.C. § 591(b), violated any federal criminal law (including mail fraud and criminal tax violations) in his billing or expense practices while a member of the Rose Law Firm, and [ ] all matters arising from that investigation to the same extent as all other criminal matters arising under the jurisdiction set forth in the original order." *Id.*, at 28.

258. *See id.*, at 33.

259. *See id.* at 33-37. In opposition to the motion, Starr argued that the court's immunity grant extended only to Hubbell's act of producing the documents. *See id.* at 33-34. The court's ruling is currently on appeal before the U.S. Court of Appeals for the D.C. Circuit. *See Starr Presses Tax Case Against Hubbell*, BOSTON GLOBE, Sept. 22, 1998, at A28.

260. *See id.*, at 33-37.

electronic communications;[261] prior to the warrantless, emergency interception of wire, oral, or electronic communications in the absence of a court order;[262] prior to the interception of verbal communications where consent of the parties has not been obtained and the interception concerns "(1) . . . member[s] of Congress, a federal judge, a member of the Executive Branch at Executive Level IV, or above, or a person who has served in such capacity within the previous two years; [and] (2) . . . any public official and the offense investigated is one involving bribery, conflict of interest, or extortion relating to the performance of his or her duties," among other individuals;[263] prior to seeking the death penalty;[264] prior to issuing a grand jury subpoena to members of the news media,[265] or to "persons or entities in the United States for records located abroad;"[266] prior to interrogating, indicting, or arresting members of the news media "for an offense which he is suspected of having committed during the course of, or arising out of, the coverage or investigation of a news story, or committed while engaged in the performance of his official duties as a member of the news media;"[267] prior to commencing investigations and prosecutions for perjury before Congress or for "perjury committed during a trial that resulted in acquittal;"[268] and prior to initiating a prosecution for flight to avoid prosecution, custody, confinement or giving testimony.[269]

In addition to the innumerable pre-trial regulations, several rules exist governing the acceptance of certain types of guilty pleas, plea processes, and post-trial practices. Department approval is required, for example, prior to accepting *nolo contendere* pleas[270] and *Alford* pleas,[271] as well as before entering into plea agreements with members of Congress, congressional

261. *See* UNITED STATES ATTORNEYS' MANUAL, *supra* note 232, at § 9-7.100.
262. *See id.* at § 9-7.112.
263. *See id.* at § 9-7.302.
264. *See id.* at § 9-10.020.
265. *See id.* at § 9-13.400.
266. *Id.* at § 9-13.525.
267. *Id.* at § 9-13.400.
268. *Id.* at § 9-69.200.
269. *See id.* at § 9-69.460.
270. *See id.* at § 6-4.320, 9-16.010.
271. *See id.* at §§ 6-4.330, 9-16.015; North Carolina v. Alford, 400 U.S. 25 (1970).

candidates, or federal judges.[272] With respect to appellate matters, the government prosecutor must consult with the Criminal Division's Appellate Section prior to confessing error before a United States Circuit Court of Appeals, or arguing a position inconsistent with prior government positions,[273] and must obtain the Solicitor General's approval to appeal a district court order adverse to the government, request en banc review, or file petitions for mandamus or certiorari.[274]

As mentioned, compliance with Department of Justice policies and regulations is entirely within the discretion of the independent counsel.[275] Thus, the statute permits independent counsels to freely ignore Department policies, including those delineated in the United States Attorneys' Manual.

The independent counsel statute must be amended to limit independent counsel discretion. To this end, the discretionary component of section 594(f) should be supplanted by a mechanism that ensures greater compliance with the reporting, consulting, and approval requirements delineated in the United States Attorneys' Manual. Hence, I propose that independent counsels adhere to the following two-pronged procedure. First, whenever a reporting, consulting, or approval provision of the Manual is implicated, an independent counsel must report to, consult with, or seek the approval of the appropriate Department of Justice official.[276] If the approval is

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272. *See* UNITED STATES ATTORNEYS' MANUAL, *supra* note 232, at § 9-16.110.

273. *See id.* at § 9-2.170.

274. *See id.*

275. 28 U.S.C. § 594(f)(1) provides that:

> An independent counsel shall, except to the extent that to do so would be inconsistent with the purposes of this chapter, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws. To determine these policies . . . the independent counsel shall, except to the extent that doing so would be inconsistent with the purposes of this chapter, consult with the Department of Justice.

However, there is no mechanism for oversight or enforcement of this directive, and commentators have noted that the independent counsel's compliance with Department of Justice guidelines is effectively discretionary. *See supra* note 231 and accompanying text.

276. I am not suggesting that every provision of the United States Attorneys' Manual be made applicable to the independent counsel. Those provisions that impose duties "directly analogous to functions" already performed by the federal judiciary, *Morrison v. Olson*, 487 U.S. 654, 681 (1988), or that do not significantly impose the judiciary upon executive branch authority or independent counsel discretion, *id.* at 682-83, should be made applicable to the independent counsel. *See, e.g.*, UNITED STATES ATTORNEYS' MANUAL, *supra* note 232, at § 9-7.100 (requiring Department of Justice approval prior to the interception of oral, wire, or electronic communications). Other provisions may be

received, the independent counsel, like the Department prosecutor, may proceed with the proposed course of action. Second, in the event approval is not obtained, the independent counsel, unlike the Department prosecutor, would not be bound by the decision. Instead, the independent counsel would have the option of presenting the request to the Special Division. The Department of Justice would be invited to present arguments in opposition. If approved by the Special Division, the independent counsel may proceed with the desired course of conduct.

Implementation of this two-pronged approach satisfies several objectives pertinent to independent counsel legislation. First, the proposal harnesses the overly aggressive prosecutor. Knowing that an investigation is subject to compliance with the regulations of the United States Attorneys' Manual, an independent counsel would be less inclined to pursue questionable investigative and prosecutorial strategies. The increased monetary costs and decreased efficiency associated with such fruitless investigative pursuits would certainly serve as additional deterrents.

Second, independence from the executive branch is preserved. The proposal does not afford the Department of Justice any additional oversight authority. Though the Department can, in some instances, argue against an independent counsel proposal before the Special Division, the Attorney General has no veto power over independent counsel conduct. Thus, the proposal carefully avoids the conflict problems inherent in the statutory alternatives suggested by O'Sullivan, Frey, Geller, and Eastland, as well as certain statutory modifications advocated by Cox, Gorelick, and Cutler.

Third, the additional costs associated with the proposal are minimal. Since the statute's inception in 1978, there have been only twenty independent counsel investigations.[277] With so few investigations, the economic and workload burdens incurred by the Justice Department and the Special Division will,

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deemed comparatively insignificant so as not to require independent counsel compliance. *See e.g., id.* at § 9-27.300 (requiring consultation with the United States Attorney, or other designated chief or supervisory assistant, prior to not filing a sentencing enhancement under 21 U.S.C. § 851).

277. *See* Purdum, *supra* note 98, at A16.

predictably, be slight. The impact of the proposal upon the Special Division will be further minimized by the first prong of the proposal, which authorizes the independent counsel to pursue the proposed avenue without Special Division approval if consent is obtained from the Justice Department.

B. Special Division

Embodied in the purpose of the independent counsel statute are the notions of fairness, independence, and nonpartisanship. To further these objectives, the independent counsel process requires a judicial body, the Special Division, to appoint a counsel "independent" of the executive branch to investigate and prosecute alleged criminal activity by high-ranking executive branch officials.[278] To reiterate, the Special Division consists of three circuit court judges or justices, one of whom must be a judge of the United States Court of Appeals for the District of Columbia Circuit.[279] The judges or justices are selected by the Chief Justice of the United States and serve renewable two-year terms.[280]

Despite this attempt to secure an apolitical appointment procedure, the provisions of section 49 do not entirely conform to this objective. For example, composition of the Special Division is entirely within the discretion of the Chief Justice of the United States. Thus, it is possible for the Special Division to be composed entirely of judges or justices who were appointed by presidents of the same political party, or who are of liberal or conservative political philosophy. Similarly, the statute leaves the selection of the independent counsel entirely within the discretion of the Special Division. Hence, the appointment of a politically biased, and thus partial, independent counsel is not an implausible prospect.

Irrespective of the current composition or political philosophy of the Special Division and the independent counsels, section 49, in its present form, invites allegations of partisanship against these entities.[281] While the validity of these

278. *See* 28 U.S.C. § 49 (a).

279. *See* 28 U.S.C. § 49 (d) ("Not more than one judge or justice or senior or retired judge or justice may be named to such division from a particular court."); *See supra* notes 27-30 and accompanying text.

280. *See* 28 U.S.C. § 49 (a), (d).

281. *See* Erik Lacitis, *If Truth is Starr's Goal, We Can Suggest a Few More Subpoenas,*

claims may not be ascertainable, appearances of partisanship, given the language of section 49, are present and, at a minimum, have tainted the public's perception of the independent counsel process.[282] Not only have such appearances detracted from successful independent counsel prosecutions, but more importantly the integrity of the independent counsel selection and prosecutorial process have been blemished. Appearances of partisanship necessarily detract from the ideals of fairness and impartiality, which are critical to the success of the independent counsel process.

While no system imposed could completely remove political influence from the selection of the Special Division or an independent counsel, or shield a prosecutorial system from allegations of political bias, additional statutory reforms could be imposed that would not only lessen the influence of political partisanship, but enhance the appearance of impartiality. Accordingly, I propose that the composition of the Special Division be increased from three to five judges, with two of the positions reserved for judges who have been appointed by presidents belonging to the incumbent's political party. The remaining three positions should be filled by judges appointed by presidents from the opposing political party. I also propose a unanimity requirement among the Special Division judges with respect to the selection of an independent counsel.

Such reforms are necessary for two reasons. First, as noted,

SEATTLE TIMES, Jan. 30, 1998, at F1 (questioning Judge Sentelle's impartiality in the selection of Kenneth Starr as independent prosecutor given that three weeks prior to Starr's selection, Sentelle had lunch with North Carolina Republican Senators Jesse Helms and Lauch Faircloth, "who are well-known for their dislike of Clinton"); Peter S. Canellos, *Judge's Leanings Central to Claims of Conspiracy*, BOSTON GLOBE, Jan. 28, 1998, at A1 (observing, *inter alia*, that Sen. Faircloth hired Judge Sentelle's wife as a receptionist six months after Sentelle's lunch with Senators Faircloth and Helms, and that Sentelle has strong affiliations with the Republican party and Sen. Helms); *supra* notes 214-15 and accompanying text.

282. *See* Toni Locy, *Former ABA Leaders Express Surprise At Response to Complaints About Judge*, WASH. POST, Nov. 3, 1994, at A9 (noting that, after Judge Sentelle's lunch with Senators Helms and Faircloth, five former presidents of the American Bar Association (ABA) wrote a letter to the Special Division asking that they "act in an impartial manner in the future;" former ABA president John J. Curtin questioned the rejection by the District of Columbia Circuit Court of Appeals of a complaint filed by citizens concerning the luncheon's propriety, commenting, "The whole point was... whether or not the public would feel there was an appearance of impropriety."). *See In re* Charge of Judicial Misconduct or Disability, 39 F.3d 374, 383 (D.C. Cir. 1994) (dismissing complaints due to complainants' failure "to allege conduct prejudicial to the effective and expeditious administration of the business of the courts"; court found that the Appointments Clause authorizes judicial consultation with others with respect to the appointment of an independent counsel).

such modifications enhance the appearance of impartiality with respect to the composition of the Special Division, as well as the selection of the independent counsel. The requirement of five justices, with the accompanying two-seat reservation, restricts the Chief Justice's selection discretion, enhances the prospect of the expression of divergent judicial viewpoints, and lessens the probability that the Special Division will be unduly influenced by a particular political philosophy. Moreover, these reforms reduce the likelihood that the selection of independent counsels will, in fact, be tainted by political bias. These suggested measures, in turn, will necessarily enhance public trust as well as the integrity of the independent counsel process. The composition of the panel will render moot any public clamor over perceived judicial partisanship in the selection of an independent counsel.

Second, such statutory reform is necessary considering my proposal for reform of prosecutorial discretion.[283] Given the Special Division's duties attendant to my proposal, it is essential that judicial integrity not be compromised. To this end, it is incumbent that diversity of thought, both in reality and in appearance, characterize Special Division practice. The suggested reforms will achieve this objective. The numerical and apparent political makeup of the panel will ensure that diverse judicial opinion will be expressed with respect to the prosecutorial discretionary issues brought before the court. Any proposed independent counsel action will benefit from balanced judicial consideration. Such internal integrity will engender public trust in the Special Division and the independent counsel process.

C. Cost Containment

The independent counsel statute must be amended to make it more effective in containing costs associated with independent counsel investigations. As noted, the current structure provides few meaningful cost restraints.[284] As a result, cumulative expenditures, especially in recent years, have been substantial. For example, as of September 1997, $54

283. *See* discussion of proposal restricting prosecutorial discretion *supra* notes 217-77 and accompanying text.

284. *See* 28 U.S.C. §§ 594, 595 and 596; *supra* notes 41-44, 47-48, 229-30 and accompanying text.

million had been expended by the six independent counsels who had been appointed during the Clinton administration.[285]

I propose that each independent counsel investigation be subjected to annual fixed expenditure limits.[286] Congress should annually appropriate a fixed budget, as it does with each federal agency, from which each independent counsel must conduct his investigation.[287] Fixed expenditures would promote the following objectives: 1) as with executive branch prosecutors, it would force independent counsel prosecutors to prioritize its prosecutions, and thus reduce independent counsel pursuit of comparatively insignificant litigation; 2) it would, at a minimum, lessen the need for independent counsel submission of paperwork, pursuant to sections 595 and 596; and 3) it would lessen overall expenditures associated with these investigations.[288]

D. Investigative Duration

Archibald Cox has proposed that each independent counsel investigation be subjected to a one-year limitation, subject to renewal if cause is shown.[289] Under this proposal, an

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285. *See* Kathy Kiely, *$54M For Independent Counsels*, N.Y. DAILY NEWS, May 12, 1998, at 2 (citing the following General Accounting Office figures: 1) Prosecutors: Robert Fiske/Kenneth Starr; Subject: Whitewater; Cost: $33,358,421; 2) Prosecutor: Donald Smaltz; Subject: Mike Espy; Cost: $13,415,151; 3) Prosecutor: Daniel Pearson; Subject: Ron Brown; Cost: $3,028,546; 4) Prosecutor: Curtis Von Kann; Subject: Eli Segal; Cost: $244,822; 5) Prosecutor: David Barrett; Subject: Henry Cisneros; Cost: $4,255,769; and 6) Prosecutor: Carol Elder Bruce; Subject: Bruce Babbitt; Cost: unavailable).

286. *See* Walter R. Mears, *Starr's Performance Exhibit A*, AP Online, July 21, 1998, *available in* 1998 WL 6699262 (discussing various proposals for independent counsel reform, including budgetary restrictions).

287. Given the common locale, the budget appropriated to the United States Attorneys' Office for the District of Columbia would be a useful guide. In 1997, the District of Columbia office, which employed over 550 individuals, including 300 attorneys, had a budget of approximately $50 million. *See The Nomination of Eric H. Holder, Jr. to be Deputy Attorney General: Hearing Before the Senate Comm. on the Judiciary*, 105th Cong. 53-131 (1997) (testimony of United States Attorney Eric H. Holder). Given the limited foci of each independent counsel investigation, and the comparatively small professional and support staff, Congress should appropriate only a fraction of that allocated to the District of Columbia office.

288. A fixed budget is also consonant with the statute's objective of ensuring prosecutorial independence. Independence does not require unlimited expenditures. Rather, it mandates a budget sufficient to permit an independent counsel to adequately pursue his investigations and subsequent prosecutions. As with most governmental or business entities, cost controls will force an independent counsel to prioritize the office's agenda, effectively allocate its resources, and operate more efficiently. In short, cost containment does not compromise a special prosecutor's independence–it simply promotes fiscal responsibility.

289. *See A Roundtable Discussion on the Independent Counsel Statute, supra* note 161, at

independent counsel seeking to extend his investigation would be required to apply annually to the Special Division, detailing the investigation and the reasons underlying the request. If necessary, the application could be submitted *in camera*. In the end, it would be the Special Division, not the independent counsel, that would decide whether a particular investigation should proceed.[290]

I wholeheartedly concur in this recommendation. By requiring annual renewal, independent counsels will be less inclined to pursue frivolous or insignificant litigation. This, in turn, will encourage independent counsels to utilize available investigative resources more efficiently.[291] Finally, annual renewal will curtail claims by political partisans that a particular investigation is politically driven, as well as enhance integrity in the independent counsel process.[292]

474.

290. *See id.*

291. Lawrence Walsh opposes this proposal. Walsh contends that adoption of time restrictions would encourage targets of investigations to engage in delay tactics, such as withholding documents, delaying testimony, and publicly criticizing the independent counsel's expenditures. *See id.* at 475. While these tactics may be a byproduct of this proposal, it would certainly not be a basis upon which the Special Division would refuse an extension request. Should such circumstances arise, an independent counsel should simply note such observations in its application. Moreover, the proposal, as noted, would encourage a more expeditious investigation. As noted by Lloyd Cutler: "What is wrong with having to show at the end of a year that you need more time? Let us take these very simple factual cases of Secretary Cisneros, who paid some money to his mistress who then taped a conversation, or the Espy case . . . . But both of those have now gone on for more than three years although they are very simple factual matrixes to deal with. Should there not have been a need to get on with it earlier or at least have to explain to the Attorney General and the court why it was taking so long?" *Id.* at 475-76.

292. The recommendations cited in this article are designed to remedy what I consider to be the most prominent deficiencies in the independent counsel statute. However, additional modifications may be necessary to address issues collateral to the actual conduct of independent counsel investigation. For example, a target of an investigation is entitled to recovery of reasonable attorneys fees only if he or she is not indicted. *See* 28 U.S.C. §§ 593(f)(1), (f)(2) (Supp. 1998). However, there is no comparable provision allowing recovery of fees for those who are not targets. Recent history suggests that non-targets have often incurred substantial legal debts. *See* Robert Dreyfuss, *Collateral Damage, The Personal Costs of Starr's Investigation*, NATION, July 27/Aug. 3, 1998, at 11 (detailing attorney fee expenditures incurred by several non-targets of the Starr investigation). Although my suggested modifications will necessarily reduce overall attorney fee expenditures, these reforms may not adequately address this issue. *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 (1997) (discussing the problems of legal fees incurred by government employees and suggesting various methods of reform); Wilkinson & Ellis, *supra* note 19, at 1589 (Theodore B. Olson, former Counsel to President Reagan, recommends that recovery of attorneys fees be extended not only to non-targets, but also to targets who have been indicted).

V. CONCLUSION

Watergate has left many lasting legacies, both for the individual participants and for the country. When considering independent counsel reform, it is important that history not be discounted, for history provides an avenue which enables society to learn from its past mistakes and improve upon the existing government structure.

In this article I have suggested an approach which respects historical precedent, protects and preserves prosecutorial integrity, and promotes a more effective system of independent counsel investigation and prosecution. Keeping the current structure–with the suggested modifications addressing prosecutorial discretion, the Special Division, cost containment, and investigative duration–will best achieve these ends. Proposed reforms which return prosecutorial duties or oversight to the executive branch improperly discount not only conflict-of-interest principles but also America's past. The appearance of fair and impartial investigation and prosecution are central to any prosecutorial mission. Such appearances can never be achieved when the Department of Justice, irrespective of the competence of its prosecutors, is assigned the task of investigating alleged wrongdoing within its own branch.

Instead, the answer to independent counsel reform lies in statutory modification. The recommended reforms avoid the appearance problems inherent in other proposals, enhance public confidence in the independent counsel process, and promote a more effectual means to investigate high ranking executive branch officials accused of federal crimes. With all that is at stake when Congress begins debate in the summer of 1999 over independent counsel reform, the memories of Watergate and its painful legacies should not be forgotten.